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Territorial Self-Government as a Conflict Management Tool

Dawn Walsh

Federalism and Internal Conflicts

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Contents

Introduction: Guaranteeing Territorial Self-Government as a Conflict Management Tool

Over the last century, the nature of violent conflict has undergone a fundamental transformation, with interstate conflict gradually being replaced by intra-state group based conflict as the most common and destructive. In the immediate aftermath of the collapse of the Soviet Union, there was a particularly sharp rise in the number of such conflicts, while this then decreased slowly and unevenly, it began to rise again in the mid-2000s.[1] Technological advances in warfare and developing international norms of minority protection combined to undermine security based responses to these conflicts. This led to a large increase in peace agreements aimed at ending these violent disputes. Territorial self-government (TSG) is at the heart of many current and proposed conflict resolution settlements. TSG provides territorially concentrated groups, usually those that are minorities within the wider state, with autonomy over a range of matters. This can provide such groups with security against discriminatory state practices and official recognition. Yet such arrangements are often unhappy compromises, with identity groups pursuing higher levels of autonomy, up to and including secession or unification with a neighbouring kin-state, and central government seeking to limit

[1] Pettersson, T., & Wallensteen, P. (2015). Armed Conflicts, 1946–2014. *Journal of Peace Research*, Vol. 52, No. 4, 536–550.

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the level of autonomy to retain power and protect against state break-up. The compromise nature of such measures and the post-conflict context in which they operate makes them inherently unstable.

Many scholars argue that TSG is not an effective conflict resolution mechanism.[2] They argue that the autonomy structures provided by TSG facilitate further centrifugal activities by identity groups. The identity groups will utilise self-rule provided by the central government to manipulate the TSG arrangements, moving the compromise in the direction which they favour—more autonomy or even full independence—again bringing them into conflict with the state. The ability of TSG to resolve conflict can also be undermined by the reverse process: re-centralisation. Central governments may agree to autonomy provisions as part of a peace accord, however once the violence has ended, identity groups have surrender land or arms, and international attention has faded, they may re-centralise these powers. Such unilateral moves are again likely to lead to the re-emergence of conflict.

Even where the identity group or central government have no intention of manoeuvring the TSG provisions to achieve their preferred outcome, a lack of trust between the parties impedes the conclusion and operation of such agreements. Conflict parties often have negative past experiences of interacting with each other. They do not typically have a history of cooperation or reciprocal compromise; rather there may have been atrocities committed by both sides or long-standing patterns of discrimination. So despite prefering reform and institutions provided for in a peace agreement to continued violence, parties may not sign up to agreements. These deficits of trust are particularly problematic in relation to TSG. They ensure that both identity groups and central governments are fearful that TSG will fail due to the possible aforementioned manipulations by the other.

This book assesses the potential of guarantee mechanisms to overcome the innate instability of TSG as a conflict resolution mechanism by examining five cases (Northern Ireland, Bosnia, Macedonia, Moldova, and Iraq) where TSG was a key element of a political agreement aimed at ameliroating intra-state group based conflict. This chapter develops a theory of TSG as a conflict management tool, including an understanding of the causes of intra-state identity conflict, the role of institutional design, and sources of instability. It then describes the different types of

[2] See for example Nordlinger (1972), Cornell (2002), Roeder and Rothchild (2005), Elkins and Sides (2007), Chapman and Roeder (2007), Meadwell (2009).

guarantees which can be used to overcome the challenge of instability. Finally, it introduces the structure of the book's five case study chapters, briefly outlining the research design and methodologies employed.

A Theory of Territorial Self-Government as a Conflict Resolution Mechanism

TSG involves the allocation of an independent public policy role to a substate geographic unit. It can comprise different forms of institutionally allocated powers. These have been defined and delineated in various ways, both empirically and in theoretical scholarship, with varying distinctions drawn between different forms including: confederation, federation, federacy, autonomy, devolution, and decentralisation.[3] For the purpose of this book TSG is divided into three main types: (1) Federation indicates a constitutionally protected structure in which the entire territory of a state is divided into separate political units, all of which enjoy exclusive executive, legislative, and judicial powers independent of the central government; (2) Autonomy is the legally entrenched power of territorial entities to exercise public policy functions (legislative, executive, and judicial) independently of other sources of authority in the state, but subject to the overall legal order of the state and any relevant international obligations. Autonomy can also have constitutional protection, but it is distinct from federation in that it does not necessitate territorial subdivisions across the entire state territory and is more limited in the scope of powers enjoyed by the substate unit; and (3) Decentralisation involves the delegation of executive and administrative powers to local levels of government. It is rarely constitutionally entrenched.[4] TSG has been divided into these main types because it provides important distinctions between the different forms of TSG based on the very meaningful dimensions of the extent of the powers enjoyed by the different levels of government and the legal entrenchment of these powers.

The use of such institutional designs is not restricted to divided conflict states—i.e. those where identity-based cleavages are profoundly

[3]Where the identity groups are not geographically concentrated, autonomy can also be arranged on a non-territorial basis.

[4]Wolff, S. (2009). Complex Power-Sharing and the Centrality of Territorial Self-Governance in Contemporary Conflict Settlements. *Ethnopolitics*, Vol. 8, No. 1, 27–45.

politically salient and have led to violence—and even when it is used in these states it can be designed to produce diverse regions rather than 'ethno-TSG'. However, it is these cases of 'ethno-TSG', where TSG is used to provide the level of political autonomy necessary to contain ethnic nationalism and to allow for 'heterogeneous policy tastes' that require deeper examination.[5] It is in these cases that the greatest demands are placed on the potential of TSG and its instability can have the gravest results, including the outbreak, re-emergence, or escalation of violent conflict.

To understand the potential and limitations of TSG to act as a conflict management mechanism one must first develop a theory of the causes of conflict. Current research highlights grievance based explanations of intra-state group conflict. It finds that social, political, and economic exclusion directed against specific identity groups is the main cause of intra-state conflict.[6] The concept of horizontal inequalities concisely captures how such discriminatory state behaviours lead to conflict. The key contention is that 'violent mobilisation is more likely when a group that shares a salient identity faces severe inequalities' along a range of political, social, economic, and cultural dimensions.[7]

Despite the prevalence of this grievance based explanation for intra-state group conflict, this analysis rests on a slightly different understanding of the causes of such conflicts. Human Needs Theory (HNT) is an explanation for conflict that captures the importance of material discrimination and non-material issues—most notably recognition—and links the resolution of such conflict directly to institutional design. It also captures how potential, as well as previous or existing issues, can create demand for TSG. Particularly where there is a sudden change in the nature of the state, groups may fear that the change will result in the frustration of their needs and consequently seek proactive protection. Central to

[5] Brown, G. (2009). Federalism, Regional Autonomy and Conflict: Introduction and Overview. *Ethnopolitics*, Vol. 8, No. 1, 1–4.

[6] Cederman, L.E., Weidmann, N.B., & Skrede Gleditsch, K. (2011). Horizontal Inequalities and Ethnonationalist Civil War: A Global Comparison. *American Political Science Review*, Vol. 105, No. 3, 478–495. Cederman, L.E., Wimmer, A., & Min, B. (2010). Why Do Ethnic Groups Rebel? New Data and Analysis. *World Politics*, Vol. 62, No. 1, 87–119.

[7] Stewart, F. (2010). Horizontal Inequalities as a Cause of Conflict: A Review of CRISE Findings. Oxford: Centre for Research on Inequality, Human Security and Ethnicity, 7.

HNT is the idea that there are certain necessities which are essential for survival. These essentials are not restricted to those material items which sustain physical life such as food, water, and shelter. While there is no agreed list of these needs, they include safety/security, belongingness/love, self-esteem, personal fulfilment, identity, cultural security, freedom, distributive justice, and participation.[8] Burton, who was at the forefront on applying this theory to social and political conflicts, argued that there are interconnected human needs for identity recognition and security. Kelman argued that 'identity, security and similarly powerful collective needs, and the fears and concerns about survival associated with them, are often important causal factors in intergroup and intercommunal conflict'.[9] Scholars and practitioners agree that the issues of identity recognition and security are critical to most, if not all, intra-group conflicts.[10]

Burton viewed the frustration of such human needs as the root cause of conflict. These needs have been frustrated due to the evolution of society in such a way as to distance decision-makers from those affected by the decisions. This has led to the creation of institutions that do not meet the needs of those who exist within their reach. Coercion and punishment can never prevent individuals or groups from seeking to fulfil these needs.[11] Furthermore, technological advances have limited the temporary and partial scope of the powerful to create conformity through coercion.[12] Such advances have made both mass communication and weapons technology more accessible to groups outside the state

[8] Marker, S. (2003). Unmet Human Needs, in Guy Burgess & Heidi Burgess (eds.), *Beyond Intractability*. Boulder, CO: Conflict Information Consortium, University of Colorado. Accessed 31 December 2017, http://www.beyondintractability.org/essay/human-needs.

[9] Kelman, H. (1997). Social-Psychological Dimensions of International Conflict, in William Zartman & Lewis Rasmussen (eds.), *Peacemaking in International Conflict*. Washington, DC: USIP Press, 195.

[10] Marker, S. (2003). Unmet Human Needs, in Guy Burgess & Heidi Burgess (eds.), *Beyond Intractability*. Boulder, CO: Conflict Information Consortium, University of Colorado. Accessed 31 December 2017, http://www.beyondintractability.org/essay/human-needs.

[11] Walsh, D. (2015). How a Human Needs Theory Understanding of Conflict Enhances the Use of Consociationalism as a Conflict Resolution Mechanism: The Good Friday Agreement in Northern Ireland. *Ethnopolitics*, Vol. 15, No. 3, 285–302.

[12] Burton, J. (1997). *Violence Explained*. Manchester: Manchester University Press, 19–24.

level, making effective organisation and operation of dissident movements easier.[13]

Drawing on this understanding of the causes of conflict, Burton determined that conflict could only be solved through the radical restructuring of society in such a manner as to ensure that basic human needs are met. Groups cannot be persuaded to abandon the satisfaction of their needs. Regardless of resources or power, groups will agitate, though in different ways, for the satisfaction of these needs. This may appear to suggest constant conflict, however the fulfilment of human needs is not a zero-sum game.[14] Burton argued that the fulfilment of a need for one party does not have to frustrate it for any other party. He argued that the appropriate institutions within a society can fulfil these needs for all parties and thus create a sustainable peace.[15] It is Burton's focus on institutions as the vehicle for fulfilling the needs of all parties to a conflict—and consequently building genuine peace—that makes this theory particularly applicable to the use of TSG as a conflict management mechanism.

By providing regionally concentrated minority groups with a degree of autonomy over local issues the state recognises the legitimacy of these identities and affords these groups a sense of security that the central state will not interfere in group internal affairs. As Rothchild and Hartzell argued 'by diffusing political power to sub-state interests, territorial autonomy can reassure minority groups about their ability to control social, cultural, and economic matters that are important to the maintenance of communal identities and interests'.[16] Forms of self-government, which fall short of independence, can decrease the possibility of secessionist activities by groups, as such autonomy measures provide the groups with many of the advantages of independence without having to resort to or continue violent conflict which has serious a serious negative impact on the group, and is often unsuccessful. TSG is

[13]Walsh, D. (2015). How a Human Needs Theory Understanding of Conflict Enhances the Use of Consociationalism as a Conflict Resolution Mechanism: The Good Friday Agreement in Northern Ireland. *Ethnopolitics*, Vol. 15, No. 3, 285–302.

[14]Ibid., 285–302.

[15]Burton, J. (1997). *Violence Explained*. Manchester: Manchester University Press, 33–40.

[16]Rothchild, D., & Hartzell, C. (1999). Security in Deeply Divided Societies: The Role of Territorial Autonomy. *Nationalism and Ethnic Politics*, Vol. 5, No. 3–4, 254–271.

often the only way to placate secessionist demands from ethnic groups by creating a separate space for identity groups to prosper.[17] TSG, structured to provide identity groups with self-government, also provides such groups with official recognition of their group identity. By restructuring the state to accommodate this identity, the state explicitly recognises it as legitimate and moves from viewing it as something to be repressed, to framing it as officially accepted, a reality which informs the character of the state.

Separation, through either the creation of a new state for the identity group or allowing it to unite with a neighbouring kin-state, may also offer the identity group security and identity recognition. However, by providing for autonomy within the overall structure of the state TSG avoids the pitfalls of separation. Migration and settlement patterns mean that separation rarely if ever results in homogenous states. The rump state is likely to include members of the identity group of which most have now left the state, these individuals will now face even more severe security and recognition challenges as their minority status is intensified. Furthermore, the new state, or newly enlarged state, will likely include individuals not part of the new majority. Again, these individuals face significant security and recognition issues with ethnic cleansing and revenge attacks possible.[18]

All three dominant conflict resolution schools (consociationalism, centripetalism, and power-dividing), to differing degrees, advocate for the creation of TSG through the diffusion of state power to different levels of government. Consocialists support TSG as a a possible complement to central power-sharing. O'Leary argued that 'complex consociations' can combine consociationalism with other options, most notably territorial autonomy.[19] However, centripetalists and power-dividers argue that substate units should be designed to ensure they encompass different identity groups to facilitate inter-group cooperation and encourage the development of cross-cutting cleavages. They do not support the use

[17] Roeder, P. (2009). Ethnofederalism and the Mismanagement of Conflicting Nationalisms. *Regional & Federal Studies*, Vol. 19, No. 2, 203–219.

[18] Horowitz, D. (2003). The Right to Secede. *Journal of Democracy*, Vol. 14, No. 2, 5–17.

[19] O'Leary, B. (2005). Debating Consociational Politics: Normative and Explanatory Arguments, in Sid Noel (ed.), *From Powersharing to Democracy*. Montreal: McGill-Queen's University Press, 3–43.

of TSG to provide identity groups with self-government, arguing that this exacerbates inter-group conflict. See, for example, Horowitz, Reilly, Roeder and Rothchild, Sisk, and Wimmer.[20]

Critics argue that the structures which accompany TSG facilitate further moves towards independence. By providing a group with TSG the state arguably undermines its own authority by empowering and legitimising group leaders, giving them official roles, for example, in regional assemblies, and making it more difficult to contain any secessionist behaviours. Ethnic groups without such infrastructure will find it more difficult to challenge state authority.[21]

Furthermore, fears that TSG is centrifugal are greatest where the delegation of powers to TSG regions is asymmetric; where more powers are delegated to a particular region than is generally afforded to regions by the centre. McGarry acknowledged this argument

> Asymmetric delegation may be particularly centrifugal. Asymmetry is said to strengthen the possibility of secession because it suggests that the region's government has a "special" responsibility for its people, one that is not shared by other regional governments, and that the state's central or federal government has less responsibility for this region's people than it has for the rest of its citizens.[22]

It may seem possible to avoid this issue by designing symmetric arrangments. However, McGarry also countered that symmetrical delegation of powers is in fact more centrifugal as it fails to recognise or accommodate the nationalistic or self-governance claims of certain ethnonational

[20] Horowitz, D. (1985). *Ethnic Groups in Conflict*. Berkeley, CA: University of California Press. Horowitz, D. (1990). Ethnic Conflict Management for Policymakers, in J.V. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies*. Lanham, MD: Lexington Books. Reilly, B. (2001). *Democracy in Divided Societies*. Cambridge, Cambridge University Press. Roeder, P., & Rothchild, D. (eds.), (2005). *Sustainable Peace: Power and Democracy after Civil Wars*. Ithaca, NY: Cornell University Press. Sisk, T. (1996). *Power Sharing and International Mediation in Ethnic Conflict*. Washington, DC: United States Institute for Peace Press. Wimmer, A. (2003). Democracy and Ethno-Religious Conflict in Iraq. *Survival*, Vol. 45, No. 4, 111–134.

[21] Cornell, S. (2002). Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective. *World Politics*, Vol. 5, No. 2, 245–276.

[22] McGarry, J. (2007). Asymmetrical Federal Systems. *Ethnopolitics*, Vol. 6, No. 1, 112.

groups.[23] Much of TSG's value as a conflict management mechanism in intra-state identity conflict is the result of its potential to provide minority groups with a degree of autonomy while maintaining the wider integrity of the state. Delegation of powers on a basis which is not designed to provide self-government to specific groups will fail to sufficiently accommodate group desire for autonomy necessary to provide it with security and recognition.

Some scholars, such as Meadwell, argued that the secession dynamic, which makes TSG unstable, cannot be countered through careful design of the TSG institutions. However, even Meadwell implicitly acknowledged the possibility that TSG could be stabilised if an enforceable contract mechanism could be implemented. While Meadwell was very skeptical of the role of TSG as a conflict resolution mechanism, his analysis is useful to those who recognise the potential secessionist dynamic of TSG but also recognise its promise as a conflict management mechanism.[24] Given TSG's ability to represent an acceptable compromise in a very challenging context where other adequate options may be lacking, relativists seek to realise this promise through careful application and thoughtful institutional design.

Relativists have examined how a range of different factors influence the secessionist tendencies of TSG. For instance, Brancati emphasised the role of regional parties—arguing that TSG can be an effective conflict management tool if the strength of regional parties is managed.[25] Other studies have found interesting relationships between certain factors, such as the absence of a dominant group, presence of moderate leaders, or whether inter-group conflict has already escalated, and centrifugal tendencies.[26] Erk and Anderson, highlighted the 'paradoxical' nature of federalism, a particular type of TSG, as it can either increase or decrease

[23] Ibid.

[24] Meadwell, H. (2009). The Political Dynamics of Secession and Institutional Accommodation. *Regional & Federal Studies*, Vol. 19, No. 2, 221–235.

[25] Brancati, D. (2006). Decentralization: Fuelling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism? *International Organization*, Vol. 60, No. 3, 651–685. Brancati, D. (2009). *Peace by Design: Managing Intrastate Conflict Through Decentralization*. Oxford: Oxford University Press.

[26] Roeder, P., & Rothchild, D. (eds.), (2005). *Sustainable Peace: Power and Democracy after Civil Wars*. Ithaca, NY: Cornell University Press. Lapidoth, R. (1997). *Autonomy: Flexible Solutions to Ethnic Conflict*. Washington, DC: USIP Press.

the risk of violent ethnic conflict depending on the will and capacity of federal units to secede (which can be heightened or reduced through federalism), the design of political institutions (including the design of federalism itself), and uncodified factors, such as, e.g. economic disparities between federal units or social cleavage structures.[27]

Given the argument that TSG is unstable due to the potentially secessionist infrastructure which it provides to ethnic entrepreneurs, it is reasonable to argue that the greater the infrastructure provided the more likely it is that this dynamic will lead to instability. This suggests that TSG regions with greater powers are more likely to pursue secession, thus undermining the ability of TSG to manage conflicts. Put simply, federation should be more likely to lead to secession than autonomy, and autonomy should be more secessionist than decentralisation. However, limiting the powers delegated to subnational regions may also undermine TSG's ability to manage the conflict and can simply redirect disputes to the centre. As Bieber argued in relation to decentralised municipalities, restrictions in the substantial nature of the powers delegated may increase conflict and contestation at the centre, as groups do not necessarily enjoy sufficient autonomous areas of decision-making.[28]

How powers have been distributed between the centre and TSG regions will affect how TSG's instability manifests. The principle mechanism for handling the distribution of powers between different layers of government is by drawing up lists indicating which competencies are enjoyed at what level. These lists can be very specific for each layer of authority or they can be specific for one or more layers and 'open-ended' for others.[29] If the open-ended list is provided to the centre it will enjoy any powers not explicitly devolved to the TSG region. This increases the importance of ensuring that those powers which are devolved are protected. Conversely, if the open-ended list is provided to the TSG region it will have competencies in all areas not explicitly retained by the centre.

[27] Erk, J., & Anderson, L. (2009). The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions? *Regional & Federal Studies*, Vol. 19, No. 2, 191–202.

[28] Bieber, F. (2013). Power Sharing and Democracy in Southeast Europe. *Taiwan Journal of Democracy*, Special Issue, 147.

[29] Wolff, S. (2005). Self-Governance in Interim Settlements, in Marc Weller & Stefan Wolff (eds.), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*. London: Routledge.

Here there is an increased risk of state disintegration—especially where insufficient powers have been retained by the centre or where there are governance difficulties at the centre. O'Leary argued that consociationalists prefer arrangements in which co-sovereign substate and central governments have clearly defined exclusive competencies whose assignment to either level of authority is constitutionally and, ideally, internationally protected, and in which decision-making at the centre is consensual.[30] It may appear that difficulties can be avoided if definitive lists are used and open-ended lists avoided. Yet there are also two difficulties which can arise with this approach. Overly inflexible delegation of powers may result in a situation where a layer of government is not empowered to meet an unanticipated need or crisis. Similarly, whole policy areas may emerge which were not anticipated: for example, due to technological advancements.

TSG represents a careful balance between self-rule and shared rule. Essential to federalism, and to TSG generally, is the idea that regions which enjoy self-government will also play a significant role in central government. As Weller argued

> …there arises the question of integrative measures with the centre. The more balanced autonomy settlements will build in incentives for genuine participation of the unit of self-governance in the overall state. These go beyond wealth-sharing, covering in particular effective representation in elected state bodies and in the government.[31]

While identity groups may seem more interested in autonomy arrangements than in mechanisms for their inclusion into the central state, these mechanisms merit careful consideration. Regardless of the strength of the TSG provided, there are powers that will not be devolved so the minority has a real interest in maintaining its role in those decisions. Furthermore, structures which encourage cooperative relationships at the central government level are likely to stabilise TSG by improving inter-group relationships.

[30]O'Leary, B. (2005). Powersharing, Pluralist Federation and Federacy, in Brendan O'Leary, John McGarry, & Khaled Salih (eds.), *The Future of Kurdistan in Iraq*. Philadelphia, PA: University of Pennsylvania Press.

[31]Weller, M. (2009). Self-Determination Conflicts: Recent Developments. *European Journal of International Law*, Vol. 1, No. 20, 161.

In order for conflict parties to lay down their arms and implement a peace agreement, they must be assured that the other side will reciprocate. If trust were present between different parties this assurance would be present as trust is 'a belief that the other side prefers mutual cooperation to exploiting one's own cooperation'. However, in post-conflict societies mistrust, 'a belief that the other side prefers exploiting one's cooperation to returning it', is much more prevalent.[32] This makes it incredibly difficult for conflict parties to end the violence and implement a peace accord, even when they favour the agreed arrangements over continued conflict.

Perceptions that the other side is not trustworthy, i.e. that it prefers to exploit you rather than cooperate, is advanced by conflicting interpretations of past interactions and by ethnic differences. As Kydd argued, conflict between different identity or ethnic groups is often accompanied by dramatically opposing narratives about historical culpability for previous conflicts. These narratives cannot be replaced with a common understanding due to the key role they have played in the construction of the groups' identities. Drawing on Social Identity Theory, Kydd highlighted the unhelpful nature of these narratives.[33] These narratives are commonly constructed in such a way as to vilify the other group and to compliment one's own group. This results in narratives where each group blames past conflicts on the other and highlight wrongs perpetrated by them. This thwarts attempts to build trust by highlighting previous occasions of cooperation or reciprocation. It is not possible to achieve cooperation based on a party's acceptance that they are to blame for a past problem and a commitment not repeat this behaviour, as groups do not accept responsibility for previous conflict. This highlights the difficulties of achieving the necessary assurances that a peace accord will be implemented by conflict parties.

Even without the weight of a recent conflict, it is challenging to achieve reassurance through trust between different ethnic groups. It is generally accepted that trust is lower between different groups than it is within groups. Common language, religion, and/or background are

[32] Hardin, R. (2002). *Trust and Trustworthiness*. New York: Russell Sage Foundation, 54.

[33] Herrera, Y.M., & Kydd, A.H. (2015). *Misremembrance of Things Past: Cooperation Despite Conflicting Narratives*, presented at the University of Oxford International Relations Research Colloquium, January 22, 2015.

viewed as facilitating trust. This differential is likely to be greatest in 'highly segmented and hierarchical societies', rather than societies with numerous cross-cutting divisions which allow the fostering of group identity without the associated negative attitude towards others.[34] Kydd modelled trust between different groups and found that it is possible to explain cases where trust is built between different groups. He argued that:

> …trust can be established across groups by individuals despite out- group hostility and in-group attachment, as long as individuals have flexible enough beliefs to be persuaded by new information and are not too hostile towards outgroups to preclude reaching out and taking chances on potential cooperation. In addition, individuals must be sufficiently attached to their own group to be able to communicate with ingroup members persuasively…[35]

While this provided a very useful formal model which can account for trust built across groups, Kydd did not provide viable policy recommendations which would allow his model to be used to build trust as the reassurance mechanism necessary to facilitate the implementation of peace agreements including TSG. There are no indications through which we can ensure that individuals who have the necessary characteristics are present in inter-group negotiations. Group conflict often results in the emergence of hard-line leaders who are less likely to be prepared to take a risk or use information to re-evaluate the other group in a positive direction.

The concept of credible commitments, initially developed by Fearon and frequently associated with Walter, is the clearest existing attempt to outline how an inability to trust that another group will faithfully implement a peace agreement hinders the capacity of groups to enter into such arrangements. Walter's argument was that external guarantees should be used to overcome this inherent lack of trust. She illustrated the dynamics by using the example of disarmament.

[34] Brewer, M.B. (1999). The Psychology of Prejudice: Ingroup Love or Outgroup Hate? *Journal of Social Issues*, Vol. 55, 429–444.

[35] Herreray, Y.M., & Kydd, A.H. (2015). *Trust-Building Across Identity Groups*, presented at the ICCS University of Birmingham, May 14, 2015.

> As groups begin to disarm, they create an increasingly tense situation. The fewer arms they have, the more vulnerable they feel. The more vulnerable they feel, the more sensitive they become to possible violations. And the more sensitive they become to violations, the less likely they are to fulfil their side of the bargain.

Walter argued that the most difficult obstacle to reaching and implementing a peace agreement is the need to design new institutions in such a manner as to convince the groups that all groups will respect the new arrangements.[36] This book develops these arguments, outlining how the need for guarantees is driven by an absence of trust between the different parties attempting to reach and implement a TSG peace agreement. We now turn to a discussion of guarantees that may be necessary to overcome TSG's innate instability.

Guarantee Mechanisms

TSG can only act as a conflict management mechanism if the self-government arrangements are expected to remain in place for the foreseeable future. Such arrangements may represent 'knife edge equilibrium' between national government and self-governing communities.[37] Early guarantees are key, as new institutions gain legitimacy as they endure over time. Endurance strengthens the legitimacy of these institutions and makes deviation from them or efforts to resolve conflict outside of them less acceptable. Guarantees are valuable for central governments, in that they commit all parties to an agreed structure and imply that there can be no unilateral changes outside pre-agreed procedures, such as the referenda provided for in the settlements. Such guarantees ensure that the number of delegated powers will not increase so as to threaten the viability of the state; countering the charges that TSG is centrifugal. Guarantees are also vital for groups provided with self-government as they mitigate against what appears to be a tendency

[36] Fearon, J. (1995). Rationalist Explanations for War. *International Organization*, Vol. 49, 379–414. Walter, B. (1999). Designing Transitions from Civil War: Demobilization, Democratization, and Commitments. *International Security*, Vol. 24, No. 1 (Summer), 127–155.

[37] Roeder, P., & Rothchild, D. (eds.), (2005). *Sustainable Peace: Power and Democracy after Civil Wars*. Ithaca, NY: Cornell University Press, 59.

towards re-centralisation, which would fundamentally undermine TSG. Rothchild and Roeder warned that where delegation is dependent on possibly shifting government majorities at the centre, re-centralisation is a real danger.[38] Similarly, Hale argued that in states where there is a core ethnic region which may possess the capacity to force the central government to renege, any concessions, such compromises made by central government, are less credible.[39]

Guarantees can be international or domestic. International guarantees may take the form of 'hard' guarantees (international treaties, direct governance or peacekeeping operations, etc.) or of 'soft' guarantees (aid or trade policy conditionality, conditional future membership of a regional organisation, etc.). Hard international guarantees usually take the form of legally enforceable international treaties or agreements and can offer strong protection of the TSG arrangements. Soft international guarantees are offered in the form of the involvement of international organisations in the negotiation, implementation, and potentially in the operation of a particular peace agreement.

Domestic entrenchment can take place either through constitutional assurance or through legislation. Domestically, constitutional guarantees are the strongest. Other special laws, for example, those which need supra-majorities to be changed, may also offer strong guarantees.[40] Guarantees provided in ordinary legislation offer the weakest form of entrenchments. To maximise stability, TSG arrangements should be guaranteed by internationalised treaty-like commitments with a high degree of third-party enforcement. At the same time, these arrangements should incorporate domestic constitutional commitments and reinforce these through international assistance to strengthen domestic institutions.[41]

[38] Roeder, P., & Rothchild, D. (eds.), (2005). *Sustainable Peace: Power and Democracy after Civil Wars*. Ithaca, NY: Cornell University Press, 129.

[39] Hale, H.E. (2004). Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse. *World Politics*, Vol. 56, 174.

[40] Wolff, S. (2005). Self-Governance in Interim Settlements, in Marc Weller & Stefan Wolff (eds.), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*. London: Routledge.

[41] Bell, C. (2006). Peace Agreements: Their Nature and Legal Status. *The American Journal of International Law*, Vol. 100, No. 2, 399.

Domestic Guarantees

Domestic guarantees involve either the incorporation of whole or parts of agreements into domestic legislation. A whole agreement may form the basis of a single act, or different parts of an agreement may be incorporated into different acts. By incorporating an agreement which provides for TSG institutions into domestic legislation, conflict parties are recognising its legally enforceable nature and are setting out the rights and responsibilities of different actors. The legalisation of the agreement will also provide a framework through which non-compliance can be sanctioned, normally through domestic courts. The potential for sanction through the courts is an incentive for compliance by different actors. Those who violate an agreement risk sanction and thus a degree of entrenchment or protection is provided to the TSG arrangements.

By entrenching such arrangements into ordinary domestic legislation there is a reasonable guarantee that these arrangements will not be altered as long as this legislation remains in place. However, such legislation can be altered by national legislators with relative ease. This flexibility has certain advantages. For example, it allows an agreement to be reformed in the face of changing circumstances or improved where unanticipated weaknesses arise. However, given the difficulty in achieving initial agreement on the new institutions, reforms, and provisions of a peace accord, achieving agreement on reforms will also be highly challenging. It may seem likely that it would be easier to implement additional reforms after an additional peace agreement has been reached and implementation initiated, with inter-group relationships improving as actors work together in new institutions and the shadow of violence recedes. Yet the post-agreement phase can be very contentious, with competing interpretations of the agreement emerging and actors seeking to consolidate their constituencies in shifting political circumstances. This context is often coupled with waning international assistance, making negotiating further reforms extremely difficult. Therefore, flexibility stemming from TSG which is only guaranteed in ordinary domestic legislation is more likely to contribute to instability than reform. Domestic legislators may regret compromises made in a peace agreement and may change legislation to roll back on these concessions. Alternatively, elections may result in new legislative majorities who may not agree with the arrangements put in place in an agreement and seek to change them.

Alone, domestic guarantees provided in ordinary legislation do not provide a sufficient level of entrenchment to lead to stable and successful TSG arrangements. Protections are not sufficient to assure conflict parties that the arrangements will continue to operate as agreed. Domestic guarantees can be strengthened by requiring particular processes for the amendment or replacement of laws incorporating provision of the agreement. Amending the law might require a supra-majority in a legislative body, parallel votes in national and regional legislatures, or local referenda. The design of such guarantees must take into consideration the particular demographic make-up of the state, and institutional issues including the impact of the electoral and party systems. Where a TSG group's representatives constitute a small portion of the national assembly, due to the size of the group or the party system, a supra-majority voting requirement in this assembly may not provide a strong guarantee, as the TSG can still be altered without the group's consent. In these circumstances requiring a concurrent majority in the national and local assemblies would be more appropriate. Such guarantees move beyond what is offered by ordinary domestic legislation and move towards constitutional protection by requiring special procedures for change. By strengthening the security provided by domestic legislation, special procedures can enable these guarantees to be more successful in providing for stable TSG. Though they still fall short of the full protection that can be offered domestically when agreements are incorporated into constitutions.

Domestically, settlements are frequently incorporated into new or existing constitutions. Such constitutions are highly symbolic and violation is generally considered more serious than breaches of ordinary law. The binding nature of a constitution creates a greater incentive for the conflict parties to adhere to the settlement than incorporating it into ordinary law. Ahuja and Varshney argued that courts are relatively resilient defenders of such guarantees.[42] By entrenching a settlement in a fundamental document not susceptible to easy alteration, it can provide a strong guarantee that TSG arrangements will continue unaltered—contributing to their success. Bell, however, argued that there are a

[42]Ahuja, A., & Varshney, A. (2005). Antecedent Nationhood, Subsequent Statehood: Explaining the Relative Success of Indian Federalism, in Philip G. Roeder & Donald S. Rothchild (eds.), *Sustainable Peace: Power and Democracy after Civil Wars.* Ithaca, NY: Cornell University Press, 242.

number of potential problems with constitutions based on peace agreements and highlighted that peace-agreement constitutions differ from traditional or conventional constitutions. Constitutions are conventionally viewed as foundational and relatively permanent documents but peace-agreement constitutions can be transitional, including provisions for their own expiration or change. Such a transitional nature would undermine any additional protection which constitutional guarantees hope to provide to the institutional arrangements. Furthermore, a lack of constitutional continuity, coupled with the international involvement that tends to be required to broker agreement, leaves guarantees incorporated into constitutions open to broad charges of illegitimacy as a constitutional rupture, and an externally imposed one at that.[43] These arguments could be used by those who seek to excuse their violation of TSG, undermining the ability of the constitution to act as a sufficient guarantee to ensure the success of TSG institutions.[44]

The ability of constitutions and other domestic guarantees to provide protection for TSG arrangements is dependent on the ability of the domestic courts to enforce the norms included in them. Judicial review in traditional contexts depends on a developed sense of law and order. In post-conflict societies, these concepts, and the neutrality of the judiciary, tend to be deeply contested. There are dangers in starting a debate regarding the correct relationship between the judiciary and the legislature. This is difficult in stable environments and often 'dramatically accentuated in societies that are constructing both core democratic and legal institutions'.[45] Weaknesses in norms related to the rule of law and the role of the judiciary, and an underdeveloped legal system, limit the

[43] Bell, C. (2006). Peace Agreements: Their Nature and Legal Status. *The American Journal of International Law*, Vol. 100, No. 2, 393.

[44] Using peace agreements as constitutions may result in an excessive focus on including reciprocal promises and guarantees, which have a greater resemblance to private law than to the broad values-based approach normally associated with constitution drafting. This will result in constitutions which are lacking in the broad principles and are restricted in their ability to act as foundational documents articulating the values of the state as a whole. Successful constitution drafting requires a careful balance between using constitutions as symbolic and legal guarantees which offer conflict parties security that arrangements will not be violated and the need to include broad values and principles which help shape the priorities of the state in the long term.

[45] Ibid., 393.

ability of domestic guarantees *alone* to provide sufficient foundations for stable TSG arrangements.

International Guarantees

International involvement in peace agreements is a widespread practice. International organisations, third-party states, or high-profile individuals act in a wide range of roles. From the early stages of the peace process where they may help in negotiating ceasefires to overseeing elections and helping to rebuild human and physical infrastructure in the peace-building stage. All three main theories of conflict resolution envisage a role for such actors, though they differ as to what this role should be: power-dividers see a limited, transitional role for them; advocates of both consociational and integrative power-sharing embrace them more willingly as facilitators and guarantors of settlements.[46] Early involvement in a peace process, particularly during the negotiation and drafting phase, is seen to commit international actors to longer-term involvement as guarantors or enforcers. International actors can also become involved at later stages of peace processes, these latecomers to a peace process can undermine the existing international guarantees where they seek to change the agreed arrangements. There is also a risk that international actors will become impatient or frustrated if institutional arrangements falter and can rush to alter them, sometimes to increase their own role, undermining compliance pull of any institutions in the process.[47]

Soft international guarantees involve international actors partaking in the negotiation, implementation, and operation of TSG peace agreements. The participation falls short of a legal commitment to the agreement, for example, as a legally responsible signature, but can still have a significant impact on the behaviour of the conflict parties. The primary function of soft guarantees is norm development and shaping preference and opportunity structures for the conflict parties. This can also reinforce the strength of constitutional domestic guarantees by producing a

[46]Van Houten, P., & Wolff, S. (2008). *The Stability of Autonomy Arrangements: The Role of External Agents*, presented at the 48th Annual Convention of the International Studies Association, Chicago, IL, 10.

[47]Papagianni, K. (2010). Mediation, Political Engagement, and Peacebuilding. *Global Governance*, Vol. 16, No. 2, 243–263.

new 'constitutionalism' norm.[48] The presence of third-party observers or mediators during negotiations can have a powerful effect on the content of the agreement, ensuring that existing and developing international norms are not violated. This can be seen in the inclusion of minority protections, such as TSG institutions, in recent peace agreements concluded under international supervision. Soft guarantees generate some of the same pressures for compliance as hard law or formal ones, and can be equally effective.[49]

During the implementation phase of peace agreements, the international community can act as a strong verifier of compliance. Pronouncements by such an actor that one of the conflict parties has violated an agreement will carry significant weight even without any material sanction. Such claims will be much more difficult for the accused party to dismiss than similar charges levied by domestic competitors. Such interventions are strongest when the international actor has a high status and is not considered to be acting to forward its own agenda but rather as an honest broker. These interventions are particularly useful for weaker conflict parties who will not have the leverage to force compliance from more powerful conflict parties. Reputational damage to a conflict party that defaults can have serious consequences for their ability to develop future relationships with other actors.

Soft guarantees are often provided as part of a policy of conditionality, which ties important benefits such as donor assistance or membership of a regional organisation, with agreement compliance. There has been a strong regional element to the application of such soft guarantees. In the 1990s, future European Union membership was used as a powerful incentive for central or eastern European states to adhere to the provisions of peace agreements. Particularly relevant to this discussion was the EU's approach to minority protection.[50] After 1992, through the Organisation for Security and Cooperation in Europe, the EU promoted minority protection. While particulars were left to individual governments, reports, and reviews arguably created an environment open

[48] Morison, J. (2009). Ways of Seeing? Consociationalism and Constitutional Law Theory, in R. Taylor (ed.), *Consociational Theory*. London: Taylor and Francis, 81.

[49] Bell, C. (2006). Peace Agreements: Their Nature and Legal Status. *The American Journal of International Law*, Vol. 100, No. 2, 385–401.

[50] Bruis, M. (2003). The European Union and Interethnic Power-Sharing Arrangements in Accession Countries. *Journal of Ethnic and Minority Issues in Europe*, Vol. 1, 14–16.

to power-sharing and TSG.[51] While EU membership has lost much of its attraction in recent years, membership still provides extensive benefits and thus could be a potent encouragement for actors to maintain TSG arrangements. Other regions may not have organisations with as attractive membership benefits as the EU, but regional and international actors can use promises of aid, trade, or organisational membership as a credible soft guarantee. However, the case of conditional EU membership also highlights how the provision of such guarantees can be limited by conditions not directly related to the conflict. Reluctance to expand membership of the EU to less economically developed states, due fears that this would place significant resource demands on the Union and potential immigration patterns, placed serious restrictions on future expansion.

Furthermore, once promises of aid, trade, and association membership have been fulfilled, soft guarantees lose much of their ability to incentivise respect for agreed institutions, including TSG. The inability of the EU and OSCE to influence Latvia and Estonia's minority protection policy once they had become EU members underscores this weakness.[52] This is a greater challenge in cases of association membership than trade or aid programmes as the revocation of membership is highly unusual and thus threats of such are unlikely to carry much weight. The premature withdrawal of resources when an agreement is reached can undermine the credibility of promises of aid. Aid and development assistance are only credible soft guarantees—which can support TSG arrangements—where investment in terms of financial and human resources is adequate.

While not an official compliance mechanism, such soft guarantees nevertheless provide strong incentives for conflict parties to comply. Conditionality is most successful where the different international actors coordinate.[53] The high cost of violating agreed arrangements means that conflict parties will not only be incentivised to respect the arrangements but can be reasonably sure that other parties to the agreement will abide

[51] Horowitz, D. (2014). Ethnic Power Sharing: Three Big Problems. *Journal of Democracy*, Vol. 25, No. 2, 5–20.

[52] Wilkinson, S. (2005). Conditionality, Consociationalism, and the European Union, in Sid Noel (ed.), *From Power Sharing to Democracy: Post-conflict Institutions in Ethnically Divided Societies*. Montreal: McGill-Queens University Press, 252.

[53] Ibid., 248.

by its provisions. This means that soft guarantees can effectively protect TSG and thus assist in stabilising these arrangements.

Hard international guarantees strengthen TSG arrangements by legally entrenching the agreements which produce them in international law, including in bilateral and multilateral treaties or United Nations Security Council (UNSC) resolutions. This produces a framework where non-compliance can be reported and arbitrated on by international courts, the UNSC, or other international arbitration mechanisms. While this is similar to the use of courts to enforce domestic laws, it can provide stronger guarantees, as enforcement does not depend on the fragile post-conflict domestic judicial system. Bell has explained that in such contexts the use of international law is motivated by the need to take processes of domestic legal reform outside their normal channels so as to address the illegitimacy of the pre-agreement legal and political order. She further outlined how the compliance pull of such hard guarantees is increased by precise and coherent commitments, and the creation of incentives for cooperation and self-execution; providing for tightly reciprocal obligations at the levels both of stopping the violence and of creating democratic institutions.[54] These strengthen the guarantee provided—and so contribute to the stability of the TSG—by imparting clarity regarding implementation and breach.

The ability of international treaties or UNSC resolutions to bind conflict parties is complicated by a dependence on the status and applicability of international law. While there are embedded and developed international courts and arbitration mechanisms, the implementation of international law is less straightforward than the implementation of domestic law in stable societies, as it operates in the relatively anarchic international legal order.[55] The use of international treaties to guarantee the arrangements provided for in a TSG agreement are further confounded by the question of who can legally contract to such treaties. Conventionally only state actors could be party to such treaties. However, in most conflicts managed by TSG arrangements one or more of the conflict parties are non-state actors. Bell argued that to ensure that there is no ambiguity over the enforceability of international treaties only state actors should be contracted, and that non-state actors can

[54] Bell, C. (2006). Peace Agreements: Their Nature and Legal Status. *The American Journal of International Law*, Vol. 100, No. 2, 406.

[55] Ibid., 384.

be incorporated or locked-into a treaty through promises made by kin-states. While the use of kin-states can overcome the challenge posed by trying to bind non-state actors in an international environment—which conventionally only recognises state actors—the use of international treaties is somewhat weakened where the main conflict parties are not the direct contracted parties. Though Bell advocated that non-state actors are not directly contracted to international treaties she also argued that such treaties can have a stronger binding effect on these non-state parties, as any legitimacy which they gained is dependent on the treaty.[56]

As well as providing a legal framework through which peace agreements can be enforced, international involvement in the operation of TSG arrangements can delegate specific responsibilities to international actors. After intra-state conflict, international security guarantees, especially peacekeeping operations tasked to monitor ceasefires or verify weapons decommissioning and demobilisation, are central. As Walter has argued, when conflict groups disarm or make other concessions they become more vulnerable—both physically and politically. This increasingly tense situation makes parties more sensitive to real or perceived defections from other actors and makes it increasingly less likely that they will fulfil their obligations. This can lead to conflict parties returning to war even if the agreement has provided a meaningful resolution to the conflict issues.[57] International actors monitoring and verifying disarmament, demobilisation, or other concessions can help to overcome the potential destabilising effect of this phase and help stabilise TSG agreements.

The deepest intervention undertaken by international actors involves the provision of an international transitional authority. In these cases, the UNSC or another regional or international organisation not only guarantees an agreement, but provides for a comprehensive mission that includes both military and civilian staff to carry out a range of tasks from institution-building to economic reconstruction and other projects. Such missions can be open-ended or of limited duration. These missions can fill a post-agreement political and security vacuum and thus can ensure

[56]Bell, C. (2006). Peace Agreements: Their Nature and Legal Status. *The American Journal of International Law*, Vol. 100, No. 2, 386–390.

[57]Walter, B. (1999). Designing Transitions from Civil War: Demobilization, Democratization and Commitments to Peace. *International Security*, Vol. 24, No. 1, 134–135.

the success of the political arrangements in the short term. However, domestic actors may not accept them where they involve an excessive surrender of sovereignty. And even where they are accepted they might undermine the ability of domestic actors to develop their own capacities.[58]

Two key inter-related issues profoundly limit the ability of international guarantees to stabilise TSG arrangements: the need for such guarantees to be long term, and the wider international environment. It takes years, not months, for new political institutions to be fully implemented and operational. It then takes additional years for such institutions to become embedded and conflict actors to develop a sense of confidence in their permanency and ability to resolve the conflict. This confidence is dependent not only on the quality of these institutions but also on improving inter-group relations which help to overcome the deficit of trust discussed above. The restructuring of group relations often requires leadership or even generational change. The prolonged nature of peace processes requires sustained international assistance. While the nature of this assistance will change over time, the international community must be vigilant and ready to help, even years after TSG arrangements are established, if the need arises.

Yet the nature of the international system hinders such prolonged assistance. International, regional and non-governmental organisations, and world and regional powers have limited resources. They must make decisions regarding how to use these resources to address crises caused by conflict and natural disasters. In relation to the UNSC, Binder finds that the type of assistance provided is determined by the level of human suffering, previous international involvement, and spillover effects to neighbouring countries or capacity of the state.[59] This suggests that the international community may be likely to assist in the guaranteeing of many TSG institutions in the short term as this is usually aimed at ending ongoing violence which is likely causing high levels of human suffering and often has potential to spillover into neighbouring states, due to refugee movements and kin-state relationships. It is also positive in so far as it finds that where the international community has previously been

[58] Roeder, P., & Rothchild, D. (eds.), (2005). *Sustainable Peace: Power and Democracy after Civil Wars*. Ithaca, NY: Cornell University Press, 10.

[59] Binder, M. (2015). Paths to Intervention: What Explains the UN's Selective Response to Humanitarian Crises? *Journal of Peace Research*, Vol. 52, No. 6, 712–726.

involved there is a higher likelihood of re-engagement. This suggests that where international actors have been engaged in peace negotiations establishing TSG, for example, as mediators, they are likely to re-engage if the TSG institutions need guaranteeing at a later stage. Yet it also suggests that international actors may turn their attentions to more acute crises and be less willing to intervene to guarantee TSG, both where it is used as a conflict management mechanism before the conflict has escalated to high levels of violence and in the long term where the acute human suffering has dissipated.

Furthermore, decisions on aid or trade policy, and membership of international or regional organisations, are based on many considerations, of which their ability to incentivise adherence to TSG institutions may not rank highly. Economic considerations are often the deciding factor in such decisions, undermining the potential to use them as soft guarantees to stabilise TSG. The coordination necessary to maximise the effectiveness of such guarantees is also often difficult to achieve. Even where certain international actors prioritise stabilising TSG arrangements to assist in conflict management when making trade or aid policy other international actors may deviate from this, undermining the guarantee's strength. Certain actors, especially kin-groups, may even adopt policies which encourage non-adherence of the TSG arrangements. Such policies are often affected by and reflect the political environment which international or regional actors face at home.

Research Design

This book provides what Van Evera termed a 'generalized specific explanation'.[60] In depth case studies allow us to identify what is unique about the specific cases studied and what is generalizable. In order to examine the role of guarantees where TSG is used as a conflict resolution mechanism, this research examined five existing cases of TSG (UK-Northern Ireland, Bosnia, Moldova-Gagauzia, The former Yugoslav Republic of Macedonia, and Iraq-Kurdistan). These cases were chosen for initial examination as they used different types of TSG, experienced different levels of conflict intensity—both in terms of duration and levels of violence, and the potential for secession or re-centralisation varied due to

[60]Van Evera, S. (1997). *Guide to Methods for Students of Political Science*. London: Cornell University Press, 16.

the size, power, and connections of the groups. Each of these factors was expected to lead to the demand for and inclusion of different guarantees. Furthermore, in each case, a form of TSG was implemented and was operational for a period of over ten years which allowed for the assessment of the effectiveness of guarantees over a period of time. In many cases peace agreements collapse before being implemented, studying these cases would not have facilitated an assessment of how guarantees effect TSG once it is operational. Finally, ability to access the necessary data to carry out the analysis was considered.

The initial examination was used to determine what guarantees were included in the respective cases and to ensure that these cases met the case selection goal of capturing the full range of variation along the dimension(s) of interest-guarantees. It was established that these cases include all the different types of guarantees—domestic (constitutional, special, and ordinary) and international (hard and soft). These cases also include different combinations of guarantees, which is important as the effectiveness of guarantees in stabilising TSG will be affected by how different guarantees work together. This case selection methodology reflects the concerns and recommendations made by Gerring in relation to 'diverse cases'. The goal of case selection is to capture the full range of variation along the dimension(s) of interest.[61]

The guarantees employed in each of the five cases were classified using the different categories outlined above, (hard international guarantees, soft international guarantees, and domestic guarantees provided in constitutional, special, or ordinary domestic legislation) the logic for the inclusion of these guarantees and whether these guarantees helped TSG to overcome its inherent instability was then examined. Careful consideration was also given to how the design of the TSG institutions, other aspects of the agreement, and the wider political context affected their operation.

This project used both co-variance and causal process observations (CPOs) methods. Co-variance corresponds to the prevailing outlook on case studies research in Political Science. Gerring coherently outlines this

[61] In all five cases, complex political developments occur during the periods under examination, for example, corruption issues in Moldova and creeping authoritarianism in the former Yugoslav Republic of Macedonia. These developments are only referred to as far as they are relevant to the operation of the TSG institutions.

approach: 'A purported cause and effect must be found to co-vary'.[62] In keeping with this approach, this project examined co-variance between its dependent variables (TSG stability) and independent variables (guarantees). This inferential power of the research is strengthened by incorporating CPOs as described by Collier, Brady, and Seawright. A CPO is 'an insight or piece of data that provides information about context, process, or mechanism, and that contributes distinctive leverage in causal inference'.[63]

In order to ascertain whether the inclusion of guarantees in TSG peace agreements increased the stability of these arrangements, a range of data relating to the different case countries was examined. There was a wealth of data in the public domain in the form of official statements, recommendations, and reports. Over 10,000 documents were analysed. These were sourced from records of political parties, governments, international organisations, research centres, and NGOs. These documents range from early 1993 to the end of 2017, and in each case, they were chosen to capture the lead up to the political agreement, negotiations, and the implementation and operation of the TSG arrangements. To ensure appropriate interpretation the process of production of these documents, the identities of the authors, the purposes for which they were produced, and the organisational framework in which they operated were all considered.[64]

Thirty semi-structured interviews with representatives of governments, political parties, international organisations, NGOs, and local academics were used to supplement these existing documents.[65] They were a particularly useful source of data for this book. This is because interviewing is often the most productive approach when influence over a particular outcome of interest was restricted to a small number of

[62] Gerring, J. (2004). What is a Case Study and What is it Good for? *American Political Science Review*, Vol. 98, No. 2, 341–354.

