

# The Internationalized *Pouvoir Constituant* – Constitution-Making Under External Influence in Iraq, Sudan and East Timor

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\* The views expressed by the author are entirely his own.

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Constitution-making, traditionally the hallmark of sovereignty and the ultimate expression of national self-determination, is increasingly becoming an object of international law. Be it Bosnia-Herzegovina, Afghanistan or most recently Iraq, several instances spring to mind in which international actors were not only instrumental in bringing about a new constitution from a factual point of view but in which international law played an important role in governing the process of constitution-making. Foreign influence on constitution-making processes is hardly a novel phenomenon. However, the extent to which the international community has become involved and the increasingly legalized forms of its involvement add a new dimension to the traditional concept of constitution-making.

A number of scholars have begun to highlight different aspects of this development. They have analyzed the legal structures of international administrations, which create the framework for constitution-making in post-conflict situations;<sup>1</sup> they have examined the political and sociological conditions of constitution-making as a tool of post-conflict reconstruction;<sup>2</sup> they have considered substantial standards for constitution-making;<sup>3</sup> and, last but not least, they have debated the legitimacy of such foreign influence on the political self-determination of a people.<sup>4</sup>

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<sup>1</sup> R. Wolfrum, "International Administration in Post-Conflict Situations by the United Nations and Other International Actors", *Max Planck UNYB* 9 (2005), 649 et seq.; S. Chesterman, *You, the People. The United Nations, Transitional Administration, and State-Building*, 2004.

<sup>2</sup> A. von Bogdandy et al., "State-Building, Nation-Building and Constitutional Politics of Post-Conflict Situations", *Max Planck UNYB* 9, see note 1, 579 et seq.

<sup>3</sup> C. Sunstein, *Designing Democracy*, 2001.

<sup>4</sup> N. Feldmann, "Imposed Constitutionalism", *Connecticut Law Review* 37 (2004/5), 857 et seq.; M. Sunder, "Enlightened Constitutionalism", *Connecticut Law Review* 37 (2004/5), 891 et seq.

This article builds on these contributions but tries to add a more comparative and conceptual perspective focusing on the processes of constitution-making. It connects the debate on international involvement with established constitutional theory and traditional concepts of constitution-making. Drawing on such theoretical material and comparing a variety of cases, the aim here is to develop a more systematic understanding of how external influence impacts constitution-making and to consider whether the concept of what might be called an internationalized *pouvoir constituant* is evolving.<sup>5</sup>

In order to achieve this goal, it will first be necessary to set out the traditional notion of constitution-making and distinguish between different types of international influence based on the degree of such influence. Particular emphasis will be given to those cases which can be understood as instances of an internationalized *pouvoir constituant* (I.). Within this conceptual framework, we will engage in a detailed study of the constitution-making processes that took place in East Timor, Iraq and Sudan. These cases exemplify different types of international influence and illustrate the ways in which such influence impacts the constitution-making processes (II.). Based on the case studies, it will be possible to explore in more general terms whether there exists a legal regime that governs the external influence on constitution-making and to what extent such influence is itself legitimate and impacts the legitimacy of a particular constitution (III.).

## I. Framing External Influence: Concepts and Categories

### 1. The Traditional Concept of Constitution-Making

Two traditions and concepts of constitution-making are regularly distinguished.<sup>6</sup> According to the first ‘revolutionary’ tradition, constitution-making stands for the foundation of an entirely new order. Making a new constitution eradicates the old political system and establishes the

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<sup>5</sup> On the notion of the *pouvoir constituant*, see under Part I.1.

<sup>6</sup> C. Möllers, “Pouvoir Constituant – Constitution – Constitutionalisation”, in: A. von Bogdandy/ J. Bast (eds.), *Principles of European Constitutional Law*, 2006, 183 et seq. (184-191); H. Ahrendt, *On Revolution*, 1963; H. Vorländer, *Die Verfassung*, 1999, 211/212.

rules and institutions of a new one.<sup>7</sup> The second tradition presents a more evolutionary concept of constitution-making, which is understood as being the incremental juridification of politics and as the ongoing process of limiting the powers of the existing and persisting government.<sup>8</sup> For the purpose of this article, the first tradition is of more relevance. International influence on constitution-making normally occurs at clear turning points of constitutional history in the respective countries, be it at the end of foreign rule, dictatorship or civil strife. It is therefore worth taking a closer look at the ‘revolutionary’ tradition and its key elements.

As already pointed out, constitution-making in the ‘revolutionary’ concept implies a moment of political rupture that erases the old and creates the new. Central to this concept is the subject of this act, the *pouvoir constituant*. It is the nation, which is to say the people as a political body. Only the nation is understood to have the force to create a new order.<sup>9</sup> This tradition of constitution-making and the concept of the *pouvoir constituant* is thus an inherently democratic concept. It encapsulates the most fundamental act of self-determination of a people. Its final vanishing point is the individual, the citizen of the country.

Constitution-making within this concept can take place according to different procedures.<sup>10</sup> Firstly, a constitutional convention, which drafts a text that is then ratified by the people, can be established. A constitutional assembly, which is vested with the task of writing and adopting a new constitution is another option. A new constitution can also be approved through a referendum on a constitutional text that has been conceived in any number of ways. The political elite of the constitution-making society typically plays a vital role in each of these scenarios, but always as an agent and representative of the entire nation. Its powers are ultimately rooted in the people and hence in the individual.

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<sup>7</sup> This tradition is based on the examples of French and U.S. American history.

<sup>8</sup> British and German history provides examples for this second tradition and concept.

<sup>9</sup> Abbé Sieyès, *Qu’est-ce que le tiers état?*, 1789; E.W. Böckenförde, “Die verfassungsgebende Gewalt des Volkes”, in: E.W. Böckenförde, *Staat, Verfassung, Demokratie*, 1992, 91 et seq. (93-98); B. Ackerman, *We, the People*, 1991; also E. Zweig, *Die Lehre vom Pouvoir Constituant*, 1905.

<sup>10</sup> C. Schmitt, *Verfassungslehre*, 1928, 84-87; A. Arato, “Forms of Constitution Making and Theories of Democracy”, *Cardozo Law Review* 17 (1995), 191 et seq.; H. von Wedel, *Das Verfahren der demokratischen Verfassungsgebung*, 1976.

Two more elements are crucial for this concept of constitution-making. First the result: constitution-making creates a text, a single written document, the Constitution.<sup>11</sup> While constitutional change in the evolutionary concept can occur in various documents or even in the unwritten form of new practices, in the revolutionary concept it comes as a unified document. Secondly, this document enjoys supreme normativity.<sup>12</sup> Inherent in this concept is the constitution's rank as supreme law of the land, thus able to establish new and overriding standards for the legal order. This aspect also reflects the somewhat paradoxical nature of the revolutionary concept of constitution-making. It is an act of politics, ultimately unrestricted by the old legal order, but it creates a new normative order, binding new actors.<sup>13</sup>

One aspect, however, is obviously absent from this concept, namely the participation of external actors in the constitution-making processes. In fact, since the exclusive subject of constitution-making is the nation, any external influence can be regarded as a dilution or attenuation of the democratic nature of the process. The very notion of the *pouvoir constituant* in this traditional perspective is thus tantamount to a national endeavor and a nation taking its political fate into its own hands and exercising its most fundamental and sovereign right.

The observation that external actors and international law have become increasingly involved in the constitution-making of sovereign nations is therefore a somewhat unsettling thought. Nevertheless, one has to acknowledge that external influences have often (if not always) played a role in constitution-making processes in the past.<sup>14</sup> The difference today, however, is the intensification and, even more importantly, the legalization of these influences. These have to be placed in a two-fold context.

Firstly, for the most part, external influence takes place in the context of a post-conflict settlement. The concerned nation is considered not to be capable of overcoming its predicament alone. External influ-

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<sup>11</sup> S.E. Finer, *The History of Government*, Vol. 3, 1997, 1503; U. Preuß, *Revolution, Fortschritt und Verfassung*, 1994, 21-22.

<sup>12</sup> N. Luhmann, *Recht der Gesellschaft*, 1993, 474-476; R. Wahl, "Der Vorrang der Verfassung", in: R. Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung*, 2003, 121 et seq.

<sup>13</sup> Böckenförde, see note 9, 99.

<sup>14</sup> See for an early analysis, K. Löwenstein, *Political Reconstruction*, 1946; more generally F. Schauer, "On the Migration of Constitutional Ideas", *Connecticut Law Review* 37 (2004), 901 et seq.

ence is therefore not intended as a way to simply interfere in a national constitutional process but rather as a tool through which international support is provided and as a type of contribution to the restoration of peace, security and the self-determination of peoples. It is, in fact, typically intended to restore the sovereignty of the people at hand.<sup>15</sup>

The other context is less situational and more fundamental. It has been described as the internationalization of constitutional law.<sup>16</sup> It refers to the fact that international law is increasingly setting standards for and shaping domestic constitutional law, most prominently in the area of human rights, but to a growing degree also with respect to the domestic systems of government.<sup>17</sup> External influence on a constitution-making process and its legal framework can be seen as a procedural extension of this development.

## 2. Categories of External Influence

The different instances of external influence on constitution-making processes can be classified according to different criteria. One such criterion is the degree of external influence, another criterion is the actors and legal form in which such influence occurs. The application of these criteria leads to different yet complementary categories of external influence.

The first criterion, the degree, refers to the extent to which external actors influence the procedure and the substance of the constitution-making process. Three categories can be distinguished, namely *total*, *partial* and *marginal* degrees of influence. The recent constitutional his-

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<sup>15</sup> Wolfrum, see note 1, 675-678.

<sup>16</sup> B.O. Bryde, "Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts", *Der Staat* 2003, 61 et seq.

