

Including Minority Rights in Peace Agreements: A Benefit or Obstacle to Peace Processes after Ethnic Conflicts?

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Abstract

Dealing effectively and efficiently with minorities and minority problems in the aftermath of ethnic conflict is central to durable and stable peace. The inclusion of minority rights in peace agreements is seen as a mandatory step in the resolution of the conflict and political stability. While references to human rights and minority rights are common, it is the implementation process that often lacks clarity and thoroughness. On the basis of three case studies, Bosnia and Herzegovina, Macedonia, and Kosovo, this study examines how human rights and minority rights provisions are put into practice and how they impact the peace process. Findings suggest that the inclusion of minority rights is only beneficial in cases in which relevant institutions and adequate political and civil society support were established to implement the provisions. Formal reference to ethnic problems or minority rights is not sufficient.

Keywords

minority rights; human rights; institutions; Bosnia and Herzegovina; Kosovo; Macedonia

1. Introduction

Dealing effectively and efficiently with minorities and minority problems in the aftermath of ethnic conflict is crucial for durable and stable peace. Minority protection is based on the recognition that minorities are in a vulnerable situation as compared to other groups in the society. Special protections are needed in cases in which the group is subject to injustice, namely when the rights of the group and each member's individual rights are violated. Minority rights abuses are often at the heart of ethnic conflict.¹

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¹) See on the causes of ethnic conflicts involving minority issues T. R. Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts* (United States Institute of Peace Press, Washington, D.C., 1993); M. E. Brown, 'Causes and Implications of Ethnic Conflict', in M. E. Brown (ed.), *Ethnic Conflict and International Security* (Princeton University Press, Princeton 1993) pp. 3–26;

The most important goal of minority protection is twofold: the maintenance of peace and security and the preservation of minority culture. The Permanent Court of International Justice (PCIJ) stated the following in its advisory opinion in the *Minority Schools in Albania* case² in 1935:

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of *living peaceably* alongside that populations and *co-operating amicably* with it, while at the same time *preserving the characteristics* which distinguish them from the majority, and satisfying the ensuing special needs.³

Similarly, the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities states that “the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live”. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) states in its preamble that human rights and fundamental freedoms are “the foundation of justice and peace in the world”. In post-conflict situations, the goal is to prevent the re-emergence of conflict.

Based on these premises, the inclusion of general human rights protections and references to minority rights in peace agreements and post-conflict constitutions is common today.⁴ The goal of this study is to examine how the nature of minority rights provisions and the structure of implementing domestic institutions included in peace agreements and post-conflict constitutions affect peace processes in the aftermath of ethnic conflict. Findings suggest that the inclusion of minority rights in peace agreements and post-conflict constitutions is only beneficial to the peace process if adequate institutional mechanisms and sufficient

and M. E. Brown, ‘Ethnic and Internal Conflicts: Causes and Implications’, in C. A. Crocker, F.O. Hampson and P. Aall (eds.), *Turbulent Peace: The Challenges of Managing International Conflict* (United States Institute of Peace Press, Washington, D.C., 2001) pp. 209–226. See generally on the need for minority protection and minority rights P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991); K. Henrard, *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination* (Kluwer Law International, The Hague, 2000); J. Packer, ‘On the Content of Minority Rights’, in J. Rääkkä (ed.), *Do We Need Minority Rights? Conceptual Issues* (Kluwer Law International, The Hague, 1996) pp. 121–178; and G. Pentassuglia, *Minorities in International Law: An Introductory Study* (Council of Europe, Strasbourg, 2002).

² *Minority Schools in Albania*, 1935, PCIJ, Advisory Opinion, PCIJ Series A/B, No. 64, 1935.

³ *Ibid.*, p. 17, emphasis added.

⁴ See the surveys of peace agreements in H. Hannum, ‘Human Rights in Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding’, 28:1 *Human Rights Quarterly* (2006) pp. 1–85; T. L. Putnam, ‘Human Rights and Sustainable Peace’, in D. Rothchild, S. J. Stedman and E. M. Cousens (eds.), *Ending Civil Wars: The Implementation of Peace Agreements* (Lynne Rienner, Boulder, 2002) pp. 237–272; and C. Bell, *Peace Agreements and Human Rights* (Oxford University Press, Oxford, 2000).

local political support for the implementation of human rights and minority rights are established. The qualitative analysis of three case studies, the 1995 Dayton Agreement ending the war in Bosnia and Herzegovina, the 2001 Ohrid Framework Agreement for Macedonia,⁵ and the peace agreements and legal frameworks of Kosovo since 1999 will serve as empirical evidence. The nature of the rights included, the institutional design of human rights and minority rights bodies, and the examination of the implementation processes will provide answers to the question if the inclusion of minority rights in peace agreements is a benefit or an obstacle to the peace process.

2. Minority Rights in Peace Agreements

2.1. Peace Agreements

Peace agreements seek a compromise between the interests and positions of the conflicting parties with the goal of widespread acceptance and sustainability.⁶ They reflect an understanding among conflicting actors at a certain point in time that provides a framework for peace implementation. Depending on the conditions and status of the conflict, peace agreements can take different forms, ranging from ceasefire agreements to advanced constitutions and from documents of unclear legal and political status to international treaties. In some cases, peace agreements are at the heart of the peace process; in others, they are neglected and only play a marginal role.⁷ The role a peace agreement plays in a peace process depends on the nature of the agreement, the negotiation process, limitations imposed by the parties involved, and the time at which the agreement came into existence during conflict.⁸

According to Christine Bell, peace agreements can be divided into three categories.⁹ First, pre-negotiation agreements set the stage for peace negotiations. During this part of the process, parties realise that they have more to gain by engaging in dialogue rather than violence. The goal is to establish who is going to negotiate what and from what position.¹⁰ Key issues include whether to include

⁵ Also known as the Former Yugoslav Republic of Macedonia.

⁶ C. Chinkin, 'Gender, Human Rights, and Peace Agreements', 18 *Ohio State Journal of Dispute Resolution* (2003) p. 868.

⁷ The Good Friday Agreement in Northern Ireland is at the heart of the peace process, while the Darfur Peace Agreement was marginalised and did not play a prominent role in subsequent negotiations.

⁸ See for a general overview Rothchild, Stedman and Cousens, *supra* note 4.

⁹ See more detailed Bell, *supra* note 4, pp. 20–32.

¹⁰ See also C. R. Mitchell, *The Structure of International Conflict* (Macmillan, London, 1981) pp. 206–216.

or exclude militants and extremist parties, questions of security, and the discussion of an agenda for a future peace process.¹¹ Good examples for pre-negotiation agreements are the settlements put forward by the international community between 1992 and 1995 in Bosnia, which resulted in the Dayton Accords.¹² Second, framework or substantive agreements are often brokered at all inclusive peace talks (which include militant groups) and aim at creating a framework for resolving the conflict. These agreements usually include references to the commitment to solve the conflict through non-violent means, the parties involved, the steps taken in the immediate aftermath of the conflict (prisoner release, emergency legislation, dealing with human rights violations), interim arrangements for governance including issues such as self-determination, democratisation, policing, and post-conflict reconstruction, and an agenda or timetable for the transition to a more permanent resolution. And third, implementation agreements sketch out details of framework agreements and often serve as final legislation. The agreements and legal frameworks considered in this study fall in the second and third categories.

Renegotiation is often a part of the process – parties want to see whether they can decrease their concessions and what final constitutional settlements work best for their situation. As a result, “peacemaking is often in fact constitution-making”.¹³ In contrast to constitutions, however, peace agreements are partial and temporary; they often have both domestic and international components (whereas constitutions in most cases only involve domestic components);¹⁴ and they rely on the political process for implementation (whereas constitutions rely on the courts for implementation).¹⁵

Implementation processes of peace agreements are dynamic and often highly complex undertakings which pose challenges to the parties involved. Even if most aspects of successful negotiation are fulfilled – the agreement originated from multi-party negotiations and is supported by all parties to the conflict and the international community – its successful realisation is far from secure. A disruptive event, a deadlock in the implementation process, or a change in power structures can lead to failure.¹⁶

¹¹) Bell, *supra* note 4, pp. 20–21.

¹²) See for example the Carrington-Cutileiro plan of March 1992, which set up basic ethnic power-sharing and decentralisation of power to ethnic communities; the Vance-Owen plan of spring 1993, which intended to set up autonomous regions within Bosnia and Herzegovina; the Owen-Stoltenberg plan of August 1993, which would have separated Bosnia and Herzegovina into ethnic states; and the Contact Group plan, brought forward by the US, Russia, Germany, France and Great Britain in 1994, which was the onset for the peace negotiations in Dayton, Ohio, in 1995.

¹³) Bell, *supra* note 4, p. 294.

¹⁴) Kosovo is a notable exception.

¹⁵) Bell, *supra* note 4, p. 305.

¹⁶) In Rwanda in 1993 or in Israel/Palestine in 1995.

2.2. *Minority Rights*

Minority rights are part of the general human rights framework. They are individual rights through which members of the group are entitled “to enjoy their own culture, to profess and practice their own religion, or to use their own language”.¹⁷ To understand the role of minority rights in peace agreements and peace implementation processes it is therefore important to examine human rights provisions and institutions.

A peace agreement usually includes both ‘forward-looking’ and ‘backward-looking’ human rights provisions. Forward-looking provisions focus on building future human rights protections and institutions including a bill of rights, an independent judiciary, courts, a rights-based police and criminal justice system, and other national human rights enforcement bodies. Backward-looking provisions deal with the past: handling refugee problems, discussing matters of access and possession of land, addressing human rights violations that happened during the conflict as well as questions of accountability, truth and reconciliation.¹⁸ The reasoning behind the inclusion of forward- and backward-looking human rights in peace agreements and post-conflict constitutions is to establish common standards and unifying mechanisms for the population. The goal is to foster stability by connecting democracy with fundamental rights and freedoms, thus creating a “rights-based democracy”.¹⁹ While both forward-looking and backward-looking human rights play a role in the peace implementation process and in fact are often closely connected,²⁰ it makes sense from an analytical point of view to distinguish the two. This study focuses mainly on forward-looking provisions and institutions, which “aim to provide a new legitimacy and a new order for the future”.²¹ The narrower focus allows for more concise conclusions with regards to the nature of these provisions and institutions and their impact on the post-conflict situation and status of minorities.

¹⁷⁾ Article 27 of the International Covenant on Civil and Political Rights. See also Thornberry, *supra* note 1, p. 394.

¹⁸⁾ See Bell, *supra* note 4.

¹⁹⁾ See J. Jowell, ‘The Rule of Law and its Underlying Values’, in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford University Press, Oxford, 2007) pp. 5–24.

²⁰⁾ See, among others, E. A. Posner and A. Vermeule, ‘Transitional Justice as Ordinary Justice’, 117 *Harvard Law Review* (2003–2004) pp. 762–825; P. van Zyl, ‘Promoting Transitional Justice in Post-Conflict Societies’, in A. Bryden and H. Haeggi (eds.), *Security Governance in Post-Conflict Peacebuilding* (DCAF, Geneva, 2005) pp. 209–231; E. E. Stensrud, ‘New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia’, 46:1 *Journal of Peace Research* (2009) pp. 5–15. From a more practitioner’s point of view, see the arguments made by E. L. Lutz, E. F. Babbitt and H. Hannum, ‘Human Rights and Conflict Resolution from the Practitioners’ Perspective’, 27:1 *Fletcher Forum for World Affairs* (2003) pp. 173–193.

²¹⁾ Bell, *supra* note 4, p. 311.

Most agreements incorporate general references to international human rights instruments with the stipulation that these are binding for the parties to the agreement.²² Forward-looking rights generally included in peace agreements embrace overarching justiciable rights (general ‘human rights’, including civil and political rights and economic, social, and cultural rights – mostly in the form of a bill of rights or a reference for a future involvement). In many cases the document also refers to implementing institutions, most importantly to the court system or other national human rights enforcement bodies such as human rights commissions or ombudsmen. On a more general level, the majority of treaties mention the independence of the judiciary and rights-based reforms of the criminal justice system and policing. Finally, peace agreements are usually more human rights friendly if the international community is involved in the negotiations process.²³

Three categories of rights are particularly relevant to minorities: rights to protection, empowerment, and the preservation of the group’s identity.²⁴ The first category concerns rights to protection against extinction and discrimination. These rights are not specific to ethnic minorities and extend to other disadvantaged groups as well. One major challenge is to establish equality ‘in fact’, which means that rights to protection generally include favourable treatment of underprivileged groups. Rights falling within the second category relate to empowering the group to have the authority to determine its own affairs, actively and effectively participate in state affairs, to obtain autonomy (non-territorial (segmental, cultural) and/or territorial), and, in certain cases, to be able to secede from the state and gain independence. The identification of the ethnic group as either a ‘minority’ or a ‘people’ is fundamental, as it determines the degree of empowerment to which the group is entitled. ‘Peoples’ have the right to self-determination, while minorities do not. Problematic is the fact that the distinction between minorities and peoples is blurry at best.²⁵ The claim to external self-determination, namely secession, statehood and independence for territorially concentrated minorities, is often a cause of ethnic conflict. The focus of this debate shifted over time towards internal self-determination – the right of minority groups to participate in governmental affairs and control their cultural matters.²⁶ The third category

²² See for example the Constitution of Bosnia and Herzegovina, which is Annex 4 of the Dayton Peace Accords. Article I confirms the significance of international human rights treaties.

