# 5. Constitutional drafting and external influence

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## 1 INTRODUCTION

External influence on a constitution-making process can be exercised actively through the direct intervention of an external actor, or passively through the impact of a series of norms or rules. A wide range of actors can be involved, including multilateral organizations such as the United Nations, the World Bank and the International Monetary Fund, individual states, civil society organizations (including well-established state-funded political organizations such as the German *stiftungen*) and individual scholars or advisers who are commissioned by participants in the constitution-making process itself to provide advice on specific issues. Recent experience indicates that external actors are almost always motivated by a desire to ensure the protection of fundamental rights and adherence to international best practice in the constitution's final draft. Although this necessarily means that they seek to influence the drafting process towards a certain outcome, many observers would probably agree that this type of influence has on the whole been enormously useful in the development of constitutional law in countless countries in recent decades. Importantly, however, recent experience also shows that different categories of external actor behave according to separate standards of behavior, sometimes to the extent that external influence can skew constitution-making processes in favor of undesirable outcomes.

By virtue of the generally accepted principle that nations do not interfere in each other's internal affairs, states tend not to intervene directly in the constitution-making process of other states except under exceptional circumstances, such as in post-conflict situations. Where foreign state actors are involved, however, a number of concerns arise. Recent experience shows that where a specific state actor has an interest – political or economic – in the outcome of a particular drafting process, some of its contributions to the drafting process can be less than benign. Despite the incredible weight and importance that is rightly attributed to the act of drafting a constitution, little to no oversight is exercised on the actions of participating bodies (whether by oversight institutions within the country in question or by oversight institutions in an external actor's home country). As a result, foreign state actors often feel at liberty to place their interests before those of the constitution-making society in question, safe in the knowledge that their actions will almost certainly not be the subject of review by the relevant institutions or bodies back home.[1] The same principle applies to individual actors acting on their own behalf (including individual advisers who have been retained by constitutional committees, particular political parties or even individual drafters) in constitutional drafting exercises, who are typically motivated by a desire to contribute positively but who can also be motivated by self-interest.[2]

In contrast, within multilateral institutions such as the United Nations, the internal convergence of political interests is often such that the institutions as a whole tend to be incapable of pursuing any political aim other than encouraging the constitution-making society in question

to satisfy minimum standards in terms of fundamental rights and democratic governance. Also, where multilateral organizations such as the United Nations establish local missions to assist constitution-making societies in the drafting process, the makeup of those missions is often too diverse to permit any national self-interest to impact the advice given.[3] On the other hand, a number of other factors (including institutional weakness, the desire to avoid conflict or even controversy within the international community of actors, amongst others) can also impact the manner in which institutions behave during delicate constitutional negotiations, often forcing them to subordinate their own goals to those of other external actors, in particular state actors.

The particular identity of the external actors that are involved in a constitution-making process is but one of the factors that can determine the type of interaction that will exist between the international community of actors and the constitution-making society in question. Other factors include the identity and legal tradition of the constitution-making society in question, as well as whether the process in question is being organized in a post-conflict situation. Through the study of a number of recent constitution-making processes, this contribution finds that varying circumstances have sometimes led external actors to exercise their considerable influence selectively, sometimes favoring particular areas of intervention over others. At the same time, there is strong evidence that areas of intervention that have been subordinated in favor of specific interests have in many cases resurfaced in later years as being particularly problematic. This contribution ends by arguing in favor of more equal treatment by external actors of areas including fundamental rights and the establishment of an effective system of government, while at the same time making a more concerted effort to prevent national drafters from settling on a set of rules that would threaten to increase the risk of conflict or that would lead to the establishment of ineffective government.

## 2 CASE STUDIES

It would be natural to expect that external actors would prioritize the protection of fundamental rights in all constitutional processes, and that the framework for governance is an issue that would be carefully studied in all situations with a view to avoiding the establishment of unrepresentative or unresponsive government, or worse to avoid prolonging or instigating a conflict within the country in question. It would also be natural to expect that, where a constitution-drafting process is part of the effort to end a conflict, the priority would be to end the conflict in question by adopting a framework or agreement that would be satisfactory to the warring parties. Iraq, Afghanistan and Bosnia and Herzegovina illustrate the shifting priorities of external actors, and also demonstrate how the international community of actors sometimes contributes to the predicament that many states suffer from today.

### 2.1 Iraq

During the drafting of the 2006 Constitution in Iraq,[4] the issue of women's rights proved particularly contentious, and provoked a number of interventions on the part of the international community. Despite an early commitment by the Iraqi drafters, apparent from the first drafts that were produced in early July 2005, to the general principle of non-discrimination on the basis of 'gender, race, [sect], origin, colour, religion, creed, belief or opinion' (Article

1, Chapter 2, 20 July draft), a question mark was raised as to whether specific responsibilities would be imposed on women by the constitution, forcing them to conform to a fundamentalist vision of society. Article 6, Chapter 2 of the 20 July draft provides that '[t]he state guarantees the fundamental rights of women and their equality with men, in all fields, according to the provisions of Islamic Sharia, and assists them to reconcile duties towards family and work in society'. Despite the lack of detail, and despite the earlier prohibition against sexual discrimination, the authors of this provision clearly sought to impose their specific vision of Iraqi society on the entire country, which would see women encouraged to become mothers regardless of their own personal choice, to dress modestly and in a way that would not bring disrepute to their male relatives, and to care for their elderly and ill relatives, without necessarily being assisted in any of these tasks by any men, who were not the subject of any specific obligations under the 20 July draft. Article 6, Chapter 2's wording was the source of a great deal of controversy within the Constitutional Committee, and caused consternation amongst women's groups, secular Iraqis and members of the international community, including officials from the United States Embassy and the United Nations. As a result, it was rewritten in practically every draft that was produced over the subsequent weeks, as opposed to other provisions such as the principle of non-discrimination, which remained essentially unchanged until the end of the negotiations. The draft article was eventually replaced by Article 29 of the final version of the Constitution, according to which: 'The State shall guarantee the protection of motherhood, childhood and old age, shall care for children and youth, and shall provide them with the appropriate conditions to develop their talents and abilities.' In the context of Iraqi legal and social traditions, the reference to the protection of motherhood is merely a reference to rights that many Iraqis take for granted today, such as maternity care and free health care in maternity wards. What distinguishes the final version from its original wording is that reference to women's undefined obligations 'towards family and work in society' was replaced by rights that actually conform to Iraqi traditions. The international community's interventions in relation to this issue were therefore successful in ensuring that all internationally recognized fundamental rights remained protected under the 2006 Constitution.