<sup>17</sup> H. Steiner/ P. Alston, *International Human Rights in Context*, 2nd edition 2000, 987 et seq.; T. Franck, "The Emerging Right to Democratic Governance", *AJIL* 86 (1992), 46 et seq., on the twin development of a constitutionalization of international law see J.A. Frowein, "Konstitutionalisierung des Völkerrechts", *Berichte der Deutschen Gesellschaft für Völkerrecht* 39 (2000), 421 et seq.; C. Walter, Constitutionalizing (Inter)national Governance, *GYIL* 44 (2001), 170 et seq.; B. Fassbender, "The U.N. Charter as a Constitution", *Colum. J. Transnat'l L.* 36 (1998), 530 et seq. (574-576).

tory of Bosnia-Herzegovina provides an example of *total influence*.<sup>18</sup> In that case, the constitution was neither drafted nor adopted by national actors, but was the result of international peace negotiations which were conducted between the presidents of the warring parties (Bosnia-Herzegovina, Croatia and Yugoslavia) and did not even take place in Bosnia-Herzegovina. The constitution itself is actually Annex IV to the peace agreement which came into force not through a popular referendum but by the signing of the peace deal by the same warring parties. In effect, the concept of *pouvoir constituant* was completely absent in the Bosnian case, since the nation as such was basically excluded from the constitution-making process.

On the other side of the spectrum, one can discern those situations in which constitutional processes were affected only by *marginal influence*. Here, the external influence consists only of advice from external experts, which is sought voluntarily by the domestic actors while control over process and substance of the constitution remains clearly in the hands of the nation at hand. South-Africa<sup>19</sup> or the multiple processes of constitution-making in Eastern Europe in the early 1990s are recent examples in which such marginal influence was exercised.<sup>20</sup> One could add to this group any form of constitutional inspiration or borrowing, in the sense that the drafters of constitutions draw regularly, necessarily and more or less extensively on the examples of constitutional experiences in other countries.<sup>21</sup> But with respect to the concept

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<sup>18</sup> K. Oellers-Frahm, "Reconstructing Bosnia-Herzegovina: A Model with Pit-falls", *Max Planck UNYB* 9, see note 1, 179 et seq.; S. Yee, "The New Constitution of Bosnia and Herzegovina", *EJIL* 7 (1996), 176 et seq.

<sup>19</sup> R. Spitz, *The Politics of Transition: a hidden history of South Africa's negotiated settlement*, 2000; also D.M. Davis, "Constitutional Borrowing: the influence of legal culture and local history in the reconstitution of comparative influence: the experience of South-Africa", *International Journal of Constitutional Law* 1 (2003), 181 et seq.

<sup>20</sup> J. Elster, "Constitution-Making in Eastern Europe", *Public Administration* 71 (1993), 169 et seq. (192-193). This is not to say that such influences are not organized and that constitutional assemblies are not lobbied by external actors (like the Venice Group). However, it is decisive that the ultimate control over process and substance remains in national hands.

<sup>21</sup> For the example of India, G. Austin, *The Indian Constitution*, 1966, 321-323; in a more general perspective Schauer, see note 14; L. Epstein/ J. Knight, "Constitutional borrowing and nonborrowing", *International Journal of Constitutional Law* 1 (2003), 196 et seq. and the other contribution in that volume.

of constitution-making, the national *pouvoir constituant* in these cases is not restrained. It would thus make no sense to classify these as cases of an internationalized *pouvoir constituant*.

The third category of external influence is clearly more complex. These cases of *partial influence* fall in between the two categories just described. Here, international influence is stronger than the voluntarily requested but limited consultation of foreign experts, but it is weaker than the international take-over of the entire constitution-making. Instead, the constitutional process is to a certain degree directed by external forces in a procedural and/or a substantial way, while the ultimate power of drafting and adopting remains in domestic hands. Instances of such partial influence are plenty and encompass several of the more recent cases. More importantly for our purposes here is that, in these cases, the *pouvoir constituant* is neither entirely surrendered nor is it kept entirely intact. Instead, control over the constitutional process is shared. A better understanding of the way in which this phenomenon plays itself out in practice may be achieved by analyzing the actors and legal forms of such external influence in a select number of cases.

## II. Describing External Influence: Three Case Studies

External influence on constitution-making processes is most often exerted to a partial degree, producing a blend of national and international control over the process itself. The purpose of this section is to explore the different forms that partial influence can take, which will then allow us to derive whatever normative lessons exist from these recent experiences: (1) The first example that we set out here is the East Timorese process, where external influence was exercised by an international, UN-led administration. (2) Second, in Iraq, the constitutional process was at first administered by a foreign occupation and was then influenced by individual external actors. (3) Finally, in Sudan, the process took the form of peace negotiations that were mediated by a regional organization and a group of states. Each of these cases differs from the rest, and can be regarded as exemplifying a specific type of influence. Such a typology and the study of all three cases will hopefully allow for a better understanding of the current state of the law in this area.

## 1. Constitution-Making Under International Administration – East Timor

### a. Factual Context

East Timor provides the most transparent example of how international actors and their regulations can instigate and govern the constitution-making process in a foreign country. When East Timor's quest for independence gained new momentum in the late 1990s, the UN played a major role in encouraging a peaceful transformation from Indonesian occupation to independence.<sup>22</sup> First, it helped to organize a referendum on independence on 30 August 1999, which resulted in overwhelming support amongst the East Timorese people for independence. To quell the ensuing violence and political vacuum after the referendum, East Timor was put under international administration.<sup>23</sup> Security Council Resolution 1272 of 25 October 1999 created the United Nations Transitional Administration in East Timor (UNTAET), which was "endowed with the overall responsibility for the administration of East Timor."<sup>24</sup> It was given comprehensive legislative as well as executive powers and entirely substituted the previous Indonesian authorities.

UNTAET's tasks were the establishment of peace and security, the delivery of humanitarian aid, reconstruction and, last but not least, the creation of local and democratic institutions. UNTAET was headed by a Special Representative of the UN Secretary-General who served as Transitional Administrator of the UN. The legal framework for the administration of UNTAET was determined by its Regulation 1999/1, which was issued on 27 November 1999.<sup>25</sup>

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<sup>22</sup> For a concise analysis of the historical background as well as the international intervention see M. Benzing, "Midwifing a New State: The United Nations in East Timor", *Max Planck UNYB* 9, see note 1, 295 et seq. (302-305).

<sup>23</sup> J. Morrow/ R. White, "The UN in Transitional East Timor: International Standards and the Reality of Governance", *Austr. Yb. Int'l L.* 22 (2002), 1 et seq.; Chesterman, see note 1, 60-64 with further references.

<sup>24</sup> S/RES/1272 (1999) of 25 October 1999, para. 1.

<sup>25</sup> UNTAET/REG/1999/1 of 27 November 1999.

## b. Legal Framework for the Constitution-Making

Constitution-making was not expressly part of the UNTAET mandate, but it was soon recognized that a successful transition to an independent East Timor would require a new constitutional basis.<sup>26</sup> After considerable discussion about the most legitimate and accepted procedure, in March 2001 UNTAET issued Regulation 2001/2, which established the legal framework for the constitution-making process and thus is the fundamental text in relation to the constitutional process that took place in East Timor.<sup>27</sup> The Regulation is remarkable in that it is as detailed in procedural terms as it is restrained in substantial terms.<sup>28</sup> This was intended. Considering the limited democratic legitimacy of UNTAET itself, most observers agreed that international influence should be as limited as possible and that it should be limited to organizing the process only.<sup>29</sup>

Regulation 2001/2 establishes a clear procedural framework. Section 3 of the Regulation provides that the Constitutional Assembly should be composed of 88 members, 75 of whom were to be elected in a nationwide election, and the remaining 13 were to be elected in regional constituencies.<sup>30</sup> This structure was designed to prevent the country's largest political group, the *Frente Revolucionária do Timor-Leste Independente* (Fretilin), from dominating the new Assembly in a way that would stifle effective deliberation.<sup>31</sup> Section 2.2 of the Regulation also determined that the Assembly could only adopt a Constitution by an affirmative vote of at least 60 of the 88 members of the Assembly, hence applying the conventional rule of a two thirds majority for constitutional amendments. In relation to the timeframe within which the drafting process was actually to take place, Section 2.3 of Regulation 2001/2 states that the Constitutional Assembly had 90 days to adopt a final text.

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<sup>26</sup> On the constitutional process Benzing, see note 22, 363-365; Morrow/White, see note 23, 33-43.

<sup>27</sup> UNTAET/REG/2001/2 of 16 March 2001, available at: <<http://www.un.org/peace/etimor/untaetR/r-2001.htm>>; on the internal discussions, Morrow/White, see note 23, 34-36.

<sup>28</sup> UNTAET/REG/2001/2 was complemented by UNTAET/REG/2001/11 of 13 July 2001, which defined the rules of electoral offences and thus aimed to ensure the free, fair, safe and secret ballot.

<sup>29</sup> Morrow/White, see note 23, 36-39.

<sup>30</sup> See also Section 5 and the detailed regulations for the elections.

<sup>31</sup> Chesterman, see note 1, 216.

Regulation 2001/2 is much less explicit in terms of the actual substantive content of the constitution. Section 2.1 provided that the mandate for the Constituent Assembly was merely to “prepare a Constitution for an independent and democratic East Timor”. Otherwise, Section 1.1 of the Regulation provides that convening the Assembly should contribute to the goal of “protect[ing] the inalienable human rights of the people of East Timor including freedom of conscience, freedom of expression, freedom of association and freedom from all forms of discrimination.” But this is less an explicit mandate and more a general description of the purpose of the Assembly. Any further specifications as to the structure of government or other aspects of the constitutional system were avoided.

UNTAET also wanted to make sure that the Timorese people and civil society would have a direct voice in the constitutional deliberations. The Special Representative therefore issued a Directive requiring the authorities to consult the East Timorese people in relation to the contents of the constitution. Constitutional commissions were established through which the population could formulate their interests and opinions. This Directive is complemented by Section 2.4 of the Regulation, which sets out that the Constitutional Assembly should give due consideration to popular consultations.<sup>32</sup>

### c. Actual Process of Constitution-Making

While the legal framework for the constitution-making process was provided for by international actors and their law, the actual proceedings, e.g. the drafting and debate in the Constitutional Assembly, were in the hands of Timorese.<sup>33</sup> There seems to have been hardly any direct international influence on the Constitutional Assembly’s proceedings. Whatever external influence was exerted appears to have been made through the provision of expert advice and through a consultative mechanism, which had been intended to allow members of the East Timorese public to voice their standpoints to the Constitutional Assembly. Even the procedural safeguards that UNTEAT established were less rigid than what was originally envisioned. For example, the tight time limit of 90 days was extended by three months in order to allow

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<sup>32</sup> UNTAET/Dir/2001/3 of 30 March 2001, Directive on the Establishment of District Constitutional Commissions.

