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International(ized) Constitutions and Peacebuilding

EMILY HAY*

Abstract
This article concerns the concept and practice of international(ized) constitutions, which have become characteristic of situations where there is deep international involvement in peacebuilding efforts. The process and nature of internationalized constitutions challenge traditional ideas about sovereignty, self-determination, and constitutions. While they reinforce the importance of constitutional documents themselves as an indicator of sovereignty, internationalized constitutions simultaneously legitimize a high degree of external influence in the creation and even implementation of that document. This article argues that internationalized constitutions are not inherently legitimate or illegitimate, but have the potential to be either in any given situation. Internationalized constitutions in Iraq and Kosovo are used as case studies to investigate how the dilemmas of internationalized constitutions have played out in two recent scenarios.

Key words
peacebuilding; constitution drafting; Kosovo; Iraq; sovereignty

1. Introduction

Internationalized constitutions are one of the latest additions to the menu of international peacebuilding efforts. While many areas of international law and the exercise of international authority are well documented and reflected upon at length in academic literature, the field of internationalized constitutions remains less defined and under-explored. Commentary has touched upon international assistance to constitution drafting in the context of peacebuilding[1] and the 'internationalized *pouvoir constituant*'.[2] Authors have conceived of new ways to understand post-conflict constitutions as 'transitional constitutions'[3] or in terms of 'new constitutionalism'.[4]

* LLM (Adv), Associate, Lorenz International Lawyers, Brussels, Belgium [emilylhay@gmail.com]. I would like to thank Prof. Carsten Stahn and Dr. Eric De Brabandere for their invaluable comments on earlier versions of this work. I am also indebted to those who generously shared their insights with me during interviews: Prof. Jaap de Hoop Scheffer, Jonathan Morrow, Laila Al-Zwaini, Sermid Al-Sarraf, Guillermo Martinez Erades, Alexis Hupin, and Maria Fihl. All errors remain my own.

1 K. Samuels, 'Post-Conflict Peace-Building and Constitution-Making', (2005) 6 *Chicago Journal of International Law* 663.

2 P. Dann and Z. Al-Ali, 'The Internationalized Pouvoir Constituant: Constitution-Making under External Influence in Iraq, Sudan and East Timor', (2006) *Max Planck Yearbook of United Nations Law* 423.

3 R. Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation', (1996) 106 *Yale Journal of International Law* 2009, at 2015.

4 V. Hart, 'Constitution-Making and the Transformation of Conflict', (2001) 26 *Peace and Change* 153, at 159–60.

The concept that has not yet been adequately explored at the intersection of all these ideas, but which yields many fruitful insights for international lawyers, is that of the internationalized constitution. Dann and Al-Ali's internationalized *pouvoir constituant* is a key concept, as it encapsulates the way that external actors may constitute part of the 'people' who draft a constitution, often under some form of UN authority. To give this concept further depth it is needed to rigorously examine the rationales of peacebuilding operations and the common dilemmas found in connecting a constitutional process to a peacebuilding mission.

This article combines a general thematic approach with a practical perspective provided by two case studies. The broad themes have been chosen to illustrate the connections between internationalized constitutions, justifying their consideration as a discrete phenomenon and deepening insight into the specific dynamics at play. These themes set the scene for the case studies of Kosovo and Iraq, which allow practical insights to be drawn, and enable an examination of the impact of this practice on fundamental principles of international law.

Section 2 of this article defines the paradigm of internationalized constitutions, putting them in theoretical and historical context and outlining their main features, forms, and relationships with international law.

Section 3 deals with the rationales behind internationalized constitutions. The primary rationales have been identified as a desire to match an internal conflict with an internal solution; a drive to ensure human rights, self-determination, and democracy; and the aim to address the root causes of conflict.

Some of the cross-cutting dilemmas of internationalized constitutions are considered in section 4, including timing, legitimacy, and sustainability. Section 5 uses the case studies of Kosovo and Iraq to highlight trends and draw conclusions about internationalized constitutions in practice. The case studies are examined through several lenses: the use of consociational power-sharing arrangements, the exercise of international authority, and over- and under-inclusion of human rights provisions.

2. Defining the paradigm

2.1. Internationalized constitutions

A constitution provides a blueprint for government in a state. It is regarded as the foundation of the legal order, providing supreme norms from which other laws flow. It is usually designed for perpetuity, and is the basis for stability.[5] A traditional understanding of state sovereignty includes the power to adopt a constitution, but whether that power is exercised, and what form the constitutional order takes, are considered beyond the purview of international law.[6] Traditional assumptions about the nature of constitutions and their insulation from international law are increasingly challenged by global interdependence, an active community of international

5 R. Arnold, 'Foreign Influences on National Constitutional Law', in E. Riedel (ed.), *Constitutionalism – Old Concepts, New Worlds: German Contributions to the VIth World Congress of the International Association of Constitutional Law, Santiago de Chile 2004* (2005), at 37.

6 R. A. Lorz, 'International Constraints on Constitution-Making', in Riedel, *supra* note 5, at 143.

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actors and institutions, and evolving concepts such as peacebuilding. While international involvement in the drafting or even imposition of constitutions is not new, the modern linkage of constitutions with peace processes is a new phenomenon with different implications. Contemporary international involvement is usually undertaken in the name of benevolent assistance in the pursuit of international peace and security. Internationalized constitutions are not the only manifestation of this benevolent international authority, but unlike other examples like the international administration of territory, they have not been the focus of much attention in the literature.