On the other hand, as the negotiations approached their end, a number of concerns were raised by many of the drafters and some internationals on the arrangement for federalism. In particular, by mid-August, the draft provided for a list of exclusive federal powers which many considered to be exceedingly short (to the extent that central government was deprived of the power to raise taxes), and for a mechanism that allowed for the formation of future 'regions' which barely imposed any limitations on the number of governorates that could merge to form a region. That arrangement was controversial for several reasons, including that it had in fact been designed by a minority of parties and incorporated into the draft only after the US Embassy had taken over the administration of the drafting process, over the objections of the majority of Iraqi political forces, who had at that point been excluded from the discussions altogether. In the political climate that was prevalent in Iraq at the time, many argued that the combination of those two provisions would lead to the formation of three large ethno-sectarian regions, and possibly even to the breakup of the country altogether. Many Iraqi drafters were concerned that this arrangement could serve to exacerbate the already intense civil conflict that had been raging in the country for some time.

That fear was shared by many in the international community. Advisers from the United Nations completed an internal 'summary and critical review' of the draft constitution on 15

September 2005, one month before the referendum date. It provided in relevant part that 'the provisions for the conversion of governorates into a region outside Kurdistan create a model for the territorial division of the State which in our view leaves the central government underpowered and possibly under resourced'.[5] Professor Yash Ghai, one of the world's leading constitutional scholars, acted as Process Adviser to the Chairman of the Iraqi Constitutional Committee. In an internal report drafted by Professor Ghai with Jill Cottrell and completed before the referendum date, they explained that the draft constitution 'could sharpen even further the divisions within Iraq and pose a serious threat to the unity and territorial integrity of the country. There are also technical deficiencies in the draft which are to some extent tied to key substantive provisions and will be hard to remedy. We have serious reservations whether the [Draft Constitution] as it stands can be fully and effectively implemented, without grave danger to state and society. Our analysis suggests that Iraqis need to give a great deal more thought to the modalities of its implementation than was possible in the process so far'.[6] That opinion was shared with the Iraqi constitutional committee and some members of the international community at the time but was not made public until much later.

Despite these concerns, the international community as a whole was not moved to intervene in the way that it did to protect fundamental rights and declared that it was satisfied with the Constitution's final text. There was in fact no appetite to debate the issue with the Iraqi constitutional committee given the insistence by the United States that the process should not be extended past the 15 October 2005 deadline, despite the fact that the possibility had been provided for in the interim constitution. The United States was apparently motivated by a desire to meet a certain number of benchmarks in Iraq, particularly with a view to portraying an image of progress for the purposes of domestic US politics. Thus, when the text of the 'summary and critical review' was leaked to the press, the UN Secretary General's Spokesman declared that it did not reflect the UN view and disingenuously added that '[t]he UN view is that the constitution should be judged by the Iraqis. The Secretary-General welcomed the adoption of the draft, the putting forward of the draft for the referendum, and this has always been an Iraqi-owned and Iraqi-led process, and it is up to them to judge the constitution'.[7] Despite this attempt to distance the international community from the constitutional process, the United Nations felt compelled to intervene in relation to Iraq's electoral framework precisely two days later when the Iraqi Transitional National Assembly passed a referendum law that many interpreted as having been designed with a view to disenfranchising a large proportion of the population. On the same day that the law was approved by the National Assembly, the United Nations explained to the press that '[w]e have expressed our position to the national assembly and to the leadership of the government and told them that the decision that was taken was not acceptable and would not meet international standards. Hopefully by tomorrow the situation will be clarified'.[8] Embarrassed into action, the law was amended by the National Assembly the next day in a way that was acceptable to the international community.

### 2.2 Afghanistan

The Afghan constitutional process bore witness to an almost identical pattern of behaviour.[9] In the period prior to the 2001 war and the introduction of the new constitutional system of government, Afghanistan was characterized by gross human rights violations (including particularly inhuman treatment of women) as well as unaccountable and unstable government

(illustrated by frequent conflagrations throughout the country as well as numerous unconstitutional changes in government). As constitutional discussions commenced in the post-2001 period, the international community was heavily involved through the participation of a number of institutions (including the Center on International Cooperation at New York University, the United States Institute of Peace, amongst others), foreign diplomats, and the United Nations (although the latter purportedly sought to leave a light footprint on the discussions in theory to avoid establishing a culture of dependency on the part of the Afghan authorities) (Schoiswohl 2006). Throughout the process, a number of organized interventions were made by external actors to the Afghan Constitutional Commission in the form of position papers in order to suggest certain outcomes, mechanisms or wording in relation to specific issues. In one such intervention, New York University's Professor Barnett R. Rubin sought to encourage the Commission to explore mechanisms that would prevent Afghanistan's future government from being dominated by one faction or from lapsing into the familiar pattern of undemocratic and illegitimate rule. In a presentation to the Constitutional Commission, Professor Rubin advised that 'as drafters of the constitution you can design a presidential system that will reduce these risks. Among the methods for doing so are inclusion of a prime minister, the design of the system for electing the president, and the drafting of the powers of the president, especially in relation to the prime minister, legislature, courts, and provincial or local government'.[10] A number of other interventions were made throughout the Constitutional Commission's tenure in relation to other issues, including the protection of fundamental rights.

As the constitutional negotiations accelerated in late 2003, the dynamics of the discussions transformed. A number of external actors participated in the discussions, and clearly set out the international community's interests and its 'red lines'. In particular, a number of foreign officials made clear to the Afghan drafters that the international community would not countenance an outcome that would subject women's rights to Islamic Sharia and that would not uphold international standards on fundamental rights (Rubin 2004). Despite the efforts of some of the more conservative elements in the Loya Jirga, most of the objectives that had been set by the external actors were achieved. Although the 2004 Constitution provides that '[t]he sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals' (Article 2) and that '[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan' (Article 3), a specific reference was included to international law so as to avoid any ambiguity as to how issues relating to human rights should be decided: 'The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights' (Article 7).