[63] Collier, D., & Brady, H. (2004). *Rethinking Social Inquiry. Diverse Tools, Shared Standards.* Lanham, MD: Rowman & Littlefield Publishers, 277.

[64] Prior, L. (2010). *Using Documents in Social Research.* London: Sage, 1–27.

[65] Attribution in interviews is in line with the requests of the interviewees. Furthermore, while the comments of the interviewees draw on their experience they do not necessarily represent the official positions of organisations for which they currently or previously worked.

decision-makers.[66] Sources of dishonesty such as the exaggeration of the positive role played by an interviewee or his/her group in a process can be discovered by comparing accounts across sources before and after the interview.[67]

The official reports, political statements, newspaper articles, and interview transcripts were analysed using the same processes. Where interview transcripts were generated, they were analysed in the same manner as the other data. In some instances, interview transcripts were not available, for example, due to interviewees not being comfortable being recorded. In these cases, interview notes taken by the researcher were used. The documents were read and any references to guarantees, TSG stability, or links between guarantees and TSG stability were coded. The coding for guarantees further categorised the data into the demand for and the operation of the different guarantees. Links between types of guarantees and TSG stability were then examined and this information was used to draft the findings of the research.

Conclusion

TSG institutions are increasingly used to manage or resolve intra-state identity group conflict. TSG arrangements often suffer from instability—critics highlight the potential for state disintegration—though re-centralisation is also a possible source of volatility. This instability is almost inherent in TSG where it is used as a conflict resolution mechanism, as it is usually an unhappy compromise; representing an acceptable but non-ideal position for the different conflict parties. Furthermore, these societies suffer from a lack of trust between different groups which makes it difficult for agreements to be concluded or operated even where the conflict issues have been resolved. There is suspicion among the conflict parties that other groups will not faithfully operate the agreed institutions and may try to renege on compromises, or interpret ambiguity in a manner beneficial to their group. This may suggest that TSG should be avoided in these circumstances. However, despite its instability, it often

[66] Rathbun, B.C. Interviewing and Qualitative Field Methods: Pragmatism and Practicalities, in Janet Box-Steffensmeier, Henry Brady and David Collier (eds.), *The Oxford Handbook of Political Methodology*. Oxford: Oxford University Press, 690.

[67] Berry, J.M. (2002). Validity and Reliability Issues in Elite Interviewing. *Political Science and Politics*, Vol. 35, No. 4, 679–682.

represents the *only* arrangement acceptable to the conflict parties. It provides identity groups with recognition and security within the broader framework of the state.

Given the inherent instability of TSG in this context, combined with the necessity of using these institutions due to the fact they are the only arrangements that meet the needs of the different parties, a range on guarantee mechanisms should be incorporated into agreements to provide reassurance that TSG will endure in its agreed form. International guarantees and domestic constitutional, special, or ordinary provisions are effective mechanisms to prevent abrogation from agreed arrangements, due to the reputational damage which their violation incurs.

Some mechanisms are useful at certain points but lose their effectiveness or can have a negative effect on success if they are applied at the wrong point. For example, soft international guarantees through policy conditionality operate most effectively where membership to a regional organisation or significant aid or trade opportunities are under negotiation. Similarly, direct international governance as a hard international guarantee provides a safety net to prevent the collapse of institutions and renewed conflict, which is necessary in the immediate post-conflict or post-agreement period. However, its ongoing use will inhibit the development of domestic capacities and lack legitimacy. Conversely, domestic guarantees may take on increasing significance due to a change in domestic political leadership and improving domestic judicial competencies.

It is also vital that guarantees are not only included in TSG peace agreements but that they are invoked where necessary. Non-implementation of guarantees can result from a range of issues including weak domestic institutions or changing international circumstances which dissuade an international actor from providing a pre-agreed assurance. Guarantees may not be applied even where TSG arrangements have been promulgated if violence has not remerged. While this may appear sensible, especially given limited resources, allowing groups to renege on elements of the peace agreement without sanction will encourage further defaulting, not only in relation to the particular conflict but potentially in other post-conflict contexts.

Finally, where guarantees successfully stabilise TSG we must consider whether they risk freezing rather than resolving conflicts. The shape of TSG institutions generally reflects the power relations between the groups at the time a peace accord incorporating them is agreed. Such power

relations are the product of military strength, control over land, size of groups, and international support. Power relations fundamentally shape the negotiating power of the groups and therefore shape the negotiation outcome. However, it may become evident over time that the agreed TSG arrangements have certain weaknesses, e.g. are overly decentralised. Furthermore, even where agreed TSG institutions do not have inherent weaknesses at conception, future reforms may be necessary to address changing circumstances such as demographic changes. Whether guarantees can be adapted to facilitate rather than prevent necessary reform is a key question which must be considered. Stability is desirable where it prevents conflict but not where it prevents the development of good governance.

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Northern Ireland: Autonomy as a Conflict Management Tool in a Stable State, Ethnonational Guarantors, and Low-Level International Assistance

Introduction

The 1998 Good Friday Agreement in Northern Ireland established a local Assembly at Stormont which has substantial legislative and executive powers.[1] The accord also mandates North-South cooperation between this Assembly at Stormont and the Irish government in Dublin. Northern Ireland is a seminal conflict resolution example, often used by researchers and practitioners to assess the advantages and obstacles to using consociationalism to resolve intra-state identity group conflict. Yet very little of this scholarship focuses on how this regional consociation operates as a TSG institution within the wider UK, and how guarantees were used to overcome concerns regarding its stability.

TSG in Northern Ireland highlights how such arrangements can be used to resolve intra-state identity group conflict by providing extensive local autonomy and links to kin-groups. However, it also demonstrates how such an unhappy compromise raises concerns about both minority groups seeking to move TSG arrangements towards unification with a kin-state and unilateral selective implementation. Furthermore, it is illustrative of the necessity of guarantees to manage this instability; highlighting the need for implementation to make guarantees effective, the

[1] The Agreement is also known as the Belfast Agreement. This volume refers to it as the Good Friday Agreement as this is most commonly used outside or Ireland and the UK.

D. Walsh, *Territorial Self-Government as a Conflict Management Tool*, Federalism and Internal Conflicts,
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importance of trust between guarantee seekers and guarantee providers, and the positive role which regional actors and the international community can play with low-cost interventions.

The Northern Ireland Conflict & Territorial Self-Government

The 1998 agreement in Northern Ireland, commonly known as the Belfast or Good Friday Agreement (GFA) was widely celebrated as resolving a centuries-long conflict which in its most recent iteration had lasted over three decades. During this period, a relatively low-intensity intra-state identity group conflict usually known as 'The Troubles' beset the region. Violent Irish nationalists, almost always Catholic, waged a war aimed at creating a united Irish state, while non-violent nationalists attempted to increase their influence and that of the Irish government in the governance of Northern Ireland. Unionists, usually Protestant, wanted to maintain Northern Ireland's position within the UK, though some also sought to have powers devolve to an Assembly at Stormont as had been the case between 1921 and 1972.[2]

The historical roots of the conflict date back to the 1600s. Since that time, there has been a pattern of heavy settlement of both English Anglican and Protestant Dissenters, usually Scottish Presbyterians, in the north-east part of the island of Ireland. Unlike on other parts of the island, Protestants became the majority community and Catholics found themselves in a minority in this region. These differing settlement patterns and the different majorities which resulted from them led to a strong and organised resistance from Protestants in the region when a form of 'home-rule', or devolution, was proposed for Ireland at the beginning of the twentieth century. In 1912, the so-called 'Ulster Covenant' was signed by over half a million people. It was a declaration of resistance to home-rule which took the form of a covenant with God

[2] This book uses the term 'nationalist' to describe those who are either 'nationalist' or 'republican' and 'unionist' to describe those who are 'unionist' or 'loyalist'. While distinctions between these groups is very important in understanding the conflict generally they are not central to the analysis of this chapter and thus the simplified terms are used.

in which the signatories pledged to resist the inclusion of the Protestant majority region in any Dublin-based devolution arrangement.[3]

This resistance was based on a fear among Protestants that their inclusion into a devolved Irish state based in Dublin would bring them under the control of a state which was not only overwhelmingly Catholic but an administration which took many of its cues in terms of policy from the Catholic Church. The nature of the new Irish state bore out some of these concerns. Despite some small allowances, such as state support for Protestant schools, the Irish state which effectively came into being in 1922 followed Catholic doctrine, especially relating to 'moral matters'. It was a state where 'the Catholic moral code becomes enshrined in the Law of the State'.[4] There was no clear separation between Church and State and successive governments acknowledged a special role for religion in education, medicine, and other facets of social life.[5] Coupled with these religious concerns were economic considerations. The north-east was somewhat industrialised, with prominent industries such as linen-making and shipbuilding. In contrast, agriculture was the dominant sector on the rest of the island. There were concerns that industry would suffer under a Dublin government.

The strength of this resistance, and desires to avoid civil war in Ireland, ensured that the Government of Ireland Act 1922 partitioned the island into *Northern Ireland* (six north-eastern counties) and *Southern Ireland* (the rest of the island). The Northern Ireland statelet that emerged was famously a 'Protestant government for a Protestant people' ruled from Stormont in Belfast.[6] Protestants were favoured in the provision of public goods, such as social housing. Employment discrimination was also prevalent, particularly at senior levels of the public sector and in certain sectors of the economy, such as shipbuilding and heavy engineering, where Protestant business owners and managers were strongly discouraged from employing Catholics.

[3]Walsh, D., & O'Malley, E. (2013). Religion and Democratization in Northern Ireland: Is Religion Actually Ethnicity in Disguise? *Democratization*, Vol. 20, No. 5, 939–958.

[4]Whyte, J.H. (1980). *Church and State in Modern Ireland 1923–1979* (2nd ed.). Dublin: Gill and Macmillan, 24–61.

[5]Girvin, B. (2008). Contraception, Moral Panic and Social Change in Ireland, 1969–79. *Irish Political Studies*, Vol. 23, No. 4, 555–576.

[6]Craig, J. (1934). Northern Ireland House of Commons, Vol. XVII, Cols. 72–73.

Politically, the abolition of proportional representation in 1929 gave the Ulster Unionist Party (UUP) a considerable and constant majority in the Assembly at Stormont, resulting in almost fifty years of one-party rule. At local government level 'gerrymandering', the selective drawing of constituency boundaries to create Protestant majorities in majority Catholic local areas, was used to unscrupulously maximise unionist representation and ensure unionist control of local councils. In the 1960s such practises prompted a civil rights movement, inspired by the civil rights movement in the USA, which campaigned for an end to such discriminatory practises. The repressive policing response to the civil rights campaign was severe, further alienating the Catholic community from the Northern Ireland government.

This response and the actions of the British Army, which was sent to aid the police in 1969 as a reaction to a rapidly deteriorating security situation, led to a resurgence in recruitment to the Irish Republican Army (IRA) a violent nationalist group which opposed the partition of the island and had engaged in an unsuccessful bombing campaign along the border.[7] In 1972 the Government of Northern Ireland resigned and the Assembly at Stormont was prorogued. Northern Ireland subsequently came under direct rule from Westminster with its own Secretary of State. This situation prevailed until the reaching of the peace agreement in 1998, with the exception of a failed devolved power-sharing agreement in 1973. The IRA focused its violent campaign on the security forces and other representations of the British state, though also injuring and killing hundreds of civilians, primarily in Northern Ireland but also in mainland Britain. The British state adopted a security response, including using draconian policing powers, and Protestant paramilitary groups emerged to 'defend' their community against the IRA.

Ethnonationalist explanations of the conflict, which became increasingly common in the academic literature on Northern Ireland throughout the late 1980s and 1990s—largely through the work of McGarry and O'Leary—informed a new approach to resolving the conflict. It was this ethnonational explanation that guided the institutional management that the GFA applies to the conflict. Existing research tends to focus on the internal workings of the Assembly and the Executive at Stormont. This is essential work, and explains some important aspects of how a

[7] English, R. (2004). *Armed Struggle: The History of the IRA*. Oxford: Oxford University Press, 73.

previously intractable intra-state identity group conflict has been successfully managed, as well as developing consociational theory in meaningful ways. However, this analysis takes a different approach, focusing on the compromise nature of the TSG institutions and the stability of these arrangements. It outlines how the TSG provisions addressed the needs of both main communities, nationalists and unionists, in Northern Ireland, the sources of instability, and how guarantees helped to overcome this instability.

How TSG Addresses Nationalist and Unionist Needs

Unlike the other states examined in this book, in Northern Ireland the intra-state identity group conflict is largely confined to one region of the state, though the British and Irish governments play important evolving roles, and TSG is provided to that region facilitating power-sharing between the two main local communities. As such the tension inherent in Northern Ireland's TSG is not the competing desire of the autonomy to maximise its powers and the centre to maintain its control. Rather, the tension is mainly between two major communities in the TSG region, one which wants to unite with a neighbouring state and the other which wishes to retain Northern Ireland's current position as part of the UK. The British Labour governments from 1997–2010 portrayed themselves as neutral on the future constitutional position, focused only on managing the region's conflict. However, the changes of government in the UK in 2010, 2015, and 2017 have reinforced concerns that the British state is inherently centralising and does not respect the concerns of the constituent parts, shifting the dynamics, as discussed below.

The peace accord provides for a new Assembly at Stormont with 108 members.[8] It has full legislative and executive powers in relation to the 'transferred matters', mainly in the social and economic field. There are also 'reserved matters' which the Assembly can legislate on with various consents, and 'excepted powers' such as foreign and defence policy which remain the exclusive responsibility of the Westminster parliament. The Assembly is elected by PR-STV using the eighteen Westminster constituencies.[9] An Executive is formed using the d'Hondt formula which

[8] Though this was reduced to ninety MLAs in the 2016.

[9] Cox, M., Guelke, A., & Stephen, F. (Eds.). (2000). *A Farewell to Arms? From 'Long War' to Long Peace in Northern Ireland*. Manchester: Manchester University Press, 43.

provides political parties with a choice of department depending on their electoral performance. The Executive is led by a First and Deputy First Minister who were elected on a cross-community basis, and cross-community voting applies to designated issues.[10] By applying consociational principles to the internal workings of the TSG institutions both communities are protected against current or future majority domination.[11]

As well as including these traditional consociational institutions to provide an internal framework for power-sharing, the TSG arrangements in the GFA also meet the needs of both main communities. It does this by providing for both the continued connection between Northern Ireland and mainland Britain and establishing new links with Ireland through novel use of TSG. The GFA stipulates that Northern Ireland remains part of the UK, which provides the unionist community with security regarding the constitutional position of Northern Ireland. However, the GFA also allows for the unification of the region with the Irish state should this be the will of the people of both Northern Ireland and Ireland, as articulated in referenda which will held if there are indications that such majorities are present.[12] This provides an explicit recognition of the legitimacy of nationalist demands, subject to majority consent. The Agreement explicitly recognises the potential for constitutional change which creates a degree of uncertainty, and consequently insecurity, but the GFA also recognises that regardless of the constitutional position of the region, people born in Northern Ireland have the right to hold British, Irish or both citizenships. Furthermore, it asserts

[10]The St Andrew's Agreement changed the election procedure for the First and Deputy First Minister. The new procedure provides for a First Minister nominated by the largest party of the largest designation in the Assembly and a deputy First Minister nominated by the largest party of the second largest designation in the Assembly thus still providing for cross-community representation as long as 'Nationalist' and 'Unionist' remain the main designation which parties in the Assembly chose to self-identify.

[11]Demographic changes driven by both variable birth and emigration rates between the communities mean Catholics have increased from 34% in the 1920s to 45% in 2015. This means institutional arrangements need to protect and possible future Protestant minority from domination as well as protecting the current Catholic minority.

[12]The Good Friday Agreement (1998). Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland. Article 1, Section I (1998). Accessed 31 December 2017, https://peacemaker.un.org/uk-ireland-good-friday98.

> that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities[13];

The GFA also provides a central role for the Secretary of State and Westminster Parliament

> Role of Secretary of State: (a) to remain responsible for NIO matters not devolved to the Assembly, subject to regular consultation with the Assembly and Ministers; (b) to approve and lay before the Westminster Parliament any Assembly legislation on reserved matters; (c) to represent Northern Ireland interests in the United Kingdom Cabinet; (d) to have the right to attend the Assembly at their invitation.
>
> The Westminster Parliament (whose power to make legislation for Northern Ireland would remain unaffected) will: (a) legislate for non-devolved issues, other than where the Assembly legislates with the approval of the Secretary of State and subject to the control of Parliament; (b) to legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland; (c) scrutinise, including through the Northern Ireland Grand and Select Committees, the responsibilities of the Secretary of State.[14]

These substantive roles preserve a strong link to the UK and thus allow for the unionists' need for recognition as British. Unlike in other cases of TSG, the Secretary of State, the member of the British cabinet responsible for Northern Ireland, is not an individual who is elected by or even comes from the region. He/she is a Member Parliament (MP) who has been elected in another part of the UK. While this was understandable given that it would be very difficult to find a local MP who is trusted by both main communities to fulfil this role, it fundamentally affects the nature of the role. Rather than acting as a local representative at central

[13]The Good Friday Agreement (1998). Section V. Accessed 31 December 2017, https://peacemaker.un.org/uk-ireland-good-friday98.

[14]Ibid. Strand One, Sections 32–33.

government the Secretary of State arguably acts as a central government representative in the region, a fact underscored by his/her role during periods of direct rule. This strengthens the link between unionists and the British state ensuring that a Briton from elsewhere in the Union is intimately involved in the region.

Furthermore, Northern Ireland continues to send eighteen members of parliament (MPs) to the Westminster parliament. While this is a very small proportion of the six-hundred and fifty MPs elected to the Westminster parliament it assists in connecting Northern Ireland to the Westminster parliament. The two largest political parties in Northern Ireland have elected MPs and MLAs.[15] Both unionist parties stressed the positive impact of the 'dual mandate' where the same individual could be an MP and MLA at the same time, with a Democratic Unionist Party (DUP) member arguing that its abolition in 2014 would make coordination more difficult, 'you have to go to additional lengths to ensure that MLAs understand what is happening in parliament and parliamentarians understand what is happening in the Assembly at Stormont. Whereas if you had a greater degree of overlap with a number of people holding joint roles that would be more easily managed'.[16] Similarly, a UUP member argued that the coordination role was particularly important in the early days of the Assembly at Stormont and that the fact party leader David Trimble was an MP as well as the First Minister of the Assembly at Stormont helped as he was in 'both places'.[17]

Likewise, institutional links to Ireland through the North-South Ministerial Council (NSMC) and cross-border implementation bodies provide nationalists with official recognition of their link to Ireland and facilitates Irish involvement in policy-making in the region. The GFA provides that a minimum of twelve subject areas will be identified for cooperation under the North-South Ministerial Council. This included

[15]While Sinn Féin, the largest nationalist party since 2003, does not take its seats in the Westminster parliament, operating a policy of abstentionism, since rule changes in 2001 it has occupied its offices at Westminster.

[16]Democratic Unionist Member (2016). Interview with Dawn Walsh. Belfast, January 18.

[17]Ulster Unionist Member (2015). Interview with Dawn Walsh. Belfast, December 2. A Joint Ministerial Committee was established in 2013 to facilitate meetings of the equivalent ministers from the Westminster parliament and devolved administrations to facilitate coordinate and cooperation.

the establishment of six implementation bodies: Food Safety, Foyle, Carlingford and Irish Lights Commission Sector, Inland Waterways, Language—Irish and Ulster-Scots, Special EU Programmes, and Trade and Business Development.[18] While these bodies provide opportunities for cross-border cooperation, and many of these sectors are most appropriately managed on a cross-border basis, the greater significance of these bodies for nationalists is in their symbolic value—they provide a tangible connection to Dublin.[19] Cross-border cooperation implicitly meets the nationalist community's needs for security and recognition by institutionally linking it to Dublin.

Institutional Sources of TSG Instability in Northern Ireland

While the internal structure of the Assembly at Stormont, the continuing role of British state, and the institutional links to the Irish state provide for innovative ways to meet the needs of both the unionist and nationalist communities for security and identity recognition, they also represent a difficult compromise where institutions or provisions which satisfy the needs of one community often represented a source of concern for the other. There was initial opposition to establishing an Assembly at Stormont in Belfast by elements of the nationalist and unionist communities. Hard-line nationalists argued it legitimised the border and thus was an impediment to a united Ireland. In the late 1980s and early 1990s Sinn Féin strongly opposed the creation of a new devolved Assembly at Stormont in Belfast arguing that the 'gradualist' approach to Irish unity adopted by the moderate nationalist party the Social Democratic and Labour Party (SDLP), which involved operating an Assembly at Stormont as part of a gradual transfer of powers from Westminster to ultimately create a united Ireland, was flawed and constituted an acceptance of the partition of the island.[20] During the

[18]For an in-depth discussion of how the institutions provided for in the GFA meet the needs of the two main communities and are suggestive of ways to improve consociational arrangements, see Walsh, D. (2015). How a Human Needs Theory Understanding of Conflict Enhances the Use of Consociationalism as a Conflict Resolution Mechanism: The Good Friday Agreement in Northern Ireland. *Ethnopolitics*, Vol. 15, No. 3, 285–302.

[19]Murphy, P. (2015). Interview with Dawn Walsh. London, October 15.

[20]Sinn Féin (1988). *SDLP-Sinn Féin Talks: Sinn Féin Document One*. Dublin, Sinn Féin. Accessed 31 December 2017, http://www.sinnfein.ie/files/2009/SF_SDLP_talks.pdf.

1998 negotiations Sinn Féin did not focus on the establishment of an Assembly at Stormont. It instead focused on the cross-border institutions, it sought to maximise the powers of the Assembly at Stormont solely to maximise the functions which could be awarded to the cross-border bodies. While the SDLP had more detailed proposals as to how the Assembly at Stormont should operate, it also sought to maximise devolution in order to facilitate extensive cross-border cooperation.[21]

Conversely, some unionists resisted the establishment of an Assembly at Stormont, they adopted an approach which sought to integrate Northern Ireland into the UK, arguing that Belfast was no different than Birmingham, and therefore should be governed from Westminster in the same manner. As a UUP member put it 'a lot of unionists would have been content with direct rule and no assembly'.[22] Even within the pro-devolution strands of unionism there was a desire to minimise the strength of any Assembly at Stormont. During the 1998 negotiations, the UUP leader David Trimble argued for administrative rather than executive devolution.[23] Such arrangements would allow the unionists to avoid executive power-sharing with nationalists, who they distrusted because of nationalism's stated aim of achieving a united Ireland. Nationalists viewed efforts to minimise the powers of an Assembly at Stormont as being motivated by a desire to minimise the cross-border cooperation and minimise the link to Dublin.[24]

This cross-border cooperation was the source of the most acute concerns regarding the TSG arrangements; unionists feared that the cross-border cooperation mandated in the accord would allow the nationalist community in Northern Ireland to conspire with the Irish government to expand the powers of the cross-border institutions until it became a de facto government. This would result in a manipulation of the TSG arrangements to bring about a united Ireland without unionist consent. As former Secretary of State Paul Murphy argued, 'certain people on the extreme in the unionist community thought it

[21] SDLP member (2016). Interview with Dawn Walsh. London, July 16.

[22] Ulster Unionist member (2015). Interview with Dawn Walsh. Belfast, December 2.

[23] SDLP member (2016). Interview with Dawn Walsh. London, July 16.

[24] Adams, G. (2003). *Hope and History*. London: Brandon.

was the beginning of the end, because you start having a North-South body on canals and the day after tomorrow you are going to be a united Ireland'.[25]

While these concerns may have seemed somewhat fanciful, particularly given the constitutional guarantee provided by the Irish government (discussed in detail below), a DUP member argued that one must consider the broader context and that unionists were mindful of the continuing aim of nationalists to establish a united Ireland. He also pointed to the cross-border institutions provided for in the failed 1973 peace agreement. This agreement, known as the Sunningdale Agreement, provided for a Council of Ireland, which had very significant powers. This included a Council of Ministers which had 'executive and harmonising functions and a consultative role'.[26] At the time a nationalist politician argued that this all-island cooperation could be 'a Trojan horse'. Thus, there was a historical memory within the unionist community that cross-border cooperation could be engineered by nationalists to create an all-Ireland government.[27] Moreover, during the 1998 negotiations such 'worries were vindicated when the Irish foreign Minister David Andrews stated that the North-South Bodies would have "strong executive functions, not unlike a government"'.[28] Unionists were appalled and demanded an apology from David Andrews, which he delivered.[29]

These fears, and the negative attitude towards cross-border cooperation which they inspired, in turn generated an anxiety within the nationalist community that unionists would operate the Assembly at Stormont but refuse to participate in or prevent the north-south institutions from working, fatally undermining this element of TSG vital to the nationalist community. Non-operation of the cross-border institutions would have been very problematic for nationalist politicians, undermining their argument that the peace agreement provided for closer links between Belfast

[25] Murphy, P. (2015). Interview with Dawn Walsh. London, October 15.

[26] The Sunningdale Agreement (December 1973). Tripartite Agreement on the Council of Ireland—The Communique Issued Following the Sunningdale Conference. Accessed 31 December 2017, http://cain.ulst.ac.uk/events/sunningdale/agreement.htm.

[27] Democratic Unionist Party Member (2016). Interview with Dawn Walsh. Belfast, January 18.

[28] Godson, D. (2004). *Himself Alone, David Trimble and the Ordeal of Unionism*. London: HarperCollins.

[29] Adams, G. (2003). *Hope and History*. London: Brandon, 320.

and Dublin and undercutting support for the GFA in the nationalist community.

Finally, while arguably unavoidable in securing agreement by the nationalists, leaving the future constitutional position of Northern Ireland open to change undoubtedly contributed to a lack of confidence that the TSG arrangements would not be unilaterally changed. The provision on potential unification with Ireland stipulates that such a change could only occur if it is supported through a referendum. However, given changing demographic make-up of Northern Ireland, such a provision does not necessarily require cross-community support for unification to occur.

These anxieties, and the unease that different actors would manipulate the TSG arrangements to move towards their desired outcome, underscore that where TSG is used as a conflict management mechanism it is usually an unhappy compromise. These concerns make it more difficult for conflict parties to agree to TSG arrangements. Furthermore, even where such agreements have been reached instability is likely, because potential manipulations come to pass, or simply the anticipation of such, leads parties to pre-emptively renege or withdraw from the peace agreement. This analysis now examines the guarantees which were included in the GFA, or developed during the implementation phase, to counter this instability by guarding against unilateral alterations of the TSG arrangements. The operation of these guarantees in the Northern Ireland context highlights the need for guarantee seekers to trust the guarantee provider, and the ability of regional and international actors to provide important assistance to mitigate against implementation challenges destabilising TSG.

Guarantee Mechanisms

The TSG arrangements provided for in the GFA meet the needs the conflict parties by innovatively providing security and identity recognition. However, there are also fears that the arrangements could be manipulated through one or more conflict parties frustrating the needs of others. The GFA includes a range of guarantees aimed at reassuring the conflict parties that the TSG institutions will be implemented faithfully and that unilateral changes will not be permitted. The use of domestic guarantees in Northern Ireland highlights the need for trust between the guarantee seeker and guarantee provider. It also illustrates how specific

domestic circumstances affect the strength of domestic guarantees. The international guarantees are largely in the form of implementation assistance from international experts, though the Agreement is also a legally binding international treaty. The operation of these guarantees shows the importance of international and regional actors, how implementation of the guarantees, and other elements of a peace agreement, impact their effectiveness.

Domestic Guarantees

Domestic guarantees that TSG institutions provided for in the GFA would be faithfully implemented are provided in the Northern Ireland Act 1998, which legislated for the provisions agreed in the accord. Whether the guarantees in this Act constitute constitutional, special, or ordinary domestic legislative guarantees is debateable. This Act has been framed as a 'constitution' for the region, and during the negotiations different actors stressed that the new act would represent fundamental change of the Government of Ireland Act. Taoiseach Bertie Ahern argued that the GFA involved a commitment to constitutional change in both Ireland and Britain and framed Irish constitutional change as balanced by British constitutional change, 'including the repeal of the Government of Ireland Act'.[30] While changes to the Government of Ireland Act were undoubtedly significant, they do not in reality deliver as strong a guarantee as one would expect from a constitutional provision. This is due to British parliamentary sovereignty, which allows the British government to change the Act through ordinary parliamentary procedures as well as the absence of a written British constitution. Despite these particularities, the domestic guarantees provided for in the Northern Ireland Act 1998 are necessary to convince nationalists and unionists that the TSG arrangements would be faithfully implemented. This section now outlines how these guarantees alleviate fears and are

[30]Ahern, B. (2008). Speech by Bertie Ahern, then Taoiseach, to the Institute for British-Irish Studies (IBIS) Conference 'From Conflict to Consensus: The Legacy of the Good Friday Agreement' at University College Dublin (Thursday 3 April 2008). Dublin: Department of the Taoiseach. Ahern, Bertie. (2000). Statement on Northern Ireland by Bertie Ahern, then Taoiseach, to the Dáil, 15 February 2000. Dublin: Department of the Taoiseach.

used to prevent unilateral modification of the TSG arrangements, but are not always effective.

Changes to the wider constitutional arrangements in the UK, though not conceived or designed as a guarantee for unionists, helped create some confidence that establishing a local Assembly at Stormont was not a first step out of the UK. The creation of the Assembly at Stormont in 1998 coincided with a wider devolution project within the UK which also involved the establishment of a local Assembly in Wales and a Scottish Parliament.[31] This created an environment in which local assemblies or parliaments were viewed as consistent with the Union. This is very much in keeping with theoretical arguments that asymmetric TSG is viewed as being more centrifugal than symmetric arrangements. However, this confidence was not uniformly felt within the unionist community and 'a lot of unionists would have been content with direct rule and no Assembly, and Scotland and Wales could have had what they wanted'.[32] Furthermore, in subsequent years the Scottish National Party's calls for additional powers, the 2014 Scottish independence referendum, and a potential future Scottish independence referendum have enhanced unionist fears.[33]

Strand three of the GFA also established regional institutions which help the unionist community to view cross-border cooperation as benign. A British-Irish Council brings together, in an institutional way, representatives of the British government, the Irish government, the devolved Assemblies in Scotland, Wales, and Northern Ireland, and representatives from the Isle of Man and Channel Islands. The Council's purpose is to promote the 'harmonious and beneficial development of the totality of relationships amongst the peoples of the Islands' and to 'exchange information, discuss, consult and use best endeavours to reach agreement on cooperation on matters of mutual interest'.[34] This Council is legislated for in Part V Section 52 of the Northern Ireland Act 1998. While the British-Irish Council is not an explicit guarantee that North-South cooperation will not increase and become an effective all-Ireland

[31] Murphy, P. (2015). Interview with Dawn Walsh. London, October 15.

[32] Ulster Unionist Member (2015). Interview with Dawn Walsh. Belfast, December 2.

[33] Democratic Unionist Party Member (2016). Interview with Dawn Walsh. Belfast, January 18.

[34] The Good Friday Agreement (1998). Strand Three, Sections 1–3. Accessed 31 December 2017, https://peacemaker.un.org/uk-ireland-good-friday98.

government, it is designed to allay unionist fears that this could happen. It is a necessary counter-balance to the North-South institutions which helped the UUP leader David Trimble to persuade his constituency that North-South cooperation and East-West cooperation were both functionalist arrangements which would benefit all.[35] Nationalist responses also highlight that the East-West arrangements were intended to neutralise unionist concerns surrounding the cross-border institutions. They stress that these East-West arrangements are not a mirror of North-South cooperation. North-South cooperation is vital to nationalists and cannot be diluted.[36] Though unionists are less enthusiastic in their support of the GFA than nationalists, these guarantees helped UUP leader David Trimble to support the accord and to gain the backing of a significant part of his community ensuring the GFA was endorsed in a local referendum. However, concerns about cross-border cooperation remained salient in parts of the unionist community and were raised by the DUP, which became the largest unionist party in the Assembly at Stormont elections held in November 2003.

These continuing fears necessitated the provision of an additional domestic guarantee in 2006 to allay continuing unionist suspicions as to the possible expanding nature of cross-border cooperation. This was a necessary element of wider reforms which convinced the DUP to enter into a power-sharing government with Sinn Féin. DUP suspicion of cross-border cooperation had remained significant and it insisted on a clarification in the 2006 St Andrews Agreement. This clarification stressed that any cooperation between Dublin and Belfast would have to be approved at Stormont, giving unionist an effect protection against the feared reunification. In its 2007 manifesto the DUP highlighted the importance of these new arrangements which removed 'any danger to the constitutional position of Northern Ireland through nationalist Ministers reaching agreement with their Dublin counterparts'.[37] This provision is enshrined in UK legislation in the Northern Ireland (St Andrews Agreement) Act 2006. This indicates that a guarantee in ordinary domestic legislation can build confidence that TSG arrangements,

[35] Godson, D. (2004). *Himself Alone, David Trimble and the Ordeal of Unionism*. London: HarperCollins, 340.

[36] Sinn Féin Member (2016). Interview with Dawn Walsh. Belfast, January 18.

[37] Democratic Unionist Party (2007). *Getting it Right, 2007 Manifesto*. Belfast: DUP.

and specifically any cross-border cooperation which local assemblies may engage in, are not a threat to the existing territorial integrity of the state.

The fact that an ordinary domestic guarantee allayed unionist fears is noteworthy. It is particularly striking that such a guarantee, which is theoretically weak due to the ease with which it can be altered, was sufficient to assuage the concerns of hard-line unionists who had not been satisfied by the existing provisions. Since the enactment of this new guarantee as part of the 2006 Act the cross-border institutions operated without issue, 'meetings are now part of routine government business in both jurisdictions…the DUP is properly engaged with them'.[38] The effectiveness of this guarantee contrasts strongly with unionist reaction to the institutionally stronger constitutional guarantee provided by the Irish government in 1998, which is discussed below. This emphasises the importance of trust between the guarantee seeker and guarantee provider. An ordinary guarantee from the British government is more valuable to the unionist community than a constitutional guarantee from the Irish government.

The unionist community's trust in the British government also affects its perception of the provisions for a possible referendum on the unification of Northern Ireland and the Irish Republic. The GFA affords the Secretary of State very wide discretion as to when such a poll will be held. He/she can organise such a referendum when 'it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'. The provision's only explicit limitation is that a poll cannot be held within seven years of a previous poll.[39] This essentially gives a British official the power to prevent such a poll and thus unification. This provision took on increased significance after the UK general election in June 2017 as Theresa May's Conservative government needs the support of the DUP to remain in power. While this reliance on the DUP continues it is very unlikely that the Secretary of State will call a referendum. However, this is problematic; while it ensures that unification of Ireland and Northern Ireland will not happen without DUP

[38] Pollack, A. (2010). A Solid Statement that North-South Cooperation is Here to Stay. Armagh: Centre for Cross-Border Studies. Accessed 31 December 2017, http://crossborder.ie/a-solid-statement-that-north-south-cooperation-is-here-to-stay/.

[39] The Good Friday Agreement (1998). Constitutional Issues, Annex A, Schedule One. Accessed 31 December 2017, https://peacemaker.un.org/uk-ireland-good-friday98.

acquiescence it goes further than guaranteeing that TSG provisions in the GFA will not be unilaterally changed, it essentially prevents the enactment of parts of the Agreement's TSG arrangements even if the specified conditions arise.

The British government also provides the nationalist community with a domestic guarantee that the unionist parties will not be able to avoid implementing the mandated cross-border cooperation. During the 1998 negotiations the UUP, 'expecting to control the Assembly, wanted any north-south bodies to be created by and subordinate to it'.[40] The nationalist parties were afraid 'that the unionists would work to make the Assembly function and then undermine the north-south institutions'.[41] In order to guarantee against this, Tony Blair suggested that the Assembly at Stormont and cross-border institutions should be mutually dependent.[42] This suggestion was included in the GFA and the Northern Ireland Act 1998. These provisions guarantee that unionists cannot prevent the cross-border institutions from operating. They also required cross-community participation in the NSMC, ensuring active unionist participation.[43]

Nationalists are, to varying extents, critical of the British government and its role in Northern Ireland. They stress the role of the Irish government as co-guarantor of the GFA, which will be examined below. However, they are content to use the British courts system to enforce guarantees as they related to the cross-border institutions. Rather than the anticipated fear that unionists would simply not operate the NSMC or would refuse to participate in it, a different difficulty arose in October and November of 2000. The UUP leader and First Minister David Trimble refused to nominate Sinn Féin ministers to the NSMC until there was substantial engagement with the international body charged with overseeing disarmament by the IRA.

The two Sinn Féin ministers affected, Bairbre de Brun and Martin McGuinness, sought a judicial review of the legality of this approach. They argued that Section 52 of the Northern Ireland Act 1998 obligated the First Minister to nominate them to the NSMC. Justice Kerr of

[40] Mitchell, G. (2000). *Making Peace*. London: University of California Press, 143.

[41] Ibid., 175.

[42] Powell, J. (2009). *Great Hatred, Little Room: Making Peace in Northern Ireland*. London: Vintage Books, 32.

[43] Northern Ireland Act (1998). Part V, Section 52. London: Stationary Office.

The High Court in Northern Ireland found that while David Trimble, as First Minister, had some discretion in nominating ministers to the NSMC, it was not legitimate for him to refuse to appoint ministers who were 'in every way suitable to attend the sectoral meeting simply because he wished to induce that Minister—or the political party to which he belonged—to act in a particular way'.[44] This decision was subsequently upheld by the Court of Appeal. These decisions highlight a potential positive role for the domestic courts in Northern Ireland, and more broadly in the UK, in enforcing domestic guarantees that TSG will operate as established in the GFA.

Judicial Review is commonly applied to TSG institutions. It is usually charged with arbitrating between substate and central government in disputes as to where competencies reside. The GFA indicates that any such disputes between Belfast and Westminster would be decided by the British courts. However, such disputes have not yet emerged. Nevertheless, the courts have still played a key role in stabilising the TSG arrangements by enforcing the domestic guarantees as outlined above. There were also other notable cases where the courts played a similar role, most notably the seminal judgment of the Judicial Committee of the House of Lords in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32. In this case, the DUP challenged the legality of the Assembly's election of the First and Deputy First Ministers as it had taken place after the six-week post-election timeframe specified in the Northern Ireland Act 1998. In finding that the election was lawful the Judicial Committee of the House of Lords facilitated the operation of the Assembly at Stormont, the central TSG institution, without the need for further elections and prevented the then Anti-Agreement DUP from undermining it.

It is important to note however, that the willingness of the highest judicial body in the UK to engage in interpretations which support the TSG provisions outlined in the GFA is limited. In UKSC5 [2016] the UK Supreme Court declined to speak to the issue of whether the Sewell convention implied that the UK parliament could not pass legislation triggering Article 50 of the Lisbon Treaty and thus beginning the

[44] Kerr, J. (2001). *[2001] NIQB 3*. Accessed 31 December 2017, https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2001/2001%20NIQB%203/j_j_KERF3332.htm.

UK's exit from the EU without the consent of the devolved authorities in Northern Ireland (and Scotland and Wales).[45] The court argued that

> Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world. (UKSC 2016)

While this judgement does not directly relate to the enforcement of guarantees designed to prevent unilateral changes to the TSG institutions by the local conflict parties, it is relevant as the withdrawal of the UK from the EU will affect how the TSG operates. By refusing to assess whether the Sewell convention required that the British government consult with the local assemblies in Northern Ireland (and Wales and the Scottish parliament), the decision facilitated the UK's exit from the EU. This complicates cross-border cooperation and will also substantially change how the TSG arrangements operate in terms of the Assembly's role in implementing EU law. Furthermore, the justification provided for refusing to consider the significance of the Sewell Convention, that it was a political not legal object, ignored the potential significance of recent legislative recognition of the convention.

International Guarantees

The conflict in Northern Ireland has traditionally been treated by much of the international community and the British government as an internal issue to be dealt with by the UK. However, attempts to resolve the conflict increasingly involved the Irish government and other international actors.[46] As mentioned earlier in this chapter, the Sunningdale

[45] In 2009 the functions of the Judicial Committee of the House of Lords were transferred to the new Supreme Court, with the exception of some issues related to the internal workings of the House of Lords. The Sewell convention is a political convention which indicates the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The Sewell Convention provides that the UK Parliament may not legislate for devolved matters without the consent of the devolved legislature affected.

[46] The designation of Irish government's involvement in Northern Ireland as 'international' is not intended to express a position regarding the rightful future constitutional position of the region, rather it reflects current legal reality. The complex nature of British

Agreement briefly and unsuccessfully introduced formal consultation with the Republic of Ireland. The Anglo-Irish Agreement of 1985 institutionalised the British government's acceptance of the advisory role of the Irish government in attempting to reach a solution to the Northern Ireland issue.[47] The 1990s saw further involvement by other international actors, most importantly the US government. This involvement was key to achieving the GFA and continued during the implementation phase of the peace process. Key international guarantees assisted in stabilising the TSG provisions in the Agreement. The Irish government changed the Irish constitution, the GFA was institutionalised as an international treaty between the British and Irish governments, and international experts assisted in overcoming challenges in implementing other aspects of the GFA which threatened the stability of the TSG. The use of these guarantees highlights the importance of kin-states in stabilising TSG and how low-cost interventions by international actors can be effective in overcoming challenges which threaten TSG.

Unionist fears that the cross-border elements of the TSG which require cooperation between the Belfast Assembly at Stormont and Irish government in Dublin will be extended without their consent and become a de facto all-Ireland government forcing them into a united Ireland, discussed at length above, were fuelled by Articles 2 and 3 of the Irish Constitution. As originally enacted in 1937, Article 2 of the Irish Constitution asserted that 'the whole island of Ireland, its islands and the territorial seas' formed a single 'national territory', while Article 3 asserted that the Oireachtas (Irish government) had a right 'to exercise jurisdiction over the whole of that territory'.[48] While these Articles had

and Irish government involvement in the region and how this can be best understood, particularly in a comparative context, is discussed in the conclusion of this chapter.

[47]Tannam, E. (2007). The European Commission's Evolving Role in Conflict Resolution, The Case of Northern Ireland 1989–2005. *Cooperation and Conflict: Journal of Nordic International Studies Association*, Vol. 42, No. 3, 337–356. Unionists vehemently opposed this Agreement, while some of the opposition stemmed from unionist exclusion from the negotiations which led to the Agreement, most of it stemmed from the acceptance of the Dublin government's role.

[48]Bunreacht na hÉireann (The Constitution of Ireland) Articles 2 & 3. Accessed 31 December 2017, https://www.constitution.ie/Documents/Bhunreacht_na_hEireann_web.pdf.

little or no legal impact they were a source of constant fear and suspicion in the unionist community.[49]

The political sensitivity to these Articles undermined previous agreements aimed at resolving the Northern Ireland conflict. Hard-line nationalists in Ireland opposed the Sunningdale Agreement, arguing that the Irish government's declaration that it 'fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status' was unconstitutional as it was incompatible with Articles 2 and 3 of the Constitution.[50] Former government minister Kevin Boland challenged the constitutionality of the Agreement in the courts and both the Irish High and Supreme Courts found that this declaration did not represent an abandonment of the State's territorial claim, it did not accept the de jure legitimacy of Northern Ireland, rather it simply recognised Northern Ireland's de facto existence.[51] Similarly, when two unionists sought a judicial review of the Irish government's commitment to the 1985 Anglo-Irish Agreement, the Irish Supreme Court found that the Anglo-Irish Agreement 'constitutes a recognition of the de facto situation in Northern Ireland but does so expressly without abandoning the claim to the re-integration of the national territory. These are essential ingredients of the constitutional provisions in Articles 2 and 3'.[52]

These judgements may, at first glance, be viewed as assisting the Irish government's conflict resolution efforts. But by finding that its involvement in these agreements was not unconstitutional they justified unionist fears by indicating that, contrary to Irish government assertions, the Irish state did not accept that Northern Ireland was part of the UK. They frustrated unionist needs to have their identity as British recognised. As a member of the UUP argued 'the issues of Articles 2 and 3 in of themselves were always a running sore for unionists…it was the Irish government saying you might think you are British but you are

[49] Ulster Unionist Member (2015). Interview with Dawn Walsh. Belfast, December 2.

[50] The Sunningdale Agreement (December 1973). Tripartite Agreement on the Council of Ireland—The Communique Issued Following the Sunningdale Conference. Accessed 31 December 2017, http://cain.ulst.ac.uk/events/sunningdale/agreement.htm.

[51] McGarry, J., & O'Leary, B. (1993). *The Politics of Antagonism: Understanding Northern Ireland*. London: Athlone, 200.

[52] Christopher McGimpsey & Michael McGimpsey Plaintiffs v. Ireland, An Taoiseach and Others Defendants [S.C. No. 314 of 1988].

Irish and we don't recognise your Britishness'.[53] The sense of insecurity which the Articles created was limited by the lack of Irish political will or military capability to pursue the territorial claim. However, these claims intensified the concerns which unionists had regarding the North-South institutions as well as the cross-border cooperation discussed during the 1998 negotiations and provided for in the GFA.

The Irish government recognised the sense of insecurity that these Articles represented to unionism and how they created a sense of insecurity regarding the stability of the cross-border arrangements in particular. As George Mitchell recalled: 'the Taoiseach [Irish Prime Minister] also said that "in the event of an overall settlement the Irish government will, as part of a balanced constitutional accommodation, put forward and support proposals for change in the Irish Constitution which would fully reflect the principle of consent on Northern Ireland"'.[54] Bertie Ahern also sought to allay unionist fears by arguing that 'if he did a deal' on changing Articles 2 and 3 he would abide by it and by stressing the 'non-threatening nature of the cross-border bodies'.[55] These commitments drew criticisms from Sinn Féin. Party President Gerry Adams insisted that the Irish government stress that constitutional change could only take place if the British government repealed the Government of Ireland Act.[56] A Sinn Féin member also underlined the importance of these Articles to the nationalist community in Northern Ireland, arguing that it would not have accepted a simple removal of the Articles but were able to support their replacement, as was agreed in the GFA.[57]

The GFA required that Articles 2 and 3 of the Irish Constitution should be changed. The new Article 2 provides for the right of people born anywhere on the island to obtain Irish citizenship, a right discussed earlier in this chapter, as well as expressing an affinity with people living abroad who have Irish Ancestry. The new Article 3 fundamentally changes that nature of Irish nationalism, replacing a territorial claim on Northern Ireland with a recognition that 'a United Ireland shall

[53] Democratic Unionist Party Member (2016). Interview with Dawn Walsh. Belfast, January 18.

[54] Mitchell, G. (2000). *Making Peace*. London: University of California Press, 19.

[55] Godson, D. (2004). *Himself Alone, David Trimble and the Ordeal of Unionism*. London: HarperCollins, 304.

[56] Adams, G. (2003). *Hope and History*. London: Brandon, 320.

[57] Sinn Féin Member (2016). Interview with Dawn Walsh. Belfast, January 18.

be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island'.[58]

This constitutional guarantee provides very strong protection that TSG and associated cross-border cooperation will not result in an undesired change in the constitutional status of Northern Ireland. A popular referendum is necessary to alter the Irish constitution. There was an extremely high level of support for changing Articles 2 and 3 in 1998 (over 93% of votes cast were in favour of the change).[59] Given this very high level of support for the 1998 referendum, and the strong support for the peace process in general it seems very unlikely that the Irish people would vote to change the Articles to reassert a claim which would undermine the progress made in Northern Ireland.

This change was important for the moderate unionist party, and UUP leader David Trimble focused on the 'consent principle' and the changes to Articles 2 and 3, arguing that 'we had a very satisfactory position on the constitutional matters. This time Articles 2 and 3 of the Irish Constitution were going to be changed. The territorial claim over Northern Ireland was going to go…We also had a strand 2 settlement which did not pose any constitutional problems'.[60] However, this did not fully alleviate fears, especially within the more hard-line unionist community, including the DUP and its supporters. Its ministers, Peter Robinson and Nigel Dodds, boycotted the first meeting of the NSMC in December 1999 because they viewed 'the cross-border co-operation as a move towards an all-Ireland administration'.[61] It was only with the further reassurances provided in the Northern Ireland St Andrews Act in 2006 that the DUP felt sufficiently protected against the manipulation of the cross-border institutions to partake in them. This highlights the

[58]The Good Friday Agreement (1998). Section 2, Annex B. Accessed 31 December 2017, https://peacemaker.un.org/uk-ireland-good-friday98.

[59]Department of the Environment, Community & Local Government (2013). Referendum Results 1937–2013. Published by the Department of the Environment, Community and Local Government. Dublin: Department of the Environment, Community & Local Government.

[60]Ulster Unionist Member (2015). Interview with Dawn Walsh. Belfast, December 2. Trimble, D. (1998). Antony Alcock Memorial Lecture University of Ulster, April 24. Accessed 31 December 2017, http://www.davidtrimble.org/speeches_alcock.pdf.

[61]Cunningham, D. (1999). Changing Times in Bandit Country as the DUP Left Without Security. *Irish Independent*, December 14.

necessity of the relationship between a guarantee seeker and a guarantee provider if the guarantee is to be effective. A theoretically and legally stronger constitutional guarantee provided by the Irish government was unable to allay DUP fears because of the absence of such a relationship. Furthermore, the DUP was better able to accept an ordinary domestic guarantee provided by the British government as such a guarantee was in keeping with its view of Northern Ireland and its conflict as primarily, if not solely, an internal issue for the British state.

The GFA is an international agreement between the UK and Ireland. This provides that any changes, including interference with the TSG arrangements, such as efforts to recentralise powers or suspend the local Assembly at Stormont, would have to be agreed between both states. This international guarantee which establishes the Irish government as a co-guarantor of the GFA was particularly important for the nationalist community in Northern Ireland who had sought to internationalise the Northern Ireland conflict for decades.[62] Sinn Féin argued 'the fact that it is an international agreement signed by both governments that has a certain standing in law that other things simply don't have'.[63]

However, at a number of points the Irish government did not invoke the international treaty as a guarantee to prevent the British government temporarily re-centralising powers and suspending TSG. Sinn Féin President Gerry Adams highlighted how 'the failure of the Irish government to prevent the British government from breaching the Agreement through these suspensions has caused difficulties throughout nationalist Ireland'.[64] While criticism of the British government by Sinn Féin is to be expected, the Irish government also acknowledged how these suspensions created a problem. The Irish government was particularly opposed to the suspension of the Executive in February 2000. At the time, hardline unionists, within his own party, were exerting extreme pressure on UUP leader and First Minister David Trimble to withdraw from the Assembly at Stormont due to a lack of progress on IRA disarmament. The British government was concerned that if nothing was done to ease this pressure David Trimble would be replaced as party leader by an

[62] Adams, G. (2003). *Hope and History*. London: Brandon, 152.

[63] Sinn Féin Member (2016). Interview with Dawn Walsh. Belfast, January 18.

[64] Adams, G. (2004). Speech by Gerry Adams, then Sinn Féin President, at St. Malachy's College, North Belfast, Thursday 15 January 2004. Belfast: Sinn Féin.

anti-agreement unionist, so the Secretary of State Peter Mandelson suspended the Executive and re-introduced direct rule.