²³ See Putnam, *supra* note 4, pp. 241–248. See also Bell, *supra* note 4, pp. 193 and 231.

²⁴ See T. Kempin Reuter, ‘Dealing with Ethnic Minorities in International Law’, 24:2 *Connecticut Journal of International Law* (2009) pp. 201–237.

²⁵ See for more details G. Pentassuglia, ‘State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal Review’, 9 *International Journal on Minority and Group Rights* (2002) pp. 303–324.

²⁶ See H. Hannum, ‘Rethinking Self-Determination’, in R. J. Beck and T. Ambrosio (eds.), *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups*

of rights focuses on the preservation of the culture and ethnic identity of the group.²⁷

While most peace agreements include general references to human rights, the establishment of mechanisms for implementation is often neglected.²⁸ Nevertheless, the ability of the peace agreement to deliver human rights commitments affects the nature of the transition. Studies show that transitions tend to be more violent without effective institutional measures.²⁹ According to Bell, human rights institutions have two roles: “to legitimize the deal and new government structures established by it, and to integrate the divided polity”.³⁰ Particularly in post-conflict divided societies, such institutions take on an enhanced role because they often provide the only political contact between groups and minorities and the government in the absence of other structures.³¹

3. Case Studies

The case studies of Bosnia and Herzegovina, Kosovo and Macedonia have been selected for several different reasons. First, the relative similarity of the context with regards to geographical location, ethnic character of the conflicts, and economic and political situation of the societies allows not only for comparative analysis, but they also show how international and national human and minority rights institutions developed and how lessons learned in one case impacted the selection and structure of institutions used in others. Second, peace talks in all three cases were relatively inclusive and led to comprehensive peace agreements. While the peace processes are different and separate, the three case studies are intertwined because lessons learned in earlier processes were incorporated in later occurrences. Third, the relative internationality of the negotiation and implementation process affected the three case studies in different ways. It is instructive to see how international involvement, particularly in the implementation phase,

(Chatam House, New York, NY/London, 2002) pp. 214–249; T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) pp. 46–91.

²⁷⁾ See Pentassuglia, *supra* note 1, pp. 97–111; Henrard, *supra* note 1, p. 8; and A. Verstichel, ‘Recent Developments in the UN Human Rights Committee’s Approach to Minorities, with a Focus on Effective Participation’, 12 *International Journal on Minority and Group Rights* (2005) p. 28.

²⁸⁾ See Putnam, *supra* note 4.

²⁹⁾ See for example L. Roniger and M. Sznajder, *The Legacy of Human Rights Violations in the Southern Cone: Argentina, Chile, and Uruguay* (Oxford University Press, Oxford, 1999) pp. 267–271.

³⁰⁾ Bell, *supra* note 4, p. 198.

³¹⁾ B. Reilly and A. Reynolds, *Electoral Systems and Conflict in Divided Societies* (National Academy Press, Washington, D.C., 1999) p. 3. See also R.M. Letschert, *The Impact of Minority Rights Mechanisms* (TMC Asser Press, The Hague, 2005).

has impacted the outcome of the peace processes. And finally, the implementation process in all three cases has moved beyond the initial steps of peace implementation. Agreements, institutions and processes have been renegotiated and changed to adapt to new situations and needs of the respective transitional societies. It is therefore possible to seek viable conclusions on the nature and impact of the transition process on human and minority rights.

3.1. Bosnia and Herzegovina

From a pure minority rights point of view, almost everything was done right in Bosnia and Herzegovina. A consociational power-sharing agreement³² secured minority participation in governmental affairs, the establishment of different human rights institutions guaranteed that human and minority rights violations could easily be reported, and high international interest and involvement served as a promise for the effective implementation of these provisions. Nevertheless, as the following paragraphs will show, the problems often outweighed the benefits of the Dayton Accords.³³

Almost 100 per cent of Bosnia and Herzegovina's population belongs to one of its three constituent ethnic groups – the Bosniaks (48 per cent, mainly Muslim), Serbs (37.1 per cent, mainly Christian-Orthodox), and Croats (14.3 per cent, mainly Christian-Catholic). Less than 1 per cent of the population belongs to neither of these categories and is known as 'Others'.³⁴ Ethnic cleansing during the Bosnian war led to widespread population movements and the displacement of more than half of the population.³⁵ Fifteen years after the end of the war, roughly

³² Consociations generally have four characteristics: grand coalitions, namely the joint exercise of governmental power; mutual veto rights for matters important to the group; proportional representation in government and societal positions; and segmental autonomy in cultural or educational matters. See A. Lijphart, *Democracy in Plural Societies* (Yale University Press, New Haven, 1977). About the consociational nature of the governmental structure provided by the Dayton Agreement, see R. Belloni, 'Peacebuilding and Consociational Electoral Engineering in Bosnia and Herzegovina', 11:2 *International Peacekeeping* (2004) pp. 334–353; S. Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention* (Oxford University Press, London, 2002) pp. 246–252; and N. Tzifakis, 'The Bosnian Peace Process: The Power-Sharing Approach Revisited', 15:1 *Perspectives* (2007) pp. 85–102.

³³ The Dayton Accords or Dayton Agreement is officially known as the 'General Framework Agreement for Peace in Bosnia and Herzegovina'. The Agreement was reached in November 1995 in Dayton, Ohio, USA and later signed in Paris on 14 December 1995. The Dayton Agreement ended the three and a half year long war in Bosnia and Herzegovina and established the sovereignty of Bosnia and Herzegovina.

³⁴ The most prominent uncategorised group is the Roma. CIA World Factbook on Bosnia and Herzegovina, <www.cia.gov/library/publications/the-world-factbook/geos/bk.html>, visited on 2 June 2012.

³⁵ UNHCR *Information Notes*, No. 6/7, June/July 1996, p. 4; and UNHCR *Information Notes*, No. 8/9, August/September 1996, pp. 10–11.

250,000 of approximately four million inhabitants are still displaced in and outside of Bosnia.³⁶

Bosnia's political arrangements have been labelled "a laboratory for what was arguably the most extensive and innovative democratization experiment in history".³⁷ To account for the deep ethnic divisions, Bosnia and Herzegovina was established as a federal state with two main entities: the multi-ethnic Federation of Bosnia and Herzegovina, inhabited by mainly Bosniaks and Croats, and the Republika Srpska, the home of a mainly Serb population.³⁸ Government institutions and political collaboration on the federal level are structured along ethnic lines and require proportional representation of the three constituent groups. As a result of high levels of decentralisation and substantial territorial and segmental autonomy, the main power lies with the two entities, which enjoy many attributes of statehood.³⁹

Despite the efforts of the past 15 years, ethno-national divisions still impact the political situation. It has proven impossible to restore a peaceful multi-ethnic state and reverse ethnic cleansing. In a recent article in *Foreign Affairs*, the authors paint a gloomy picture and portray Bosnia as a country on the brink of war.⁴⁰ Trends towards fragmentation, secessionist tendencies involving both the Republika Srpska and the Croat parts of the Federation, economic problems and the collapse of overarching political institutions make Bosnia one of the most unstable states in Europe.⁴¹ Increasing ethnic extremism and the resulting challenges to authority have left Bosnia on the verge of collapse. As the latest general election results show, ethnic tensions continue unabatedly.⁴²

Failure of the Dayton peace process is not an option. Potential spill over effects into neighbouring states and grave international consequences leave the region prone to renewed war and devastation. A fragile peace is upheld mainly by heavy

³⁶ UNHCR, Bosnia and Herzegovina 2010 UNHCR Country Operations Profile, <www.unhcr.org/cgi-bin/texis/vtx/page?page=49e48d766>, visited on 2 June 2012.

³⁷ P. C. McMahon and J. Western, 'The Death of Dayton – How to Stop Bosnia from Falling Apart', 88 *Foreign Affairs* (2009) p. 69.

³⁸ Constitution of Bosnia and Herzegovina, Article I, para. 3.

³⁹ According to the Dayton Accords, Annex 4, Article III.1, the central government oversees only foreign policy, trade, customs, and monetary policy, immigration, refugee, and asylum regulations, international and inter-entity criminal law enforcement, regulation of international and inter-entity communication and transportation, and air traffic control. All other issues are the responsibility of the two entities.

⁴⁰ McMahon and Western, *supra* note 37.

⁴¹ See the World Bank Country Brief for Bosnia and Herzegovina <web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/BOSNIAHERZEXTN/0,,menuPK:362032-pagePK:141159-piPK:141110-theSitePK:362026,00.html>, visited on 3 June 2012.

⁴² See the reports and analyses by the International Crisis Group, 89 *Crisis Watch* (3 January 2011) and International Crisis Group, 'Federation in Bosnia and Herzegovina – A Parallel Crisis', 209 *Europe Report* (28 September 2010).

international oversight and investment.⁴³ Despite these risks, international presence has steadily declined over the past couple of years. The global financial crisis, wars in Afghanistan and Iraq and diplomatic issues with Iran and North Korea have turned the focus of the international community elsewhere. Between 2005 and 2007, the international security presence declined from 7,000 troops to fewer than 2,000, with less military capacity. This level of troops will diminish to 200 for training purposes, without Chapter VII powers.⁴⁴ This leaves the country without an early warning system or deterrent of potential new conflict.

One way in which the drafters of the Dayton Accords attempted to overcome these ethnic divisions was the inclusion of wide-ranging, overarching human rights provisions. Widespread violations of these rights were at the core of conflict and, as such, the establishment of human and minority rights protections was one of the main focal points of peace negotiations and peace deals leading to the Dayton Accords.⁴⁵ The applicable human rights framework is laid down in the Bosnian Constitution (Annex 4 of the Dayton Agreement) and in greater detail in Annex 6, which focuses exclusively on human rights. The Preamble of the Constitution refers to “human dignity, liberty, and equality” and dedication to “peace, justice, tolerance and reconciliation”, the need to “ensure full respect for international humanitarian law”, and various international human rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Article II of the Constitution is devoted to human rights and includes a mixture of substantive rights and procedures comparable to other constitutions. According to paragraph 2 of Article II, the European Convention of Human Rights and Fundamental Freedoms (ECHR) “shall apply directly in Bosnia and

⁴³ See the *Report by the UN High Representative for Bosnia and Herzegovina* of 7 May 2010 (UN Doc. S/2010/235). In addition to UN peacekeeping troops, 17 foreign governments, 18 UN agencies, 27 international organisations and over 200 NGOs were engaged in reconstruction efforts in Bosnia in 1996. McMahon and Western, *supra* note 37, pp. 69–70.

⁴⁴ *Ibid.*, p. 79.

⁴⁵ See for more information Z. Pajic, ‘A Critical Appraisal of Human Rights Provisions of the Dayton Constitution of Bosnia and Herzegovina’, 20 *Human Rights Quarterly* (1998) pp. 125–38; P. C. Szasz, ‘Protecting Human and Minority Rights in Bosnia: A Documentary Survey of International Proposals’, 25:2 *California Western International Law Journal* (1995) pp. 237–310; P. C. Szasz, ‘The Quest for a Bosnian Constitution: Legal Aspects of Constitutional Proposals Relating to Bosnia’, 19 *Fordham International Law Journal* (1996) pp. 363–407; P. C. Szasz, ‘The Protection of Human Rights through the Dayton/Paris Peace Agreement in Bosnia’, 90:2 *American Journal of International Law* (1996) pp. 301–316; H. Stokke, ‘Human Rights as a Mechanism for Integration in Bosnia–Herzegovina’, 13 *International Journal on Minority and Group Rights* (2006) pp. 263–84; W. Benedek (ed.), *Human Rights in Bosnia and Herzegovina after Dayton* (Kluwer Law International, The Hague, 1999); and M. O’Flaherty (ed.), *Post-War Protection of Human Rights in Bosnia and Herzegovina* (M. Nijhoff Publishers, The Hague, 1998).

Herzegovina. These [rights and freedoms] shall have priority over all other law.” Paragraph 3 provides a list of the rights and freedoms applicable. Paragraph 4 is the non-discrimination clause, which includes besides the usual proscriptions (sex, race, colour, language, religion, *etc.*) the prohibition to discriminate on the grounds of political or other opinion, national or social origin, association with a national minority, property, birth or other status. Paragraph 5 and Annex 7 deal with the right of refugees and displaced persons to return to their homes of origin. In addition, the Bosnian Constitution guarantees the freedom of movement (Article I, paragraph 4) and the right of people to remain where they are (Annex 7), a right Pajic calls “freedom from harassment and expulsion”.⁴⁶ Article II ends with the declaration that all competent authorities have to

cooperate with and provide unrestricted access to any international human rights monitoring mechanisms established for Bosnia and Herzegovina; the supervisory bodies established by any of the international agreements listed in Annex I to this Constitution; the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal); and any other organisation authorized by the United Nations Security Council with a mandate concerning human rights or humanitarian law.