On the other hand, the transition to the Constitutional Loya Jirga phase of the negotiations also saw the introduction for the first time in the draft of a system of government that concentrated significant power in the office of the president. Previous proposals had provided for a semi-presidential system of government that would have subjected the president to greater oversight and control by the legislative branch of government amongst others. The final proposal that took shape in December 2003, however, provided for a powerful directly elected president who was solely responsible for appointing the prime minister as well as other key officials and who was not subject to a vote of no-confidence in the legislature, except for an impeachment process requiring an almost unattainable super-majority (Article

69). Given the state's institutional weakness and the volatility of previous administrations, a number of concerns were raised that the proposed framework could encourage the illegitimate capture of power. Some advisers suggested that collegiate systems of government should be adopted to avoid concentrating too much power in the hands of one individual. None of these concerns was raised by the international community and by those external actors that had established red lines in relation to the role of Islam before the final adoption of the Constitution in January 2004. Some suggestion has been made that the United States and the United Nations had a vested interest in ensuring a strong presidential system centered around the person of Hamid Karzai (Thier 2006).

### 2.3 Bosnia

In Bosnia and Herzegovina ('BiH'), external actors were equally if not even more involved in the discussions that led to the adoption of the 1995 Constitution, and also spearheaded the effort to reform the constitution a decade later.[11] However, as a result of various circumstances, including a desire to end the country's civil war, the international community pursued a different set of priorities, to the extent that the values that it had established as 'red lines' in both Afghanistan and Iraq were relegated in favor of a number of other concerns. In particular, the BiH Constitution establishes a delicate system of checks and balances, which is designed to provide equal representation to each of BiH's 'constituent peoples' (Bosniacs, Croats and Serbs) in each of the national institutions. Indeed, other than in the Central Bank and the Constitutional Court, each group has a veto power over all essential decision-making. This structure was intended to ensure that ethnic groups would remain equal, but it also gives each ethnic group ultimate decision-making power in relation to any matter that it considers important. In this sense, each group is sovereign. Thus, the three-member Presidency is encouraged to act by consensus. If that fails, two members may adopt a decision, but the dissenting member may then declare that decision 'destructive of a vital interest of the Entity from the territory from which he was elected' in which case the matter is referred to the legislature of the ethnic group from which the dissenting member of the Presidency was elected (Article V(2)(d)). The BiH Constitution also establishes a Parliamentary Assembly, in which each group is granted a veto power. The Assembly is composed of a lower chamber (the House of Representatives) and an upper chamber (the House of Peoples), which is to be composed exclusively of members of the three 'constituent peoples' (Article IV). Both must approve a bill before it can be considered to be law (Article IV(3)(c)). Each of BiH's main ethnic groups enjoys a *de facto* veto by virtue of the quorum requirement, according to which at least three Bosniac, three Croat and three Serb delegates must be present in each of the House of Peoples sessions to be valid (Article IV(3)(d)). The Dayton Accords also established an Office of the High Representative (OHR), which has a responsibility to 'monitor the implementation of the peace settlement' (Article III(I)(a) of Annex 10) which includes overseeing the 'establishment of political and constitutional institutions in Bosnia and Herzegovina' (Article I(1)).[12] The High Representative has since intervened in BiH's governance structure on a number of occasions, including to grant a number of authorities to the state that were not originally provided for by the Constitution.[13]

This clearly discriminatory regime was endorsed by all the external actors that participated in the drafting process, including the United States and the European Union, mainly for the purpose of seeking an accommodation between the three principal warring factions and with

a view to ending the conflict. Thus, although the new Constitution and the remainder of the Dayton Peace Accords did successfully achieve that objective, the rights of minorities and fundamental freedoms such as the right to racial and religious equality were subordinated to the Constitution's horizontal distribution of powers, making it impossible for BiH to live up to the commitments it undertook when it joined the Council of Europe.[14] During the following decade, the new state made little progress in resolving its many political, social and economic difficulties. In particular, the two 'entities' failed to cooperate towards a strengthening of the state, with all three 'constituent peoples' entrenching themselves in ethno-sectarian positions, often leading to paralysis within parliament and government. The prospect of acceding to the European Union served as an incentive for some to reform the Constitution, but was ultimately insufficient to cause any real momentum to reform.[15]

An opportunity to amend the Constitution presented itself in 2005 when a number of external actors (including officials from the United States and the European Union) encouraged the eight major political parties that were represented in the Parliamentary Assembly to form a constitutional working group with a view to making a number of amendments. Despite the heavy involvement of external actors (the Secretariat that was tasked with composing a final list of suggested amendments was exclusively staffed by non-BiH officials), the proposal that was eventually put together focused almost exclusively on clarifying governmental procedures with a view to making the state more efficient and creating a path towards European integration, whereas fundamental freedoms such as the right to equality did not register during the discussions. The final proposal that was eventually put together would have increased the number of powers that are attributed to the State (Amendment I), simplified the law-making process by reducing the powers of the House of Peoples (Amendment II), and established new rules relating to the election, mandate, powers and procedures of the Presidency (Amendment III), as well as entirely new provisions relating to the election, mandate, powers and procedures of the Council of Ministers, of the Prime Minister, and even of individual Ministers (Amendment IV).[16] Significantly, however, in their effort to bring BiH closer to European integration, the suggested reforms sought to introduce the following wording into Article III of the BiH Constitution: 'State institutions are responsible for negotiating, developing, adopting and implementing, and the functioning of laws necessary for the fulfillment of European standards, as well as political and economic conditions linked with European integration'. Neither the BiH negotiators and drafters, nor the external actors that were so instrumental in designing the changes, sought to define the term 'European standards', which was somewhat surprising considering how vital this matter was to the negotiations – the proposal therefore sought to solve one difficulty by replacing it with what would inevitably have become an interpretative nightmare for officials and the courts alike. In addition, the proposed changes explicitly sought to maintain the Constitution's discriminatory horizontal distribution of powers between BiH's three 'constituent peoples'. The proposals were eventually put to a vote in the House of Representatives during April 2006, but failed to meet the two-thirds majority required by Article X of the Constitution and therefore did not take effect.[17]

It was eventually left to two private citizens of BiH, one Jewish and one Roma, to bring a claim against the BiH state before the European Court of Human Rights in which they took issue with their ineligibility to stand for election to the House of Peoples and to the Presidency on the basis of their ethnic and religious backgrounds. The court ultimately decided in favour of the complainants, arguing that their 'continued ineligibility to stand for

election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification'.[18]

## 3 PATTERNS OF INTERACTION

The above case studies, as well as a number of other recent constitution-making processes, illustrate a number of developments in comparative constitutional practice. Amongst other things, external influence has today extended its reach to all areas of law to the extent that advice is given and pressure is exerted in relation to socio-economic rights, although within each area of law important limitations often work against the exercise of influence (3.1). Our case studies also show that disagreements can arise between external actors and national drafting committees and that the outcome of such a disagreement will often depend on a number of factors, including the type of disagreement that has emerged (3.2).