<sup>33</sup> Benzing, see note 22, 365; Morrow/ White, see note 23, 40-42; Chesterman, see note 1, 140-142.

the Assembly to complete its work.<sup>34</sup> Also, a letter by the Special Representative of the Secretary-General to the heads of the political parties in the Assembly voiced some procedural, as well as, substantial problems with the draft, but the remarks were variously accepted and ignored.<sup>35</sup>

The main difficulty that the drafting process faced seems to have been less the interference of international actors than a rather authoritarian tendency within the Timorese leadership. The *Fretilin*, which was by far the largest group in the Constitutional Assembly, was successful in pushing through its own constitutional proposals. The constitutional commissions, which were set up to ensure bottom-up input for the constitutional deliberations, seem to have had a very limited impact on the final outcome.<sup>36</sup>

In sum, we can observe a clear distinction between the instigation and regulation of the constitutional process on the one side, and the actual process on the other side. The international administration set the legal framework for the process, but determined little with respect to the substance. Within this framework, the actual constitution-making and its adoption remained in Timorese hands. There was almost no meddling of UNTAET or other foreign actors in the actual process. The internationalized part of the *pouvoir constituant* is thus the instigation and framework-setting of the constitutional process.

## 2. Constitution-Making Under Foreign Occupation – Iraq

### a. Factual Context

As is well known, Iraq's constitutional process would most probably not have taken place were it not for the military invasion and the subsequent foreign occupation of the country. This is the main characteristic that distinguishes the Iraqi constitutional process from the other case studies set out in this article.

Another result of the invasion was the subsequent lack of consensus that existed amongst Iraq's population and political elites throughout

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<sup>34</sup> Morrow/ White, see note 23, 37/38, Footnote 155.

<sup>35</sup> Morrow/ White, see note 23, 41.

<sup>36</sup> See H. Charlesworth, "The Constitution of East Timor", *International Journal of Constitutional Law* 1 (2003), 325 et seq. (327/328); also Cheserman, see note 1, 141/142.

the constitutional process. Indeed, although a majority of the Iraqi elites who came to power after 2003 were clearly in favor of the war and its outcome, a large number of the country's political leaders decided to boycott the political process altogether, including the drafting of the new constitution.<sup>37</sup>

Generally speaking, the Iraqi constitutional process took place in two stages. The first phase began during the period immediately following the initial invasion of the country in March 2003 by the United States and the United Kingdom (the "Coalition") and ended with the election of a Transitional National Assembly (TNA) in January 2005. During that time, the framework for the drafting of the permanent constitution was established mostly by the occupation authorities, but also in collaboration with a number of appointed Iraqi actors. The second phase, during which the constitution was actually drafted, began after the elections on 30 January 2005, and ended with the referendum that took place on 15 October 2005.

#### **b. Legal Context**

The question of which legal regime governed the Iraqi constitution-making process is complicated by the fact that the country was under a state of occupation when the process began, but that it officially regained its sovereign status before the drafters actually sat down to start writing the constitution itself. The effect is that the drafting process was actually governed by two separate and successive legal regimes.<sup>38</sup>

On 22 May 2003, the United Nations Security Council passed Resolution 1483 which explicitly recognized the United States and the United Kingdom as "occupying powers".<sup>39</sup> The Coalition was called upon "to promote the welfare of the Iraqi people through the effective administration of the territory", while creating the conditions for Iraqis to "freely determine their own political future". The effect of this Resolution was therefore twofold. Firstly, it indisputably established that the United States and the United Kingdom were occupants and that therefore the international law of belligerent occupation was applicable in

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<sup>37</sup> 'Draft constitution gained, but an important opportunity was lost', United States Institute of Peace, October 2005, available at: <[www.usip.org/newsmedia/releases/2005/1011\\_draft.html](http://www.usip.org/newsmedia/releases/2005/1011_draft.html)>.

<sup>38</sup> See generally, R. Wolfrum, "Iraq: From Belligerent Occupation to Iraqi Exercise of Sovereignty", *Max Planck UNYB*, see note 1, 1 et seq.

<sup>39</sup> S/RES/1483 (2003) of 22 May 2003.

the circumstances. Secondly, the Resolution complemented the general law of occupation by imposing a number of positive obligations on the occupying powers.

The Coalition responded by establishing the Coalition Provisional Authority (CPA), which was given the task of administering Iraq during the official period of occupation from 2003 to 2004 and which was responsible for setting Iraq on the path to drafting a new constitution.<sup>40</sup> The CPA's initial plan was to appoint a national conference that would be responsible for drafting the constitution, rather than holding democratic elections.<sup>41</sup> However, under pressure from Iraq's most senior religious authority<sup>42</sup> and the United Nations,<sup>43</sup> it accepted that direct elections would in fact be held, and that a transitional law should be written in order to establish the framework within which the country's permanent constitution would be drafted. This document, which was eventually entitled the Law of Administration for the State of Iraq for the Transitional Period (TAL), was drafted between January and April 2004, which is to say, while Iraq was under occupation.<sup>44</sup>

The TAL was officially drafted by the Iraqi Governing Council (IGC), which was an appointed body that was established by the CPA.<sup>45</sup> At the same time though, U.S. officials were involved in the drafting process through the CPA, and made use of this position firstly in order to ensure that the document was completed within a short period of time given, and secondly to call for the inclusion of particular provisions in the final document. This is reflected for example by the fact that the TAL's bill of rights articulates rights as if they are absolute, thereby mimicking the U.S. Bill of Rights.

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<sup>40</sup> L.E. Halchin, "The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities", *Congressional Research Service*, The Library of Congress, 6 June 2005, 5, available at: <[www.fas.org/sgp/crs/mideast/RL32370.pdf](http://www.fas.org/sgp/crs/mideast/RL32370.pdf)>.

<sup>41</sup> L. Diamond, *Squandered Victory*, 2005, 41.

<sup>42</sup> Feldman, see note 4, 857, footnote 2.

<sup>43</sup> See *The Political Transition in Iraq: Report of the Fact-finding Mission*, United Nations Security Council, 23 February 2004, Doc. S/2004/140 available at: <<http://www.un.int/usa/s-2004-140-iraq.pdf>>.

<sup>44</sup> Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, available at: <[www.cpa-iraq.org/government/TAL.html](http://www.cpa-iraq.org/government/TAL.html)>.

<sup>45</sup> 'Overview: The Governing Council', BBC News, available at: <[http://news.bbc.co.uk/1/shared/spl/hi/middle\\_east/03/post\\_saddam\\_iraq/html/governing\\_council\\_overview.stm](http://news.bbc.co.uk/1/shared/spl/hi/middle_east/03/post_saddam_iraq/html/governing_council_overview.stm)>.

The TAL covers a wide-ranging number of issues, including the basic rights of Iraqi citizens, as well as the provisional structure of the government. Most importantly for the purposes of this article, the TAL sets out the mechanism according to which the country's permanent constitution was to be drafted. These rules provide in relevant part that:

- the first phase of the transitional period "shall begin with the formation of a fully sovereign Iraqi Interim Government that takes power on 30 June 2004" (article 2(b)(1));
- the second phase of the transitional period "shall begin after the formation of the Iraqi Transitional Government, which will take place after elections for the National Assembly have been held as stipulated in this Law, provided that, if possible, these elections are not delayed beyond 31 December 2004, and, in any event, beyond 31 January 2005" (article 2(b)(2));
- in the context of this second phase, "[t]he National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005" (article 61(a)). Note that this gave the Iraqis exactly six months to draft the entire text;
- "The draft permanent constitution shall be presented to the Iraqi people for approval in a general referendum to be held no later than 15 October 2005" (article 61(b));
- "The general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it" (article 61(c)).<sup>46</sup>

Most of the rules and provisions set out in the TAL were reached through common accord between all the parties that were involved in the process – most of whom, it should be recalled, were appointed by the CPA. However, some of the provisions – notably article 61(c), which was considered by some political leaders to be anti-democratic – caused a serious breakdown in consensus that was in fact never resolved.<sup>47</sup>

By virtue of Security Council Resolution 1546 that was adopted on 8 June 2004,<sup>48</sup> the international community endorsed the framework established by the TAL, although, ambiguously, the text is not actually

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<sup>46</sup> Law of Administration for the State of Iraq for the Transitional Period, see note 44.

<sup>47</sup> Diamond, see note 41, 177.

<sup>48</sup> S/RES/1546 (2004) of 8 June 2004.

mentioned in the Resolution. Also, Resolution 1546 provided that the United Nations Assistance Mission for Iraq (UNAMI) should “promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq”.

The state of occupation officially came to an end and sovereignty was transferred to an appointed Iraqi government on 28 June 2004.<sup>49</sup> Thus, when the actual drafting process began, the international law of occupation no longer applied. The only applicable rules were therefore those contained in Resolution 1546 and those contained in the TAL.

### c. Actual Process of Constitution-Making

The actual process of constitution-writing in Iraq took place in three distinct stages: to begin with, the first three months after the elections of the National Assembly on 30 January 2005 were spent by selecting the makeup of the body that was eventually appointed to draft the constitution; secondly, the actual drafting process itself lasted for three months, and ended on 15 August 2005 in accordance with the provisions of the TAL; and thirdly, after the drafting process officially and legally came to an end, protracted and *ad hoc* negotiations took place between a group of the country’s most senior politicians (the Leadership Council), in the presence of U.S. officials, and continued until two days before the referendum. Different actors and different ideas were aired at various points during the drafting process.

#### *aa. Which Actors?*

After the Transitional National Assembly (TNA) was elected in January 2005, it was decided that a committee (the Constitutional Committee) made up of members of parliament who would be answerable to the TNA should be constituted. The Committee was at first made up of 55 members, who were allocated proportionally to the various political parties that were represented in parliament.

