



DEVOLUTION AND FEDERALISM IN COLLAPSED STATES

Constitutional Process and Design

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Devolution and Federalism in Collapsed States: Constitutional Process and Design

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EXECUTIVE SUMMARY

This working paper examines the implications of state collapse for constitution-making and constitutional design, with a particular focus on devolution and federalism. It examines four cases of collapsed states from the Middle East and North Africa—Lebanon, Libya, Somalia, and Yemen.

State collapse and the absence of a functioning government is characterized by the territorial fragmentation of a country, with different areas under different claimants to authority and some ungoverned spaces. There may be extensive fighting over control of various areas and significant fluidity in alliances on the ground. International actors may be drawn in as partisans of different factions or a potential mediators and facilitators of conflict resolution and state reconstruction. Peace-making in such a context requires the main factions—and their sponsors—to accept that the costs of fighting outweigh any benefits and to agree on structured negotiations with one another, which may be a phased arrangement; this may take years. Sustainable peace requires agreements on governance arrangements, potentially including interim power-sharing, a constitution-making process, transitional security arrangements and some guiding principles for a reconstructed state. While a federal or devolved governance arrangement may seem a logical response to such territorial fragmentation, factional elites may prefer power-sharing at the centre. And if they do opt for a federal or devolved structure, they face vexing issues in defining the constituent units, the allocation of powers, and the nature of central institutions, which may result in an extended period of muddled governance and power politics with no constitutional clarity..

This paper analyzes four thematic issues regarding constitutional design and process in collapsed states raised by the case-studies:

(a) Challenges of constitution-making processes in collapsed states: Constitution-making is so difficult in collapsed states because of the depth of the divisions among the factions. In this context, there are difficult questions of process. Peace-making and constitutional processes can have different timeframes, goals, participants and decision-rules. A peace process focuses on ending violence but it does not necessarily address longer-term institutions. Peace agreements often establish interim governance arrangements, notably power-sharing, and they may establish basic principles and processes that must be respected in a the new or amended constitution. A formal constitution-making process is normally longer-term and includes more public engagement with a broader cross-section of political actors. The process might include elections and referenda. A constitutional process following a peace agreement would normally be led by a parliament or constituent assembly; however, electing such a body in situations state collapse or deep insecurity may be impossible so that alternative approaches to creating a constitutional forum may be necessary.

- (b) Role of international actors of constitution-making:** External actors can play a major role in addressing state collapse. Some sovereign countries intervene militarily in a highly directive and even brutal manner as partisans to the conflict. Their involvement in the peace process is clearly important, including dealing with terms such as troop withdrawal, which apply directly to them. Moreover, they may be able to lean on their internal partisans to agree to peace. However, externally imposed settlements may not reflect any deep consensus in the society and prove hard to sustain. Moreover, if the peace settlement is to be followed by a constitution-making process, external actors would normally have less stake in the outcome which should emerge from a domestically owned process, although this may be mediated or facilitated by an international body. Too often, domestically owned processes may prove incapable of reaching a substantive conclusion about the future constitutional order leading to a frozen conflict or partial transition.
- (c) Interim vs. longer term options for devolution:** There is frequently a demand for federalism or devolution following state collapse, given the territorial fragmentation of governance. But negotiating federalism can be an order of magnitude more difficult than negotiating a unitary regime, given the need to decide the number and boundaries of constituent units, the allocation of powers, and the institutional arrangements at the centre. Realities on the ground may create a status quo ante and path dependencies for the ultimate design of the state, giving parties that have functioning regional autonomy leverage to protect it. But even in these cases it may be necessary to proceed by steps, including interim power-sharing arrangements at the centre. There are three approaches that can address the paralysis arising from competing longer term constitutional visions: deferral, interim arrangements, and incrementalism. Somalia combines deferral with incrementalism. The challenge is to frame interim arrangements that provide common ground between parties that may deeply disagree on the future structure of the state. One option to build on previous institutions and units for devolution.
- (d) Integrating security and political issues in constitution-making:** Peace agreements following state collapse typically seek to bring separate armed factions under a single command structure, through a process of disarmament, demobilization and reintegration. Given the critical role of armed groups, interim and longer-term security sector governance arrangements can be key for the success of a peaceful transition and any subsequent constitutional process. There is a risk of these being neglected. Armed groups may want to see a future for themselves within new security institutions or, at least, adequate protections for them after disarmament and demobilization.

INTRODUCTION

This working paper examines four cases of collapsed states from the Middle East and North Africa—Lebanon, Libya, Somalia,¹ and Yemen. In each case, state collapse was marked by the breakdown of national institutions and the effective loss of a functioning central government, at least for a period. Different governance arrangements appeared across the territory of the country, with various actors asserting authority over different areas, often through violent conflict. This is an extreme version of “decentralized” governance, the subject of this volume. State collapse leads to an inherently unstable situation that can evolve through different phases, including civil war and military intervention by outside powers.

This working paper discusses the nature of state collapse and its bearing on constitution-making processes and constitutional design. The examination of our four cases sets the stage for a synthetic and analytical conclusion that draws out our major findings, including lessons for constitution-making processes and constitutional design in collapsed states.

WHAT IS A COLLAPSED STATE AND DOES THIS CONTEXT AFFECT CONSTITUTION-MAKING PROCESSES AND CONSTITUTIONAL DESIGN?

The term “collapsed state” differs from “fragile state” and “failed state”. The latter terms have been applied to wildly diverse situations – as is reflected by the development of numerous indices, such as the Fragile States Index, the Index of State Weakness in the Developing World, and the Bertelsmann Transformation Index² – so much so that it has been argued that the “concept of failed state is so flawed that it ought to be abandoned”.³ State collapse, by contrast, is a narrower and more tractable concept, because, as Iqbal and Starr put it, it is premised on “an explicit view of failure in its extreme form” and “captures the idea of a state without a functioning

¹ While not in the Middle East and North Africa (MENA) region, Somalia neighbors the Middle East, is a predominantly Muslim country, a member of the League of Arab States, and is perhaps the archetype of a collapsed state. Moreover, Arab states have been deeply engaged in its politics.

² See fundforpeace.org/2019/04/10/fragile-states-index-2019/ (Fragile States Index), www.brookings.edu/wp-content/uploads/2016/06/02_weak_states_index.pdf (Index of State Weakness in the Developing World), and www.bti-project.org/en/home/ (the Bertelsmann Transformation Index).

³ Andrew Taylor, *State Failure* (London: Palgrave, 2013), p. 224. Also see Zaryad Iqbal and Harvey Starr, *State Failure in the Modern World* (Stanford: Stanford University Press, 2016), pp. 14-22.

government, incapable of providing order and carrying out the responsibilities that international law has always expected of states claiming sovereignty.”⁴

Because the threshold for a collapsed state is relatively high, very few states – even fragile ones – pass the threshold of collapse. For example, Lembach et al. operationalized a definition of state collapse occurring along three dimensions of state function in parallel – making and enforcing rules, wielding a monopoly over coercive power, and collecting public revenues – for at least six months, yielding a list of 17 cases of collapsed states between 1960 and 2007, including Lebanon and Somalia. Our examination of the underlying indicators as of 2017 would retain Somalia and add Libya and Yemen. Iqbal and Starr – relying exclusively on the Polity IV database, which classifies some states as “interregnum”, i.e. collapsed – identified 26 such states between 1946 and 2010. We reviewed the 2017 Polity IV database on the basis of this criterion, which led to the identification of 31 collapsed states between 1946 and 2017, including Lebanon, Libya, Somalia and Yemen.

In a collapsed state there may cease to be even the pretention of a nominal government or the nominal government’s writ may be reduced to a small area and limited functions. In Yemen and Somalia, the nominal governments had periods in exile. Remnants of state institutions may be controlled by a central authority or armed rivals, depending on territorial location. Non-state institutions may emerge in localities and regions that fill the vacuum left by the state. Actors operating at the local level may include traditional leaders, heads of militias and criminal gangs. The territorial extent of their authority, their functions, their ties to supportive external governments, and their standing with the local population, will vary. They can be in conflict with one another as well as with any central government forces. State control may have been voluntarily or involuntarily ceded to or shared with actors other than legally recognized sovereign authorities.⁵ Finally, there may be “ungoverned spaces” in which neither state nor non-state institutions operate, which are truly anarchic and lacking in any semblance of governance.