Article II of the Constitution contains two novelties. First, the ECHR and its Protocols were made the highest law in Bosnia and Herzegovina before the state became a member of the Council of Europe. This shows not only the high commitment to human rights, but also the desire to integrate Bosnia into Europe and to preserve the uniformity of the European human rights system. The language of Article II provides a detailed list of human rights which are immediately applicable to domestic constitutional law – a task that would have been difficult to achieve given the time pressure of the peace negotiations.⁴⁷ Second, the level of involvement of international bodies and mechanisms provided in Article II, paragraph 8 calls for international presence and interest beyond that embedded in comparable constitutions. The inclusion of respective monitoring mechanisms that go along with the treaties mentioned in the Constitution has the potential for a strong implementation of human rights.

Annex 6 of the Dayton Agreement provides a list of rights picked from the ECHR, as well as the procedures and institutions for review of human rights cases. Article II establishes a Human Rights Commission consisting of two parts: the Office of the Ombudsman⁴⁸ and the Human Rights Chamber.⁴⁹

⁴⁶ Pajic, *supra* note 45, p. 132. Pajic provides a detailed analysis of the human rights provisions of the Dayton Accords.

⁴⁷ Szasz, *The Protection of Human Rights*, *supra* note 45, p. 306.

⁴⁸ Dayton Framework Agreement, Annex 6, Articles IV–VI.

⁴⁹ *Ibid.*, Annex 6, Articles VII–XII.

The relationship between the Ombudsman and Human Rights Chamber was modelled after the former relationship between the European Commission and European Court of Human Rights.

The Office of the Ombudsman serves as a complaints mechanism. The Ombudsman is to consider allegations of human rights violations that were submitted by any “[p]arty or person, non-governmental organisation, or group of individuals claiming to be the victim of violation by any Party or acting on behalf of alleged victims who are deceased or missing”⁵⁰ except if the applicant refers to the Human Rights Chamber. The Ombudsman can decide if a complaint should be investigated and what priority it should receive. He/she has access to files, can conduct hearings and interviews, take part in administrative meetings, and is allowed to inspect workplaces and homes (“any place where persons deprived of their liberty are confined or work”).⁵¹ If a violation of human rights is found, the violating party has to issue a written statement in which it explains how it will comply with the agreement. The Ombudsman was to work closely with the Human Rights Chamber and could refer the case to the High Representative in the event of non-compliance with his conclusions. The powers and authorities of the Office of the Ombudsman were expanded in 2001 when the Law on the Human Rights Ombudsman of Bosnia and Herzegovina entered into force.⁵²

The Human Rights Chamber was a hybrid body consisting of both international and national members.⁵³ Its mandate included the consideration of human rights violations, which could be referred to the Chamber directly by the victim, a third party or the Ombudsman. Similar to the European Court of Human Rights, the Chamber was mainly concerned with the adjudication of human rights cases. The mandate of the Human Rights Chamber expired on 31 December 2003. The interim successor organisation, the Human Rights Commission of the Constitutional Court, dealt with pending cases that were submitted before the mandate of the Human Rights Chamber ended. Human rights violations brought forward after 1 January 2004 have been adjudicated by the Constitutional Court.⁵⁴ The Constitutional Court also determines whether law is in accordance with the ECHR.⁵⁵

⁵⁰ *Ibid.*, Annex 6, Article V, para. 2.

⁵¹ *Ibid.*, Annex 6, Article VI, para. 1.

⁵² Law on the Human Rights Ombudsman of Bosnia and Herzegovina, 2000. The original Ombudsman was a non-Bosnian appointed by OSCE. Since 2001, the Ombudsman has been appointed by the three-person presidency of Bosnia and criterion of foreigner was dropped.

⁵³ The Human Rights Chamber consisted of 14 members, four of which represent the Federation and two the Republika Srpska. The remaining eight members have to be picked by the Committee of Ministers of the Council of Europe and may not be citizens of Bosnia and Herzegovina or neighbouring states.

⁵⁴ See <www.hrc.ba/>, visited on 3 June 2012.

⁵⁵ Dayton Framework Agreement, Annex 6, Article VI, para. 1. In addition, the Court can settle disputes between entities, the Bosnian government and an entity/entities, or between institutions

Besides the specific human rights bodies, the Office of the High Representative (OHR), and the International Police Taskforce play an important role in human rights implementation. First, the function of the OHR is “to facilitate the Parties’ own efforts to mobilize and, as appropriate, coordinate the activities of the organisations and agencies involved in the civilian aspects of the peace settlement”.⁵⁶ The High Representative’s Bonn powers allow him to directly implement the recommendations of the Human Rights Ombudsman.⁵⁷

Second, while their mandate does not directly refer to the enforcement of human rights law, the International Police Task Force established in Annex 11 of the Dayton Agreement is allowed to notify the Human Rights Commission, the International Criminal Tribunal for the Former Yugoslavia (ICTY) or other appropriate bodies in the case of human rights violations.⁵⁸ The roles of the United Nations (UN), the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe and other international organisations in the implementation process were not officially acknowledged despite the fact that they carried the most responsibility.⁵⁹

The following analysis will focus mainly on role of Office of the Ombudsman as it has proven to be the most important and only remaining specific human rights institution established by the Dayton Accords. Three phases can be distinguished in the role of the Office of the Ombudsman.⁶⁰ Before 2002, the internationally appointed Ombudsman collaborated closely with the Human Rights Chamber. The cases focused mainly on issues related to property in connection with the right to return for displaced persons in accordance with Annex 7. The Ombudsman relied heavily on the High Representative for implementation during this first phase. After 2002, the Ombudsman started to fulfil a conflict resolution role, as the caseload now included general human rights violations relating to ethnic issues. At the end of 2003, the Office of the Ombudsman was restructured. First, the internationally established Office was transformed into a domestic institution of three Ombudspersons representing the three constituent groups. Second, the entity-level Ombudsmen were integrated into the Office of the

and serves as an appeals court. The Constitutional Court is composed of nine members, three of which are international appointees of the President of the European Court of Human Rights. The Federation provides four judges and the Republika Srpska two.

⁵⁶ *Ibid.*, Annex 10.

⁵⁷ The ‘Bonn powers’ allow the High Representative to dismiss public officials who violate legal commitments and the Dayton Peace Agreement, and to impose laws as he sees fit if Bosnia and Herzegovina’s legislative bodies fail to do so. See the *Peace Implementation Council Report of December 1997*, <www.ohr.int/pic/default.asp?content_id=5182>, visited on 3 June 2012.

⁵⁸ Dayton Framework Agreement, Annex 11, Article VI.1

⁵⁹ Pajic, *supra* note 45, p. 126.

⁶⁰ See for more details and an analysis of the Office of the Ombudsman A. Lee Wetzel, ‘Post-Conflict National Human Rights Institutions: Emerging Models from Northern Ireland and Bosnia & Herzegovina’, 13 *Columbia Journal of European Law* (2006–2007) pp. 427–470.

Ombudsman on the national level. These transitions proved to be more difficult than anticipated and implementation was delayed.⁶¹ The new Ombudspersons took up their work at the end of 2008. They may investigate individually, but all recommendations, decisions and reports have to be issued jointly.⁶² Chairmanship rotates every two years.

With regards to minority rights, the Office of the Ombudsman assumes an important function. While only a few cases were submitted to the Office's Department for the Protection of the Rights of National, Religious, and other Minorities in the two years since its establishment, the largest numbers of complaints submitted to the Department for Elimination of All Forms of Discrimination are based on ethnic origin (23 per cent).⁶³ In addition, the Office has addressed other cases related to minority rights violations, such as property-related issues, labour problems and health care.⁶⁴ The important role of the Ombudspersons for the protection and promotion of minority rights has been widely recognised.⁶⁵

The Office of the Ombudsman has dealt with many obstacles since it was established. First, the remarkably high caseload has prevented the Office of the Ombudsman from assuming other responsibilities such as its mandate to advise the government on human rights policy.⁶⁶ In 2011, for example, the Office of the Ombudsman dealt with 4,750 cases, 3,067 of which were new complaints and 1,683 which were carried over from 2010. Of these cases, the Office was able to close about 60 per cent in 2011; the rest remained open.⁶⁷

Second, the recommendations issued by the Office of the Ombudsman are non-binding.⁶⁸ The Ombudsman issued 221 recommendations to the government in 2011, most of which concerned labour relations, governmental and court procedures, prevention of discrimination, and freedom of access to information.

⁶¹ See for an overview of some of the issues faced *Information on the situation in the Institution of Human Rights Ombudsman for Bosnia and Herzegovina*, <www.ombudsmen.gov.ba/docs/Information2008english.pdf>, visited 11 August 2012. The transition process, which was supposed to be completed in 2006, did not start until the end of 2008 and was finished in 2010.

⁶² Law on the Human Rights Ombudsman of Bosnia and Herzegovina and Law on Amendments to the Law on Ombudsman for Human Rights of Bosnia and Herzegovina, <www.ombudsmen.gov.ba/IndexEn.aspx>, visited on 12 August 2012. See also B. Kofler, 'Bosnia and Herzegovina', in G. Kucsko-Stadlmayer (ed.), *European Ombudsman Institutions* (Springer, Vienna, 2008) pp. 119–127.

⁶³ See the *Annual Report on Results of the Activities of the Institution of Human Rights Ombudsman of Bosnia and Herzegovina 2011*, p. 95, <www.ombudsmen.gov.ba/materijali/publikacije/GI2011/Annual_Report2011.pdf>, visited on 12 August 2012.

⁶⁴ See *ibid.*, pp. 11–18.

⁶⁵ See for example the *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, Following his visit to Bosnia and Herzegovina on 27–30 November 2010*, CommDH(2011)11, <wcd.coe.int/ViewDoc.jsp?id=1766837>, visited on 12 August 2012.

⁶⁶ See Dayton Framework Agreement, *supra* note 33, Annex 6, Article V.

⁶⁷ Annual Report, *supra* note 63, p. 11.

⁶⁸ Law on the Human Rights Ombudsman of Bosnia and Herzegovina, Article 32.

In about a third of the cases, the Ombudsman's recommendations were implemented according to the procedures foreseen in Article 32 of the Law on the Ombudsman of Bosnia and Herzegovina. In another third of the cases, cooperation with governmental institutions was achieved, but the implementation process was either ended or delayed. For the rest of the recommendations, the institutions either failed to respond or did not comply with the recommendation.⁶⁹

And third, besides the struggle of the reorganisation process described above, the Office has struggled with funding and outreach. In 2011, the authorities failed to adopt a budget funding the Ombudsman's activities, which limited the Office's capacities to hire the appropriate number of personnel needed to deal with the case load and jeopardised its field presence and outreach function.⁷⁰

An assessment of the human and minority rights situation in Bosnia reveals the following conclusions. On the positive side, the establishment of the national human rights institutions, namely the Office of the Ombudsman and the Human Rights Chamber, provided an alternative dispute settlement platform. This platform was particularly important in the first few years after the adoption of the Dayton Accords because domestic courts were unable to deal with human rights cases. The dismissal of the Human Rights Chamber at the end of 2003 illustrates the improvement of the situation. Additionally, because of the initial international composition of the two institutions, they were perceived impartial and well-versed in the application of the ECHR.⁷¹

However, the human rights institutions never fully developed their potential for several reasons. First, it is worth noting that none of the political bodies or peacekeeping forces have a mandate to arrest human rights violators despite discussed improvements of compliance with recommendations and resolutions issued by the human rights bodies. Implementation relies mainly on the government and the institutions of the two entities, which stand in opposition to the multi-ethnic unitary central state that the human rights provisions and institutions aim to create and enforce.⁷² Over time, this has eroded the credibility of overarching mechanisms and procedures, which affects the potential for full implementation of the Dayton Accords.

Second, the focus on the distribution of power along ethnic lines and, as such, collective rights ultimately inhibited human rights implementation. The prediction that the human rights system could counterbalance disintegrative tendencies

⁶⁹ Annual Report, *supra* note 63, p. 15.

⁷⁰ *Ibid.*, p. 101.

⁷¹ Z. Pajic, 'The Role of Institutions in Peacebuilding', in F. Butler (ed.), *Human Rights Protection: Methods and Effectiveness* (Kluwer Law International, The Hague, 2002) pp. 111–133, at pp. 122–123.

⁷² Bell, *supra* note 4, p. 228.

did not come to pass.⁷³ The Dayton Accords attempted to find a middle ground between individual rights and group rights – to account for human rights violations while at the same time acknowledging ethnic divisions or human rights violations along ethnic lines. The Preamble of the Bosnian Constitutions illustrates this dilemma: by naming ‘constituent peoples’, namely the Bosniaks, Serbs and Croats, the Preamble focuses on the collective element instead of the individual. Sovereignty is given to the three ethnic groups and taken away from Bosnia’s citizens as a whole. There are no references to the ‘population’ or the ‘people’ of Bosnia and Herzegovina in the Constitution. All ‘Others’ are left in limbo as they are not considered constituent peoples. The fundamental contradiction of the Dayton Agreement is its attempt “to guarantee the highest level of individual rights while, at the same time, accommodating the demands of nationalists and separatists to preserve and reify collective rights in ‘cleansed’ enclaves”.⁷⁴ In addition, all common institutions in Bosnia and Herzegovina such as the Parliament, the Presidency, the Council of Ministers and the domestic judges of the Constitutional Court are divided along ethnic lines. As such, the Bosnian state hardly exists because most powers (*e.g.*, military, police and administration of justice) are in the hands of the two ethnic entities. The implementation of individual human rights becomes difficult as the political situation fosters ethnic division and mutual mistrust and leads to the question as to whether individuals will only be protected on the basis of their collective national identity.⁷⁵ As Bell observes,

[i]f the solution is primarily about separation of ethno-national groups, then individual rights may be irrelevant to the deal cut ... , or be left to the feeble institutions of an emaciated common sphere, whose power to enforce rights within autonomous spheres is negligible.⁷⁶

Third, as can be seen from the description above, the institutional mechanisms are fragmented and overlapping in both jurisdiction and responsibilities, which leads to political and financial disputes between them. While the responsibilities are separated on the surface – the Ombudsman focuses on investigative and screening tasks, while the Chamber, and later the Constitutional Court, focus on adjudication – they both deal with the same violations of the ECHR. These overlapping responsibilities combined with complex administrative procedures make the process quite confusing and not particularly transparent and easily accessible.