However, as a result of the fact that the Sunni community had by and large boycotted the elections, they were under-represented in both

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<sup>49</sup> ‘President Bush discusses early transfer of Iraqi sovereignty’, The White House Office of the Press Secretary, 28 June 2004, available at: <[www.whitehouse.gov/news/releases/2004/06/20040628-9.html](http://www.whitehouse.gov/news/releases/2004/06/20040628-9.html)>.

the TNA, and the Constitutional Committee.<sup>50</sup> This, coupled with the fact that the ongoing insurgency in Iraq was largely attributed to disaffection in the Sunni community, made it important for many of the parties involved in Iraq's political transition to reach out to the Sunnis. It was eventually agreed that 15 Sunni Arabs would join the two Sunni members already sitting on the Committee and that an additional 10 Sunni Arabs would also join the deliberations, but only in an advisory capacity.<sup>51</sup> These 25 individuals were finally elected and approved by all the relevant governmental institutions on 5 July 2005.<sup>52</sup> Significantly however, because of a number of delays, and another short-lived boycott, the Sunni community was actually only engaged in the drafting process for little more than three weeks. One can conclude however that the Constitutional Committee did manage to evolve into a relatively representative body.

As soon as control over the draft passed to the Leadership Council in mid-August 2005, all attempts at reaching a nation-wide consensus were abandoned with a view to ensuring that the drafting process was completed on time. The Leadership Council's membership, procedures and responsibilities were for the most part left undefined as a result of which U.S. officials were able to play a major role in the negotiations. Indeed, at least one of the Leadership Council's plenary sessions was actually held at the U.S. Ambassador's residence. Also, because the Leadership Council's meetings were by nature informal, the U.S. Ambassador attended negotiation sessions regularly, and other American officials became implicated in the negotiations in order to accelerate a final draft constitution.<sup>53</sup> The main interest of the U.S. officials that were involved was to ensure that the process was not extended beyond

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<sup>50</sup> 'Shia majority for Iraq parliament', BBC News, available at: <[http://news.bbc.co.uk/2/hi/middle\\_east/4273931.stm](http://news.bbc.co.uk/2/hi/middle_east/4273931.stm)>.

<sup>51</sup> 'Parliament, Sunnis reach deal on Iraq's constitutional process', USA Today, available at: <[http://news.yahoo.com/s/ap/20050616/ap\\_on\\_re\\_mi\\_ea/iraq\\_constitution\\_2;\\_ylt=AktZKe7Z3PTpb5RQW7Cd3eJX6GMA;\\_ylu=X3oDMTBiMW04NW9mBHNIYwMlJVRPUCU1](http://news.yahoo.com/s/ap/20050616/ap_on_re_mi_ea/iraq_constitution_2;_ylt=AktZKe7Z3PTpb5RQW7Cd3eJX6GMA;_ylu=X3oDMTBiMW04NW9mBHNIYwMlJVRPUCU1)>.

<sup>52</sup> "The constitutional committee starts with the Sunni members 'from zero' – Attacks are driving away diplomats from Iraq", *Al-Safir*, 6 July 2005.

<sup>53</sup> Interview with Khalid Ahmed, Legal Officer, Office of Constitutional Support, United Nations Assistance Mission for Iraq, 18 November 2005 (according to whom there were at least three officials from the U.S. embassy that were directly implicated in drafting particular provisions); 'Draft constitution gained, but an important opportunity was lost', see note 37.

the referendum date for domestic U.S. political reasons.<sup>54</sup> U.S. officials therefore encouraged the exclusion of the Sunni community at the Leadership Council phase, with a view to facilitating agreement between the other negotiators.<sup>55</sup> Thus, consensus-building was sacrificed in order to satisfy external political concerns.

*bb. Which Ideas?*

During the Constitutional Committee phase of the process, all foreign and international experts were specifically forbidden from participating in the drafting process. Nevertheless, the Committee was subjected to a number of direct and indirect external influences. For example, experts from the United Nations – through its Office of Constitutional Support – provided commentary to a number of the drafts that were being produced, which sometimes led to certain changes in the constitution's wording. Also, many of the drafting sessions started on the basis that the TAL – which was heavily influenced by officials from the United States as well as the United Kingdom – was a blueprint for the constitution.<sup>56</sup>

That being said, the Constitutional Committee's draft was evolving in a way that incorporated principles that were based on Iraqi societal norms, and modern constitutional best practice. So for example, whereas the TAL's bill of rights was mostly based on the United States model, the Constitutional Committee's draft contained a well developed section on socio-economic rights, in accordance with Islamic and Arab custom. The Committee's draft also contains guidelines relating to the permitted grounds of statutory limitation of rights, which was con-

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<sup>54</sup> See, for example, 'President Welcomes Iraqi Prime Minister Jaafari to the White House', The White House, June 24, 2005, available at: <[www.whitehouse.gov/news/releases/2005/06/20050624.html](http://www.whitehouse.gov/news/releases/2005/06/20050624.html)>.

<sup>55</sup> Representatives of the Sunni community complained that they were excluded from the negotiations and that they were not being made aware of the substance of the discussions, which caused them to officially withdraw from the negotiations on 28 August 2005 (see International Crisis Group, "Unmaking Iraq: A Constitutional Process Gone Awry", *Middle East Briefing*, Number 19, 26 September 2005, 4, available at: <[www.crisisgroup.org](http://www.crisisgroup.org)>); a number of other Constitutional Committee Members also expressed their bewilderment that the negotiations were proceeding in a secretive and restrictive manner (see International Crisis Group, *ibid.*, 3).

<sup>56</sup> See also International Crisis Group, "Iraq: Don't rush the constitution", *Middle East Report*, Number 42, 8 June 2005, 7.

sidered to be in line with international best practice. In addition, the Committee was in favor of establishing a constitutional court for the first time in Iraq and was in the process of negotiating the details of the court's mission, jurisdiction and composition when control over the draft was passed to the Leadership Council. This idea was subsequently abandoned as there was insufficient time to complete the negotiations.<sup>57</sup>

The dynamics of this semi-independent drafting process suddenly changed when the Leadership Council took over responsibility of the draft. The U.S. officials that were involved in the negotiations focused on a limited number of substantive issues, which were those that were significant for U.S. domestic politics, especially, amongst others, women's rights and the role of Islam.<sup>58</sup> Another example is that a previous version of article 44, which related to international human rights standards, was removed from the final version of the draft constitution, reportedly at the request of U.S. officials.<sup>59</sup>

Secondly, the fact that one of the communities was not represented at the Leadership Council phase also had a profound effect on the draft. At the Constitutional Committee stage of the negotiations, a balance was struck between the Kurds (who favored the establishment of a highly decentralized state), the Shi'a (who were relatively indecisive and at times even indifferent), and the Sunni (who favored a strong central state). Once the Sunni were excluded from the process at the Leadership Council phase, the negotiations were obviously tilted towards strong decentralization, and the result was therefore that consensus was not reached between the country's various communities.<sup>60</sup>

In conclusion, the United States and other foreign authorities intervened throughout Iraq's constitution-writing process in a number of

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<sup>57</sup> See Z. Al-Ali, *Iraq: A Constitution to Nowhere*, OpenDemocracy, 14 October 2005, available at: <[www.opendemocracy.net/conflict-iraq/iraqconstitution\\_2925.jsp](http://www.opendemocracy.net/conflict-iraq/iraqconstitution_2925.jsp)>.

<sup>58</sup> L. Baker/ M. Georgy, "US concedes ground to Islamists on Iraqi law", Reuters, 20 August 2005, available at: <[http://web.krg.org/articles/article\\_detail.asp?LangNr=12&RubricNr=&ArticleNr=5450&LNNr=28&RNnr=70](http://web.krg.org/articles/article_detail.asp?LangNr=12&RubricNr=&ArticleNr=5450&LNNr=28&RNnr=70)>.

<sup>59</sup> The article that was eliminated provided that: "All individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified and that do not contradict with the principles and provisions of this constitution".

<sup>60</sup> Z. Al-Ali, *The Evolution of the Iraqi Constitution – From the Constitutional Committee to the Leadership Council*, 2007 (forthcoming).

different ways, including at least the following: (i) the occupation authorities selected the makeup of the commission that was charged with drafting Iraq's transitional law; (ii) they determined the procedural framework within which the constitution was to be drafted; (iii) they influenced the manner in which the Iraqi Constitutional Committee proceeded within that framework; and (iv) officials from the U.S. embassy in Baghdad intervened directly in order to safeguard its interests in the context of the constitutional negotiations.

### 3. Constitution-Making through International Moderation – Sudan

#### a. Context

The adoption of a new constitution for the Sudan in 2005 marked the end of a 20-year civil war between the central government in Khartoum and various rebel movements in the South, most notably the Sudan's People Liberation Movement/Army (SPLM/A). A number of reasons sparked the conflict, chief among them a long history of neglect of the South by successive governments in Khartoum, the religious divide between a mainly Islamic north and a mainly Animist and Christian South and the conflict over oil and water.<sup>61</sup> After Sudan became an Islamic Republic in 1983 and the Khartoum government introduced an Islamic Constitution in 1998, it was clear that any settlement of the conflict would have had to provide for a new constitutional basis of government.<sup>62</sup> However, this would necessarily have to be preceded by a peace agreement between the North and the South.

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<sup>61</sup> D. Johnson, *The Root Causes of Sudan's civil wars*, 2003; International Crisis Group, *God, Oil and Country: Changing the Logic the War in Sudan*, 2002, 3-33 (available at: <[www.crisisgroup.org](http://www.crisisgroup.org)>).

<sup>62</sup> A. el-Gaili, "Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan", *Harv. Int'l L. J.* 45 (2004), 503 et seq. (531); on the background briefly A. Loyd, "The Southern Sudan: A Compelling Case for Secession", *Colum. J. Transnat' L.* 32 (1994), 448 et seq. and extensively L. Lauro /P. Samuelson, "Toward Pluralism in Sudan", *Harv. Int'l L. J.* 37 (1996), 65 et seq. and A. El-Affendi, *Turabi's Revolution: Islam and Power in Sudan*, 1991.

National efforts to negotiate a peace and find a constitutional settlement began in the late 1980s, but had little success<sup>63</sup> despite a significant effort on the part of individual regional and international actors to encourage a peace agreement.<sup>64</sup> The negotiations that finally lead to a peace agreement and the ensuing constitution, which were unthinkable without strong external support, began only in 2002. However, in contrast to the cases of East Timor and Iraq, these external involvements were entirely diplomatic and were in no way military. During the entire civil war and during the course of the country's constitutional reform, Sudan was a sovereign entity, even though the central government had lost actual control over most of the South.