In our cases, state collapse was a product of civil war (or at least the military takeover of the capital by the Houthis in Yemen). Civil wars do not necessarily lead to state collapse, because a government may lose control of some parts of the country but remain functional, with an army and central bureaucracy.⁶ The civil war in Syria has not seen state collapse, in that the Assad government has never ceased to function. The success of the Islamic State in taking over much

⁴ Iqbal and Starr, *State Failure*, p. 24.

⁵ Anne L. Clunan and Harold A. Trinkunas, ‘Alternative Governance and Security’, in Clunan and Trinkunas (eds.), *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty* (Stanford: Stanford University Press, 2010), pp. 275-293.

⁶ Of course, governments that have remained fairly functional can lose civil wars, but their defeat may be followed by the victorious rebels quickly assuming power, in which case the state has not collapsed.

of northern Iraq did not threaten the central institutions of Iraq. While collapse is normally associated with a failure of security and civil war, the extent and nature of violence after collapse varies greatly. There may be relatively little violence, or violence confined to particular areas or groups. The extent and character of violence can change over time, especially in countries going through long periods of collapse.

The proliferation of competing centres of power of very different kinds can greatly complicate state rebuilding. Constitution-making may have to be preceded by or integrated with a peace process.⁷ Peace processes focus on ending violence (at least amongst the parties to the peace) and institutional design is often neglected, or a secondary consideration; they often produce interim governance arrangements, with longer-term constitution-making to follow. Absent a military victor, in a collapsed state the main players must negotiate if peace is to be achieved because none is able to impose an outcome. Foreign intervenors are often active in collapsed states and in associated peace processes, where they may also be partisans in the internal dispute. Because of collapse, there are no established procedures, so many process issues arise, including: the relationship between political issues (including constitution-making) and security issues (such as the demobilization, disarmament and reintegration of non-state forces into a single set of security sector institutions under civilian authority⁸); the participants in the negotiations (which may change from the peace process to a constitution-making process); the choice and role of mediators; and the key milestones on a political roadmap, such as interim power-sharing, elections, and the creation of constitutional assemblies.

Because a collapsed state has been territorially fragmented, one constitutional design option could be to build a new state on the basis of federalism or devolution,⁹ perhaps basing the new regime on the territorial fragments in existence on the ground. But equally, a centralised model may be preferred given concern that federalism may risk the disintegration of the state. Moreover, elites will have their own interests, which may include power-sharing arrangements at the centre. Designing and agreeing on a detailed constitution can be extremely time-consuming and fraught. Interim arrangements potentially offer a path forward from fragmentation and civil war to peaceful constitutional politics, while possibly deferring a conclusive answer on these fraught questions of constitutional design.

⁷ Christine Bell and Kimana Zulueta-Fülscher, *Sequencing Peace Agreements and Constitutions in the Political Settlement Process* (International IDEA, 2016); George Anderson and Sujit Choudhry, 'Territorial Cleavages and Constitutional Transitions: Political Mobilization, Constitution-Making Processes, and Constitutional Design' in George Anderson and Sujit Choudhry (eds.), *Territory and Power in Constitutional Transitions* (Oxford: Oxford University Press, 2019) 374-428.

⁸ Zoltan Barany, Sujit Choudhry and Kent Roach, 'Security Sector Reform and Constitutional Transitions: Challenging the Consensus' in Zoltan Barany, Sumit Bisarya, Sujit Choudhry & Richard Stacey (eds.), *Security Sector Reform and Constitutional Transitions* (Oxford: Oxford University Press, 2019), pp. 247-281.

⁹ Anderson and Choudhry, 'Territorial Cleavages and Constitutional Transitions'.

FOUR CASES OF COLLAPSE

1. LEBANON

Shortly after Lebanon's independence in 1941, sectarian leaders negotiated the National Pact, which provided for politics to be based on an elite power-sharing arrangement, with the effect that "both the parliamentary system and the executive... were not only a mirror of confessionalism, but also enhanced it". Lebanon was effectively run by a small number of key families, with political loyalties primarily to clan and sect.¹⁰ Given the weak consensus amongst the ruling sects, the state was relatively weak but highly centralized. The National Pact gave the greatest influence to the Christian, mainly Maronite community, which also enjoyed the highest standard of living.

By the 1970s this power-sharing system was under strain. There was increasing civil unrest associated with poverty and underdevelopment, especially in the Sunni and Shia populations, which now outnumbered the Christians.¹¹ The sectarian communities were divided on the military activities of the Palestine Liberation Organization (PLO) and the presence of Palestinian refugee communities in Southern Lebanon. Fighting between Maronite and Palestinian forces broke out in 1975, leading to the civil war, which lasted until 1990. The war drew in military interventions by Syria and Israel, as well as a short-lived multinational force of American, French, Italian and British troops. The fighting was not only between the different sectarian groups and outside forces but also, especially in the later years, within the sectarian groups, with bewildering shifts of alliances between groups and outside powers.

While in the early years of the war, the Lebanese state survived in a reduced form, largely under the control of the Christians, in 1982 the President, a Christian, suspended the constitution and the government's reach became limited to a Maronite controlled mini-state. Israel, allied with Maronite forces, then invaded southern Lebanon and surrounded the PLO, which negotiated its withdrawal from the country. The sectarian character of the conflict amongst Lebanese intensified, with confessional segregation and militia rule becoming the norm.¹² The Lebanese state, always weak, effectively collapsed. The Government of Lebanon consisted of little more than one militia among others, controlling a small area, though the Central Bank, Foreign Ministry

¹⁰ Nurit Kliot, 'The Collapse of the Lebanese State' (1987) 23 *Middle Eastern Studies* 54-74 at 67.

¹¹ For an analysis of demographic shifts see Kliot, 'The Collapse of the Lebanese State' at 61-5.

¹² Fawwaz Traboulsi, *A History of Modern Lebanon*, (London: Pluto Press, 2007), p. 228.

and Presidency remained quasi-functional. The cabinet was often paralyzed, and the Parliament was ineffective. The army split along confessional lines.¹³

From 1985 to 1990 the various militias largely renounced fighting one another, respected mutual borders, and "entertained close ties between themselves for a better spoliation and control of everything Lebanese".¹⁴ These militia cantons approximated the elements of a Weberian state in that they offered security, held territory and gathered taxes, ran bureaucracies and delivered services.¹⁵

In the summer of 1988, the country entered its ultimate political deadlock, with a failure to agree on a candidate for President and the emergence of competing claimants to be Prime Minister. In January 1989, the Arab League appointed a committee to mediate the crisis. Mediation failed initially, after which serious military escalation broke out, and Arab League mediators formulated a truce plan which called for a cease-fire and for the surviving members of Lebanon's Parliament elected in 1972 to meet in Taif, Saudi Arabia to negotiate peace. These representatives had largely been spectators during the conflict, and most had limited power bases, but they "were left to their own devices to hammer out the details of the agreement", with foreign mediators backing off after preparing the ground.¹⁶

The Taif Agreement addressed both the internal and external aspects of Lebanon's crisis.¹⁷ It resulted in a significant readjustment of the National Pact and in practice ended Maronite hegemony and created more equal power-sharing among Christians, Sunnis and Shias. Executive power was transferred from the Christian-held President to the Council of Ministers, where important decisions required two-thirds approval, giving each community an effective veto. Militarily, it called for all Lebanese and non-Lebanese militias to disband within six months and provided for the Syrian forces (about 40,000 troops) to assist the Lebanese government in spreading its authority over a period of two years. Most factions in Lebanon welcomed the Agreement, but the Maronite leader Michel Aoun, after indicating his support, came out against it; he refused to step down as (the contested) President and moved to dissolve parliament. A major conflict then broke out between the Lebanese Army, headed by Aoun, and the Lebanese

¹³ Marie-Joelle Zahar, 'Peace by Unconventional Means: Evaluating Lebanon's Ta'if Accord', in Donald Rothchild, Steve Stedman and Elizabeth Cousens (eds.), *Ending Civil Wars* (Boulder: Lynne Rienner, 2001), pp. 567-597 at 570.