This practice and its normative underpinnings are a challenge to international law because although the law is nominally blind to differences in constitutional orders, international actors are in fact having significant input in this area, bringing international law with them. As a phenomenon, internationalized constitutions in peacebuilding raise questions about our understandings of state sovereignty and the role of a constitution, as well as widely accepted norms such as self-determination and a belief in democratic processes.

The genesis of a direct connection between constitution drafting and peacebuilding can be traced back to Cambodia in 1991.[7] An annex to one of the Paris accords listed six guiding principles for the drafting of a new constitution, which included that Cambodia would be a liberal democracy based on pluralism, that the constitution would contain a declaration of human rights, and that there would be periodic elections with universal suffrage.[8] Since Cambodia the involvement of international actors in peacebuilding and constitution drafting has taken a variety of forms and has expanded well beyond the auspices of the UN; however, these principles remain central to internationalized constitutions.

Deep international involvement in a constitution-drafting process is most evident where there has been some form of international administration of a territory or close supervision of a peace process. In some cases an internationalized constitution will be preceded by an 'international' constitution, being a document completely founded in international authority such as the Transitional Administrative Law (TAL) in Iraq, or the UNMIK Constitutional Framework for Provisional Self-Government. Examples of internationalized constitutions include those of Cambodia, Timor-Leste,[9] Bosnia and Herzegovina, Kosovo, Afghanistan, and Iraq. These examples fit within the paradigm because while they are founded in the domestic authority to draft a constitution, they manifest such a degree of international influence over the process of the drafting, or the substance of the constitution, or both, that international actors can be understood to form part of the *pouvoir constituant*.[10] The internationalized constitution reflects not just the wishes of the local

7 E. De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (2009), ar 12.

8 United Nations, Department of Public Information, *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict: Paris* (23 October 1991), Annexure 5; S. R. Ratner, 'The Cambodia Settlement Agreements', (1993) 87 *American Journal of International Law* 1, at 27.

9 Also known as East Timor.

10 See Dann and Al-Ali, *supra* note 2.

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population but also international views about the structure of governance, division of power, appropriate legal standards, and vision of the nation. Internationalization arises from the intersection of international authority with domestic law, which may take the form of an international legal instrument initiating or authorizing the constitution-drafting process (for example Security Council resolutions or peace agreements), and may include elements of institutional internationalization in the constitution (for example international judicial or executive authority).

In order to examine important issues related to the rationales, dilemmas, and trends of internationalized constitutions, it will be necessary to look at both the process of constitution drafting and the substance of the document itself. No strict delimitation is made between these two aspects of constitution making because, as will be seen, process and substance are often so interrelated as to be inseparable.

In an internationalized setting, assistance goes beyond mere consultation or advice on comparative constitutional laws. These constitutions are created in and reflect an environment of high or even complete dependence on outside support to build a legal order. As they form part of a peace process they are also influenced by recent or continuing violence and a prerogative to halt it or prevent future outbreaks. This affects the substance of the constitution, the time frame of the drafting, and its long-term sustainability. The common features of internationalized constitutions reveal a pattern of substance and practice which forces us to re-evaluate some of the norms such as sovereignty, self-determination, and democracy that are presumed to be central to our international order.

2.2. Forms

In the post-conflict environment a flexible approach to constitutions is called for, including interim arrangements and transitional provisions where necessary. The type and degree of international influence over a constitution can vary and can relate to the constitution-drafting procedure or to the substance of the actual provisions. One approach to international influence is what the UN Secretary-General in 2002 referred to as the 'light expatriate footprint' in relation to Afghanistan, which was also intended for Iraq.[11] On this model, international authority may be the legal impetus for the drafting of a constitution, but the process and substance are largely left to local actors, with international facilitation and support. In other cases, the point of intersection with international authority may be deeper, with direct oversight of the drafting process and input into the substance of provisions.

As well as manifesting different degrees of international influence, internationalized constitutions can serve varied purposes and take on a variety of forms. The instrumental role of the constitutions of Kosovo, Bosnia and Herzegovina, and Timor-Leste was the creation of new sovereign entities. In Cambodia, Afghanistan, and Iraq the purpose was transformative, in order to deviate from the status quo in a pre-existing sovereign state. Internationalized constitutions are often part of a series of interim arrangements in a post-conflict sequence. In Kosovo, Timor-Leste, and

11 Report of the Secretary-General, The Situation in Afghanistan and Its Implications for International Peace and Security, UN Doc. A/56/875-S/2002/278, (2002), para. 98(d).

Iraq, international administrations and occupations were founded on temporary 'constitutions' of Security Council resolutions and regulations, which preceded the drafting of more permanent structures. Even the 'permanent' constitutions in Bosnia and Kosovo included transitional provisions for unspecified periods of international supervision. Kosovo's 'supervised independence' came to an end in September 2012 after these provisions were removed. To accommodate this 'new constitutionalism', there have been calls for a more flexible understanding of constitutions which accommodates creative and interim arrangements, and which sees a constitution more as a process than as a definitive moment or document.[12] Such an approach is useful for two reasons – first it more accurately represents the reality of internationalized constitutions, which are often part of a transitional process serving various functions, and second it places emphasis firmly on that process, including the aims and purpose served by the internationalized constitution. This focus lessens the risk that the drafting of a constitution is treated simply as one more box to tick on the peacebuilding agenda, absolving international actors of further responsibility.

2.3. Normative embedding

A distinctive feature of internationalized constitutions is their normative embedding in the discourse, framework, principles, and rules of international law. This feature goes beyond the traditional distinction between monist and dualist systems, which does not adequately convey the overlapping and multifaceted interactions between the domestic and the international in these constitutions.