To understand the constitution-making process and to assess the external influence that was exercised, one has to distinguish two phases of the process. The first phase encompasses the negotiations and conclusion of the peace agreement, the so-called Comprehensive Peace Agreement (CPA), signed on 9 January 2005 which ended the civil war.<sup>65</sup> The actual drafting and enactment of a new constitution took place only afterwards, in a second phase mainly between May and July 2005. While this second phase was an almost entirely internal process, the negotiation and conclusion of the CPA was considerably influenced by external factors. And it was the CPA that determined the procedural and substantial framework for the constitution-making process.

## b. The Peace Negotiations

The peace negotiations were organized and hosted by a regional, East African organization called the Intergovernmental Authority on Development (IGAD).<sup>66</sup> IGAD was first approached in 1993 by the Sudanese government and the SPLM/A to help resolve the Sudanese conflict, but

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<sup>63</sup> B. Kuol Deng, "The Legal Implications of the Sudan Peace Process", in: K.G. Adar (ed.), *Sudan Peace Process: Challenges and Future Prospects*, 2004, 102 et seq. (103).

<sup>64</sup> International Crisis Group, see note 61, 153-177; H. Elliesie, "Quo vadis Bilad as-Sudan? The Contemporary Framework for a National Interim Constitution", *Recht in Afrika* 2005, 63 et seq. (64/65).

<sup>65</sup> It is available at: <[http://www.mpil.de/shared/data/pdf/cpa\\_complete.pdf](http://www.mpil.de/shared/data/pdf/cpa_complete.pdf)>

<sup>66</sup> The Intergovernmental Authority on Development (IGAD) was established in 1996 and superseded the Intergovernmental Authority on Drought and Development (IGADD), which had been founded in 1986. Members of IGAD are Djibouti, Ethiopia, Kenya, Somalia, Sudan, Uganda and Eritrea. For further information, see under <<http://www.igad.org/>>.

the negotiations that commenced soon afterwards proved unsuccessful.<sup>67</sup> Negotiations resumed in 2002, apparently as a result of the exceptional pressure that was exerted by the U.S. government.<sup>68</sup> These peace negotiations, however, were not governed by any formal mandate, and were not governed or even ever the subject of a UN Security Council Resolution or the like. The only document that formed a basis for the negotiations was the IGAD Declaration of Principles that was signed by the negotiating parties on 20 July 1994.<sup>69</sup> This declaration set out seven substantive principles to guide a negotiated solution to the conflict but did not determine the role of IGAD or any procedural rules.<sup>70</sup>

When the negotiations first began, the two sides were represented by a number of different officials, but senior leaders tended not to involve themselves directly. As the talks progressed, however, the two sides upgraded their respective representation as they realized the importance of safeguarding their interests. Thus, midway through the negotiations, Khartoum nominated its then Vice President, Ali Osman Mohamed Taha, to be its representative in the talks while the SPLM was represented by its chairman, John Garang. The Government of Sudan was tantamount to the National Islamic Front of President El-Bashir, which had taken over power in 1988. Other political parties or groups, be it from the South or the North, were not included in the negotiations. This seriously undercut the inclusiveness and general acceptability of the process.<sup>71</sup>

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<sup>67</sup> On IGAD's role, International Crisis Group, see note 61, 155-160.

<sup>68</sup> Soon after the terrorist attacks of September 2001, US President Bush sent a Special Envoy (Senator John C. Danforth) to the Sudan in order to bring the negotiations back on track, see International Crisis Group, "Sudan, Capturing the Moment", *Africa Report* No. 42, 3 April 2002; also E. Rogier, "No More Hills Ahead? The Sudan's Tortuous Ascent to Heights of Peace", Security Working Paper No. 1, Clingendael - Netherlands Institute of International Relations, 2005, 45-57.

<sup>69</sup> See Joint Communiqué Issued on the First Session of the Political Committee Task Force for Sudan, available at: <[http://www.igad.org/sudanpeace/sudp\\_20\\_07\\_2002.htm](http://www.igad.org/sudanpeace/sudp_20_07_2002.htm)>, on this declaration, International Crisis Group, see note 61, 155.

<sup>70</sup> Kuol Deng, see note 63, 103/104.

<sup>71</sup> A. Al-Madhi, "The Peace Agreement of January 2005 and the draft Constitution of May 2005", available at: <<http://www.sudaneseonline.com/epressrelease2005/jul30-69840.shtml>>; also A.M. Flacks, "Sudan's Transitional Constitution", *The Journal of International Policy Solutions* 3 (2005), 8 et seq.

Three types of international actors were involved in the negotiations. First, there was IGAD, which officially hosted the negotiations in Kenya and provided a regional framework for the negotiations.<sup>72</sup> It was represented by General Lazaro Sumbeiywo, a Kenyan national who served as IGAD's Special Envoy and central mediator in the talks. General Sumbeiywo was assisted by envoys from various IGAD states, including Eritrea, Ethiopia and Uganda as well as by a number of international experts in constitutional law and mediation, including Nicholas Haysom from South-Africa and Julian Hottinger from Switzerland. Secondly, four non-African countries – Italy, Norway, the United Kingdom and the United States (sometimes referred to as the “four powers”)<sup>73</sup> – were actively involved in the negotiations in a number of ways, not least by funding the negotiations. Thirdly, a number of international actors were indirectly involved in the peace negotiations. By way of example, the UN was constantly represented in the negotiations by at least one observer or liaison person. Also, a variety of international civil society actors with different roles and interests formed a background to the negotiations. For example, the German Max Planck Institute for Comparative Public Law and International Law under the guidance of Professor Rüdiger Wolfrum provided constitutional expertise to both parties of the negotiations, and in fact mediated a first formulation of a draft constitution for the Sudan.<sup>74</sup>

The role of non-Sudanese actors who were directly represented at the talks was primarily organizational and procedural. Neither IGAD and its mediator, nor the observer states, nor the international experts had any formal decision-making power in the negotiations and say over the outcome. Instead, their task was to moderate, mediate and help to bring about a solution. More concretely, one can say that the role of IGAD and of the observer countries was firstly to keep the parties at the negotiating table and secondly exert enough pressure to prevent a breakdown of the talks. The experts might have also served to create a level playing field between the resourceful and highly skilled lawyers of

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<sup>72</sup> F.A. Kornegay, “Regional and International Implications of the Sudanese Peace Agreement”, in: K.G. Adar (ed.), *Sudan Peace Process*, 2004, 58 et seq.

<sup>73</sup> These countries are Members of the IGAD Partners Forum, which is a consortium of western countries interested in supporting IGAD and its regional efforts.

<sup>74</sup> For details on the Sudan Peace Project on this so-called Heidelberg Dialogue, see under: <[http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/sudan\\_peace\\_project/dialogue.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/sudan_peace_project/dialogue.cfm)>.

the central government and the southern negotiators, who were less prepared for the negotiations as a result of their comparatively disadvantaged background.

The way in which the negotiations proceeded from a practical point of view is that the IGAD mediators worked in close collaboration with the parties, sometimes jointly and sometimes individually, with a view to producing a draft agreement.<sup>75</sup> This required that the international experts be intimately familiar with the parties' respective positions to formulate the agreement in a way that would be acceptable to both parties. This approach was initially successful as the international mediators managed to broker an agreement between the parties in relation to a number of key issues in a way that many observers had previously thought was impossible. Eventually however, those parties that were close to the talks, including representatives from the four powers, saw in this manner of proceeding a need to intervene so as to influence the negotiations in favor of certain outcomes in the text. For example, for the purpose of meeting the demand of their respective Christian communities, representatives from the U.S. and Norway applied significant pressure on the international mediators to tilt a compromised proposal in favor of the South, particularly in relation to issues concerning the application of Sharia law in the capital Khartoum.<sup>76</sup> One can also trace a number of other elements in the CPA that might have been unlikely without input from external forces.<sup>77</sup> When the skewed agreement was presented to the parties, the reaction from Khartoum was extremely negative. The international mediators were criticized as a result, and both parties reacted by upgrading their representation at the talks, and reduced the internationals to a more background role.<sup>78</sup>

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<sup>75</sup> Interview with Nicholas Haysom, Process Adviser to the IGAD Facilitator, 14 June 2006 (Madrid, Spain).

<sup>76</sup> Interview with N. Haysom, see note 75; see also, Kornegay, see note 72, 59-61.

<sup>77</sup> One example could be the stress on the respect for the legal obligation flowing from the signing of international human rights treaties, PSP article 1.6.1; article 2.9.11; another example could be the federal structure, even though this has taken on a highly innovative form, see R. Wolfrum, "Föderalismus als Beitrag zur Friedenssicherung: Überlegungen zu einer Verfassung für Zypern und den Sudan", in: M. Brenner (ed.), *Der Staat des Grundgesetzes*, 2004, 1245 et seq. (1261-1262); also Ellisie, see note 64, 78-79; for the Sudanese quest see the contributions in H.M. Salih (ed.), *Federalism in the Sudan*, 1995.

<sup>78</sup> Interview with Nicholas Haysom, see note 75.

The CPA was signed by the negotiating parties, that is, the Government of Sudan and the SPLM on 9 January 2005. In addition, the observer countries as well as some regional countries (Egypt and Djibouti, amongst others) appeared as international witnesses of the treaty, and hence serve as “trustees” of the agreement. The CPA was then ratified in accordance with Chapter II, article 2.12.4.1 of the CPA by the Sudanese parliament and the SPLM National Liberation Council.

### c. Executing the Peace Agreement: The Process of Constitution-Making

The actual process of drafting and adopting a new constitution commenced only after the CPA was signed. It took place in Khartoum during the summer of 2005 and proceeded with almost no international involvement.<sup>79</sup> However, the process and substance of the constitution was almost entirely predetermined by the CPA. In fact, the domestic constitutional process only executed what had been agreed upon in the CPA which makes it necessary to take a closer look at what the CPA actually prescribed.