¹⁴ Traboulsi, *History of Modern Lebanon*, p. 231.

¹⁵ Paul Kingston and Marie-Joelle Zahar, 'Rebuilding A House of Many Mansions: The Rise and Fall of Militia Cantons in Lebanon', in Paul Kingston and Ian Spears (eds.), *States-Within-States: Incipient Political Entities in the Post-Cold War Era* (New York: Palgrave, 2004), pp. 81-98.

¹⁶ Zahar, 'Peace by Unconventional Means', pp. 570-1.

¹⁷ The Taif Agreement (4 November 1989), available at: https://www.un.int/lebanon/sites/www.un.int/files/Lebanon/the_taif_agreement_english_version_.pdf.

Forces, a Christian-based militia. In late 1990, when Syria joined the US coalition expelling Iraq from Kuwait, it got US approval to move against Aoun, whom it defeated and sent into exile. Thus, "Syria effectively became the external implementer of Ta'if", which it did reflecting its priorities¹⁸

The Taif Agreement paved the way for the reconstruction of Lebanon in the 1990s. Syria's role as political guarantor contributed to stability but it came under severe strain after Hafez Assad passed responsibility for Lebanon to his son Bashar in 1998. Bashar increasingly favoured Hezbollah and opposed Sunni Prime Minister Hariri, who was close to Saudi Arabia. Bashar's anti-Hariri sentiment peaked when the UN Security Council passed Resolution 1559, calling on Syria to leave Lebanon and Hezbollah to disarm.¹⁹ Hariri's assassination in 2005 sparked huge anti-Syrian protests by Sunnis and Christians in Lebanon, and forced Syria to withdraw. Bahout says this marked the "clinical death of Taif" and led to open hostility between the Sunnis and Shias.²⁰ In Syria's absence the country's politics became even more chaotic and dysfunctional.

Lebanon in mid-2020 was "at a breaking point. Its economy is imploding, and with it social stability."²¹ The crisis is the "result of decades of colossal political and economic mismanagement and corruption enabled by sectarian power-sharing."²² The government resigned in 2019 in favour of a more technocratic regime, but the old sectarian, elite politics still dominated. After the massive explosion of a fertiliser plant in Beirut in August 2020, huge demonstrations by civil society brought the resignation of the government. There has been a "complete collapse of trust in all institutions" and, for many, a rejection of the sectarian style of politics in favour of a national identity and shared interests as citizens.²³ However, the old sectarian system endured in effectively blocking the formation of a new government as of October 2020.

During this crisis, municipalities have played an increasing role, as they did in addressing the Syrian refugee crisis after 2011.²⁴ Although some Christians advocated federalism as part of the civil war settlement, the more widely shared objective was to restore national institutions in

¹⁸ Zahar, 'Peace by Unconventional Means', p. 575.

¹⁹ S/RES/1559 (2004).

²⁰ J. Bahout, *The Unraveling of Lebanon's Taif Agreement* (Washington: Carnegie Endowment for International Peace, 2016), p. 14.

²¹ Maya Yahya, 'At a Breaking Point', Diwan, 30 April 2020, carnegie-mec.org/diwan/81695.

²² Yahya, 'At a Breaking Point'.

²³ Yahya, 'At a Breaking Point'.

²⁴ Maya Yahya, comments in Michael Young (eds.), 'How Will the Coronavirus Crisis Affect Your Middle Eastern Focus Area in the Coming Months?', Diwan, 2 April 2020, carnegie-mec.org/diwan/81409.

a centralized regime and put an end to localized militia rule. Section III of the Taif Agreement called for administrative decentralization, including enhanced prerogatives for governors and the election of district (*caza*) councils. It took until 1998 to win agreement on holding municipal elections, which have happened every six years since, but the *National Development Report 2008-2009* found that political elites viewed decentralization as threatening their leadership and clientelist relations.²⁵ The Sleiman-Baroud draft law of 2014, which would establish elected district councils and executives with enhanced fiscal resources, has not been enacted.²⁶ Hezbollah has emerged as a uniquely powerful actor: it maintains its militia (ostensibly to continue the combat with Israel) and controls a section of southern Lebanon. Indeed, it is the country's largest non-state provider of health care, social services and schools.²⁷

LIBYA

Muammar Qaddafi ruled Libya from 1969 to 2011, after coming to power in a coup.²⁸ Qaddafi initially consolidated power by abolishing the parliament and opposition parties, establishing state control over religious institutions, and nationalizing banks and oil companies. He fashioned a regime around a set of institutions, including a prime minister (the General People's Secretary) and cabinet (General People's Committee) with ministers (secretaries) and a parliament (General People's Congress).²⁹ The regime was highly personalized, with power being wielded by Qaddafi along with members of his tribe and regime loyalists (and later his family). Qaddafi funded patronage networks with oil revenues. Qaddafi's foreign policy – especially his support for terrorist groups – led to international sanctions, which combined with lower oil prices, urbanization, population growth, youth unemployment, and poor economic management put stress on the regime. Qaddafi's son, Saif Al-Islam, led half-hearted economic and political reforms, which ultimately foundered.

²⁵ Noha El-Mikaway and Claudia Melim-McLeod, *Lebanon: Local Government in Complex Environments* (Cairo: United Nations Development Program, 2010).

²⁶ Michel Akl, *Administrative Decentralization in Lebanon* (Beirut: Democratic Renewal Movement and Konrad Adenauer Stiftung, 2017).

²⁷ Bryan R. Early, 'Larger than a Party, yet Smaller than a State': Locating Hezbollah's Place within Lebanon's State and Society' (2006) 168 *World Affairs* 115-128.

²⁸ For overviews, we have relied on Ronald Bruce St. John, *Libya: From Colony to Independence* (Oxford: Oneworld, 2008); Dirk Vandeville, *A History of Modern Libya* 2d ed. (New York: Cambridge University Press, 2012) and Frederic Wehrey, *The Burning Shores: Inside the Battle for the New Libya* (New York: Farrar, Straus and Giroux, 2018).

²⁹ International Crisis Group, *Holding Libya Together: Security Challenges after Qadhafi* (15 December 2011).

In 2011, inspired by events in Tunisia, protests in Benghazi escalated into armed rebellion and plunged Libya into civil war.³⁰ Aided by North Atlantic Treaty Organization airstrikes, armed rebels took Tripoli in late August, while Qaddafi fled to Sirte with a band of loyalists. After his fall, a self-appointed interim authority – the National Transitional Council (NTC) – asserted control over the Libyan state, but from the outset, its control was limited. Hundreds of local militias had arisen as part of the uprising, There was never a single, integrated armed force that after Qaddafi, but a fragmented security landscape. Militias forced weak ministers and authorities to hire their men and they effectively controlled some ministries (or carved up control with amongst themselves).³¹

This fragmentation posed a major challenge to the consolidation of a national political process.³² These challenges intersected with other cleavages – for example, the strong regional identity in the east in Cyrenaica (with Benghazi as its capital), which had longstanding grievances of discrimination by Qaddafi for favouring the western region of Tripolitania. Libya’s third historical region is Fezzan in the south, largely populated by non-Arabs. Despite this unfavourable environment, the NTC issued a Constitutional Declaration in August 2011 that created an interim government charged with drafting an electoral law for elections to a new parliament, the General National Congress (GNC). The GNC would replace the NTC, oversee the drafting of a new constitution and then itself expire. The elections to the GNC in July 2012 saw roughly half of eligible Libyans (and 60% of registered voters) participate. The vote yielded a deeply divided body with a substantial Islamist component. The GNC proved unable to establish shared security sector agencies under civilian authority, or to launch the constitutional process.