⁷³ Pajic, *supra* note 45, p. 136.

⁷⁴ International Crisis Group, ‘Implementing Equality: The “Constituent Peoples” Decision in Bosnia & Herzegovina’, 128 *Balkans Report* (2002) p. 25.

⁷⁵ Pajic, *supra* note 45, p. 135.

⁷⁶ Bell, *supra* note 4, p. 189.

Fourth, most human rights provisions and implementation mechanisms were established without taking the Bosnian experience into account. The mechanisms were established mainly by outsiders, which led to low acceptance levels among the population.⁷⁷ In the absence of strong central institutions, it became the responsibility of the international community to stabilise the country and with regards to human rights, implement the provisions laid down in the Dayton Agreement. This strong oversight by the international community has been compared to imperialism.⁷⁸ In addition, there was a lack of focus on strengthening the Bosnian governmental system, particularly with regards to legal matters. Legal education for judges and legal professionals in Bosnia was not started until 2001.⁷⁹ The development of the judicial system between 1995 and 2001 did not include training on international or European human rights norms. The ECHR was not translated into the local languages until late 1999, almost five years after the Dayton Agreement entered into force.⁸⁰ And as McMahon and Western observe, “[t]he establishment of the [ICTY] has left little energy and few resources for the development of the Bosnian courts”.⁸¹ The impact on human rights implementation was detrimental. The Constitutional Court only started dealing with cases involving human rights violations in 2004. Before that, the human rights institutions established by the Dayton Agreement, namely the Ombudsman and the Human Rights Chamber, were in charge of dealing with human rights violations. As discussed above, the problems with these institutions, namely heavy caseload, low levels of compliance and little domestic support, in combination with the originally almost exclusive international composition of those bodies led to a weakened acceptance of human rights and human rights implementation in Bosnia. Judicial reform and focus on the establishment of strong national

⁷⁷ See for example the newspaper articles and blog posts available at <www.worldpress.org/0402views_milosevic.htm>; <www.balkaninsight.com/en/main/blogs/22255/> and <archives.cnn.com/2002/WORLD/europe/02/11/milosevic.serbia/index.html>, visited 2 June 2012. See also G. Aybet, ‘Assessing Institutional Legitimacy in State Building: NATO Conditionality in Bosnia’, Paper presented at the 49th annual meeting of the International Studies Association, San Francisco, CA, USA (26 March 2008). See for an overview of the potential of the ICTY to contribute to peace and reconciliation P. Akhavan, ‘Justice in The Hague, Peace in Former Yugoslavia? A Commentary to the United Nations War Crimes Tribunal’, 20:4 *Human Rights Quarterly* (1998) pp. 737–816. See generally L. E. Fletcher and H. M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’, 24:3 *Human Rights Quarterly* (2004) pp. 573–639.

⁷⁸ G. Knaus and F. Martin, ‘Lessons from Bosnia and Herzegovina: Travails of the European Raj’, 14:3 *Journal of Democracy* (2003) pp. 60–74.

⁷⁹ International Crisis Group, ‘Courting Disaster: The Misrule of Law in Bosnia & Herzegovina’, 127 *Balkans Report* (2002) pp. 4–5.

⁸⁰ *Annual Report of the Human Rights Ombudsman of Bosnia and Herzegovina*, 1999.

⁸¹ McMahon and Western, *supra* note 37, p. 75. See also W. Burke-White, ‘Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia-Herzegovina’, 46 *Columbia Journal of Transnational Law* (2007–2008) pp. 279–350.

institutions have proven to be among the most important tasks in early post-conflict reconstruction⁸² – a task that had been gravely neglected in the first years of the implementation of the Dayton Agreement. The foreign imposition of rules and procedures combined with the weakness and lack of support of national institutions and needs led to a loss of credibility of both the international involvement in Bosnia and Herzegovina and the implementation capability of national institutions.

Finally, while the Ombudsman and the Human Rights Chamber are technically ‘forward-looking’ institutions as defined above, neither of them have a mandate to promote human rights. The focus is clearly on the complaints procedure and adjudication. The only institutions concerned with human rights promotion and education were international organisations such as the UN High Commissioner for Human Rights, the UN Mission to Bosnia and Herzegovina, and the OSCE. The Human Rights Coordination Center of the OHR had a mandate to monitor human rights education efforts. While these efforts are commendable and have produced some impact,⁸³ the exclusion of local actors, including key members of the government, civil society leaders and the public in general, has led to a lack of human rights consciousness. If a human rights strategy is to succeed in ethnically divided Bosnia, human rights education will prove vital to address the underlying causes of human rights abuses and to promote tolerance. As Wetzel observes, the quasi-judicial functions of the Bosnian human rights institutions were overemphasised to compensate for Bosnia and Herzegovina’s hardly operative judiciary. In contrast, human rights education has not played an adequate role mainly because it was coordinated by the OHR and carried out by international organisations.⁸⁴ Some point out that the lack of an educational focus is a result of the high caseloads faced by Bosnian human rights institutions.⁸⁵ However, the lack of education and training might also be a cause of that high caseload. Had members of judicial and law enforcement institutions been

⁸² See for more information R. Teitel, *Transitional Justice* (Oxford University Press, Oxford and New York, 2000); J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge University Press, Cambridge, 2006) pp. 178–248; E. G. Jensen, ‘The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses’, in E. G. Jensen and T. C. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, Stanford, 2003) pp. 336–381; C. T. Call, ‘Introduction: What We Know and Don’t Know about Post-Conflict Justice and Security Reform’, in C. T. Call (ed.), *Constructing Justice and Security After War* (United States Institute for Peace Press, Washington, D.C., 2006) pp. 3–28.

⁸³ See for more information International Crisis Group, *supra* note 79; and M. O’Flaherty, ‘International Human Rights Operations in Bosnia and Herzegovina’, in A. H. Henkin (ed.), *Honoring Human Rights* (Kluwer Law International, The Hague, 2000) pp. 227–252.

⁸⁴ Wetzel, *supra* note 60, p. 463.

⁸⁵ See for example P. Ashdown, ‘What I learned from Bosnia’, *New York Times*, 28 October 2002. See also Pajic, *supra* note 71, 122–123.

properly trained, particularly with regards to human rights and ethnic sensitivity, the likelihood of cases focusing on ethnic discriminations and problems relating to misadministration on ethnic grounds might have decreased.

In conclusion, the Dayton Agreement has both strengthened and undermined minority rights. It has strengthened minority rights by establishing mainly autonomous entities and quotas for minority representation on the national level. At the same time, the system provided severely weakened minority rights. Not only is the group of 'Others' left in legal and political limbo, but the implementation of minority rights and the administration of minority rights violations by national human rights institutions has been made impossible. The focus on ethnic divisions and collective rights rather than unity and individual rights contributed to peace in Bosnia and Herzegovina in the first years after the war. In the long run, however, this one-dimensional approach has undermined the overall peace process. There will be a growing need to move from the emphasis on ethnic belonging and group rights to a more inclusive approach focusing on individual rights and the equality of human beings.

A highly decentralised system such as the one in Bosnia and Herzegovina prohibits the evolvement of overarching values (such as individual human rights). While the state structures in Bosnia technically fulfill minority rights concerns, the overall focus on ethnic divisions leads to an unstable peace, which in turn threatens to undermine human and minority rights.

3.2. Macedonia

Macedonia experienced its violent manifestation of the underlying ethnic tensions between the majority group, the ethnic Macedonians and its largest minority, the Albanian Macedonians,⁸⁶ from 1999–2001 as a result of a spill over of the ethnic conflict in Kosovo. While the conflict resulted in relatively few deaths as

⁸⁶ Ethnic Macedonians make up 67.5 per cent of the population, Albanian Macedonians 22.2 per cent. Other ethnicities include Turks (3.8 per cent), Roma (3.7 per cent), Serbs (1.3 per cent) and Vlachs (0.1 per cent). See the PCA Household Survey of September 2009, published in UNDP People Centered Analyses on Macedonia, United Nations Development Programme, April 2010, p. 59. See also footnote 1 of the report: "According to the 2002 census, Macedonia has a population of just over two million people. Broken down into ethnic groups: 64.2 per cent (or 1,297,981) are ethnic Macedonians, 25.2 per cent (or 509,083) are ethnic Albanians, 3.9 per cent are Turks, 2.7 per cent are Roma 1.8 per cent are Serbs, 0.8 per cent are Bosnians, 0.5 per cent are Vlachs, and 1.0 per cent are 'others'. The country's two major religions are Orthodox Christianity and Islam. There is a general correlation between ethnicity and religious affiliation – the majority of Orthodox believers are ethnic Macedonian, and the majority of Muslim believers are ethnic Albanians and Turks. Approximately 65 per cent of the population is Macedonian Orthodox, and 32 per cent is Muslim. Other groups include Roman Catholics, members of various Protestant denominations, and Jews." See for more specifics on the ethnic communities in Macedonia S. Škarić. "The Ohrid Agreement and Minority Communities in Macedonia, *Prospects of Multiculturalism in Western Balkan States*

compared to the other two conflicts discussed in this study, the tensions caused widespread displacement in the north-western part of the country.⁸⁷ The conflict ended on 13 August 2001 with the signing of the Ohrid Framework Agreement (OFA), which was supported by the four main political parties in Macedonia, the European Union (EU) and the United States.⁸⁸

The goal of the Ohrid Framework Agreement was to keep the territorial integrity and Macedonian state intact while calling for measures that would improve human rights and minority rights of the Albanian ethnic group and other minorities through constitutional and legislative changes.⁸⁹ The agreement states in Section 1 that the “multi-ethnic character of Macedonia’s society must be preserved and reflected in public life”,⁹⁰ but 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.”⁹¹ Unlike the Dayton Accords in the Bosnian case, the OFA emphasises the integration of all ethnic groups into one state and establishes Macedonian citizenship as the common point of reference.

With regards to minority protection, the OFA provided for non-discrimination and equal treatment under the law, the development of a decentralised governmental system, and a new census to determine the boundaries of municipalities.⁹² Local governments are in charge of public services, urban and

(2004) pp. 94–110, at pp. 102–107, <74.125.113.132/search?q=cache:OIG1LKw8M6sJ:www.fcs.org.mk/pdf/SVETOMIR%2520SKARIC%2520OHRID%2520AGREEMENT%2520AND%2520MINORITY%2520COMMUNITIES.pdf+international+involvement+in+ohrid+skaric&cd=1&hl=en&ct=clnk&gl=us>, visited on 3 June 2012. While two waves of Kosovar Albanian immigration, one in 1963 and one in the 1980s, increased the Albanian population, the surge of 350,000 Kosovar Albanians into Macedonia in 1999 was temporary and most of these refugees did return to Kosovo. See for more information M. F. R. Lebamoff and Z. Illievski, ‘The Ohrid Framework Agreement: Neither Settlement Nor Resolution of Conflict?’, *Paper presented at annual meeting of the International Studies Association*, San Francisco, CA, USA (26–29 March 2008), pp. 7 and 15, <www.allacademic.com/meta/p_mla_apa_research_citation/2/5/4/4/8/p254488_index.html>, visited 2 June 2012. See also International Crisis Group, ‘Macedonia: No Room for Complacency’, 149 *Balkans Report* (2003) p. 24.

⁸⁷⁾ 171,000 people were displaced, 74,000 of them within Macedonia. Internal Displacement Monitoring Center, ‘Macedonia: Fear Prevents Remaining IDPs from Returning Home’, <www.internal-displacement.org/8025708F004CE90B/(httpCountries)/64A4EC2CB5C0F210802570A7004C8BD8?OpenDocument>, visited 2 June 2012.

⁸⁸⁾ The four parties included the Internal Macedonian Revolutionary Organisation-Democratic Party of National Unity (VMRO-DPMNE), the Social-Democratic Union of Macedonia (SDSM), the Democratic Party of the Albanians (DPA), and the Party of Democratic Prosperity (PDP). See U. Brunnbauer, ‘The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments’, 1 *Journal on Ethnopolitics and Minority Issues in Europe* (2002).

⁸⁹⁾ Globalsecurity.org, ‘Conflict in FYR Macedonia’, <www.globalsecurity.org/military/world/war/macedonia.htm>, visited on 2 June 2012.

⁹⁰⁾ Ohrid Framework Agreement, Article I, para. 3.

⁹¹⁾ *Ibid.*, Article I, para. 2.