In the lead up to suspension the Irish government voiced its opposition to such a move and Paddy Teahon, head of the Taoiseach's office, 'forcefully put the legal case against suspension'.[65] Once the suspension had been enacted, Bertie Ahern admitted that the 'Constitution has now been amended to include the terms the British-Irish Agreement which do not expressly include provision for suspension' and 'in that context, suspension raises issues of concern for the Government and any significant extension of it could make the situation more difficult'.[66] McGarry and O'Leary argued that the 'Suspension Act of 2000 was in breach of the United Kingdom's treaty obligations with the Irish government… against the express wishes of the Irish government'.[67]

Despite these concerns, the Irish government did not use the international treaty nature of the Agreement to try and prevent or reverse this suspension. While it mentioned the constitutional crisis such a suspension could cause, it did not mention that the British government's actions were contrary to its international obligations as set out in the Treaty. It showed absolutely no political will to enforce the treaty through international legal mechanisms. As Wolff has argued, 'for any violation of the treaty…to be addressed, one of the signatory parties needs to bring a case before a relevant international legal institution… If this does not happen, the protection theoretically afforded by the link between the agreement and an international bilateral treaty remains an empty shell'.[68] Instead, the Irish government opted to work with the British government to remove the wider issue which had arguably led to the suspension, a lack of progress on IRA disarmament. This lack of disarmament was the most serious threat to the stability of the TSG arrangements, and the success of the GFA more broadly, from 1998 to

[65] Godson, D. (2004). *Himself Alone, David Trimble and the Ordeal of Unionism*. London: HarperCollins, 566.

[66] Ahern, B. (2000). Article by Bertie Ahern, then Taoiseach, Which Appeared in the 'Irish Times' on 14 February 2000. Dublin: Department of the Taoiseach.

[67] McGarry, J., & O'Leary, B. (2004). *The Northern Ireland Conflict: Consociational Arrangements*. Oxford: Oxford University Press, 39.

[68] Wolff, S. (2005). Complex Autonomy Arrangements in Western Europe, in S. Wolff & M. Weller (Eds.), *Autonomy, Self-Governance and Conflict Resolution*. London: Routledge, 128.

2005. This emphasises the inter-connected nature of peace processes and highlights how issues not directly connected to the design of the TSG institutions can also destabilise these arrangements.[69] As such, international actors assistance in areas such as disarmament is also key to stabilising TSG arrangements.

The involvement of the USA was undoubtedly the most significant international contribution to the Northern Ireland peace process. Albert Reynolds commented that the 'much vaunted greening of the White House cannot be underestimated in its effect on the trajectory of the Northern Ireland Peace Process'.[70] The election of Bill Clinton as President of the US led to an unprecedented level of US interest and involvement in Northern Ireland.[71] The US did not provide an explicit guarantee aimed at overcoming fears regarding the possible manipulations of the TSG arrangements provided for in the GFA. Yet, its interventions, designed to overcome difficulties surrounding IRA disarmament introduced above, had a considerable impact on stabilising the TSG arrangements. These difficulties delayed the full operation of the Assembly at Stormont between July 1998 and December 1999 and resulted in its suspension from February to May 2000, as well as twenty-four hour suspensions in August and September 2001.

In 1995 Bill Clinton appointed George Mitchell as a peace envoy to Northern Ireland. George Mitchell went on to chair the GFA negotiations and undertook a review of the implementation of the Agreement in 1999. The Mitchell review of the GFA was necessitated by competing interpretations of the Agreement's provisions regarding disarmament; specifically, whether Sinn Féin could partake in the Executive without prior IRA disarmament. While the accord provided that disarmament should be completed within two years of the referenda it did not specify a start date. During the GFA negotiations this had been a source of concern for the UUP who argued that it could not enter into an Executive with Sinn Féin without such disarmament. In order to

[69]There is arguably a direct link between IRA disarmament and the TSG institutions in that the GFA provided that disarmament would be completed within two years of the referenda (May 2000) or political parties associated with non-disarming groups would be excluded from the institutions.

[70]Reynolds, A. (1999). The Irish Government and the Peace Process, 1992–1994: A Political Perspective. *Working Papers in British Irish Studies*, Vol. 30, 1–13.

[71]Though there had been some involvement by earlier administrations.

address these concerns Tony Blair provided a side letter to the party. The letter stated that 'it's our view the effect of the decommissioning section of the Agreement, with decommissioning schemes coming into effect in June (1998), is that the process of decommissioning should begin straight away'. Tony Blair claimed this meant IRA decommissioning should begin immediately and this would be before devolution (likely in February 1999). However, Sinn Féin viewed this letter as having no status.[72]

These differing interpretations, which emerged even before the GFA negotiations were completed, suggested that there would be future difficulties. The Mitchell review was aimed at overcoming this impasse to facilitate devolution, as such the review was central to ensuring operation of the TSG institutions. In a statement on the review, George Mitchell argued that 'devolution should take effect, then the executive should meet', and that the disarmament process should take place within this context, where the GFA was being implemented as agreed.[73] This review facilitated devolution and full operation of the Assembly at Stormont from December 1999. Thus, an international actor's intervention was key in ensuring that the TSG institutions provided for in the GFA were fully operational.

International involvement was also central to overcoming these disarmament difficulties, facilitating implementation and operation of TSG. A commission charged with verifying disarmament was composed of international members. Ambassador Donald C. Johnsons, and later, Andrew D. Sens, from the US were members of the Independent International Commission on Decommissioning.[74] Less high-profile states also provided vital support. Brigadier Tauon Nieminen from Finland also sat on the disarmament commission and the commission was chaired by General John de Chastelain from Canada. Another American, Dick Kerr, also held an important position on the Independent Monitoring Commission (IMC), which was primarily charged with overseeing the

[72] O'Kane, E. (2007). Decommissioning and the Peace Process: Where Did It Come From and Why Did It Stay So Long? *Irish Political Studies*, Vol. 22, No. 1, 81–101.

[73] Mitchell, G. (1999). Statement by Senator George Mitchell in Belfast, Concluding the Review of the Northern Ireland Peace Process, 18 November 1999. Belfast. Accessed 31 December 2017, http://cain.ulst.ac.uk/events/peace/docs/gm181199.htm.

[74] Decommissioning was the term used in Northern Ireland to refer to paramilitary disarmament.

paramilitary ceasefires and reporting any activity. Concern surrounding continued paramilitary activity, specifically DUP concerns around IRA activity, prevented the operation of the TSG institutions between 2003 and 2007. The DUP became the largest unionist party in the Assembly at Stormont elections of November 2002 and refused to enter into an Executive with Sinn Féin, who had become the largest nationalist party, citing continued IRA activity. The IMC was central to overcoming these concerns and re-establishing the TSG. When the IMC's reports were favourable towards the IRA, the British and Irish governments used them to pressure the DUP to enter government with Sinn Féin. The international representation on the commission solidified perceptions of its independence and expertise, increasing the reports' leverage.[75] Again, an international actor's involvement was central in facilitating the operation of the TSG.

Conclusion

The use of TSG as part of a package of conflict resolution measures in Northern Ireland illustrates how innovative application of TSG can meet the needs of different identity communities. Yet it also highlights how such arrangements are usually a reluctant bargain and that conflict parties fear others will manipulate or selectively implement TSG institutions to move the bargain towards their preferred outcome; thus undermining their potential stability and effectiveness. Yet by embedding guarantees into TSG agreements and adding additional guarantees at later points, these concerns were sufficiently addressed to allow the conflict parties to—with notable exceptions—commit to and operate such arrangements.

The relationship between the guarantee seeker and the guarantee provider proved to be essential. While this analysis categorised guarantees provided by the UK as domestic and those provided by Ireland as international to recognise the current legal situation, it is useful to think of both states as external ethnonational guarantors. External ethnoguarantor captures many of the complexities of the relationships between the two governments and the parties in Northern Ireland.

[75]Walsh, D., & Doyle, J. (2018). The Role of External Actors in the Operation of Consociationalism. *Ethnopolitics*. Vol. 17, No. 1, 21–36.

> External ethnonational guarantors perceive that they have a direct and historical connection, and a shared national identity, with their internal allies or co-nationals. EEGs have historical, cultural, economic, and political ties with internal co-nationals supporting the interests of their internal allies. The internal ethnic groups believe they have a shared nationalism, historical heritage, and perceived ethnic identity with their external ethnoguarantors. These groups look to their external allies for support and behave as though such support can be taken for granted.[76]

There is a wealth of literature that addresses the role kin-state actors can play in the dynamics of a conflict. However, Byrne's model provides an ideal basis for this analysis, as his model recognises two key elements which are not fully explicated in much of the other literature: the role of these actors during the peace process, not the wider conflict, and the presence of *two* EEGS with links to each conflict group. Byrne's model explains the behaviour of the British and Irish governments as guarantee providers and the reaction of the guarantee seekers—unionists and nationalists in Northern Ireland.

The positive way in which unionists received guarantees related to the TSG provided by the British government, both in terms of the problematic side letter which assured the UUP that it would not have to operate the TSG institutions with Sinn Féin until IRA disarmament occurred and the enhanced control of cross-border cooperation provided for in the St Andrews Agreement Act 2006, can be directly linked to the EEG relationship between the unionist community and British government. This also explains why the unionist community, particularly the DUP, was not convinced by the legally stronger constitutional guarantee provided by the Irish government. Furthermore, Byrne's recommendation that EEGs should take a cooperative and unified approach to addressing the conflict explains why the Irish government did not react to the February 2000 Suspension Act by invoking the international treaty status of the GFA and instead worked with the British government.

By applying EEG theory to the provision of TSG guarantees in Northern Ireland more generalizable lessons can also be drawn. Many intra-state identity group conflicts involve EEGs or neighbouring

[76]Byrne, S. (2000). Power Politics as Usual in Cyprus and Northern Ireland: Divided Islands and the Roles of External Ethno-guarantors. *Nationalism and Ethnic Politic*, Vol. 6, No. 1, 1–23.

kin-states. The Northern Ireland case demonstrates that guarantees provided by an EEG will be well received by a conflict party, whereas guarantees provided by others may be insufficient to overcome concerns about TSG implementation. In other cases the enforceability of such guarantees may be more difficult than in the Northern Ireland case, where guarantees provided by the British government could be enforced through UK courts. However, this difficulty can be overcome, either through the use of existing regional courts or arbitration mechanisms, or the creation of new arbitration mechanisms.

The Northern Ireland case also emphasises the necessity of cooperation between the EEGs to overcome challenges around TSG. Disagreement between EEGS can lead to them becoming proxy conflict actors, exacerbating the conflict by supporting unhelpful behaviours by their internal co-ethnics. This does not mean that an EEG should simply ignore unwise policies or actions of another EEG but rather that they should engage with the other EEG asserting a shared desire to resolve the conflict, assessing what goals the policies or activities are trying to achieve, and if possible re-establishing a common approach. This underlines the grave risk posed by the deteriorating Anglo-Irish relations around Brexit and special arrangements necessary to prevent a hard border on the island.

Finally, the Northern Ireland case also demonstrates how wider difficulties in the implementation of peace agreements, such as delayed disarmament, can undermine and destabilise TSG. This provides an opportunity for international actors to engage in lower cost interventions, such as verification missions, with a view to overcome these difficulties to facilitate the implementation and operation of the TSG arrangements. Therefore, it is not only international interventions targeted directly at the TSG elements of a peace agreement that are vital to its stability; wider international involvement can also ensure that such arrangements are successful.

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Bosnia and Herzegovina: Ethnic Entities in a Multi-ethnic State? Instability and Disputed Interpretations of the State

The General Framework Agreement for Peace in Bosnia and Herzegovina, or Dayton Agreement, ended the 1992–1995 Bosnian War. The Agreement built on the 1994 Washington Agreement which ended the war between Bosnian Croats and Bosniaks and divided the combined territory held by Bosnian Croat and Bosnian government forces into ten autonomous cantons, establishing the Federation of Bosnia and Herzegovina. Under the Dayton Agreement, Bosnia and Herzegovina (BiH) retained its internationally recognised borders but was internally divided into two entities, the Federation of Bosnia-Herzegovina and the Republika Srpska (RS). The new state is highly decentralised, with most powers resting at entity level though the central government retains some important functions such as foreign affairs. While there has been scholarship criticising the Accord, both in terms of the inflexible and exclusionary nature of its power-sharing provisions and the excessively decentralised state it established, there has been no focused examination of how both domestic and international guarantees have been used in attempts to stabilise the territorial arrangements provided for in the 1995 Agreement. This chapter addresses this weakness in current literature on the BiH peace processes and draws wider lessons for the use of Territorial Self-Government (TSG) as a conflict management tool.

TSG in BiH highlights how such arrangements can be used to end identity group conflict through the creation of a federation and the

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provision of autonomy at a cantonal level. It also underlines how such arrangements can create centripetal momentum, which threatens the unity of the state. While the Dayton Agreement ended a vicious war and has prevented the recurrence of widespread violence, it failed to salvage a multi-ethnic state; instead re-enforcing the partition of BiH. Political leaders in the RS engage in recurrent secessionist rhetoric and activities. There have also been efforts by Bosnian Croats to create a third entity for Bosnian Croats while Bosniak (Bosnian Muslims) leaders have pushed for centralisation of powers. The weakness of domestic institutions, which had to be completely reconstructed as the result of the war, and the lack of a strong rule of law norm have undermined the ability of domestic guarantees to stabilise the TSG institutions. Furthermore, TSG in BiH is illustrative of the necessity of strong international guarantees to prevent unilateral changes to the TSG arrangements. It also highlights how this role is complicated when the international actors providing such guarantees are also advocates for reform of the TSG, regardless of the necessity of such reforms.

The Bosnian War

The intensity of the 1992–1995 war was devastating. It is estimated that over 100,000 people were killed and two million were forced to leave their homes. Sexual violence was systematically used as a weapon and its savagery was all the more shocking in the light of the positive interethnic relationships which had previously existed in BiH. In November 1995, under intense international pressure particularly from the USA and Russia, the parties to the Bosnian War; President of Bosnia and Herzegovina Alija Izetbegović and Foreign Minister Muhamed Šaćirbeg, President of Croatia Franjo Tuđman, and President of the Republic of Serbia Slobodan Milošević, who represented the Bosnian Serbs, attended intense talks at Wright-Patterson Air Force Base near Dayton, Ohio, in the USA. These negotiations culminated in the Dayton Peace Agreement, which was formally signed in Paris on 14 December 1995. After many unsuccessful attempts to end the war, including a number of failed peace plans, the international community finally persuaded the conflict parties to commit to a peace agreement. This agreement included a new constitution for BiH.

The war was the most destructive of the conflicts which occurred as the result of the break-up of Yugoslavia, a federation consisting of the six

republics: Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the regions of Kosovo and Vojvodina), and Slovenia. When Croatia and Slovenia were recognised as independent states in January 1992, the BiH multi-ethnic ruling coalition fell apart. The Yugoslav constitution and its political institutions had been delicately balanced to manage the challenges posed by nationality. However, the death of President Tito in 1980, and the consequent instability created by a rotating presidency, selected by the assemblies of Yugoslavia's six republics and two autonomous regions, facilitated the voicing of ethnic as well as nationalist sentiment.[1] This, coupled with increasing dissatisfaction over economic decline throughout the 1980s, facilitated the rise of nationalism. As the Socialist system came under increasing stress, independent parties which appealed to voters' national identities emerged. While some politicians sought to recreate themselves as Western-European style social democrats, others turned to national identity to attract voters—manipulating history to feed interethnic tensions.

> Once unleashed, nationalism in Yugoslavia set on a collision course the two largest nationalities, the Serbs and the Croats. With a quarter of Serbs living outside Serbia, a centralized Yugoslav state was a guarantor of Serb security. For Croats and their history of opposition to Hapsburg rule, a decentralized state and weak federation meant control of their own destinies, unencumbered by inefficient state agencies and enterprises staffed and controlled by Serbs.[2]

Federal elections proposed by the then federal Prime Minister, Ante Markovic, were thwarted by Slovenian and Serbian boycotts. In June 1991, both Croatia and Slovenia proclaimed their independence from Yugoslavia. Tensions between the three main communities in BiH grew. Bosnian Croats looked to Croatia for protection and Bosnian Serbs turned to Serbia for security. Bosniaks supported the unity of BiH, but this position was seen by its opponents as striving to establish a unitary, Muslim-dominated BiH. The possibility of partitioning BiH was

[1] Kalyvas, S., & Sambanis, N. (2005). Bosnia's Civil War: Origins and Violence Dynamics, in P. Collier & N. Sambanis (eds.), *Understanding Civil War: Evidence and Analysis*. Washington, DC: The World Bank, 191–229.

[2] Oberschall, A. (2000). The Manipulation of Ethnicity: From Ethnic Cooperation to Violence and War in Yugoslavia. *Ethnic and Racial Studies*, Vol. 23, No. 6, 982–1001.

discussed during talks between the Croatian President, Franjo Tudjman, and the Serbian President, Slobodan Milošević.[3] The European Community (EC) deferred a decision on BiH's independence, pending the results of a referendum.

In March 1992, a majority of Bosnians voted for independence, though Bosnian Serbs almost entirely boycotted the vote. The referendum was followed by recognition of BiH by both the EC and the USA. Immediately Bosnian Serbs set up roadblocks around major cities, cutting them off from the mostly Bosnian Serb countryside and later a Bosnian Serb parliament was established.[4] The Bosnian Croats also sought to secure parts of BiH as Croatian. Klemenčič and Žagar argued that 'ideas of nationalistic ethnic politicians that Bosnia and Herzegovina be reorganised into homogenous national territories inevitably required the division of ethnically mixed territories into their Serb, Croat, and Muslim parts'.[5] Ethnic cleansing was a common occurrence during the war. This entailed intimidation, forced expulsion, and killing of unwanted ethnic groups as well as the destruction of their places of worship, cemeteries, and cultural and historical buildings of those ethnic groups.

In 1994, in the face of UN-EU failure, the USA began to more actively encourage a settlement. In March that year, these efforts produced an agreement between the Bosnian government, Bosnian Croats, and the government of Croatia to establish a federation between Muslims and Croats in BiH. Fighting between the two sides ceased. The Bosnian Serbs, although initially militarily superior due to the weapons and resources provided by the Yugoslav People's Army and militia assistance from Serbia, began to lose the upper hand as the Bosniaks and Croats allied against them. In the Spring of 1995, Bosnian Serb attacks on designated safe areas led to a massacre of Bosniaks in Srebrenica and prompted US President Clinton to insist that NATO and the UN make good on their commitment to protect the remaining safe areas. When

[3] Ashdown, P. (2007). *Swords and Ploughshares: Bringing Peace to the 21st Century*. London: Weidenfeld & Nicolson, 32.

[4] Kalyvas, S., & Sambanis, N. (2005). Bosnia's Civil War: Origins and Violence Dynamics, in P. Collier & N. Sambanis (eds.), *Understanding Civil War: Evidence and Analysis*. Washington, DC: The World Bank, 191–229.

[5] Klemenčič, M., & Žagar, M. (2004). *The former Yugoslavia's Diverse Peoples: A Reference Sourcebook*. Santa Barbara, CA: ABC-CLIO, 311.

the Bosnian Serbs again attacked designated safe zones, NATO undertook an intensive month-long bombing campaign.[6] This campaign, and the unified approach of the Croat and Bosniak leaders, convinced the Bosnian Serbs to participate in US-led mediation.

The Dayton Agreement and the Needs of Bosniaks, Bosnian Croats, and Bosnian Serbs

The collapse of Yugoslavia, and manipulation by political elites, fuelled concerns that the security and recognition needs of the different national and ethnic groups would not be met in the new and rapidly changing context. The intensity and barbarity of the war inevitably frustrated both the security and recognition needs of the different groups. Thus, the Dayton Agreement had to address these needs to be acceptable to the Bosnian conflict parties and the neighbouring kin-states. As a result, the Agreement established an extremely complex system of government. The State of BiH is divided into two entities: the RS, which constitutes 49% of the territory and forms a crescent shape around the north and east, and the Federation, which occupies the other 51% of the territory.[7]

Each entity has its own political structure and administration, with an overarching but weak central government. The central (BiH state) government consists of a parliamentary assembly, which is divided into a House of Representatives and a House of Peoples, a rotating tripartite Presidency, and a Council of Ministers. The political structure of the Federation is divided into three levels: (1) the entity level, (2) the canton level, and (3) the municipal level, with each having their own assemblies and administrative structures. In contrast, RS has no cantons, only municipalities. At the RS-level there is a national assembly, a President, a Vice President, and a government under a Prime Minister. As with the Federation, the municipalities all have their own assemblies and administrative structures. There are three Constitutional Courts, one at the BiH level and one in each entity. The Agreement stipulated ten areas

[6] Kalyvas, S., & Sambanis, N. (2005). Bosnia's Civil War: Origins and Violence Dynamics, in P. Collier & N. Sambanis (eds.), *Understanding Civil War: Evidence and Analysis*. Washington, DC: The World Bank, 191–229.

[7] No agreement could be reached as to its position on the Brcko district, the Agreement submitted the issue to binding arbitration which in 1999 created an autonomous region, 'The Brcko District of Bosnia and Herzegovina'.

which were the responsibility of the central state, and all other matters, including defence, fall within the competency of the entities. Additional responsibilities can only be transferred to the central state if both entities agree.

The extent of this decentralisation, the strength of the TSG provided for in the Dayton Agreement, was particularly appealing to the Bosnian Serb community. They felt their security and recognition needs would be frustrated in a centralised Bosnian state where Bosniaks would be a majority. Such a situation would also have strongly contrasted with the situation of Bosnian Serbs before the collapse of Yugoslavia, when their links to the largest ethnic group had provided them with the reassurance that their security and recognition needs would be met. The need to provide the entities with extensive powers in order to secure Bosnian Serb's assent was underlined by the initial position which the Bosnian Serb delegation adopted: complete opposition to a unified Bosnian state.[8] The delegation was side-lined at the Dayton negotiations, with Slobodan Milosevic 'representing' Bosnian Serbs. When the Accord was finally drafted there were fears that, unwilling to acquiesce to the RS' position as a TSG entity and clinging to a desire for statehood, the Bosnian Serb leadership would refuse to sign it. However, Slobodan Milosevic delivered on his promise that the Bosnian Serb leadership would sign the Agreement, though this was no guarantee that it would be faithfully implemented.

The Dayton Agreement also provides that both entities 'shall have the right to establish special parallel relationships with neighbouring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina'.[9] This provision seeks to balance the needs of the different communities. The Bosnian Croat and Bosnian Serb communities need to have the legitimacy of their connection to their ethnic kin recognised. The Bosniak community needs assurance that these kin-states will not engage in activities which undermine their security, as they had during the war, and that parts of the BiH state will not be carved up among these neighbouring states. Despite difficulties with early proposals, the Federation entered into a special relations agreement with Croatia in

[8] Holbrooke, R. (1999). *To End a War*. New York: Random House, 243.

[9] General Framework Agreement for Peace in Bosnia and Herzegovina (1995). Annex 4, Article 2.2. Accessed 31 December 2017, https://peacemaker.un.org/bosniadaytonagreement95.

1999. Similarly, the RS entered into such an agreement with the rump Yugoslavia, consisting of Serbia and Montenegro, in 2001.

As the Accord did not provide for an entity for the Bosnian Croat community, they were a minority in the Federation. As such the above agreement with Croatia provides important recognition of the legitimacy of their community identity. Furthermore, while the settlement did not provide TSG for the Bosnia Croat community through the provision of a third entity, a matter which angers many in that community, it does offer autonomy through the canton system. All but two of the cantons have a clear ethnic majority and these territorial units also have legislative and executive structures. The ethnic nature of these units was further underlined by demands for additional divisions since the Agreement, which has resulted in the establishment of forty additional cantons.[10]

The continuing significance of the strong TSG for the Bosnian Serb community was further illustrated by its response to actual or proposed centralization of powers. In the aftermath of the conclusion of the Dayton Agreement, it quickly became apparent to most in the international community that the central state which the Agreement established was too weak to effectively function. As a result, the international community sought to persuade the entities to transfer additional powers to the central government. Paddy Ashdown, who served as High Representative (HR)—the international communities' civilian representative in BiH—from 2002 to 2006, was particularly active in trying to pressure the entities to engage in such transfers. He argued that the Bosnian Serbs disliked him as he was trying to build a Bosnian state, they saw the RS as a state and resisted the transfer of any competencies. He also conceded that he could not force the transfer of powers, rather he had to exert extreme pressure to secure consent to the transfer of competencies related to 'taxation, the intelligence services, the army, the judiciary and the customs services'.[11]

The seceding of these powers to the central state, even if it only occurred as result of pressure from the international community, may suggest that the strong TSG provided for in the Dayton Agreement was

[10]London School of Economics (2011). Decentralisation and Regionalisation in Bosnia-Herzegovina: Issues and Challenges. London: London School of Economics Research on South East Europe.

[11]Ashdown, P. (2007). *Swords and Ploughshares: Bringing Peace to the 21st Century*. London: Weidenfeld & Nicolson, 295.

not necessary to meet the security and recognition needs of the Bosnian Serb community. However, political leaders in the RS have since claimed that these powers were unlawfully transferred and that they will unilaterally reverse these reforms, though other parties including the international community have rejected this interpretation.[12] It appears that it is only through control over most governance powers that the Bosnian Serbs felt secure, particularly in light of comments from Bosniak politicians that the RS could be abolished. These statements must, of course, be considered in conjunction with secessionist rhetoric and actions of RS politicians. Nevertheless, they contributed to the Bosnian Serb demands for strong entity powers to meet their need for security. Furthermore, the RS engaged in a number of highly contentious disagreements with the central state over symbolic issues including the use of flags and symbols and naming of towns and cities.[13] These disputes highlighted the importance of recognition needs to Bosnian Serbs. Attempts to prevent the use of ethnically exclusive names and symbols were perceived by the RS as frustrating the need for recognition of Bosnian Serb identity.

The TSG arrangements which are primarily aimed at meeting the needs of the Bosnian Serb and Bosnian Croat communities are balanced by provisions which create an overarching central state to provide security to the Bosniak community. The Bosniak community favours a strong BiH state as the best way to provide its members with security and recognition. It has no direct kin-state and was subject to horrific abuse during the war. The BiH state includes central government institutions which are governed by power-sharing rules, and the creation of a Central Bank and state-level Constitutional Court.[14] Furthermore, provisions to

[12] High Representative (2007). Thirty-Second Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 1 April–30 September 2007. Sarajevo: Office of the High Representative.

[13] See for example Constitutional Court cases U-4/04, U-44/01.

[14] The Dayton Agreement has been heavily criticised for its treatment of those groups and individuals who do not identify with the three main constituent communities identified in the Agreement. These criticisms have focused on the exclusionary nature of the power-sharing provisions at state-level culminating in the European Court of Human Rights The 'Sejdić-Finci' case in which the Court found that the ethnic rule for electing the State Presidents was unduly discriminatory. However, similar criticisms can be made of the TSG arrangements in so far as they became ethnic homelands which did not sufficiently consider the needs of those not aligned with the three constituent peoples.

facilitate the return of refugees and displaced persons and overarching human rights protections are aimed at providing security to those individuals who found themselves as ethnic minorities in the entities.

Institutional Sources of TSG Instability in BiH

The provisions outlined in the Dayton Agreement represent a difficult compromise which was necessary to end a vicious war. They sought to balance contradictory aims. Yet they have arguably encouraged secessionist activities by the RS and efforts by the Bosnian Croats to unilaterally establish a third entity for their community. There is a fundamental tension within the Agreement between the extensive TSG and the agreement's aim of creating a multi-ethnic state. The provisions which established the entities allowed them to develop an exclusive ethnic identity and encouraged the communities to view the different self-governing entities, and to a lesser extent cantons, as homelands for the different ethnic groups. However, other provisions within the Agreement were indicative of an intention to build a multi-ethnic state where the three constituent peoples enjoy equal rights across the whole of BiH.[15]

The strength of the TSG powers provided to each entity allows Bosnian Serbs to view the RS as a stepping stone towards either independence or unification with Serbia. In the decade after the signing of the Dayton Agreement, support for violent separatism diminished but Bosnian Serbs felt little loyalty to the BiH state.[16] The state's weak remit means that Bosnian Serbs have very little contact with it and what social services the post-war institutions are able to provide are delivered by the entity and not the state. The strict power-sharing rules which govern the operation of the central state, while aimed at ensuring that none of the three main communities could be excluded from decision-making and that their interests are protected, also weaken it. The necessity of securing interethnic agreement, coupled with an acute deficit in interethnic

[15] See for example Annex 7, General Agreement for Peace in Bosnia and Herzegovina. Accessed 31 December 2017, https://peacemaker.un.org/bosniadaytonagreement95.

[16] United Nations Development Programme (2000). Early Warning System in Bosnia and Herzegovina, Quarterly Report, July–September. New York: United Nations Development Programme. United Nations Development Programme (2003). Early Warning System in Bosnia and Herzegovina, Quarterly Report, July–September. New York: United Nations Development Programme.

trust in the post-war context, has resulted in constant logjams which prevent both necessary post-war reforms and normal governance.[17] The absence of an effectively operating state at the central level strengthens the already powerful entities, particularly the RS with its unified structure.

In the lead-up to the October 2006 election, the then Prime Minister of the RS, Milorad Dodik, suggested that if Kosovo was allowed to become independent, the RS should also be permitted to declare independence.[18] He has openly stated that he believes that RS will eventually emerge as an independent state and has threatened to take actual steps towards secession. His party, the Alliance of Independent Social Democrats (SNSD), issued a declaration stating that RS intends to hold a referendum on independence in 2018.[19] Inevitably, this rhetoric has raised concerns about the future unity of BiH and fuelled fears that violence could return. Within the Bosniak community there are those, especially veterans, who speak of a return to armed conflict if the RS attempts to break away.[20] Such discussions further feed instability and are illustrative of how threats to renege on an agreement can themselves destabilise TSG arrangements. This is the case even if, as discussed below, due to international pressure it is unlikely to occur.

The creation of the RS as a strong entity was deeply resented by many Bosniaks who viewed it as the legitimisation of a Serbian entity created from ethnic cleansing and genocide, and many within the Bosniak community are determined to centralise power.[21] The fact that many Bosniaks see the RS as illegitimate and temporary while many Bosnian Serbs see the RS as the best preservation of their interests and attribute the BiH state only secondary importance underlines the lack of a

[17] McEvoy, J. (2015). *Power-Sharing Executives: Governing in Bosnia, Macedonia, and Northern Ireland*. Philadelphia, PA: University of Pennsylvania Press, 107–131.

[18] Van Willigen, N. (2013). *Peacebuilding and International Administration: The Case of Bosnia and Herzegovina*. London: Routledge, 148.

[19] *Balkan Insight* (2012). Dodik: Republika Srpska Will Be Independent, October 5.

[20] Ker-Lindsay, J. (2016). *The Hollow Threat of Secession in Bosnia-Herzegovina: Legal and Political Impediments to a Unilateral Declaration of Independence by Republika Srpska*. London: London School of Economics Research on South East Europe.

[21] Ibid.

common understanding of the nature of the BiH state.[22] As HR Lajčák reported

> Of particular note are the ongoing attacks by the Republika Srpska government against State institutions, competencies and laws. Together with provocative statements from the Bosniak side questioning the right of the Republika Srpska to exist, this has served to further undermine inter-ethnic trust.[23]

This highlights that in trying to engineer political institutions, particularly TSG, that satisfies the needs of different conflict parties, mediators run the risk of creating not just separate understanding of the nature of the state, but contradictory ones. This leads to instability profoundly complicating implementation as there is no common interpretation of the Agreement.

The creation of two entities in an Agreement which explicitly recognises three constituent peoples inevitably creates tensions. As Paddy Ashdown argued 'Many Croats, meanwhile disliked Dayton and dislike it still, because it meant the end of Herceg-Bosnia'.[24] In over twenty years since the conclusion of the Dayton Agreement there have been threats and moves by Bosnian Croats to unilaterally establish another self-governing region. The most serious of these occurred in 2001 when, with the support of the Hercegovacka Bank which provided financing for the parallel structures, the Croatian Democratic Union of BiH (HDZ) proclaimed 'Croat Self-Rule'. This represented a full-scale challenge to BiH's constitutional order, specifically the TSG arrangements. The international community, particularly through the Office of the HR, successfully intervened to prevent the unilateral establishment of the third region, in direct contradiction to the TSG provisions in the Agreement, discussed below. In the direct aftermath of this attempt, Bosnian Croat

[22] Aybet, G., & Bieber, F. (2011). From Dayton to Brussels: The Impact of EU and NATO Conditionality on State Building in Bosnia & Hercegovina. *Europe-Asia Studies*, Vol. 63, No. 10, 1911–1937.

[23] High Representative (2008). Thirty-Fourth Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 1 April–30 September 2008. Sarajevo: Office of the High Representative.

[24] Ashdown, P. (2015). Speech by Paddy Ashdown 20 years after Dayton implementation. American University, Sarajevo, November 5.

threats to create a third entity appeared to dissipate. In 2000, in predominantly Croat areas of the Federation, 21.8% consider either an independent Republic Herceg-Bosna, or joining Croatia as the paramount Croat interest. By early 2003 among Croats the establishment of Herceg-Bosna enjoyed only the support of 3.5%, with no support for joining Croatia.[25]

However, there have been continuing suggestions that a third entity for the Bosnian Croats will be created. In January 2009, the 'Prud process' of talks among the leaders of three ruling nationalist parties (SNSD, SDA, HDZ), led to a declaration by the three leaders that the country's future constitutional order would consist of four regions, including a Sarajevo district. While interethnic agreement on reforms of the TSG arrangements may at first appear not to constitute instability, rather they may appear to be multilaterally accepted reforms, the destabilising effect is the result of lack of agreement as to how these new units would be constituted. As Bassuener argued:

> Wildly differing interpretations immediately emerged, with Dodik claiming that a Croat-majority entity would have to be carved solely out of the Federation, as the Republika Srpska was inviolable…The Bosniak and Croat party leaders, Sulejman Tihić and Dragan Čović had differing views, but both appeared to think that the four territorial units would include the partial dismemberment of the current RS. The controversy surrounding the competing interpretations has deepened public insecurity.[26]

Unsurprisingly, these proposals did not progress but suggestions that a third entity or unit should be created for the Bosnian Croat community have persisted. In 2015, Paddy Ashdown strongly condemned this 'talk of the possibility of the creation of what is euphemistically called a "third electoral entity" in Herzegovina…Does no-one doubt that this is the first step to the creation of a de facto, if not de jure, third entity?

[25] United Nations Development Programme (2000). Early Warning System in Bosnia and Herzegovina, Quarterly Report, July–September. New York: United Nations Development Programme. United Nations Development Programme (2003). Early Warning System in Bosnia and Herzegovina, Quarterly Report, July–September. New York: United Nations Development Programme.

[26] Bassuener, K. (2009). How to Pull Out of Bosnia-Herzegovina's Dead-End: A Strategy for Success. Berlin: Democratization Policy Council.

Does no one remember where that leads to?'[27] In the same speech, he criticised the EU and the wider international community for not being pro-active in discouraging the threats to TSG arrangements.[28] This underscores the continuing need for international guarantees to ensure the stability of the self-government institutions provided in the Dayton Agreement.

Guarantee Mechanisms

While the TSG provisions in the Dayton Agreement highlight how carefully crafted institutions can meet the needs of different conflict parties, they also acutely underline how the quest to balance competing needs in the design of such institutions can facilitate the emergence of unstable arrangements based on incompatible interpretations of the provisions. The Agreement attempted to provide clear guidance as to how the TSG arrangements would operate and ensure that they would not be unilaterally altered. It provides them with domestic constitutional entrenchment, includes substantial regional involvement by binding the neighbouring kin-states to the Agreement, and has international support through both the Office of the High Representative and the presence of international military forces. The effectiveness of the domestic guarantees has been profoundly undermined by divisions on the BiH Constitutional Court and weak rule of law norm. Only the international guarantees have created confidence that the TSG institutions will be maintained as provided for in the Agreement and even here the international community has often been ineffective and at times has been the source of instability.

Domestic Guarantees

The HR frequently refers to the fact that the TSG arrangements are guaranteed by the Bosnian Constitution. Successive HRs have stressed that the existence of and powers provided to the entities are both clearly constitutionally determined when countering claims that the TSG will be unilaterally altered. Such statements are primarily directed at the political

[27] Ashdown, P. (2015). Speech by Paddy Ashdown 20 years after Dayton implementation. American University, Sarajevo, 5 November 2015.

[28] Ashdown, P. (2015). Speech by Paddy Ashdown 20 years after Dayton implementation. American University, Sarajevo, 5 November 2015.

leaders in the RS. They are crafted to counter secessionist rhetoric and threats, though the constitutional authority has also been invoked to counter Bosniak claims that the RS will be abolished.[29] However, the fact that it is the international communities' representatives—the HRs, not the domestic parties, who refer to the constitutional guarantee of the TSG arrangements is indicative of a lack of domestic esteem for the Constitution. This is understandable given its largely international origin, it was provided for in Annex Four of the Dayton Agreement and was largely externally formulated.

Yet the constitutional guarantee does provide a route through which alleged breaches of the agreed TSG arrangements can be arbitrated and sanctioned: the Bosnian Constitutional Court. Domestic actors have made substantial claims to the Court alleging such breaches. However, the Court's own composition and decision-making procedures, specifically bias and divisions, undermine the role of Courts as an enforcer of the constitutional guarantee of the TSG institutions. An examination of cases where a party accused either an entity or the central government of acting *ultra vires* or in an unconstitutional manner uncovers deep ethnic divisions. There are also legitimacy concerns surrounding the continued involvement of international judges on the Court.[30]

Current literature on judicial review argues that Constitutional and Supreme Courts cannot be viewed as neutral arbiters when ruling in disputes between the centre and subnational levels of government. Bzdera examined judicial review in federations and found that it had a strong centralising bent.[31] The question of whether a court is biased in favour of the central government always relies not only on whether decisions

[29] See for example, High Representative (2012). 42nd Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 21 April 2012–26 October 2012. Sarajevo: Office of the High Representative. EU Representative and High Representative (2017). Speech by the High Representative and EU Special Representative in BiH, Miroslav Lajčak at a round table organised by GRAD Association. Sarajevo: Office of the High Representative.

[30] The issues raised by the presence of the international judges are discussed the 'International Guarantees' section as these issues directly relate to the benefits and disadvantages of international intervention.

[31] Bzdera, A. (1993). Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review. *Canadian Journal of Political Science/Revue Canadienne de science politique*, Vol. 26, No. 1, 3–29.

reflect the central government's position or strengthens it, but also whether these decisions differ from what one would have expected if the court was weighing legal arguments.

There are clear indications that the Constitutional Court of BiH has centralising tendencies, including in the very contentious U-5/98 case. In this case, widely known as the 'Decision on the constituency of peoples', the Court found that certain aspects of the entity constitutions were incompatible with the BiH Constitution. Four partial decisions were made in 2000. In the most controversial, the Court found that it was unconstitutional for the entity constitutions not to recognise all three constituent peoples (Serb, Croat, and Bosniak) of BiH as constituent peoples of both entities. The RS constitution had stipulated that Bosnian Serbs were the constituent people in the RS while the Federation constitution had specified that Bosniaks and Bosnian Croats were constituent peoples in the Federation. This decision limited the autonomy of the entities.

The Bosnian Serb judges denounced the judgement and argued that the Court had not just failed to fulfil its mandate to protect the Bosnian Constitution but had actively undermined it and the Dayton Peace Agreement, attacking the data used, and the involvement of fellow judges who they felt had a conflict of interest.[32] In other cases where the Court found in favour of an entity, such as in U 15/08 and U 15/09, the Bosniak judges dissented and argued against the decisions. The different judges' opinions frequently reflect the political positions of the political actors responsible for their appointment.[33] This supports the contention that Constitutional Courts are centralising because of 'shared-opinions', judges share the opinions of those appointing them. This means that where the majority of judges are appointed by actors who favour the strengthening of the central state, as it arguably is the case in BiH, centralisation will occur.

The weaknesses of the rule of law norm in BiH have also undermined the effectiveness of the constitutional guarantee. The judiciary controls neither the financial or military resources of the state and so depends

[32]Constitutional Court of Bosnia and Herzegovina (2000). U-5/98 (Partial Decision Part 3), July 1. Sarajevo: Constitutional Court of Bosnia and Herzegovina.

[33]In these cases, the Court found that by engaging a US lobbying company and submitting a report to the UN the RS was not acting engaged in foreign policy which is a central level competency.

on other institutions to enforce its decisions. There is always the potential that other institutions of the state will simply ignore its rulings.[34] In developed democracies where the judiciary has had an opportunity to develop its authority, non-implementation of judicial decisions is unusual and often seen as unacceptable. However, during transitions from non-democratic regimes to democracies, and importantly for this article, in the aftermath of conflict, state institutions need to be extensively reformed, these essentially new institutions, including the judiciary, need time to become established. During the transitional or post-conflict period, institutions with financial or military clout may be able to ignore judicial decisions. Norms have not sufficiently developed to make such actions widely unacceptable. As Horowitz argued, the constitutional court can become 'a powerless structure, unable to…compel compliance with its decisions or restrain the appetites of politicians'.[35]

Non-implementation of Constitutional Court decisions has fundamentally undermined the BiH Constitutional Court's ability to enforce the constitutional guarantee of TSG. There are currently over eighty decisions of the Bosnian Constitutional Courts which have not been implemented. Though the vast majority of these decisions do not relate to the Court's role in protecting the TSG arrangements, this number highlights the weakness of the rule of law in BiH. In relation to the U-5/98, political negotiations secured an agreement to make the necessary changes to the entities' constitutions but the local parties did not implement it. The Court's decision was only finally implemented when the HR intervened and imposed the necessary changes to the constitutions of both entities.[36] While the necessary changes were eventually made, the delay of over two years and the necessity to have the HR intervene shows the weakness of the domestic constitutional guarantee and the continuing requirement of international intervention.

The very high levels of violence during the Bosnian War, the continuing ethnically charged rhetoric, and the fact that two of the communities in BiH have neighbouring kin-states that played a key role in the war,

[34]Yoo, J.C. (1996). The Judicial Safeguards of Federalism. *Southern California Law Review*, Vol. 70, 1311.

[35]Horowitz, D. (2006). Constitutional Courts: A Primer for Decision Makers. *Journal of Democracy*, Vol. 17, No. 4, 125–137.

[36]McCrudden, C., & O'Leary, B. (2013). *Courts and Consociations: Human Rights Versus Power-Sharing*. Oxford: Oxford University Press, 32.

ensured that there is little trust between the domestic parties. This cannot be fully addressed by domestic guarantees. Only hard international guarantees, including military forces and the HR's strong mandate, could bridge this lack of trust and provide a minimum level of confidence that the TSG arrangements would not be unilaterally changed.[37]

International Guarantees

There has been very deep and wide-ranging international involvement in the BiH peace process. After the tragic failure of the international community to prevent or end the horrific violence in a timely manner, NATO interventions, amongst other factors, bought the Bosnian Serbs to the negotiation table. The discussions had a regional and international character, the Bosnian Serb community was represented by its kin-state and the Croatian government was also present at the peace conference which was held in the USA. The conference was led by US Secretary of State Warren Christopher, mediator Richard Holbrooke, and included two Co-Chairmen, the EU Special Representative Carl Bildt and the First Deputy Foreign Minister of Russia Igor Ivanov.

The resultant Agreement is an international treaty and provides for very substantial international intervention in BiH. Though none of these provisions are solely and explicitly established as guarantees of the TSG provisions, they include provisions which provide mandates for international guarantee of the TSG. The Dayton Agreement's status as an international treaty is frequently referred to by international parties when responding to threats to the TSG arrangements. The Principal Deputy HR Laurence Butler specifically referred to the 'internationally binding treaty' nature of Dayton in response to Dodik's secessionist rhetoric.[38] The Steering Board of the Peace Implementation Council, established to provide political guidance to the HR underlined its unequivocal commitment to the preservation of BiH's territorial integrity and sovereignty in

[37]Former strategist for High Representative (2015). Interview with Dawn Walsh. Sarajevo, September 29. Independent Policy Advisor (2015). Interview with Dawn Walsh. Sarajevo, September 28.

[38]Office of the High Representative (2006). Ambassador Butler Asks for Clarification from RS Prime Minister on Referenda Reports. Sarajevo: Office of the High Representative.

accordance with international law.[39] The current HR argued that 'Bosnia and Herzegovina is an internationally recognized state whose sovereignty and territorial integrity is guaranteed under international law'.[40]

However, it is worth noting that references to international law focus on territorial integrity which, while guarding against secession, does little to prevent the centralisation of powers. This highlights that the international system is better equipped to act as a specific guarantee against secession rather than a general guarantee that TSG arrangements will be respected. This means that TSG units, often weaker than the central government, are left vulnerable. While the entities are powerful vis-a-vis the central state, in the BiH case Bosnian Serbs feel the international community is prejudiced against them, a feeling which is also shaped by the international communities' advocacy of strengthening the central BiH state, discussed below.

The Presidents of Serbia and Montenegro and Croatia, as well as the BiH President, signed the Dayton Agreement. The involvement of two key neighbouring states, who have kin groups within BiH, and had been actively involved in the war, was necessary for the Agreement to be effective or credible. However, these two external ethnonational guarantor (EEG) states have not always lived up to their commitments as guarantors.[41] The first HR, Carl Bildt, argued that the centrifugal tendencies in BiH have on occasion received 'encouragement from Zagreb and Belgrade', he highlighted the danger of 'moves to reforge the old alliance between President Slobodan Milosevic in Belgrade and Mr Radovan Karadzic in Pale', and 'long-term Croatian intentions', arguing that these activities directly contribute to the need for international intervention to prevent disintegration.[42] His successor Carlos Westendorp further argued that proposed special relationships between the Federation and Croatia and the RS and Serbia were contrary to the Dayton Agreement, going beyond what was permitted and encouraging perceptions that Croatia

[39] Peace Implementation Council (2015). Communiqué of the Steering Board of the Peace Implementation Council, December 2.

[40] Office of the High Representative (2014). Entities Have No Right to Secede under the Dayton Peace Agreement. Sarajevo: Office of the High Representative.

[41] Serbia has also been criticised for failing to adhere to its commitment in the Dayton Agreement to cooperate with International Criminal Tribunal for the former Yugoslavia.

[42] Bildt, C. (1997). Beyond Grand Speeches. *The Financial Times*, August 2. Bildt, C. (1996). Extend the Brief on Bosnia. *The Financial Times*, April 11.

and Serbia still had territorial ambitions towards BiH.[43] Despite being signatories to the Agreement, and in sharp contrast to the positive role played by Ireland in the Northern Ireland peace process, in the years after the conclusion of the Agreement the neighbouring kin-states did not provide credible guarantees that the TSG arrangements would be respected. Rather, they represented a threat to the stability of the territorial provisions.

In 2005, the Serbia and Montenegro Foreign Minister Vuk Draskovic, echoing comments made in the RS, attempted to link the issue of a settlement on Kosovo with BiH.[44] However, in the last decade, Serbia and Montenegro's decision to actively pursue European integration strongly discouraged it from supporting secession activities in the RS. In rejecting linkages between Kosovan independence and possible RS independence the HR stressed that such statements undermined Serbia and Montenegro's own EU ambitions.[45] This demonstrates how potential membership of a regional organisation can be indirectly used to stabilise TSG, such membership can be used as an incentive to dissuade neighbouring states from acting to undermine the territorial integrity of their neighbour. Similarly, at a meeting with Miroslav Lajčák, who was EU Special Representative to BiH as well as the HR, links were drawn between Serbia's progression on the EU integration path and its 'position…with regard to the state sovereignty of Bosnia-Herzegovina'.[46]

Boris Tadić, who was President of Serbia from 2008 to 2012, at times supported Dodik's secessionist rhetoric. The then Interior Minister Ivica Dacic openly mused that both BiH and Kosovo could be partitioned, with parts annexed to Serbia. However, any suggestions that Serbia would be willing to sacrifice possible EU membership in the name of Serbian solidarity is not very credible. As Ker-Lindsay argued the Serbian government has spent the last five years involved in a painful EU-led process to normalise relations with Pristina to further its EU accession

[43] *Slobodna Bosna* (1997). Interview: Carlos Westendorp, High Representative in BiH 'Carlos Westendorp Reveals His Opinion about the Bosnian Politicians', November 30.

[44] Office of the High Representative (2005). There Can Be No Meddling With BiH's Borders. Sarajevo: Office of the High Representative.

[45] Ibid.

[46] In 2006 Montenegro became independent completing the break-up of the old Yugoslavia. Office of the High Representative (2008). Lajčák Meets Tadić, Jeremić in Belgrade. Sarajevo: Office of the High Representative.

ambitions and is unlikely to undo any progress it has made to support a unilateral declaration of independence from the RS. Furthermore, Ker-Lindsay highlighted that Aleksandar Vucic's government has not enjoyed a very positive relationship with Dodik and has committed to the integrity of BiH, albeit in a format which continues to respect the strong autonomy of the RS.[47] These movements are encouraging in relation to the potential of Serbia to act as a stabilising rather than a destabilising force in relation to the TSG arrangements in BiH and its potential to live up to its role as a guarantor of the Dayton Agreement.

The Agreement also provided international guarantees with both military and civilian aspects. The military aspects provided physical security which was absent due to the widespread violence and efforts to disarm and demilitarise the state. In the first phase of the peace process, the NATO led international mission (IFOR) focused on containing the conflict through peace-enforcement measures. Sixty thousand troops were deployed rapidly along the ceasefire lines, separating the three armies and creating a weapons exclusion zone at the inter-entity boundary line.[48] The presence of the international force was also key in providing returnees with security and 'an internal SFOR survey revealed that many ordinary Bosnian citizens fear that war would break out in a matter of days if SFOR were to go home any time soon'.[49] This military guarantee was also considered to apply directly to the TSG element of the Agreement and provided confidence that RS secession, in particular, would not occur.[50]

The tense political situation, fuelled by the ethnically divisive rhetoric and actions of some political leaders, has necessitated the continued presence of an international force in BiH. While the leadership of the force

[47] Ker-Lindsay, J. (2016). *The Hollow Threat of Secession in Bosnia-Herzegovina: Legal and Political Impediments to a Unilateral Declaration of Independence by Republika Srpska*. London: London School of Economics Research on South East Europe.

[48] Cox, M. (2001). State Building in Post-conflict Reconstruction: Lessons from Bosnia. Centre for Applied Studies in International Negotiations. Accessed 31 December 2017, http://www.casin.ch/web/pdf/cox.pdf.

[49] Office of the High Representative (2001). Address by High Representative Wolfgang Petritsch to the Euro-Atlantic Partnership Council (EAPC). Sarajevo: Office of the High Representative.