In response to political paralysis, the GNC unilaterally extended its mandate from February to late December 2014. This move led General Khalifa Haftar, the head of the self-styled Libyan National Army based in Cyrenaica, to call for the dissolution of the GNC. This resulted in a compromise in March 2014 whereby the Constitutional Declaration was amended to allow for the election of a new parliament, the House of Representatives (HoR). These elections took place in June 2014. The elections, in which 40% of registered voters participated, marked a sharp defeat for the Islamists, who in turn refused to accept the legitimacy of the HoR and reconvened the GNC. The Libyan Supreme Court – arguably under coercion from the Islamists – declared the election of the HoR unconstitutional in November 2014, which the HoR and Haftar refused to accept. This constitutional crisis precipitated the return to civil war with

³⁰ Mieczysław P. Boduszyński and Duncan Pickard, 'Libya Starts from Scratch' (2013) 24 *Journal of Democracy* 86-96.

³¹ Ulf Laessing, *Understanding Libya Since Gaddafi* (London: Hurst, 2020) ch.2

³² International Crisis Group, *Divided We Stand: Libya's Enduring Conflicts* (14 September 2012).

competing parliaments and governments – the GNC in Tripoli, and the HoR in Benghazi under the control of Hafter.

Since 2014, there have been several attempts to end the civil war through international mediation. The United Nations sponsored a process that resulted in the Libyan Political Agreement (LPA) of 17 December 2015, which provided for the merger of the HoR and the GNC.³³ It would reconstitute the HoR as a bicameral legislature with the HoR as the lower chamber and the GNC as an upper chamber (renamed the Shura Council). The LPA also established a new power-sharing executive, the Presidential Council (9 members), as well as a cabinet, the Government of National Accord (GNA) with 17 members headed by the Prime Minister.

The LPA failed. The GNC did not sign it and remains a separate body. Although seven members of the LPA's new Presidential Council arrived in Tripoli in March 2016, the remaining two members boycotted, thereby depriving the Council of legitimacy and rendering it unable to assert effective authority. The expanded HoR never convened. The GNA remains the internationally recognized government, but has not been recognized by the HoR, and indeed has been ruled unconstitutional by courts in the HoR-controlled east – fueling competing claims of constitutional legitimacy.

The LPA lacked an overarching strategy on security issues that would be integrated with its political arrangements. Hafter opposed the LPA because it designated the Presidency Council as the commander-in-chief, thereby removing his power. The LPA did not address disarmament, demobilization and reintegration and security sector reform at all, though these were integral to re-establishing the Libyan state's monopoly on coercive power and would allow militias to envision their role in a future Libyan state. As well, the LPA did not acknowledge the facts on the ground and attempt to institutionalize a role for local administrations, which were under the control of militias.

The Libyan Constitution Drafting Assembly (CDA) began its work in April 2014, prior to the LPA. It was elected with very low turnout, with equal representation from each of Libya's three regions – Cyrenaica, Fezzan and Tripolitania – reflecting the importance of regional identities and setting the stage for decentralization. Amidst the conflict between the HoR and the GNC, the drafting assembly continued its work and its role and independence were recognized by the LPA. In 2017, it produced a draft that provided for a strong president and very

³³ Libyan Political Agreement (17 December 2015), available at: <https://unsmil.unmissions.org/sites/default/files/Libyan%20Political%20Agreement%20-%20ENG%20.pdf>.

limited decentralization, replicating the constitutional patterns of the past to respond to the reality of the collapse of the Libyan state.³⁴

Armed conflict continued. In 2019, Haftar marched on and laid siege to Tripoli, but faced fierce resistance.³⁵ Outside powers have played increasingly direct roles in this phase of the conflict, with the UAE and Russia providing military aid to Haftar, and Turkey (joined by Qatar) intervening militarily to support the GNA.³⁶ Turkey's intervention in the spring of 2020 turned the tide against Haftar, while Russia, in response, increased its support to him with fighter jets.³⁷

The German government hosted a major conference in January 2020 to promote a mediated settlement and stop outside powers arming forces within Libya. It was attended by the United Nations and 11 countries, as well as by the African Union, the Arab League, and the European Union. The Berlin Process supported the LPA including the establishment of the Presidency Council and a political roadmap to end the transitional period through parliamentary and presidential elections, but made no reference to the work of the Drafting Assembly.³⁸ The conclusions called for the establishment of unified security sector institutions under civilian leadership.

Haftar rebuffed the conclusions of the Berlin Process in April 2020, when he announced that the LPA and the Presidency Council were no longer valid and asserted a mandate from the Libyan people to lead the country.³⁹ Haftar's external allies distanced himself from his attempt to assert national leadership and his political position in the east was weakened by the failure of his assault on Tripoli and subsequent retreat. There was a tentative ceasefire in August 2020, which was given formal approval by the two sides on October 23, 2020. The UN proposed to take steps to relaunch the political dialogue forum following this ceasefire.

³⁴ Draft Libyan Constitution (29 July 2017), available at: <https://www.temehu.com/CDA/final-draft-libya-constitution-29-july-2017-english-translation.pdf>. For an analysis, see Zaid Al-Ali, *Libya's final draft constitution – a contextual analysis* (International IDEA, 4 October 2017).

³⁵ Frederic Wehrey and Wolfram Lacher, 'Libya's New Civil War and What the United States Can Do About It' *Foreign Affairs* (30 May 2019).

³⁶ Jalel Harchaoui, 'The Libyan Civil War Is About to Get Worse;', *Foreign Policy* (14 March 2020); Emadeddin Badi, 'Russia Isn't the Only One Getting Its Hands Dirty in Libya', *Foreign Policy* (21 April 2020).

³⁷ International Crisis Group, *Turkey Wades into Libya's Troubled Waters* (30 April 2020).

³⁸ The conference conclusions are annexed to Letter dated 22 January 2020 from the Permanent Representative of Germany to the United Nations addressed to the President of the Security Council, S/2020/63.

³⁹ International Crisis Group, *Interpreting Haftar's Gambit in Libya* (4 May 2020).

3. SOMALIA

The collapse of the Somali state was effectively complete by the mid-1990s. The oppressive and divisive Barre regime fought a bloody civil war through the 1980s, and in 1990 the combined opposition forces converged on Mogadishu and Barre fled. However, the largest opposition force, the United Somali Congress, split into competing factions, leading to looting, disruption and famine. Interclan fighting in the early 1990s “when Somali civilians... conducted clan cleansing against other largely unsuspecting Somali civilians... marked the shift to the dominance of a new logic... and ripped Somalis apart in new ways”, undermining the prospects for reconstruction.⁴⁰ Somaliland broke off and declared independence in 1991. With the collapse of the state, there was no pretence of national government during the 1990s, and largely a “patchwork quilt” of local political orders, often run by warlords, in neighbourhoods, towns and villages, though a regional government was established in Puntland in 1998.

In 2000, at the initiative of the president of Djibouti, the Somalia National Peace Conference met and established the Transitional National Government (TNG). This was essentially a deal among leading Mogadishu-based businessmen, powerful Djiboutian interests, and Islamists, but it was opposed by an important paramilitary group in the south, the state of Puntland, and Ethiopia. The TNG failed to establish security or effective institutions. Major Saudi funding to the TNG was quickly dispersed amongst key players and “reinforced in the minds of the political elite that state-building pacts, even if stillborn, attracted easy money from external actors” so additional actors found it in their interest to come to the table.⁴¹

The breakthrough political settlement emerged from the intensive Intergovernmental Authority on Development (IGAD)-led Mbagathi process from 2002 to 2004. Ken Menkhaus has written that this:⁴²

[c]ritical elite bargain... has been challenged, renegotiated, or reshaped several times since 2004, but ... has remained the basic framework for the country’s tenuous political settlement... It produced an accord on which a nominal government, known as the Transitional Federal Government (TFG) existed from 2003 to 2012. The post-transitional successor government... formed in 2012, the Federal Government of Somalia (FGS), has also been based largely on the elite bargain first struck in 2004.