The embedding is often formalized in the constitution itself but the process begins much earlier. Contact with international law may begin at the stage of a peace agreement where UN guidelines, resolutions, and recommendations may regulate the process and substance of the agreement.[13] The embedding may deepen if there is an international administration or occupation governed by international law. Where the UN is exercising executive powers in an administration, those powers will be rooted in Security Council resolutions, and exercised by way of international regulations and decrees. The judicial process is also internationalized by the use of international judges, and because cases will have to be decided on the basis of the applicable laws which include international regulations and Security Council resolutions.[14] This legal framework provides the basis for international law to become embedded, because even transitional and interim arrangements have a strong impact on the subsequent legal regime. In the post-conflict setting where peace is often precarious and governance structures are weak, this embedding can fill a normative gap in the legal order. When a more 'permanent' constitution is drafted, the influence of international law does not instantly evaporate. The norms and discourse of international law will continue to influence the legal order

12 See Teitel, *supra* note 3, at 2063. See also Hart, *supra* note 4, at 169; K. McConnachie and J. Morison, 'Constitution-Making, Transition and the Reconstitution of Society', in K. McEvoy and L. McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (2008), 75 at 83.

13 C. Bell, 'Peace Agreements: Their Nature and Legal Status', (2006) 100 *American Journal of International Law* 373, at 373.

14 See De Brabandere, *supra* note 7, at 194 et seq.

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informally as those actors who have participated in the transitional administration will inevitably have absorbed some of the language, expression, and principles of international law. Those actors will likely be both local and international as, though international involvement evolves and may lessen over time, it rarely disappears very quickly.

Further, in many internationalized constitutions, a more explicit role is often reserved for international law in the legal order. This often takes the form of a 'monist' rather than 'dualist' system.[15] In Bosnia and Herzegovina and in Kosovo, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols were given direct application by the constitutions.[16] Article III(3) of the Constitution of Bosnia and Herzegovina states that 'international law shall be an integral part of the law of Bosnia and Herzegovina and the Entities'. Kosovo's Constitution also provides that 'ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo'.[17] The Constitution of Timor-Leste provides that 'the legal system of Timor-Leste shall adopt the general or customary principles of international law', and that 'all rules that are contrary to the provisions of international conventions, treaties, and agreements applied in the internal legal system of Timor-Leste shall be invalid'.[18] These constitutional provisions show a high level of integration with the international legal order. Bosnia and Herzegovina, Timor-Leste, and Kosovo are also situations where there has been some level of international governance of the territory either during an interim administration or through executive powers in the constitution. The strong role for international law in the constitutions may reflect the degree of international leverage in the drafting process, and a recognition of the need to rely on international frameworks for practical and political reasons. It may also reflect, and perpetuate, a level of normative embedding of these constitutions within international law, creating a kind of happy relationship with international law.[19]

Constitutions displaying a lower degree of internationalization such as Iraq and Afghanistan, while including human rights provisions derived from international law, take on a dualist model and do not have the same relationship with international legal frameworks seen above. This is not to say that international law has not had any impact on their legal orders, but rather that such impact may be less tangible in the written document itself. This lower level of internationalization can be seen as a corollary of the light-footprint approach taken in both countries.

The notion of embedding is a dynamic one, meaning that not only is the domestic legal order embedded in the international, but international law is becoming embedded at the domestic level. International law is inevitably evolving as a

15 H. Kelsen, *General Theory of Law and State* (1945).
16 Constitution of Bosnia and Herzegovina, Dayton Peace Accords, Art. II(2), Ann. IV; Constitution of the Republic of Kosovo, Art. 22.
17 Constitution of the Republic of Kosovo, Art.19(2).
18 Constitution of Timor-Leste, Section 9(1) and (3).
19 V. Morina et al., 'The Relationship between International Law and National Law in the Case of Kosovo: A Constitutional Perspective', (2011) 9 *International Journal of Constitutional Law* 274, at 283.

result. Domestic systems directly plugged into international law, especially where there has been international governance, blur the boundaries between the categories of domestic and international law. Internationalized constitutions call on international law to play new roles, and the practices of states and international actors may crystallize into new international law.

2.4. Sovereignty and facilitated self-determination

Internationalized constitutions present a dilemma for traditional state sovereignty. Rather than being exceptions to the rule, the conditional independence and supervised orders created by internationalized constitutions are part of a new understanding of sovereignty in a highly interdependent world.

The Montevideo criteria for statehood[20] were already modified in the context of decolonization to give priority to self-determination even where those criteria are not necessarily met.[21] Internationalized constitutions present a new scenario, in that the international community may not only be willing to recognize the sovereignty of a territory based on self-determination, but also willing to step in and facilitate that self-determination in a very hands-on way. The difference is that self-determination of that territory almost certainly would not otherwise occur, and this high dependency moves even further from the Montevideo criteria. The interdependence of the current world order is a given, but to see its manifestation in internationalized constitutions is a concrete sign of how flexible the idea of sovereignty has become. In the case of Kosovo, it may transition from supervised independence to eventual EU membership (assuming recognition of its statehood can be obtained from all member states) without ever really being a fully sovereign state in the sense of the Montevideo criteria.[22] In every internationalized constitution, self-determination was realized in such a way that the international actors effectively became a part of the 'self', creating the internationalized *pouvoir constituant*. The acceptance of this depth of international participation in traditionally sovereign practices modifies our assumption of a community of equal and independent states, because internationalized constitutions codify de jure an inequality which previously only existed de facto. The implications of 'facilitated self-determination' and the new sovereignty it brings about deserve further attention. For the purposes of this discussion we note simply that internationalized constitutions are being influenced by, and are influencing, changes in fundamental norms.