[50] Former strategist for High Representative (2015). Interview with Dawn Walsh. Sarajevo, September 29. Independent Policy Advisor (2015). Interview with Dawn Walsh. Sarajevo, September 28.

transferred to the EU in 2004, it continues to play an important role in guaranteeing stability. In 2006 the HR reported that the then 6.200 strong mission provided 'a more than credible deterrent' and engaged in 'a number of operations' including those to 'prevent anti-Dayton activities'.[51] In response to the 'impending threat of a unilateral referendum by part of the country against the state', the HR argued that the EUFOR mandate was vital to provide reassurance to BiH citizens that the EU 'lives up to its promises and supports its declarations with deeds'.[52] Baussuer argued that the 2007 drawdown of EUFOR to 'a Sarajevo-based, road-bound force incapable of rapidly projecting power throughout the country' mean that 'potential belligerents with unfulfilled agendas now fear no external restraint'.[53]

The HR also repeatedly stated that the military forces were necessary to enable his office and other international organisation to fulfil their Dayton mandates.[54] In the first two years after the conclusion of the Dayton Agreement the HR had relatively limited powers. However, these powers were greatly increased, and the 'Bonn powers' established at Sintra in May 1997 effectively allowed the HR to impose laws at any constitutional level and to dismiss elected representatives, political party officers, and public officials. The HR's mandate was not specifically focused on the TSG arrangements. However, the HR was the actor who repeatedly countered activities which violated the TSG arrangements provided for in the Agreement. As briefly mentioned above, the HR acted to prevent the unilateral establishment of the 'Croat Self-Rule'. He removed a number of Bosnian Croat politicians from their positions. This included Ante Jelavic, the Croat member of the BiH state

[51] Office of the High Representative (2006). Report to the European Parliament by the OHR and EU Special Representative for BiH, June–December 2005. Sarajevo: Office of the High Representative.

[52] Office of the High Representative (2007). Speech by High Representative and EU Special Representative Valentin Inzko 'Bosnia and Herzegovina between Dayton & Europe: Current & Future Challenges' French Institute for International Relations. Sarajevo: Office of the High Representative.

[53] Bassuener, K. (2009). How to Pull Out of Bosnia-Herzegovina's Dead-End: A Strategy for Success. Berlin: Democratization Policy Council.

[54] See for example, Office of the High Representative (2009). Thirty-Sixth Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 1 May–31 October 2009. Sarajevo: Office of the High Representative.

Presidency, and Dragan Mandic, the Minister of Interior of Canton 7 (Mostar). He also appointed an administrator to the Hercegovacka Bank, to prevent it from providing financial support to the illegal self-declared 'Croat Self-Rule'.[55] The former-HR Paddy Ashdown also confirmed that he viewed the HR's powers as directly allowing him to counter any violations of the TSG arrangements.[56]

However, Ashdown's own activities as HR also contributed to charges that the Office of the HR did not act as a guarantee of the TSG arrangements. Instead they invited accusations that the HR was undermining these arrangements by seeking the centralisation of competencies provided to the entities in the Agreement. He was even accused of trying to destroy the RS.[57] While efforts to centralise powers were aimed at trying to build a more effective central state and correct excessive decentralisation, they also undoubtedly indicated a preference for reform over preservation. This undermined claims that the HR was a neutral actor mandated solely to implement the Dayton Agreement, suggesting the mandate included changing the TSG arrangements in a direction strongly opposed by the Bosnian Serbs.

The international community also had a very strong involvement in BiH through the presence of a number of international and regional organisations. These included the Organization for Security and Co-operation in Europe, the UN, and the EU. The involvement of such organisations in post-conflict societies is commonplace and not restricted to cases where TSG is a key part of the settlement. However, where TSG is central to the Agreement the work of these organisations often becomes key to ensuring that these institutions operate. Yet in the BiH case the international communities' preference for a stronger central state, even if the result of benign motivations, has weakened its credibility as a guarantor of the TSG.

[55] Office of the High Representative (2001). Nineteenth Report of the High Representative for Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations, 24 February–11 June 2001. Sarajevo: Office of the High Representative.

[56] Ashdown, P. (2015). Interview with Dawn Walsh, London. November 10.

[57] Office of the High Representative (2001). Interview: Paddy Ashdown, High Representative and EU Special Representative for BiH: 'I have no intention of abolishing the Republika Srpska'. Sarajevo: Office of the High Representative.

The OSCE's role in assisting the parties in negotiating agreement on regional arms control was central to building confidence between the various groups in BiH, and across the region. This was a necessary part of providing assurances that no party would be sufficiently militarily superior to threaten the arrangements. Given the key roles which disparity in military strength and military support from kin-states played in the war, it was vital to ensure the parties were confident that variations in military strength could not be used in the future to force changes in the agreed territorial arrangements. Moreover, the OSCE organised, supervised, and verified the initial post-war elections which were necessary for the establishment of the executive and legislative institutions at the various levels. This role was also important in ensuring that elections were not used to threaten the stability of arrangements. In 1999 the OSCE, working with the HR, highlighted that the Croat political parties were proposing candidates for the diaspora seats in the Croatian parliament who had either been removed from office in BiH as a result of obstructing the implementation of the Dayton Agreement or who already held elected office in BiH. It emphasised that individuals could not simultaneously hold elected positions in BiH and hold positions outside of BiH. It stated that, if elected, such individuals would have to choose which position to hold or the Provisional Election Commission, headed by the OSCE, would decide for them.[58] This was very important in guaranteeing the TSG arrangements as individuals simultaneously holding elected positions in BiH and Croatia would inevitably fuel fears that Bosnian Croats were trying to create links to Croatia beyond what was provided for in the Agreement.

In 2001, at the height of HDZ attempts to circumvent the Federation institutions and establish a separate unit for the Bosnian Croat community, the OSCE declared a 'referendum' on Bosnian Croat rights illegal. In this referendum Croats were asked whether 'Croats should have their own political, educational, scientific, cultural and other institutions'. According to the HDZ, over 70% of the registered Bosnian Croats participated in the vote, with nearly 99% supporting the question asked in the referendum.[59] This referendum was a clear attempt by the HDZ to

[58] Office of the High Representative (1999). OHR, OSCE Express Concern About Croatian Candidates'. Sarajevo: Office of the High Representative.

[59] Bieber, F. (2001). *Croat Self-Rule in Bosnia: A Challenge to Dayton*. European Centre for Minority, Brief 5.

try and provide democratic legitimacy for its attempts to violate the TSG arrangements. The OSCE's declaration that it was illegal, in combination with the HR's intervention to prevent such violations, was important in preventing deviation from the agreed institutions.

In keeping with the international communities' goal of strengthening the central state, the OSCE sought to support and encourage educational reforms which would create a state-level Ministry for Education in BiH. Such efforts undoubtedly sought to alter the TSG arrangements agreed in 1995 by transferring additional responsibilities to the central state. Furthermore, the International Police Task Force (IPTF), and later the EU Police Mission (EUPM) were involved in creating state-level policing structures, amongst other tasks. The IPTF focused on state-level institution-building by setting up the State Border Police (SBS) in 2000 and the State Information and Protection Agency (SIPA) in 2002. The creation of both institutions encountered political opposition from the RS and the establishment of SBS and SIPA was only completed through HR intervention.[60] The EUPM, which placed added emphasis on institution-building at all levels, faced opposition from the RS as it strengthened the state-level institutions.[61] Such endeavours are illustrative of international organisations attempting to alter the TSG arrangements with the aim of improving governance. Despite the stated goal of improving governance this understandably provoked hostility from the RS which sees such activities as attempts to undermine its autonomy by altering agreed institutions.

BiH's European integration ambitions had a limited impact on the stability of TSG arrangements. In the late 1990s and early 2000s, the international community highlighted the potential benefits of European integration to BiH and such integration was popular with BiH citizens. The international community argued that the state was moving from 'Dayton to Brussels', from the post-conflict to the pre-accession

[60] UNSC (2002). Report Secretary General on UNMIBH. S/2002/1314 of 2 December 2002. New York: United Nations. International Crisis Group (ICG) (2002). Policing the Police in Bosnia: A Further Reform Agenda. Balkans Report, No. 130, 10 May 2002. Accessed 31 December 2017, https://www.crisisgroup.org/europe-central-asia/balkans/bosnia-and-herzegovina/policing-police-bosnia-further-reform-agenda.

[61] Padurariu, A. (2014). The Implementation of Police Reform in Bosnia and Herzegovina: Analysing UN and EU Efforts. *Stability: International Journal of Security & Development*, Vol. 3, No. 1, 1–18.

phase.[62] During a meeting of the HR with British Secretary of State David Miliband and Minister for Europe Caroline Flint, Miliband and Flint argued that only a 'sovereign and single Bosnia and Herzegovina can count on a future in the EU'.[63] The HR has also linked possible European integration, including future EU membership, with the territorial integrity of BiH, countering RS secessionist rhetoric arguing that such rhetoric and efforts to undermine the central state are

> completely contrary to the strategic objective of full Euro-Atlantic integration, which Bosnia and Herzegovina's authorities have together declared to be a priority. The time has come for senior politicians to stop opening wounds that are still healing and finally sincerely turn their attention to the country's future in the EU and NATO.[64]

However, in line with concerns that Dayton did not provide for a sufficiently strong central state to allow for effective governance, conditions for progress towards EU membership have required substantial structural reforms including 'the transfer of key competencies from the entities to the State'.[65]

In his inaugural speech as HR, Paddy Ashdown chastised those who 'believe that we can be accepted into Europe as two, or, as some even say, three failed statelets within a failed state' but at the same time he stressed that decentralisation and devolution processes are not incompatible with EU membership as long as the central state is not 'fractured'.[66] Police restructuring (as mentioned above), judicial reform, and public broadcasting reform, aimed at creating services which were organised on a state rather than an entity level, were particularly contentious

[62] Office of the High Representative (2003). Hard Work and Confidence Will Take BiH from Dayton to Brussels. Sarajevo: Office of the High Representative.

[63] Office of the High Representative (2009). Inzko and Miliband: 'Only a sovereign and single BiH can join the EU'. Sarajevo: Office of the High Representative.

[64] Office of the High Representative (2012). High Representative Presents Report to UN Security Council. Sarajevo: Office of the High Representative.

[65] Office of the High Representative (2006). 26th Report by the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations, 1 January–30 June 2004. Sarajevo: Office of the High Representative.

[66] Office of the High Representative (2002). Inaugural Speech by Paddy Ashdown, the New High Representative for Bosnia & Herzegovina. Sarajevo: Office of the High Representative.

conditions which the EU set out for BiH to progress towards negotiations on a stabilisation and association agreement. In an interview with the RS daily newspaper *Glas Srpske* EU ambassador to BiH Lars Wigemark tried to assuage Bosnian Serb fears that EU membership conditions were aimed at centralising powers, he argued that this 'reform agenda' does not 'imply centralization or the transfer of authority', instead he focused on the possible job creation and investment which would result from such reforms.[67] However, the credibility of these claims is somewhat questionable given the wider background of frequent international advocacy for the strengthening of the BiH state.

A key component of this centralising tendency of the international community is the role of international judges on the BiH Constitutional Court. In the immediate post-conflict period international involvement can overcome issues of independence and technical capacity. International involvement can be written into treaties or agreements and can include the inclusion on international actors on domestic courts.[68] Yet domestic judicial arrangements used to adjudicate and enforce TSG should mature and become more effective over time. International involvement can also sharpen rather than mitigate questions of the legitimacy of judicial review. The external nature of international judges leaves them open to deeper questions of legitimacy due to their lack of domestic credentials. Internationals may also be viewed as having insufficient understanding of the local circumstances or furthering the aims or goals of a specific conflict actor or the international community rather than being primarily concerned with the general domestic good.

The continued role of the international judges on the Bosnian Constitutional Court raises the issue of a lack of domestic legitimacy, which is compounded by the fact that the international judges are not viewed as neutral. While many institutions in BiH still suffer from weaknesses, there is little evidence that this form of international involvement is still necessary or helpful. Any help which it provides is arguably undermined by the fact that the international judges are widely viewed as serving to reinforce the Bosniac position and allow for the overruling of the Bosnian Serbs and Bosnian Croats. The Serb judge Popović,

[67] *Glas Srpske* (2015). Interview with Ambassador Lars-Gunnar Wigemark for the daily *Glas Srpske*. October 10.

[68] Samuel, K. (2006). Post-conflict Peace-Building and Constitution-Making. *Chicago Journal of International Law*, Vol. 6, No. 2, 680.

in his dissenting decision on U-5/98 argued that 'we cannot disregard the fact that this Decision was adopted in a manner that the judges from amongst the Bosniacs and foreign Judges voted for the Decisions and that the Judges from amongst Serbs and Croats voted against it'.[69]

Finally, while international actors were initially willing to provide substantial international guarantees to the conflict parties in BiH this willingness has declined over time. The EUFOR has been reduced and HRs have opted not to use the Bonn powers. Other international crises, including the threat of international terrorism, instability in Iraq, and the war in Syria have focused international attention elsewhere. This has resulted in some calls for the international community to re-engage, in order to allay fears that the RS will secede.[70] Furthermore, the ability of the international community to act in a unified manner to counter such moves has been weakened by the approach of Russia. Russia has been a harmful force in the Balkans, and central and Eastern Europe, in recent years.[71] The exercise of the Russian veto to prevent a UN Security Council resolution on Srebrenica was viewed as undermining BiH.[72] Russia could also block any UN Security Council resolution explicitly condemning a RS attempt at secession, undermining a key international organisation's ability to guarantee the TSG arrangements in BiH. However, the EU and the USA would certainly still issue statements declaring any such move to be illegal.

Conclusion

The use of TSG in BiH shows how efforts to create institutions which meet the competing needs of different conflict groups can create arrangements that are inherently unworkable and unstable. It also highlights how creating ineffective institutions can profoundly complicate the

[69] Constitutional Court of Bosnia and Herzegovina (2000). U-5/98 (Partial Decision Part 3), Sarajevo, 1 July 2000. Sarajevo: Constitutional Court of Bosnia and Herzegovina.

[70] Independent Policy Advisor (2015). Interview with Dawn Walsh. Sarajevo, September 28.

[71] For an overview of Russian activities in the regions, see London School of Economics (2015). Russia in the Balkans, Conference Report, LSE-Research on South East Europe and SEESOX South East European Studies at Oxford, 13 March 2015.

[72] Lyon, J. (2015). Is War about to Break Out in the Balkans? *Foreign Policy*, October 26.

task of guaranteeing against unilateral change; creating a tension where the same actors are tasked with advocating reform and maintaining stability. Furthermore, changing international conditions and shifting priorities of regional and international actors will affect how guarantees operate. Finally, the experience of BiH demonstrates that weak domestic institutions struggle to effectively guarantee TSG.

The institutions established in the Dayton Agreement represented a careful compromise aimed at meeting the needs of different conflict parties, and significant kin-neighbours, to bring an end to a ruthless war. However, it quickly became apparent that these incredibly complex institutions are largely unworkable. The extent of the decentralisation coupled with the extensive power-sharing provisions at the state level prevent effective governance. A lack of cross-entity and even inter-canton coordination, and ethnic-blockages, present particularly insurmountable challenges. While it is questionable whether the Agreement would have been reached without these provisions, they undoubtedly require substantial reform if BiH is to become a functioning state.

However, the need for substantial reform profoundly complicates the issue of TSG stability. The international community, which essentially authored the Dayton Agreement and provided the only credible guarantees that it would be respected, was also a key advocate for its reform. While it is undeniable that the institutions require reform, by advocating for the centralisation of powers different international institutions involved in BiH have pitted themselves against the Bosnian Serb leadership. Dodik has accused the international community of perpetuating political crises through the 'imposition of the principle of respect towards the "spirit", and not the "letter" of Dayton.'[73] Bosnian Serbs can simply not trust the international community to ensure that their security will not be undermined through the centralisation of powers without their agreement.

Furthermore, while the HR, with the support of an international military presence and other international organisations, has made vital interventions to prevent unilateral changes to the TSG, the willingness and capacity of the international community to continue to play such an interventionist role is questionable. International crises elsewhere,

[73]Cited in Kulenović, N. (2016). Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation. Sarajevo: Analitika.

particularly in the Middle East, internal difficulties for the EU, and a deterioration in relations between Russia and the USA and EU in recent years, have all diverted international attention away from BiH and made unified response to recent RS secessionist threats more difficult. However, the USA and EU are still highly likely to act to prevent any concrete steps towards independence, particularly by using Serbia's European integration ambition to convince it to not support the RS, effectively making secession unfeasible.

Finally, BiH's experience with TSG highlights how domestic institutions are ineffective guarantees. Internationally crafted domestic institutions may not enjoy local status or support. As a largely imported document, the Bosnian Constitution is not held in the elevated regard which foundational texts usually enjoy. Furthermore, where deep divisions remain, domestic institutions will not enjoy sufficient broad support to act as credible guarantors of the TSG arrangements. The Bosnian Constitutional Court has often experienced intense ethnic divisions undermining its ability to enforce the Constitution's guarantees of TSG.

The ferocity of the Bosnian War undoubtedly made management of the conflict through TSG more difficult than in the other cases in this volume. However, more positive interventions by the kin-states would undoubtedly improve the situation. Serbia's hopes to become part of the EU may incentivise it to engage in such activities in the future. However, the current US and Russian administrations are unlikely to act as guarantors of the TSG. Under such circumstances, the EU needs to rebuild its credibility as a guarantor of the TSG arrangements, and more profoundly as guarantor that the different communities' needs are met. It must act as a bulwark against RS secession and condemn any domestic or regional activities which could destabilise the Bosnian TSG institutions. It also needs to recognise that essential reforms of the Dayton institutions need to be negotiated and can only be successful if accepted by the RS.

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The Former Yugoslav Republic of Macedonia: Enhanced Local Government and Ethnic Conflict

The Ohrid Framework Agreement (OFA), reached on the 13 of August 2001, ended the violent inter-ethnic conflict which throughout the first half of 2001 had threatened to plunge the former Yugoslav Republic of Macedonia (FYRM) into a full-scale civil war. Unlike Bosnia's Dayton Agreement, the OFA aimed to foster 'institutional inter-ethnic integration and accommodation in a unitary state'.[1] However, amongst its provisions it provides for a decentralisation process giving substantial powers to municipalities in areas including education, public services, local economic development, culture, and social welfare. The FYRM has received much less attention from researchers than its neighbour Bosnia and Herzegovina (BiH), and while this is understandable given the much larger-scale of the conflict in BiH, this deficit needs to be addressed as the FYRM provides unique insights into the benefits and challenges

[1]Due to an ongoing name dispute with Greece, discussed in the International Guarantees section of this chapter, the state is recognised by international organisation including the UN under its provisional name the former Yugoslav Republic of Macedonia. While many states including the US recognise it under the constitutional name 'Macedonia' this chapter uses the FYRM to in recognition of the sensitivity of the issue. Ordanoski, S., & Matovski, A. (2007). Between Ohrid and Dayton: The Future of Macedonia's Framework Agreement. *Südosteuropa Mitteilungen*, No. 4, quoted in Paintin, K. (2009). States of Conflict: A Case Study on Conflict Prevention in Macedonia. London: Institute for Public Policy Research.

D. Walsh, *Territorial Self-Government as a Conflict Management Tool*, Federalism and Internal Conflicts,
https://doi.org/10.1007/978-3-319-77234-9_4

of using a different form of territorial self-governance as a conflict management tool.

TSG in the FYRM underlines how such arrangements can end ongoing ethnic conflict by balancing the security and recognition needs of a substantial and regionally concentrated national minority through enhanced local government and the needs of the national majority. However, it also shows that contradictions within a peace agreement can ensure that domestic parties and institutions remained divided in their interpretation of the agreement, creating political paralysis and ethnic tensions. Furthermore, while international and regional actors managed to intervene to prevent the outbreak of full-blown civil war, they have at a number of times contributed to the destabilisation of the TSG institutions and wider political situation in the FYRM, allowing Macedonian nationalism to take hold, and the Internal Macedonian Revolutionary Organization–Democratic Party for Macedonian National Unity (*VMRO-DPMNE*) under *Nikola* Gruevski to engage in state capture leading to serious crises in 2014/2015 and 2017.

The 2001 Conflict

The FYRM seceded peacefully from the Yugoslav federation. However, in February 2001 ethnic Albanian rebels calling themselves the National Liberation Army (NLA) took control of Tanusevci, a village on the Kosovo-Macedonia border. This move precipitated a series of violent clashes in various locations between NLA and Macedonian security forces, which lasted for almost seven months, resulted in more than 200 casualties, and displaced approximately 180,000 people.[2] Unlike in BiH, the international community acted quickly to prevent the conflict from escalating, and the successful diplomatic efforts of international actors greatly contributed to the conclusion of the OFA.

Despite achieving independence peacefully, the FYRM faced serious challenges. Primary among these were tensions between the country's ethnic Macedonian majority and ethnic Albanian minority. While officially constituting a quarter of the national population in the FYRM, the Albanian community represents a majority in certain parts of the country. Albanians reside mainly in compact areas in the north and west of

[2] Jerker Lock, J. (2003). Macedonia: A Conflict Analysis. Stockholm: Division for South-East Europe, Swedish International Development Agency.

the country, along the borders with the Republic of Albania and Kosovo. Furthermore, regional instability and challenging economic circumstances compounded these ethnic difficulties; the Macedonian Republic had been the poorest Yugoslav republic. The poor economic situation was intensified by UN sanctions on Yugoslavia from 1992 to 1996 and the Greek embargo imposed on the FYRM as a punishment for 'name appropriation'.

Similar to BiH, ethnic tensions between the majority Macedonian and minority Albanian communities in the FYRM are not a consequence of centuries of negative ethnic interactions. Rather they stem from the break-up of Yugoslavia, and the political responses to the resultant renegotiation of the relationship between the state and the different ethnic communities.[3] The declaration of independence and subsequent drafting of a new constitution in 1991 gave rise to very different concepts of the nature of the state and the status of Macedonia's ethnic communities living within it. A senior politician, speaking in 2004, echoed this interpretation, arguing that

> …each side holds a different view of the ownership of…the country: is it a country with one principal nationality plus large ethnic minorities whose rights are protected and guaranteed, or is it a multi-ethnic country belonging to several ethnic groups?[4]

The language of the preamble in the 1991 Constitution became a microcosm of these differing interpretations. The Constitution stated that 'that Macedonia is established as a national state of the Macedonian people'.[5] Unsurprisingly Albanian political leaders rejected this Constitution arguing that it downgraded the status of Albanians in the

[3] Adamson, K., & Jović, D. (2004). The Macedonian–Albanian Political Frontier: The Re-articulation of Post-Yugoslav Political Identities. *Nations and Nationalism*, Vol. 10, No. 3, 303.

[4] Project on Ethnic Relations (PER) (2004). Macedonia's Interethnic Coalition: Solidifying Gains. Mavrovo: PER, quoted in Lyons, A. (2012). Decentralisation and the Management of Ethnic Conflict: A Case Study of Macedonia. University of Bradford eThesis. Accessed at https://bradscholars.brad.ac.uk/bitstream/handle/10454/5693/PhD%20Thesis%20-%20Aisling%20Lyon%2007014955.pdf?sequence=3.

[5] Macedonia's Constitution of 1991 with Amendments through 2011. Accessed 31 December 2017, http://rai-see.org/wp-content/uploads/2015/08/Macedonia_Constitution_2011.pdf.

FYRM by treating them as a minority. This can be contrasted to the 1974 Constitution of Yugoslavia, which accorded equal rights to all ethnic units of the federation, of which the Albanian population was one and a 1974 version of the Macedonian Constitution which declared the Socialist Republic of Macedonia to be 'a national state of the Macedonian people and as a state of the Albanian and Turkish nationalities in it…'.[6] Macedonian 'ownership' of the state was also implied in certain constitutional articles, including article 7, which declared the Macedonian language (using the Cyrillic alphabet) the official language of the state, and article 19, which made special reference to the Macedonian Orthodox Church.[7]

Furthermore, the new Constitution removed collective rights which had previously been granted to Macedonia's non-majority communities in terms of proportional representation by quota in public bodies, language rights, and the right to fly national flags.[8] The removal of these rights further strengthened feelings within the Albanian community that the Macedonian majority was establishing a new state which was ethnically exclusive and failed to consider its needs. Resultant tensions sometimes led to violent clashes, for example the clashes around the forced closure of the 'illegal' Albanian-language university in Tetovo left one dead in February 1995. The negative effect of removing these rights was amplified by a programme of centralisation which the newly independent state initiated. Before 1991 the Macedonian Republic had been a heavily decentralised state, but a process of recentralization took place during the 1990s. This programme of recentralization also involved the redrawing of municipal boundaries, which Albanians felt was aimed at breaking up Albanian majority municipalities to counter their claims for autonomy.

[6] Poulton, H. (2000). *Who Are the Macedonians?* London: C. Hurst and Co, 133.

[7] Engström, J. (2002). Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State. *Journal on Ethnopolitics and Minority Issues in Europe*, No. 1, 1–21.

[8] Lyons, A. (2012). Decentralisation and the Management of Ethnic Conflict: A Case Study of Macedonia. University of Bradford eThesis. Accessed 31 December 2017, https://bradscholars.brad.ac.uk/bitstream/handle/10454/5693/PhD%20Thesis%20-%20Aisling%20Lyon%2007014955.pdf?sequence=3; Macedonia's Constitution of 1991 with Amendments through 2011. Accessed 31 December 2017, http://rai-see.org/wp-content/uploads/2015/08/Macedonia_Constitution_2011.pdf.

The Albanian population in the FYRM boycotted the referendum on the independence of Macedonia in 1991. This non-participation in the referendum was the product of the failure of Macedonian political leaders to clearly define the legal status of the Albanian population in an independent Macedonian state. There was also strong resistance to the questions put forward in the referendum which included possibly re-joining a federal Yugoslavia. This was completely unacceptable to the Albanian community as it was aware of Serbia's repressive policies towards Albanians in Kosovo. Prior to the referendum, the leading Albanian political party at the time, the Party for Democratic Prosperity (PDP), issued a Declaration for the 'Equal Status of Albanians in Macedonia', and made Albanian participation in the referendum conditional on Macedonian consideration of this Declaration, which the Macedonian politicians rejected.[9]

Instead, the Albanian community held a separate unrecognised plebiscite in 1992 on the creation of an autonomous territory for the Albanians in the FYRM. This was endorsed by a large majority of Albanians, resulting in the proclamation of a Republic of Ilirida, which was to exist within a broader federal Macedonia. These actions undermined inter-ethnic trust and raised concerns within the Macedonian community that Albanians were a threat to the territorial integrity of the new state and would seek to unify with Albanian kin found both in Albania and Kosovo. These fears were further fuelled by higher birth rates in the Albanian community which increased both the absolute and relative strength of the community. In the eyes of many Macedonians, this 'demographic expansion' of the Albanian community was a deliberate political strategy for increasing their influence in the state.[10]

The 'four wolves', the FYRM's neighbours Greece, Bulgaria, Serbia, and Albania, regarded the state as an artificial creation of former Yugoslav President Josip Tito. The very existence of the FYRM, along with the Macedonian national identity and language, has been contested by its neighbours. The persistent disputes with neighbouring

[9] Engström, J. (2002). Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State. *Journal on Ethnopolitics and Minority Issues in Europe*, No. 1, 1–21.

[10] Brunnbauer, U. (2004). Fertility, Families and Ethnic Conflict: Macedonians and Albanians in the Republic of Macedonia, 1944–2002. *Nationalities Papers,* Vol. 32, 566–597.

states during the 1990s ensured that the government was not focused on domestic issues, and the feelings of insecurity contributed to the majority's reluctance to acknowledge Albanian demands for greater rights. In the absence of this existential threat, the state is likely to have responded more favourably to such demands.[11] The greatest of these threats was perceived to come from Albania, as unification of the Albanian-dominated North and West regions of the FYRM with Albania was a constant fear.[12] This created further opposition from the majority Macedonian community to calls from the Albanian community for increased autonomy.

Despite these difficulties a full-fledged armed conflict was avoided in the 1990s. Albanian political parties were well-established and were coalition partners in all Macedonian governments from 1992 onwards. Although there were no formal requirements for such inter-ethnic grand coalitions this informal power-sharing was a widely accepted practise.[13] Hence, at the elite level, Macedonians and Albanians found themselves engaged in a continual political dialogue with cooperation across ethnic party lines. This arguably helped to defuse some of the tension between the two communities at a political level.[14] Against this backdrop of elite inter-ethnic cooperation, the eruption of a violent conflict in the FYRM in 2001 took both the government and the international community by surprise. Despite the tensions which had persisted through the 1990s—Albanian dissatisfaction with the ethically exclusive ownership of the state, concerns over language rights, access to quality education, disagreement over the use of flags and symbols, and calls for decentralisation—Albanians in the FYRM were not subject to same kind of

[11]Lyons, A. (2012). Decentralisation and the Management of Ethnic Conflict: A Case Study of Macedonia. University of Bradford eThesis. Accessed 31 December 2017, https://bradscholars.brad.ac.uk/bitstream/handle/10454/5693/PhD%20Thesis%20-%20Aisling%20Lyon%2007014955.pdf?sequence=3.

[12]Though the name dispute with Greece and the instability in Kosovo both also created very serious issues which are discussed below.

[13]Greissler, C. (2014). The Albanians in Macedonia: The Role of International Organisations in Empowering the Ethnic Albanian Minority. ECMI Working Paper 79. Flensburg: European Centre for Minority Issues.

[14]Engström, J. (2002). Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State. *Journal on Ethnopolitics and Minority Issues in Europe*, No. 1, 1–21.

discriminations which they experienced in Kosovo and as such the sudden escalation of tensions into a violent conflict was unforeseen.

Beginning in January 2001 a violent Albanian group in the FYRM, the NLA began to carry out attacks on Macedonian security forces. The conflict quickly escalated and within three months the NLA had taken control of parts of northern and western Macedonia and had come within 12 miles of Skopje.[15] Macedonian President Boris Trajkovski and Premier Ljubcho Georgievski claimed that the rebels were mostly Kosovo Liberation Army (KLA) members who infiltrated the country from Kosovo. NLA members claimed that the rebel force comprised several thousand men, coming mainly from the FYRM. However, it is widely accepted that the instability emanating from the conflict in Kosovo and, more specifically, NATO's failure to disarm the KLA and effectively police the border between Kosovo and the FYRM facilitated cross-border support for the NLA and so contributed to the violence.[16] At the onset of the conflict, the NLA's goals were unclear. Its communiqués claimed it was fighting against 'Slavo-Macedonian' oppressors and for a 'Greater Kosovo' or a 'Greater Albania'. However later, the organisation argued that it was 'fighting for the human rights of the Albanians in Macedonia and for constitutional reforms'.[17]

Aware that the conflict was not only exacerbating ethnic tensions within the FYRM but that it could quickly become a full-scale civil war—and even spill over into other Balkans states resulting in a conflict that ravaged the whole region—the international community was quick to intervene. Even before the intensive negotiations surrounding the OFA, there was high-level shuttle diplomacy from the EU and NATO with George Robertson, then Secretary General of NATO, and Javier Solana, EU High Representative for the Common Foreign and Security Policy, both repeatedly visiting the FYRM and encouraging all parties to end the violence and seek a political solution. This succeeded in controlling the spread of violence in the short-term. However, the failure of negotiations

[15] *The Guardian* (2001). Macedonia Timeline. August 22.

[16] Engström, J. (2002). Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State. *Journal on Ethnopolitics and Minority Issues in Europe*, No. 1, 1–21.

[17] Daskalovski, Z. (2004). *The Macedonian Conflict of 2001: Between Successful Diplomacy, Rhetoric, and Terror*. Studies in Post Communism Occasional Paper No. 7, Centre for Post-communist Studies, St. Francis Xavier University.

led by Macedonian President Boris Trajkovski suggested that such an intervention was not sufficient to produce a comprehensive accord. As a result, the international intervention was deepened and a permanent negotiating team was deployed. It was led by former French Foreign Minister Francis Leotard and US Balkans expert Ambassador James Pardew facilitated the commencement of focused negotiations. These talks led to the OFA.[18]

The OFA, Territorial Self-Government, and Balancing the Needs of the Conflict Parties in the FYRM

The OFA arguably provides for the weakest form of self-governance of the cases examined in this volume. Rather than establishing a federation or an autonomous region for Albanians in the FYRM it included provisions for enhanced local government or decentralisation. Section Three of the OFA provides for 'a revised Law on Local Self-Government…that reinforces the powers of elected local officials and enlarges substantially their competencies'.[19] The provisions for enhanced local government are intended to meet the security and recognition needs of the Albanian community in the FYRM while not encroaching on the needs of the majority Macedonian community.

The Agreement sought to increase the role of local self-government, which would reverse the extensive centralisation programme which the state had engaged in since independence in 1991. It stipulates that a revised Law on Local Self-Government must be adopted to reinforce the powers of elected local officials and to substantially enlarge their competencies in the areas of public services, urban and rural planning, environmental protection, local economic development, culture, education, social welfare, and health care.[20] The provisions fall short of the regional autonomy, or even federal arrangements that some Albanians had demanded. However, the process of decentralisation and the devolution of power to the municipalities, are undoubtedly aimed at satisfying the

[18] Paintin, K. (2009). States of Conflict: A Case Study on Conflict Prevention in Macedonia. London: Institute for Public Policy Research.

[19] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[20] Daftary, F. (2001). Conflict Resolution in FYR Macedonia: Powersharing or the 'Civic Approach'? *Helsinki Monitor*, No. 4, 201–312.

Albanian community's needs. It provides the Albanian community with increased autonomy in areas closely linked to both security and identity recognition, including policing, language rights, and the use of flags and symbols.

However, the Agreement has to balance these provisions with the majority Macedonian community's needs, particularly security needs around the territorial integrity of the state. Consequently, the OFA argues that 'Macedonia's sovereignty and territorial integrity, and the unitary character of the State are inviolable and must be preserved. There are no territorial solutions to ethnic issues'.[21] These provisions are necessary to alleviate fears that Albanian demands were a first-step towards secession. Such fears were common place among Macedonians and were a key factor in determining the provision of decentralisation, rather than autonomy or a bi-national federation. In addition, the OFA framework for increased local government refrains from framing the TSG (and other) reforms as being targeted at the Albanian community. Instead they are presented as being part of a programme which seeks to provide for integration of the various minority communities into the state. Furthermore, the OFA also stipulates that the new Law on Local Self-Government will reflect 'the principle of subsidiarity in effect in the European Union' and all municipalities received the same powers regardless of their ethnic composition. This condition portrayed enhanced local government as part of governmental reforms which were primarily aimed at increasing the participation of citizens in government and improving services.

In an important indication of how the OFA's provisions on decentralisation are aimed at meeting the Albanian community's need for security, the Agreement indicates that the municipalities have a role in appointing police commissioners. Increased control over policing in areas where Albanians were in the majority is vital to provide the community with a sense of security because there had been previous cases of police brutality against the Albanian community. Clashes between local citizens and the police in the Albanian-dominated Bit Pazar neighbourhood of Skopje left four dead in November 1992. Furthermore in 1997 a dispute over the Gostivar and Tetovo municipalities' right to fly 'flags of foreign states', in recognition of sizable local Albanian and Turkish communities,

[21]Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

led to the flags' removal by special police forces in July 1997, the arrest of both mayors, and riots which resulted in three civilian deaths and up to 400 injured.[22] The OFA provision also had to ensure that local involvement in policing did not become a source of insecurity for the Macedonian community. Specifically, it has to counter fears that locally led police forces in majority Albania municipalities would become ethnically exclusive and discriminatory, and could even effectively become a separate Albanian force which could facilitate Albanian efforts to secede. The Agreement guards against these concerns and ensures that the police continue to provide the Macedonian community with security by providing that 'The Ministry of Interior will retain the authority to remove local heads of police in accordance with the law'.[23]

The abovementioned incident related to the flying of minority community flags is illustrative of the importance of recognition needs for the Albanian community. The OFA's decentralisation provisions directly address these needs. It provides that 'with respect to emblems, next to the emblem of the Republic of Macedonia, local authorities will be free to place on front of local public buildings emblems marking the identity of the community in the majority in the municipality'.[24] The Yugoslav constitution had provided protection for non-majority communities to display symbols associated with their identity and the 1991 Macedonian Constitution had extended this protection. However, during Yugoslav times, these community flags had been distinguished from those of their titular countries by the inclusion of a red five-pointed star.[25] However after the disintegration of Yugoslavia these stars were removed from the flags and so they became identical to their titular state flags and this created additional difficulties as they became 'flags of foreign states'. In June 1997 legislation was passed which was aimed at resolving this difficulty by allowing for the flying on these flags next to the Macedonian

[22] ICG (1997). Macedonia: The Politics of Ethnicity and Conflict. Skopje and Brussels: ICG. Accessed 31 December 2017, http://old.crisisgroup.org/en/regions/europe/balkans/macedonia/026-macedonia-report-the-politics-of-ethnicity-and-conflict.html.

[23] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[24] Ibid.

[25] ICG (1997). Macedonia: The Politics of Ethnicity and Conflict. Skopje and Brussels: ICG. Accessed 31 December 2017, http://old.crisisgroup.org/en/regions/europe/balkans/macedonia/026-macedonia-report-the-politics-of-ethnicity-and-conflict.html.

flag on special holidays. However, this law was rejected by the mayors of the Gostivar and Tetovo municipalities, resulting in the violent clashed mentioned above, and the law was repealed by the Constitutional Court in 1998. Thus, this provision in the OFA directly addressed this frustrated need.

The Agreement also addresses the Albanian community's need for recognition through its provisions on TSG and language. Article 7, of the 1991 Macedonian Constitution had declared the Macedonian language (using the Cyrillic alphabet) the official language of the state. This had frustrated the Albanian community's need for recognition, and throughout the 1990s the language issue was a constant source of discontent. The OFA makes some important concessions regarding the use of languages other than Macedonian throughout the state by providing that primary and secondary education would be available to students in their native language, any language spoken by more than 20% of the population would be an official language, and that there would be state funding for university-level education in such languages. It also explicitly states that Macedonian was the official language throughout the state. The provision for government funding for university education was particularly important to the Albanian community as improved education levels would help to correct economic disparities between the majority and minority communities and demands for an Albanian-language university had dominated political discourse throughout the 1990s.[26] Again these stipulations were presented as part of a programme which sought to provide for additional language rights for various minority communities rather than simply elevating the status of the Albanian community.

Specifically related to the TSG arrangements the agreement required that

> Any person living in a unit of local self-government in which at least 20 percent of the population speaks an official language other than Macedonian may use any official language to communicate with the regional office of the central government with responsibility for that municipality; such an office will reply in that language in addition to Macedonian. Any person may use any official language to communicate

[26]For details of the establishment of an 'illegal' Albanian-language university in Mala Recica, Tetovo in 1994 and its treatment by the state, see Vetterlein (2006).

> with a main office of the central government, which will reply in that language in addition to Macedonian.

And

> With respect to local self-government, in municipalities where a community comprises at least 20 percent of the population of the municipality, the language of that community will be used as an official language in addition to Macedonian. With respect to languages spoken by less than 20 percent of the population of the municipality, the local authorities will decide democratically on their use in public bodies.

Again, these articles refrain from singling out the Albanian community and they have led to Turkish, Serbian and Romani becoming official languages in some municipalities. However, the 20% threshold meant that the increased language rights largely applied only to the Albanian community given the demographic make-up of the FYRM and the settlement patterns of the minorities. Thus, the language provisions in the Agreement met the Albanian community's needs by greatly enhancing its right to use Albanian. Yet the provisions were structured in such a way as to prevent singling out and elevating the status of the Albanian community which could have been seen to frustrate the Macedonian community's need for recognition as the national majority. Furthermore, the provisions did not establish a bilingual state, alleviating Macedonian fears that bilingualism would become a requirement for state jobs which would undermine their access to such positions and accordingly represent a threat to their economic security.[27]

Like the other agreements and laws in this volume, the OFA seeks to provide for the competing needs of the conflict parties. While the reforms, including the enhanced local government, are presented as better including all minorities in the state rather than seeking to satisfy Albanian needs, the Agreement was largely an unhappy compromise between two conflict groups. The OFA was carefully crafted and the international community sought to avoid the excessive decentralisation and inflexible power-sharing arrangements which had been included in the Dayton Agreement in BiH. However, like the Dayton Agreement,

[27] An estimated 90% of the Albanian community is proficient in the Macedonian language, whereas less than 2% of Macedonians can speak Albanian.

the Ohrid Agreement failed to establish a common understanding of the nature of the state. This contributed to difficulties in its implementation and has destabilised the TSG arrangements.

Controversy and delays surrounding the revised law on local self-government, which the OHR stipulated must be passed by the Macedonian parliament within 45 days of the signing of the accord, highlight how the two main communities feared that the other would unilaterally change the arrangements, pushing them towards their desired position. The law was the subject of contentious debate, as many Macedonians believed that its implementation would result in the fragmentation of Macedonia along ethnic lines, which ultimately might lead to the de facto secession of the Albanian-dominated parts of Macedonia.[28] An initial draft of the law by the Minister for Local Government, Faik Arslani, from the Albanian DPA party, fuelled these fears by allowing close cooperation and joint institution between municipalities.[29] The Macedonian community argued that this could lead to the creation of an autonomous Albanian region in north-western Macedonia, facilitating a unilateral change to the TSG arrangements in the agreement. The Albanian parties boycotted parliament in response and the law was only passed under strong international pressure, which will be discussed further in the *International Guarantees* section of this chapter.

Implementation of the provision on the use of community emblems has also been controversial, with Macedonian nationalists seeking to minimise its impact. The Law on the Use of Flags of the Communities was originally adopted in 2005 when Albanian DUI was in coalition with the Macedonian Social Democrats (SDSM). However, when the Macedonian VMRO-DPMNE led the next government it challenged the Law in the Constitutional Court. Certain provisions were annulled by a Constitutional Court decision in 2007. The Albanian community was greatly angered by this decision. It appeared to be contrary to the relevant provisions in the OFA. Albanians also argued that it was reached in a majoritarian manner which was inconsistent with the broader

[28] Engström, J. (2002). Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State. *Journal on Ethnopolitics and Minority Issues in Europe*, No. 1, 1–21.

[29] Brunnbauer, U. (2002). The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments. *Journal on Ethnopolitics and Minority Issues in Europe*, No. 1, 566–597.

power-sharing principles of the Agreement (this will be discussed in detail in the *Domestic Guarantees* section below). The sensitivity of the issue, and other political developments, meant that the situation was not remedied until amendments to the law were passed in 2011. These amendments confirm the right of communities constituting more than 50% in a municipality to display their flag outside local or public buildings. However, it must be displayed alongside the Macedonian flag and the Macedonian flag must be one-third larger in size than the community flags.[30] These difficulties are illustrative of the Macedonian community attempting to interpret provisions in the peace accord related to TSG in such a way as to ensure their implementation mostly closely represents its desired outcome. This gave rise to political crises, dissatisfaction, and instability, as the provisions were not implemented until they were refined in prolonged negotiations.

The provisions for municipal language rights in the OFA became a key part of the discussions around the 2004 revision of municipal boundaries. While the revision was officially aimed at creating more sustainable municipalities, in terms of population and resources, the relative size of the ethnic groups rapidly became the most significant issue. The reorganisation became very controversial when it became evident that Albanian politicians were using it to increase the number of municipalities in which Albanians were a majority or breached the 20% boundary necessary to facilitate the use of Albanian in that municipality.[31] The most controversial boundary changes proposed were those affecting the municipalities of Struga and Kičevo, which were due to be enlarged to ensure Albanians became the majority in both municipalities. For Struga, expansion meant that the local Albanian population increased from 42 to 57%; while in Kičevo, the local Albanian population was set to rise from 31 to 59%.[32] Boundaries of the City of Skopje were also extended

[30]Lyons, A. (2012). Decentralisation and the Management of Ethnic Conflict: A Case Study of Macedonia. University of Bradford eThesis. Accessed 31 December 2017, https://bradscholars.brad.ac.uk/bitstream/handle/10454/5693/PhD%20Thesis%20-%20Aisling%20Lyon%2007014955.pdf?sequence=3.

[31]ICG (2003). Macedonia: No Room for Complacency. Skopje and Brussels: ICG. Accessed 31 December 2017, http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan015070.pdf.

[32]ICG (2004). Macedonia: Make or Break. Skopje and Brussels: ICG. Accessed 31 December 2017, http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan017930.pdf.

to include rural Saraj municipality and ensure the Albanian population reached the 20% threshold required to make Albanian an official language in the capital.

These reforms arguably undermined the OFA's premise that there was no territorial solution to ethnic problems and were very unpopular in the Macedonian community. In Struga and Kičevo the proposed changes undermined the Macedonian community's security, and Macedonians argued that they feared that they would not be able to access state services in these areas. Introducing bilingualism in Skopje, the capital city, frustrated the Macedonian community's need to be recognised as the majority and created a feeling that the Albanian community had been elevated to equal status.[33] In protest against this redistricting, the World Macedonian Congress initiated a referendum on the Law on Territorial Organisation, advocating a return to the status quo of 123 municipalities from the 84 created under the new legislation.[34]

A failure of fiscal decentralisation to ensure that municipalities have adequate financial independence and resources to effectively fulfil the additional competencies also undermined the ability of decentralisation to effectively manage inter-ethnic tensions. Macedonia's fiscal decentralisation reforms were carried out gradually in two stages. During the first phase, between 2005 and 2007, municipalities received reserved grants from central government to cover the operating costs of public service institutions. Municipalities which fulfilled certain legal criteria could then move into the next phase of fiscal decentralisation, in this stage municipalities were entrusted with the payment of staff salaries and the earmarked grants they received from the central government were transformed into unconditional block grants. This approach was proposed by the International Monetary Fund due to concerns that inadequate local financial management could contribute to an excessive budget deficit.[35]

This process was beset by constant delays, with a number of municipalities struggling to move from the first to second stage. Furthermore,

[33]Friedman, E. (2009). The Ethnopolitics of Territorial Division in the Republic of Macedonia. *Ethnopolitics*, Vol. 8, No. 2, 209–221.

[34]The referendum result was deemed invalid as turnout was below the necessary 50%, the role of the international community in this result will be discussed in the International Guarantee section.

[35]Lyons, A. (2014). Challenges to Municipal Fiscal Autonomy in Macedonia. *Publius: The Journal of Federalism*, Vol. 4, No. 44, 1–26.

the strength of the VMRO-DPMNE between 2009 and 2016, coupled with the existence of strong internal party discipline and vertical clientelist relationships, suggests that governing parties relied on party-controlled intergovernmental transfers and capital grants to fund devolved competences.[36] Over a decade after the OFA was reached and more than five years after fiscal decentralisation began, the EU hinted at the continuing challenge presented by these clientelist relationships arguing that there was a lack of transparency in how central government funding for municipal projects was allocated and that 'further efforts are required to ensure the financial sustainability of municipalities so they can carry out the responsibilities transferred to them'.[37]

Continuing demands by some Albanian leaders, including secessionist rhetoric and low-level violence, have sustained the majority Macedonian community's fears that Albanians are not committed to implementing the TSG arrangements provided for in the agreement, but rather want to extend and manipulate its provisions to obtain greater autonomy. In 2008 and again in 2014 the founding leader of the first ethnic Albanian political party PDP, Nevzat Halili, stated that the OFA was no 'longer operational' and proclaimed the Republic of Ilirida arguing that Macedonia should function as a federation of two equal republics.[38] The Albanian party, the DPA, repeatedly claimed that the OFA was a 'dead document' and its chairman Menduh Thaçi, threatened a new war of separation from the FYRM because Albanian demands were being constantly disregarded by Premier Gruevski and the VMRO-DPMNE.[39] While these positions do not necessarily receive widespread support from ordinary members of the Albanian community in the FYRM, such statements and actions undoubtedly destabilise the TSG arrangements. They contribute to Macedonian fears that Albanians would contravene

[36] Ibid.

[37] European Commission (2012). The former Yugoslav Republic of Macedonia Progress Report. Brussels: European Commission. European Commission (2013). The former Yugoslav Republic of Macedonia Annual Progress Report. Brussels: European Commission.

[38] BBC Monitoring Europe (2014). Former Albanian Party Leader Proclaims Republic in Western Macedonia, Text of report by Macedonian independent news agency Makfax.

[39] Rosůlek, P. (2011). Macedonia in 2011—On the Way Towards Stabilization or before the New 'Grand' Agreement? in M. Risteska & Z. Daskalovski (eds.), *One Decade after the Ohrid Framework Agreement: Lessons (to Be) Learned from the Macedonian Experience*. Skopje: Friedrich Ebert Stiftung and Center for Research and Policy Making.

the TSG arrangements and unilaterally push for further autonomy, this coupled with other developments, also encourage hard-line Macedonian nationalism.

This Macedonian nationalism was largely promoted by Prime Minister Nikola Gruevski and his VMRO-DPMNE party—which was the largest party in the government coalition from 2006 to 2016. Particularly after Greece's veto of the FYRM application to join NATO in 2008, discussed below, and his re-election in 2011, Gruevski appeared to abandon efforts to improve inter-ethnic relationships and pursued a hardline nationalist agenda. The most visible representation of this agenda was the so-called Skopje 2014 urban renewal programme which involved building a new archaeological museum, national theatre, philharmonic hall and many sculptures.[40] The Hellenic nature of many of the buildings and sculptures suggested that the programme was a propaganda tool in the long-standing name dispute with Greece. However, the ethnically exclusive nature of the monuments also angered ethnic Albanians, reinforcing suspicions that the majority Macedonian community was not interested in creating an inclusive FYRM, even in the ethnically mixed capital.

Guarantee Mechanisms

The TSG provisions in the OFA demonstrate how enhanced local government can be used as part of a wider packaged aimed at managing an inter-ethnic conflict. It seeks to provide the minority Albanian community in the FYRM with greater autonomy by increasing the powers enjoyed by municipalities. It was hoped that by delivering TSG through local government reform and attempting to de-ethnise such reforms, rather than creating an autonomous unit for the Albanians or even creating a bi-national federation, the provisions would not create the centripetal momentum seen elsewhere—particularly in neighbouring BiH. However, the TSG arrangements in the FYRM became ethnised and the conflict parties, both the majority Macedonian community and the minority Albanian community, feared manipulation of the institutions by the other side to move the uneasy compromise in their desired direction. The Agreement explicitly provides strong domestic guarantees to guard against such dangers. Unusually the enhanced local government

[40]Smith, H. (2011). Macedonia Statue: Alexander the Great or a Warrior on a Horse? *The Guardian*, August 14.

is constitutionally protected and the passing or alteration of specific laws, including those dealing with local government, language, and symbols require supra-majorities. But these guarantees have not always been effective. Furthermore, the track record of the international community as a guarantor of the TSG institutions is mixed; at times it has successfully incentivised the domestic parties to compromise and implement the Agreement, yet it has also been guilty of ethnising the TSG arrangements in contravention of the OFA. The name dispute with Greece has also fundamentally undermined the ability of promises of Europe–Atlantic integration to stabilise the TSG institutions.

Domestic Guarantees

The Agreement provides strong domestic guarantees to ensure that the TSG institutions, and other arrangements, outlined in the OFA would not be unilaterally altered. The accord provided that relevant laws could only be adopted or altered using supra-majorities, this system is known as the Badinter Principle and is designed to redistribute parliamentary power between the Macedonian majority and the minority groups. Two slightly different formulations were used.