⁴⁰ Lidwien Kapteijns, *Clan Cleansing in Somalia: The Ruinous Legacy of 1991* (Philadelphia: University of Pennsylvania Press, 2013), pp. 12-13.

⁴¹ Ken Menkhaus, *Elite Bargains and Political Deals Project: Somalia Case Study* (Stabilization Unit, Government of the United Kingdom, February 2018), p. 15.

⁴² Menkhaus, *Elite Bargains and Political Deals*, p. 15.

A key feature was the “4.5 formula”, a power-sharing arrangement at the centre which apportioned political spoils equally to the four largest clans, with the small clans sharing a half portion. The bargain also recognized facts on the ground, notably the existing government in Puntland and the domains of various warlords.

This elite bargain was far from creating an effective system of government. The Transitional Federal Government (TFG) and Parliament were in exile, gaining a toehold presence in the country only in 2005. However, an alternative group, the Islamic Courts Union (ICU), allied with the business community and civil society, expelled the warlords in 2006 and brought order to Mogadishu and much of the south. The ICU was unacceptable to the international community and many regions of Somalia, and so Ethiopia intervened militarily in 2006 and with Somali allies pushed the ICU out of its areas of power. Some elements of the ICU broke off to form Al-Shabab. Ethiopia withdrew in 2009, to be replaced by a 20,000 person peacekeeping African Union Mission in Somalia (AMISON), which permitted the TFG and Parliament to establish a presence in Mogadishu.

The Parliament had been formed using the 4.5 formula, whereby elders of each clan had selected their parliamentary representatives, who in turn elected the President. The Parliament initially had 275 members but was doubled to 550 to accommodate 200 former partisans of the Islamic Courts and 75 civil society members. The enlarged Parliament elected the former ICU chairman as president in 2009. The period from 2009 to 2012 was marked by paralysis. External aid fed a culture of extreme corruption, while the TFG was a “government” with almost no real presence or functions. In 2012, the international community sponsored a new process whereby 14,000 clan representatives were selected to elect a new parliament charged with drafting a constitution for the Federal Republic of Somalia.

The intent was to achieve a complete constitution, but the constitution that emerged in 2012 failed to resolve both the allocation of powers between the federal and state governments and the number and boundaries of the states (though it set criteria for state creation). A key focus since 2012 has been putting in place the new regional states. Puntland had existed since 1998. Galmudug had existed informally since 2006 and sought official recognition in 2013, which was agreed in 2014. In 2013, the Ethiopian government mediated the Addis Agreement between the federal government and a self-declared Jubaland administration, giving recognition to the state and agreeing on certain transfers of powers. In the same year, the federal government and local representatives held a conference on creating a Southwest state: this proved contentious because local groups split over whether it should be a three or six-region state. The federal government insisted on a three-region state, which would have been consistent with the Addis Agreement. This view prevailed at the price of merging the two competing administrations into an oversized ministry.

The President elected in 2017, Mohamed Abdullahi Mohamed, strongly favoured centralisation. Under his leadership, Parliament approved laws regarding elections, petroleum, mining, taxation, civil aviation, and fisheries, which the President of Puntland rejected as illegal. The federal government became increasingly antagonistic towards the member states, which formed a common front, so that politics became “two increasingly distrustful forces entangled in political tug of war of unprecedented gamesmanship”.⁴³ The regional state leaders suspended ties with the federal government in 2018. Subsequently, President Mohamed interfered in state elections, successfully seeing his supporters elected as heads of two states.

There has been a real fraying of the elite bargain. The federal government has reluctant relations with most regional states and tense relations with powerful local politicians who are warlords sitting in Parliament and preventing the police from entering their neighbourhoods. Menkhaus argues that “[s]uch a path towards state-building is messy, fluid, conflictual, and not at all amenable to most state-building aid programs. But it is a much more realistic model of how weak states seek to claim, and gradually build, authority over their territories.”⁴⁴

In 2017, the federal government set out a roadmap with the aim of completing the constitutional review and holding elections by 2020, but because of rising tensions there has been almost no progress in resolving the key issues. Given the security situation, the federal and state leaders agreed in September 2020 to have indirect elections, with a few thousand delegates electing the Parliament, which will then elect the President, but they had not resolved key details of the mechanics or the date for the election.

The international community has played a mixed role. IGAD and the UN, largely supported by Western donors, have sponsored endless meetings and tried to respect the principle of a process led by local actors. But geopolitics has been at play as well. “Somalia has become a chessboard in the power game between Qatar and Turkey on one side and Saudi Arabia, the United Arab Emirates and their allies on the other”.⁴⁵ The UAE is building a massive base in Somaliland and is also bypassing the federal government to strike deals with regional states. Mogadishu, the only real redoubt of the federal government, has a vast Turkish base and its port is run by a Turkish company. Ethiopia, which had favoured the regional states, has shifted to supporting Mogadishu, notably in Jubaland where there has been intense jockeying over local control, which sparked a serious military clash between federal and state forces. Kenya, for its part, supports Jubaland. These tensions divert efforts to defeat Al-Shabab’s insurgency. Long-

⁴³ Heritage Institute for Policy Studies, *Options to End Somalia’s Current Political Stalemate* (October 2018), pp. 1 and 2.

⁴⁴ Ken Menkhaus, “State Collapse and Local Response in Somalia,” in Ingo Trauschweizer and Steven M. Miner, eds., *Fragile States and Fragile Societies: A New World Order?* (2014) at 149.

⁴⁵ How the crisis in the Gulf could spread to East Africa, 8 April 2018, www.bbc.com/news/world-africa-43585814.

time observer Alex de Waal suggests Somalia's international backers might outlast Al-Shabab – if slowly and haltingly – given some positive economic developments. But this “war must be won politically as well as militarily ... (so) the Somali government must cultivate an Islamist constituency of its own, winning over most of the political and financial backers of the Islamic Courts Union”.⁴⁶ And defeating Al-Shabab would still not resolve the deep divisions over the form of the Somali state.

YEMEN

When the Arab Spring sparked a popular uprising in 2011 that forced the resignation of Yemen's long-time strongman Ali Abdullah Saleh, the country was already politically stressed and Saleh faced “a bewildering array of political conflicts”.⁴⁷ Saleh had proved a master of patronage politics, playing sheiks and tribal chiefs off one another.⁴⁸ Discontent was boiling in the South, which had been exploited following unification with the North in 1990 and then brutally repressed after a revolt in 1994. In the northern border area, the armed movement rooted in the Zaidi-Shia tradition led by Hussein Badreddin al-Houthi had fought five short wars against Saleh and was openly hostile. The economy was extremely weak, with high unemployment, which gave city dwellers ample grievances.

The transition to a new regime was remarkably quick. Abdrabbuh Mansur Hadi, Saleh's weak Vice-President, became President and a national unity government was formed by Saleh's party and the established opposition parties, but it had no representatives of dissidents from the South, the Houthis and civil society. The government proved dysfunctional, while the economy and security deteriorated. The United Nations and neighbouring Arab countries promoted an ambitious National Dialogue to set national goals and the basics of a new constitution. However, the National Dialogue suffered from having 565 delegates required to achieve consensus, and from the absence of key powerful players, including Saleh, who acted as spoilers from the outside. The National Dialogue reached a weak consensus in favour of federalism, with an unwieldy model of six regions on top of the existing 22 governorates, and with many important issues, such as the division of powers, very unclear. On the critical issue of state delineation, Hadi pushed through a six region model that was totally unacceptable to the Houthis, who would be a minority in a state with no access to the sea and no important resources. The proposed

⁴⁶ Alex de Waal, 'Can Somalia Ever Win Against Al-Shebab?', *Foreign Policy*, 19 October 2017.