3. Rationales

The rationale for including constitution writing in the toolbox of peacebuilding can be traced to the changing nature of warfare, growing international concern about

20 Permanent population, defined territory, government, and the capacity to enter into relations with other states; see 1933 Convention on Rights and Duties of States, Art. 1.

21 M. N. Shaw, *International Law* (2008), at 204.

22 Interview with Professor Jaap de Hoop Scheffer, former secretary-general of NATO, professor at Leiden University, 1 May 2012; interview with Mr Alexis Hupin, political adviser, European External Action Service, Civilian Planning and Conduct Capability, 4 May 2012.

human rights and the protection of civilians, and the UN's increasing preoccupation since the 1990s with addressing the root causes of conflict.[23] The connection between new constitutions and peace is rarely questioned, even though as a phenomenon it certainly challenges some of the traditional rationales for constitution drafting and by no means guarantees enduring peace.[24]

3.1. Internal solutions for internal wars

The general shift from inter-state to internal conflict in the second half of the twentieth century brings different conflict resolution tools into play.[25] While the resolution of an inter-state war commonly takes place by way of a peace agreement or treaty between two or more states, wars fought to gain independence from a colonial power, or a civil war between a state and a group within it, demand a different approach. Such wars are often fought with the aim of changing the system of government or the distribution of power within it, and as a result peace may not come without an agreement to change the constitutional order.[26] These situations may involve the creation of a new constitutional entity, as in Kosovo and Timor-Leste, or the transformation of an existing order, as in Cambodia.

3.2. Human rights, self-determination, and democracy

The development of constitution drafting as peacebuilding can be seen as part of the international community's increasing willingness since 1945 to monitor, comment on, and take action regarding the internal affairs of other states.[27] In spite of the principle of non-intervention enshrined in Article 2(7) of the UN Charter, we live in a world where issues of human rights, self-determination, and democracy are matters of international concern. The drafting of internationalized constitutions is an opportunity to ensure that a country has a legal framework in conformity with those norms.

Self-determination is a legal right under international law for a people to 'freely determine their political status and freely pursue their economic, social and cultural development'.[28] While there is legal uncertainty over whether there is a right to secede from the territory of a state where internal self-determination is denied,[29] situations such as Kosovo and Timor-Leste show that the principle may operate in that way in exceptional circumstances. Self-determination is a driving force behind internationalized constitutions as it is the ultimate way for a people to

23 V. Sripati, 'UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989–2011' (2012) 19 *International Peacekeeping* 93, at 94.

24 H. Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage', (2011) 33 *University of Pennsylvania Journal of International Law* 239, at 241.

25 Bell, *supra* note 13, at 373.

26 C. Bell, *On the Law of Peace: Peace Agreements and the* Lex Pacificatoria (2008), Part I(5).

27 For an outline of the proliferation of human rights mechanisms see C. Tomuschat, *Human Rights: Between Idealism and Realism* (2008), at 97–290.

28 General Assembly Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); see Shaw, *supra* note 21, at 251–2.

29 See International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, para. 82; cf. *Reference re Secession of Quebec* [1998] 2 SCR 217.

determine their political status. The way in which international actors facilitate self-determination in internationalized constitutions creates interesting dynamics which will be considered further below.[30]

The less visible aspect of this rationale is that international actors are seeking not just to guarantee any kind of self-determination, but self-determination in the form of liberal democracy. Democracy promotion can result in an uncomfortable perception of imposition;[31] however, it is safe to say that an internationalized constitution with any other system of government is unthinkable today. Due to express and implied requirements in many treaty regimes and international organizations, it would be virtually impossible for a new undemocratic state to be recognized by and participate in the international world order.[32] The pro-democracy agenda is rooted in international liberalism, which is the driving force behind the action of most international institutions.[33] A central belief is that democracy provides the best chances of internal stability, as well as a peaceful international order.[34]

An internationalized constitution is seen as an opportunity to ensure that the newly created legal order protects liberal values, including democracy and strong human rights protections.

3.3. The opportunity to address root causes

Although the nature of conflict had already changed, it was not until the end of the Cold War that the UN possessed the political will and means to provide deep input into the prevention and resolution of conflicts. Since the UN Secretary-General included peacebuilding in his 1992 'Agenda for Peace',[35] peacebuilding has become accepted as a way to prevent a relapse into conflict through 'action to identify and support structures which will tend to strengthen and solidify peace'.[36]

The rationale to address the root causes of conflict remains central to international involvement in constitution drafting. The Constitution of Bosnia and Herzegovina perhaps epitomizes the use of a constitution as a tool for peace, as the Constitution is Annexure 4 to the Dayton Peace Agreement itself.[37] In relation to Iraq, Security Council Resolution 1511 (2003) first recognized that 'international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq', and in the next line welcomed the process initiated to 'draft a constitution to embody the aspirations of the Iraqi people'. In Kosovo the Ahtisaari Plan, which was

30 See section 5 *infra*.
31 S. Choudry, 'Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities', (2005) 37 *Connecticut Law Review* 933, at 933.
32 Lorz, *supra* note 6, at 152; Tomuschat, *supra* note 27, at 60.
33 R. Paris, 'Peacebuilding and the Limits of Liberal Internationalism', (1997) 22 *International Security* 54, at 56.
34 Samuels, *supra* note 1, at 665; A. Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', (1993) 87 *American Journal of International Law* 205, at 228; U. K. Preuss, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization', (2006) 51 *New York Law School Law Review* 467, at 492. For further literature on democratic peace see Paris, *supra* note 33, at 60.
35 An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping, UN. Doc A/47/277–S/24111 (1992).
36 Ibid., para. 21.
37 See General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995.

granted pre-eminence over even the Constitution itself,[38] prescribed 'constitutional, economic and security provisions ... aimed at contributing to the development of a multi-ethnic, democratic and prosperous Kosovo'.[39] The fundamental rationale to ensure peace and stability through a new constitutional order is explicit.