⁹²⁾ *Ibid.*, Article III and Annex C deal with the decentralisation of the governmental system, Article IV with non-discrimination, and Annex B with the proposed new census.

rural planning, environmental protection, local economic development, culture, local finances, education, social welfare and health care. The OFA includes provisions to increase the participation of underrepresented communities in public administration and government decisions. Appointees for positions on the Constitutional Court, the Judicial Council and the Ombudsman (Public Attorney) must have the support of the majority of representatives in the Assembly in addition to the endorsement of minority communities.⁹³ The OFA further includes provisions falling within the third category of minority rights mentioned above, which establishes measures to protect and promote minority identity and culture. The protection of minority language is stipulated in Section 4, which states that languages spoken by at least 20 per cent of the population should be considered the official languages of Macedonia. Furthermore, students whose native language is an official language shall be taught in that language, including at state-funded schools and universities. Section 7 deals with cultural rights and the privilege to express local ethnic identity in the form of symbols and emblems that may be displayed in addition to the official insignias of the Republic. Interestingly enough, the OFA did not refer to the ECHR or any other international human rights instruments beyond the general assertion that human rights should be respected.

Annex A of the Agreement proposed a couple of constitutional amendments, many of which deal with minority rights. Article 7, for example, incorporates wide-ranging linguistic guarantees. Article 19 deals with religious freedom, Article 48 with freedom of expression and the protection of ethnic identity, and Article 56 with cultural rights. Articles 114 and 115 focus on local self-government and minority participation. Laws affecting culture, use of language, education, personal documentation and the use of symbols have to be passed by a majority which includes “the Representatives claiming to belong to the communities not in the majority in the population of Macedonia”.⁹⁴ With regards to institutional implementation, Article 77 establishes a Public Attorney (also known as Ombudsman) whose mandate is to protect “constitutional rights and legal rights of citizens when violated by bodies of state administration and by other bodies and organisations with public mandates” and to safeguard “the principles of non-discrimination and equitable representation of communities in public bodies at all levels and in other areas of public life”. Article 78 establishes a Committee for Inter-Community Relations which represents all ethnic communities within Macedonia. The Committee is tasked with considering relations between the different ethnic groups and proposing solutions to issues to the Assembly. Annex B deals with legislative measures including new laws on policing and local government, while Annex C discusses the implementation of the Agreement, including

⁹³ *Ibid.*, para. 4.3.

⁹⁴ *Ibid.*, Annex A, Article 114.

the role of the international community. The international community took on a facilitating, monitoring and assisting role⁹⁵ and thus worked more behind the scenes as compared to the other two case studies examined in this paper.⁹⁶ The amendments to the Macedonian Constitution were passed on 16 November 2001 and legislation on local self-government was passed on 24 January 2002.⁹⁷

The implementation of the OFA was a success overall, at least on the surface. The International Commission on the Balkans, a group of international experts tasked with developing a vision for the integration of South East European countries into the EU, referred to Macedonia as “a model for other parts of the Balkans”.⁹⁸ Macedonia has been a candidate for EU membership since 2005 and is considered to have made significant progress on implementing democracy, human rights and minority protection.⁹⁹ In many ways, the Agreement provided the necessary framework to legally terminate the discrimination and underrepresentation of minorities in the Macedonian state. It established Macedonia as a multi-ethnic state and ended the idea of ethnic Macedonians as being the only national group in the state.¹⁰⁰ The implementation process was relatively

⁹⁵ *Ibid.*, Annex C, Article 1.

⁹⁶ A good example of this ‘work behind the scenes’ is the engagement of the OSCE High Commissioner on National Minorities (HCNM) whose involvement in the agreement making process had a profound influence not only on the OFA itself, but also on the implementation process. As part of his mandate on conflict prevention, then HCNM Max van der Stoep was personally engaged to find a peaceful solution to Macedonia’s issues. See M. Czaplinski, ‘Conflict Prevention and the Issue of Higher Education in the Mother Tongue: The Case of the Republic of Macedonia’, 19:4 *Security and Human Rights* (2008) pp. 260–272; M. Czaplinski, ‘The University’, 22:3 *Security and Human Rights* (2011) pp. 265–270. This engagement continued beyond the conclusion of the OFA. See V.-Y. Ghebali, ‘The High Commissioner on National Minorities after 15 Years: Achievements, Challenges and Promises’, 20:2 *Security and Human Rights* (2009) p. 120.

⁹⁷ Brunnbauer, *supra* note 88.

⁹⁸ International Commission on the Balkans, ‘The Balkans in Europe’s Future’, Robert Bosch Stiftung, King Baudouin Foundation, German Marshall Fund of the United States, Charles Stewart Mott Foundation (2005) p. 37, <www.becci.org/DOKUMENTI/Report.pdf>, visited on 2 June 2012.

⁹⁹ See the European Commission, ‘The Former Yugoslav Republic of Macedonia 2010 Progress Report’, (9 November 2010), <ec.europa.eu/enlargement/pdf/key_documents/2010/package/mk_rapport_2010_en.pdf>, visited on 2 June 2012.

¹⁰⁰ Škarić, *supra* note 86, p. 97. The Constitution of 1991 established Macedonia as the “National State of Macedonian people, which guarantees the full civic equality and permanent coexistence of the Macedonian people with the Albanians, Turks, Vlachs, Roma and other nationalities” (Preamble of the Constitution). While referring to equality among citizens, the Constitution nevertheless set up a hierarchy among ethnicities in Macedonia with three tiers: the ethnic Macedonians as the national people of the state, the named minorities as peoples with equal rights but not as primary claimants to the state, and groups not named by the Constitution and generally referred to as ‘others’. As a result, the Constitution was rejected by minorities in Macedonia, most prominently by the Albanians. See Z. Daskalovski, ‘Language and Identity: The Ohrid Framework Agreement and Liberal Notions of Citizenship and Nationality in Macedonia’, 3:1 *Journal on Ethnopolitics and Minority Issues in Europe* (2002) p. 15. In addition, the Constitution denied Albanians secondary education in their native language by making Cyrillic and Macedonian the only official language

efficient – most bills referring to the Agreement were passed by 2005. Political parties in favour of the Ohrid peace process dominated the political landscape in the years after the Agreement was reached. On the grass roots level, interethnic tensions have lessened and relations between the ethnic groups have improved. Interethnic friendships are more common and prejudices are less pronounced.¹⁰¹ The current risk of ethnic conflict has been rated very low despite the problematic socio-economic situation and high poverty rates among minorities.¹⁰² With regards to participation and non-discrimination, the representation of Albanians and other groups in state administration and police has significantly increased.¹⁰³ Institutionalised forms of cultural and political discrimination were greatly reduced in the years after the Ohrid Agreement, particularly with regards to language use. The ‘20 per cent rule’ not only established Albanian and in five municipalities the Turkish, Serbian and Romani as official languages,¹⁰⁴ it also allowed for primary and secondary education in these languages.¹⁰⁵ Most people do not think they are discriminated against as a result of their ethnicity in employment, career advancement, movement across the state, application to educational programmes, or when using social services.¹⁰⁶ This is illustrated by the case work of the Public Attorney (Ombudsman). In 2011, 4,256 cases were submitted to the Ombudsman, only 42 of which were related to ‘non-discrimination and adequate and equitable representation’ (0.99 per cent of all cases).¹⁰⁷ Of these, most were based on ethnic discrimination (36 per cent).¹⁰⁸ However, these numbers may be misleading. The low discrimination related caseload may very well be a consequence of widespread mistrust and fear of public authorities rather than an indication of widely decreased minority rights violations.¹⁰⁹ In addition, there is a

(Article 7 of the Constitution). Similarly, it elevated the Macedonian Orthodox Church over “other religious communities and groups”(Article 19 of the Constitution).

¹⁰¹ See UNDP People Centered Analyses on Macedonia, United Nations Development Programme, April 2010, pp. 57–86, <www.undp.org.mk/content/Publications/People-centeredper cent20Analysesper cent20ENGper cent20web.pdf>, visited on 3 June 2012.

¹⁰² *Ibid.*, p. 67.

¹⁰³ See A. Reka, ‘The Ohrid Agreement: The Travails of Inter-ethnic Relations in Macedonia’, 9 *Human Rights Review* (2008) pp. 61 and 66.

¹⁰⁴ See International Crisis Group, ‘Macedonia: Make or Break’, 33 *Europe Briefing* (3 August 2004) pp. 1–15, at p. 5, <www.crisisgroup.org/-/media/Files/europe/040803_macedonia_make_or_break.ashx>, visited on 2 June 2012.

¹⁰⁵ Before the Ohrid Agreement, most Albanians got their higher education in Pristina in Kosovo. The OFA states that “state funding will be provided for university level education in languages spoken by at least 20 per cent of the population of Macedonia” (Section 6.2). The State University of Tetovo, a mostly Albanian institution, was officially recognised in 2004. See for more information on the issue of higher education Reka, *supra* note 103, pp. 62–65.

¹⁰⁶ UNDP, *supra* note 101, p. 81.

¹⁰⁷ *Annual Report of the Ombudsman* (2011), pp. 16–19, <www.ombudsman.mk/ombudsman/upload/documents/2012/Izvestaj%202011-ANG.pdf>, visited on 5 July 2012.

¹⁰⁸ *Ibid.*, p. 33.

¹⁰⁹ *Ibid.*

lack of educational campaigns focusing on raising awareness for issues related to discrimination.¹¹⁰

When taking a closer look, it becomes clear that even though the implementation process seemed quick and successful, many outstanding issues remain. Observers have pointed out that even though steps were taken to realise the Agreement, the timetable has been overly optimistic and was only possible with strong international pressure and monitoring.¹¹¹ Furthermore, implementation has slowed in the past five years and major structural and socio-economic problems persist, which have threatened the integration of the state and have led to inter-ethnic tensions. The implementation process of the OFA shows “signs of erosion”,¹¹² particularly with regards to the failure to develop non-ethnic based civil society institutions and political parties. Ethnocentrism is still widespread despite the improvement of interethnic relations mentioned above. Most ethnic Albanians would not vote for a Macedonian candidate and vice versa. Power struggles among political elites have worsened interethnic relations and have been quoted as one major contributing factor to the ethnicisation of politics.¹¹³ The relative lack of business relationships between the two groups increases ethnic isolationism,¹¹⁴ particularly in urban areas.¹¹⁵ In addition, Albanians generally look more favourably on interethnic relations than Macedonians, who still see minority rights as ‘zero-sum-game’. Many ethnic Macedonians were opposed to the Agreement and saw themselves as victims of yet another great-power decision favouring the minority group.¹¹⁶ As a result, the Ohrid Agreement was perceived by Macedonians as a loss of both security and national identity.¹¹⁷ Attempts to delay implementation or change the scope of minority protection illustrate the on-going debate about minority rights and the political and societal divisions that might hinder further progress. For example, in 2004 the Parliament passed legislation increasing the power of local governments in accordance with the OFA. Ethnic Macedonians staged large protests and gained enough signatures to force the Parliament to schedule a referendum on whether the law should be

¹¹⁰ *Ibid.*, p. 35.

¹¹¹ Brunnbauer, *supra* note 88, p. 7.

¹¹² Lebamoff and Ilievski, *supra* note 86, p. 28.

¹¹³ UNDP, *supra* note 101, pp. 68–69. On the influence of elite power struggles on ethnic conflict see Brown, *Ethnic and Internal Conflicts*, *supra* note 1.

¹¹⁴ UNDP, *supra* note 101, pp. 78–79.

¹¹⁵ *Ibid.*, p. 66.

¹¹⁶ See for more information RFE/RFL, ‘Macedonian Disappointments and Fears’, 5:60 *Balkan Report* (24 August 2001), <www.rferl.org/content/article/1341153.html>, visited on 3 June 2012; K. Brown, ‘In the Realm of the Double-Headed Eagle: Parapolitics in Macedonia 1994–1999’, in J. K. Cowan (ed.), *Macedonia. The Politics of Identity and Difference* (Pluto Press, London-Sterling, VA, 2000) pp. 122–139.

¹¹⁷ International Crisis Group, ‘Macedonia’s Name: Why the Dispute Matters and How to Resolve It’, 122 *Balkans Report* (December 2001) p. 9. See also Brunnbauer, *supra* note 88, pp. 7–17.

overturned. The Albanian political parties and international officials called for boycotts to the referendum, which allowed for a ‘turn to the past’ to be averted.¹¹⁸

Issues also persist with regards to discrimination, representation of minority groups and protection of minority culture and language.¹¹⁹ The 2008 Concluding Observations of the UN Human Rights Committee found that minorities still suffer from widespread discrimination in administrative, political and economic matters. Relatively high levels of police violence against minority groups, such as the Roma, and the lack of investigation into police brutality cases show areas in which minority protection needs to be improved. Minority participation in the police force has increased, but it has not yet reached proportional representation.¹²⁰ In addition, a shortage of court translators for minority languages such as Albanian, Turkish and Romani and the lack of ballot papers in some minority areas during local elections have been criticised as political discrimination by the international community.¹²¹ Indeed, the 2008 parliamentary elections did not meet OSCE standards and were classified as flawed due to Macedonian authorities’ inability to prevent violence and intimidation in primarily ethnic Albanian areas.¹²² With regards to language rights, while the overall situation has improved, many ethnic Macedonians living in Albanian territories do not learn the Albanian language and the knowledge of the ‘other’ language is still perceived as a sign of weakness. As one observer aptly expresses, “[l]anguage is not perceived as a form of communication but rather in terms of differentiation and separation”.¹²³ In education, the implementation of educational and cultural programmes has been relatively successful, but battles over the preservation of culture and minority language are still common.¹²⁴ For example, an initiative by the Macedonian

¹¹⁸ See A. van Hal, ‘Back to the Future: The Referendum of November 7th in Macedonia’, 16:1 *Helsinki Monitor* (2005) pp. 36–52; J. Kim, ‘Macedonia (FYROM): Post-Conflict Situation and U.S. Policy,’ *CRS Report for Congress* (17 June 2005), p. 9, <www.fas.org/sgp/crs/tow/RL32172.pdf>, visited on 2 June 2012.