⁴⁷ Thomas Juneau, 'Elite struggles, state collapse and regional security: Yemen and the Arab Awakening' (2013) 57 *Orbis* 408-423 and Sarah Phillips, *Yemen and the Politics of Permanent Crisis* (New York: Routledge, 2011).

⁴⁸ Isa Blumi, *Chaos in Yemen: Societal collapse and the new authoritarianism* (New York: Routledge, 2011), pp. 155-56. Blumi argues this represented a break from Yemen's earlier more deliberative and accommodative politics.

state structure was also detested by some leading southerners, who wanted the South to be one region. While the National Dialogue was meeting, the Houthis had advanced militarily down from the north. When rioting over the end of fuel subsidies broke out in August 2014, the Houthis entered an alliance with their old enemy Saleh and took over control of Sana'a. Hadi's position was hopeless and he resigned. Within days, he revoked his resignation and established himself in Aden, supported by international recognition as the legitimate president.

The Houthis and Saleh's forces then launched an offensive on the South. Meanwhile, Saudi Arabia formed an international coalition of 10 Arab states (backed by the United States, the United Kingdom and France) supporting Hadi. The Saudis undertook a campaign of heavy air bombardments in aid of government troops and brought in several thousand Sudanese mercenaries. Their allies, the United Arab Emirates (UAE), deployed 3500 land troops, with some 5000 air and offshore troops in support. The war quickly became internationalized, though the various members of the coalition had quite different objectives.

By the spring of 2016 Peter Salisbury wrote that Yemen was a deeply fragmented "chaos state".⁴⁹ This was something of an exaggeration in that the Houthis had effective control of much of the North, including Sana'a—though their regime was characterized by oppressive taxation, a lack of services, and a singular focus on warfare. The situation was still very fluid in other areas, but by 2020 the division of the country fell into roughly five areas controlled respectively by the Houthis, the Hadi government, southern separatists, the Joint Resistance forces (along the Red Sea), and local authorities in Hadramawt.⁵⁰

Early in the combat, the Saudis pushed for United Nations Security Council Resolution 2216, which called on the Houthis to withdraw from Sana'a, hand over seized weapons, and cease actions within the authority of the Government of Yemen.⁵¹ This resolution provided no real basis for negotiations because it called for the Houthis to give up all their gains before entering talks and increasingly became an obstacle to diplomatic progress.

A first serious engagement was in 2016 when the Houthis and Saleh met Hadi in Kuwait, though the real negotiations were backroom talks between the Saudis and the Houthis. It was rumoured that a deal might see the Houthis agree to secure the Saudi-Yemeni border, and to distance themselves from Iran and become allies with Saudi Arabia (which they once had been); in return, the Saudis would agree to the Houthis being dominant in a national unity government.

⁴⁹ Peter Salisbury, *Yemen: Stemming the Rise of the Chaos State* (Chatham House Research Paper, May 2016).

⁵⁰ *Rethinking Peace in Yemen*, Crisis Group, 2 July 2020, <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/216-rethinking-peace-yemen>

⁵¹ S/RES/2216 (2015).

The deal failed, apparently because Saleh insisted the sanctions on him be lifted and there be a role for his son.

The Saudis were being heavily criticized for their bombing campaign and the worsening humanitarian situation, when Jamal Khashoggi was murdered in October 2018. The negative international reaction put Saudi Arabia under even greater pressure, which led it to agree to UN mediated talks in Stockholm between the Hadi government and the Houthis. Under US pressure, the Saudis agreed to a package including a ceasefire in Hodeidah and other ports and their opening for humanitarian aid, a swap of 15,000 prisoners and detainees, and discussions toward creating a humanitarian corridor to the Taiz Governorate.⁵² The deal led the UAE, which had wanted to push into Hodeidah, to start withdrawing its ground troops from Yemen.

The Stockholm Accord may have prevented a bloodbath, but it did not stop the war. The Saudis were shocked in the fall of 2019 by a missile attack on the Aramco refineries (perhaps by the Iranians), which led to direct, secret talks between the Saudis and Houthis, though with no real progress. Earlier in August, the STC had seized Aden from the Hadi government. In December, the Saudis brokered the Riyadh Agreement to create a new government equally made up of Hadi and STC ministers, but this collapsed with weeks and the STC declared self-governance for at least part of the South.

In the absence of diplomatic progress, the Houthis moved forward militarily, taking Al-Jawf in early 2020 and then threatening Mahrib, the last government allied bastion in the North. While the Houthis are in a strong position militarily, there were still no serious negotiations in late 2020. Any any peace will require buy-in from the Saudis and perhaps the UAE⁵³ but the Saudis have trouble defining a face-saving and acceptable exit. The Houthis indicated after the STC took Aden that they would support a federal regime but offered no specifics. The short-lived Riyadh Agreement would have brought the STC to the negotiating table, but they are now on the outside as are the Joint Resistance Forces and authorities in Hadramawt. Given the difficulties in multilaterising the negotiations, the Saudis may try to impose a settlement if they can reach an understanding with the Houthis, but any agreement made without buy in from key domestic groups may prove untenable.

ANALYSIS

⁵² Stockholm Agreement (13 December 2018), available at: <https://dppa.un.org/en/full-text-of-stockholm-agreement>.

⁵³ Peter Salisbury, *Yemen: National Chaos, Local Order* (Chatham House Research Paper, 20 December 2017).

CHALLENGES OF CONSTITUTION-MAKING PROCESSES IN COLLAPSED STATES

The most fundamental reason why constitution-making is so difficult in collapsed states is the depth of the divisions among the factions. In our four cases, there are advocates of strong centralization and of federalism or devolution – even secession, as in Yemen and Somalia. These different preferences can be ideological, but they also reflect what groups or leaders see as being in their self-interest. Progress in a constitutional process requires the key parties to conclude that continuing their combat is no longer in their interests, which may happen only after both are exhausted by fighting. Even then, finding common ground may prove elusive.

Any process to design a political settlement and a future constitution faces difficult questions. *When* should the major issues of constitutional design be addressed – during or after peace negotiations? *Who* should participate in drafting the new constitution? *What* issues should be addressed in *which* order? A peace process focuses on ending violence through a ceasefire and peace agreement, but may not address institutions. Peace negotiations are usually confidential and limited to active combatants – who may include foreign intervenors. Armed parties may have leverage to insist that a peace agreement establish at least key parameters regarding the content of a future constitution and the constitution-making process. Peace agreements often establish interim governance arrangements, notably power-sharing, as well as basic principles of process and substance for the future constitution. Constitution-making is often a longer-term process that allows for engagement with a broader cross-section of political actors, such as opposition parties and civil society. The process of amending or writing a constitution might include elections or a referendum.

In Lebanon, the peace and constitutional processes were tightly integrated. The Taif Agreement for Lebanon emerged from peace negotiations amongst parliamentarians, who later constitutionalized relevant provisions. This approach worked because the constitutional revisions were relatively limited, with consensus on retaining a centralized regime (and thus avoiding all the complications of negotiating a federal arrangement). However, in Libya, Somalia and Yemen, constitutional drafting has followed, or been separate from, peace negotiations, with the two processes having different timeframes, goals, participants and decision-rules.

A constitutional process would normally be led by a parliament or constituent assembly. Electing such a body in situations of state collapse or deep insecurity, however, may be impossible. Alternative approaches to create a constitutional forum may be necessary, and were attempted in Somalia, Libya, and Yemen. In Somalia, the Mbagathi process from 2002 to 2004 struck the fundamental power-sharing bargain amongst clan elites that permitted the creation of the Transitional Federal Government. Drafting of the proposed federal constitution was assigned to a fifteen-member Federal Constitutional Commission that took several years before delivering an incomplete draft to the National Constituent Assembly of 825 delegates. The

assembly had been “selected” and not elected and proved dysfunction, so that it in turn was able to approve only a provisional and incomplete constitution. Critical issues of federal design were left unresolved, and their future resolution requires the agreement of the heads of all the regional states and the federal government—a very demanding prospect.