3.4. Problematizing the rationales

Although the rationales of matching an internal tool of peace to internal conflicts, addressing the root causes of conflict, and protecting civilians and their human rights, can hardly be questioned as worthwhile, they do raise important issues regarding international involvement in constitution writing in general, and the connection of constitution writing to peace processes.[40]

The rationale of protecting human rights and fostering self-determination through democracy is problematic because it is difficult to empirically prove the connection between democracy and stability, or democracy and peaceful international relations. In attempting to measure the success or failure of a post-conflict constitutional order, there is no reliable indicator.[41] The use of different measures can lead to different statistics and conclusions.[42] In the absence of concrete proof, the liberal values underlying internationalized constitutions look more like a conviction than a fail-safe model. Unfettered democracy can be highly destabilizing, especially in a post-conflict setting, by exacerbating ethnic tensions, permitting tyranny of the majority over minorities, and even sparking further conflict.[43] Recognizing the possible irrationality behind trying to protect liberal values through internationalized constitutions is not intended to discredit the entire endeavour, but rather to encourage sensitivity to context. Systems of government and legal frameworks are more effective when they are tailored to the specific society they are intended to govern, and indeed arguably much progress has been made in this regard since early peacebuilding efforts. We should beware of wholesale importation of international models, while acknowledging the consensus that liberal democracy with strong human rights protections is the best starting point that has been come up with so far.

The drafting of a constitution in proximity to conflict can highlight the different purposes that constitutions and peace arrangements usually serve.[44] The clash in rationales may occur because peace agreements often make immediate changes and compromises in order to end violence, while constitutions generally 'codify an existing consensus on national identity and values and on how society wishes to be governed'.[45] Where there is still ongoing conflict, or an imminent threat of

38 See Constitution of the Republic of Kosovo, *supra* note 17, Article 143.
39 Main Provisions of the Comprehensive Proposal for the Kosovo Status Settlement, Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, 26 March 2007, UN Doc. S/2007/168, Ann., at 5.
40 Other cross-cutting dilemmas will be considered in section 4, *infra*.
41 M. Ignatieff, 'Human Rights, Power and the State', in Chesterman et al. (eds.), *Making States Work: State Failure and the Crisis of Governance* (2005), 68.
42 Bell, *supra* note 13, at 410.
43 Ignatieff, *supra* note 41, at 69.
44 Ludsin, *supra* note 24, at 245.
45 Ibid., at 247.

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it breaking out again, the constitution will likely be influenced by the overriding concern to end the violence.[46]

The creation of a constitution which embodies or fosters a unified national identity is extremely unlikely if the parties are also negotiating peace. Those at the negotiating table may only be armed groups, excluding the voices of non-violent groups and the general population from participation. The resulting constitution will disproportionately reflect the interests of those groups. The Constitution of Bosnia and Herzegovina, for example, entrenched the ethnic divisions that had fuelled the conflict and in effect ratified the results of the ethnic cleansing that had been carried out.[47] The lack of national unity is highlighted by the specific terminology used to describe the three main ethnic groups as 'constituent peoples'. An extremely weak central government was created because each ethnic group wished to preserve its independence, which has caused significant problems for passing laws necessary for eventual EU accession.[48]

Where there is violence ongoing, security concerns may place physical constraints on the drafting process, polarize groups, and prevent participation.[49] In Iraq during August 2005, when most of the Constitution was written, there were 70 insurgent attacks daily, 282 Iraqi military and police killed, between 414 and 2,475 civilians killed, 27 multiple fatality bombings, 23 kidnappings of non-Iraqis, and 3,000 insurgents detained or killed.[50] The violence and insecurity endangered and prevented the participation of many negotiators and excluded the general population from the process. The result was 'a one-month charade from which not only fragmentation, but also civil war, was virtually guaranteed'.[51]

The problems associated with drafting a constitution where there is no durable peace may undermine the entire process and the resulting constitution, defeating the rationales of the whole exercise. It is not so simple, however, to conclude that a constitution should never be part of a peace process. Internationalized constitutions build frameworks for countries and territories in transition, which have the potential to channel conflict into political structures, and the potential to contribute to the rule of law. But this is no more than a potential. Whether an internationalized constitution actually does address the root causes of conflict depends on how dilemmas such as those considered further in section 4 of this article are managed.

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46 Ibid.

47 M. Cox, 'Building Democracy from the Outside: The Dayton Agreement in Bosnia and Herzegovina', in S. Bastian and R. Luckham (eds.), *Can Democracy Be Designed? The Politics of Institutional Choice in Conflict-Torn Societies* (2003), 253 at 259; V. Bojicic-Dzelilovic, 'Managing Ethnic Conflicts: Democratic Decentralisation in Bosnia–Herzegovina', in ibid., at 281; J. C. O'Brien, 'The Dayton Constitution in Bosnia and Herzegovina', in L. E. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010), at 332.