The CPA is actually a compilation of several agreements that had been negotiated in the IGAD-led talk in Kenya.<sup>80</sup> These cover all aspects that one would expect in a constitution, and in fact, the CPA reads more like a constitution than like a peace treaty. It contains an encompassing list of Civil Rights (Chapter II., article 1.6, including the role of religion in the new state), sets out rules for the sharing of natural resources and governmental income (Chapter III.), neatly prescribes the institutional system (Chapter II., Part II.) and, last but not least, specifies the relationship between North and South, the federal system of government and the right to self-determination (Chapter II. article 1.7, article 1.5.1; Chapter I., article 1.3).

The CPA also provided for a procedural regime for the constitution-making process. It declared that a National Constitutional Review Commission (NCRC) was to be formed and have as its first task the preparation of a new constitution (Chapter II., article 2.12.5). This body was to be made up of representatives from (el-Bashir’s) National Congress Party, the SPLM and “other political forces and civil society”

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<sup>79</sup> There was only some minor and informal international involvement in the (secretive) preparation of a Draft Constitution which would serve as basis for deliberations in the constitutional assembly.

<sup>80</sup> Ellisie, see note 64.

(Chapter II., article 2.12.4.3). The CPA also outlined how the new Constitution was to be adopted, namely through adoption by the National Assembly and the SPLM National Liberation Council (Chapter II., article 2.12.7).

The actual constitution-making process followed this framework. The National Constitutional Review Commission (NCRC) was formed according to the CPA, but with an expanded membership. Instead of 60 members, the NCRC had 180 members during the constitutional drafting process in order to provide greater representation for other political parties. The NCRC drafted the Interim National Constitution for the Republic of the Sudan from May to July 2005, which was then adopted on 5 July 2005.<sup>81</sup> In substantive terms, however, the NCRC's contributions were very limited since most of the constitution was predetermined through the CPA.<sup>82</sup> Article 2.12.5 of Chapter II. of the CPA reveals to what extent the CPA is actually intended to be a virtual *Über*-constitution of the new state. It provides that in cases of conflict between the new Constitution and the CPA, the latter will prevail.

In sum, the "real" constitution-making occurred in the guise of peace talks. The domestic constitution-making in Khartoum was a premeditated confirmation of the internationally brokered peace agreement, the CPA. However, although the CPA was brokered by international actors, its substantive content reflected the consensus that was reached between those national drafters that were involved in the process. International actors influenced the peace talks, but their influence was one of moderation and expert support only. IGAD as a regional organization and the four observer countries provided human and financial resources and pressed for a constitutional settlement, but they did not impose any rules for constitutional process (in contrast to East Timor or Iraq). Also, the CPA as well as the final constitution was adopted by representative assemblies of the two conflicting parties alone. Finally, international law had no direct influence on the constitution-making process although it might have provided argumentative

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<sup>81</sup> The constitution is called an "Interim Constitution" because the CPA envisages that after 6 years there shall be a referendum on the final status of the South and its relationship to the north, see Chapter I, article 2.2, 2.5 CPA. This does not limit the text's current status as fully applicable fundamental law in any way.

<sup>82</sup> An example of what kind of questions were left open by the CPA could be the question of how the Members of the second chamber (the Council of States) should be elected, c.f. Chapter II, article 2.2.3.2 CPA and article 85 Interim Constitution Sudan.

material and standards for the parties. In effect, one can thus say that the *pouvoir constituant* in Sudan remained entirely autonomous and national, but the fact that it could arrive at its decision was only possible because external actors had created the framework for negotiations and a constitutional settlement.

### III. Assessing External Influence: Legality and Legitimacy

East Timor, Iraq and the Sudan present three distinct cases of how external influence on constitution-making processes has been organized and taken effect. There is first the case of the international community as external actor which confines its influence to organizing the procedural framework based on UN law (East Timor). There is second the case of the UN but more decisively of some occupying forces as external actors which not only organize the process but also work to impose substantive outcomes on the constitution-making parties (Iraq). And there is third the case of external influence through a regional organization and a group of interested states which act without a legal framework and impose neither procedural nor substantive outcomes but just serve to moderate and finance negotiations (Sudan). How can one assess these cases and what normative lessons can be derived from them? Two frameworks for assessment seem especially relevant, namely the legality and the legitimacy of such influences.

External influences over what should in principle be national constitutional processes occur in the context of international law. The first issue that ought to be determined is therefore first what kind of a legal regime governs external influence and whether such influence is exercised in conformity with those rules. A second related issue is the extent to which external influence affects the legitimacy of a particular constitution. According to the traditional concept of the constitution-making, as described at the outset of this paper, any external influence over a constitutional process dilutes a constitution's democratic nature as well as its legitimacy in the eyes of the nation. A vital question is therefore, in a time when the *pouvoir constituant* is increasingly being internationalized, whether, and if so in what way, such internationalization affects the legitimacy of the constitution in question.

## 1. The Legality of External Influence

### a. Applicable Law and Legal Regime

The legal regime governing external influences over constitution-making processes and providing standards for the assessment of its legality can be derived from at least two sources. Firstly, UN Security Council Resolutions have set out obligations and limitations in relation to particular constitution-making processes. Several examples have been described in the case studies set out above. Security Council Resolution 1272 provided for the establishment of UNTAET, which was responsible for the administration of East Timor, and for the creation of local and democratic institutions. Also, Resolutions 1483 and 1511 required of the occupation authorities in Iraq that they allow for a democratic process that would lead to the establishment of a new constitution. Finally, Resolution 1546 required of UNAMI that it provides assistance in the Iraqi constitutional process if so requested by the government. All these sources provide for positive obligations on the part of either international institutions or individual states and also typically call for the future constitution to respect basic human rights and establish a democratic system of government.<sup>83</sup>

The second set of norms that can affect the legality of external influence over constitution-making processes is the international law of belligerent occupation.<sup>84</sup> For example, the Fourth Geneva Convention provides *inter alia* that where one state occupies another, the occupant must maintain an orderly system of government; that the resources of the occupied state may be controlled and utilized for that purpose and in order to meet the military needs of the occupant; the occupant has limited legislative powers and may not make permanent changes in fundamental institutions; and when possible the occupant must utilize already existing local laws. However, the impact of these rules is some-

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<sup>83</sup> At the same time, Security Council Resolutions can require individual states to refrain from exerting influence on the internal political processes of other states. For example, S/RES/1559 (2004) of 2 September 2004 relating to the Lebanon, demanded “a free and fair electoral process in Lebanon’s upcoming presidential election conducted according to Lebanese constitutional rules devised without foreign interference or influence”.

<sup>84</sup> Wolfrum, see note 38, 4-7; A. Roberts, “What is a military occupation?”, *BYIL* 55 (1984), 249 et seq.; C. McCarthy, “The Paradox of the International Law of Occupation: Sovereignty and the Occupation of Iraq”, *Journal of Conflict & Security Laws* 10 (2005), 43 et seq.

what limited, since they obviously only apply where there is an occupation. Also, there is little incentive for the occupant to obey international standards that require non-interference, particularly when at least one of the reasons for the occupation is regime change. The result is therefore that, in the few instances where occupation law actually does apply, it often has a minimal impact.

Aside from these two sources of legal obligations which apply only to particular cases, there is a question as to whether general rules of public international law govern external influence over constitution-making processes. Such rules could form the basis of a more general legal regime that could govern external influence on constitution-making processes anywhere and at any time. It is possible to argue, for example, that the right to self-determination or perhaps even the notion of sovereignty can be understood as limitations on external influence or as constituting an obligation on every external actor to be as unobtrusive as possible. In a more substantive perspective, one could argue that certain substantial standards of the political process, such as the right to democratic governance and certain human rights have emerged as being inalienable, and that not only domestic governments but also external actors have to respect such standards.<sup>85</sup>

However, it is difficult to consider that this actually constitutes a distinct and coherent set of rules that must be respected during constitution-making processes or even an existing right to democracy. Even though the right to self-determination is generally recognized as a universal entitlement and includes a guarantee of self-government and independence,<sup>86</sup> it is hardly precise enough to outline effective criteria for the process of drafting a constitution and thus fails to provide concrete limits or standards for external influences. One also has to remain realistic. In the absence of a generally applicable convention, treaty or the like, we would have to prove the emergence of a legitimate rule of international law through state practice supported by an *opinio juris*.<sup>87</sup> For both aspects, the material available seems too meager and too disparate.

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<sup>85</sup> See e.g. Franck, see note 17. See also in this respect the discussion in the article of J. Leininger in this Volume.

<sup>86</sup> See in this respect Article 76 (b) UN Charter; H. Hannum, *Autonomy, Sovereignty, and Self-Determination*, 1990.

<sup>87</sup> S. Hobe/ O. Kimminich, *Einführung in das Völkerrecht*, 8th edition 2004, 184; see also Franck, note 17, 51.

### **b. Whether Existing Rules are Respected in Practice**

The question of whether the particular rules governing external influence are respected in practice can only be considered on a case by case basis. In the case of Sudan, the issue is relatively straightforward as there were in fact no international rules that were to be followed. Thus, all the external influence that was exercised by IGAD, by individual foreign states and by international experts was unregulated by international law. The only counterbalancing measure to this influence was therefore the presence and independence of mind of the constitutional drafters. As set out above, the Sudanese drafters did resist external influence on more than one occasion when they considered that the particular intervention was motivated by self-interest rather than by a desire to make a positive contribution to the constitutional process.

Similarly, in the case of East Timor, we cannot detect any breach of the legal regime that was set up for the process of constitution-making. One might ask whether UNTAET Regulation 2001/2, which established the framework for the constitutional process in the first place, went beyond the mandate that was given by Resolution 1272, since the latter did not explicitly mention a constitution-making process.<sup>88</sup> However, one can convincingly argue that Regulation 2001/2 was implicitly covered by the mandate given in Resolution 1272. And also, in the actual process of constitution-making as it unfolded on the basis of UNTAET Regulation 2001/2, there is no indication that external actors violated the self-given rules.

In relation to Iraq, the question is complicated by the fact that the legal regime changed during the constitutional process. From the end of the war in May 2003 until June 2004, the country was under occupation, hence the international law of belligerent occupation applied. In addition, Security Council Resolutions 1483 and 1511 imposed a number of positive obligations on the occupying powers. After June 2004, the occupation officially came to an end and sovereignty was transferred to the Iraqi government, which meant that the involvement of external actors was then governed solely by the applicable Security Council Resolutions.