Firstly,

> the laws on local finances, local elections, boundaries of municipalities, and the city of Skopje shall be adopted by a majority vote of the Representatives attending, within which there must be a majority of the votes of the Representatives attending who claim to belong to the communities not in the majority in the population of Macedonia.

Secondly,

> the articles on local self-government, Article 131, any provision relating to the rights of members of communities, including in particular Articles 7, 8, 9, 19, 48, 56, 69, 77, 78, 86, 104 and 109, as well as a decision to add any new provision relating to the subject matter of such provisions and articles, shall require a two-thirds majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives claiming to belong to the communities not in the majority in the population of Macedonia.

Both formulations are aimed at ensuring that laws providing for and related to local government, and others laws which provide communities with specific group rights, cannot be unilaterally altered. While not specifically mentioning the Albanian community, the supra-majority requirements are effectively a veto mechanism for the Albanian community. However, there is very little evidence that these principles have been applied at the municipal level despite stipulations for their use.[41]

After the 2006 parliamentary elections the VMRO-DPMNE, the largest party, failed to successfully negotiate a coalition agreement with the largest Albanian party, the DUI, and instead the smaller Albanian party, the DPA was included in the government. This created a difficult situation, which lasted until 2008, as it did not control enough of the votes of the non-majority community MPs to ensure it could pass legislation under the Badinter process. However, unlike the extensive veto rights in BiH, the double majority voting rules have not resulted in frequent decision-making blockages or paralysis. Nevertheless, the question of to which laws the Badinter principle should apply has been a source of conflict between the Macedonian and Albanian communities. Although OFA listed the fields in which such a double majority is necessary, this list has been interpreted differently and this has resulted in substantial delays in the implementation of the reforms outlined in the Agreement.[42] For example, in January 2007, the Assembly was debating changes to the Broadcasting Law, originally adopted with the Badinter principle. The representatives of DUI demanded that changes be passed also with the Badinter principle; however, the majority rejected this demand.

The OFA provides for the establishment of the Committee on Inter-Community Relations, which 'in the event of a dispute among members of the Assembly regarding the application of the voting procedure…shall

[41]Association for Democratic Initiatives (2006). Power Sharing—New Concept of Decision Making Process in Multicultural Municipalities, quoted in Lyons, A. (2012). Decentralisation and the Management of Ethnic Conflict: A Case Study of Macedonia. University of Bradford eThesis. Accessed 31 December 2017, https://bradscholars.brad.ac.uk/bitstream/handle/10454/5693/PhD%20Thesis%20-%20Aisling%20Lyon%2007014955.pdf?sequence=3.

[42]Bieber, F. (2011). Introduction, in M. Risteska & Z. Daskalovski (eds.), *One Decade after the Ohrid Framework Agreement: Lessons (to Be) Learned from the Macedonian Experience*. Skopje: Friedrich Ebert Stiftung and Center for Research and Policy Making.

decide by majority vote whether the procedure applies'.[43] In practice, the Committee has been of only marginal significance, as evidenced by the fact that the Committee was established in September 2003, nearly a year after the post-conflict elections and met only 6 times between its formation and May 2004. Instead, the key mediating body has been the Government, using elite discussion and informal agreements. Furthermore, when difficulties arose during the 2006–2008 period, such as the above-mentioned dispute over whether changes to the Broadcast Law required a double majority, the Committee did not meet to make a decision on the voting procedure, although this was the only body officially mandated to settle such disagreements. Instead, the Speaker of the Parliament, Ljubisa Georgievski, drafted and distributed an opinion that the changes to the Broadcasting Law need not be passed according to the Badinter process.[44]

Local level commissions have also not operated effectively 'owing to outstanding issues related to the election of members, administrative support, and the operating budget'.[45] Local authorities have a legal obligation to establish such commissions in municipalities where at least 20% of the population belong to a certain community. The International Crisis Group (ICG) argued that 'the parliamentary committee on inter-ethnic relations and the municipal-level inter-ethnic committees should meet more regularly, monitor inter-ethnic issues and contribute to policy-making more effectively'.[46]

Given that the OFA explicitly rejects federalism as a solution to the inter-ethnic conflict in the FYRM, it is not unsurprising that the Agreement did not provide for the municipalities to be represented in

[43]Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[44]Mehmeti, E. (2008). Implementation of the Ohrid Framework Agreement, in S. Dehnert & R. Sulejmani (eds.), *Power Sharing and the Implementation of the Ohrid Framework Agreement*. Skopje: Friedrich Ebert Stiftung and Center for Research and Policy Making.

[45]Council of Europe (2014). Fourth Report Submitted by the Government of the former Yugoslav Republic of Macedonia Pursuant to Article 25, Paragraph 2 of the Framework Convention for Protection of National Minorities, received 14 July 2014. Strasbourg: Council of Europe.

[46]ICG (2011). Macedonia: Ten Years after the Conflict. Skopje/Istanbul/Brussels: ICG. Accessed 31 December 2017, https://www.crisisgroup.org/europe-central-asia/balkans/macedonia/macedonia-ten-years-after-conflict.

the central government through a second chamber. The municipal association (widely known by its Macedonian acronym ZELS) is the official channel through which the municipalities can attempt to have their voice heard in central government. Though ZELS has played a useful role at times, including advocating for sufficient fiscal decentralisation to allow municipalities to fulfil their mandates and providing training to strengthen municipal capacities, it has often been bypassed by local and national politicians who use party structures to carry out negotiations. This puts municipalities with mayors from ruling parties in stronger positions than other mayors, creating inequitable access to central government resources including capital grants.[47] Furthermore, as the majority of municipalities have been controlled by governing parties, ZELS has become dominated by mayors from these parties compromising its capacity for independent action.[48]

The OFA also includes constitutional guarantees that the TSG arrangements would not be unilaterally changed. The double majority Badinter voting procedures are entrenched in constitutional amendments, see Articles 114, 115, and 131. Articles 69 and 78 provides for the establishment of the Committee for Inter-Community Relations, mentioned above, and Article 7 includes stipulations on municipal language rights. Finally, Article 131 of the Constitution also stipulates that changes to the constitutional articles which related to rights of the communities including those mentioned above, can only be changed by 'a two-thirds majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives claiming to belong to the communities not in the majority in the population of Macedonia'.[49] This is distinct to the specification that other constitutional articles can be changed by a simple two-thirds majority and highlights a desire to strongly guarantee that the TSG arrangements, and other provisions related to community rights, will not be unilaterally altered. However, constitutional protections are only as strong as the domestic constitutional arbitration mechanism, usually a Supreme or Constitutional Court and the Macedonian Constitutional Court has not always been effective in this role.

[47] Ibid.

[48] Macedonia Legal Expert (2016). Interview with Dawn Walsh. Skopje, November 24.

[49] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

In case U.No.133/2005, the Court found that certain provisions (Articles 4, 5, 6, and 7) of the Law on the Use of the Flags of the Communities were unconstitutional. The decision in U.No.133/2005 was arguably contrary to provision within the OFA. It limited the capacity of decentralised administrations to display flags which represented the identity of the majority within that municipality. The Court primarily justified its decision by arguing that these provisions undermined the rights of individuals from other communities and was not in line with international practise of only displaying the flags of other states in an effort to promote good relation with these states.[50] This was a restrictive interpretation of the relevant provisions in the OFA which provided that 'local authorities will be free to place on front of local public buildings emblems marking the identity of the community in the majority in the municipality respecting international rules and practises'.[51] This decision damaged the ability of the TSG to act as a conflict management mechanism as it ran contrary to a central aim of the OFA's TSG provisions to provide the Albanian community with certain rights, including the right to use flags and emblems which reflected its identity, in municipalities where it was in the majority.

The Albanian community was particularly angered by this ruling as it echoed the Court decision from 1997, discussed early in this chapter, and was indicative of an unwillingness of the Court to recognise the increased autonomy which the community had obtained in the 2001 Agreement. Furthermore, it was part of a pattern of behaviour. The Court also refused a bilingual complaint lodged by the former Mayor of Tetovo arguing that the Court only accepted correspondence in the Macedonian language. While this action was not directly related to the TSG provisions in the Agreement it was in contravention to the OFA more broadly and clearly failed to acknowledge the Agreement's guarantee that 'any other language spoken by at least 20% of the population is also an official language'.[52]

The legitimacy of the decision was also questioned due to the ethnic divisions which emerged during the case. Both Albanian judges resigned

[50]Macedonia Constitutional Court (2007). U.No.133/2005. Skopje: Macedonian Constitutional Court.

[51]Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[52]Ibid.

in protest at the Court's decision. The Court Chairman Jusufi, one of those who resigned, claimed he could not 'sign such a decision'. Jusufi also argued that the Court's procedures must respect the double voting minority protection mechanisms, arguing that he could not support the decision as it reflected a majoritarian principle which was in contravention to the Badinter double majority voting principle which was used to adopt the Law in the Assembly.[53] This raises questions as to how Courts can be best designed to defend minority protections, including those implemented through TSG. The Macedonian Constitutional Court's composition is strictly regulated to ensure minority representation. It is composed of nine judges, three of which are elected through the double majority system. Yet its internal decision-making procedure requires a simple majority allowing the judges who have been elected without the effective minority veto to interpret minority protections. Given the ethnically divisive and politicised nature of minority provisions, including TSG provisions, in post-conflict situation such an arrangement undermines the strength of constitutional guarantees.

There was a protracted delay in the implementation of the decision in U.No.133/2005. As was discussed in the previous chapter, the judiciary does not have the ability to compel parties to enforce its decisions and where it is weak non-implementation is a threat. The main Albanian opposition political party, DUI, threatened to ignore the Court's decision. Municipalities with a DUI mayor initially called for civil disobedience and claimed that they would continue to fly the Albanian flag.[54] Despite the fact that the main government party had been central in instigating the case, changes in the political context between the initiation of the case in 2005 and the decision in 2007 also made the government wary of implementing the decision. In 2005 nationalist feelings among the majority Macedonian community were heightened in response to the controversial redrawing of municipal boundaries in 2004. By 2007 when the decision was announced, there were ongoing violent clashes along the Macedonian-Kosovan border. Kosovo final status talk were scheduled for a month after the decision and the NATO summit at Bucharest where Macedonia hoped to receive an invitation for membership was six months away. In this context, the government was

[53] BBC Monitoring (2007). Macedonia's Constitutional Court Should Avoid 'Unnecessary Provocations'—Daily, November 1.

[54] Ibid.

reluctant to implement the decision for fear of further exacerbating ethnic tensions.[55] As mentioned earlier in this chapter the flags issue was only resolved in 2011.[56] This highlights the effect of regional events on the implementation and stability of TSG as a conflict management tool. Favourable regional and international involvement is often necessary to ensure that either the centripetal or centralising fears of conflict parties are not realised.

International Guarantees

The OHR foresaw a role for the international community in monitoring and assisting in its implementation. This involvement included an international military presence, international assistance in developing domestic capacities, economic support, and potential Euro-Atlantic integration. The involvement was vital to safeguard the successful implementation and operation of the Agreement broadly and was also directly connected to the stability of the TSG arrangements. Despite the success of the international community in intervening to prevent the conflict in the FYRM becoming a full-scale civil war and the helpful role it has played over the last sixteen years, there have also been substantial weaknesses in its approach. Most noteworthy, Euro-Atlantic integration—a very important incentive for the domestic parties to implement and respect the provisions in the OFA—was allowed stall due to the name dispute with Greece.

The international community used economic incentives to guarantee that the provisions set out in the OFA were fully implemented and respected. The agreement invited

> the European Commission and the World Bank to rapidly convene a meeting of international donors after adoption in the Assembly of the Constitutional amendments in Annex A and the revised Law on Local Self-Government to support the financing of measures to be undertaken for

[55] Ilieveski, Z. (2008). The Role of Human and Minority Rights in the Process of Reconstruction and Reconciliation for State and Nation Building: Macedonia. MIRICO: Human and Minority Rights in the Life Cycle of Ethnic Conflicts.

[56] Risteski, L.A., & Kodra Hysa A. (2016). Strategies for Creating the Macedonian State and Nation and Rival Projects between 1991 and 2001, in P. Kolstø (ed.), *Strategies of Symbolic Nation-Building in South-Eastern Europe*. London: Routledge.

> the purpose of implementing the Framework Agreement and its Annexes, including measures to strengthen local self-government and reform the police services, to address macro-financial assistance to the Republic of Macedonia, and to support the rehabilitation and reconstruction measures identified in the action plan

In order to pressurise the domestic parties to adopt the necessary constitutional amendments and reform law on local government, the international community tied the passing of these amendments and laws to the holding of the donor conference. The conference was initially planned for October 2001 but was not held until March 2002, at which point these constitutional reforms and new law had been adopted.

The international community also provided practical assistance to help the domestic parties to implement the OFA, including special support which aided in the implementation and operation of the TSG arrangements. The Organisation for Security and Cooperation in Europe (OSCE) was involved in monitoring the decentralisation process and producing annual assessments of municipal reform. The organisation has also sought to develop the financial and human capacity of the municipalities through training programmes.[57] Despite ongoing challenges such assistance programmes arguably stabilise the TSG institutions by focusing on increasing the quality of local governance rather than divisive ethnic issues. The OSCE was also involved in the implementation of language rights in the municipalities. It established an inter-ministerial group to examine the realisation of language rights on a local level. The work of the group was delayed due to the reluctance of Secretariat for the Implementation of the Ohrid Framework Agreement (SIOFA) to participate. The group found that resource scarcity made municipalities reluctant to recognise additional languages as working languages. Even where they were recognised, the municipalities were often unable to ensure that recognised languages become working languages in practice.[58] This shows that light touch international interventions, such as

[57] Organisation for Security and Cooperation in Europe (OSCE) (2007). Survey on Decentralisation 2007. Skopje: OSCE, Spillover Mission to Skopje.

[58] Lyons, A. (2012). Decentralisation and the Management of Ethnic Conflict: A Case Study of Macedonia. University of Bradford eThesis. Accessed 31 December 2017, https://bradscholars.brad.ac.uk/bitstream/handle/10454/5693/PhD%20Thesis%20-%20Aisling%20Lyon%2007014955.pdf?sequence=3.

assistance in implementing language rights as part of TSG arrangements, can only be effective if there is also domestic political will.

Both the OSCE and the EU were also involved in policing training. This again directly linked to decentralisation as it included improving policing at municipal level. Efforts to ensure that policing structures and procedures met international best practise also arguably helped to dispel fears that increased municipal ownership of policing in the OFA could led to discrimination or even the creation of separatist Albanian forces.

The OFA demanded the 'complete voluntary disarmament of the ethnic Albanian armed groups and their complete voluntary disbandment' and the 'establishment of a general, unconditional and open-ended cease-fire, agreement on a political solution to the problems of this country'.[59] At the end of August 2001, a thirty-day NATO mission, Essential Harvest, composed of 3500 troops, was deployed to the FYRM to oversee the disarmament of former Albanian rebels and to destroy their weapons.[60] This mission was necessary to establish a security environment in which the Agreement could be implemented. It was directly relevant to the implementation and operation of the TSG arrangements as the presence of an armed Albanian group which had been fighting for increased autonomy greatly increased Macedonian concerns. Albanians could unilaterally contravene the agreed territorial provisions, with armed groups re-engaging in violence.

Yet Macedonians complained that NATO only gathered approximately 10% of the NLA's weapons, and that those surrendered were junk weapons. The Ministry of Defence argued that there may still be over half a million illegal weapons in circulation. Furthermore, former members of the NLA were later responsible for organising low-intensity incidents.[61] NATO's failure to collect more weapons limited the effectiveness of the mission. The mission was restricted by its mandate

[59]Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[60]NATO (2002). NATO's Role in the former Yugoslav Republic of Macedonia. Accessed 31 December 2017, http://www.nato.int/fyrom/tfh/home.htm#fs.

[61]Jerker Lock, J. (2003). Macedonia: A Conflict Analysis. Division for South-East Europe, Swedish International Development Agency. Rosůlek, P. (2011). Macedonia in 2011—On the Way Towards Stabilization or before the New 'Grand' Agreement? in M. Risteska & Z. Daskalovski (eds.), *One Decade after the Ohrid Framework Agreement: Lessons (to Be) Learned from the Macedonian Experience*. Skopje: Friedrich Ebert Stiftung and Center for Research and Policy Making.

from guaranteeing that Albanians did not have the capacity to use force to violate the TSG arrangements at a future date. NATO instructions only allowed it to oversee voluntary disarmament, not to compel the NLA to disarm. Additionally, the visible presence of international troops undoubtedly had a deterrent effect and the international community ensured that the international military presence was not prematurely terminated. Essential Harvest was replaced by operation Amber Fox (September 27, 2001–December 15, 2002) which was officially in charge of protecting EU and OSCE international monitors, but mostly focused on preventing clashes in the former crisis areas.[62]

The OFA also explicitly connected the fulfilment of its stipulations with future integration of the FYRM into the Euro-Atlantic community.[63] This essentially linked both future membership of NATO and the EU to successful implementation of the provisions in the Agreement. These future memberships were tied to the implementation of the Agreement. The European Commission, on recommending that the FYRM be granted membership candidate status, praised the 'substantial progress made by the country in completing the legislative framework related to the Ohrid Framework Agreement of 2001'.[64] While EU membership was tied to a range of other reforms, it has been explicitly linked to the implementation of the TSG elements in the Agreement. The linking of decentralisation to the European principle of subsidiarity through the OFA stipulation that the revised law on local government would be 'in conformity with…the European Charter on Local Self-Government, and reflecting the principle of subsidiarity in effect in the European Union', essentially created a conditional relationship between EU membership and the passing and implementation of this new law.[65] The EU

[62] NATO's Allied Harmony and EU missions Concordia and Proximia respectively also constituted an international military presence in the FYRM though the focused more on assisting the domestic Dawn Walshities with security sector reform in preparation for Euro-Atlantic integration and therefore are discussed momentarily in relation to prospective NATO and EU membership.

[63] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[64] Commission of the European Communities (2005). Commission Opinion on the application from the former Yugoslav Republic of Macedonia for membership of the European Union. Brussels: Commission of the European Communities.

[65] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

has also closely monitored the implementation of decentralisation as part of its assessment of the FYRM's accession process and has used the associated reports to press the Macedonian government to ensure that municipalities have the necessary resources to make decentralisation effective.[66] This conditionality was particularly important in guaranteeing that Macedonian elites dissatisfied with the decentralisation outlined in the Agreement, viewing it as both rewarding the 'terrorist' NLA and threatening the integrity of the state, implemented and operated these provisions.

Yet the effectiveness of these international guarantees was undermined by the international community's own behaviour surrounding redistricting in 2004, regional events and challenges, and most acutely the name dispute with Greece. To date, this dispute has been an insurmountable barrier preventing the FYRM's membership of both the EU and NATO. The OFA provided for the redrawing of municipal boundaries, with international assistance, following an internationally monitored census.[67] The plan was to use the census to complete a redistricting process which would create more sustainable municipalities. However, as was discussed earlier in this chapter, when the process was undertaken in 2004, ethnic composition of municipalities instead became a central if not the key factor in redrawing boundaries. Albanian politicians sought to maximise the number of municipalities where they were a majority as well as ensuring Skopje became bilingual by redrawing its boundaries to ensure Albanians breached the 20% threshold. This infuriated the Macedonian community and arguably breached of the OFA's commitment that there was no territorial solution to ethnic difficulties.

The World Macedonian Congress, a pan-Macedonian diaspora organisation, and the ethnic Macedonian opposition, organised the collection of 150,000 signatures necessary to compel a nationwide referendum to approve or reject these new boundaries. The governing coalition (SDSM and DUI) argued were that these revisions reflected the spirit of the OFA and were necessary for Euro-Atlantic integration. Despite international support for this position opinion polls suggested that the

[66]See for example (2010) Commission of the European Communities the former Yugoslav Republic of Macedonia 2010 Progress Report. *Commission Staff Working Paper*. Brussels: Commission of the European Communities.

[67]Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

new boundaries would be rejected. However, just three days before the referendum, the USA surprisingly recognised the FYRM Macedonia under its constitutional name, The Republic of Macedonia rather than the compromise name the former Yugoslav Republic of Macedonia. The referendum subsequently failed to prevent the redistricting. While voters rejected the boundaries, the poll was invalid due to low turnout. The recognition of the FYRM under its constitutional name, the Republic of Macedonia, was linked to the failure of this referendum.[68] Recognition by the USA went some way to counter Macedonian fears that the very existence of the state was under threat due to the refusal of its neighbours to recognise its legitimacy. This in turn somewhat alleviated fears that increased autonomy for the internal Macedonian community was a threat to the integrity of the state.

As the kin-state of the minority Albanian community in the FYRM, Albania has been associated with calls for the creation of a 'Greater Albania'. Yet, due to its preoccupation with its own political crises and reliance on international support, Macedonia's neighbour has largely avoided becoming embroiled in the country's domestic affairs. However, Albania has linked the full implementation of the OFA to its support for the FYRM's Euro-Atlantic integration.[69] The FYRM's other neighbours and the regional power, Russia, have failed to provide guarantees to the TSG arrangements, as for example was the case in Northern Ireland, rather their rhetoric and challenges have at times destabilised the TSG institutions. In particular, issues around the recognition of Kosovo's independence have been manipulated by Serbia and Russia to suggest that such independence would necessitate the redrawing of borders in the Balkans and that Albanians would use the occasion to seize additional land that was home to Albanian majorities, including in the FYRM.[70] Rather than guaranteeing that the TSG arrangements in the

[68] Ilievski, Z. (2008). Country Specific Report: Macedonia. The Role of Human and Minority Rights in the Process of Reconstruction and Reconciliation for State and Nation-Building: Macedonia. MIRICO: Human and Minority Rights in the Life Cycle of Ethnic Conflicts.

[69] Çejku, A. (2011). Speech of the Ambassador Arben Çejku Ambassador of the Republic of Albania in Macedonia, in B. Reka (ed.), *Ten Years from the Ohrid Framework Agreement Is Macedonia Functioning as a Multi-ethnic State?* Tetovo: SEE University.

[70] Zunce, V. (2010). Territorial Swap Could Destabilise Balkans. Faki reported by BBC worldwide monitoring. Russian State News Agency ITAR-TASS (2008). Albanians May Ask for More in Montenegro, Macedonia–Russia's NATO Envoy, Text of report by Russian state news agency ITAR-TASS. BBC Worldwide Monitoring.

2001 Agreement will not be violated, such provocative comments greatly increase Macedonian fears. They felt that the TSG changed without their consent and the territorial integrity of the state was disrupted.

Such threats also increase the FYRM's desire to become a NATO member in order to enjoy its collective security arrangements. This is despite the Macedonian community's negative attitude to NATO's involvement in Kosovo in the late 1990s. There were accusations that, at best, NATO it did not effectively police the FYRM-Kosovo border to prevent militants and weapons being imported and used in 2001 conflict, that its support for the KLA in Kosovo encouraged Albanian militants in the FYRM, and that at worst NATO was biased in favour of Albanians.[71] Thus while there are no warm feelings towards NATO in the FYRM, its citizens support membership for the protection it would offer. If the FYRM was to achieve NATO membership this would certainly lessen Macedonian fears that the internal Albanian community could unilaterally violate the TSG arrangements in the OFA and join with kin either in Kosovo or Albania.

Indeed, the country had been on the path to NATO membership before the conflict, becoming a member of NATO's Partnership for Peace initiative in 1995 and joining NATO's Membership Action Plan and the Planning and Review Process in 1999. Furthermore, after the conflict, when the NATO mission in country handed over control to the EU in 2003 it remained present to help the government initiate security reforms necessary for NATO membership.[72] However, it has not been a failure to reach NATO standards that has proven to be the most difficult barrier to the state achieving NATO membership. A range of prominent members have praised the FYRM's progress on reforms and have supported its membership ambition. Yet the country failed to achieve

[71] Bissett, J. (2001). We Created a Monster; Albanian Terrorists, Armed by the West to Fight; in Kosovo, are Destroying Macedonia, Says Canada's; Former Ambassador to Yugoslavia James Bissett. *The Globe and Mail* (Canada), July 31. Macedonia Matters, *The Times* (London) March 16, 2001. Daftary, F. (2001). Conflict Resolution in FYR Macedonia: Power-Sharing or the 'Civic Approach'? *Helsinki Monitor*, Vol. 12, No. 4, 291–312. Engström, J. (2002). Multi-ethnicity or Bi-nationalism? The Framework Agreement and the Future of the Macedonian State. *Journal of Ethnopolitics and Minority Issues in Europe*, No. 1, 1–21.

[72] Paintin, K. (2009). States of Conflict: A Case Study on Conflict Prevention in Macedonia. London: Institute for Public Policy Research.

membership at a summit in 2008 because of its ongoing name dispute with NATO member Greece.

Athens does not recognise the state under its constitutional name 'The Republic of Macedonia', viewing it as an expropriation of Greece's Hellenic heritage and a potential territorial claim against Greece's northern province of the same name.[73] Despite a 1994 Interim Accord between the two countries in which the Greek government agreed that it would not block the it neighbour's entry into international organisations it has effectively done so. Following the 1998 summit which explicitly linked resolution of the name dispute to NATO membership, the FYRM sued Greece at the International Court of Justice and won in 2011 but this victory did not progress Macedonian aspirations to join NATO.[74] The failure of the FYRM to join NATO weakened the ability of the international community to provide credible guarantees of the TSG arrangements provided in the 2001 Agreement. As discussed above, NATO membership would have reassured the Macedonians that the Albanian minority would not breach the territorial arrangements to unite with their kin across international borders.

The refusal of NATO to offer membership to the Macedonians in 2008 also created an additional division between the majority Macedonian community and the Albanian minority. Attitudes towards the name dispute differ in the two main communities. There has been support for a hardline attitude to the dispute within the majority community, this is understandable as for Macedonians the name dispute is representative of the existential threat posed by its neighbours.[75] However, the name issue is less sensitive for the Albanian community and at times it has pushed for a compromise to allow for Euro-Atlantic integration.[76] After the NATO rejection Prime Minister Gruevski

[73]ICG (2011). Macedonia: Ten Years after the Conflict. Skopje/Istanbul/Brussels: ICG. Accessed 31 December 2017, https://www.crisisgroup.org/europe-central-asia/balkans/macedonia/macedonia-ten-years-after-conflict.

[74]Makfax (2015). Greek Crisis Seen Providing Macedonia with Chance to Push for NATO Entry. Excerpt from report by Macedonian independent news agency Makfax.

[75]Business Monitor International (2012). Emerging Europe Monitor—South-East Europe, Macedonia. May 28.

[76]BBC Worldwide Monitoring (2008). Think-Tank Urges EU to Pressure Greece Over "Patently Absurd" Macedonia claims, Text of report in English by Czech-based Transitions Online website on 4 April), April 5.

focused on ethnic politics, 'he campaigned in snap June 2008 elections on a platform of ethnic pride based in part on an idiosyncratic view of Macedonians' glorious ancient past', this included the much derided Skopje 2014 urban renewal project.[77] This approach antagonised Greece and damaged inter-ethnic relations in the FYRM. Gruevski governed for almost ten more years, undermining the quality of Macedonian democracy by engaging in state capture. Elections in December 2016 led to months of political deadlock as the parties failed to form a government. The deadlock was broken in April 2017, and a change in government, which many feared would not be permitted by Gruevski, especially after a violent incident in which a mob attacked SDSM and Albanian politicians in the Assembly, has offered new hope that the name dispute may be resolved and that NATO membership may be finally secured.[78] This new government and its renewed approach to Euro-Atlantic integration offers the international community an opportunity to re-engage in the FYRM and ensure that the OFA is respected, including its TSG provisions.

Conclusion

The Macedonian model of TSG is different from the others discussed in this book, using enhanced local government rather than federalism or autonomy. Furthermore, the OFA avoids presenting the TSG, and other provisions in the Agreement, as being targeted at the Albanian community, instead framing them as aimed at bringing all minorities groups closer to the state. These factors are aimed at alleviating Macedonian fears that the Albanian community's demands for autonomy could undermine the integrity of a state already anxious about its neighbours' attitudes towards it. However, the demographics ensure that the Albanian community is the main beneficiary of the enhanced decentralisation, and the redrawing of municipal boundaries in 2004 further ensured that the TSG arrangements strengthened its position. This redistricting, separatist rhetoric by some leaders in the Albanian community, and regional events, heightened Macedonian fears that the TSG

[77] ICG (2011). Macedonia: Ten Years after the Conflict. Skopje/Istanbul/Brussels: ICG. Accessed 31 December 2017, https://www.crisisgroup.org/europe-central-asia/balkans/macedonia/macedonia-ten-years-after-conflict.

[78] Smith, H. (2017). Macedonia and Greece Appear Close to Settling 27-year Dispute over Name. *The Guardian*, June 13.

arrangements would be used by the Albanians to undermine the integrity of the state. On the other hand, efforts by the majority Macedonian community to limit the enhanced autonomy of the municipalities and the exclusive nationalism of Nikola Gruevski and his VMRO-DPMNE party, which was the major government coalition party from 2006 to 2016, raised Albanian concerns that the TSG institutions, and other minority protections, would not be fully and faithfully implemented.

The domestic guarantees which the Agreement sought to provide were largely undermined by ethnic divisions and the weaknesses of domestic institutions, which were essentially captured by Nikola Gruevski between 2006 and 2016. Like the other cases in this volume, the FYRM's experience with TSG shows the weaknesses of domestic courts in enforcing domestic guarantees. The international community's initial intervention in the 2001 conflict was undoubtedly very successful, a coordinated effort prevented the conflict from escalating and was essential in the conclusion of the OFA. In the years which followed the international community provided some useful assistance in strengthening municipal capacity, for example in the areas of police training and language rights. However, it also made some serious missteps.

The international community facilitated the redrawing of municipal boundaries in 2004. This undermined its role as a guarantor of the OHR's TSG arrangements as it put ethnic composition ahead of effective governance and arguably contravened the Agreement's statement that there were no territorial solutions to the ethnic tensions in the FYRM. It could be claimed that the international community was simply seeking to ensure that the apparently contradictory nature of the Agreement's implicit commitment to community self-government at a local level and the above statement that there was no territorial solution to the conflict, did not lead to renewed conflict. The USA's recognition of the State under its constitutional name was aimed at providing the Macedonian community with security in light of the threat posed by the redistricting which was necessary to satisfy Albanian needs. However, the redistricting did not only further ethnise local government, it failed to implement international best practise to create municipal units which were large enough and had sufficient resources to be effective. In allowing for the maintenance and creation of ineffective municipalities the international community failed to utilise TSG effectively. This is in sharp contrast to the BiH case where the international community supported reform of the TSG arrangements. While this has also undoubtedly complicated the

international community's role as guarantor of the TSG in BiH, at least it was aimed at improving the quality of government.

Allowing the name dispute with Greece to act as a barrier to the FYRM's Euro-Atlantic integration undermined the potential of a powerful soft international guarantee. The attraction of the EU has waned in the last decade, due to the economic crisis of 2007, and the EU is unlikely to engage in further enlargement in the immediate future as it concentrates on other issues—for example Brexit—but membership is still attractive. It would also likely improve the economic situation in the country, which could help improve inter-ethnic relations by increasing the resources available to address economic grievances. Despite feelings that it has been biased against the majority Macedonian community in the past, as discussed above NATO membership is still highly coveted for the security it offers. Furthermore, while the realisation of both EU and NATO membership would remove the ability of the international community to use these as a carrot persuading the parties not to violate the TSG arrangements in the OHR, the benefits of these memberships would likely have a positive effect on inter-ethnic relations, offering additional security and economic opportunity. This highlights that while the guarantee provided by membership conditionality cannot necessarily be maintained, long-term actual membership can also help stabilise the TSG arrangements.

The Macedonian case also illustrates that regional dynamics can undermine international guarantees of TSG. In particular, and in a very similar way to the BiH case, Serbia and more importantly Russia, used the dispute over the final status of Kosovo to try and destabilise the FYRM, threatening the integrity of the state. The malignant role of Russia in the Balkans in recent years is very worrying. Both the BiH and FYRM cases in this volume underline the delicate nature of the TSG compromises which were necessary to end violence. While these states have not thrived, and serious issues remain, such TSG arrangements represented the only bargains which were capable of ending violence, and they need regional and international support to ensure that such violence does not reoccur. However, the recent developments in the FYRM, as of December 2017, are heartening. After appearing to on the brink of a coup, the new Macedonian government is approaching efforts to resolve the long running name dispute with Greece in a very positive way. Such an approach removes a source of frustration for the Albanian community. Ending this dispute would undoubtedly have great benefits, not least

the reopening of the Euro-Atlantic integration path which, as discussed above, could increase the stability of the TSG institutions and improve inter-ethnic relations.

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Moldova: Weak Autonomy, Central Government Neglect, and Mixed International Impact

Unlike the cases in the preceding chapters of this volume, the conflict between the Moldovan majority and the small Gagauz minority, located mainly in the south of the country, was addressed not through the conclusion of a peace accord, but through the enactment of a piece of domestic legislation: The Law on the Special Juridical Status of Gagauzia (Gagauz-Yeri). The Law was made possible by constitutional amendments made in the wake of the 1994 Moldovan elections and reflected negotiations between central government and Gagauz politicians which had been ongoing since 1992. The Law seeks to balance the minority's demand for territorial autonomy, which had been growing since the 1980s and had led to small-scale violent attacks by Gagauz hardliners targeted at the police, with the majority's desire for a unitary state. The Gagauz case is important as it has successfully prevented widespread violence and has been offered as a template to resolve other such disputes, primarily the dispute between the Moldovan central government and the breakaway Transniestria region, but also other conflicts in the former Soviet Union states and Eastern Europe more widely.

Despite its relative success in preventing violence, the law has fundamental weaknesses. The territorial self-government (TSG) provided for in both the Constitution and the Law on the Special Juridical Status of Gagauzia (Gagauz-Yeri) does not include sufficient detail to allow for smooth implementation and operation of the TSG. Unlike the other cases in this book, the legal framework for TSG was not a compromise

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in so far as the Gagauz were satisfied with the provision of autonomy and did not seek independence or unification with another state. Thus, the ambiguity was not 'constructive ambiguity' rather it was indicative of a poorly written Statute and Constitution. This has led to disagreements in its application and operation. This lack of detail in conjunction with profoundly weak domestic institutions has undermined efforts to guarantee the TSG arrangements. It is near impossible to stabilise arrangements which have not been clearly established. Furthermore, the low level of violence during the conflict means that it has not attracted a high level of interest from the Euro-Atlantic community to assist the domestic parties in developing and stabilising the TSG. Finally, increased tensions between the EU and Russia, and the latter's recent reassertion of its power in the region have undermined the ability of the international community to play a constructive role in improving relations between Gagauzia and the centre. Rather, Moldova's foreign policy or—'external vector' has become a divisive issue.

The Conflict Between the Gagauz Minority and the Moldovan Majority

The Gagauz are a Christian Turkic population, accounting for about 5% of the Moldovan population, and are located mainly in the south of the country. Both the origin of the Gagauz and the date of their arrival in the south of Moldova are hotly contested. Different scholars have argued that the group is descended from the Pecheneg and Cuman tribes that once inhabited the lands along the Black Sea, or that they are simply Anatolian Turks. Others have described them as Christianised or 'Bulgarianised' Turks, 'Turkicised' Christian Bulgarians, or some combination of both. Most scholars seem to agree that Bulgarian and Gagauz populations migrated to the southern Bessarabia region from the Balkan peninsula at some point in the late eighteenth century or early nineteenth century in the wake of the Russo-Turkish wars. However, other historians reject any theory that presents the group as immigrants, arguing that the region is as much their homeland as they homeland of the Moldovan majority.[1]

[1] King, C. (1997). Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi. *Ethnic and Racial Studies*, Vol. 20, No. 4, 738–756.

The mid- to late-1980s saw political turmoil in Moldova which mirrored in other parts of the Soviet Union. Gagauz intellectuals and local political elites initially mobilised to prevent the demise of the Gagauz language. Under Soviet rule, state education and official communications took place in Russian and the local Gagauz language began to disappear, only being used for oral communication between family members and local village communities. The policies of *glasnost* and *perestroika* provided the Gagauz elite with the opportunity to organise around and promote a cultural identity.[2] The Gagauz community is one of the most socially and culturally disadvantaged ethnic groups in Moldova and campaigners sought to improve the group's economic and social position.

The *glasnost* and *perestroika* policies also allowed Moldovan movements in Chişinău to unite into the Popular Front of Moldova (PFM) in summer 1989. Initially, the PFM was inclusive of minority groups in the country—including the Gagauz (and Ukrainians) who had suffered under Soviet rule and policies of russification. However, a majority nationalist agenda quickly came to dominate the movement. A new language law passed on the 31st of August 1989 declared Moldovan in the Latin script as the state language. The Russian-speaking parts of the population, including the Gagauz, perceived the new language law as a threat to their already disadvantaged economic and employment situation. Secondary education in the Gagauz region has traditionally been of relatively inferior quality resulting in proportionally few Gagauz progressing to higher education and onto higher positions in the state's administrative structures.[3] The law specified that those working in a position in which they had to communicate with customers had to speak both the Moldovan and Russian. After decades of intense russification, everybody in Moldova could speak Russian but only ethnic Moldovans could communicate in the new state language. According to the 1989 census, only 4.4% of the Gagauz were fluent in Moldovan.[4] This raised concerns that

[2] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

[3] King, C. (1997). Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi. *Ethnic and Racial Studies*, Vol. 20, No. 4, 738–756.

[4] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

when the language tests were introduced, within five years of the passing as the new language law stipulated, Gagauz and other groups, such as Ukrainians, would be excluded from many careers.

Furthermore, demands for a union of Moldova with neighbouring Romania stirred Gagauz fears even further, as Romanian rule is remembered among the Gagauz in terms of oppression and corruption.[5] The concern that the PFM was eager to develop a state which was not accommodative of or responsive to their needs encouraged nationalist movements among the minority groups in Moldova. In Gagauzia, this nationalism also advocated for greater control over local resources and revival of indigenous culture. Communist elites in the region also mobilised national sentiments to strengthen their position in the rapidly changing political environment, though the nationalist movement also included long-standing nationalists who had suffered oppression under Soviet rule, including imprisonment in work camps.

In September 1989, Gagauz leaders in Comrat proclaimed the creation of an autonomous Gagauz Republic in southern Moldova. This was declared illegal by the authorities in Chişinău and the Moldovan parliamentary elections of February 1990 further escalated the Moldovan-Gagauz dispute. PFM candidates defeated many of the Republics top Communist Party leaders. For the Gagauz, the ballot signalled a further shift towards pan-Romanian nationalism. In reaction to the Moldovan declaration of sovereignty, on the 19th of August 1990, the Gagauz leadership proclaimed a 'Gagauz Soviet Socialist Republic', which would be independent from Moldova, but part of the Soviet Union. Gagauz elections were scheduled for the 28th of October. Prime Minister Mircea Druc mobilised approximately 40,000 Moldovan volunteers to travel to Gagauzia to prevent the unilaterally called elections. The intervention of Moldovan police and Soviet Interior Ministry troops averted a violent confrontation between the volunteers and Gagauz nationalists.[6] This prevented widespread violence but a small number of Moldovan policemen were killed in 1991 and 1992 during Gagauz attacks on Moldovan police stations. Relations between Comrat and Chişinău were

[5] King, C. (1997). Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi. *Ethnic and Racial Studies*, Vol. 20, No. 4, 738–756.

[6] Fane, D. (1993). Moldova: Breaking Loose from Moscow, in I. Bremmer and R. Taras (eds.), *Nations and Politics in the Soviet Successor States*. Cambridge: Cambridge University Press.

further damaged and the central authorities de facto lost control over the Gagauz area around Comrat.

During this period, the Gagauz were also politically and militarily supported by the more powerful 'Transnistrian Moldovan Republic', another separatist enclave declared in eastern Moldova. The two groups occasionally cooperated, with the Transnistrians using the Gagauz as a second front against Chişinău.[7] The more militarised Transniestria conflict had an important effect in resolving the Gagauz conflict. Over the summer of 1992 violent conflict in the city of Bender resulted in over 200 fatalities over just three days. This violence strengthened moderate opinion regarding the Gagauz dispute in both Chişinău and Comrat. Both sides were eager to reach a compromise and avoid a repetition of the violence. In September 1992, official negotiations began and President Snegur travelled to Comrat for a meeting with the Gagauz 'President' Stepan Topal. The extreme poverty in Gagauzia also discouraged hard-line separatism as the Gagauz have always depended on the economic support of the central government.[8]

However, unionist forces in Chişinău opposed any form of TSG for national minorities, and especially opposed the federalisation of Moldova. They favoured the accommodation of the non-Moldovan population by offering only cultural autonomy. There were also hard-line nationalists who viewed the minorities living in Moldova are a result of the colonising policy of the Russian and Soviet Empires and are thus opposed to any accommodation. However, confronted by difficult economic circumstances, ordinary Moldovans did not show much interest in political situation in small Gagauzia. In the 1994 parliamentary elections, the centre-left Agrarian Democrats received an absolute majority of the seats. In cooperation with the Socialist Unity Bloc, they were strong enough to pass a new Constitution which allowed for TSG, and to overcome opposition of the unionist parties, which together gained only 17%

[7] King, C. (1994–1995). Moldova with a Russian Face. *Foreign Policy*, Winter, 106–120.

[8] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123. King, C. (1997). Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi. *Ethnic and Racial Studies*, Vol. 20, No. 4, 738–756.

of the vote.[9] Article 111 (1) of the new Constitution postulated that 'The places on the left bank of the Nistru river, as well as certain other places in the south of the Republic of Moldova may be granted special forms of autonomy according to special statutory provisions of organic law'.[10] After further negotiations with Gagauz politicians, discussions in Parliament, and consultations with experts from the Council of Europe, in December 1994, the Moldovan Parliament passed the 'Law on the Special Legal Status of Gagauzia (Gagauz-Yeri)', which is commonly referred to as the 'Autonomy Statute'.

The Autonomy Statute and Territorial Self-Government

Statutory recognition of 'the Gagauz as a people and not as a minority was of paramount importance'.[11] It meets the Gagauz need for official recognition and provides security by accepting that they 'were a nation with its own rights and territory'.[12] Their need to be recognised as a legitimate group is further met by Article 4 which stipulates that 'Gagauzia shall have its own symbols which shall be used alongside the state symbols of the Republic of Moldova'.[13] The Law also states that Moldovan, Gagauz, and Russian are all official languages in the autonomous region.[14] This provides further official recognition of the legitimacy of Gagauz identity. It also provides the Gagauz with security that they would not be excluded from employment in the public service, at a local level, due to their lack of fluency in the Moldovan language.

[9] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

[10] Constitution of the Republic of Moldova (1994). Accessed 31 December, http://www.presedinte.md/titlul3#6.

[11] Troebst, S. (2001). Die Autonomieregelung für Gagausien in der Republik Moldova – ein Vorbild zur Regelung ethnopolitischer Konflikte? in *Berliner Osteuropa Info*, No. 17, quoted in Avram, A. (2010). Territorial Autonomy of the Gagauz in the Republic of Moldova: A Case Study. Leipzig: Moldova-Institut.

[12] Demirdirek, H. (1996). The Painful Past Retold. Social Memory in Azerbaijan and Gagauzia. Postkommunismens Antropologi Conference, Copenhagen, April 12–14. Accessed 31 December, http://www.anthrobase.com/Txt/D/Demirdirek_H_01.htm.

[13] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Article 4. Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[14] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Article 3(1).

However, it is the widespread fluency of Gagauz in Russian which has provided for their access to public service jobs. Despite receiving official status in the Autonomy Statute, the Gagauz language has not experienced a resurgence since 1994 with Russia remaining the language of official communication in the region. This illustrates that complex historical events, such as the widespread russification of Moldova, may lead to situations where symbolic group recognition and practical provisions meet economic security needs and may need to be addressed through nuanced stipulations.

The failure of the Law to encourage the widespread use of the Gagauz language has been used by Moldovan critics of TSG to highlight that it has failed to achieve one of the Gagauz's own stated aim for the Statute, to foster greater use of Gagauz. Rather they stress that the continued use of Russian in the region is indicative of a Gagauz tendency to have a nostalgic attitude to the Soviet era and russification. This prevents the area from properly integrating into Moldova.[15] Furthermore, the failure of most Gagauz to gain competency in Moldovan has also been cited as preventing the Gagauz from fully participating in the state.[16] For example, draft state-level laws are only presented in Moldovan which limits the region's ability to review these acts.[17] While older Moldovans fluency in Russian allowed it to be used as the language of interethnic communication, as is provided for in the Constitution, many younger Moldovans do not have the same command of Russian which is contributing to a chasm between Moldovans and Gagauz. This underscores a point which has been widely established in large-N cross-national studies, TSG must be designed in such a way as to promote shared rule as well as divided rule. Unique historical circumstances largely decide the linguistic capabilities of different ethnic groups. In linguistically and ethnically diverse societies, the state must provide sufficient language tuition and support to ensure that groups can communicate freely. Economically weak states and regions can undoubtedly struggle to provide such support, as was seen in the previous chapter where economically underdeveloped municipalities in the Former Yugoslav Republic of Macedonia struggled to provide sufficient translation services.

[15] Avram, A. (2010). Territorial Autonomy of the Gagauz in the Republic of Moldova: A Case Study. Leipzig: Moldova-Institut.

[16] Groza, I. (2016). Interview with Dawn Walsh. Chişinău, January 28.

[17] Rank, H. (2016). Interview with Dawn Walsh. Chişinău, January 27.

Like the 1998 Agreement in Northern Ireland, the Autonomy Statute provides for a possible change in the sovereignty of Gagauzia in a specific circumstance. Paragraph 4 of the first Article of the Autonomy Statute states that, should Moldova no longer be an independent state, the people of Gagauzia have the right to external self-determination.[18] While this provision did not specifically refer to possible union with Romania, it addresses Gagauz concerns over such a unification. As mentioned above, the Gagauz feel that such a union would represent a fundamental threat to both their security and recognition of their identity. Previous Romanian rule in the region (1918–1940 and 1941–1944) was marked by assimilation attempts and oppression. Because of this, the Gagauz need a sense of security that they will not be part of any future Greater Romania.[19] The likelihood of a union between Moldova and Romania is the subject of much debate. There are pan-Romanian groups that argue that Moldova is essentially Romanian territory which was wrenched from the motherland by the treachery of the Soviets. These groups vigorously opposed the creation of the TSG region as it undermined this argument.[20]

Security and recognition fears surrounding a Moldovan–Romanian union are often presented as unfounded paranoia on the part of the Gagauz. The current Gagauz administration has tried to move away from this negative relationship with Romania. The popularly elected Gagauz Governor Irina Vlah visited Romania in 2015 to discuss regional development projects. The visit was illustrative of a new agenda which sought to go beyond historically negative perceptions of Romania.[21] Yet some Romanian politicians, including a representative of the Liberal Party, have previously argued that unification would naturally take place once Moldova was integrated into the EU.[22] This has contributed to

[18]Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Articles 1(4). Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[19]Demirdirek, H. (1996). The Painful Past Retold. Social Memory in Azerbaijan and Gagauzia. Postkommunismens Antropologi, Copenhagen, April 12–14. Accessed 31 December, http://www.anthrobase.com/Txt/D/Demirdirek_H_01.htm.

[20]King, C. (1997). Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi. *Ethnic and Racial Studies*, Vol. 20, No. 4, 738–756.

[21]Groza, I. (2016). Interview with Dawn Walsh. Chișinău, January 28.

[22]Wober, S. (2013). Making or Breaking the Republic of Moldova? The Autonomy of Gagauzia. European Diversity and Autonomy Papers—EDAP, No. 2.

Euroscepticism in Gagauzia, which will be discussed in the *International Guarantees* section of this chapter.

Article 5 of the Statute provides that

1. Gagauzia shall include localities in which Gagauzes constitute more than 50% of population.
2. Localities in which Gagauzes constitute less than 50% of population may be included in Gagauzia on the basis of the freely expressed will of a majority of the electorate revealed during a local referendum.[23]

As a result of these provisions, a referendum was held on the 5th of March 1995 in 36 localities in which the Gagauz either constituted more than 50% of the population or in which the referendum was initiated by one-third of the population. The results led to the creation a Gagauz TSG region which covers 1848 km^2, comprising three towns and 29 villages. The Gagauz are a large majority, accounting for 78% of the 175,000 population, but there are also Bulgarians (5.5%), Moldovans (5.4%), Russians (5%), and Ukrainians (4%).[24]

This process was desirable in that it allowed local village populations to determine whether they joined the new TSG unit. The goal of this provision was to provide security and recognition through TSG to a maximum number of Gagauz without including too many non-Gagauz. However, the procedure led to the inclusion of settlements which are not territorially contiguous. The patchwork nature of this new administrative unit has complicated governing the region. To whom local inhabitants must turn for provision of goods and services, what portion of the central budget is to go to the new administrative unit, and how local leaders are to administer a region whose constituent parts (the villages) do not share common borders are all questions of concern for policy-makers.[25] Neukirch argued that

[23] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Article 5. Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[24] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

[25] King, C. (1997). Minorities Policy in the Post-Soviet Republics: The Case of the Gagauzi. *Ethnic and Racial Studies*, Vol. 20, No. 4, 738–756.

> although the administration on both sides acted quite pragmatically and flexibly and, for instance, allowed people from nearby villages still to use 'their' hospital, some tension arose especially in Vulcăneşti. There remained a Moldovan and Gagauz district administration in this town and it was not always clear who had to finance and control what.[26]

This highlights the need to balance giving voice to local populations as to whether they are included in any TSG region, to meet their needs for the recognition and security, with the requirement that a region to be practically workable. Anything which undermines good governance also undermines the ability of TSG to act as a conflict management mechanism.

The creation of a geographically patchwork TSG unit also creates an opening for disputes between the region and the centre on how to decide if more populations should be included or others should be facilitated to leave. There is no explicit limit to the number of referenda that can be held with areas technically able to join and leave Gagauzia at any point should there be a referendum initiated by over a third of the citizens and supported by an absolute majority.[27] The Gagauz have pressed for the inclusion of additional areas. They have claimed the right to organise further local referenda in areas bordering Gagauzia to determine whether they should join the TSG region. This claim is counter to the Autonomy Statute which affords the People' Assembly the power to organise local referenda but does not afford it any such right in surrounding areas.[28] Conversely, some politicians in Chişinău not only oppose allowing further referenda on asking whether a population would like to join the region but also support the secession of localities from Gagauzia. Moldova's leading right-wing newspaper, Flux, published a map of Moldova, showing Gagauzia even smaller and more dispersed than it actually is in an effort to paint the TSG as unnecessary and

[26] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

[27] Avram, A. (2010). Territorial Autonomy of the Gagauz in the Republic of Moldova: A Case Study. Leipzig: Moldova-Institut.

[28] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Articles 12(3e).

impractical.[29] This underlines how non-settled borders in TSG arrangements can encourage instability.