48 European Commission, Commission Staff Working Paper: Bosnia and Herzegovina 2011 Progress Report' (12 October 2011), SEC(2011), 1206 final, at 7.

49 Ludsin, *supra* note 24, at 255.

50 Iraq Index, Brookings Institution, 26 September 2005, quoted in J. Morrow, 'Deconstituting Mesopotamia: Cutting a Deal on the Regionalization of Iraq', in L. E. Miller (ed.), *Framing the State in Times of Transition: Case Studies in Constitution Making* (2010), at 589.

51 Ibid., at 588. For further analysis of the Iraqi case study see section 5 *infra*.

4. Cross-cutting dilemmas

Internationalized constitutions present a number of cross-cutting dilemmas. Reflecting upon these dilemmas and their dynamics in different situations is useful in order to understand the imperatives and limitations of international involvement, and consider options for future interventions.

4.1. Timing

The dilemma of timing a constitution-drafting process is so significant because it can dictate the perceived success or failure of the resulting constitution and the content of its provisions, and smooth implementation. Decisions about the timing of international action are often made on the basis of factors unconnected with the constitution itself. The political will of international actors to remain deeply involved in any given situation is often limited by the desire to make a swift exit, due to other states' domestic political concerns, budgetary constraints, or fast-changing agendas. Furthermore, the ability of the international community to influence constitutional matters within a country will diminish over time.

The rushed completion of a constitution-drafting process has the potential to defeat all of the aims of an internationalized constitution. Time pressure may lead to ill-considered provisions; to a lack of awareness, education, or consensus in the local population about the desired system of government; to a concomitant lack of a sense of ownership over the document; and to the failure to ensure peace and stability.

To advocate for a longer, slower, and more organic constitution-drafting process, however, is not as straightforward as it may seem. International leverage fades after a crisis situation has stabilized, and international actors may find it impossible to apply pressure for constitutional provisions that are regarded as necessary to address the root causes of conflict.[52] These provisions may include strong human rights protections for all groups in society, guaranteed applicability of international law in the domestic legal regime, and a system of government that international actors see as guaranteeing peace and stability.[53] For example, minority rights protections and human rights enforcement mechanisms contained in the Constitution of Bosnia and Herzegovina would almost certainly not appear in their current form if the constitution had been drafted over several years in a home-grown process.[54]

Even where a constitution is not immediately put in place by the international community, as happened in Bosnia and Herzegovina, the legal framework put in place in the immediate aftermath of a conflict will have a significant impact on later developments. Arrangements initially regarded as interim may be absorbed into the political and legal culture and prove hard to dislodge later. Arguably, therefore,

52 O'Brien, *supra* note 47, at 347.

53 Generally a form of liberal democracy. See C. Grewe and M. Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia–Herzegovina and Kosovo Compared', (2011) 15 *Max Planck Yearbook of International Law* 1, at 1; M. Benzing, 'Midwifing a New State: The United Nations in East Timor', (2005) 9 *Max Planck Yearbook of International Law* 295, at 352; N. Feldman, 'Imposed Constitutionalism', (2004) 37 *Connecticut Law Review* 857.

54 O'Brien, *supra* note 47, at 347.

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insistence by international actors on particular legal frameworks or guarantees, whether or not they reflect local wishes, could provide a better starting point for future constitution drafting. As well as providing a potential benefit in terms of legal standard setting and culture, early legal arrangements serve an important role in ensuring that undertakings of international actors can be followed up later and expectations can be met. A balance must be struck between maximizing the moment of international influence, and avoiding time pressures which undermine the goals of the entire constitution-drafting process.

4.2. Legitimacy

Internationalized constitutions challenge our conventional understanding of a constitution because the degree to which the document can be said to express the will of a population may be extremely limited. This fact is in opposition to the fundamental legal principle of self-determination which gives a 'people' the right to choose their own system of governance.[55] As Feldman notes, the distinctive feature of 'imposed liberal constitutionalism' today is that '*it takes place against a backdrop of widespread commitment to democratic self-determination*'.[56] Traditionally, a nation, or a people, are the *pouvoir constituant* of a constitution. They draft a document which represents their political self-expression, to the exclusion of outside influence which would dilute the democratic nature of the process.[57] While this view probably never reflected the reality of every constitution-drafting process, it is still the point of departure for contemporary discussion.

The UN and other actors providing assistance in drafting constitutions are generally conscious of their role and make efforts to avoid the perception of imposition or neo-colonialism.[58] There is also widespread recognition in the literature of the need for 'local ownership' of a constitution-drafting process, however much less consensus on the precise meaning of that term. 'Local' could be used to indicate the national, as opposed to international, constituency, or rather to focus on local communities over centralized national institutions. 'Ownership' could be fostered or expressed through public participation in the drafting process, education campaigns, or a final referendum on the constitutional document. While keeping in mind the contested meaning of local ownership and its potential misuse, strong public participation and consultation in the actual process of drafting a constitution remain important ways to increase the chances that people identify with the constitution that is created.[59]

The dilemma is how to reconcile sensitivity to sovereignty and local ownership of the process with the two guidelines given primary importance by the

55 *East Timor (Portugal v. Australia)*, 1995 ICJ Rep. 90, at 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 136, at 171–2; see Shaw, *supra* note 21, at 251.

56 Feldman, *supra* note 53, at 859 (italics added).

57 Dann and Al-Ali, *supra* note 2, at 427.

58 Guidance Note of the Secretary-General, 'United Nations Assistance to Constitution-Making Processes' (April 2009), at 4.