### 3.1 The Reach and Limitations of External Influence

Whether by virtue of international conventions, established norms or practices, or the weight of world opinion, external influence can be felt in relation to every area of constitutional law, including fundamental rights, of governance structures, and even macroeconomic policies (Backer 2009). At the same time, however, there are relatively few areas in which a sufficient degree of consensus exists internationally to allow for constitution-making societies to be compelled to adopt a specific outcome. Although most observers would probably welcome the fact that drafters remain free to decide upon whatever options present themselves, past experience nevertheless shows that national drafting committees can sometimes adopt certain arrangements that can lead to or prolong conflict, or that can result in unrepresentative or ineffective government.

On the issue of fundamental rights, a growing number of scholars today agree that there exists a core number of norms that transcend international borders and must be reflected in the constitutional law of any nation that today wishes to be part of the community of nations.[19] These values were greatly influenced by the US Bill of Rights and are easily recognized in many basic texts around the world, including the constitutions of Afghanistan, BiH and Iraq.[20] The consensus on this issue does not enjoy much depth, however, as the agreement only extends to the enumeration of some rights and does not cover a number of issues that are considered fundamental by some and not by others, while the equally important matter of implementation barely registers at the stage of constitutional negotiations (Goldsworthy 2010). The result is that in countries such as Iraq or Ethiopia, which provide for the protection of basic rights in their fundamental texts, life goes on in the courts and in prisons as if those rights did not exist, not necessarily as a result of bad faith or evil intent, but through a number of factors, including a failure in the law-making and regulatory processes. Put another way, in many jurisdictions around the world, constitutional principles in relation to basic rights often remain just that, and are not translated into concrete rules to be followed by state officials, in part as a result of the state in question's failure, but also because of the lack of adequate attention that this issue receives amongst those actors and individuals that focus so much of their efforts on encouraging the inclusion of rights in constitutional texts.

A number of scholars have also maintained that international law has evolved to the point where one can speak of a right to democratic governance (Grant 1999: 102). Although there is some debate as to the existence of such rights or whether there is any means to enforce them in practice (Griffin 2000), there is little question today that the international environment is such that there exists a strong expectation both within and without countries that are involved in a constitution-making exercise that any new framework for governance must include some provisions that limit the exercise of government through any number of practices and norms, including the rule of law, democratic elections, the establishment of supreme audit institutions, amongst others. There was never any question in Afghanistan, BiH and Iraq that these principles and mechanisms would not be provided for in the respective constitutional texts. The difficulty once again is that aside from general principles, there is very little agreement about how democratic governance should function in practice, or even what the constituent elements of notions like the rule of law actually are.[21] From Bosnia to Iraq, judicial independence has been a long-standing constitutional principle, which was applied in both countries in ways that would be unacceptable in the West. As both countries adopted their most recent constitutions, both were bequeathed by US officials judicial councils that were for the first time responsible for managing the judiciary's internal affairs. Since that time, both Iraq and Bosnia have sought to adapt to the new institutional framework, but the notion of independence itself continues to encounter strong resistance in the halls of government, with senior officials wondering how a judge can be considered to be independent if the state pays his or her salary. Similar difficulties have arisen in relation to electoral systems and the relationships between the executive and legislative branches of government. The separation of powers is never challenged as a general principle, but the level of agreement between national actors is as shallow as international consensus on these same issues.

In the period following the collapse of the Soviet Union, as the Washington Consensus of neo-liberal economic policies spread its influence to new geographic areas, so too was its weight felt in the context of modern constitutional negotiations. The threat of being excluded from the international monetary system as well as from debt markets was sufficient in most cases to encourage most constitution-making societies to set aside what are now considered to be outdated economic policies in favor of open market policies. As South Africa began its discussions on the formulation of a final text, subtle influence from the World Bank and the International Monetary Fund helped convince the African National Congress to abandon some of the more left-wing elements of its programme. In Iraq, the drafting process that led to the adoption of the interim constitution in 2004 was heavily influenced by American jurists and officials, many of whom were affiliated to the US Republican Party,[22] which led to Iraq's heavily entrenched welfare system being limited by a sense of neo-liberal realism.[23] Nevertheless, states still retain enough flexibility to decide whether or not to guarantee strong socio-economic rights, as shown by the Iraqi example. During the negotiations that led to the adoption of Iraq's permanent Constitution in 2005, American advisers left a much lighter footprint, particularly in relation to the section on 'Rights and Liberties' (Section Two), therefore allowing enough room for the re-emergence of a number of socio-economic rights that most Iraqis feel automatically entitled to. For example, the 2006 Constitution provides that the state shall guarantee, without limitation, 'social and health security, the basic requirements for living a free and decent life, and shall secure for them suitable income and appropriate housing', 'health care', 'the right to live in safe environmental conditions', and 'free education at all stages' (Articles 30, 31, 33 and 34).

### 3.2 Categories of Disagreement

Although external actors and national drafting committees do not always see eye to eye, not all disagreements are of the same order of magnitude, in terms of both the legal tenure of the relevant subject matter area, as well as the possible repercussions of the arrangement that the national drafters are proposing to adopt. Three categories of disagreement exist:

(i) there is first the situation in which the constitution-making society itself is seeking to establish a new constitutional order that would amount to a 'gross violation' of fundamental rights, including basic human and democratic rights;
(ii) the situation in which there is a disagreement between the constitution-making society and external actors in relation to an area that does not concern fundamental rights, but on which there is a consensus on what is commonly referred to as 'international best practice'; and
(iii) the situation in which some elements of the international community, perhaps even a totality of the external actors that are involved in the constitutional process itself, have a 'difference of opinion' in relation to a matter that does not concern fundamental rights and on which there is no established or recognized best practice internationally.

It has been suggested elsewhere that, as a general response to all departures from western liberal constitutional values, the court of world opinion (through 'transnational dialogue') should be used to pressure the constitution-making society in question to amend the relevant wording (Sunder 2005). Although a necessary component of any attempt to encourage constitutional reform within a particular country, world opinion alone is insufficient, particularly in those numerous countries where government is unresponsive to local, let alone world, opinion.[24] In addition, although fundamental rights can often be a source of contention in modern constitution-making processes, the most heated and dangerous disagreements often surround governance-related issues (particularly matters that affect the exercise of power and access to funds), where none of the negotiating parties' positions can easily be identified as more 'liberal' than the others. A more nuanced approach is required, one that will necessarily vary depending on the type of constitutional arrangement that is at issue.