¹¹⁹ See Human Rights Watch, ‘Macedonia’, *World Report 2005*, <www.hrw.org/en/world-report-2005/Macedonia>, visited on 2 June 2012.

¹²⁰ In 1997, only 4 per cent of the police force in Macedonia was ethnically Albanian. In 2008, ethnic Albanians made up 16 per cent of the police force and together the ethnic minorities made up 20.3 per cent of the force. *Ibid.* See also US Department of State, ‘2008 Human Rights Report: Macedonia’, Bureau of Democracy, Human Rights, and Labor, <www.state.gov/drl/rls/hrrpt/2008/eur/119091.htm>, visited on 3 June 2012.

¹²¹ Human Rights Committee, *Advanced Unedited Version, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the UN Human Rights Committee on the Former Yugoslav Republic of Macedonia* (CCPR/C/MKD/CO/2 (April 3, 2008)).

¹²² US Department of State, *supra* note 120.

¹²³ M. Najcevska, ‘Bilingulism in a Kumanovo Kindergarten’, Local Government and Public Service Reform Initiative (Open Society Institute, New York, 2000) p. 95.

¹²⁴ Progress was achieved particularly in matters related to language and education. Of the 1,012 primary schools and 229,564 students there were 148,374 Macedonian students, 75,015 Albanian students, 5,712 Turkish students, and 463 Serbs. As a result, there were 6,380 classes conducted in the Macedonian language, 3,106 in Albanian, 279 in Turkish and 34 in Serbian. Committee on the

Education Minister requires Albanian first graders to study the Macedonian language. This decision has led to an outcry by the Albanian minority who challenged the initiative in the Constitutional Court.¹²⁵ Conflict also remains regarding which language is to be used in instruction in state funded universities.¹²⁶ While Macedonia has worked to increase their participation, members of the Albanian, Turkish and Roma minorities still have much higher dropout rates in secondary school and higher education, which in turn leads to higher unemployment and poverty rates among minorities.¹²⁷ Consultations among all members of Macedonian society are needed to address these issues and to improve school governance.¹²⁸

In conclusion, the 2001 Ohrid Framework Agreement was crucial to preventing a civil war in Macedonia and increasing the freedoms and civil rights for all minorities in Macedonia. Progress was made on the implementation of minority rights and the empowerment of minorities, particularly the Albanians, with regards to local self-government, the preservation of language and culture, and the establishment of Macedonia as a multi-ethnic state. Macedonia continues to strive for the security, economic stability and transparent democracy necessary for EU accession. Nevertheless, ethnic tensions continue to be an issue. The most worrisome development in Macedonia is the lack of a strong civil society that connects all ethnic groups. This gap is filled with ethnic politics, which leads to mistrust in the institutions of the state. Much of the underlying tensions between ethnic Macedonians and minority groups seem to be rooted in fear and lack of understanding of the cultural, religious and social differences. While consociational arrangements and strong minority rights have allowed for political stabilisation and an improvement of interethnic relations, ethnocentrism is still the dominating feature of Macedonian society. As one commentator suggests, “[i]t would be an illusion to believe that Macedonians (and Albanians) would now suddenly define themselves and their attitudes towards the state in civic terms”.¹²⁹

Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Second Periodic Report of State Parties Due in 1998, The Former Yugoslav Republic of Macedonia* (CRC/C/MKD/2 (12 November 2009)).

¹²⁵ Macedonian Information Center, ‘Ethnic Albanians Boycott Macedonian Language in Schools’, <micnews.com.mk/node/20770>, visited on 3 June 2012.

¹²⁶ See Czaplinski, *supra* note 96.

¹²⁷ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, The Former Yugoslav Republic of Macedonia* (CERD/C/MKD/CO/7 (13 June 2007)). See also Reka, *supra* note 103, pp. 65–66.

¹²⁸ Initiatives and studies by the OSCE High Commissioner on National Minorities (HCNM) have shown that the involvement of all stakeholders, including minorities, can serve as a way to achieve greater equality in education and other areas. See for example S. Holt, ‘The Activities of the OSCE High Commissioner on National Minorities: July 2003–June 2004’, in 3 *European Yearbook of Minority Issues* (Leiden, Brill, 2004) pp. 429–450.

¹²⁹ Brunnbauer, *supra* note 88, p. 20.

The unfavourable perception of the Ohrid process by ethnic Macedonians is particularly troublesome. A dissatisfied majority is dangerous as it affects the willingness to further implement and promote minority rights and leads to ethnic tensions.

3.3. Kosovo

Compared to the other two case studies, Kosovo has by far the most sophisticated and multifaceted system of minority protection. In fact, the sophistication of the legal framework and implementing institutions reaches a complexity that makes it hard to keep an overview of rules and regulations, bodies and organisations. As a result, raising awareness of minority rights standards among the people and public officials in Kosovo, education about the system and human rights and minority rights in general, and coordination between different institutions are the major challenges that Kosovo faces with regard to the implementation of minority rights.

Albanians represent the majority in Kosovo; Serbs, Bosniaks, Roma, Turks, Sakhalin, Egyptians, Grain and Croats constitute the minority. The exact proportion of ethnic groups in Kosovo is unclear,¹³⁰ but ethnic Albanians represent an overwhelming majority (about 92 per cent). 5.3 per cent of people identify themselves as Serbs while the rest of the population belongs to one of the other communities mentioned above.¹³¹ Most of these groups live in homogenous neighbourhoods or municipalities, which makes Kosovo a patchwork of territorially concentrated ethnic communities.

After the ethnic conflict between the Serbs and Albanians in 1998 and 1999, UN Security Council Resolution 1244¹³² established Kosovo as an autonomous territory within the Federal Republic of Yugoslavia without mentioning a final status for the region. This “unambiguous compromise”¹³³ was also reflected in the Constitutional Framework for Provisional Self-Government¹³⁴ of 2001, which set up the legal basis for local institution building. The approach taken was based on the formula ‘standards before status’ – the idea that Kosovo should meet certain

¹³⁰ See E. Lantschner, ‘Protection of Minority Communities in Kosovo: Legally Ahead of European Standards – Practically Still a Long Way to Go’, 33 *Review of Central and East European Law* (2008) pp. 452–454.

¹³¹ CIA World Factbook ‘Kosovo’, <www.cia.gov/library/publications/the-world-factbook/geos/kv.html>, visited on 3 June 2012.

¹³² UNSC Resolution 1244 (1999) of 10 June 1999.

¹³³ J. Marko, ‘The New Kosovo Constitution in a Regional Comparative Perspective’, 33 *Review of Central and East European Law* (2008) p. 440.

¹³⁴ *Constitutional Framework for Provisional Self-Government in Kosovo* (UNMIK regulation 9/2001), signed 15 May 2001, <www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf>, visited on 3 June 2012.

human rights and minority rights standards before the international community would discuss the final status of the province.¹³⁵ The ‘status question’ and minority rights are thus inextricably linked.

However, the ‘standards before status’ approach failed, partly because the complexity of the human rights system established by the international community, in conjunction with little local involvement in and ownership of the process, made implementation almost impossible.¹³⁶ To alleviate the situation the UN appointed former Finish President Martti Ahtisaari as UN Special Envoy for the Future Status of Kosovo in 2005. This move again increased Albanian hopes of independence and led to Serbian protests. The Comprehensive Proposal for the Kosovo Status Settlement (also known as Ahtisaari Proposal) was structured along the lines of Dayton with general principles such as multiculturalism, international human rights and political participation for ethnic minorities, but did not include a full-fledged constitution.¹³⁷ International involvement was foreseen to continue, *inter alia*, in the form of an internationalised Constitutional Court and through international military and civil presence. While the Ahtisaari Proposal addressed some of the technical issues earlier legal and political documents overlooked, it did not deal with the question at hand, namely the determination of the final status of Kosovo.¹³⁸ In the end, the Proposal served mainly as a manual for the constitution drafting process rather than a document envisioning Kosovo’s future.¹³⁹

With regard to minority rights, the Constitutional Framework, the Ahtisaari Proposal, and the 2008 Constitution and laws of the newly independent state have given far reaching guarantees to all ethnic groups present in Kosovo. Legal

¹³⁵ See W. Benedek, ‘Final Status of Kosovo: The Role of Human Rights and Minority Rights’, 80 *Chicago-Kent Law Review* (2005) pp. 215–234. See also K. Vollebaek, OSCE High Commissioner on National Minorities, ‘Address on Minority Rights in Kosovo’, p. 3, <www.osce.org/files/documents/b/b/33537.pdf>, visited on 3 June 2012.

¹³⁶ I. Krstić, ‘Failure of the International Community to Safeguard Basic Human Rights in Kosovo’, 3 *Annals – Belgrade Law Review* (2008) pp. 88–91; D. Marshall and S. Inglis, ‘The Disempowerment of Human Rights Based Justice in the United Nations Mission in Kosovo’, 16 *Harvard Human Rights Journal* (2003) pp. 95–146; K. Beurmann, ‘Human Rights in Kosovo’, 9:1 *Human Rights Review* (2007) pp. 41–54; M. A. Wolfgram, ‘When Men with Guns Rule: Explaining Human Rights Failures in Kosovo since 1990’, 123:2 *Political Science Quarterly* (2008) pp. 461–484; K. Eide, *A Comprehensive Review of the Situation in Kosovo* (UN Doc. S/2005/635 (October 2005)), <www.unosek.org/docref/KaiEidereport.pdf>, visited on 3 June 2012.

¹³⁷ UNSC, *Comprehensive Proposal for the Kosovo Status Settlement*, (S/2007/168/Add.1 (26 March 2007)) (hereinafter Ahtisaari Proposal).

¹³⁸ Marko, *supra* note 133, p. 441.

¹³⁹ See M. Weller, ‘The Vienna Negotiations on the Final Status for Kosovo’, 84:4 *International Affairs* (2008) pp. 659–681 and the follow up article M. Weller, ‘Kosovo’s Final Status’, 84:6 *International Affairs* (2008) pp. 1223–1243. See also A. Ernst, ‘Fuzzy Governance: State-Building in Kosovo Since 1999 as Interaction Between International and Local Actors’, 7:2 *Democracy and Security* (2011) pp. 123–139.

documents do not refer to the ‘minority’ or ‘majority’, but use the general term ‘communities’ instead. This somewhat imprecise use of words was originally chosen to avoid any reference to a potential final status of Kosovo. Communities are “inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo”.¹⁴⁰ Today, the term is used synonymously with ‘minorities’.¹⁴¹

The Constitutional Framework for Provisional Self-Government provides for “Rights of Communities and Their Members” in Chapter 4. These rights include the protection of cultural, religious and linguistic rights for all groups in Kosovo, the rights to equal opportunity and representation in political and economic life, and extensive non-discrimination and equality clauses. The document also refers to various international and European human rights instruments including the Universal Declaration of Human Rights, the ECHR and its Protocols, and minority-specific documents.¹⁴² In addition, extensive anti-discrimination regulations¹⁴³ were passed in 2004. After the declaration of independence, the Constitution of the Republic of Kosovo provides for minority rights in Chapter II. Article 22 confirms that international and European human rights and minority rights instruments directly apply in Kosovo and have priority over domestic law. Minority rights mentioned in earlier proposals and legal documents are confirmed and expanded. A variety of additional laws complete the minority rights architecture in Kosovo, the most important of which will be discussed briefly. First, the Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo (Law on Communities)¹⁴⁴ provides for extensive minority rights that go beyond comparable measures in other states. Besides the usual measures of non-discrimination, equality, protection of language, religion and culture, and minority representation, it establishes an extensive right to identity and institutions to oversee the implementation of the Law. In addition, the Law on Communities extends minority rights to members of the majority who are in the minority in the municipality in which they live.¹⁴⁵ Second, with regards to linguistic minority rights, the Law on the Use of Languages was established to ensure “[t]he equal status of Albanian and Serbian as official languages”¹⁴⁶ and to

¹⁴⁰ Constitution of the Republic of Kosovo, Article 57, para. 1.

¹⁴¹ The Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo states in Article 1, para. 4 that “[f]or the purposes of this law, communities are defined as national, ethnic, cultural, linguistic, or religious groups traditionally present in the Republic of Kosovo *that are not in the majority*” (emphasis added). Law on the Promotion and Protection of the Rights of Communities and their Members in Kosovo, Law No. 03/L-047 signed 13 March 2008.

¹⁴² Constitutional Framework, *supra* note 134, Article 3.2.

¹⁴³ Law on Anti-Discrimination, Law No. 2004/3, signed 19 February 2004.

¹⁴⁴ Law on Communities, *supra* note 141.

¹⁴⁵ *Ibid.*, Article 1.4.