In the first phase, the occupation authorities drafted the TAL, which took the form of a temporary constitution.<sup>89</sup> There is a question as to whether this process represented a violation of the pre-existing consti-

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<sup>88</sup> See under Part II. 1. a.

<sup>89</sup> See under Part II. 2. b.

tutional order, but the debate is somewhat academic as, in any event, the invading armies not only swept away all the institutions that would have been responsible for amending the previous constitution,<sup>90</sup> it was moreover one of the very goals of the war to bring the regime of Saddam Hussein to an end. However, it seems practically beyond question that the drafting of the TAL does represent a violation of the international law of occupation and of the specific Security Council Resolutions that apply to the Iraqi situation. Indeed, not only did the TAL establish a new constitutional order, but it also reformed the structure of the state. For example, article 4 provided that Iraq is “federal”, which was a clear departure from Iraqi constitutional tradition. Security Council Resolutions 1483 and 1511 do not actually specifically allow for the possibility of drafting a temporary constitution – they merely indicate that a timetable should be set for the drafting of a new permanent constitution and the UN and “associated organizations” should support these constitutional efforts.<sup>91</sup> The fact that the Security Council never acknowledged the TAL’s existence in any of its resolutions is an indication that it recognized that the document was lacking internal and international legality. It is arguable therefore that the TAL was never a valid legal document.

In the second phase, that is after sovereignty was transferred back to the Iraqi government, Security Council Resolution 1546 is the only source available and it only sets out the specific role that the United Nations was to play during the drafting process. In its operative para. 7(a)(iii) it provides that UNAMI as well as the Special Representative were to “play a leading role to: (iii) promote national dialogue and consensus building on the drafting of a national constitution by the people of Iraq”, and that this role could only be played if requested by the government of Iraq, which is what took place.<sup>92</sup> More important,

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<sup>90</sup> Article 63(b) of the 1970 Iraqi Constitution, which is the text that was in force when the war broke out, provided that “[t]his Constitution shall not be amended except by the Council of Revolutionary Command through the majority of two third [sic] of its members” [official translation], Iraqi Gazette No. 10, 13/3/1971; this body was swept away during the war, and the majority of its Members were arrested by the U.S. and the U.K.

<sup>91</sup> S/RES/1511 (2003) of 16 October 2003 operative paras. 7, 10, 11.

<sup>92</sup> The president of the Iraqi parliament, in a letter dated 18 May 2005, invited the United Nations to “provide technical assistance, including technical and logistical public affairs expertise that can help promote national dialogue [...] and build consensus nationwide”, letter from Hajim M. Al-

though, is that Resolution 1546 does not set out a specific role or guidelines for the involvement of other actors, including individual external actors such as the United States and the United Kingdom. Nevertheless, there is no question that the United States influenced the drafting process. It intervened in order to prevent Iraqi officials from extending the process by six months, even though additional time was needed.<sup>93</sup> It encouraged the exclusion of some of the negotiating parties, even when it had originally encouraged their inclusion.<sup>94</sup> Finally, it introduced a number of substantive changes to the text itself, sometimes for the purpose of preserving its own self-interest.<sup>95</sup> However, improbable as it may seem, these interventions do not actually represent a violation of international law, because there are no positive rules that could have been violated in the circumstances. Given the above, the intervention of *individual states* as external actors in what should be a sovereign constitutional process is a clear example of an area that would benefit from additional regulation or at least further consideration by the international community in order to avoid the type of outcome that was reached in Iraq.

## 2. External Influence and Constitutional Legitimacy

Since the legality of external influences is hard to assess and legal rules only exceptionally provide a sharp normative yardstick, as just seen, another framework of analysis comes into play: the question of how external influences affect the legitimacy of the newly drafted constitutions. This framework is easily justified since the legitimacy of the new constitutional order is of paramount importance for whether the new order will succeed or fail.

But how to analyze constitutional legitimacy? Obviously, there is no universally accepted definition of constitutional legitimacy. It can, firstly, be understood in a sociological perspective, referring to the question of whether citizens regard the constitution as being justified and effective and thus acquiesce to the particular legal order that it es-

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Hasani, President of the Iraqi National Assembly, to Ashraf Jehangir Qazi, UN Special Representative of the Secretary-General, (unpublished).

<sup>93</sup> See under Part II. 2. c.(i), especially note 55.

<sup>94</sup> *Ibid.*, see note 55.

<sup>95</sup> See under Part II. 2. c, note 58 and 59.

establishes.<sup>96</sup> However, such legitimacy is hard to measure, especially so in the cases presented here which relate to constitutional systems that have only recently come into force. It would be difficult to predict the societal acceptance of the constitution and whether it will succeed or fail in establishing an accepted order.

Legitimacy can also be understood in a more normative perspective, referring to the (moral or normative) acceptability of the constitutional order.<sup>97</sup> This acceptability rests on two dimensions. Firstly, normative or moral legitimacy can be based on the *substance* of the constitution, hence the acceptability of the content of the constitution. But it can also, secondly, rest on the *procedural* aspect of how the constitution came into being. Both dimensions will be analyzed here. We will first ask what effect the external influence has on the substance of the new constitutions. We will then analyze what effect external influences have on the process of constitution-making and hence on the sense of ownership that the affected society can have for the newly established order.

Yet, we should not only concentrate on the effects of external influences but also ask for the legitimacy of the external influence itself. In a final step, we will therefore inquire into the question of whether such external influences should be conducted in accordance with certain criteria to be legitimate in itself.

#### a. The Effect of External Influence on the Substance of the Constitution

External influence is typically provided in the form of technical assistance to the drafters of the constitution. Although the results were never perfect, in all three of our cases studies, external influence played a major (and mostly positive) role in supporting the national actors in preparing a technically advanced text. However, it is also possible in some circumstances to attribute failures and successes in designing a constitutional system on the impact of external influence. For example, the American push to exclude the Sunnis from the later stages of the

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<sup>96</sup> M. Weber, *Economy and Society*, 1968, 33 et seq.; also Schmitt, see note 10, 87-91; R. Fallon, "Legitimacy and the Constitution", *Harv. L. Rev.* 118 (2005) 1787 et seq.

<sup>97</sup> J. Habermas, "Legitimationsprobleme im modernen Staat", in: P. Graf Kielmansegg, (ed.), *Legitimationsprobleme politischer Systeme*, PVS Sonderheft 7 (1976), 39 et seq.; D. Copp, "The Idea of a Legitimate State", 28 *Philosophical & Public Affairs* 28 (1999), 43 et seq.

constitutional negotiations certainly contributed to the fact that the constitution now imposes something akin to confederalism on a people that is not entirely committed to the idea – and the effect that the country has practically become ungovernable.

Another aspect that affects the substantive outcome is the type of external actor that is involved. One can draw a distinction between influence that is exerted by individual states on the one hand, and influence that is exerted by multilateral institutions on the other. Where an individual state influences the drafting process of a constitution-making society, it seems natural that the interests of those two can conflict with each other. At that moment, it is also natural that the influencing state will act in order to protect its interest. One way in which this strain materializes in a constitutional text is that the intervening state will favor one or a group of local factions over one or a group of others, therefore creating an unnatural imbalance in the system of government that would not otherwise have existed. This problem typically does not exist when external influence is exerted by multilateral institutions. Because of the fact that they have a varied membership that is often characterized by contradictory interests, it is often difficult for such institutions to focus on anything other than the particular missions with which they have been entrusted.

In this respect, external influence by an individual external actor can have a detrimental impact on the moral legitimacy of a constitution. In the case of Iraq, the U.S.' main interest was to ensure that the constitutional process was completed on time and an extension avoided. Thus, whereas the UN as well as senior U.S. officials initially pushed for all communities to be represented in the Iraqi constitutional process, the U.S. ambassador eventually encouraged the exclusion of the Sunnis when it became obvious that their incorporation would prolong the negotiations in a way that was not consistent with U.S. domestic interests.<sup>98</sup> The result was that the framework that was favored by the Kurds and that was originally intended to form an exception in an overall and comprehensive federal system was adopted as a generalized solution throughout the constitution. Many observers have expressed the concern that the implementation of this new system could very well lead to a collapse of the state in its entirety.<sup>99</sup>

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<sup>98</sup> International Crisis Group, see note 55, 3-4.

<sup>99</sup> See, for example, N. Haysom, "Summary and Critical Review of the Draft Constitution Presented to the TNA on 28 August 2005", The United Nations' Office of Constitutional Support, 15 September 2005, Unpub-

The case of Sudan is complicated by the fact that individual intervening nations involved themselves in the constitutional process through a multilateral institution, but the experience was similar. As mentioned, for domestic political reasons, the United States successfully applied pressure on IGAD to skew the draft agreement in favor of its own interests. The unbalanced sections of the draft were not actually adopted in the final text as a result of the fact that the multilateral institution in question was acting merely as a mediator and not as an occupant that had the power to impose solutions. However, the tendency that individual intervening actors attempt to skew agreements in accordance with their own interests was also borne out in the Sudanese example.

The East Timorese experience, in which the entire constitutional process was managed by the United Nations is the only case in which no allegations have been made according to which external actors had unduly impacted the substance of the constitution. It is possible to assume therefore that where the only intervening actor is a multilateral institution, the pattern of behavior tends to be more balanced.<sup>100</sup>

#### **b. The Effect of External Influence on the Process and on the Society's Sense of Ownership**

External influence can also affect the process of constitution-making and thus impact the relationship between the constitution-making society and the constitution itself. Firstly, in each of our case studies, external influence affected the way in which the citizens of each country participated in the respective drafting processes. So, for example, as a result of the fact that the main interest of the U.S. was to ensure that the Iraqi

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lished (quoted by Newsweek, available under: <[www.msnbc.msn.com/id/9558117/site/newsweek/](http://www.msnbc.msn.com/id/9558117/site/newsweek/)>; also Al-Ali, see note 57.