#### 3.2.1 Gross violations

Despite advances in recent decades on the issue of fundamental rights, some constitution-making societies have wavered dangerously close to adopting specific wording that would, if implemented, have led to a violation of a number of fundamental rights. This was the case in Iraq and Afghanistan, where the international community intervened in order to prevent the adoption of wording that, many assumed, would have legitimized gender discrimination as well as other important violations. There is significant agreement between policy makers and scholars alike that some form of direct intervention is permissible or even required in the event fundamental rights are threatened.

In the past, where particular countries have adopted constitutional arrangements that indisputably violate fundamental rights, the international community deployed a number of mechanisms to force a change to the offending wording. The clearest examples are perhaps the international reaction to Southern Rhodesia's unilateral declaration of independence in

1965 and to the establishment of the Apartheid regime in South Africa. Both situations involved the establishment of discriminatory legal regimes that deprived the vast majority of the populations of both countries of basic human and democratic rights on the basis of race. The racism inherent in both systems was so blatant that the international community was prompted into action: in the case of Rhodesia, the United Nations General Assembly called for military intervention, while the Security Council established an economic sanctions regime;[25] the South African state was frequently targeted for condemnation by the United Nations, leading many nations to divest from South African interests altogether.[26] Another possibility that has been raised would be to exclude offending nations from the community of nations through the use of the United Nations' accreditation process, although that option remains theoretical for now as the United Nations is yet to develop any specific criteria that can be applied to reject a request for accreditation (Griffin 2000).

At the same time, however, the evidence also clearly shows that the international community considers that certain interests are of such paramount importance that they trump fundamental rights. This was the case in BiH, where the right to equality was clearly subordinated in favor of the effort to end that country's conflict, despite legitimate complaints that peace could very well have been achieved without such a compromise.

### 3.2.1 Disagreements on international best practice

Although the term has not been clearly defined, 'international best practice' refers to those areas that are not governed by a binding international treaty or norm, and that do not relate to fundamental rights, but on which scholars, officials and practitioners alike universally accept that specific practices are preferable to others. By way of example, the principle of judicial independence (which is today understood to entail financial independence, self-regulation by the judiciary of its own internal affairs, the absence of political pressure on members of the judiciary, etc.) has been universally accepted by the international community as a vital component of any functional constitutional system.[27] Thus, whereas all past Iraqi constitutions paid lip-service to judicial autonomy while at the same time ensuring that judges would remain under the control of the executive, the 2006 Constitution provides for the first time for the establishment of a 'Higher Judicial Council' that is responsible for managing the judiciary's affairs independently of all other branches of government (Article 90). Other areas in which scholars and practitioners recognize the existence of international best practice include the principle of decentralization (which today entails the right of local communities to choose their own representatives and officials, and for the distribution of powers between central and local government to be firmly established and not left to be modified at will by the central government), as well as the requirement that central government should be provided with the necessary resources to satisfy its constitutional obligations, amongst others.[28] As already mentioned, despite significant progress, the areas in which an established and widely accepted practice has been reached remain relatively limited.[29]

In practice, the difficulty for external actors will be to identify those situations in which, despite their expertise in local affairs, drafters have nevertheless agreed upon a set of rules that, if implemented, would increase the risk of conflict or lead to unresponsive government. Despite the unavoidably difficult working conditions, Afghanistan and Iraq both show that it is possible to identify departures from best practice even in the context of intense pressure to reach an agreement within short deadlines. It was thus that many of the international advisers that were party to the negotiations remarked at the time that Iraq's federal authorities

could not fulfill their obligation to 'preserve the unity, integrity, independence, and sovereignty of Iraq' (Article 109) without the power to raise taxes, and that the 2006 Constitution's permissiveness in the formation of new regions was likely to increase ethno-sectarian tensions at a time of already intense civil conflict.[30] Similarly, Afghan drafters were warned against establishing an overly powerful office of the president, particularly given their country's long history of institutional weakness, which could potentially serve as an incentive to seize power through illegitimate means.[31] In both cases, however, the international community remained firmly divided on which system of government should be adopted. Despite the warnings of the independent advisers that were involved in the process, the dominant foreign state actor favored the position adopted by one of the negotiating parties over all others, rather than making an objective determination of what arrangement was most likely to lead to effective government. Developments since the respective constitutions entered into force have given truth to the warnings that were made and have dramatically illustrated the dangers that inappropriate constitutional arrangements can create.[32]

### 3.2.3 Differences of opinion

The third category of disagreement covers areas of law other than fundamental rights and where there is no international best practice, which would include matters such as the type of supreme audit institution that should be established, to which branch of government the audit institution should be answerable, the mechanisms on future constitutional amendment, specific types of social and economic rights, term limits, amongst others. Although it would be natural to expect external actors to concede in favor of national constitutional actors where this type of disagreement arises, there is evidence once again of external actors seeking to skew agreements in favor of particular outcomes and over the objections of national actors. In the delicate negotiations that eventually led to the adoption of the Comprehensive Peace Agreement in Sudan, the interest of US and Norwegian officials was to skew the agreement in favor of the Southern Sudanese, in a way that would have been attractive to the US and Norway's domestic Christian communities. Although they were successful in modifying the draft, the changes were quickly rejected by Khartoum's negotiators, who reacted by downgrading the international community's entire involvement in the drafting process (Dann and Al-Ali 2006).

## 4 THE IMPACT OF NORMATIVE VALUES ON EXTERNAL INFLUENCE

The behaviour of external actors is guided by several fundamental norms, including state sovereignty, the need to prevent and remove all 'threats to peace', to protect fundamental rights, and to ensure the establishment of stable and effective government. However, in the absence of any oversight, external actors have developed an ad hoc approach to constitutional processes, in which the importance of certain values rises and falls depending on the circumstances. There is a strong argument, however, based on the legal rules already in place and the available evidence, that although external actors should always exercise deference in favor of local rules, traditions and expertise, there are some principles that should always guide the hand of external actors.