The Autonomy Statute established a new legislative assembly, the People's Assembly. It also provided for an Executive Committee headed by the aforementioned Governor.[30] The region received a wide range of competencies. The People's Assembly has the right to adopt laws in areas including culture, education, health, the economy, ecology, social assistance, and regional budgetary matters.[31] The Venice Commission noted that 'the extent of the powers conferred on the Gagauzian autonomous institutions is very striking'.[32] The apparent extensive nature of these devolved competencies is sufficient to meet the Gagauz's need for security by giving them control over a range of policies. However, there have been numerous disputes between the TSG region and the central authorities as to where specific competencies lie. This was somewhat inevitable given the vagueness of the Autonomy Statute. Both sides seek to interpret equivocal provisions in such a way as to maximise their powers. While the Autonomy Statute lists the areas in which the Gagauz enjoy self-government, it does not specify how far their power in these areas extend. For example, the Statute lists education as a devolved competency but it is unclear whether this means that Gagauzia has full control over teacher training and curricula development. Furthermore, the provisions related to some vital economic powers are unclear in the Autonomy Statute. Article 6 stated that 'the property of the people of the Republic of Moldova and at the same time represent the economic basis of Gagauzia', this wording makes it very difficult to determine whether the central state or Gagauz authorities are the ultimate authority over state property. This led to a dispute between the central and the

[29] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

[30] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Article 10, 13, & 14. Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[31] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Articles 12(2). Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[32] Venice-Commission (2002). Law on Modification and Addition in the Constitution of the Republic of Moldova. Strasbourg: Venice Commission. Accessed 31 December, http://www.venice.coe.int/docs/2002/CDL(2002)029-e.asp.

regional authorities regarding the issue of privatising enterprises.[33] This highlights that ambiguity fundamentally undermines the use of TSG as a conflict management mechanism and prevents the relevant domestic legislation from being an effective guarantee mechanism to stabilise the arrangements, which will be discussed below.

As well as manipulating areas of ambiguity, both the central government and the Gagauz have also engaged in activities which violate the division of powers. The Autonomy Statute called for the drafting of a Code of Gagauzia, which was to act as a sort of constitution for the region and would provide necessary further detail. However, the Code which was passed by the People's Assembly in May 1994 included little useful detail and has more symbolic than practical significance. Having a quasi-constitution further recognised the legitimacy of the Gagauz as a group. Yet, when the Gagauz tried to organise a referendum on the Code in 1998, it was blocked by the Constitutional Court, partly because its contents were not consistent with the Autonomy Statute. After further negotiations, the document was finally approved by Moldovan and by international experts, but still includes stipulations which contradict the original statute, the Moldovan Constitution, and other state-level laws.[34]

Gagauzia was also accused of holding an illegal referendum in 2014. Citizens were asked whether they favoured closer economic links with the Russian-led customs union or with the EU, as well as whether they supported the Gagauz right to independence. It was unclear whether the latter question was linking this potential independence to the feared Moldovan–Romanian union or Moldovan membership of the EU. Either way the referendum was illegal as the Gagauz can only organise local referenda on matters within their competencies; foreign affairs do not fall into this category. Any referendum on Gagauz independence due to Moldovan unification with Romania, which is permitted in the Autonomy Statute, would have to be agreed by central government and the region if the required circumstances arise. The Gagauz have also been accused of overstepping the limits of their competencies through

[33] Avram, A. (2010). Territorial Autonomy of the Gagauz in the Republic of Moldova: A Case Study. Leipzig: Moldova-Institut.

[34] Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

the enactment of local laws in other areas. These include licencing enterprises, audio–visual regulation, and anti-discrimination protections.[35] However, it would be an oversimplification to view these moves as the typical overstepping of authority which critics of TSG highlight as illustrative of its centrifugal tendencies.

The Gagauz strongly deny that there is any substantial appetite for secession and were quick to distance themselves from reports of plans to establish a 'Bessarabian republic of Budzhak' with part of Ukraine's Odessa Region'.[36] Rather, the region engages in such activities to seek attention from the central government which often ignores Gagauzia and its needs.[37] The central government has frequently made and changed laws without due regard for the Autonomy Statute.[38] For example, in 1998, a new central Moldovan Law on Public Administration proposed the appointment of a prefect in every county *and in Gagauzia*. The prefects' role was to supervise whether the actions of the local administration comply with Moldovan state-level legislation. However, in Gagauzia, these powers are devolved to the Governor and the Executive Committee. Understandably, the Gagauz regarded the nomination of a prefect for Gagauzia as a violation of the Autonomy Statute and as an attempt to downgrade Gagauzia to the status of a regular county. In March 1999, prefects were appointed for all counties except Gagauzia. Given that disputes are often eventually resolved in favour of Gagauzia and that many of these laws were part of a wider development of legal structures in Moldova, it appears likely that these moves are mainly the result of a lack of understanding of their potential implications for the Autonomy Statute rather than a conscious desire to undermine the TSG. Yet they still damage the relationship between Comrat and Chişinău. Mikhail Formuzal, who was the Governor in Gagauzia from 2006 to 2015, argued that the more the Autonomy Statute was ignored or the authorities in Chişinău engaged in centralising activities, the more self-rule the Gagauz would demand and radicalism in society

[35] Cioaric, V. (2016). Interview with Dawn Walsh. Chişinău, January 28.

[36] Ceban, V. (2016). Interview with Dawn Walsh. Chişinău, January 29. BBC Monitoring Kiev Unit (2015). Moldova's Gagauz Politicians Deny Links to Purported Ukrainian Separatists, October 30.

[37] Sultanli, J. (2016). Interview with Dawn Walsh. Chişinău, January 25.

[38] Ceban, V. (2016). Interview with Dawn Walsh. Chişinău, January 29.

could grow.[39] Apparently, centrifugal tendencies may actually represent a desire to have existing arrangements properly implemented, not to increase the autonomy. This highlights that non-implementation of moderate TSG arrangements can encourage more radical claims for autonomy.

The compromise reached between Comrat and Chișinău in 1994 also meets the needs of the central authorities. It reintegrated the Gagauz into the Moldovan state without the use of force. It also avoided the federalisation of Moldova which was opposed by the majority because of its associations with the Soviet era. Ending the conflict with the Gagauz was vitally important to the state, as it was gravely weakened by the conflict with the other breakaway region, Transniestria. Thus, the Autonomy Statute recognises the legitimacy of the Moldovan state asserting its territorial integrity and avoiding any violent conflict and the associated security concerns. As such the Transniestria issue contributed to the settlement of the Gagauz dispute as it encouraged moderation in both Chișinău and Comrat.[40] However, at other times, the Transniestria conflict has also had a negative effect on the Gagauz Autonomy. Initial contacts between the Transniestria and Gagauz authorities when both regions declared independence inevitably harmed relations between the Gagauz and the central Moldovan government. While these links weakened when the Gagauz entered into negotiations and reached an agreement with Chișinău, the 'alliance of convenience' was also re-established at times when the relationship between the central Moldovan state and Comrat was difficult, for example in 2000.[41]

The ongoing, if frozen conflict, between the state and the Transniestria region also destabilises the TSG arrangements in Gagauzia, as any settlement with Transniestria authorities in Tiraspol will affect the overall legal-territorial structure of Moldova. A settlement with Tiraspol will inevitably involve the delegation of substantial competencies to Transniestria. Formuzal argued Gagauzia could not accept a lower level of autonomy than any new Transniestria entity and that if a federation

[39]Wober, S. (2013). Making or Breaking the Republic of Moldova? The Autonomy of Gagauzia. European Diversity and Autonomy Papers—EDAP, No 2.

[40]Avram, A. (2010). Territorial Autonomy of the Gagauz in the Republic of Moldova: A Case Study. Leipzig: Moldova-Institut.

[41]Wober, S. (2013). Making or Breaking the Republic of Moldova? The Autonomy of Gagauzia. European Diversity and Autonomy Papers—EDAP, No 2.

was set up, the Gagauz would insist on federative status. Such support for a federal solution exacerbates fears in Chișinău about the very future of Moldovan statehood—especially when linked to the Transniestria issue.[42] Overall, while the violence in Transniestria and the weakness of a Moldovan state confronted with two breakaway regions encouraged moderation—which contributed to agreement on the Autonomy Statute—this enduring conflict creates uncertainty around the future territorial composition of Moldova. This has inhibited the bedding down of the TSG institutions.

Guarantee Mechanisms

The TSG provisions for Gagauzia sought to meet the minority's security and recognition needs while also satisfying the majority's desire for a largely unitary state. It was hoped that, by delivering TSG through autonomy, the provisions would not create the centripetal momentum seen elsewhere and could even serve as a positive example to encourage the Transniestrians to reach a similar agreement. However, TSG arrangements in Moldova have not been adequately specified and ambiguity has led to disputes as to where certain competencies lie. Strong domestic guarantees are provided to guard against re-centralisation or attempted secession. The TSG is constitutionally protected and alteration of the Autonomy Statute requires a three-fifths supra-majority vote in the central Assembly. Yet these guarantees have not been effective. They have been essentially undermined by the electoral/party system and the lack of detail. Furthermore, the Euro-Atlantic community has not provided hard guarantees of the TSG arrangements, favouring instead technical support and focusing on resolving the militarised Transniestria conflict. Russia's efforts to reassert its dominance in the region have also negatively affected Gagauzia, contributing to tensions between the Gagauz and Moldovan central state.

Domestic Guarantees

Despite having established some leverage by declaring the Gagauz Soviet Republic, the Gagauz were relatively weak vis-à-vis the central

[42] Avram, A. (2010). Territorial Autonomy of the Gagauz in the Republic of Moldova: A Case Study. Leipzig: Moldova-Institut.

government, especially given their economic dependency. As such, and acutely aware of the lack of strong external support, in contrast to the Transniestria, the Gagauz do not trust the central government not to interfere in their TSG. Ivan Topal, Member of People's Assembly of Gagauzia, argued that the Gagauz do not trust that the central government will not eliminate the Autonomy Statute, as a result of its unfounded fear of secession.[43] Consequently, it was necessary to provide strong domestic guarantees when the Autonomy Statute was adopted in 1994. The Law enjoyed the status of 'a special organic law', requiring a three-fifths majority vote for alteration. This provision demonstrated an understanding that it is necessary that the law enjoyed a special status. It regulated an issue which went beyond everyday politics and such a provision would give the Gagauz some confidence that their TSG will endure.[44] However, the effectiveness of this guarantee is limited by ambiguity as to how the law fits into the legal hierarchy of Moldova and a combination of the small size of the Gagauz minority and the electoral system.

The Moldovan legal hierarchy does not provide for 'special organic' laws. Article 72 of the Constitution, which provides for different types of laws and in what areas they should apply, only provides for constitutional, organic, and ordinary laws.[45] While this may appear to be a theoretical consideration, it has practical implications. It creates confusion as to whether the Autonomy Statute takes precedence over other organic laws. For example, when the central government passed the Law on Local Public Administration, which provided for the prefects discussed above, the Venice Commission highlighted that the lack of a clear hierarchy created uncertainty. While some state officials including the Deputy Ministers of Justice, Chairman of the Committee on National Minorities of the Parliament, and Vice-Chairman of the Committee on Legal Affairs have suggested that they considered that the Autonomy Statute was a *lex specialis* and so had priority over the Law on Local Public Administration, other representatives of the Parliament and the Ministry of Justice have underlined on several occasions that both Laws have the same legal value. The Venice Commission suggested that it should

[43] Topal, I. (2016). Avdarma, Gagauzia, February 16.

[44] Kirnitki, I. (2016). Interview with Dawn Walsh. Chișinău, January 26.

[45] Constitution of the Republic of Moldova (1994). Article 72. Accessed 31 December, http://www.presedinte.md/titlul3#6.

be clearly established that the Autonomy Statute is superior and that other laws only operate as far as they do not contradict it.[46] However, this ambiguity has not been resolved and some commentators argue that where the Autonomy Statute clashes with another organic law, the more recent law should be applied.[47] At times, the provisions of the Autonomy Statute have effectively been altered by the passing of a new organic law, this has allowed changes to be made without the three-fifths support an explicit modification in the Statute requires.

A combination of the small size of the Gagauz minority and the electoral system in Moldova also mean that the supra-majority required for an explicit change can be reached without the consent of, or even consultation with, the Gagauz. As the Gagauz are approximately 5% of Moldova's population they were unlikely to control enough seats to prevent changes to the law regardless of the design of the electoral system. However, a combination of the electoral system and political party laws in Moldova makes this practically impossible. A closed list system is used to elect the 101 Assembly deputies. There is a single nationwide constituency and to enter the Assembly, there is a 3% threshold for independent candidates, 6% threshold for parties, and a 12% threshold for electoral blocs consisting of more than two political parties. A revised Moldovan Law on Parties and Socio-Political Organizations effectively bans regional parties as it stipulates that before a party can be registered, it must have a minimum of 5000 members from half of the counties in Moldova.[48] These electoral and party laws prevent the creation of a Gagauz party and while there are usually three or four deputies from Gagauzia elected to each Assembly, they are not in a position to represent the Gagauz interests as they are members of national parties and depend on these parties, not the Gagauz population, for their political futures.

[46]Venice Commission (1999). Opinion on the Questions Raised Concerning the Conformity of the Laws of the Republic of Moldova on Local Administration and Administrative and Territorial Organisation to Current Legislation Governing Certain Minorities. Strasbourg: Venice Commission. Accessed 31 December, http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(1999)014-e.

[47]Beschieru, I. (2016). Interview with Dawn Walsh. Chişinău, January 27.

[48]Venice Commission (2004). Republic of Moldova Law on Political Parties and Socio-Political Organisations. Venice Commission, Strasbourg. Accessed 31 December, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2004)023-e.

Discouraging regional parties is understandable as they have been associated with separatism. Furthermore, allowing the Gagauz to control the twenty seats necessary to block a change to the Autonomy Statute would involve greatly over representing the minority which is likely to be rejected by the majority. However, these conditions ensure that the three-fifths supra-majority voting requirement does not guarantee that the Autonomy Statute cannot be changed unilaterally by the central authorities. Such a guarantee could be provided by requiring a concurrent majority in the central Assembly and the People's Assembly in Comrat to make changes to the Autonomy Statute. However, there appears to be very little appetite for such a guarantee from either side. Rather, the political leaders in Gagauzia seek to strengthen the constitutional protection of their TSG.

The Autonomy Statute is referenced in the Constitution, and certain aspects, such as the powers of the local Governor, are outlined.[49] A constitutional guarantee is the strongest domestic guarantee which can be provided to TSG and these provisions provide the Gagauz with a guarantee that their TSG will not fall below a certain level.[50] However, the lack of detail has limited the effectiveness of this guarantee.[51] The Gagauz argue that either the full Autonomy Statute should be included in the Constitution or the Autonomy Statute's status should be increased so it is more difficult to alter.[52] They also compare the constitutional protections for the Autonomy Statute to other cases in Italy and Spain, arguing that a higher level of protection is common.[53] Officials from the centre have also admitted that a constitutional amendment would lower fears that the self-government could be reduced or eliminated.[54] However, arguments for detailed constitutional protection have largely been dismissed on the grounds that the role of the Constitution is to establish a general framework for the whole country, that other important issues also only have an article or two dedicated to them, and that it is very

[49]Constitution of the Republic of Moldova (1994). Articles 110 & 111. Accessed 31 December, http://www.presedinte.md/titlul3.

[50]Rank, H. (2016). Interview with Dawn Walsh. Chișinău, January 27.

[51]Cuijuclu, E. (2016). Avdarma, Gagauzia. February 16.

[52]Ceban, V. (2016) Interview with Dawn Walsh. Chișinău, January 29.

[53]Member of People's Assembly (2015). Institute for European Policies and Reforms conference. Chișinău, November 24.

[54]Creanga, I. (2016). Avdarma, Gagauzia, February 16.

difficult to change the Constitution.[55] Furthermore, even if detailed stipulations were included in the Constitution, it is still questionable as to whether this would provide a strong guarantee for the TSG. There is little faith that the Constitutional Court would be able to effectively implement any such guarantee.[56]

The Autonomy Statute affords the Gagauz 'the right to appeal in a manner fixed by law to the Constitutional Court of the Republic of Moldova with a case concerning the voiding of enactments by the legislative and administrative authorities of the Republic of Moldova if they infringe on the authority of Gagauzia'.[57] However, despite numerous complaints by the Gagauz, many of which appeared credible, that laws enacted in central government infringe on their TSG, the People's Assembly has rarely made use of its right to address the Constitutional Court. According to the reports of the Constitutional Court for the period 1995–2015, the People's Assembly has submitted only seven requests (1 request in 1998, 1 request in 1999, 4 requests in 2001, and 1 request in 2013). The Court refused to examine the requests for technical reasons. An examination of the Constitutional Court's response to the claims reveals that they were not examined for reasons including (1) the request is unfounded and lacks subject matter on which the request is based; (2) there is no causal link between the contested provisions and the existing constitutional norms; (3) the request does not meet formal requirements of a request; and (4) the author of the request did not provide additional information and did not answer the questions of the Constitutional Court within the specified period of time.[58]

O'Leary and McCrudden have argued that the refusal to examine a case can be indicative of a centralising bias.[59] Many Constitutional Courts are found to have centralising tendencies and the Courts' dependency on central government for appointment and support, shared

[55] Beschieru, I. (2016). Interview with Dawn Walsh. Chişinău, January 27. Cioaric, V. (2016). Interview with Dawn Walsh. Chişinău, January 28.

[56] Sultanli, J. (2016). Interview with Dawn Walsh. Chişinău, January 25.

[57] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Articles 12(3i–j). Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[58] Cuijuclu, E., & Sirkeli, M. (2015). Reciprocal Control between the Center and Autonomy: Experience of Implementing the Gagauz Status. Comrat: Pilgrim-Demo.

[59] O'Leary, B., & McCrudden, C. (2013). *Courts and Consociations: Human Rights Versus Power-Sharing*. Oxford: Oxford University Press: 116.

preferences between judges and those central politicians who appoint them, and desires to increase central powers to increase their own importance, have all been forwarded as explanations for these tendencies.[60] Yet a centralising bias seems unlikely to provide a full explanation of the refusal in this case, as the Court has previously defended the TSG against claims by central elites that it is unconstitutional. It has also refused to examine cases brought by the central authorities, see below. Therefore, it is at least partially the Gagauz's weak legal and technical capacities which undermined the effectiveness of judicial review. This highlights that TSG units need assistance in developing capacities, especially small and economically challenged regions.

Between 1995 and 2016, central figures made four appeals to the Constitutional Court that different aspects of the Autonomy Statute were unconstitutional. In the first case, brought in 1995, the Court found that Article 1(4) of the Autonomy Statute was constitutional. Deputy V. Nedelciuc, from the central Assembly, had argued that the stipulation that the Gagauz have the right to self-determination in the event that Moldova losses its independence was contrary to Article 1 and 2 of the Constitution of the Republic of Moldova. These are the articles on the sovereignty, independence, unity, and indivisibility of the state.[61] While there was one dissenting opinion, this decision clearly shows the Court protecting an important provision of the Autonomy Statute. This was necessary to provide the Gagauz with security that they will not be included in any Moldova–Romania union without their consent. As such, it shows judicial review operating as an effective guarantee. The decision was widely accepted and the relevant provision has not been questioned since the ruling.

In 2014, the Constitutional Court refused to examine a complaint by deputies of the central Assembly which alleged that Article 14(4) of the Autonomy Statute, which provided that the Gagauz Governor was a member of the central executive, was unconstitutional as the Governor

[60] Vaubel, R. (2009). Constitutional Courts as Promoters of Political Centralization: Lessons for the European Court of Justice. *European Journal of Law and Economics*, Vol. 28, 203–222.

[61] Constitutional Court of the Republic of Moldova (1995). Judgement of the Constitutional Court on Constitutionality Control of Article 1, para. (4) of the Law No. 344-xiii of December 23, 1994 on the Special Legal Status of Gagauzia (Gagauz-Yeri). Chişinău: Constitutional Court of the Republic of Moldova.

then occupied two incompatible positions and that it was discriminatory against other local government units. The Court found that 'under Article 97 of the Constitution…ministers, in the composition of the Government can be other members, determined by organic law' and thus their appointment is the prerogative of the Assembly and beyond the Court's remit.[62] By refusing to examine this complaint, the Court eschewed centralising tendencies often found in the decisions of such bodies. Furthermore, the decision also allowed the practise provided in the Autonomy Statute where the Governor is included in the central government to continue. This is a mechanism which has the potential, even if it has not been fully realised, to act as an important vehicle for ensuring Gagauzia's needs are articulated at a central government level.

Another claim was filed by the Minister of Justice of Moldova in 1999. It questioned the constitutionality of Article 20 part (2) of the Autonomy Statute. The Article provided that the appointment of judges in Gagauzia would be by the Decree of the President at the proposal of the People's Assembly after coordination with the Superior Council of Magistracy. The Court found that this aspect of the Autonomy Statute was unconstitutional as it differed from the appointment procedure for judges set out in the Constitution. The Constitution stated that the Supreme Council of Magistracy is the only body empowered to submit candidates to be appointed as judges.[63] This highlights that drafters of the Autonomy Statute were remiss in not assessing whether the provisions in the Law were consistent with procedures already stipulated in the Constitution. Similarly, in 2008, the General Prosecutor of Moldova claimed that Article 21 parts (2) and (3) of Autonomy Statute, which empowered the People's Assembly to submit proposals to the General Prosecutor for the appointment of candidates for the position of Prosecutor of Gagauzia, were contrary to the principle of separation of powers and independence of the prosecutor's office, as well as to

[62] Constitutional Court of the Republic of Moldova (2014). Judgement On Rejection the Referral no. 22a/2014 on Constitutional Review of the Article 14, para. (4) of the Law No. 344-XIII of December 23, 1994 on the Special Legal Status of Gagauzia (Gagauz-Yeri). Chişinău: Constitutional Court of the Republic of Moldova.

[63] Constitutional Court of the Republic of Moldova (1999). Decision of the Constitutional Chamber No. 24 of May 06, 1999 on the Control of Constitutionality of Article 20 part (2) of the Law No. 344-XIII of 23 December 1994 'On the Special Legal Status of Gagauzia (Gagauz-Yeri)'. Chişinău: Constitutional Court of the Republic of Moldova.

the provision that the right to put forward candidates for the position of prosecutors belongs solely to the Superior Council of Prosecutors. However, in 2011, the Court proceedings were discontinued. The General Prosecutor recalled its claim, arguing that the Assembly had passed a Justice Sector Reform Strategy for 2011–2015, which provides for changing the criteria and procedure of selection, appointment, and promotion of prosecutors.[64] These cases are illustrative of the lack of attention which was paid to ensuring that the Autonomy Statute and the Constitution were compatible. Such inconsistencies not only create ambiguity as to what process should be followed but they also provide opponents of TSG with opportunities to undo some of its provisions.

The lack of attention paid to ensuring that the Autonomy Statute and Constitution were compatible, as well as the failure to consider the Autonomy Statute when passing a wide range of new laws since 1994 resulted in numerous inconsistencies. These inconsistencies and the need to develop further details for how the division of powers should operate must be addressed through a focused programme of reform. It is not advisable to task the Constitutional Court with such a programme of work as it is essentially political in nature. It would risk politicising the Court as well as distracting it from other work. Furthermore, the Constitutional Court's standing has fallen in the last number of years as it has been suspected of being subject to political influence.[65] While the controversial decisions do not relate to the regulation of centre-autonomy relations, they have undermined the general public's faith in the Court. This makes it even less advisable to involve the court in synchronising and developing Gagauzia's position and laws.

In 2003, an amendment to the Constitution provided that laws adopted by the People's Assembly are subject to administrative control to check their compliance with the Constitution, the Autonomy Statute, and all other central state laws. Consequently, many disputes between Gagauzia and central authorities are now settled on the basis of claims

[64] Constitutional Court of the Republic of Moldova (2011). Judgement on Ceasing the Process for Constitutional Review of Article 21, para. (2) and para. (3) of the Law No. 344-XIII of December 23, 1994 on the Special Legal Status of Gagauzia (Gagauz-Yeri) and Article 40, para. (5) of the Law No. 294-XVI of December 25, 2008 on Prosecution. Chişinău: Constitutional Court of the Republic of Moldova.

[65] Beschieru, I. (2016). Interview with Dawn Walsh. Chişinău, January 27. Sultanli, J. (2016). Interview with Dawn Walsh. Chişinău, January 25.

submitted by the State Chancellery office in Comrat to the administrative court. As Cuijuclu and Sirkeli highlighted, data on these cases is only available from December 2013. Between December 2013 and the December 2015, the office of the State Chancellery appealed against 6 regulations and 3 local laws. Five of the appealed regulations were cancelled by the administrative court on the grounds of violating not only of state-level laws but also the Autonomy Statute and local laws. Half of the regulations were recognised as going beyond the competence of the People's Assembly. In only one case was the State Chancellery's claim dismissed as unfounded. These decisions included declaring the aforementioned 2014 referenda as illegal.[66]

Technical legal capacity undermined the Gagauz's recourse to the Court as a way to enforce the domestic guarantees designed to protect their TSG. However, even if these capacities were developed it would still be preferable to have a mechanism which could resolve such issues on a political level, avoiding the need to turn to the courts in all but the most serious cases. Such an instrument would be particularly useful in Moldova where there are a large number of national and autonomy laws which are inconsistent and thus large amounts of work to be carried out to resolve this issue. Relying on the courts in such a case represents an abdication of responsibility by politicians and would prove to be a great burden to the judicial system.

Since the establishment of Gagauzia, there have been five joint working groups or commissions, including deputies from the central Assembly and the People's Assembly in Gagauzia, tasked with addressing difficulties between Comrat and Chişinău. All five commissions were established to address specific difficulties which arose between Gagauzia and the centre. They were only provided with short-term mandates. In early 1995, when the Autonomy Statute became law, the Mixed Commission for the Implementation of the Law on the Special Legal Status of Gagauzia was established. It was charged with overseeing the implementation of the Autonomy Statute, organising local referenda in settlements to decide whether the area would join the autonomy, and organising elections for the People's Assembly of Gagauzia and the

[66]Cuijuclu, E., & Sirkeli, M. (2015). Reciprocal Control between the Center and Autonomy: Experience of Implementing the Gagauz Status. Comrat: Pilgrim-Demo.

Governor of Gagauzia.[67] While the organisation of the referenda and elections was a success and the votes occurred without major difficulties, the Commission was unable to ensure that national laws were consistent with the Autonomy Statute. The Commission, which had been established as a temporary body, was dissolved in September 1995.

As it became increasingly obvious that there were a large number of contradictions between state-level and autonomy-level laws, the Commission on Elaboration of Proposals for Bringing Legislation in Compliance with the Constitution of the Republic of Moldova on Issues related to the Special Status of the Autonomous-Territorial Unit of Gagauzia was established in 2001. This group focused primarily on constitutional amendments. The work of the commission was beset with controversies and it resulted in the central Assembly and People's Assembly members making separate proposals. While some constitutional amendments were made in 2003, the group did not resolve the main issues of the division of competencies and harmonisation of different levels of law.[68] Between 2005 and 2007, another working group was formed to provide greater detail on how the division of competencies could be established and managed. This group also organised training for staff from the People's Assembly. However, after a change in leadership in Gagauzia, the group was suspended without any legislation having been passed as a result of its work. There were two additional groups established in 2014 and 2015. The 2014 group made little progress due to difficult relationships between Comrat and Chişinău and only existed for a short time due to state-level parliamentary elections in November 2014.

After a year's delay due to wider political difficulties in Moldova, another group was established in 2015. This group differs from its predecessors in that it is to be a permanent body and the legislation

[67]Moldovan Parliament (1994). Resolution of the Parliament No. 345 on Implementation of the Law on Special Legal Status of Gagauzia (Gagauz-Yeri) of 23/12/1994. Accessed 31 December,http://lex.justice.md/viewdoc.php?action=view&view=doc&id=308860&lang=2.

[68]Cuijuclu, E. (2017). The Cooperation Mechanisms between the Centre and Autonomy: The Case of Gagauzia in Moldova. International Political Science Association colloquium, *Democratization and Constitutional Design in Divided Societies*, University of Cyprus, Nicosia, Cyprus, 24 June 2017.

establishing it allowed for international expert assistance.[69] The group did not make progress in 2015 due to the wider political crisis in Moldova. Nevertheless, the election of the new Governor Irina Vlah in Gagauzia, who seems eager to cooperate with the central authorities, and the central parliamentary speaker Andrian Candu's proactive approach, suggest that this group may be more successful in resolving the major difficulty of specifying the division of powers and harmonising legislation between the autonomy and centre.[70] The group's work is still interrupted and limited by the fact that its membership changes after central parliamentary or Gagauz elections. This is compounded by the fact that these elections do not follow the same cycle resulting in non-concurrent changes in the group's membership.

There are two further mechanisms, aimed at integrating Gagauzia into the state, which need to be considered: The co-option of TSG level officials into relevant state institutions and a legislative initiative through which the Gagauz could propose legislation at central government level. While neither provision was explicitly designed to guarantee the TSG arrangements, in practise they have a potentially important role. The inclusion of Gagauz officials in central institutions may allow them to proactively highlight instances where activities of the central state affect Gagauzia and thus the need to consider the TSG. Their inclusion could also improve Gagauz knowledge and experience of the workings and policies of central government. This may decrease the potential for unintentional overstepping of the delegated competencies. Fundamentally, this inclusion could create a more cooperative relationship between Gagauzia and the central authorities and provide a degree of shared rule which is shown to counter the centrifugal tendencies of TSG.

Article 14(4) of the Autonomy Statute stipulates that 'The Governor of Gagauzia shall be appointed as a member of the Government of the Republic of Moldova after a decree by President of the Republic of Moldova' and Article 19 provides that 'On the recommendation of the Governor of Gagauzia the directors of the corresponding branch departments shall become members of the boards of ministries and of departments of the Republic of Moldova'.[71] The latter article is used to appoint

[69] Ibid.

[70] Groza, I. (2016). Interview with Dawn Walsh. Chișinău, January 28.

[71] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Articles 14 & 19. Accessed 31 December, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

the heads of the Gagauzian departments of justice, internal affairs, and security, as well as the head of the prosectutor's office and the chairman of the appeals court, as ex officio members of the respective national ministries and other government institutions.[72] This co-option provides for an innovative form of shared rule which has the potential to stabilise the TSG institutions by encouraging cooperative rather than competitive relations.

A number of actors have highlighted the potential or actual useful role which the co-option of the Governor can play. For example, the Governor has previously used it to secure special funding from the central state.[73] There are no indications that the other co-options had any impact.[74] The operation of the co-option arrangement appears to be very dependent on good personal relationships between the Governor and the central government. This meant it operates well at times, for example, after the election of the current Governor Irina Vlah, as both she and the Speaker of the central Assembly were predisposed towards trying to improve Gagauzia centre relations. It was less effective when the relationship between the central state and the Governor was strained, as it was under the previous Governor Mikhail Formuzal. This is unhelpful, as it is when personal relationships are not conducive to effective cooperation that institutionalised mechanisms are most necessary. In fact, rather than improving relations between the Gagauz and the centre, the failure of authorities in Chişinău to show respect for the co-option by forgetting to invite the Governor to a meeting of the government in 2015 further fuelled feelings in Comrat that the central government did not care about the Gagauz.[75]

The legislative initiative which is provided for in Article 73 of the Moldovan Constitution is even less effective at developing a cooperative relationship between the Comrat and the central authorities. Between

[72] Protsyk, O., & Rigamonti, V. (2007). 'Real' and 'Virtual' Elements of Power Sharing in the Post-Soviet Space: The Case of Gagauzian Autonomy. *Journal on Ethnopolitics and Minority Issues in Europe*, Vol. 6, No. 1, 1–22.

[73] Cuijuclu, E. (2015). The Mechanisms of Cooperation between the Autonomy and the Central Executive Authorities: Experience of Italy and the Republic of Moldova. Comrat: Pilgrim-Demo.

[74] BBC Monitoring Kiev Unit (2015). Gagauz Autonomy Head Slams Moldova's pro-EU, Pro-Romanian Foreign Policy, December 23.

[75] Beschieru, I. (2016). Interview with Dawn Walsh. Chişinău, January 27.

the introduction of this provision, in 2003, and 2015 there were no successful legislative initiatives.[76] Bills which were forwarded did not even reach an Assembly vote as they were rejected at committee stage. The limited capacity of the Gagauz, for example, deputies of the People's Assembly are not full-time professional politicians, results in the submission of bills which are often not well drafted. However, if there is political will at the centre to take the bills forward, they could be developed in conjunction with experts rather than rejected.[77] Additionally while international organisations such as the United Nations Development Programme (UNDP) and the Council of Europe (COE) have carried out training sessions to improve the skills and capacity of Members of the People's Assembly, these efforts are undermined by the high turnover of deputies after each four-year election cycle. The high number of independent members in the People's Assembly also means that such knowledge is not institutionalised and disseminated through party political channels.

International Guarantees

The conflict between the Moldovan central state and the Gagauz was the least intense of the cases examined in this book and lacked a heavy or prolonged militarisation. As a result, it is unsurprising that there was relatively little international involvement. The Organization for Security and Co-operation in Europe (OSCE) was involved in mediating the 1994 Autonomy Statute, but there are no international guarantees built into the Agreement. However, the international community did offer some technical assistance. Furthermore, the so-called 'external vector' of Moldova, whether it seeks Euro-Atlantic integration or develops a closer relationship with Russia, is an extremely sensitive issue for the Gagauz. The central government's approach to this issue undoubtedly affects its relationship with Gagauzia.

In the years after the Autonomy Statute was adopted, the Council of Europe was involved in its implementation, the Venice Commission assessed proposed changes in Moldovan laws, looking both at their design broadly and how they related to Gagauzia. The Council of

[76] Cuijuclu, E. (2015). Implementation of the Status of Gagauz-Yeri Autonomy: Challenges and Prospects. Comrat: Pilgrim-Demo.

[77] Beschieru, I. (2016). Interview with Dawn Walsh. Chişinău, January 27.

Europe experts were largely critical of actions taken and legislative adaptations initiated by both the central authorities and the Gagauz. It was almost a decade before amendments were made to the Constitution to strengthen the TSG and while international expert opinions were sought, Chişinău and Comrat largely ignored their suggestions.[78] Similarly, the international community offered assistance to the working groups. Members of the 2005–2007 working group received assistance of international experts from the European Centre for Minority Issues aimed at helping them to develop proposals on the distribution of competencies. The parliament regulation establishing the 2015 group allowed for the participation of international organisations and NGOs through monitoring, mediation, technical assistance, consultations, and training. The Finnish NGO Crisis Management Initiative (CMI), the OSCE, High Commissioner on National Minorities (HCNM), and other international organisations provided assistance in the establishment of the group, monitor its work, and provide technical assistance.[79] The effect of this assistance is limited due to the temporary nature and the frequent changes in membership due to national and Gagauz elections, as well as the domestic actors discarding advice provided. While the current group is established on permanent basis, it still suffers from election disruption and turnover issues. These challenges could be addressed if a permanent secretariat was created to act as the institutional repository of knowledge and expertise.

Future membership of regional organisations is often considered to be a 'carrot' which can be used to ensure that both central authorities and minority groups respect TSG arrangements used to manage conflict. In Moldova, future possible membership of the EU does not have that effect. Instead, it is a further issue which creates divisions between political elites in Chişinău and Comrat. Central state political elites have tended to claim that they are eager to make necessary reforms to pursue EU integration, though it is unclear whether they are genuinely committed to making the required changes. In the past, the Gagauz were

[78]Wober, S. (2013). Making or Breaking the Republic of Moldova? The Autonomy of Gagauzia. European Diversity and Autonomy Papers—EDAP, No. 2.

[79]Cuijuclu, E. (2017). The Cooperation Mechanisms between the Centre and Autonomy: The Case of Gagauzia in Moldova. International Political Science Association colloquium, *Democratization and Constitutional Design in Divided Societies*, University of Cyprus, Nicosia, Cyprus, 24 June 2017.

wary that EU integration would be a step towards the feared union with Romania. In recent years, EU integration was viewed as less attractive than developing closer links with Russia. While there was no consensus on whether to pursue EU membership among the general Moldovan population, the issue had special significance in Gagauzia. As tensions between the EU and Russia increased, particularly after Russian involvement in the Ukraine conflict, Moldova was forced to 'choose a side'. After signing its Association Agreement with the EU, Moldova was subject to a Russian import ban which has had substantial negative impact on the already weak economy, though the ban was supposedly not motivated by political issues but by health and safety concerns. Gagauz Governor Irina Vlah claimed that the possible access to the EU market was only 'illusionary' and argued that 98% of Gagauzia's residents had voted in favour of integration with the United Economic Space of Russia, Belarus, and Kazakhstan in the 2014 referendum in Gagauzia.[80]

The economic impact of Moldova's foreign policy influences the Gagauz's attitude to these policy decisions. This is unsurprising given the economic situation in the region, which is grave even by Moldovan standards. Russia has a history of providing aid or economic support to the Gagauz. Gagauzia is exempted from the Russian embargo on Moldovan wine which was put in place after Moldova signed the EU Association Agreement.[81] The central authorities are very suspicious of Russian economic support of Gagauzia and view it as part of a wider project aimed at preventing Moldova from leaving its sphere of influence through EU integration. There are also long-standing difficulties between Moldova and Russia due to the latter's involvement in Transniestria. The attraction of Russian economic support—and its ability to harm relations between Comrat and central authorities—could be somewhat negated if the central government and the Gagauz negotiate an agreement on how the budget of Gagauzia will be funded.

[80]TASS—News Agency (2017). Gagauzia does not support Moldova's policy of integration with EU—Gagauz head, April 25.

[81]Gilet, K. (2015). In Tiny Moldova, Hints of a 'Federalized' Ukraine's Future; Gagauzia, an Autonomous Region in Southern Moldova, Looks to Moscow before the West, much as Ukraine's Restive East does. *The Christian Monitor*, May 25.

The Gagauz have also argued that to address their severe economic challenges they need more space to pursue their own economic policy.[82]

Yet the relationship between the Gagauz and the Russians is not simply one of economic dependence. There are also long-standing cultural and linguistic ties. The Gagauz fondly remember special dispensation they were awarded by the Russian Empire which exempted them from taxes and military service.[83] In 2015, 'Russian envoy to Moldova Farit Mukhametshin said that Russia and Gagauzia feel "reciprocal deep sympathy with each other"'.[84] As almost all Gagauz are fluent in Russian, and they are relatively weak in the Moldovan language, almost all media consumed in Gagauzia is of Russian origin. During election campaigns, up to 95% of news received in the region is in Russian. This unsurprisingly leads to greater support for pro-Russian candidates. Furthermore, it is very important for candidates for the position of Governor to travel to Moscow and be photographed with high-level Russians.[85] At a meeting in July 2014, Moldova's Coordination Council for Television and Radio Broadcasts banned all Russia 24's broadcasts in Moldova until the 1st of January 2015, citing its 'biased presentation' of news about Ukraine. The then-Governor Mikhail Formuzal rejected the ban, arguing that 'the ruling pro-EU Coalition, are exerting every effort to cleanse the information field, restrict the access of Moldovan voters to true information and save themselves from imminent defeat', and the Russian Foreign Ministry described the ban as 'outrageous'.[86] It has also been suggested that the Gagauz strategically used links with Russia, which make Chişinău nervous, to encourage the central authorities to treat it more favourably.[87]

[82]Neukirch, C. (2002). Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova, in Kinga Gal (ed.), *Minority Governance in Europe*, Series on Ethnopolitics and Minority Issues, Vol. 1, 105–123.

[83]Wober, S. (2013). Making or Breaking the Republic of Moldova? The Autonomy of Gagauzia. European Diversity and Autonomy Papers—EDAP, No. 2.

[84]BBC Monitoring Kiev Unit (2015). Moldovan, Gagauz Leaders Urge Unity on Anniversary Day, 19 August.

[85]Cioaric, V. (2016). Interview with Dawn Walsh. Chişinău, January 28.

[86]TASS—News Agency (2014). Moldova's Gagauz autonomy continues Russia 24 broadcasts despite Chişinău's ban, July 11.

[87]Groza, I. (2016). Interview with Dawn Walsh. Chişinău, January 28.

The other regional actor with which the Gagauz have close links is Turkey. The Gagauz have ethnic ties with Turkey and the Gagauz language is Turkic. Turkey has offered economic and cultural support to the Gagauz. For example, in 2015, the Turkish company Ottoman Grup Hulki Eroglu signed a protocol of intentions to build a modern hotel in Gagauzia's capital, Comrat, the investment is estimated to be worth five million dollars and the Turkish Cooperation and Development Agency has provided considerable financial and educational support.[88] Turkey has also advocated for the establishment of the autonomy and for the implementation and development of the Autonomy Statute. The then-Governor Formuzal argued that

> It is difficult to overestimate the role of Turkey in these issues. We believe that the existence of our autonomy was made possible thanks to a great deal of support and assistance given to us by the Turkish Republic. It is Turkey that played a decisive role in acknowledging Gagauzia as autonomous, and in resolving this international conflict peacefully. So I do esteem Turkey's contribution.[89]

But these links have not been viewed as suspicious by the Moldovan central authorities. There were no suggestions that Turkey had any selfish interest in the autonomy. Turkey's involvement has largely been viewed as positive, supporting the social, cultural, and economic development of the region.[90] This shows that not all close ethnic links between TSG regions and neighbouring states have destabilising effects. Where there are no territorial claims or expressions of interest in unification links, connections with more powerful neighbours can be largely depoliticised and can become a non-controversial source of economic and cultural support.

[88] BBC Monitoring Kiev Unit (2015). Programme Summary of Moldova One TV 'Mesager' News 12 Nov 15, 13 November. BBC Monitoring Kiev Unit (2014). Turkish Speaker Visits Gagauz Region of Moldova, May 9.

[89] Radio Free Europe/Radio Liberty (2005). Moldova: The Example of Gagauz-Yeri As An 'Unfrozen Conflict' Region, April 5.

[90] Kirnitki, I. (2016). Interview with Dawn Walsh. Chişinău, January 26.

Conclusion

The use of TSG as a conflict management tool in Moldova shows that states with less developed governance structures struggle to establish and implement these arrangements. The relationship between the Gagauz and the central Moldovan authorities is not as negative as many of the other centre-TSG relations discussed in this volume. The conflict never became highly militarised and casualty levels were relatively low. The Gagauz's demands are more moderate than many other minorities. They do not ultimately seek independence or unification with a kin-state. While the Moldovan central elites favour a unitary state, they are willing to establish TSG, in part to avoid the violence experienced in Transniestria and to allow them to concentrate on resolving this more problematic conflict. As such, the Autonomy Statute is not an 'unhappy compromise' to the same extent as the TSG institutions in other cases, fears of malicious centrifugal or centripetal tendencies are lower.

Yet the TSG arrangements in Moldova have still experienced instability. This instability is largely the result of an underdeveloped legal framework and a lack of focus on Gagauzia by the central state. The Autonomy Statute and relevant constitutional articles do not clearly elaborate the division of power between the Gagauz and the centre, a vital component of any TSG arrangement. Any domestic or international guarantees cannot operate effectively if it is unclear what arrangements they are designed to protect. Chişinău has also neglected to consider the provisions, as vague as they are when making national laws. This has led to occasions when the central state has arguably infringed on the region's competencies. Additionally, the central authorities have relatively stronger technical capabilities which have allowed it to make better use of the domestic guarantees by taking cases to the constitutional and administrative courts. The Gagauz's frustration at the non-implementation or development of the Autonomy Statute in part explains some of the region's actions, which have clearly exceeded its powers. Technical assistance from international and regional organisations, such as the Council of Europe and Organisation for Security and Cooperation in Europe, has had some positive effect on the situation, but only when domestic actors have demonstrated a willingness to follow advice to improve the situation.

The Moldovan central state has not been focused on implementing the TSG arrangements and working for good relations with the

autonomy. Gagauzia is a very small region of the state and Moldova has been facing very difficult challenges. In years following the collapse of communism and Moldova's declaration of independence in 1991, the state began to make the necessary reforms to establish a functioning democracy. It made progress by having a number of competitive elections, developing links with the EU, and passing political reforms. However, serious economic difficulties—underpinned by the fact that most heavy industry is located in the breakaway Transniestria region—high levels of emigration, and political instability as parties and coalitions became dominated by oligarchs, have undermined its development. The state has also struggled to resolve its conflict with Transniestria and reintegrate the breakaway region into the state.[91] Given this broader framework, it is unsurprising that the central state has not been focused on the situation in and relationship with a small poor region which is home to only approximately 5% of the country's population. However, this failure has undermined the ability of the TSG to operate effectively, frustrated the Gagauz, and has ensured that the conflict between the autonomy and the state remains a potential source of instability.

These difficulties have been greatly compounded by the regional environment. The deterioration of relations between the EU and Russia has had a profoundly negative impact on the situation. It had further complicated possible EU membership, which was already a sensitive issue for the Gagauz due to its association with union with Romania. The Russian sanctions which followed the Moldovan initialling of an Association Agreement with the EU, while under the guise of health and safety concerns, clearly show Moscow exerting pressure on a state which was traditionally in its sphere of influence in an effort to reassert its dominance in the region and prevent EU integration. This has had a negative economic impact on the already economically weak Moldova. Most profoundly for this research, it has driven a further wedge between Chișinău and Comrat as the latter's pro-Russia attitude is viewed with suspicion. Furthermore, neither the EU nor Russian attention is directed at ensuring that the Gagauz's autonomy is respected. Instead, Gagauzia receives some economic assistance but political focus is on the Transniestria conflict. Finally, if or when a resolution to the Transniestria conflict is found,

[91] Freedom House (2003). Nations in Transit—Moldova 2003. Washington, DC: Freedom House. Litra, L. (2016). Nations in Transit—Moldova 2016. Washington, DC: Freedom House.

it will almost inevitably include changes to the autonomy enjoyed by the Gagauz. While such a solution does not appear, imminent potential changes create an additional source of instability making it more difficult for domestic or international guarantees to stabilise the TSG arrangements. However, new TSG arrangements that include both Transnistria and Gagauzia are more likely to include strong international guarantees. These may, in the longer term, provide stronger support for the Gagauz.

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Iraq: Iraqi Kurdistan, Unresolved Issues, and Changing International Priorities

The most recent attempts at providing TSG to the Kurdish population in Iraq occurred within the wider framework of rebuilding the state after the US-led invasion of Iraq in 2003. Both the Law of Administration for the State of Iraq for the TAL and new 2005 Constitution provided for a specific type of federation. In this arrangement there is one federal unit, a federacy, with Kurdistan as the sole federal region.[1] While the 2005 Constitution had the unenviable task of re-creating the Iraqi state, including trying to manage relations between the Shia and Sunni Arabs, considerable attention was paid to providing the Kurds with autonomy. The TSG arrangements seek to balance the Kurds longstanding demand for independence, which had led to numerous rebellions since the collapse of Ottoman rule in the region at the end of World War One, with a desire held by the international community and many Sunni and Shia Iraqis for the preservation of a single Iraqi state.

While these TSG institutions provide the Kurds with a great deal of autonomy and insulated the region from much of the sectarian violence which ravaged Iraq between 2005 and 2008, they failed to convince the Kurds that their future lay within Iraq. In September 2017 the *Kurdistan* Regional Government (KRG) unilaterally held a referendum

[1] Though there was the potential for the creation of new regions through the amalgamation of governorates these regions would enjoy less autonomy than Kurdistan which was afforded particular protections.

D. Walsh, *Territorial Self-Government as a Conflict Management Tool*, Federalism and Internal Conflicts,
https://doi.org/10.1007/978-3-319-77234-9_6

on independence. The existential threat posed to the Iraqi state by the rise of the *Islamic State of Iraq and Syria* (ISIS) in 2014 and the prominence of Peshmerga (Kurdish forces) in re-taking territory undoubtedly strengthened the Kurds position, for example giving them de facto control over disputed territories, and thus encouraged this secessionist manoeuvre. However, disputes between the Kurds and the central state regarding matters which were not settled in the 2005 Constitution also fuelled this centrifugal momentum. Ambiguity and disagreement over what provisions the Constitution makes for the future of the Peshmerga, hydrocarbons, and disputed territories, made domestic guarantees completely ineffective. The international community has not been able to resolve these difficulties. Furthermore, the international community's reliance on the Kurds in the fight against ISIS, and international business interest in hydrocarbons under Kurdish, control meant that the territorial integrity of Iraq has not always been the primary concern of regional and international actors. The Kurds also view any international guarantees of their autonomy with suspicion, recalling that the international community has been an unreliable ally in the past. The presence of significant Kurdish groups in neighbouring states also complicates the role of these states in guaranteeing the TSG secured by the Iraqi Kurds.

The Conflict Between Iraqi Kurds and the Iraqi State

The Kurds are often referred to as the world's largest nation without a state. This situation dates back to the redrawing of the global map by the victorious parties at the end of World War One. Despite the Kurds identifying as a national group and advocating for the creation of a Kurdish state, the victorious powers divided them between the states of Iran, Iraq, Turkey, Armenia, and Syria. The architects of the new order ignored the salience and strength of the Kurdish identity.[2] In the decades after independence the new Sunni Arab elite in Iraq focused on building an Arab nation. They felt that this would create a strong state capable of defending itself against European imperialism. This policy of creating an Arab nation envisioned the compulsory assimilation of the different minorities, including the Kurds.

[2]Wilgenburg, W. (2012). Breaking from Baghdad: Kurdish Autonomy vs. Maliki's Manipulation. *World Affairs*, Vol. 175, No. 4, 47–53.

Kurdish nationalists, including the Sheiks and their tribal followers, urban intellectuals and professionals, and Kurdish Officers serving in the Iraqi Army, engaged in numerous rebellions against the central state between the 1930s and 1990s. This movement, which itself was wracked by in-fighting, sought to seize on moments of central state weakness to win concessions on autonomy.[3] During the 1958 revolution, which replaced the Iraqi monarchy with a republic, Mullah Mustafa, the founder of the modern Kurdish national movement, returned to Iraq from exile in the Soviet Union, hoping that the country's new military leaders would be open to making an agreement with the Kurds to stabilise their rule. They were initially receptive to his overtures and Article 3 of the 1958 Interim Constitution declared that the Arabs and Kurds were partners in the new Iraqi state but 'before long competing agendas emerged, hitched to duelling narratives that reflected rival nationalisms'.[4]

When the Ba'ath Party came to power in a coup in 1968, it also initially reached an agreement with Mullah Mustafa providing for considerable Kurdish autonomy. It hoped securing his support would strengthen its nascent grip on power. However, the 1973 oil crisis economically strengthened the new regime, so it no longer needed Kurdish support. Furthermore, the new regime concluded a treaty with The Shah of Iran, who had assisted the Iraqi Kurds, settling the Shatt al-Arab border dispute. This allowed Baghdad to hold power without the Kurds and it reneged on its promises. The state's failure to fulfil these agreements created a profound distrust between the Kurds and the central state which continues to characterise relations. The 2009 draft Constitution for the Kurdish region specifically refers at length to these events.[5] The failure of the political agreements led to Kurdish military campaigns for independence or autonomy which were met with ferocious repression by the central state. Reprisals did not only focus on those who had been involved in

[3]Wimmer, A. (2003). Democracy and Ethno-religious Conflict in Iraq. *Survival*, Vol. 45, No. 4, 111–134.