59 See McConnachie and Morison, *supra* note 12, at 89; K. Samuels, 'Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies', prepared for International IDEA (2007).

Secretary-General and reflecting the basic rationales of international involvement: 'seize the opportunity for peace-building', and 'encourage compliance with international norms and standards'.[60] The imperatives of peacebuilding may require forging agreements between groups of unelected elites who may not represent the interests of the entire population. Encouraging compliance with international norms and standards may involve the importation into a constitution of laws which have no resonance with national culture. All these dynamics may undermine local ownership of a constitution and restrict self-determination. The resulting absence of self-determination may be detrimental to the legitimacy of a constitution in the eyes of the *pouvoir constituant*. Legitimacy is a vague concept, open to manipulation, but reflects a level of acceptance of the exercise of power.[61] If the constituent peoples do not accept a constitution as a legitimate exercise of power over them, they are unlikely to consent to be governed by it, undermining the legal order that was created and any culture of constitutionalism.

Internationalized constitutions force us to reformulate the traditional understanding of legitimacy as a purely internal matter, because the international community effectively becomes part of the constituency being expressed and consenting to the constitution.[62] Because they are made by an 'internationalized *pouvoir constituant*', legitimacy is measured by the additional imperatives and concerns of those actors. International actors are driven by the rationales discussed in section 3 of this article, namely to maintain and build peace and security, and to import international standards of democracy and human rights, so their consent to the constitution hinges on achieving those goals. These objectives may be in tension with the norm of self-determination which is the primary concern of the local *pouvoir constituant*.

The legitimacy of internationalized constitutions, therefore, depends on a level of acceptability for all parties concerned. For the local population, ownership is necessary to consider the constitution an exercise of self-determination. A sense of ownership is difficult to orchestrate, although it is often attempted through a programme of formal public participation in the process. Several studies have failed to find a solid correlation between public participation and what could be regarded as a legitimate constitutional framework.[63] A case in point is the Eritrean constitution, which was the result of a deeply participatory process but has been completely disregarded by the autocratic government. Similar examples are found in Thailand and Ethiopia.[64] The counterexamples of Germany and Japan demonstrate that a constitution may gain legitimacy even in the absence of public participation. These studies and examples demonstrate that the internationalization of a constitution

60 Guidance Note of the Secretary-General, *supra* note 58.
61 E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality and Legitimacy* (2006), at 202.
62 Dann and Al-Ali, *supra* note 2; Grewe and Riegner, *supra* note 53, at 11.
63 L. E. Miller, 'Designing Constitution-Making Processes: Lessons from the Past, Questions for the Future', in Miller, *supra* note 50, at 602; J. Widner, 'Constitution Writing in Post-Conflict Settings: An Overview', (2008) 49 *William and Mary Law Review* 1513, at 1531–2; T. Ginsburg, Z. Elkins, and J. Blount, 'Does the Process of Constitution-Making Matter?', (2009) 5 *Annual Review of Law and Social Science* 201, at 215.
64 Ginsburg, Elkins, Blount, *supra* note 63, at 215–16.

is not necessarily fatal to its legitimacy, and that public participation is also no guarantee of local ownership or legitimacy. While outside influence presents a challenge, and public participation is one logical way to meet that challenge, a constitution may be accepted or rejected by a population for a range of reasons.

Another concern for the local constituency is that international action is not perceived as illegitimate. This may be judged on the conduct of the actors, for example whether they are mediating conflicts, counterbalancing undue influence from any one group, and ensuring an inclusive drafting process.[65] Other measures of legitimacy may be that international assistance is provided transparently, is genuine rather than self-interested, and focuses on process rather than substance.[66] According to a realist view of international relations, however, there is no such thing as genuine rather than self-interested international action. The discourse of human rights can be used to 'lend moral allure to naked state interests';[67] and terms like 'local ownership' may mask dictatorial powers or carry psychological rather than political meaning.[68] While realist theory is generally premised on the centrality of sovereign states in the international order, it could also be argued that international organizations and their various agencies act in support of particular state interests, or in the realm of peacebuilding they could be regarded as actors with vested interests in their own right. From this perspective international influence could be seen by the local population as outright interference or just the latest form of colonialism.[69] These concerns should be borne in mind as they will play directly into the legitimacy needed to sustain the constitution.

In terms of international influence over the substance of constitutional provisions, it is also necessary to consider what level of artificiality is tolerable for legitimacy. In cases where a constitution is creating a new entity, or where there is no democratic tradition of government, a high level of artificiality is inevitable.[70] However, where those international standards directly conflict with local culture and are likely to be ignored, it may also reduce the legitimacy of the resulting document.[71]

The tension between the different legitimacy concerns within an internationalized *pouvoir constituant* highlights the delicacy of the process and the challenge in ensuring that it is regarded as legitimate by all those invested in it. Self-determination remains central but the multiplicity of actors and rationales makes legitimacy a more complex equation.