### 4.1 A Sovereignty and the Principle of Non-interference

According to the traditional understanding of sovereignty, a state could only be sovereign if it was the sole authority capable of exercising force within specific borders such that it was subject to no authority other than international law. That notion has long served as a means to prevent or discourage external interference or involvement in the internal matters of a particular state. Based on a large body of doctrine and established practice, the United Nations Charter sought to codify that understanding in its Article 2(7), according to which '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII'. Although the Charter simultaneously provides that the United Nations has as its objective to prevent and remove all 'threats to the peace' (Article 1), international practice has leaned strongly in favor of a limited interpretation of that term.[33]

That principle has been strained in recent decades under the weight of a large number of doctrinal, legal and political developments. In the first instance, throughout the twentieth century, the majority of the world's states have agreed to curb their own sovereignty through the establishment of multilateral institutions such as the World Trade Organization, which have subjected member states to huge volumes of transnational rules, forcing many to make significant changes to their own domestic legislation in ways that were often unexpected.[34] Also, the network of international court systems have broadened their jurisdiction both substantively and geographically, particularly with the establishment of the International Criminal Court and the increasing number of hybrid courts in operation.[35]

From an institutional perspective, ever more states are turning to international organizations such as the United Nations to participate and sometimes even play a key role in what have traditionally been considered to be sensitive internal processes. For example, the international community participated in the electoral process in both Afghanistan and Iraq, in terms of monitoring and capacity development, but also in administering the electoral process itself. In both countries, the United Nations appointed staff to key positions in national electoral and complaints commissions, and has also participated in the counting process and in announcing official results (while at the same time providing the international community's seal of approval). Similarly, in Bosnia and Herzegovina, the President of the European Court of Human Rights is mandated by the Bosnian Constitution itself to appoint three members to serve full terms in its Constitutional Court. Finally, despite the absence of any international agreements on the matter, the involvement of the international community in the inner workings of national constitution-making processes has become a reality. Indeed, an increasing number of constitutional drafting processes are in and of themselves taking place through some form of international administration, including Iraq (where the 2004 interim constitution was drafted under a recognized international occupation of the country), Sudan (in which the Intergovernmental Authority on Development and a number of western states participated in the mediation process that led to the adoption of the Comprehensive Peace Agreement, and where they continue to play an important role through the Assessment and Evaluation Commission) and East Timor (where the constitutional process was directly administered by the United Nations) (Dann and Al-Ali 2006). Finally, the international community has for 15 years been directly involved in administering BiH's constitutional structure through the OHR.[36]

The pace at which multilateral institutions are being established and the rate at which states are willingly surrendering their own authority in relation to a large number of subject matter areas establishes beyond question that the traditional understanding of sovereignty is evolving in favor of a more integrated legal order. However, a number of scholars and international officials have argued that sovereignty has eroded even further and towards an understanding that imposes on states a number of duties towards the polity that exists under their authority and that such a duty gives rise to enforceable rights, regardless of whether or not the state in question accepts that it is subject to such a duty. Since the end of the Cold War, dozens of hitherto undemocratic states have sought to establish accountable government and to strengthen the protection of fundamental rights within their borders, leading a number of scholars to claim that democratic governance has become an enforceable right.[37] A number of international officials with an interest in the protection of human rights have taken the argument even further, maintaining that a failure on the part of a state to protect its own citizens constitutes a 'threat to the peace' under Article 1 of the United Nations Charter and therefore imposes a duty to intervene on the international community.[38] Meanwhile, developments over the past two decades, including the Balkan wars, September 11 and the invasions of both Afghanistan and Iraq, have encouraged still others to argue in favor of intervention in the case of internal civil conflict in order to promote, preserve or establish democracy or even in the event of passive security threats.[39]

Despite the introduction of democratic and fundamental rights in the debate on sovereignty, the content of those rights remains undefined in the absence of a binding treaty or an international agreement (Griffin 2000). As a result of that, as well as a number of other factors, the suggestion that the international community should have the right to intervene where a particular state has failed to protect its citizens' basic rights has remained particularly controversial. According to Professor Dominik Zaum, '[s]tate practice suggests that human rights, human security, welfare and democracy have become important elements of the beliefs that legitimize authority held in particular by western members of the international community, though not necessarily of all states in the world. [However] even among western states, the notion of sovereignty as responsibility does not seem to have evolved to the extent that all human rights violations, and in particular a right to democratic governance necessarily justify military intervention.'[40] Opinions in the world community tend to reflect that view, particularly given the concern amongst many in the developing world of renewed domination on the part of western nations,[41] and based on the accusation of double standards which saw western nations intervene militarily for the protection of the civilian population in Kosovo, but ignore a much more violent and destructive conflict in Rwanda during the same period.[42]

### 4.2 'Threats to Peace' and Constitutionalism

While the relationship between state sovereignty and the duty of intervention remains ambiguous today, there is scarcely any debate whatsoever on how the responsibility to prevent and remove all 'threats to the peace' impacts the interaction between external actors and the constitution-making society in question. Most contemporary authors that have addressed this issue tend to focus on individual drafting processes without necessarily discussing the impact of external influence, or limit their deliberations to whether external actors should intervene at all, without entering into how different interests and principles should interact in theory and in practice (Feldman 2005; Sunder 2005). A number of impor-

tant questions are therefore left open for debate, and are informed by recent experience, including the three case studies discussed earlier in this chapter.

Are 'threats to peace' of such paramount importance that they constitute an overriding factor that force constitutional processes and external actors to set aside all other concerns? Although a precedent was established in BiH, where some fundamental rights were set aside in favor of the general effort to end the conflict in that country, there is a strong argument against generalizing that practice. Aside from the fact that there are genuine arguments that have yet to be addressed that peace in countries such as BiH can be achieved without compromising basic freedoms, the logical conclusion of the tendency to prioritize the achievement of peace over all other interests leads to bleak scenarios in which the international community can be brought to encourage the suspension of democracy and individual freedoms without limitation where it is considered that 'peace' is at risk. That possibility rings especially true considering that fundamental rights are in fact the only rules that are binding under international law – as discussed earlier, there is as of yet no concrete right to democracy, which leads one to assume that there are less theoretical and legal impediments to suspending democratic governance in the event of a threat to peace. In addition and in any event, external actors in both Iraq and Afghanistan followed a different standard of behavior, working to ensure the protection of all fundamental rights (at least partly in order to respond to the concern that both countries could either lapse or continue in the tradition of Islamic intolerance while under international tutelage), regardless of the increasingly dangerous nature of the conflicts that had already commenced in both countries.