Libya elected its Constitutional Drafting Assembly of sixty members, but its legitimacy was weakened by its small electorate and very low turnout. It was one of three elected bodies, and the larger, more representative House of Representatives easily challenged its legitimacy and draft constitution and the draft died in a context of civil war and political infighting. In Yemen, even before its collapse, it was decided that effective parliamentary elections could not be organized, and so 565 delegates were named to the National Dialogue, which was to decide the future constitutional form of the country. This was unwieldy and undermined by key players who were not in the room and played the role of spoilers from outside. The eventual draft constitution was unclear on key issues of federal design and proposed six-state structure was widely rejected. However, the results of the National Dialogue have remained a reference point of combatants in the civil war.

ROLE OF INTERNATIONAL ACTORS IN CONSTITUTION-MAKING

The Busan Partnership for Effective Development Co-Operation, now endorsed by over 150 countries, aims to shift donor-led interventions in fragile countries to equal partnerships, with “country-led and country-owned transitions out of fragility.”⁵⁴ In our cases the United Nations has tried to mediate following these principles, but some sovereign countries have, after intervening militarily, tried to influence political developments in a highly directive and even brutal manner as partisans to the conflict.

Sean Kane has written that “[t]here is broad consensus that (external military) intervention results in longer and deadlier civil wars and reduces the likelihood of a negotiated settlement”,⁵⁵ and he argues that mediators should design processes to include both international and domestic actors and sequence the external and internal dimensions of the conflicts, with the withdrawal of foreign troops as a primary objective. In all our cases, there has been significant military intervention by outside states drawn in by the vacuum created by state collapse.

⁵⁴“A New Deal for engagement in fragile states” (International Dialogue on Peacebuilding and Statebuilding, 30 November 2011), posted at: https://www.pbsdialogue.org/media/filer_public/07/69/07692de0-3557-494e-918e-18df00e9ef73/the_new_deal.pdf

⁵⁵ Sean William Kane, ‘Making Peace When the Whole World Had Come to Fight: The Mediation of Internationalized Civil Wars’ (2020) *International Peacekeeping*, DOI: <https://www.tandfonline.com/doi/full/10.1080/13533312.2020.1760718>.

Syria had 40,000 troops in Lebanon prior to the Taif Agreement, and kept them there until 2005, far beyond the two years stipulated for their withdrawal. It finally withdrew only because of Lebanese reaction to the assassination of Hariri. Ethiopia invaded Somalia in 2000 to defeat the Islamic Courts Union and withdrew after two more years, having no interest in siding with competing clans on the shape of the federation. 40,000 AMISON troops were brought in to combat Al-Shabab, but they have played no political role and Al-Shabab itself remains outside the political process. Saudi Arabia was engaged from the outset in Yemen's civil war and the Hadi government has become a virtual agent of the Saudi government. The UAE's intervention in Yemen, resulted in the Southern Transitional Council becoming an effective military force that took on Hadi's forces and claimed independence. Finally, the conflict in Libya has become a virtual proxy war, with Hafter supported by Russia, the UAE, and Saudi Arabia, while the Government of National Accord has received military support from Turkey and financial aid from Qatar.⁵⁶ These interventions reflect geopolitical and ideological rivalries with Saudi Arabia, the UAE, Egypt and allies opposing Iran, Turkey, Qatar, and Syria; Western powers largely support the former group and Russia the latter.

Kane sees mediators as neutral and distinct from the partisan actors. However, in Yemen, the United Nation's neutrality was undercut initially by Security Council Resolution 2216, pushed through by the Saudis and allies, which asserted the legitimacy of the Hadi government and basically called on the Houthis to surrender prior to talks. Subsequently, the Saudis have negotiated in secret with the Houthis, in the absence of a mediator or Hadi. In Lebanon, the Arab League, along with Saudi Arabia and Syria, set the stage for the Taif negotiations and had the leverage to produce an agreement – which a neutral international mediator might not have. Moreover, Syria assumed a central role in Lebanese politics as the “implementer” of the Taif Agreement for fifteen years.

Involving external intervenors in peace negotiations – whether through mediated talks or otherwise – is clearly important, but is limited in what it can achieve. External intervenors typically play a more substantive role in initial peace negotiations than in a subsequent process of constitution-making. Thus, while IGAD and the UN have played the major role in shaping Somalia's constitution-making process, with funding from supportive governments, their role has been more as facilitators than mediators, and they have not taken positions on the substantive issues. However, Somalia's “country-led and country-owned” processes have proven incapable of resolving the deep differences among the internal factions, and the UN and other external actors have lacked the leverage to push them to conclude an agreement. The National Dialogue process in Yemen, which preceded collapse, was similar in that the UN and Gulf Cooperation Council played a largely neutral role on substance and lacked the leverage to force the relevant

⁵⁶ Ramy Aliahoum, “Libya's war: Who is supporting whom”, *Al Jazeera*, 9 January 2020, <https://www.aljazeera.com/news/2020/01/libya-war-supporting-200104110325735.html>.

parties to the table and a resolution of core issues. In Libya, the UN sponsored Constitutional Drafting Assembly approved a draft constitution, but the assembly had limited legitimacy and its draft failed to win support from the warring factions.

In sum, external intervenors may necessarily be engaged in peace negotiations in which certain terms, such as troop withdrawal, will apply directly to them. Moreover, they may be able to lean on their internal partisans to agree to peace. On occasion, that peace agreement may also be a constitutional settlement, as happened in Lebanon (and similarly in Bosnia). However, externally imposed constitutional settlements may lack consensus in the society and prove hard to sustain. If a peace settlement is followed by a constitution-making process, external actors would normally have less stake in the outcome and so may promote a domestically owned process, which may be mediated or facilitated by an international body. But given deep divisions, domestically owned processes may prove incapable of reaching a substantive conclusion about the future constitutional order and so the society may continue for years with an uneasy peace and a frozen conflict marked by a partial transition's constitutional confusion—as in Somalia, where we agree with De Waal's assessment that Somalia's political order may never revert to a Weberian model of statehood.⁵⁷

INTERIM VS. LONGER TERM OPTIONS FOR DEVOLUTION

A particular challenge for constitution-making after state collapse can arise when a federal or devolved structure is an option. While the territorial fragmentation in a situation of state collapse may suggest federalism or devolution as a natural response, negotiating federalism can be an order of magnitude more difficult than negotiating a unitary regime, given the need to decide the number and boundaries of constituent units, the allocation of powers, and the institutional arrangements at the centre. Realities on the ground may create a status quo ante and path dependencies for the ultimate design of the state, giving parties whose goal is regional autonomy greater leverage than they would have had under the previous regime. Thus in Somalia, Puntland has been able to maintain a veto on any transfer of its powers to the federal government. But even in these cases, as Somalia illustrates, it may be necessary to proceed by steps, perhaps with interim power-sharing arrangements at the centre or step-by-step building of the central and regional governments. Of course, there is no guarantee that collapse sets the stage for a new federal or devolved regime. Lebanon opted for centralization with only the most modest and tardy gestures of decentralization. The draft Libyan constitution of 2016 was centralizing, but given the subsequent evolution of the conflict this might change.

⁵⁷ Alex de Waal, *The Real Politics of the Horn of Africa: Money, War and the Business of Power* (Cambridge: Polity, 2013).

The debates in Yemen illustrate some of the dynamics of negotiating a federal arrangement. The Yemeni constitution is unitary, and its regime of decentralization to 22 governorates was essentially administrative with final authority reserved to the central government. While there has been a measure of consensus on federalism, Hadi's proposed six states were unacceptable to the Houthis and most southerners and the allocation of powers in the draft constitution was far from settled. With the civil war, both the Houthis and the Hadi's forces claim to support federalism but neither has advanced a real vision of federalism while the Southern Transitional Council has a first preference for secession. The civil war has not yet reached an agreed ceasefire, let alone the most preliminary negotiations on constitutional options. Even if there were to be some agreement on federalism in principle, it would take time and hard negotiations to resolve its form and to implement it—but no such result can be assured. The priority for the Houthis has always been power-sharing at the centre (and now, given their strength, likely power-sharing with Houthi predominance). The STC will likely demand substantial political devolution from the outset. The lack of consensus on a new regional state structure might encourage recourse to a regime devolved to the existing governorates, which have some legitimacy as political units.