<sup>100</sup> However, it has to be noted also that international institutions with particular missions, such as the IBRD and the IMF, can at times intervene in order to impress upon the constitution-making process legal and economic mechanisms that would be more advantageous to their membership than to the constitution-making society in question. For example, when constitutional drafters are considering what economic model they should adopt in relation to the exploitation of their national resources, or whether to allow for a system to let foreign investors freely enter into their domestic market, it can be possible for individual nations outside the constitutional process to secure an economic interest in that constitution-making society through advice given by such institutions.

constitutional process was completed on time, the views and opinions of the Iraqi people were at best secondary. The consequence was that although an effort was made to consult the public as to the type of state that it wanted to live in, the drafting process was already completed by the time the results of the consultation were received. On the other hand, in situations where external influence does not make its presence felt as strongly, or where it is exerted by multilateral institutions, this does not automatically translate into greater input from the citizens of the relevant countries either. With respect to East Timor and Sudan, there is very little indication that the views and opinions of their respective citizens were taken into account during the drafting process.<sup>101</sup>

Secondly, external influence can also impact the sense of ownership of political elites over the constitution. The role of elites is an issue that increasingly forms part of the discourse of both international institutions that are involved in constitution-making, and of constitutional law scholars. Noah Feldman, for example, who acted as a legal adviser to the Coalition Provisional Authority in Iraq, argues that in order for a new constitutional order to succeed it must get off the ground through a process in which local elites adopt particular constitutional principles out of self-interest.<sup>102</sup> Madhavi Sunder, on the other hand, retorts that in the current geo-political context, the West has a responsibility not to allow traditionalist or fundamentalist local elites to determine the constitutional order of a particular country, but to take sides in favor of what she sees as those who seek to institute a democracy that is respectful of egalitarianism.<sup>103</sup> The question in this debate is whether or not external actors should act upon their self-interest and affect constitutional processes in a way that protects their own domestic concerns, despite the danger that such a manner of proceeding could impair the sense of ownership of local elites over a constitution.

Although Sunder mentions the danger that acting upon self-interest poses, she fails to take into account the different factors that can motivate self-interest. Her assumption is that the only reason constitution-making societies object to external influence is because intervening states do not live up to the standards that they seek to impose on others. This argument simply does not follow as it practically denies that selfish self-interest exists at all, which is particularly worrying considering what has been set out above. It is well known to all those that par-

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<sup>101</sup> See under Part II.1. c. and Part II. 3.b.

<sup>102</sup> Feldman, see note 4.

<sup>103</sup> Sunder, see note 4.

ticipated in the Iraqi process that one of the U.S.' main concerns was to ensure that the constitution's section on human rights should not create a mechanism that would allow Iraqi citizens to bring claims against U.S. troops in Iraqi courts. The U.S. therefore intervened to ensure that what was previously article 44, which provided that "[a]ll individuals shall have the right to enjoy all the rights mentioned in the international treaties and agreements concerned with human rights that Iraq has ratified", was dropped from the final draft of the constitution. This created an uproar in Iraq. The result of the influence of self-interested intervening state actors in this case was therefore to alienate precisely those elites that Sunder would have hoped the U.S. would favor.

But there's more. In all three of our case studies, one of the objectives of the external actors was to ensure that the processes would be as inclusive as possible. However, this goal proved difficult to achieve. In Sudan the external actors worked towards encouraging dialogue and consensus-building between the country's communities. However, they were ultimately unsuccessful in including negotiating parties from the North or the South other than the central government and the SPLM. This was mostly due to the fact that the external actor was in fact not administering the constitutional process, but was in fact merely acting as a mediator. In East Timor, we have seen that although UNTAET instituted a number of rules with a view to ensuring that Fretilin would have to seek compromise with some of the country's minority parties, it was eventually unable to prevent Fretilin from dominating the discussions and imposing its will. Finally, in Iraq, although the UN and the U.S. initially pushed for Sunni negotiators to be included in the discussions, they were dropped when it became apparent that their presence would have extended the drafting process in a way that would have been inconvenient for U.S. domestic purposes. Therefore, although the external actor here did choose sides, it proceeded not in the interest of favoring progressive forces within the country as Sunder would have liked, but in order to satisfy its own narrow self-interest.

In sum, we can note that external actors have generally tried to ensure that the constitution-making processes are as inclusive as possible in order to enhance the society's ownership over the new constitution. However, such external attempts often fail. The reasons can be located in domestic political circumstances that discourage or even prevent popular involvement (like in Sudan or East Timor) – or in the self-interest of the respective external actor (like in Iraq). Nevertheless, the failure does not diminish the value of such attempts to provide channels for more participation in the political processes in the first place. As

long as such attempts are not perceived as violating fundamental local rules or customs, any such procedural help, be it for elites or for the general public, should be seen as a legitimating and positive influence.

### **c. How External Influence Can Itself Be Legitimate**

External influence can play a positive role in constitutional processes, sometimes directly and sometimes indirectly. An example can be drawn from Iraq. Were it not for the presence of the UN on the ground, which was responsible for the entire printing and distribution of the constitution to the Iraqi people, it is very likely that Iraqi voters would never have seen the text of the constitution before the day on which the referendum was held. However, external influence can also have a negative effect, for example, when external actors impose ideas on national actors, as witnessed in several of our case studies. This leads to the question of whether the external influence itself is legitimate – and what contributes to such legitimacy.

As we have argued above, there is no general legal regime that regulates external influences on constitution-making processes. It would need more concrete cases and more legal scholarship to argue that such a regime has evolved. However, it seems possible and worthwhile to build on the experience of our case studies in order to propose a tentative set of rules or recommendations – not in the sense that they ought to be applied with a view to granting constitutions ‘official’ approval, but rather with a view to allowing future constitutional drafters to benefit from the experience of others in as clear and systematic a manner as possible. These recommendations could not only contribute to more legitimate outcomes (i.e. the constitutions) but also legitimize the external influence itself.

The first recommendation would be that external actors ought to be as unobtrusive as possible. They should certainly not impose substantive outcomes on the parties to a constitutional process. Also, constitutional assemblies ought to be independent in terms of the internal procedures that they adopt. The only exception to this rule could be that external actors should work to ensure that a drafting process proceed on the basis of the greatest inclusion possible of the respective country’s different communities.

Secondly, with respect to the actors of external influence, individual states should, in as far as possible, be prevented from intervening in constitutional processes. The danger that external influence always poses is related to the self-interest of any external actor. This danger is

much greater in the case of individual state actors than in the case of multilateral institutions. External influence should therefore be channeled through multilateral institutions. As we have seen from the Sudanese case, multilateral institutions are also not immune from self-interest, but their involvement reduces the risk, particularly if the institution in question has no power to impose outcomes on the constitutional assembly.

Third, legal advice from foreign experts should be given publicly, in a transparent manner, and should be provided equally and to all the parties that request such advice from them. Indeed, in the same way that international attention can indirectly cause national drafters to improve their standards, the same applies to external legal experts, who would also benefit from additional scrutiny.

#### IV. Conclusion

External influence on constitution-making today has become much more than a mere migration of ideas or borrowing of concepts. In recent years, multilateral institutions and individual states have involved themselves in national constitutional processes in an increasingly sophisticated manner and in a number of different ways. Indeed, external actors often influence constitutional processes by making use of considerable organizational resources and sometimes even act through particular multilateral institutions in order to satisfy specific objectives. In that regard, one of the issues that has been a constant source of concern for a number of constitution-making societies is the self-interest of external actors. Even though external influence is often intended to be a source of support in a situation of post-conflict crisis, such influence can distort the constitutional-process in favor of concerns that are completely foreign to the relevant country.

In this short article, we have distinguished three different categories of external influence by the degree of the influence exerted (total, marginal, and partial), and focused on the category of partial influence. In that regard, our three case studies analyzed different forms in which external influence can manifest itself. In all three cases, the respective constitution-making bodies were supported, directed or influenced by external actors, and as such one can speak of a factual internationalization of the *pouvoir constituant*. From a legal perspective, three variations of partial influence can be distinguished.

In East Timor, the process and the organizational framework of constitution-making were determined almost entirely by the United Nations as mandated by a Security Council Resolution. In substance, however, the external influence was minimal and choices were left to the indigenous actors. The Iraqi process was regulated by a number of Security Council Resolutions, and by the applicable international law of belligerent occupation. While the latter prohibited any interference with the domestic constitutional system, the UN resolutions provided that the United Nations should play a role in the process of constitution-making. However, a small number of individual states (most notably the U.S.) involved themselves in terms of both the process that was followed and of substance of the negotiations itself. This occurred even after the occupation ended, which meant that their interventions were not regulated by any discernable legal regime. External influence in Sudan manifested itself in the form of international mediation. The constitution-making process took place mostly in the guise of formal peace talks that were organized by a regional organization and individual states, and that were outside the context of a particular legal framework, whether provided by the United Nations or otherwise. Since the mediators could not impose any solutions, the Sudanese were autonomous from a procedural and substantive point of view, while external influence occurred mostly in the form of the expert advice.

Do these three constellations result in something that could be described as an (evolving) legal concept of an internationalized *powvoir constituant*? Hardly. It seems clear that, by and large, the only source of law that regulates constitution-making is the authority of the United Nations, especially the resolutions of the Security Council. However, such resolutions have up to now regulated only specific cases, and only in relation to particular issues. There is therefore nothing like a general legal regime of external influence. The internationalized *powvoir constituant* is therefore not a clearly describable legal regime of public international or international constitutional law. Instead, the resulting legal vacuum has created the space for a number of abuses to take place. With time, it may be possible to establish a more precise body of rules than the one that exists so far. For now, the rules that do exist are clearly unsatisfactory.

In that situation, and given the impossibility of regulating such an issue, we suggest that, in order for external influence to enjoy legitimacy it must satisfy a number of criteria. Firstly, it must be exercised with restraint. This goes certainly for any attempt of imposing substantial outcomes. Influence on the procedure, on the other hand, can have

a positive effect or even be itself fundamental for bringing about the constitution-making process in the first place. Nevertheless, such merely procedural influence has to be exerted in a way that avoids that the self-interest of the external actor conflicts with or even prevails over the interests of the respective nation. This relates to a second point. External influence should, whenever possible, be exercised through multilateral institutions, in order to avoid possible conflicts of interest that may exist between individual intervening states and the constitution-making society itself. Finally, any external actors that are involved in the process must observe procedural neutrality, which entails, for example, that advice is given to all parties equally and in as transparent a manner as possible. Perhaps such rules will benefit future constitution-making societies and create a setting that will allow for more serious consideration of this topic in the future.