If anything, the result of any analysis of the relationship between the need to eliminate 'threats to peace' and constitutionalism is wholly different. Recent experience clearly shows that external actors have an especially important role to play in the establishment of stable, effective and responsive government (regardless of whether or not international best practice relating to governance is legally enforceable or not under international or national law), given the impact that issues including the distribution of state funds and the horizontal distribution of powers can have in encouraging conflict. External actors should in fact always work on the basis that poor governance represents as important a threat to peace as the failure to guarantee equality or to guarantee other fundamental rights under a constitution. The difficultly in practice will be to develop some form of mechanism which will prevent external actors, particularly foreign state actors, from acting on the basis of what is most politically expedient (as was the case in Iraq, where external actors favored one side in the constitutional discussions merely with a view to forcing an early conclusion of the discussions, and in Afghanistan, where the purpose of their intervention was to ensure that political allies would benefit from the constitutional negotiations) rather than what is most likely to produce a positive outcome for the people of the country in question.

## 5 CONCLUSION

Recent constitution-making societies illustrate the progress that has been made in comparative practice, but also show that more effort needs to be made to understand the manner in which the international community and national constitution-making bodies should interact in practice. Although one can no longer exist or function without the other in our new globalized world, very little thought has gone into understanding the implications of and the rules

that should guide their interaction. External actors clearly have much to contribute to the exercise of drafting a constitution, but there is cause to be concerned about the ramifications of their involvement, particularly in the case of foreign state actors that have a vested interest in the outcome. At the same time, however, significant miscalculations have been made by national drafting bodies themselves, despite their inherent expertise in their own affairs, underlying the importance of involvement by the international community. Moving forward, greater interaction between the two sides is inevitable, but hopefully in an environment in which factors such as the self-interest of external actors will have less of an impact. The challenge moving forward will be to ensure the enforcement of a mechanism that will prevent such factors from playing a role in constitution-making processes in the future.

## NOTES

1. Iraq provides an ideal illustration of how this problem can arise in practice. Despite the fact that its own constitutional rules require a two-thirds majority in the Senate for the adoption of an international treaty (see Article II, Section 2, Clause 2 of the United States Constitution), the United States used its more than considerable influence in Baghdad in 2004 to force the requirement under Iraq's interim constitution down to a simple majority of parliament, over the objections of the Iraqi constitutional drafters. US officials were apparently motivated by a desire to negotiate and enter into a long-term status of forces agreement with the Iraqi state, a goal that they presumably felt would be threatened by a high threshold for treaty approval. See Larry Diamond, Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq, New York: Times Books (2005).
2. For example, an individual adviser who played an important role in shaping the Iraqi Constitution had acquired, prior to the constitutional negotiations, a stake in a major oil field in the country and, according to reports, stands to reap very significant financial rewards if the arrangement on natural resources that he helped design is ultimately implemented. See James Glanz and Walter Gibbs, 'US adviser to Kurds Stands to Reap Oil Profits', *New York Times*, 11 November 2009, at <www.nytimes.com/2009/11/12/world/middleeast/12 galbraith.html>, accessed 2 June 2010.
3. In Iraq, the United Nations' Office of Constitutional Support, which was tasked with providing support and advice to the Iraqi Constitutional Committee on a wide range of substantive and procedural issues, was staffed by officers from South Africa, Eritrea, India, Iraq, Sri Lanka, the United Kingdom, New Zealand, Spain, Italy, Egypt, amongst others.
4. The Arabic original of the Iraqi Constitution was published in the Iraqi Official Gazette Issue 4012 (28 December 2005). An official English language translation of the Iraqi constitution has not been published and is not available online. An unofficial translation of the final draft is available here: <www.uniraq.org/documents/iraqi_constitution.pdf>, accessed 12 June 2010. All translations contained in this chapter are the author's own.
5. See Nicholas Haysom, The United Nations' Office of Constitutional Support, Summary and Critical Review of the Draft Constitution Presented to the TNA on 28 August 2005 (15 September 2005), unpublished; a leaked copy of this paper was quoted in Scott Johnson, Babak Dehghanpisheh and Michael Hastings, 'Iraq: Loose Federation or Violent Disintegration?' *Newsweek* (10 October 2005).
6. Yash Ghai and Jill Cottrell, 'A Review of the Draft Constitution of Iraq' (3 October 2005), at <www.law.wisc.edu/gls/arotcoi.pdf>, accessed 15 March 2010.
7. Daily Press Briefing by the Office of the Spokesman for the Secretary-General, 3 October 2005.
8. 'UN Calls for Review of Changes to Referendum Rules in Iraq', the *Guardian*, 5 October 2005, Ewen MacAskill, <www.guardian.co.uk/world/2005/oct/05/iraq.ewenmacaskill>, accessed 1 June 2010.
9. An English language version of the 2004 Afghan Constitution is available at <http://president.gov.af/sroot_eng.aspx?id=68>, accessed 12 June 2010.
10. Barnett R. Rubin, Presentation to Constitutional Commission of Afghanistan, 5 June 2003, available at <www.cic.nyu.edu/peacebuilding/oldpdfs/Presentationto.pdf>, accessed 1 June 2010.
11. The United States and various European states intervened in the Bosnian civil war in part by negotiating and enforcing the General Framework Agreement for Peace in Bosnia and Herzegovina, often referred to as the Dayton Peace Accords, which were entered into in 1995. The General Framework sought to end the conflict by setting fixed boundaries between the two warring factions, namely the Federation of Bosnia and Herzegovina and the Republika Srpska (referred to as the 'entities'). A new constitution for BiH (the 'BiH

Constitution' or the 'Constitution') was set out in Annex 4 to the General Framework. An English language version of the BiH Constitution is available at <www.ohr.int/dpa/default.asp?content_id=372>, accessed 12 June 2010.