¹⁴⁶ Law on the Use of Languages, Law No. 02/L-37, signed 26 June 2006. Article 1, para. 1.1.ii.

preserve “[t]he multilingual character of Kosovo society”.¹⁴⁷ At the local level, other minority languages such as Turkish, Bosnian and Roma have official status if at least 5 per cent of inhabitants speak it.¹⁴⁸ Third, the Ahtisaari Proposal suggested that minority communities are brought into the majority by a redrawing of administrative borders or by creating new municipalities.¹⁴⁹ The Law on Administration of Municipal Boundaries introduced ten new municipalities to the existing 28.¹⁵⁰ Fourth, the Constitution foresees a “high degree of self-governance” for municipalities in Kosovo.¹⁵¹ According to the Law on Local Self-Governance, municipalities decide over local economic development, urban and rural planning, public services and utilities, public primary and secondary education, promotion and protection of human rights, health care, family and social welfare services, public housing, *etc.*¹⁵² Additionally, municipalities with Serb majorities can decide their cultural affairs and participate in the selection of members of the local police force.¹⁵³ Partnerships among minority municipalities allow for collaboration and give Serb communities a form of territorial autonomy.¹⁵⁴ Municipalities are even allowed to establish relations “with municipalities and institutions, including government agencies, in the Republic of Serbia”.¹⁵⁵ For other minorities, the Law on Local Self-Government prescribes that if minorities constitute at least 10 per cent of the population, the position of the deputy chairperson of the municipal assembly has to be held by the non-majority candidate¹⁵⁶ in order “to promote inter-community dialogue and serve as [a] formal focal point for addressing non-majority communities’ concerns and interests in meetings of the Assembly and its work”.¹⁵⁷ In addition, a Deputy Mayor for Communities provides the Mayor with “advice and guidance ... on issues related to the non-majority communities”.¹⁵⁸

This local autonomy is paralleled by extensive power-sharing mechanisms to ensure adequate representation of minorities on the central level. Representatives of minorities have to be present in the executive,¹⁵⁹ the Central Election

¹⁴⁷ *Ibid.*, Article 1, para 1.1.iv.

¹⁴⁸ *Ibid.*, Article 1, para. 1.2 and Article 2, para 2.3.

¹⁴⁹ Ahtisaari Proposal, *supra* note 137, Annex III, Introduction.

¹⁵⁰ Law on Administration of Municipal Boundaries, Law No. 03/L-41, signed 20 February 2008, Article 5.

¹⁵¹ Constitution of the Republic of Kosovo, Article 124.

¹⁵² Law on Local Self-Government, Law No. 03-L-40, signed 20 February 2008, Article 17.

¹⁵³ *Ibid.*, Article 19–23.

¹⁵⁴ Lantschner, *supra* note 130, p. 483.

¹⁵⁵ Law on Local Self-Government, *supra* note 152, Article 30.

¹⁵⁶ *Ibid.*, Article 54.

¹⁵⁷ *Ibid.*, Article 55.

¹⁵⁸ *Ibid.*, Article 61, para. 4.

¹⁵⁹ Constitution of the Republic of Kosovo, Article 96.

Commission,¹⁶⁰ the Supreme Court and any other court with appeal capacities,¹⁶¹ the Judicial Council,¹⁶² and the police and security forces.¹⁶³ In the Kosovo Assembly, 20 seats out of 120 are reserved for minorities, ten of which for Serbs. Minorities can win more than those seats, but they are guaranteed these 20.¹⁶⁴ Similarly, one of the Assembly Deputy Presidents has to represent minority communities, a rule that is also applicable for parliamentary committees.¹⁶⁵ Special voting procedures guarantee that the minority vote is heard.¹⁶⁶

To implement these laws, a variety of human rights institutions have been established, the most important of which will be discussed briefly below. The most visible and longstanding¹⁶⁷ one is the Ombudsperson of Kosovo, which is “[a]n authorized body to receive and investigate complaints concerning violations of rights based on discrimination”.¹⁶⁸ The body was established with a complementary role to the courts and the government, but generally allows for faster and less bureaucratic procedures. While the Ombudsperson cannot issue fines or demand court proceedings, s/he fulfils an important mediating role.¹⁶⁹ In addition, the Ombudsperson serves as an individual complaints mechanism, is allowed to investigate, monitor, take preventive steps and advise on human rights issues. In case human rights standards are compromised, the Ombudsperson may issue a Special Report to the government.¹⁷⁰

The Community Consultative Council in the President’s office, the successor of the Minority Consultative Council, was involved in the drafting of Kosovo’s minority protection plans.¹⁷¹ The Council’s mandate is to provide a mechanism for regular exchange and to give minorities an opportunity to comment on

¹⁶⁰ *Ibid.*, Article 139, para. 4.

¹⁶¹ *Ibid.*, Article 103, para. 3.

¹⁶² *Ibid.*, Article 108.

¹⁶³ *Ibid.*, Articles 125, 126 and 128. However, Serbs have been boycotting police and security forces and therefore, representation is currently not proportional. *See* more detailed Lantschner, *supra* note 130, p. 477.

¹⁶⁴ Constitution of the Republic of Kosovo, Article 64, para. 2.

¹⁶⁵ *Ibid.*, Article 67, para. 4 and Article 77, para. 3 respectively.

¹⁶⁶ *Ibid.*, Article 144, para. 2. Article 144, para. 2 foresees that constitutional amendments require a two-thirds majority of the Assembly and a two-thirds majority of delegates representing minorities.

¹⁶⁷ The Office of the Ombudsperson was set up as part of the Constitutional Framework.

¹⁶⁸ Law on Anti-Discrimination, *supra* note 143, Article 10.

¹⁶⁹ H. Jashari, ‘Kosovo’s Anti-Discrimination Law and the Ombudsperson’s Role in it’, in OSCE Mission to Kosovo (ed.), *Implementing the Anti-Discrimination Law: A Challenge for Kosovo* (OSCE Kosovo, Pristina, 2007) pp. 22–25.

¹⁷⁰ European Centre for Minority Issues (ECMI) – Kosovo, ‘Institutions for the Protection of Communities’, <www.ecmi-map.com/map/index.php?option=com_content&view=category&layout=blog&id=35&Itemid=&lang=en>, visited on 3 June 2012.

¹⁷¹ M. Weller, ‘The Kosovo Constitution and Provisions for the Minorities of Kosovo’, 6 *European Yearbook of Minority Issues* (2006–2007) p. 496.

legislation and policy changes.¹⁷² Article 12 of the Law of Communities gives specific instructions on the mandate of the Council, the composition, the frequency of meetings, and its powers and responsibilities.

The Committee on the Rights and Interests of Communities is one of two permanent committees of the Assembly. Its membership consists of one-third Serb, one-third other minorities, and one-third majority. The Committee's mandate is to review laws and propose recommendations to the Assembly with the goal of ensuring that minority rights are adequately addressed. The Committee can also suggest laws on its own initiative.¹⁷³

The Advisory Office on Good Governance, Human Rights, Equal Opportunities and Gender Issues to the Office of the Prime Minister reviews legislation and policies relating to human rights and good governance and makes recommendations to the Prime Minister. The focus is not on minorities themselves, but the Advisory Office's mandate states that it has to consult with community representatives and take their needs and contributions into account.¹⁷⁴

The Office for Community Affairs (OCA) in the Office of the Prime Minister was established in May 2008 as a key institution for minority rights implementation. The OCA coordinates government efforts on community issues and works with independent agencies and international donors and organisations to bridge gaps in the governmental structure.¹⁷⁵

In addition, special Human Rights Units were established in each ministry to protect, advance and promote human rights in Kosovo.¹⁷⁶ The Human Rights Units participate in the drafting of laws in the ministries they serve and report on human rights issues to the Permanent Secretary of the Ministry. Their mandate includes the monitoring of ministerial policies and legislation on the general human rights practices, including community related issues. They also serve as a point of contact for the Ombudsperson.¹⁷⁷ A Human Rights Coordinator oversees the work of the Human Rights Units and reports to the government.¹⁷⁸

Some laws have supplementary implementing bodies concerned with their implementation. For example, the Law on the Use of Language is monitored by the Language Commission,¹⁷⁹ which can investigate claims, mediate in case of

¹⁷²) Constitution of the Republic of Kosovo, Article 60.

¹⁷³) *Ibid.*, Article 78.

¹⁷⁴) See for more details ECMI, *supra* note 170.

¹⁷⁵) See A. Beha and G. Visoka, 'Minority Consultative Mechanisms in Kosovo', Roma and Ashkalia Documentation Centre, November 2010, <www.aktion302.de/fileadmin/aktion302/10RADminorityconsultativeE.pdf>, visited on 3 June 2012.

¹⁷⁶) Administrative Instruction of the Prime Minister No. 8/2005 on the Terms of Reference for Human Rights Units, Section 2, para. 2.

¹⁷⁷) ECMI, *supra* note 170.

¹⁷⁸) *Ibid.*

¹⁷⁹) Law on the Use of Languages, *supra* note 146, Article 32.

disagreements, and work out solutions and recommendations. In case the situation does not improve, the Commission may issue a written warning and if further intervention is needed report their concerns to the government. The Commission can also issue fines.¹⁸⁰

As this short overview shows, the minority rights system of Kosovo, both with regards to its laws and institutions, is extremely complex and detailed. Communication and cooperation among these different institutions is a tremendous problem. Not only do mandates and jurisdictions overlap, but the institutions are also underfunded and understaffed.¹⁸¹ This leads to disagreements and competition, and in turn even less coordination and oversight. In addition, the implementation and decision-making process is highly internationalised; the large number of national institutions and processes are paralleled by internationally supervised bodies, thereby further complicating the picture.¹⁸² Duplication, miscommunication and overly bureaucratic processes make the implementation of minority rights almost impossible.¹⁸³ The lack of overview correlates with low understanding and awareness of minority rights in the general population. Even government officials and civil servants in charge of implementing and monitoring the laws seem to be overwhelmed by the sheer number of rules and regulations.¹⁸⁴ As aptly put by Lantschner in her very detailed study on the situation of minority protection in Kosovo, the main issues are “lack of information about the law, a lack of internalization of its principles and the lack of political will to prioritize the implementation of the law”.¹⁸⁵

As a result, the situation of minorities in Kosovo is far from ideal.¹⁸⁶ Widespread discrimination and lack of accountability for offenses reduce the credibility of the minority rights protection system. Discrimination is such a part of everyday life

¹⁸⁰) Administrative Instruction of the Ministry of Public Services No. 2007/1 on Determining Administrative Sanctions for Violation of the Law on Language Use.

¹⁸¹) For example, most legal and political materials are only published in Albanian due to a lack of translators. See more detailed Lantschner, *supra* note 130, pp. 469–471 and 480.

¹⁸²) Institutions are related to the UN, the EU, ICTY, NATO, OSCE and others. See for a complete list <www.balkananalysis.com/kosovo/international-organizations/>, visited 3 June 2012.

¹⁸³) See for example the 2010 US State Department Country Report on Human Practices on Kosovo, pp. 37–40, <www.state.gov/documents/organisation/160196.pdf>, visited on 3 June 2012.

¹⁸⁴) See for example OSCE Mission in Kosovo, ‘Implementation of the Law on the Use of Languages by Kosovo Municipalities’ (June 2008), <www.osce.org/kosovo/32762>, visited 3 June 2012. See also Lantschner, *supra* note 130, p. 460.

¹⁸⁵) *Ibid.*, p. 461.

¹⁸⁶) See for an assessment Commission of the European Communities, *Kosovo 2010 Progress Report* (9 November 2010), SEC(2010)1329, pp. 18–21, <www.delprn.ec.europa.eu/repository/docs/ks_rapport_2010_en.pdf>, visited on 3 June 2012. See also Commission of the European Communities, *Kosovo under UNSCR 1244/99 2009 Progress Report*, (14 October 2009), SEC (2009) 1340, pp. 17–19, <www.delprn.ec.europa.eu/repository/docs/ks_rapport_2009_en.pdf>, visited on 3 June 2012.

that complaints are rare because people are so used to the situation.¹⁸⁷ The government has established action plans and other measures for implementation with little presentable results.¹⁸⁸ Indeed, the European Commission remarked that while the legal standards met European requirements, “little progress was achieved in implementing anti-discrimination legislation”.¹⁸⁹ Similarly, hardly any progress has been made with regards to the integration of minority language and Kosovo society remains divided along linguistic lines.¹⁹⁰ This division is evident in the education system, where parallel school systems abound. Albanian children are taught in Albanian and follow an Albanian curriculum while Serbs are taught in Serbian and follow the curriculum of Serbia. This system leaves the young generation monolingual, which negatively impacts equal opportunities for minorities in the job market.¹⁹¹ Furthermore, minority participation in public institutions is still rare, particularly at the senior level.¹⁹² One of the greatest issues is the lack of integration of the Serb community. Serbs are reluctant at best to accept Kosovo’s independence. Many of the minority rights laws specifically designed to benefit the Serb community cannot be implemented because of little or no Serb cooperation. For example, the Law on Local Self-Government cannot be realised because the Serbs boycotted Kosovo municipal elections in 2007, but participated in Serbian elections in 2008 instead.¹⁹³ This lack of progress is just as problematic for non-Serb minorities such as the Roma, Sakhalin and Egyptians, who have limited access to health care, education, and social welfare programmes.¹⁹⁴ Many laws and institutions give the Serb minority priority

¹⁸⁷) Ombudsperson Institution of Kosovo, *Eight Annual Report 2007–2008*, pp. 66–67, <www.ombudspersonkosovo.org/?id=2,e,74,2008>, visited on 3 June 2012.