[4]Hilternmann, J. (2008). To Protect or to Project? Iraqi Kurds and Their Future. *Middle East Report*, No. 247, 6–17.

[5]Romano, D. (2010). Iraqi Kurdistan: Challenges of Autonomy in the Wake of US Withdrawal. *International Affairs*, Vol. 86, No. 6, 1345–1359.

the violence but also on 'ever larger sections of the Kurdish population' creating ever worse relations.[6]

During the Iran-Iraq war the two main Kurdish groups, The Kurdistan Democratic Party (KDP) led by the Masoud Barzani and the Patriotic Union of Kurdistan (PUK) led by Jalal Talabani, ultimately allied themselves with Iran. This infuriated Saddam Hussein and he declared them to be traitors to Iraq.[7] When the war ended in 1988 he unleashed vicious and widespread reprisals against the Kurdish community. The chemical attack on Kurdish town of Halabja, in retaliation for its alleged sympathy with the Kurdish movement and Iran, killed up to 5000, and up to 10,000 were injured. This was indicative of the genocidal character of the so-called *Anfal* campaign. The Iraqi Army systematically destroyed Kurdish villages that had supported the insurgences and deported approximately 800,000 people, resettling the area, especially the oil-rich region of Kirkuk, with Arab families.[8] The horrors of this campaign drove the remaining Kurdish leadership into exile in Iran.

Saddam Hussein's invasion of Kuwait and the subsequent international reaction provided another opening for the Kurds to rebel. As the international coalition pushed the Iraqi army out of Kuwait this gave the Kurds the opportunity to return from Iran and rise up against the government. Unfortunately for the Kurds, and the Shia who were rebelling in the South, the international coalition did not assist the rebels. Saddam Hussein's regime recovered and violently put down the rebellions.[9] This violence drove hundreds of thousands of Kurds into Iran and the mountainous border region with Turkey. Confronted by a worsening humanitarian disaster the international community finally acted in April 1991 when the United Nations Security Council passed Resolution (UNSCR) 688, calling on Iraq to end repression of its population.[10] Operation Provide Comfort began the next day as a no-fly zone was established by

[6]Wimmer, A. (2003). Democracy and Ethno-religious Conflict in Iraq. *Survival*, Vol. 45, No. 4, 111–134.

[7]Hilternmann, J. (2008). To Protect or to Project? Iraqi Kurds and Their Future. *Middle East Report*, No. 247, 6–17.

[8]Wimmer, A. (2003). Democracy and Ethno-religious Conflict in Iraq. *Survival*, Vol. 45, No. 4, 111–134.

[9]Brancati, D. (2004). Can Federalism Stabilise Iraq?' *The Washington Quarterly*, Vol. 27, No. 2, 5–21.

[10]United Nations (1991). Resolution 688 of 5 April 1991. New York: United Nations.

the United States, UK, and France, and humanitarian relief and military protection were provided to the Kurds by a small Allied ground force based in Turkey. While there were some negotiations between the Kurds and Baghdad, in October 1991 Iraqi forces unilaterally withdrew to the so-called Green Line, effectively leaving the Kurds to over a decade of US-protected autonomy.[11]

This autonomy provided an important opportunity for the Kurds to develop self-rule and a Kurdish Regional Government (KRG) was established. Some notable milestones were achieved, for example, the region held its first free and fair election in 1992. However, economic challenges and internal fighting among the Kurds threatened to undermine the experiment. The 1992 election resulted in a legislative and executive coalition between the two dominant parties, the KDP and PUK. The system which became known as the 50:50 system divided all executive and legislative positions equally between the groups. But the real power was vested in the political party bureaucracies. The official governmental structures were weakened by a failure to include the party leaders, Jalal Talabani and Massoud Barzani. Furthermore, while management of revenues and the Peshmerga were officially vested in the government, the parties effectively maintained control over these areas. In 1994 the unified administration collapsed and widespread fighting broke out. After several rounds of fighting the Kurdish region was effectively divided into two. Each party controlled a separate area, a KDP dominated axis of Erbil–Dohuk, and a PUK-dominated axis of Suleimaniyah–Darbandikhan (Kirkuk).[12] In 1998 the KDP and PUK signed the Washington Peace Accord, in which they agreed to cease hostilities, hold region-wide elections in 1999, share revenues, and reunite their administrations. For the next several years, however, none of the accord's provisions (except for the cessation of hostilities) were implemented.[13]

Initially the economic situation in the region was grave, it was essentially the subject of two sanctions regimes—the whole of Iraq was the target of international sanctions and Baghdad in turn applied sanctions

[11] Hilternmann, J. (2008). To Protect or to Project? Iraqi Kurds and Their Future. *Middle East Report*, No. 247, 6–17.

[12] Stansfield, G. (2003). *Iraqi Kurdistan: Political Developments and Emergent Democracy*. London: Routledge.

[13] Romano, D. (2010). Iraqi Kurdistan: Challenges of Autonomy in the Wake of US Withdrawal. *International Affairs*, Vol. 86, No. 6, 1345–1359.

against the KRG. However, between 1997 and 2003, when the revenues from the 'oil-for-food programme' provided for in Resolution 986 distributed 13% of Iraqi oil revenues to Kurdistan, living standards improved. The KRG was also able to rebuild almost all the 4000 villages destroyed by the state in the 1980s.[14] While the international community encouraged some development in the Kurdish region during this period, it was reluctant to allow the Kurds to become too economically strong, lest it facilitate full-scale secession. Secession was vehemently opposed by neighbouring Turkey so as not to encourage Turkey's own much larger Kurdish population.[15]

In the period from mid-1991 to late 2001 the Kurds largely existed separately from the rest of the Iraqi state. Operation Northern Watch enforced a no-fly-zone which protected them from Saddam Hussain's regime. However, after the terrorist attacks in New York and Washington D.C. on the 11th of September 2001 it quickly became obvious that the US intends to remove the Iraqi regime. This created uncertainty for the Iraqi Kurds. It seemed inevitable that any new Iraqi government would seek to reintegrate the Kurds into the state. This risked undermining the autonomy which they had enjoyed, and this threat motivated the PUK and KDP to present a unified position arguing for continued Kurdish autonomy.[16] While the fundamental aim of independence was never abandoned, aware of international opposition the Kurds became the strongest proponents of federalism in Iraq. They hoped this position could protect their needs in a new Iraq.[17]

Federalism as a Conflict Management Tool in a 'New' Iraq

In the led up to the controversial 2003 US-led invasion of Iraq, the major opposition groups in Iraq all advocated for a federal structure for the 'new' Iraq. At a conference for the Iraqi opposition in London in late

[14] Ibid.

[15] Hilternmann, J. (2008). To Protect or to Project? Iraqi Kurds and their Future. *Middle East Report*, No. 247, 6–17.

[16] Stansfield, G. (2003). *Iraqi Kurdistan: Political Developments and Emergent Democracy*. London: Routledge.

[17] BBC Worldwide Monitoring (2002). Kurdish Leader Barzani Believes Federalism Is the Answer, December 1.

2002 opposition leaders including Sunnis and Shias, as well as Kurds, argued that '[n]o future state of Iraq will be democratic if it is not federal', they claimed that federalism was necessary as it protects the minority against the majority.[18] This shows that even before the invasion Iraqi, opposition leaders were arguing that federalism was necessary as it met not only the Kurds', but also the Sunnis' and Shia's, need for security. The US-led coalition forces also supported the use of federalism and the establishment of a semi-autonomous region for the Kurds in a post-Saddam Hussein Iraq. This disposition shaped the TSG arrangements in the Law of Administration for the State of Iraq for the Transitional Period (TAL), which in turn influenced the Constitution adopted in 2005.

Article Four of the TAL, provided that 'the system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations' and Article 53(A) stated that 'the Kurdistan Regional Government is recognised as the official government of the territories that were administered by that government on 19 March 2003 in the governorates of Dohuk, Arbil, Sulaimaniya, Kirkuk, Diyala, and Neneveh'.[19] These Articles met the Kurds needs for recognition by legitimising their identity. Likewise, Article 117 of the Iraqi Constitution recognises Kurdistan 'as a federal region'.[20] Furthermore, both the TAL and the Constitution provide that the Kurdish language is an official language in Iraq. This allowed for its widespread official use, for example on passports, and allowed both Kurdish and Arabic to be used in the official and federal institutions in Kurdistan.[21] Such language provisions provide strong recognition of the

[18]Conference of the Iraqi Opposition, Final Report on the Transition to Democracy in Iraq, November 2002, www.wadinet.de/news/dokus/transition_to_democracy.pdf, amended by the members of the Democratic Principles Workshop, quoted in Brancati, D. (2004). Can Federalism Stabilise Iraq? *The Washington Quarterly*, Vol. 27, No. 2, 5–21.

[19]Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 53. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html.

[20]Iraqi Constitution (2005). Article 117. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

[21]Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 9. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html. Iraqi Constitution (2005). Article 4. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

legitimacy of the Kurdish identity and underlined that it can exist as part of the state; that it is not subversive.

The recognition of Kurdistan as a federal region is balanced with provisions which stressed the unity and territorial integrity of the state. These reassured other groups in Iraq that Kurdish secession would not destroy Iraq.[22] While maintaining a single state was generally favoured by Sunnis and Shias, many argued that this new Iraq should also include federal regions for the other two main groups. Some Shia leaders argued that there should also be a federal unit for Shias, who are mainly located in the south of Iraq. Such a provision would meet the Shia need for security by providing them with regional control of hydrocarbon fields in the area. It would also alleviate fears that previous persecution would not be repeated should the Sunni minority come to dominate government in the future, as they had since in the 1920s. Requests for a Sunni region were largely motivated by a desire to compensate for the loss of power they experienced in the 'new' Iraq and to protect them against any discriminatory policies motivated by a desire for revenge. As the group which had previously dominated government, it was feared that they would be collectively held responsible for historical persecution of Shias and Kurds.

These demands were strongly criticised by those opposed to the use of TSG as a conflict management mechanism in Iraq. Integrationists argued that providing homelands to the three major groups in Iraq and allowing for strong autonomy in these regions would fuel sectarian violence and led to the collapse of the state. They claimed that a strong central government was necessary to ensure the future integrity of the state and that there was an appetite for such among the Iraqis.[23] McGarry and O'Leary were highly critical of these integrationist arguments, countering that support for the Iraqi Constitution in a referendum indicated that there was support for TSG. They also highlighted that those in Iraq who support the creation of a strong central state do not necessarily have benign motives. They highlighted that Shia proponents of such arrangements, for example Muqtada al-Sadr and the Dawa party, adopted such a position because they would be the dominant group under such a state design. They could use the provisions to promulgate Shia religious values

[22] Ibid.

[23] See for example, Visser, R. (2006). Iraq's Partition Fantasy. *Open Democracy*, May 19.

which would create further divisions, as Kurds and Sunnis would reject such policies.[24]

The 2005 Constitution sought to provide procedures which could meet developing needs for additional regions for Shia and Sunni populations without creating centrifugal momentum. Article 119 of the 2005 Constitution states that

> One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods:
>
> First: A request by one-third of the council members of each governorate intending to form a region.
>
> Second: A request by one-tenth of the voters in each of the governorates intending to form a region.[25]

This enables but does not mandate the creation of additional federal units and was crafted in such a way as to facilitate the creation of numerous regions, rather than simply providing for two additional regions. This was an important effort to counter centrifugal tendencies of TSG as history has shown that states with two or three federal regions are more likely to collapse than those with a greater number of regions.[26] Furthermore, the creation of additional federal regions with the same or similar powers as Kurdistan may have been rejected by the Kurds. They felt that the extent of Kurdish autonomy between 1991 and 2003 coupled with the ferocity of the repression they suffered under previous Iraqi regimes meant that they required stronger autonomy to meet their recognition and security needs. Where Kurds support the creation of other regions they do so to counter the creation of a strong central state which could threaten them.

The TAL and the 2005 Constitution also met the Kurdish need for security by awarding them control over a broad range of policy areas, legitimising laws made in the region since 1992, and allowing the KRG

[24] McGarry, J., & O'Leary, B. (2007). Iraq's Constitution of 2005: Liberal Consociation as Political Prescription. *i.Con*, Vol. 5, No. 4, 670–698.

[25] Iraqi Constitution (2005). Article 119. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pd.

[26] McGarry, J., & O'Leary, B. (2007). Iraq's Constitution of 2005: Liberal Consociation as Political Prescription. *i.Con*, Vol. 5, No. 4, 670–698.

to amend the operation of federal law in Kurdistan region. The latter has exceptions in a limited number of areas such as national security.[27] The TAL even allowed that 'The Kurdistan Regional Government shall retain regional control over police forces and internal security', and the Constitution stated that 'The regional government shall be responsible for…the establishment and organisation of the internal security forces for the region such as police, security forces, and guards of the region'.[28] Danilovich highlighted that these provisions were vital for the Kurds, as the Peshmerga has protected them in previous centre-Kurdish conflicts. Provisions which allow such an independent security force are highly unusual and the continued existence of the Peshmerga fuelled fears that the Peshmerga would be used in a future fight for Kurdish independence, and that the Peshmerga would not treat other groups living in Kurdistan fairly.[29] These fears support the theoretical argument that TSG is centrifugal, as TSG groups can use the infrastructure provided to unilaterally take more autonomy or secede. This demonstrates that the stronger the TSG provided, the greater the potential for such activities. Additionally, the combination of the continuing existence of a Kurdish military force and the lack of resolution as to the status of the disputed territories is highly problematic. At times the Peshmerga took control of disputed areas and where the Peshmerga and the Iraqi army geographically coexist in disputed territories, tensions have been high.[30]

The issues of the disputed territories and the ownership and control of hydrocarbons destabilised the TSG arrangements provided to the Kurds. The 2005 Constitution contains articles outlining how hydrocarbons are to be managed. Article 112 of the Constitution clearly provides a role for the federal government in the management of oil and gas fields stating that 'The federal government, with the producing governorates

[27]Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 53 and 54. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html. Iraqi Constitution (2005). Article 141. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

[28]Ibid.

[29]Danilovich, A. (2014). *Iraqi Federalism and the Kurds: Learning to Live Together*. Burlington, VT: Ashgate, 67–68.

[30]International Crisis Group (2009). Iraq and the Kurds: Trouble Along the Trigger Line, *Middle East Report*, No. 88–8, July. Brussels: International Crisis Group. Accessed 31 December 2017, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/iraq-and-kurds-trouble-along-trigger-line.

and regional governments, shall undertake the management of oil and gas', but this role is also limited not only by specifics within this Article but due to the wider territorial separation of powers provided for in the Constitution. Firstly, Article 112 stipulates that the federal government must work 'with the producing governorates and regional Governments' and restricts its role to 'present fields'.[31] Furthermore, as McGarry and O'Leary argued when reading Articles 115 and 121 central control was further limited by regional legal supremacy.[32]

As such these stipulations could be viewed as frustrating the needs of other groups in Iraq. Specifically, critics have argued that as most oil fields are located in areas dominated by the Kurds or the Shia that these provisions will leave the Sunni without sufficient resources and the central state without the necessary revenues to correct regional inequalities.[33] However, McGarry and O'Leary claimed that the continued sharing of revenues from current fields will ensure that any change in revenue distribution will be gradual, limiting its effects. They also note that there are further opportunities to explore fields throughout Iraq.[34] This highlights that in the longer term the delegation of control of hydrocarbons to regions and governorates may not have negative effect on Iraq. But securing agreement on a federal law which allows for the agreed implementation of the constitutional provisions was very problematic and tainted relations between Erbil and Baghdad for a decade.

Between 2005 and 2014 Iraq failed to reach an agreement on a federal hydrocarbon law. Opposition to alleged further decentralisation of control over the hydrocarbon sector contained in a draft law in early 2007 prevented its ratification. Amendments to this draft which clarified ambiguities in the earlier draft in favour of the central state were completely rejected by the Kurds who refused to even discuss this draft.

[31] Iraqi Constitution (2005). Article 112. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

[32] McGarry, J., & O'Leary, B. (2007). Iraq's Constitution of 2005: Liberal Consociation as Political Prescription. *i.Con*, Vol. 5, No. 4, 670–698.

[33] International Crisis Group (2006). The Next Iraqi War? Sectarianism and Civil Conflict. *Middle East Report*, No. 52. Brussels: International Crisis Group. Accessed 31 December 2017, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/next-iraqi-war-sectarianism-and-civil-conflict.

[34] McGarry, J., & O'Leary, B. (2007). Iraq's Constitution of 2005: Liberal Consociation as Political Prescription. *i.Con*, Vol. 5, No. 4, 670–698.

In the vacuum left by the failure to agree a federal law, the Kurds passed a regional hydrocarbon law and used it as the basis to unilaterally issue licenses to international oil firms.[35] In the years that followed, the Kurds awarded more than 30 contracts to international oil companies despite strong opposition from Baghdad. The Kurds also excluded any company which has signed such a contract from competing for oil contracts in other parts of Iraq.[36] The ability of the Kurds to fulfil these contracts was initially limited as it needed access to government-controlled pipelines to export its oil and gas. However, improving relations with Turkey, motivated by economic self-interested, and discussed below in the *International Guarantees* section, freed the KRG from these restrictions. This allowed them to export oil and gas to and through Turkey.[37]

This mutually harmful stalemate reached a climax in late 2014. Firstly, the Iraqi central government refused to transfer the 17% of the national budget reserved for the KRG, due to its view that the unilaterally reached oil contracts were illegal. This meant that the KRG was unable to pay the monthly salary of regional employees.[38] The Iraqi central government was also able to secure a judgement in a US courts placing an injunction on vessels carrying Kurdish oil. As a result, US refineries stopped using Kurdish oil and this led to a refusal of international markets to accept Kurdish oil.[39] This further intensified the economic crisis in the region. However, Baghdad was also in a weak position. Falling global oil prices were producing an increasing gap in the central budget.[40]

[35]International Crisis Group (2012). Iraq and the Kurds: The High-Stakes Hydrocarbons Gambit. *Middle East Report*, No. 120. Brussels: International Crisis Group. Accessed 31 December 2017, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/iraq-and-kurds-high-stakes-hydrocarbons-gambit.

[36]Williams, T. (2009). Kurdistan Halts Oil Flow and Angers Baghdad. *International Herald Tribune*, October 14.

[37]House of Commons Foreign Affairs Committee (2015). UK Government Policy on the Kurdistan Region of Iraq Eighth Report of Session 2014–15. London: The Stationery Office Limited.

[38]Alaaldin, R. (2014). Backing the Kurds will Stabilise Iraq. *Al Jazeera*, August 27.

[39]BBC Monitoring Europe (2014). Turkey Said Urging USA to Lift North Iraq Oil Ban to Help Kurds Fight ISIL, August 20.

[40]Morris, L., & Murphy, B. (2014). Baghdad and Kurds Reach 'Win-Win' Accord over Iraq's Oil Revenue. *The Washington Post*, August 16.

The threat posed by ISIS also served as an opening for an agreement. Both the Kurds and Turkey argued that the grave economic circumstances in Iraqi Kurdistan were limiting its ability to fight ISIS.[41] As the Iraqi state appeared on the verge of being completely overrun by ISIS Haider al-Abadi replaced Nouri Malaki as Iraqi Prime Minister. Reaching an agreement with the Kurds on a federal hydrocarbon law was a key element in Haider al-Abadi's plan to rebuild relations between the Shia majority and the Kurdish and Sunni minorities, which had all but collapsed under Nouri Malaki's increasingly sectarian government.[42] This agreement met the needs of both the central state and the Kurds. The KRG agreed to provide 550,000 barrels of oil a day to central authorities for export and Baghdad committed to permanently providing Erbil with 17% of the national budget. An additional $1 billion was also provided from central funds to pay and equip the Peshmerga.[43] A combination of the threat posed by ISIS, a change of leadership in Baghdad, and increasingly bleak economic climate caused by falling oil process altered the incentive structure for both the Kurds and the central government. Both parties recognised that in this challenging environment their need for security was best met by compromise.

In addition to the four governorates which are accepted to be part of Iraqi Kurdistan (Erbil, Dahuk, Halabja, and Sulaymaniyah), the Kurds have demanded inclusion of other territories in parts of Nineveh, Kirkuk, Salah ad Din, and Diyala. These areas have symbolic value for the Kurds with Kirkuk being referred to as their 'Jerusalem'.[44] The Kurds argue that these areas are essential parts of the historical Kurdish homeland and these territories are associated with the suffering caused when Kurds were expelled from these lands by the Iraqi central

[41]Arango, T. (2014). Iraqi Government and Kurds Reach Deal to Share Oil Revenues. *The New York Times*, December 4. BBC Monitoring Europe (2014) Turkey Said Urging USA to Lift North Iraq Oil Ban to Help Kurds Fight ISIL, August 20.

[42]Arango, T. (2014). Iraqi Government and Kurds Reach Deal to Share Oil Revenues. *The New York Times*, December 4.

[43]Morris, L., & Murphy, B. (2014). Baghdad and Kurds Reach 'Win-Win' Accord over Iraq's Oil Revenue. *The Washington Post*, August 16.

[44]Williams, T., & Al-Salhy, S. (2009). Clouds Gathering over Kirkuk; Iraq Takes Bids On Its Oil, While Many Kurds Try to Establish a Foothold. *International Herald Tribune*, May 29.

state during the forced process of Arabisation in the 1980s–1990s.[45] Jalal Talabani leader of the PUK claimed 'Only death—no powers or states in the world—can make me give up Kirkuk'.[46] For the Kurds, any autonomy only meets their need for recognition of the legitimacy of Kurdish identity if it integrates the disputed territories into Kurdistan.

However, any resolution of the disputed territories issue must also consider the needs of other groups living in the areas. The Arabs who came to live in the region in the 1990s accused the Kurds of carrying out the same type of forced expulsion programmes which they were subject.[47] There are also other minorities, for example the Turkomen, who live in these areas and worry about how they will be treated if these areas are permanently integrated into Iraqi Kurdistan. In an address to the European Parliament, Muzaffar Arslan argued that Arab and Turkoman territories should not be incorporated into Iraqi Kurdistan emphasising that the number of Kurds in Kurdistan Region was less than the total number of the other ethnic minorities and claiming that Erbil was a Turkoman city until it was forcibly transformed into a Kurdish city in the 1950s.[48] This highlights that TSG regions are rarely if ever homogenous. Complex settlement patterns result in the presence of other groups, some of these groups may be content to be included in TSG regions *if* provisions are put in place to meet their recognition and security needs. However, those who are part of the larger state-wide majority are likely to resist, seeing their needs as better met within the wider state where they are in a stronger position. Furthermore, any TSG policies motivated by a desire to correct previous domination can frustrate the needs of other groups in the region, making them less likely to submit to having their homes included in a TSG region.

Article 58 of the TAL dealt with the disputed territories. It provided for the return of those expelled during the Arabisation campaign, compensation for lost property, and a census. But it deferred any decision on

[45] Hauslohner, A., & Van Heuvelen, B. (2014). As Iraq Fractures, Kurds Consolidate Control of Kirkuk. *The Washington Post*, July 5.

[46] McGeough, P. (2005). Kurds Have the Power to Shape Iraq. *The Age* (Melbourne, Australia), February 12.

[47] Oppel, R. (2004). Iraq's Kurds Enjoy Self-Rule and Are Trying to Keep It. *The New York Times*, December 31.

[48] BBC Monitoring Middle East (2008). Turkoman Figure Says Kurds Benefit from Destabilised Iraq, July 6.

how to resolve the disputed territories issues until 'after these measures had been completed' and 'a permanent constitution ratified'.[49] Article 140 of the 2005 Constitution provided for the further completion of the normalisation process and census outlined in the TAL. It also included a provision for 'a referendum in Kirkuk and other disputed territories to determine the will of their citizens, by a date not to exceed the 31 of December 2007'.[50] This article appeared to provide a constitutional mechanism through which the issue of the disputed territories could be resolved, but it failed to identify exactly what territories it was referring to. This process was never completed and most notably no referendum was held. The reasons behind the failure to implement this process up to 2014 will be discussed below in the sections on *Guarantees*.

Sectarian discrimination and the politicisation of the Iraqi Army—and the wider state—under Prime Minister Nouri al-Maliki, coupled with the departure of US forces in 2011, precipitated by a failure to agree a 'status of forces' agreement, fundamentally undermined the project to create a national army for a new Iraq. As a result, the Iraqi Army that was confronted by the much smaller but vicious ISIS force in 2014 was not prepared to stand and fight to hold Iraqi territory. The Shia dominated forces were not prepared to fight and die to hold mainly Sunni areas. Consequently, ISIS captured vast swathes of Iraq as in many cases the Iraqi Army simply dumped arms and fled.[51] In contrast, Peshmerga forces engaged in fierce fighting with ISIS and quickly became a key part of not only the Iraqi plan to defeat ISIS but the wider international strategy. The Peshmerga recaptured towns such as Bashiqa, scores of villages, and thousands of square miles of territory including much of Kirkuk province, northern Diyala, and Sinjar. In total, the Kurds increased the land mass under their control by up to 40%. Having won effective control of most of the disputed territories by capturing them from ISIS in costly battles, it initially seemed unlikely that the KRG would ceded these to the central state. However, in the aftermath of the unilateral independence referendum in September 2017 Iraqi forces launched an

[49] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 58. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html.

[50] Iraqi Constitution (2005). Article 140. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

[51] *The Economist* (2004). Why Iraq's Army Crumbled, June 19.

operation to retake Kirkuk. They faced little opposition in taking areas near Kirkuk, and the forces went on to take control of a wider area including the towns of Bashiqa, Khanaqin, and Sinjar.[52]

The Iraqi battle with ISIS has thus further complicated an already complex relationship between the Kurds and the central state. In line with Lijphart's traditional view that an external threat can promote power-sharing in divided societies the threat posed by ISIS has necessitated cooperation between Baghdad and Erbil which would have been unthinkable in the past. However, the centrality of the Kurds in countering this threat also strengthened their position, encouraging them to hold the unilateral independence referendum in September 2017. This demonstrates that external threats do not only encourage internal cooperation between different groups to protect the population and save the state but that such episodes can alter internal dynamics and encourage secessionists.

Guarantee Mechanisms

The TSG arrangements outlined in the TAL and in the 2005 Constitution sought to meet the Kurds needs for recognition and security by establishing Iraqi Kurdistan as a federal unit with substantial autonomy. It also attempted to meet the needs of other groups, notably the Sunni and Shia, by facilitating the creation of other federal regions and stressing the territorial integrity of the state. However, disagreements over the Peshmerga, hydrocarbon management, and the disputed territories coupled with the rapidly changing environment produced by ISIS' rise and fall have destabilised the TSG arrangements. Domestic guarantees designed to counter such instability have been undermined by constitutional ambiguity, a failure to implement constitutional processes, and a failure to pass a domestic law on the Federal Constitutional Court. International guarantees have also had limited capacity on creating stability in this context. Historical failures of the international community to fulfil its promises to the Kurds mean the KRG is wary of international commitments to its autonomy. Changing regional dynamics and self-interest have dominated external actors approach to the Kurds,

[52] Chulov, M. (2017). Kurdish Forces Abandon Long-Held Lands to Iraqi Army and Shia Fighters. *The Guardian*, October 17.

undermining any claims that the international community can act as the steadfast protector of the TSG arrangements.

Domestic Guarantees

During negotiations over Iraq's political future, the Kurds made it clear that they would only countenance re-integration into the Iraqi state if it included constitutional protection of their autonomy.[53] The TAL essentially ensured that such a provision would be included in any new constitution by giving the Kurds a de facto veto over such a constitution requiring that 'two-thirds of the voters in three or more governorates do not reject it'.[54] The Kurds were the strongest supporters of the 2005 Constitution. The then KRG High Representative told the UK House of Commons Foreign Affairs Committee that it was 'the best document that had ever been produced in Iraq'. Peter Galbraith, who had advised the KRG, explicitly argued that Kurds supported the Constitution because it guaranteed their autonomy.[55] Yet the different actors in Iraq did not share common understanding of how extensive decentralisation should be or how power should be divided between the central government and regional administrations.[56]

As has been seen in other cases, the general framework which constitutions are designed to provide do not typically include detailed stipulations as to how specific provisions will operate. Rather such detail is typically outlined in other legislation and documents. In the Iraqi case disputes over the details as to how the hydrocarbon management and the continued existence of the Peshmerga would operate became acute sources of dispute between the KRG and the central authorities in Baghdad. As detailed above, Article 121 of the Constitution satisfies

[53] Anderson, L., & Stansfield, G. (2005). The Implications of Elections for Federalism in Iraq: Toward a Five-Region Model. *Publius*, Vol. 35, No. 3, 359–382.

[54] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 61. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html.

[55] House of Commons Foreign Affairs Committee (2015). UK Government Policy on the Kurdistan Region of Iraq Eighth Report of Session 2014–15. London: The Stationery Office Limited.

[56] Alkadiri, R. (2010). Oil and the Question of Federalism in Iraq. *International Affairs*, Vol. 86, No. 6, 1315–1328.

the Kurdish need for security by providing that 'regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organisation of the internal security forces', which essentially legitimised the Peshmerga.[57] However, difficulties quickly emerged, Erbil demanded central government funding for the force and a failure to provide for coordination between the Peshmerga and the Iraqi Army, especially in the disputed territories, created serious tensions which could have easily become violent.

In order to improve coordination between the Peshmerga and Iraqi Army

> The multinational force in Iraq (MNF-I) has engaged the Government of Iraq and the Kurdistan Regional Government in discussions on developing cooperative frameworks for Iraqi army and Kurdish Peshmerga units and police forces from both sides. These efforts aim to improve coordination among different chains of command for units manning checkpoints and to conduct joint patrols in the area.[58]

And to reduce tension central authorities and the KRG agreed to set up joint security structures in the Governorates of Kirkuk, Ninewa and Diyala, including joint patrols and checkpoints consisting of personnel from the Iraqi Army, Iraqi Kurdistan Peshmerga and the Iraqi police, under the coordination of the US Forces in Iraq.[59] In 2010, when Prime Minister Nouri al-Maliki was looking for allies so that he could remain in power, he professed to accept the Kurds demands for a security apparatus law which would clarify the division of competencies between the different security forces and ensure the Peshmerga received an adequate budget. He also acquiesced to the KRG's demand for a federal hydrocarbon law which decentralised control, but once in power he did not move to implement such laws.[60]

[57] Iraqi Constitution (2005). Article 121. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

[58] United Nations Security Council (2009). Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1883. New York: United Nations.

[59] Ibid.

[60] Wilgenburg, W. (2012). Breaking from Baghdad: Kurdish Autonomy vs. Maliki's Manipulation. *World Affairs*, Vol. 175, No. 4, 47–53.

This failure was part of a wider pattern. Differing interpretations of how much decentralisation the Constitution mandated in terms of the management of hydrocarbons acted as a barrier to securing agreement on a federal hydrocarbon law for over a decade. As outlined above, there were sharp disagreements between the KRG and the authorities in Baghdad as to whether the constitutional provision related to hydrocarbon management allowed the KRG to unilaterally reach agreements with international companies related to the exploitation of hydrocarbons. Ashti Hawrami, Natural Resources Minister of the KRG, argued that the Kurds were 'exercising our constitutional rights in the oil and gas sector' by signing agreements with international oil companies despite the opposition of the central government.[61] The central government strongly rejected this claim and argued that the export arrangement between the KRG and Turkey 'is a huge violation against the Iraqi Constitution because they didn't make the deal with the coordination of the central government'.[62]

In most federal systems the central Supreme or Constitutional Court is tasked with the arbitrating these kinds of disputes between the central government and federal units. In Iraq, the Supreme Federal Court was charged with 'settling disputes that arise between the federal government and the governments of the regions and governorates, municipalities, and local administrations'.[63] In case of No.59/Federal/2012 the Court rejected a request by the Iraqi Minster of Oil to prevent Minister of Natural Resources in the KRG from exporting oil outside Iraq. Interestingly the decision in this case is counter to claims that such courts tend to be centralising. The Court's decision found against the central government Minister of Oil and facilitated, rather than restricted, autonomous actions by the KRG.

However, it is important to note that in other cases the Court has had a more centralising tendency. In 2010 it halted the implementation of two laws (Laws 18 and 20) which were aimed at transferring some

[61] Fortson, D. (2008). Kurdistan Defies Iraqi Authorities on Oil Contracts. *The Independent* (London), February 9.

[62] Arango, T., & Krauss, C. (2013). A New Threat to Stability in Iraq; Kurds' Oil Sales to Turkey Raise Concerns in United States of a Growing Independence. *International New York Times*, December 4.

[63] Iraqi Constitution (2005). Article 93. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

responsibilities from the Ministry of Municipalities and Public Works to Governorates. Though these laws did not apply to KRG or the Kirkuk governorate, pending the resolution of the issue of the dispute territories, the Court's decision is suggestive of a court which favours the maintenance of powers at the central level. This suggestion is further strengthened by justification provided by the Court—that the laws were unconstitutional as they were 'drafted' by the Council of Representatives and the Constitution only permitted the Council of Representatives to 'propose' a law and that laws must be 'drafted' by the Council of Ministers.[64]

Furthermore, there were also wider concerns that under Prime Minister Nouri al-Maliki the Court was acting to inappropriately strengthen the executive branch of government. In 2011 it issued an opinion on the status of the independent commissions, including the Central Bank, the Independent High Electoral Commission and the proposed Independent High Commission for Human Rights. The Court ruled that the Council of Ministers, as the executive branch, should have oversight over commissions that have executive roles, a number of political parties and some of the institutions in question expressed concerns that this would undermine their independence. In 2013 the Court ruled that a law limiting the terms of the President, Prime Minister and Speaker of the Parliament was unconstitutional allowing Nouri al-Maliki to run for Prime Minister again in the 2014 election.

Unsurprisingly given the importance of this arbitration role, and other roles, assigned to central supreme or constitutional courts, the composition, and decision-making procedures can be controversial, especially where the TSG system has been put in place as a form of conflict management. The composition and process through which the Federal Supreme Court operates have been divisive, with the KRG arguing for strong regional representation on the Court and consensus decision-making procedures and other groups rejecting the demands.[65] These disagreements have proved to be an unsurmountable obstacle

[64] Danilovich, A. (2014). Combining Islam and democracy in a Federal Constitution in A. Danilovich, (ed.), *Iraqi Federalism and the Kurds: Learning to Live Together*. Burlington, VT: Ashgate, 159.

[65] Eklund, K., O'Leary, B., & Williams, P. (2005). Negotiating a Federation in Iraq, in B. O'Leary, J. McGarry, & K. Salih (eds.), *The Future of Kurdistan*. Philadelphia: University of Pennsylvania Press.

to the adoption of a domestic law on the operation of the Court. Consequentially the Court is still operating under provisions provided for in the TAL. This raises concerns as to the domestic legitimacy of the Court.

Legitimacy is necessary to ensure that court decisions are implemented. Where domestic institutions have been radically reformed and rebuilt after conflict they have not had the required time to acquire social authority and this can lead to non-implementation, see for example the case of Bosnia-Herzegovina in Chapter 3 of this book. There were no statements by the central government indicating an intention not to implement the decision in case No. 59/Federal/2012 or to appeal the decision despite a clear opening to do so in the language of the judgement.[66] However, given that the decision was made in June 2014, when the state's attention was quickly consumed by the existential threat posed by ISIS, this may not be indicative of a central state accepting an arbitration in favour of a TSG region. Instead it may, like many other aspects of the Kurd-central state story, show that unforeseen events can dramatically alter the TSG arrangements outside of legal processes.

Non-implementation was, however, a serious issue in relation to Article 140 of the Iraqi Constitution, which outlined how the issue of the disputed territories was to be resolved. Non-implementation completely undermined the Constitution's ability to act as a domestic guarantee that TSG institutions will be operated as agreed. Furthermore, as Danilovich noted non-implementation of Article 140 has undermined constitutionalism more broadly.[67] Article 140 had three sequential phases: normalisation, census, and referendum, and appears to have been designed to provide 'a once-for-all legal resolution of the disputed areas question in the Kurds' favour, to circumvent another tedious negotiation round with the Arabs'.[68] The tight deadline for what was a very complex and sensitive project may have been intended to allow the Kurds to press their advantage. However, it quickly became obvious to all that this deadline could not be met 'without further negotiation and political

[66] Investors Chronical (2014). Three Oil Game Changers? July 2.

[67] Danilovich, A. (2014). Combining Islam and Democracy in a Federal Constitution, in A. Danilovich, (ed.), *Iraqi Federalism and the Kurds: Learning to Live Together*. Burlington, VT: Ashgate.

[68] Bartu, P. (2010). Wrestling with the Integrity of a Nation: The Disputed Internal Boundaries in Iraq. *International Affairs*, Vol. 86, No. 6, 1329–1343.

agreement concerning boundaries, voter eligibility, the referendum question, and units of decision (governorate, district, and subdistrict)'.[69] The referendum was unpopular with non-Kurdish groups in the area fearing that the Kurds would bring in Kurds from outside the Kirkuk area to rig the vote.[70]

Despite these concerns, the Kurds were determined that Article 140 would be implemented. Kurdish leader Khasro Ghoran bluntly stated that 'for 80 years we have been shedding blood for these areas and we're not going to give up'.[71] Furthermore, the Kurds resented any claims that they were trying to exercise a land grab in relation to the disputed territories, arguing that they were simply advocating for the implementation of an agreed constitutional process.[72] The 2005 elections results also suggested that there were Kurdish pluralities in Kirkuk which would lead to its integration into Kurdistan should the referendum proceed as outlined.[73] The KRG argued that acts of violence in the disputed territories were being orchestrated to prevent the inevitable. They also feared that if the process was not completed quickly a US exit from Iraq and the deteriorating situation in the Baghdad government would ensure it was never completed.

Yet at the end of 2007 the KRG authorities made a serious concession, accepting that the implementation of Article 140 could not be completed on schedule and accepting international arguments that extra time would be needed to resolve issues over the disputed territories' borders, how a census will be conducted, and what the eligibility criteria will be for voting in the referendum.[74] This concession, on an extremely salient issue, can be explained by the changing position of the US in the second half of 2007. The US entered into new alliances with former Sunni

[69] Ibid.

[70] Rubin, A.J., & Tavernise, S. (2008). Turkey's Warplanes Attack Villages in Iraqi Kurdistan. *The New York Times*, February 5.

[71] Arraf, J. (2009). Kurdistan: Why It Could Spark New Front in Iraq War. *Christian Science Monitor*, July 24.

[72] *The New York Times* (2008). Kurds and the New Iraq, February 10.

[73] Bartu, P. (2010). Wrestling with the Integrity of a Nation: The Disputed Internal Boundaries in Iraq. *International Affairs*, Vol. 86, No. 6, 1329–1343.

[74] Steele, J. (2006). Comment & Debate: Iraq Is Already Enduring Two Wars. Could it Survive a Third?: The Competing Claims of Arabs, Turkomans, and Kurds in the Oil-Rich Iraqi North are an Explosion Waiting to Happen. *The Guardian*, December 1.

Arab insurgents, who set up Awakening Councils, this suggested that the US was shifting 'from supporting the Kurds' approach on Kirkuk (i.e., that the issue should be resolved via Article 140) to backing a negotiated settlement'.[75] The international involvement in resolving the non-implementation of Article 140, most notably the United Nations Assistance Mission in Iraq's (UNAMI) role in trying to resolve the disputed territories issue, will be discussed below as part of a wider examination of the role of regional and international actors as guarantors of the TSG arrangements in post-2003 Iraq.

When Prime Minister Nouri al-Maliki needed Kurdish support to remain in power after the 2010 elections, as mentioned above, implementation of Article 140 of the Constitution by the end of 2012 was one of conditions of Kurdish support.[76] For Kurds this was something of a last chance saloon and the deputy chairman of the KDP Nechirvan Barzani, argued that 'When the article was not implemented [by 2007], it was a constitutional violation. We had already agreed that the issue had to be resolved as per the requirements of the Constitution. And now, if we find that the Constitution is not being respected, we should really think of other political and legal means to enforce the implementation of this constitutional article', he went on to claim that non-implementation would result in Iraq becoming another Sudan—alluding to the referendum in South Sudan which resulted in its secession from Sudan. Kurdish President Massoud Barzani argued that if Article 140 was not implemented it would be the end of the Constitution.[77]

In the summer of 2014, when ISIS swept across Iraq, the issue of the disputed territories had still not been resolved. In June 2014 Kurdish President Massoud Barzani made it clear that the Kurds would not countenance relinquishing the control of Kirkuk which they had gained by pushing ISIS out. He implicitly ruled out any return to the process outlined in the Constitution, highlighting that Baghdad had failed to

[75] International Crisis Group (2008). Oil for Soil: Toward a Grand Bargain on Iraq and the Kurds. *Middle East Report*, No. 80. Brussels: International Crisis Group. Accessed 31 December 2017, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/oil-soil-toward-grand-bargain-iraq-and-kurds.

[76] BBC Monitoring Middle East (2011). Kurdistan Former PM Says 'Iraq Will End up Like Sudan' if Kurd Rights Ignored, January 22.

[77] Dagher, S. (2010). Election Victories Help Kurds in Iraq Push for More Sovereignty. *The New York Times*, May 3.

implement Article 140 for almost a decade. This shows that while the Kurds were quick to point to the Constitution when they felt it would fulfil their ambitions to control the disputed territories. Once they were in control of the territories they were no longer interested in ensuring the Constitution was upheld. As such, at different points both the central government and the Kurds were willing to ignore the constitutional guarantees which had been agreed in 2005 to ensure that there was no unilateral change of the TSG institutions.

As a federal constitution the 2005 Iraqi Constitution provides for shared-rule. While this shared-rule is not explicitly a guarantee of the TSG institutions it can offer implicit guarantees. It can do this by ensuring that the Kurdish region has a strong say in any decisions of central government, thus acting as a guard against re-centralisation. However, despite early indications that the Kurds could be integrated into the federal government and thus establishing the shared-rule which theorists argue is also an important bulwark against the centrifugal tendency of TSG, real shared-rule has not developed. The TAL provided for a 'Presidency Council' consisting a President of and two Deputies and to be elected 'on the basis of a single list and by a two-thirds majority of the members' of the National Assembly'[78] and Article 70 of the Constitution provides that

> The Council of Representatives shall elect a President of the Republic from among the candidates by a two-thirds majority of the number of its members.
>
> Second: If none of the candidates receive the required majority vote then the two candidates who received the highest number of votes shall compete and the one who receives the majority of votes in the second election shall be declared President.

The weighted majority had the effect of making it likely that the Presidential Council would be broadly representative, though it did not require that any member of the Presidential Council come from a particular ethnic or religious group. The Kurdish leader Jalal Talabani became President,

[78] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 36. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html.

with Shi'ite UIA and SCIRI member Adil Abdul al-Mahdi and Sunni Ghazi al-Yawar as his deputies. The second Presidency Council, the first under the new Constitution of Iraq, consisted of President Jalal Talabani, and Vice Presidents Adil Abdul al-Mahdi and Tariq al-Hashimi. Furthermore, when the 2005 Constitution came into force Jalal Talabani remained President.

Iraq's proportional representation—party list electoral system also ensured that Prime Ministers would need to build broader coalitions of support to remain in power. As has already been discussed, Nouri al-Malaki needed Kurdish support to remain in power in 2014. However, while Jalal Talabani enjoyed the prestige of being the President of Iraq, the Kurds have used their influence in the central government to try and settle unresolved issues around the TSG in favour of the KRG rather than using it to integrate themselves into the state. As such, any power that the Kurds have in central government has been utilised to move the TSG arrangements in the direction desired by the Kurds. Additionally, the other two federal institutions which could have played a significant role integrating the Kurds into the Iraqi state and so guarding against secession, the Federal Supreme Court and the Federal Council, have not been successful. As was mentioned above, in relation to the Federal Supreme Court's decision on hydrocarbons no domestic agreement has been reached on the appointment and decision-making processes of the Court. Kurds could not secure the necessary two-thirds majority to pass a law providing for a court with strong regional representation and would not acquiesce to a law which established a more integrationist court, resulting in stalemate. A similar failure to secure agreement on a law on the Federal Council means that it has failed to be established at all. Thus, the potential to integrate the Kurds into the Iraqi state and to create space for shifting coalitions between the Kurdish region, and Shia and Sunni dominated governorates has not been realised.

The domestic guarantees of Iraqi's TSG arrangements included in the 2005 Constitution were legally strong. But they were practically undermined by differing interpretations and a lack of political will to ensure implementation. The threat which ISIS prosed to the survival of the state utterly altered the environment. Just as they did in the past, the Kurds sought to turn Iraqi's difficulty into Kurdish opportunity for independence. The wider international threat posed by ISIS and other changing international circumstances also meant that the international guarantees

provided to Iraq's TSG waxed and waned in the decade after the US-led invasion.

International Guarantees

As mentioned above, in the lead up to the US-led invasion of Iraq in 2003 the Kurds were extremely anxious that the removal of Saddam Hussein would also effectively end the special level of autonomy which they had effectively enjoyed since 1991. They strongly advocated for a federal Iraq to protect it. Despite the support for a federal Iraq which was voiced by both of the other many Iraqi groups and the US before the invasion there were doubts that the Kurdish region would be awarded a sufficiently high-level of autonomy to satisfy their needs. However, the position of the Kurds was dramatically strengthened in 2003, when the Turkish Parliament refused to allow the US to use Turkey as a launch point for the invasion 'the Kurds were in a position to offer themselves as a viable alternative'.[79] This position as a key US ally, coupled with US memories of the harsh repression suffered by the Kurds under Saddam Hussein—some of which was the result of US lack of support in 1991—strengthened US support for Kurdish demands for strong autonomy.

Unlike some other Iraqis the Kurds looked favourably on the presence of US troops on the ground in Iraq. The US presence acted as a guarantee of Kurdish autonomy protecting them from any attempted centralisation from Baghdad.[80] It also provided them with a degree of protection against interference from neighbours including Turkey and Iran. Similarly, US opposition to Kurdish independence served to reassure the central government, and importantly neighbouring Turkey, that regime change in Iraq would not result in an independent Kurdistan.[81] The US Army also played a key role mediating disputes between the

[79]Newton-Small, J. (2014). Kurds Welcome US Help in Iraq, But Remember History of Betrayal. *Time*, August 12.

[80]Wilgenburg, W. (2012). Breaking from Baghdad: Kurdish Autonomy vs. Maliki's Manipulation. *World Affairs*, Vol. 175, No. 4, 47–53.

[81]International Crisis Group (2003). War in Iraq: What's next for the Kurds?' *Middle East Report*, No. 10. Brussels: International Crisis Group. Accessed 31 December 2017, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/war-iraq-whats-next-kurds.

Peshmerga and the Iraqi Army in the disputed territories and encouraging open communication and shared command posts.[82]

Similarly, in 2014 when ISIS swept across Iraq and the Iraqi Army seemed both incapable and unwilling to stand and fight, the Kurds again became the international community's key ally in Iraq. There was an initial reluctance to directly supply the KRG with weapons to fight ISIS, with Baghdad insisting all such military aid should come through central government.[83] It was feared that direct military aid to the Kurds would encourage secessionism. But as the Iraqi Army abandoned its equipment along with its posts in August 2014, ISIS seized this equipment and quickly became much better equipped than the Peshmerga. The initial reluctance to send arms to the KRG directly was quickly replaced by a willingness to provide the Kurds with the necessary military hardware to hold back the onslaught.

However, the Kurds were wary of proclaimed US support, acutely aware of its fickle nature. They recaled in particular the 1991 betrayal, when George H.W. Bush encouraged the Kurds and Shias to rebel against Saddam Hussein but then failed to support them. He was tragically hesitant in acting to protect them against the regime's reprisals.[84] The temporary nature of the US guarantee came sharply into focus in 2007 when the US government began to plan for a withdrawal from Iraq. Qubad Talabani, Head of the KRG's office in Washington D.C. stressed the link between the Kurds role as an ally for the coalition and its need for protection, arguing that a premature withdrawal of US forces from Iraq would place the Kurds in a precarious position because of its support for the coalition.[85]

In 2009 as Barrack Obama planned to withdraw 142 000 US soldiers from Iraq—many of whom could then be redeployed to Afghanistan—the Kurds became acutely concerned that they were again going to be

[82]Arraf, J. (2009). Kurdistan: Why It Could Spark New Front in Iraq War. *Christian Science Monitor*, July 24.

[83]Spencer, R., & Huggler, J. (2014). Is This the End for the Yazidis? *The Daily Telegraph* (London), August 8.

[84]Contenta, S. (2003). Blood and Oil Flow in Kirkuk Iraq, Kurds, Turkey, United States all have eyes on Kirkuk. *Toronto Star*, February 22.

[85]Ward, O. (2007). Iraq's Corner of Relative Calm; Surrounded by Hostile Factions, Kurdistan Set Its Sights on Construction Rather Than Confrontation in a Bid to Lure Tourists and Investors to the Battered Region. *Toronto Star*, May 12.

left to vulnerable and alone to deal with Baghdad.[86] These fears were not unwarranted, and Nouri al-Maliki government's eagerness to have the US leave Iraq was at least partially motivated by a desire 'to deal with the Kurds on its own terms'. Without the US presence central government was more likely to triumph in disputes over oil or territory.[87] This underlines the unstable nature of TSG where both sides are eager to move the arrangements towards their favoured outcome. In this case TSG is highly dependent on substantial and prolonged external or international guarantees. Changing international circumstances, new crises, and changing priorities are a substantial barrier to the provision and maintenance of these guarantees.

Furthermore, the international community's own actions can profoundly undermine the value of both international and domestic guarantees. In Iraq the international community's approach to the implementation of Article 140 of the 2005 Constitution underlined this problem. Both the US government and the UN failed to advocate for the implementation of the Article 140 process for settling the issue of the disputed territories. The Kurdish president, Massoud Barzani, claimed that President Obama promised that the US would ensure the process was implemented. A senior American diplomat in Baghdad essentially disputed this, arguing that the US supported the Iraqi Constitution broadly, including Article 140, but that it was opposed to moving ahead with the referendum without an agreement with Baghdad—highlighting the role which referenda played in sparking violence in the Balkans.[88] The US's unwillingness to press for the implementation of a domestic constitutional guarantee fundamentally undermined its value, and suggested that following a prescribed constitutional process was open to negotiation.

[86]Cockburn, P. (2009). Iraq Faces a New War as Tensions Rise in North; Violence Between Iraqi Kurds and Arabs Is Threatening an All Out Conflict That Could Complicate US Plans to Withdraw Troops. *The Independent* (London), February 23.

[87]Webster, P.C. (2009). Iraq is a hard place; The Violence Isn't the Hard Part. For Talisman and Its Upstart Partner WesternZagros, Finding Oil in Kurdistan Will Be a Prelude to the Real Challenge: Coming to Terms with Two Governments That Don't Believe in Each Other. *The Globe and Mail* (Canada), February 27.