A contrast with Lebanon is instructive. During the civil war, it was divided into militia cantons which each provided security and public services, but reconstitution as a federal state was never a goal for most parties (with the occasional exception of the Liberation Forces), partly because populations were so intermixed, but also because the elites favoured central power-sharing. The focus of constitutional politics was not on territorial autonomy, but legislative and executive power-sharing, representation in the bureaucracy and military, and sharing fiscal resources. In Libya, the negative experience of state collapse led the CDA to prepare a draft constitution with a strong president and very limited decentralization and no hint of federalism or devolution, though that approach may be questioned once peace negotiations engage, given the strength of autonomous sentiment in the east.

Paralysis arising from competing longer term constitutional visions, such as in Yemen, can be addressed in three ways: deferral, interim arrangements, and incrementalism. Somalia combines deferral with incrementalism. Its 2012 constitutional framework was incomplete, notably in not resolving the allocation of powers between the federal and state governments and the number and boundaries of regional states. It effectively deferred these issues. The number and general definition of regional states has been largely resolved incrementally with the exception of the status of Mogadishu. However, despite having a constitutional review process, the allocation of powers remain unresolved and so the country operates with a constitutional gap in which the federal and regional state governments engage in raw power politics.

At an early stage in peace negotiation, a key challenge may be how to frame interim arrangements between parties that may deeply disagree on the future structure of the state.

Renad Mansour and Peter Salisbury have argued that in collapsed states such as Yemen, the first step in reconstituting public authority should consist of developing institutional links between remnants of state bureaucracies and de facto authorities, to restore some semblance of coherence and coordination in providing basic public services and maintaining public order.⁵⁸ On their argument, focussing on this “middle” layer should come before addressing larger questions of the constitution-making process and constitutional design. They appear to suggest an interim measure moving from fragmentation to some sort of devolution short of federalism, but they do not describe the legal mechanisms for pursuing their “middle-out” approach. One option proposed in Libya and Yemen is to adopt and adapt existing laws on devolution, which provide a ready-made set of institutional tools that are familiar. Whether such a modest first step would be acceptable to all the parties – especially in Yemen – could depend on other elements of agreement including interim power-sharing at the centre on future, further steps.

INTEGRATING SECURITY AND POLITICAL ISSUES IN CONSTITUTION-MAKING

An issue that is too often overlooked is the integration of security and political issues in constitution-making,⁵⁹ notably over security sector governance. Constitutions frequently set out the institutions, procedures and norms for common security sector agencies. A peace agreement provides a pathway for separate armed factions to come under a single command structure, through a process of disarmament, demobilization and reintegration. How a peace agreement addresses interim security sector governance arrangements is key for the success of a constitutional process. The question is whether such arrangements enable armed groups to see a future for themselves in new security institutions or, at least, adequate protections for them after disarmament and demobilization. If they do not, the political process may be stillborn.

Lebanon was the one partial success story from among our cases. The Taif Agreement addressed both political and security issues in the same document, which were viewed as part of an integrated package to reconstitute the Lebanese state. In exchange for the reconfiguration of central power-sharing, the parties agreed to engage in a process of demobilization, disarmament, and reintegration (DDR), coupled with the deployment of state security personnel across Lebanon and the recruitment across sectarian lines. The Syrians undertook to assist Lebanese state security forces, over a period of two years, “to spread the authority of the State of Lebanon” across its entire territory. The exception was Hezbollah, which was permitted to

⁵⁸ Renad Mansour and Peter Salisbury, *Between Order and Chaos: A New Approach to Stalled State Transformations in Iraq and Yemen* (Chatham House, 9 September 2019). For a similar argument in the context of Libya, see John R. Allen et al., *Empowered Decentralization: A City-Based Strategy for Rebuilding Libya* (Brookings Institution, 11 February 2019).

⁵⁹ Barany, Bisarya, Choudhry and Stacey, *Security Sector Reform and Constitutional Transitions*. Op.cit.

remain armed on the grounds that it operated in an area then under Israeli control. However, now, twenty years after Israeli withdrawal, Hezbollah has built up a large independent force that regularly clashes with the Israelis and controls much of southern Lebanon. At this point with Lebanon in deep distress, the success of Taif looks like a temporizing fix that failed to address the fundamental problems of governance.

A vivid example of the failure to properly integrate security and political issues in constitution-making is Libya. One reason the National Transitional Council was unsuccessful was that the constitutional process continued to move forward without concrete progress on the integration of armed militias into a single command structure that in turn was accountable to political institutions. The LPA's failure was different – it did address security governance, by designating the Presidential Council as the commander-in-chief of the armed forces, but impliedly denied that role to Haftar, who then opposed the LPA. In both cases, the constitutional process would have had more success if security sector governance had provided better incentives to armed groups to participate by providing them with an institutionalized role.

In Somalia, security issues also remain an obstacle to moving further in the constitutional process. At present, the federal army is small and relatively ineffective. Most regional leaders have their own militias, some of which have clashed with federal forces, and the issue of integrating all these groups into the national army received little attention in the process that produced the 2012 constitution. AMISON tries to bring enough security to permit the governments to function more effectively. Despite this lack of a coherent, shared security framework (and of an ability to hold elections), Somalia has been able to create the federal parliament and government and regional legislatures and governments. However, without careful attention to security issues and how they relate to political ones, the reconstitution of the state under a single constitutional framework will remain fragile and partial.

Finally, the current multilateral framework for the Yemen peace process, found in Security Council Resolution 2216, also fails to integrate the political and security tracks. It recognizes the legitimacy of the Hadi government and demands that the Houthi unilaterally cease military operations, disarm, and discontinue exercising governmental functions, prior to the commencement of a political process (including any constitutional change). It provides no guarantees to the Houthi with respect to security sector governance or the future shape of a constitutional settlement. Insistence that the Houthi comply with Resolutions 2216 would create an enormous obstacle to reaching a political solution to the Yemeni conflict and is unrealistic given their military successes in the field (and in absorbing parts of the Yemeni army). Any credible peace proposal must address the Houthi's concerns. The recent experience of conflict in the south, illustrates how difficult this could be. In response to armed clashes between the Southern Transitional Council and the internationally recognized government – which led to the STC seizing control of Aden – Saudi Arabia brokered the Riyadh Agreement, which was signed by the parties in November 2019. The Agreement provided the STC with executive power-sharing in the Hadi government in exchange for bringing its armed forces under

the command of the Ministry of Defence and the Ministry of the Interior. The deep lack of trust among the parties led to the failure of the Agreement within days of its signature.

CONCLUSION

State collapse and the absence of a functioning government is characterized by the territorial fragmentation of a country, with different areas under different claimants to authority and some “ungoverned spaces”. There may be extensive fighting over control of various areas and significant fluidity in alliances on the ground. International actors may be drawn in as partisans of different factions or a potential mediators and facilitators of conflict resolution and state reconstruction. Peace-making in such a context requires the main factions—and their sponsors—to accept that the costs of fighting outweigh any benefits and to agree on structured negotiations with one another—which may be a phased arrangement; this may take years. Sustainable peace requires agreements on governance arrangements, including potentially interim power-sharing, a constitution-making process, transitional security arrangements and some guiding principles for a reconstructed state. While a federal or devolved governance arrangement may seem a logical response to such territorial fragmentation, the factional elites may prefer power-sharing at the centre. And if they do opt for a federal or devolved structure, they face vexing issues in defining the constituent units, the allocation of powers, and the nature of central institutions, which may result in an extended period of muddled governance and power politics with no constitutional clarity. It not be possible to recreate a state on the Weberian model.

The Forum is an international organization that develops and shares comparative expertise on the practice of federal and decentralized governance through a global network.



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