¹⁸⁸) See for example the Comprehensive Action Plan for the Implementation of the Anti-Discrimination Law, adopted in 2005 by Administrative Instruction No. 04/2006. There are also offices at all levels of the government that are supposed to receive requests and complaints on discrimination in public services. Administrative Instruction on the Organizing and Functioning of the Offices for Receiving Complaints and Requests – Desk Office. Administrative Instruction No. MPS2006/05. See for more details Lantscher, *supra* note 130, p. 459.

¹⁸⁹) European Commission Staff Working Document, *Kosovo Under UNSC 1244/99 2007 Progress Report*, p. 19, <ec.europa.eu/enlargement/pdf/key_documents/2007/nov/kosovo_progress_reports_en.pdf>, visited on 3 June 2012.

¹⁹⁰) OSCE, *supra* note 184, p. 3.

¹⁹¹) See Republic of Kosovo Ombudsperson Institution, *Ninth Annual Report 2008–2009*, <www.ombudspersonkosovo.org/repository/docs/RAPORTIper cent20VJETORper cent202009per cent20anglisht_OK.pdf>, visited on 3 June 2012, in particular pp. 18–22. See also Lantschner, *supra* note 130, pp. 461–468.

¹⁹²) OSCE, *Communities Rights Assessment Report 2009*, pp. 6–7, <www.osce.org/kosovo/40779>, visited on 3 June 2012. From 2009 to 2010 report, some steps were taken to improve the situation, but the overall issue of lack of communication, linguistic and educational challenges, limited resources for cultural rights, and limited access to employment in public services for minorities remain. OSCE, *Communities Rights Assessment Report Second Edition 2010*, pp. 6–7, <www.osce.org/kosovo/74597>, visited on 3 June 2012.

¹⁹³) See Lantschner, *supra* note 130, pp. 483–484.

¹⁹⁴) See Commission of the European Communities, *supra* note 186, pp. 18–21.

because of pressure from Serbia and the attempt of the Kosovo government to encourage members of the Serb community to abandon parallel structures and acknowledge the Kosovo governmental institutions. Serbs dominate bodies dedicated to minorities and thus have a far greater say in the allocation of resources and in setting the agenda for minority rights implementation.¹⁹⁵ In addition, smaller minorities have a tendency to focus very narrowly on their own group's interests. This creates unnecessary competition for resources and access to the political system and prevents minorities from presenting one united front.¹⁹⁶

All of this impedes mutual trust between the communities and prevents 'true reconciliation' from happening.¹⁹⁷ The OSCE Communities Rights Assessment Report 2009¹⁹⁸ "finds that, although a comprehensive legal framework is in place to ensure promotion and protection of communities' rights, its implementation remains insufficient or does not bring about sufficient positive changes in the daily life of non-majority communities".¹⁹⁹ Ethnic relationships particularly those between the Albanian and Serb communities are difficult to establish, which prevents the realisation of a multi-ethnic society.

In conclusion, the legal framework for minority rights in Kosovo is ahead of comparable standards in Bosnia and Macedonia and even in the rest of Europe. Kosovo's solution reflects the lessons the international community learned in Bosnia and Macedonia. The failures of Dayton with its strict separation of the two entities and focus on ethnic politics with the resulting deadlock on political decision-making on the central level were not repeated despite the fact that original negotiations seemed to follow the same trajectory. The Kosovo Constitution clearly profited from the process in Macedonia, in which both civic and ethnic elements played a role.²⁰⁰ At the same time, implementation and awareness for minority protection are severely lagging behind. In order to secure adequate promotion and protection of minority rights, the level of knowledge about minority rights and efforts for their implementation need to increase. The lack of coordination and cooperation among different institutions greatly hampers the implementation of minority rights. The politicisation of minority rights as an instrument of the Serbs paired with divisions and disorganisation among other minority groups have led to the failure of the Kosovo minority rights system in the past years. Kosovo's laws have been called "too ambitious" given "the institutional and financial capabilities of Kosovo".²⁰¹ In addition, the process is still heavily dominated by international actors and has not grown from within the

¹⁹⁵) Beha and Visoka, *supra* note 175, p. 42.

¹⁹⁶) *Ibid.*, pp. 34–36.

¹⁹⁷) Lantschner, *supra* note 130, p.490.

¹⁹⁸) OSCE, Communities Rights Assessment Report 2010, *supra* note 192, pp. 1–2.

¹⁹⁹) OSCE, Communities Rights Assessment Report 2009, *supra* note 192, p. 6.

²⁰⁰) *See also* Marko, *supra* note 133, p. 450.

²⁰¹) Lantschner, *supra* note 130, p. 488.

Kosovo society.²⁰² Civil society is hardly integrated in the process and the general level of acceptance of minority rights in the population is low. The depth and breadth of Kosovo's minority rights laws and institutions combined with internal and external influences on the process prevent implementation from occurring. While the integration of such extensive minority rights in the legal framework before and after Kosovo's independence were a condition of the peace process, they almost serve as an obstacle to 'true reconciliation' because of the lack of progress and high degree of complexity.

4. Discussion and Conclusion

As can be seen from the case studies above, minority rights can be both an obstacle and benefit for the peace process. Proportional representation in government positions, local or regional autonomy, decentralised power-sharing agreements, and far reaching cultural and identity rights ensure protection and participation of minorities. At the same time, minority rights focus on the ethnic dimension, which in some cases prevents reconciliation and makes the implementation of overarching values such as human rights particularly challenging.

Minority rights are an integral part of the human rights framework – a framework that focuses on individual rights, not group rights. The tension between the collective element of minority rights and the focus on individual protection is clearly observable in all three case studies. In Bosnia and Herzegovina, the focus on ethnic representation, strong minority group rights and territorial and segmental autonomy led to an end of civil war. At the same time, it has prevented the establishment of strong, overarching human rights structures, which could benefit the evolution of values uniting ethnic groups and the strengthening of the central state. Minority rights can be an obstacle to the peace process if they are used to solidify cleavages and separation instead of as mechanisms for empowerment of the vulnerable and a way to integrate minorities into the state structure. If they are used to foster domination and one-sided distribution of power, minority rights are detrimental to long-term peace and stability. They may, in the worst case, lead to secession and, as a result, more potential conflict. This is what sets the Macedonian case study apart from the other two. The OFA does not provide for extensive territorial autonomy or refer to extensive minority rights. It seeks to integrate all ethnic communities in a multicultural state without questioning the integrative character of the Macedonian state.

Another major difference among the three case studies is the role of the international community in the implementation of the peace agreements. While

²⁰²⁾ See Ernst, *supra* note 139.

international involvement was the driving force behind both the Dayton Accords and the legal framework in Kosovo, it played, at least at the forefront, a less prominent role in Macedonia. The international community took on a facilitating function; while a number of solutions were dictated from abroad in case of deadlock between the parties, the negotiations were not initiated unilaterally by the international community or completely dependent on international involvement for implementation. The minimal presence of international forces has focused mainly on the support of a stable political environment and has not enjoyed the same status or powers as peacekeeping troops and International Police Task Force deployed in Bosnia or the UN administration of Kosovo.²⁰³ The international community worked behind the scenes, thus shaping policy and law in Macedonia and by Macedonian authorities and guiding local actors in the implementation process.²⁰⁴

The level of internationalisation of the agreement and implementation has a significant impact on institutional setup and realisation of human rights and the outcome of the peace process. Studies suggest that “the more internal the deal, the greater its human rights sophistication; the more international, the less human rights friendly it is”.²⁰⁵ There are several reasons explaining these findings. First, the inclusion and implementation of human rights and human rights institutions depends on the pressure of producing a deal. If parties to the conflict perceive an end to the conflict as vital, they try to find common ground. Human rights language might be the way to express common interests. In Macedonia, for example, the negotiation of the OFA provided a framework for discussion of human rights issues. If, however, the deal is imposed by the international community, the negotiation process and the terms of the agreement might just be yet another forum to wage conflict. In this case, human rights might be foreign to the society and ‘one-size-fits-all’ solutions, which leads to low levels of acceptance and implementation.²⁰⁶ This is most apparent in Kosovo where the internationally-driven human rights system is so complex and detailed that both government officials and the general population struggle with realising human rights standards. In addition, the dependence of an internationally backed mechanism on various other actors can negatively affect its ability to effectively implement minority rights.²⁰⁷ Clashes between differing societal and international normative orders

²⁰³⁾ See Škarić, *supra* note 86, p. 95 and Kim, *supra* note 118, p. 11.

²⁰⁴⁾ See A. Ackermann, ‘International Intervention in Macedonia: From Preventive Engagement to Peace Implementation’, in Peter Siani-Davies (ed.), *International Intervention in the Balkans since 1995* (Routledge, London, 2003) pp. 105–119, and Czaplinski, *supra* note 96.

²⁰⁵⁾ Bell, *supra* note 4, p. 231.

²⁰⁶⁾ See International Council on Human Rights Policy, ‘Negotiating Justice? Human Rights and Peace Agreements’, 2006, <www.ichrp.org/files/reports/22/128_report_en.pdf>, visited on 13 June 2012. Of particular interest are pp. 114–117.

²⁰⁷⁾ Letschert, *supra* note 31, pp. 438–445.

lead to different notions and understandings of human rights. Outsiders often want to promote civil and political rights, which can lead to disorder if the social change is not wanted by the society or if the change is not managed.²⁰⁸ This was the case in Bosnia, where human rights have been neglected despite their prominent inclusion in the peace agreement. The incentives of the powerful ethnic entities have been to counteract overarching institutions and values. As was depicted above, the failure of the international community to account for these divisions had a grave impact on the possibility to implement human rights. While knowledge about minorities and about their needs and claims is crucial for peace building, it is just as important to establish unifying mechanisms to overcome divisions.

Second, if the deal is internal, negotiations often include members of civil society. The civil society is vital for human rights implementation, as churches, women's groups, voluntary associations, NGOs and others often provide key expertise on how to achieve social goals. The most internal peace agreement discussed in this study is the OFA in Macedonia. Civil society in Macedonia is relatively well-established compared to the other two case studies despite the political and social challenges described above.²⁰⁹ It played an important role both in the process leading to the OFA, as well as the implementation of the peace agreement by raising awareness for human rights issues and establishing local ownership of the implementation process.²¹⁰ The more international the negotiation process, the more emphasis is laid on negotiations in the highest political circles and violence-focused paradigms.²¹¹ These peace deals are often removed from the population and might not achieve high levels of endorsement. Bosnia and Kosovo are good examples. In both cases, the international community imposed their point of view on the peace process, which led to many more internal problems and the need for renegotiation of key clauses of the deal. The lack of inclusion of local actors or, in the case of a non-existent civil society, the lack of grass-roots institution building are grave oversights with long-term consequences in both Bosnia and Kosovo.

²⁰⁸) M. S. Lund, 'Human Rights: A Source of Conflict, State Making, and State Breaking', in J. A. and J. W. Helsing Mertus (eds.), *Human Rights and Conflict: Exploring the Links between Rights, Law, and Peacebuilding* (United States Institute of Peace Press, Washington, D.C., 2006) p. 40.

²⁰⁹) See the CIVICUS, *Civil Society Index Report: Macedonia 2010, 2011*, <www.civicus.org/images/stories/csi/csi_phase2/macedonia%20acr%20final.pdf>, visited on 5 July 2012. To enhance the openness and strength of the movement, the UN established a Civil Society Advisory Board for Macedonia. See the report of the UNCT Civil Society Advisory Board in the Former Yugoslav Republic of Macedonia, UNCT/RCO/CSFP Feb–Mar 08, <www.undg.org/docs/7175/Meeting-Minutes-UNCT-Civil-Society-Advisory-Board-in-the-Former-Yugoslav-Republic-of-Macedonia.docx>, visited on 3 June 2012.

²¹⁰) CIVICUS, *supra* note 209, p. 51.

²¹¹) See International Council on Human Rights Policy, *supra* note 206, p. 42.

Third, the more internationally influenced the agreement and the peace process, the more human rights implementation is focused on adjudication. Human rights education and promotion of human rights standards only play a secondary role. However, as the case of Bosnia clearly illustrates, the need for human rights education cannot be underestimated. In Macedonia, the progress made in human rights implementation had some beneficial impact on awareness, despite the fact that the overall human rights situation is still dire.²¹² In Kosovo, most of human rights education is done by international organisations and international NGOs, thereby contributing to the feeling that the process is owned by the international community, not by the local population.

In sum, the nature of 'forward-looking' human rights provisions and the institutions set up to realise them matter tremendously, as the above case studies show. "Laws do not implement themselves"²¹³ unless they matter in people's everyday lives. It is the challenge of local and international actors alike to make human rights and minority rights matter by determining what kind of human rights and minority rights norms are appropriate to address issues in each case and by considering the political and social context in which implementing institutions will operate.

²¹²⁾ See Office of the Ombudsman, *Annual Report 2008*, <www.ombudsman.mk/comp_includes/webdata/documents/Annualper cent20Report-2008.pdf>, visited on 3 June 2012.

²¹³⁾ Vollebaek, *supra* note 135, p. 6.