12. See <www.ohr.int/dpa/default.asp?content_id=366>, accessed 23 June 2010.
13. See, for example, Venice Commission, *Opinion on the Need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina*, 3 November 1998, <www.venice.coe.int/docs/1998/CDL-INF(1998)017-e.asp>, accessed 23 June 2010; Venice Commission, *Opinion on the Competence of Bosnia and Herzegovina in Electoral Matters*, 19 October 1998, at <www.venice.coe.int/docs/1998/CDL-INF(1998)016-e.asp>, accessed 23 June 2010; and Venice Commission, *Opinion on the scope of responsibilities of Bosnia and Herzegovina in the field of immigration and asylum with particular regard to possible involvement of the Entities*, available at <www.venice.coe.int/docs/1999/CDL-INF(1999)006-e.asp>, accessed 23 June 2010.
14. See International Crisis Group, 'Ensuring Bosnia's Future: A New International Engagement Strategy', 15 February 2007, available at <www.crisisgroup.org/~/media/Files/europe/180_ensuring_bosnias_future.ashx>, accessed 12 June 2010, 9.
15. See Venice Commission, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, 11 March 2005, available at <www.venice.coe.int/docs/2005/CDL-AD(2005)004-e.asp>, accessed 12 June 2010.
16. The text of the April 2006 Proposal is available at <www.coe.ba/pdf/CDL_2006_025-e.doc>, accessed 12 June 2010.
17. See 'Ensuring Bosnia's Future', *supra* note 14, at p. 10.
18. See *Sejdic and Finci v Bosnia and Herzegovina* (2009), available at <www.echr.coe.int/echr/>, accessed 12 June 2010.
19. Thomas M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* 46 (1992); Gregory H. Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* 539 (1992); and Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law*, Cambridge: Cambridge University Press (2000).
20. Iraq's 2006 Constitution provides for a detailed and very well developed section on fundamental rights, which itself owes much to the South African Constitution. The Constitution of Bosnia and Herzegovina, which contains a section entitled 'Human Rights and Fundamental Freedoms' is completed by a direct reference to 'international standards' according to which '[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law' (Paragraph 2, Article II).
21. For a recent attempt to define the rule of law, see Tom Bingham, *The Rule of Law*, London: Allen Lane (2010).
22. The Law of Administration for the State of Iraq for the Transitional Period, usually referred to as the Transitional Administrative Law or the 'TAL', is available at <www.cpa-iraq.org/government/TAL.html>, accessed 12 June 2010.
23. Article 14 of the TAL provides that: 'The individual has the right to security, education, health care, and social security. The Iraqi State and its governmental units, including the federal government, the regions, governorates, municipalities, and local administrations, *within the limits of their resources and with due regard to other vital needs*, shall strive to provide prosperity and employment opportunities to the people'. Emphasis added.
24. See, for example, Helen Epstein, 'Cruel Ethiopia', *New York Review of Books*, 13 May 2010, <www.nybooks.com/articles/archives/2010/may/13/cruel-ethiopia/>, accessed 12 June 2010 (which describes the manner in which the current Ethiopian government has moved away from multi-party democracy despite significant attention and support from the international community).
25. The General Assembly called on the UK as the administering power to use force to put an end to the illegal racist regime (GA2151 (XXI) 17/11/66). The Security Council resolutions however called only for economic sanctions: voluntary at first, then selective mandatory, and finally comprehensive mandatory sanctions (SCR217, 232, 253). International Commission of Jurists (1976), *Racial Discrimination and Repression in Southern Rhodesia: A Legal Study*, London: Catholic Institute for International Relations, 8–9.
26. For the international effort to ostracize apartheid South Africa, see UNGA, 'First Report of the Credentials Committee', UN Doc. A/9779 (1974), 29th Sess., Annex, Agenda Item 3, at 2; and UNGA Res 3068, 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1973), reprinted in 13 ILM 56 (1974) (entered into force 18 July 1976).
27. On the principle of judicial independence, see Peter H. Russell and David M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, Charlottesville: University Press of Virginia (2001).
28. See, for example, Kiichiro Fukasaku and Luiz R. de Mello Jr. (eds), *Fiscal Decentralisation in Emerging Economies: Governance Issues*, Paris: France: Development Centre of the Organisation for Economic Co-operation and Development (1999).
29. See *supra* at IIIA.

30. See *supra* at notes 5 and 6 and corresponding text.
31. See *supra* at note 14 and corresponding text.
32. See, for example, The International Crisis Group, 'Afghanistan: Elections and the Crisis of Governance', Asia Briefing Number 96, 25 November 2009, <www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/b96_afghanistan___elections_and_the_crisis_of_governance.ashx>, accessed 13 June 2010; Al-Ali and Fedtk (forthcoming 2011); The International Crisis Group, 'The Next Iraqi War? Sectarianism and Civil Conflict' (27 February 2006), Middle East Report No. 52, 13, <www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-syria-lebanon/iraq/052-the-next-iraqi-war-sectarianism-and-civil-conflict.aspx>, accessed 27 June 2010, 13; and Zaid Al-Ali, 'Iraq's War of Elimination', *OpenDemocracy* (London, 20 August 2006), <www.opendemocracy.net/conflict-iraq/war_elimination_3839.jsp>, accessed 15 March 2010; Anthony H. Cordesman, *Iraq's Insurgency and the Road to Civil Conflict*, Westport: Connecticut: Praeger Security International (2008), 251. For the opposite view, see Chibli Mallat, 'Reconciliation in Iraq: Taking the Constitution Seriously', *The Daily Star*, 16 July 2009, <www.mallat.com/pdf/Mallat16Jul09.pdf>, accessed 21 June 2010.
33. Article 1 of the United Nations Charter provides that the purposes of the United Nations are '[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.
34. Ulrich Camen and Charles Norchi, 'Challenging Sovereignty: India, TRIPS and the WTO', in *Sovereignty under Challenge: How Governments Respond*, in J. Montgomery and N. Glazer (eds), New Brunswick, NJ: Transaction Publishers (2002), 180–81.
35. Jean Galbraith, 'The Pace of International Criminal Justice', 31 *Michigan Journal of International Law* 79 (2009).
36. See notes 12 and 13 and corresponding text.
37. See Franck, *supra* at note 19..
38. 'The state is now viewed as having an obligation to protect its citizens. When this is not fulfilled there is a growing acceptance that the international community has a right – perhaps even a duty – to step in to fill that gap', Sergio de Mello, quoted in Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding*, Oxford: Oxford University Press (2007).
39. Nicholas J. Wheeler, 'The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society', in *Humanitarian Intervention and International Relations*, ed. Welsh, Oxford University Press (2006), 32–3; and Douglas Lee Donoho, 'Evolution or Expediency: The United Nations Response to the Disruption of Democracy', 29 *Cornell International Law Journal* 329 (1996).
40. See Zaum, *supra* at note 38, 37. See also Simón Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law*, Oxford: Oxford University Press (2002), 45.
41. Donoho, *supra* at note 39, 372–3.
42. Karsten Nowrot and Emily W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14 American University International Law Review 321 (1998).

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