[88]Dagher, S. (2010). Election Victories Help Kurds in Iraq Push for More Sovereignty. *The New York Times*, May 3.

The approach to resolving the issues surrounding the disputed territories adopted by UNAMI further undermined the constitutional guarantee in Article 140. When it became apparent that the 2007 deadline provided for in Article 140 would not be met the UNAMI began to try and find an acceptable process. The language in the UN Security Council Resolution which provided for UNAMI's remit broadly and its work on the disputed territories in particular clearly shows the UN was not taking the constitutional process as a starting point and was looking for 'processes acceptable to the Government of Iraq to resolve disputed internal boundaries'.[89] Crucially, this did not mention that a solution must also be acceptable to the KRG.

Unsurprisingly, the KRG rejected the UN's role in resolving issues surrounding the non-implementation of Article 140; arguing that the Constitution does not provide for such and that the UN's role should be restricted to providing technical assistance for the census and referendum.[90] The Kurds were acutely aware that any new process which might be suggested by the UN would be unlikely to provide as great a chance for the KRG to claim all the disputed territories as Article 140, which they had carefully crafted to maximise their chances of successfully expanding the KRG. When the UN report was completed the KRG took issue with the recommendations, arguing that Staffan de Mistura, the UN Special Envoy to Iraq, had promised that if the referendum provided for in Article 140 could not work the process would instead be based on the results of the elections held in December 2005 and that the phase one recommendations in the report did not deliver on that promise.[91] While the Kurds' consistent criticism of the international community and central government for not adhering to the agreed constitutional process may be framed as a rejection of unilateral changes to TSG arrangements, this rings somewhat hollow given their later position. Once the Peshmerga's victories over ISIS allowed the KRG to take control of

[89] United Nations Security Council Resolution 1770 (2007). Adopted by the Security Council at its 5729th meeting, on 10 August 2007. New York: United Nations.

[90] BBC Worldwide Monitoring (2007). Kurds Welcome UN Role in Iraq but Not Intervention in Kirkuk Issue. August 13.

[91] International Crisis Group (2008). Oil for Soil: Toward a Grand Bargain on Iraq and the Kurds. *Middle East Report*, No. 80. Brussels: International Crisis Group. Accessed 31 December 2017, https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/iraq/oil-soil-toward-grand-bargain-iraq-and-kurds.

the disputed territories the KRG completely dismissed the idea that an agreed solution had an implicit value, stating that there would be no further negotiations.[92]

Given that the Kurds had been repeatedly forsaken by the US government when strategic priorities shifted, the KRG sought to develop additional international relationships which could support and protect its autonomy. Central to this strategy were the KRG's efforts to enter directly into oil contracts with international companies, without the involvement of the federal government. While this strategy escalated tensions with Baghdad, as discussed above, the Kurds viewed these contracts as strong mechanisms to guarantee their autonomy. KRG President Masoud Barzani argued that 'if ExxonMobil came, it would be equal to 10 American military divisions. They will defend the area if their interests are there'.[93] This highlights that the international oil agreements which the KRG sought out and entered into were not simply an economic policy, they also had a broader aim of creating an environment in which powerful international companies would be incentivised to advocate for the KRG. This understanding is further supported by the timing, the KRG actively sought international oil contracts in light of both the weakening US military presence in Iraq and Nouri al-Maliki's government's increasingly sectarian outlook.[94]

However, it is questionable whether the Kurdish simply wanted to use these contracts as 'a commercial bulwark against renewed southern Iraqi aggression' or whether they felt that these contracts could be used to facilitate a unilateral movement towards independence.[95] It seems highly unlikely that international oil companies would be perturbed by the unilateral nature of any Kurdish moves towards independence, rather it is more likely they would oppose any response from the federal government or the international community that undermined their commercial

[92] *Al Jazeera* (2014). Iraq's Kurds rule out any Kirkuk retreat, June 28.

[93] Owtram, F. (2014). The Federalisation of Natural Resources, in A. Danilovich, (ed.), *Iraqi federalism and the Kurds: Learning to Live Together*. Burlington, VT: Ashgate.

[94] Wilgenburg, W. (2012). Breaking from Baghdad: Kurdish Autonomy vs. Maliki's Manipulation. *World Affairs*, Vol. 175, No. 4, 47–53.

[95] Webster, P.C. (2009). Iraq is a Hard Place; The Violence Isn't the Hard Part. For Talisman and Its Upstart Partner WesternZagros, Finding Oil in Kurdistan Will Be a Prelude to the Real Challenge: Coming to Terms with Two Governments That Don't Believe in Each Other. *The Globe and Mail* (Canada), February 27.

interests. This logic is supported by the very willingness of international oil companies to sign agreements with the KRG while its right to do so was disputed. Potential profits prevailed over international diplomacy. While there was no federal hydrocarbon law, the US State Department dissuaded US companies from signing contracts with the Kurds by arguing that such moves served to destabilise Iraq.[96] Thus while it was wise from a Kurdish point of view to enter into these contracts as they did make it less likely that the international community would permit Baghdad to recentralize powers—especially those around hydrocarbons—international commercial interests did not act as a guarantee that the TSG institutions would be respected by all parties. They encouraged rather than impeded secessionist and centripetalist momentum.

Self-interest, including economic self-interest created by the presence of hydrocarbons in Iraqi Kurdistan, also had a profound effect on the KRG's relationship with Turkey. Turkey's utter opposition to Iraqi Kurdistan's independence, for fear it would encourage further autonomy demands from its own Kurdish population, was once a regional guarantee that KRG autonomy would not lead to secession. However, this waned over time. In the lead up to the US invasion of Iraq, Turkey argued that it would enter Northern Iraq if the Iraqi Kurds were allowed to establish an independent state.[97] Turkey was also opposed to the inclusion of Kirkuk in the KRG, fearing for the security of the Turkomen population. However, the KRG's eschewing of involvement in any pan-Kurdish movement and willingness to condemn attacks by the Kurdish PKK in Turkey softened Turkey position.[98]

Turkey's own economic interests also dramatically improved relations between Erbil and Ankara. The KRG was able to turn a traditional enemy of its increasing autonomy into an ally. Turkey became a major investor in Iraqi Kurdistan.[99] Presidents Masoud Barzani and Recep Tayyip Erdogan developed a close relationship, with Masoud

[96] Oppel, R. (2008). State Department Inspector to Investigate Texas Oil Company's Deal in Kurdistan. *The New York Times*, July 25.

[97] BBC Monitoring Europe (2012). Column Views Turkey's Policy on Iraq, Syria, Kurds, July 30.

[98] Romano, D. (2010). Iraqi Kurdistan: Challenges of Autonomy in the Wake of US Withdrawal. *International Affairs*, Vol. 86, No. 6, 1345–1359.

[99] Black, I. (2010). Kurdistan Pitches to Western Investors as Secure Gateway to Iraq. *The Guardian*, June 16.

Barzani even appearing at an election rally for Erdogan's AKP party in a Kurdish district of southern Turkey.[100] The, '50-year oil export deal' between Turkey and the KRG further signalled a change of Turkish policy towards the Iraqi Kurds, and the rise of ISIS solidified Recep Tayyip Erdogan's view that a Kurdish state, as long as it is not supportive of similar independence for Turkey's Kurds, is 'a preferable neighbour to an Iraq in constant chaos or an extremist mini-state ruled by ISIL'.[101] By the summer of 2014 Turkey's position was that 'the Kurds of Iraq can decide where to live and under what title they want to live'.[102] However, the unilateral referendum on independence in 2017 re-hardened attitudes. Turkish President Recep Tayyip Erdogan called the referendum 'treachery' and threatened to cut off the pipeline which is used to export oil from the KRG.[103]

Interestingly, the improvement in relations took place despite the fact that Turkey's aspirations to join the EU have all but disappeared. Previously it had been suggested that should Turkey not have the opportunity to progress its membership aspirations it would likely lead to less incentives to respect the rights of Turkey's Kurds. This in turn would hinder relations between Erbil and Ankara. Furthermore, the additional guarantee of Turkey's territorial integrity which would have been provided by EU membership is no longer likely to materialise. However, despite Turkey's undeniable slide away from democracy its relations with the KRG were for a time largely divorced from the issue of Kurdish rights in Turkey. They were instead defined by economics and ISIS. Perhaps if Turkey were still hoping to join the EU it would be warier of implicitly encouraging KRG secessionism through investment for fear of annoying the EU, as Serbia did in relation to the Republika Srpska in Bosnia-Herzegovina. However, since August 2014 EU members have paid more attention to strengthening the KRG so it can defeat ISIS than how such actions effect the stability of the TSG arrangements.

[100] House of Commons Foreign Affairs Committee (2015). UK Government Policy on the Kurdistan Region of Iraq Eighth Report of Session 2014–15. London: The Stationery Office Limited.

[101] MacKinnion, M. (2014). Kurdistan; As Iraq Devolves into Chaos, Kurds Push for Independence. *The Globe and Mail* (Canada), July 4.

[102] Ibid.

[103] McKernan, B. (2017). Kurdistan Referendum: Erdogan says Iraqi Kurds risk 'Ethnic War' and Threatens Military Response to Vote. *The Independent*, September 26.

Turkey is not the only neighbour which has opposed independence for Iraq's Kurds for fear of encouraging Kurds within its own borders to seek autonomy or independence. Both Iran and Syria have also been wary of the message sent out by the KRG's autonomy. In 2007 the Iranian government sent shells over the border in its campaign against its Kurdish rebels, the Party for a Free Life in Kurdistan (PJAK) and Jabar Yawar, a deputy Minister for the KRG, argued that any escalation could 'pose a real threat to the Kurdistan region, which is Iraq's most stable area'.[104] In 2011 the tensions were escalated when the Iranian government accused the KRG of allocating land within the KRG to the PJAK for training and crossed the border to engage PJAK fighters. These events were also part of the wider context in which Iran was seeking to encourage 'disorder in Iraq as a means of placing pressure on the US and the West', especially in light of the possible loss of Bashar Assad's Syria as a key ally.[105]

However, as was the case with Turkey, economic interests and the threat posed by ISIS dramatically improved relations between Tehran and Erbil. In April 2014 Iran and the KRG signed a long-term energy deal, and in June, while Western countries were hesitant to supply military aid directly to the KRG to assist it in its fight against ISIS, Tehran offered military, intelligence, and humanitarian support, which greatly improved governmental relations.[106] This demonstrates that an external threat as serious as ISIS—which has regional and international implications—as well as economic opportunities, can incentivise neighbours to pursue policies which undermine rather than stabilise TSG arrangements. However, the unilateral independence referendum held in September 2017 drove Iran to seek an alliance with Turkey to prevent the 'drive for independence'.[107]

[104] Howard, M. (2007). International: Kurds Flee Homes as Iran Shells Villages in Iraq: Guerrillas in Clashes with Revolutionary Guards: Conflict Threatens Stability of Kurdistan Region. *Guardian International*, August 20.

[105] Spyer, J. (2011). Iran Strikes Across Border into Iraqi Kurdistan. Push to up Violence May Be Timed to Coincide with US Pullout. *Jerusalem Post*, July 20.

[106] House of Commons Foreign Affairs Committee (2015). UK Government Policy on the Kurdistan Region of Iraq Eighth Report of Session 2014–15. London: The Stationery Office Limited.

[107] Hafezi, P., & Karadeniz, T. (2017). Khamenei Says Iran, Turkey Must Act Against Kurdish Secession. *Reuters*, October 4.

The war in Syria also had the effect of creating an additional chasm between Baghdad and Erbil. The KRG sided with the Syrian opposition, motivated by the opportunity for Syrian Kurds to gain a degree of autonomy in a post-Assad Syria. KRG President Barzani publicly admitted in July that his government was providing Syrian Kurds with military training. Conversely, the fear of a Sunni-regime in post-Assad Syria encouraged Nouri al-Maliki to support the embattled Syrian President.[108] When questioned about the legitimacy of pursuing a foreign policy which diverged from the position of the central government a KRG spokesman argued that the central government was becoming increasingly autocratic. He claimed that policy was being determined not by the institutions of the state but by one party and more specifically by one individual, alluding to the Dawa Party and Nouri al-Maliki, and that this meant the policy towards Syria was questionable.[109] This illustrates that, in sharp contrast to Lijphart's contention that external threats encourage domestic parties to cooperate, an external threat can encourage divisions and incentivise certain domestic parties to realise any opportunities provided by the threat to improve their own position.

Conclusion

The use of federalism in Iraq demonstrates the difficulty of using TSG as a conflict management mechanism when the group seeking TSG hopes to achieve independence in the near future. In this regard, it is illustrative of the centrifugal risks which are associated with TSG. Given the very troubled historical relations between the Kurds and Baghdad, even federalism did not fully meet the Kurds security needs. The ability of the Constitution to act as a strong guarantee was profoundly undermined by the presence of unresolved issues and the need to add detail to apparently accepted broad principles, which uncovered disagreements. International guarantees did not provide reassurance, as international actors have previously reneged on similar promises. Economic

[108] Salih, M. (2012). Syrian Conflict Threatens to Fracture Iraq; Semi-Autonomous Iraqi Kurdistan and the Central Iraqi Government are on a Collision Course as the Kurds Increasingly Side with the Syrian Opposition and Baghdad stands by the Assad Regime. *The Christian Science Monitor*, December 27.

[109] Ibid.

considerations and international crises took precedence over stabilising TSG in determining international and regional actors' policies.

The Kurds were never committed to remaining part of Iraq. Rather, they preferred independence but accepted a federal Iraq because of US, Turkish, and Iranian opposition to their secession. They then used their strong position during the negotiation of the 2005 Constitution, which resulted from being a US ally, to secure maximum autonomy. However, securing apparent constitutional commitments on the key issues of maintaining the Peshmerga, hydrocarbon management, and the disputed territories, did not deliver what the Kurds had hoped. The resultant frustration only weakened any Kurdish willingness to remain part of Iraq, particularly as it coincided with other security and political difficulties in Iraq broadly from which the Kurds wanted to insulate themselves. Additionally, the Kurds were never fully convinced that their autonomy would be respected in the long-term, and international guarantees could not assuage these fears due to previous costly betrayals. This underlines the importance of trust in the effective operation of TSG as a conflict management institution. Where the central government was guilty of extremely repressive actions against the minority requesting TSG even a high-level of autonomy may not create a sense of security. These difficulties are sharpened when the minority cannot trust an external party to act as its protector or guarantor due to previous failures.

Yet it was not inevitable that the federal Iraq provided for in the 2005 Constitution would eventually lead to the independence referendum which the KRG held in September 2017. If more attention had been paid to strengthening the shared-rule aspect of the Iraqi federation some of these difficulties may have been avoided. By permitting Nouri al-Maliki's government to become increasingly sectarian and authoritarian, the international community implicitly contributed to the KRG's further alienation from Baghdad. Furthermore, de-Ba'athification of the Iraqi state facilitated the rise of ISIS, most notably in the creation a new but inexperienced Army, by distancing the Sunni population from the state. The threat ISIS posed to Iraq and the region then created opportunities for the Kurds to separate themselves from Iraq, expanding their territory and developing separate relationships with international actors. The danger posed by ISIS also largely neutered Turkey and Iran's previous opposition to Kurdish independence. These circumstances undermined any efforts to use international guarantees to stabilise TSG and have all contributed to the much-feared centrifugal momentum which

is clearly evident in Iraq's experience of TSG as a conflict management mechanism. A fundamental difficulty for those hoping to use guarantees to ensure the stability of TSG institutions is that the policies of international actors and organisation are driven by wider economic and security concerns and thus often promote rather than prevent secession.

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Conclusion

United we stand, divided we fall
(Aesop, The Four Oxen and the Lion)

The logic of the above quote from Aesop's ancient fable has long been used to argue that territorial self-government (TSG) will exacerbate rather than ameliorate intra-state group conflict. Advocates of TSG counter that it can be used to satisfy group demands for autonomy while maintaining the territorial integrity of the state, thus avoiding the pitfalls of partition. The empirical record appears mixed and does not provide convincing evidence to support either argument. Actual secession is rarely the outcome of TSG provisions but separatist rhetoric, threats, or actions are more common. The less discussed but equally problematic issue of the unilateral re-centralisation of powers is also not as widespread as some might fear, and few governments simply legislate to re-centralise devolved competencies. More commonly, disputes arise over which level of government possesses a particular competency. These challenges support the argument that TSG is volatile—with both centripetal and centrifugal momentum undermining its stability. Despite such challenges, it is both practically difficult and theoretically unwise to simply disregard TSG's potential as a conflict management mechanism. It is often the only outcome which is acceptable to both or all sides in an intra-state group conflict, and the multitude of design options demand careful theoretical

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consideration. Guarantees are necessary to assure both the group(s) gaining TSG and the central government that TSG institutions will be faithfully implemented and that changes will only occur if both/all parties agree.

This volume assessed the effectiveness of a range of guarantee mechanisms across five diverse cases. The findings largely support theoretical expectations that stronger guarantees are more effective at both encouraging conflict parties to reach TSG agreements and countering centrifugal or centripetal momentum during their implementation. Domestic constitutional guarantees and both hard and soft international guarantees convince conflict parties that TSG will not be manipulated. However, during the implementation and operation of TSG these guarantees can be much weaker than was expected during the negotiation or drafting of the peace accord. Constitutional guarantees run into problems when efforts to add detail to the broad framework and resolve ambiguity uncover competing interpretations of what kind of TSG has been agreed. In addition, in the post-conflict context the domestic courts are not well placed to protect any constitutional entrenchment. International guarantees are weakened, as the approach and policies of international actors are driven by a range of concerns: other international crisis, economics, and domestic challenges among others. These factors often do not facilitate the continued guaranteeing of TSG stability. This conclusion combines the findings of the analysis of each case and explicates what a comparison between the different cases reveals. The strengths and weaknesses of different types of guarantee are outlined. Finally, the policy implications of the findings are explored, with a focus on what actions can be taken to ensure that the guarantees operate effectively.

Domestic Guarantees

In all five cases examined there were domestic guarantees. This is indicative of at least a basic understanding that peace agreements, other agreements, and laws aimed at ending intra-state conflict, must be given a domestic foundation even where they are internationally brokered. Ordinary domestic legislation as a guarantee only had a substantial role in the Northern Ireland case. The lack of a written constitution in the UK and the supremacy of parliament meant that the use of constitutional or special laws was not in keeping with the wider institutional environment. The ordinary legislative guarantee provided for in the

2006 Northern Ireland (St Andrew's Agreement) Act was sufficiently strong to convince the Democratic Unionist Party (DUP) that the cross-border elements of the TSG, which mandated cooperation between the regional Assembly in Belfast and the Irish government in Dublin, would not be manipulated to force them into united Ireland.[1] This highlights that a theoretically weak guarantee can overcome long-standing suspicions if there is a trusting relationship between the guarantee seeker and the guarantee provider. This is further underlined by the fact this ordinary guarantee was viewed more favourably by the DUP than the legally stronger constitutional guarantee provided by the Irish government.

Developments after the 2017 UK general election support the theoretical contention that ordinary guarantees are greatly weakened by their dependence on shifting central government majorities. The Labour governments which were in power during the end stage of the peace negotiations and for over a decade after its conclusion, were relatively successful at positioning themselves as supportive of the 1998 Agreement. They encouraged compromise between the local conflict parties, and did not have a selfish interest in Northern Ireland. The Conservative led governments which have followed have been more stringently pro-Union, weakening their ability to act as neutral guarantors of TSG. While Prime Minister Theresa May's dependence on the support of the DUP to remain in power strengthened the above guarantee, making it politically impossible for her to change it, it profoundly undermined the ability of ordinary domestic guarantees to reassure nationalists that the TSG arrangements provided for in the 1998 peace Agreement will be respected. This is very worrying for nationalists, especially given that the international guarantee, the treaty nature of the Agreement, has not been effective in preventing re-centralisation which they opposed in the past.

Special domestic guarantees were used in both the former Yugoslav Republic of Macedonia (FYRM) and Moldova. In the FYRM supra-majorities were required for the alteration of the law on decentralisation and other ethnically sensitive legislation. The supra-majority requires the support of a majority of members of parliament *and* a majority of the members which identified as being from a non-majority community to

[1] Northern Ireland (St Andrew's Agreement) Act 2006, Part 2, Section 12. London: The Stationery Office Limited.

change these laws.[2] In Moldova, a three-fifths parliamentary majority is required to alter the law on the special status of Gagauzia.[3] A comparison between these two cases highlights that the effectiveness of a special domestic legislative guarantee is dependent on its specific design. In the FYRM the supra-majorities ensure that the TSG arrangements cannot be altered without the support of the Albanian minority. In the Moldovan electoral system demographics mean the three-fifths majority can be reached without the involvement of the Gagauz. Their autonomy can be altered without their consent. While this could be changed by requiring concurrent regional and national assembly majorities to alter the autonomy statute, the weakness of the existing special domestic guarantee has encouraged the Gagauz to focus on the constitutional guarantee of their autonomy.

Constitutional guarantees are legally the strongest domestic guarantee and play an important role in convincing minorities that TSG arrangements will be respected. They were not central in Bosnia-Herzegovina (BiH) and required additional support in Northern Ireland. In BiH the post-conflict constitution was part of the internationally brokered Dayton Peace Agreement and as such is often conflated with the wider accord. It does command a high level of domestic support. It is more commonly referred to by international than domestic parties. In Northern Ireland, the only explicit constitutional guarantee of the TSG was provided by the Irish government, a neighbouring kin-state, which altered a previous territorial claim, reframing it to only provide for unification of Ireland and Northern Ireland if it is the will of the majority.[4] This was a legally strong guarantee, indicating that the Irish government would not exploit the cross-border elements of the TSG to create a united Ireland. It did also assuage moderate unionist opinion but did not convinced the DUP, as discussed above. This highlights the significance of the relationship between those demanding a guarantee and those providing it. A legally weaker guarantee between parties which have positive

[2] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[3] Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Article 13. Accessed 31 December 2017, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

[4] Bunreacht na hÉireann (The Constitution of Ireland), Articles 2 & 3. Accessed 31 December 2017, https://www.constitution.ie/Documents/Bhunreacht_na_hEireann_web.pdf.

past relations can provide more reassurance than a legally strong guarantee from another source.

However, the Gagauz in Moldova, Albanians in the FYRM, and Kurds in Iraq have all made references to the constitutional guarantees of the TSG afforded to them to argue that it should be fully implemented and cannot or should not be altered without their consent. Despite the legal strength of these constitutional guarantees they have not been as effective as predicted in guaranteeing the stability of TSG. This can almost wholly be attributed to the gap between the broad framework provided in a Constitution and the detailed provisions need to implement TSG. In both Moldova and Iraq there were disputes between the groups afforded TSG and the central government as to the exact nature of the TSG. The Constitutions did not adequately outline the division of powers between the central government and the TSG region. This is not surprising, as Constitutions often provide a broad framework. Nevertheless, it highlights that even where it appears that conflict parties are committed to peace accords or equivalent laws there is often hidden disagreement.

This raises the question of whether TSG agreements actually represent 'unhappy compromises' or simply conceal continuing disagreements as to how the state should be organised. In Moldova, while there has been some disagreement between the Gagauz and the central government, there does not appear to have been continuing fundamental disagreement between the central government and the Gagauz as to how the state should be organised. Rather the ambiguity in the Constitutional guarantee of TSG seems to be the result of a lack of attention to detail. The Autonomy Statute also failed to provide details as to how the autonomy would operate.[5] The central government has neglected to expend the resources necessary to fully develop the TSG arrangements. This has frustrated the Gagauz and encouraged some activities which clearly overstep the agreed autonomy, though most Gagauz leaders simply continue to demand the development and implementation of the existing provisions.

In Iraq, the weaknesses of the constitutional guarantee are clearly the result of a failure to actually reach agreement on important elements of the TSG. The division of powers relating to the management of hydrocarbons was subject of diverging interpretations. This prevented agreement

[5]Law on the Special Legal Status of Gagauzia (Gagauz-Yeri), Article 13. Accessed 31 December 2017, http://www.regione.taa.it/biblioteca/minoranze/gagauziaen.pdf.

on a federal law which would have provided details as to how hydrocarbons were to be managed and was a running sore between the Kurdish Regional Government (KRG) and the Iraqi government. Furthermore, while the Iraqi Constitution provided for a process through which the issue of the disputed territories could be resolved, it left important questions—for example, eligibility to vote in the proposed referendum—unresolved.[6] Continuing disagreements which are uncovered as part of efforts to develop general principles provided in Constitutions, and ambiguity which results from a failure to spend time and resources clarifying TSG provisions, make it incredibly difficult to guarantee TSG.

Difficulties around non-agreement can also be seen in Dayton Agreement in BiH and the Ohrid Agreement in the FYRM. Both agreements included provisions which arguably promoted contradictory understandings of the territorial organisation of the state. In the FYRM the peace agreement stated that there were no territorial solutions to ethnic problems but it also essentially provided for enhanced decentralisation which implicitly had an ethnic nature.[7] Similarly, in BiH there was a tension between the Dayton Accord's stated aim of encouraging refugee return and facilitating a multi-ethnic state across both federal entities, and its implicit acceptance of the entities as being ethnic homelands.[8] No guarantee mechanisms can stabilise arrangements which are contradictory. In BiH it fell to the Constitutional Court to resolve differences between incompatible understandings of the TSG. These legal cases, and similar legal cases in the other four states, allowed for an assessment of the role of courts in applying domestic guarantees.

The ability of domestic guarantees to stabilise TSG is undermined by the inability of domestic courts to act as protectors of domestic TSG laws, including Constitutions. Across the five cases, Constitutional or Supreme Courts have struggle to be effective arbiters of disputes between TSG units and the central government. It is common for such courts to be tasked with adjudicating on disputes between different levels of government. However, even when TSG is not associated with conflict

[6] Iraqi Constitution (2005), Article 140. Accessed 31 December 2017, http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf.

[7] Framework Agreement Concluded at Ohrid, Macedonia, on 13 August 2001. Accessed 31 December 2017, http://peacemaker.un.org/fyrom-ohridagreement2001.

[8] General Framework Agreement for Peace in Bosnia and Herzegovina (1995). Accessed 31 December, https://peacemaker.un.org/bosniadaytonagreement95.

management there are difficulties with using judicial review as an arbitration mechanism. Evidence of centralisation undermines the alleged neutrality of courts.[9] In Northern Ireland, BiH, and Moldova, there is evidence that using the constitutional or supreme court as the arbiter has provided the central government with an advantage where disputes between the TSG unit and the central government have occurred.

In Northern Ireland the Judicial Committee of the House of Lords, which acted as the UK Supreme Court before it was established in 2009, had a clear history of facilitating the central government's security response to the conflict.[10] After the 1998 Agreement was concluded, the Judicial Committee of the House of Lords and the Supreme Court both took positions which were supportive of the peace accord, even when it involved taking a broad reading of the law, see for example UKHL 32 [2002], discussed in Chapter 2.[11] Yet this support does not actually indicate whether the Judicial Committee of the House of Lords or Supreme Court were neutral in disputes between the centre and TSG unit, as most cases related to adjudicating disputes between two or more parties from Northern Ireland. The Court has not been asked to adjudicate between the Stormont Assembly and the Westminster government or parliament. However, the so-called Brexit case, UKSC5 [2016], is illustrative of a Court which views the regional parliament and assemblies, in Northern Ireland, Wales, and Scotland, as utterly subservient to the central Westminster parliament and which is reluctant to interpret devolution laws in a manner which recognises the legal and political conventions which regulate the division of powers. This ruling suggests that difficulties facing TSG regions are seen as secondary to the 'real problems' facing the state as a whole. This indicates that where there is no

[9] Bzdera, A. (1993). Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review. *Canadian Journal of Political Science/Revue canadienne de science politique*, Vol. 26, No. 1, 3–29. Eskridge, W.N. Jr., & Bednar, J. (1995). Steadying the Court's 'Unsteady Path': A Theory of Judicial Enforcement of Federalism. *Faculty Scholarship Series*, Paper 3799.

[10] Dickson, B. (2006). The House of Lords and the Northern Ireland Conflict—A Sequel. *Modern Law Review*, Vol. 69, No. 3, 383–417.

[11] House of Lords (2002). Robinson vs Secretary of State for Northern Ireland and Others [2002] UKHL 32. London, HMO. United Kingdom Supreme Court. (2017). JUDGMENT R (on the Application of Miller and Another) (Respondents) v Secretary of State for Exiting the European Union (Appellant), London, HMO.

history of TSG and the state is traditionally centralised, the organs of the state—including the courts—will reinforce this pattern.

In Moldova, the use of the Constitutional Court, and later administrative courts, as arbiters of disputes between central authorities and the Gagauz also clearly favoured the central government. Bias in favour of maintaining or recentralising powers was, however, not the main cause. Rather, the weak capacity of the Gagauz to draft and frame complaints led to the Court rejecting them for technical reasons. Conversely, the State Chancellery had a strong capacity to review the acts of the local Assembly in Comrat and refer them to local administrative courts for review. The disparity of legal and technical capacity between the central state and a TSG unit which is less developed ensures that only the central state can effectively harness domestic guarantees through complaints to the courts. This finding is particularly important for cases where the TSG unit is peripheral and does not have technical or legal capacities. In these cases, the provision of TSG must be accompanied with programmes which develop these capacities if the courts are to be used as an effective arbitration mechanism.

The use of Constitutional Courts in BiH and the FYRM was very problematic as it showed centralisation and accompanying ethnicisation. The Courts often interpreted peace agreements in such a way as to minimise the independence of the TSG units. These rulings were usually majority decisions in which the judges from the communities which had requested TSG dissented. Ethnicisation of court decisions undermines their legitimacy and has the potential to undermine the wider authority of the judiciary. Furthermore, where court decisions are presented as illegitimate this allows parties opposed to them to resist implementation. Non-implementation was a problem in the FYRM, though there were complex regional dynamics at play in this case, see Chapter 4. Non-implementation was seen most severely in BiH where international intervention was necessary to ensure, for example, the implementation of U-5/98.[12] This emphasises that courts cannot force the implementation of their rulings, they do not control the public purse or the security apparatus. The historical and sociological legitimacy of the judiciary makes non-implementation unusual in an established democracy with no history

[12]Constitutional Court of Bosnia and Herzegovina (2000). U-5/98 (Partial Decision Part 3), July 1. Sarajevo: Constitutional Court of Bosnia and Herzegovina.

of conflict. However, in post-conflict contexts, non-implementation is much more likely to occur. Institutions are usually completely reformed and thus do not enjoy historical legitimacy. Furthermore, the aforementioned ethnicisation weakens sociological legitimacy.

Where there is no political will to compromise, simply delegating decisions to the courts does not ensure issues are resolved. It just drags the judiciary into disputes which are essentially political. The experiences of the five cases in this volume indicated that the establishment of alternative dispute resolution commissions would be helpful. Such commissions would be composed of the actors with the leverage and authority to ensure decisions are executed. Choosing such individuals would be a delicate task—they would need to have the necessary expertise but also have links to the conflict parties. This would ensure that they can voice the concerns of the parties and that the decisions are seen to reflect input from all relevant groups, increasing the chances of implementation.

In BiH, centralisation and ethnicisation was further aggravated by the role of the international judges. They often voted for centralisation, tipping majority decisions in favour of centralisation over the objections of the majority of domestic judges. Prolonged deep international intervention in the domestic Constitutional Court creates a profound legitimacy crisis. Bosnian Serbs in particular see the Court as the servant of an international community which is determined to centralise powers and erode autonomy gains they secured in the Dayton Peace Agreement.[13] In Iraq, there is also prolonged international involvement in so far as the Federal Constitutional Court continues to operate on the basis of provision made in the international Law of Administration for the State of Iraq for the Transitional Period (TAL).[14] This is the result of a domestic failure to agree on a domestically crafted law, and this weakens the domestic legitimacy of the court. In combination, the BiH and Iraqi case underline the challenges associated with deep and long-lasting international intervention. The international community has not managed to help the

[13]See Popović's dissenting decision in Constitutional Court of Bosnia and Herzegovina (2000). U-5/98 (Partial Decision Part 3), July 1. Sarajevo: Constitutional Court of Bosnia and Herzegovina.

[14]Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, Article 44. Accessed 31 December 2017, http://www.refworld.org/docid/45263d612.html.

domestic parties to take responsibility for resolving disputes and instead remains overly involved in shaping the domestic political landscape.

International Guarantees

International guarantees can act as strong protection of TSG. The international community, through military presence or direct governance, can act directly to prevent deviations from agreed institutions. It can also use incentives to encourage compliance and sanctions to discourage breaches or non-conformity with agreed institutional arrangements. Finally, it can also act to mediate wider challenges in the peace process which can have spillover effects destabilising the TSG. However, there are both broad challenges to the use of international guarantees and specific difficulties in how certain international guarantees operate. International guarantees, in line with international norms, are more focused on preventing secession than recentralisation. They are also often only provided in cases where there have been very high levels of violence and threats that the conflict will spillover and create wider regional or international problems. The policies of international actors are also dependent on a range of factors, including domestic politics, economic concerns, and new international crises, meaning that the need to stabilise TSG arrangements is often not the key driver of the behaviour of international actors.

Much like the courts discussed above, international actors should not be viewed as neutral in relation to disputes between the central state and TSG units. As Ker-Lindsay argued: 'wishing to protect their own sovereignty and territorial integrity, over the course of the last two hundred and fifty years states have tended to take a very strong line against separatist initiatives'. He further highlighted that this aversion to secession has increased in the post-World War Two era. The territorial integrity of states has become a defining principle of international relations, even overriding the principle of self-determination.[15] These observations are generally confirmed by the role of international actors in both negotiating and stabilising the TSG institutions in the five cases examined in this volume. TSG was advocated as a solution to the conflicts in BiH, FYRM, Moldova, and Iraq to prevent secession, which was more likely

[15] Ker-Lindsay, J. (2016). *The Hollow Threat of Secession in Bosnia-Herzegovina: Legal and Political Impediments to a Unilateral Declaration of Independence by Republika Srpska*. London: London School of Economics Research on South East Europe.

in some cases than others. The international community was very reluctant to permit the changing of international border, especially in areas where this could precipitate further demands for border changes, such as the Balkans, the former Soviet space, and the Middle East. While there is arguably wisdom in this approach, it creates a situation where the international community is often more focused on preventing secessionist activities by the TSG unit than re-centralisation by the state-level government. Centralisation simply does not present the same threat to the international order and as such receives less attention. This means that, in general, a TSG unit cannot rely on the international community to protect its autonomy in the same way as the state can rely on it to protect its territorial integrity.

Interestingly, in both Northern Ireland and Moldova the international community was willing to support agreements which permitted the changing of state borders through agreed processes. What future the international community sees for the very small Gagauz region should the circumstances arise is questionable. Even if the Moldova-Romania union occurred and Gagauzia consequently voted for independence, it would not be able to survive without significant support. In Northern Ireland, the 1998 Agreement allowed for unification of Northern Ireland with the Republic of Ireland if a majority in both jurisdictions voted for such unification. This would change an international border. However, in both these cases the international community was willing to countenance changing international border and the creation of new states under two conditions through popular votes *and where the central state had agreed*. No unilateral secession processes have been tolerated. This is very understandable where TSG units were at least partially the result of the group demanding autonomy perpetrating extreme violence, such as in the case of the Republic Srpska. The international community does not want to be seen to reward ethnic cleansing with full independence. However, even where the group demanding autonomy has been repeatedly subjected to central state repression, such as in the case of Iraqi Kurds, the international community still opposes independence, underlining its commitment to the territorial integrity of states.

Furthermore, the international community is not equally willing to provide international guarantees to stabilise TSG arrangements across different contexts. Unsurprisingly the international community is more willing to provide guarantees where there has been very high level of violence and where there is potential for the conflict, which the TSG is

aimed at managing, to spillover and caused wider regional problems. Previous involvement in a region or conflict also facilitates the provision of post-agreement guarantees. A tremendously high level of international guarantee was provided in BiH as a result of the extreme violence which had characterised the conflict. Fears that any conflict in the FYRM would precipitate wider conflict in the Balkans led to a higher level of pre- and post-agreement international involvement than one may expect, given the relatively low level of violence. In Iraq, the need for a new territorial arrangement was precipitated by the US-led invasion in 2003. As a result, the international community's guarantees can be viewed as part of a wider regime change and peace-building programme. The guarantees could also be viewed as an extension of the post-1991 protection that had been provided to the Kurds. In Moldova the low level of violence, including when compared to the other secession conflict in Transnistria, meant that the international community did not provide guarantees which were in any way comparable to those given in the BiH, FYRM, and Iraq cases.

In Northern Ireland, there was an international guarantee in the form of an international treaty between the UK and Ireland. However, the unwillingness of the Irish government to invoke the treaty has limited it effectiveness. Indirect international stabilisation of the TSG arrangements occurred where international actors assisted in resolving other issues in the peace process, for example the reform of policing, which had destabilised the entire accord including the TSG. However, this involvement was very much targeted at managing the conflict between the parties in Northern Ireland rather than conflict between the centre and the TSG unit. The international Treaty status of the 1998 Agreement was not invoked to prevent the re-centralisation of powers, even when the Irish government, the other signature of the treaty, opposed the centralisation. While the reasons for this are multi-faceted, and the Irish government undoubtedly felt working with the British government was a sensible approach to re-establishing the TSG institutions, it is also illustrative of the fact that strong states which occupy prominent positions in the international system will not be subject to the same scrutiny as weaker or more peripheral states.

The use of international guarantees across the five cases in this book indicates that where TSG regions result from low-level conflict or conflict with strong central state minorities will not be able to rely on strong international guarantees to support their TSG. In the former situation

this may not have serious consequences. If levels of violence have been low it may be possible for domestic parties to resolve any difficulties without much external assistance. But it does leave non-violent seekers of TSG in a weaker position. The latter situation is more troubling and is part of a wider problem where certain states in the international system can act with relative impunity and this leaves minorities in these states vulnerable.

Regional powers and neighbouring states can offer guarantees, but their policies and actions can also have a profoundly destabilising effect on TSG arrangements. Kin-states are often viewed as having the potential to destabilise TSG arrangements. Minorities which have been granted TSG may seek to unite with a neighbouring kin-state, encouraging centrifugal rhetoric or activities. Given the small size and relative weakness of many of these groups, it is often only through support of or unification with a neighbouring kin-group or state that the secession is realistic. If such kin-states or groups discourage their kin from engaging in such activities this can act as an effective guarantee that TSG will not be centrifugal. It can be difficult for kin-states to balance a desire to protect kin who are suffering discrimination within another state with a wish to dissuade unilateral or violent separatism. The Irish government's commitment to the principle of consent, that unification with Northern Ireland will only occur if the majority within Northern Ireland vote for such, and the changes made to the Irish constitution, were attempts to guarantee that the TSG provided for in the 1998 Agreement would not facilitate unilateral secession of Northern Ireland from the UK. In Moldova, the role of Turkey as a kin-state for the Gagauz has been positive. There have been no suggestions that the Gagauz would use Turkish support to secede, and the link has been used to encourage the economic and cultural development of the very underdeveloped Gagauz region. However, in BiH both Croatia and Serbia have played a complex role, sometimes discouraging their kin from engaging in secessionist activities but at other times encouraging it. The different approaches are frequently the result of domestic political conditions. These illustrate that kin-states are not simply benign guarantors of TSG, rather their own political considerations often determine the steadfastness of any guarantees supplied.

In Europe, future conditional membership of the European Union (EU) has been seen as a strong tool which the Union can use to encourage states who aspire to membership to follow certain desirable policies. In the 1990s and early 2000s the EU used future membership to

encourage minority protections. Such incentives have previously proved powerful during the accession process but lose much of their power once a state becomes a member. The effectiveness of such conditionality as a guarantee of TSG in BiH, FYRM, and Moldova has been undermined by a decreasing desire of states to become members in the face of apparently endless technical accession criteria, the EU's economic woes, and Brexit. As the EU struggles to manage its internal challenges further enlargement is not a priority. However, EU membership has affected the use of TSG across all five cases. Brexit, for example, will make the operation of the cross-border aspects of the TSG in Northern Ireland more difficult and as such has a strong potential to destabilise the TSG institutions. In the FYRM potential EU membership is essentially out of reach until the 'name dispute' with Greece is resolved. As was outlined in Chapter 4, placing EU and NATO membership out of reach made it impossible for the EU to realistically make membership conditional on maintaining the TSG and implementing the Ohrid Agreement more widely. It also had serious negative effects on the wider political situation in the FYRM and created additional divisions between the Macedonian majority and Albanian minority.

In BiH, the EU has focused on securing wider reform of the cumbersome and ineffective Dayton institutions as part of the accession process. This can have a destabilising effect on the TSG as the centralisation of further powers is often seen as an essential part of these reforms, though such reforms would be part of a negotiated package. Interestingly, in BiH future EU membership has been used to incentivise Serbia to dissuade the RS from engaging in secessionist activities. By encouraging a neighbouring kin-state to adopt policies which deter secession, future EU membership has been used to counter the centrifugal tendencies of TSG in BiH. This highlights that future EU membership can not only influence the behaviour of TSG groups or the central state but important kin-states. As discussed above, kin-state support is often vital for secessionists and discouraging such can be an effective barrier to separatism, guaranteeing the stability of TSG.

It was also predicted that possible Turkish membership of the EU could improve relations between Turkey, as a key regional power, and the Iraqi Kurds. EU membership would further strengthen Turkish territorial integrity, lessening fears in Turkey that TSG for Kurds in Iraq would lead to Kurdish separatism in Turkey. Such future EU membership would also ensure that Turkish policies towards its Kurdish

population are not repressive, facilitating better relations between Turkey and the Kurdish authorities in Iraq. However, in recent years Turkish accession has become increasingly less likely. Yet despite this, Turkey's relationship with the KRG in Iraq improved greatly. The relationship flourished due to economic self-interest based on a controversial hydrocarbon agreement and investment flowing from Turkeyto the KRG. However, the unilateral independence referendum held in September 2017 damaged this relationship. In Moldova the Gagauz are wary of future membership of the EU due to associations with a potential union with Romania. Instead they prefer closer economic cooperation with the Eurasian Economic Union. While this is also popular with the wider Moldovan population, Russian involvement in Gagauzia is viewed with suspicion by the central state. Being caught between the EU and Russia has created additional divisions in Moldova and created a further source of potential destabilisation for the TSG arrangements.

The cases examined in this book are illustrative of a key weakness in using international actors as guarantors of TSG. The policies of international actors are determined by a wide range of factors and are not driven by a benevolent desire to stabilise TSG institutions. This can be most acutely seen in Iraq, where both Turkey and the wider international community's policies were shaped by economic considerations and a need to respond to the threat posed by ISIS. Similarly, the increasingly hostile relationship between the EU and Russia has undermined the international community's ability to act as a useful guarantor of the Gagauz TSG in Moldova. Similarly, new international crises can distract international actors from the prolonged proactive involvement that is necessary to stabilise TSG. Post 9/11 the international communities' focus moved away from BiH, and the Balkans broadly, to Afghanistan and Iraq. Finally, Brexit has damaged Anglo-Irish relations and created real problems as to how the 1998 Agreement will operate in this new context.

Lessons for Policy-Makers and Practioners: Increasing the Effectiveness of Different Guarantees

This section briefly outlines the role of different types of guarantees. It highlights how the failings of both domestic and international guarantees may be overcome. This may provide advice to policy-makers and practitioners—both domestic and international—as to how guarantees should

be designed and combined to ensure that they are effective in entrenching TSG.

Domestic ordinary laws are not commonly used as guarantees of TSG and are not effective as they do not provide sufficient entrenchment to stabilise TSG. International policy-makers and mediators should avoid relying on such laws to prevent unilateral changes to TSG. Even where the current central government is sincere in its commitment to upholding TSG arrangements to manage a conflict, future governments may not share this commitment. If TSG is reliant on an ordinary domestic law it is incredibly vulnerable to such shifting central majorities. Domestic laws can be used to provide additional details developing a commitment to TSG outlined in special laws or the constitution but alone they are ineffective.

Special domestic laws, which do not have a constitutional status but require special procedures to be altered can provide a solid guarantee of TSG. However, their utility is dependent on ensuring that they are designed in such a way as to prevent unilateral alteration of the TSG. They need to be structured in such a way as to ensure that the group granted TSG can veto any changes. In some cases, where the group is sufficiently large and politically represented, central parliament supra-majorities may provide this minority veto. But in cases where the TSG group is too small or not sufficiently politically represented at the centre concurrent majorities between the central parliament and a local assembly would provide a better guarantee of the TSG. These supra or concurrent majority processes can also be applied to other laws which have formed part of the peace accord. TSG is often used in conjunction with other minority protections, including cultural or linguistic rights, throughout the state. Requiring supra or concurrent majorities to change laws related to these aspects of an agreement will protect the peace agreement more broadly.

Domestic constitutional guarantees are important for minorities seeking TSG. Where TSG is entrenched in a domestic constitution, minorities are provided with reassurance that the central state will not infringe on its self-government in the future. Central governments are often willing to include mentions of or references to autonomy in a constitution. The more difficult it is for a constitution to be altered, the stronger the guarantee that is provided to TSG through constitutional entrenchment. Constitutional guarantees are the strongest domestic guarantee and as such can play a vital role providing a permanent guarantee

that will continue to exist once international guarantees are withdrawn. Entrenchment in the constitution can also afford TSG a degree of domestic legitimacy which is particularly important where agreements are the result of deep international intervention.

However, constitutions are not effective if they are ambiguous or do not provide clear guidelines on important elements of TSG, such as the delineation of powers between the state and the TSG region. Both domestic negotiators and international mediators need to ensure that provisions included in constitutions clearly address the important aspects of TSG and represent a shared understanding of the how the TSG will operate. TSG is usually an unhappy compromise but for it to work as a conflict management mechanism the terms of the compromise need to be established and accepted. Ambiguity cannot be maintained once implementation begins and inevitably leads to disputes which endanger the peace.

The effectiveness of all domestic guarantees is dependent on the presence of an enforcement mechanism. Constitutional or supreme courts are often charged with fulfilling this role. This is a similar to where TSG is used in non-conflict context. However, disputes which arise between the central government and a TSG unit, particularly in the early period of the TSG, are often political in nature. Using the judiciary to resolve them risks politicisation. Judges can come to be seen as proxies for political parties or ethnic/identity communities. This undermines the independence and legitimacy of the courts system as a whole. To avoid this, domestic negotiators and international mediators should consider establishing alternative dispute resolution committees which can mediate or arbitrate these disputes. Negotiated solutions will have the added benefit of being easier to implement.

Attention should also be paid to how any responsible court is constituted and what decision-making procedures are used. Regional representation is vital if TSG regions are to have any confidence that the court will act to protect its autonomy. Measures should also be put in place to try and encourage consensual decision-making processes and to minimise the potential for any divisions to be publicised as they undermine the court, as described above. The European Court of Justice prohibits the use of dissenting opinions to prevent such opinions resulting in or highlighting national divisions. Such prohibition should be considered to protect the legitimacy and prevent divisions where courts arbitrate disputes between TSG regions and the central state.

Soft international guarantees such as conditional aid and trade relationships or future membership of regional organisations are relatively low-cost ways which international actors can incentivise respect for TSG institutions. Yet, the ability of these guarantees to effectively prevent violation of TSG arrangements is limited by the fact that trade policy and membership of organisations is dependent on a variety of factors. Other considerations such as economic needs may take precedence. International actors should consider whether it is realistic to use these soft guarantees to stabilise TSG. Where an aid or trade relationship is not particularly important for the international provider but is significant for the central state or TSG unit, such conditionality might be realistic. However, where an economic relationship offers substantial benefit for an international actor it is likely that the actor will enter into this relationship even if it destabilises the TSG institutions.

Hard international guarantees are the strongest assurance conflict parties can receive that TSG will be faithfully implemented and will not be unilaterally changed. The presence of international military forces or an international administrator on the ground in post-conflict states will strongly discourage domestic actors from trying to manipulate TSG. Where secessionist or centralising rhetoric or activities occur the military forces or international administrator can sanction the perpetrators. It is often difficult for the international community to sustain the depth of intervention which these guarantees represent over the long term. Once violence has dissipated the international community's attention may be drawn to other crises. This is understandable, but the transformation of relationships between the central state and TSG groups takes years, even decades, and until trust between the groups develops international guarantees are vital. This is further complicated by legitimacy concerns surrounding prolonged deep international interventions in post-conflict contexts.

In order to ensure that domestic actors develop necessary capacities to take responsibility for their own affairs, international guarantees should be combined with efforts to develop local capacities. For example, helping TSG units develop technical expertise. Furthermore, international actors should only intervene when necessary and the depth of any intervention should be appropriate to the level of instability which the TSG is suffering. The international community needs to be a proactive observer of the TSG. Low-level mediation may be sufficient where the dispute between the TSG region and the state does not pose a serious risk of

renewed conflict, for example where the central government inadvertently passes law which violates the TSG regions autonomy but is willing to reform it. However, where a domestic party willingly violates the TSG, for example by threating an independence referendum, the international community should act swiftly to outline the strong sanctions which will be used to punish such a move.

International actors can also use soft guarantees to deter neighbouring states or kin-states from engaging in activities which destabilise TSG. This provides additional opportunities for the international community to stabilise TSG. For example, offering a kin-state aid or trade opportunities as a reward for discouraging their kin from engaging in separatist activities can be a strong stabiliser of TSG. TSG regions may require the support of kin-states to make any demands for further autonomy realistic. The coordination of international guarantees, both soft and hard, is also necessary for them to be effective. It can be difficult to secure agreement between different international actors with different priorities to take a consistent approach to guaranteeing TSG. Powerful international actors need to build coalitions and dissuade other international actors from deviating from an agreed approach that prioritises stabilising TSG.

The international community needs to recognise that centralisation represents a serious threat to peace. International legal norms often encourage the international community to pay attention to secession but to be less aware of centralisation. Secession may appear to be a more serious problem than centralisation, but centralisation can put minorities at serious risk of discrimination or repression. Furthermore, unilateral centralisation risks provoking a violent response from the TSG group, and as such represents a real threat to international peace and stability. The TSG group is often less capable of harnessing any domestic guarantee and as such is dependent on the international community to protect its autonomy.

Combining domestic and international guarantees offers the best possibility of ensuring that TSG arrangements are stable and operate as an effective conflict management mechanism. Strong domestic guarantees, such as constitutional entrenchment, combined with international intervention, which is flexible to address the shifting domestic environment, can convince the domestic actors that TSG will not be unilaterally altered and can avert such actions when they appear imminent. International actors need to be constantly vigilant and consider the impact of any policies on TSG.

There is an instability which is intrinsic in using TSG, this increases where it is used as a conflict management mechanism. However, every form of social organisation has its own inherent contradictions. The challenges which undermine the use of guarantees in consolidating TSG may suggest that it should not be used as a conflict management tool. Yet it is often the only solution which is acceptable to the state and the group seeking greater autonomy. As such it is paramount that scholars and practioners develop an understanding of how to best counter instability and overcome the challenges which weaken the guarantees. To produce peace TSG institutions must reconcile the competing needs for group autonomy and a cohesive central state, *and* ensure that this delicate balance is not violated.

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