The Iraqi case shows that where a constitution is internationalized by the primary involvement of just one state, especially where that state is so deeply implicated in

65 Ibid.
66 Ibid.
67 Ignatieff, *supra* note 41, at 61.
68 S. Chesterman, 'Transitional Administration, State-Building and the United Nations', in Chesterman et al. (eds.), *Making States Work: State Failure and the Crisis of Governance* (2005), 344.
69 N. Bhuta, 'New Modes and Orders: The Difficulties of a *Jus Post Bellum* of Constitutional Transformation', (2010) 60 *University of Toronto Law Journal* 800.
70 J. Morrow and R. White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance', (2002) 22 *Australian Yearbook of International Law* 1, at 34.
71 Feldman, *supra* note 53, at 872, 882.

the previous (and ongoing) violence as a party to the conflict, the impact of those narrow interests is amplified, and the rationales of constitution making are at high risk of being subjugated. Although in that case it was the flawed imposition of the arrangements by outside actors that was fundamentally problematic, what was needed was in fact greater internationalization.[72] The UN was largely sidelined in the administration of Iraq generally and also in the Iraqi constitution-drafting process. A constitutional support team of the United Nations Assistance Mission in Iraq (UNAMI) was present, but was not formally invited by the Iraqis to assist until June 2005. That role became informal once more after the drafting committee was de facto dissolved.[73] The Iraqi constitutional process highlights the benefit of acting through an organization perceived to represent the international community as a whole, rather than one single state and its close allies. If the process had been administered by the UN, it would by no means have been an apolitical, disinterested intervention, but it would at least have the appearance of objectivity and accountability to a broader range of interests. In addition, the process would have been guided by the accumulated expertise of the constitution-making community. In the end the overriding rationale behind the Iraqi Constitution was to meet a set deadline, and in pursuing that rationale, the priorities of securing participation, legitimacy, and minimum international standards were sacrificed.

5. Emerging trends, issues, and conclusions from two case studies: Kosovo and Iraq

While a broad look at the rationales, forms, and cross-cutting dilemmas of internationalized constitutions gives a general overview of the paradigm, a closer examination of two case studies enables us to draw more concrete insights. These case studies have been chosen as they are the two most recent internationalized constitutions to come into force, and therefore may be thought to embody the accumulated experience of previous endeavours. Both of the internationalized constitutions in the case studies were embarked upon in the aftermath of conflict in which there was international military intervention, i.e. where forces representing other states or international organizations were a party to the conflict. This was a factor which ensured high international investment in the outcome of that constitutional process and in seeing that its rationales were fulfilled. While there are commonalities between the case studies, there are also important differences that enable comparisons to be made. The situation in Iraq followed an occupation that, while being recognized by the Security Council, was not part of a peacebuilding mission. The Kosovo scenario, by contrast, followed years of international administration of the territory as part of a UN-led peacebuilding process. The Constitution of Kosovo was drafted while that territory was under effective international administration, and marked the creation of a new sovereign entity. Iraq's Constitution was drafted in a period of transition out of occupation, with the aim of transforming the system of

72 Ibid.
73 Morrow, *supra* note 50, at 580.

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government. The range of international actors involved is also very different in each case study, with a narrower sphere of influence constituted mainly by the US in Iraq, and a much broader range of interests in Kosovo, where the UN and several other international multilateral institutions were involved. These case studies provide the opportunity to consider the use of consociational power-sharing arrangements, the exercise of international authority, and the over- and under-inclusion of human rights.

5.1. Iraq

The Iraqi constitution-drafting process was defined by the invasion of Iraq and subsequent occupation by the Coalition Provisional Authority (CPA), led by the United States. With many of the other rationales for the US invasion discredited and a civil war developing, the desire to secure something which could concretely be described as an achievement was strong. A constitution could, and in fact for some did, begin to vindicate the entire intervention.[74] Officially, the entire constitution-drafting process took place under sovereign Iraqi rule, as the CPA had transferred power to the Iraqis in June 2004. But as the process stalled in the face of the 15 August 2005 deadline set by the CPA, the US intervened in a visible way.

The Iraqi constitution-drafting process was characterized by a failure to involve or win the support of Sunni Arabs, and an extremely short deadline for drafting. There were calls to extend the deadline, but the US had made it clear that this would not be acceptable.[75] Due to the slow progress of the drafting committee, the US government began convening closed-door meetings with Shia and Kurdish political party leaders in a 'Leadership Council', during which text was negotiated and the deals necessary to secure an agreement were made.[76] Sunni members of the committee were largely left out of this process, until last-minute changes attempted to win over their support.[77] The Constitution was finally approved by referendum on 15 October,[78] but was largely rejected by Sunni Arabs.[79]

5.2. Kosovo

International actors were heavily involved from day one of the drafting process of Kosovo's Constitution, starting with the identification of potential members of

74 Milano, *supra* note 61, at 196.
75 Ibid., at 574.
76 Dann and and Al-Ali, *supra* note 2, at 439.
77 Ibid. However, see the account from the US embassy's legal adviser and deputy legal adviser, which includes some Sunnis among attendees at the meetings. A. S. Deeks and M. D. Burton, 'Iraq's Constitution: A Drafting History',(2007) 40 *Cornell International Law Journal* 1, at 4; International Crisis Group, 'Unmaking Iraq: A Constitutional Process Gone Awry', *Middle East Briefing* No. 19, 26 September 2005, available at www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Iraq/B019%20Unmaking%20Iraq%20A%20Constitutional%20Process%20Gone%20Awry.pdf (last visited 06 November 2013).
78 S. Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq', (2006) 17 *European Journal of International Law* 531, at 536.
79 International Crisis Group, 'The Next Iraqi War? Sectarianism and Civil Conflict', Middle East Report No. 52, 27 February 2006, at 13, available at www.crisisgroup.org/en/regions/middle-east-north-africa/iraq-iran-gulf/iraq/052-the-next-iraqi-war-sectarianism-and-civil-conflict.aspx (last visited 6 November 2013); R. Chandrasekaran, *Imperial Life in the Emerald City: Inside Baghdad's Green Zone* (2007), at 331.

the Constitutional Working Group foreseen by the Ahtisaari Plan.[80] In accordance with the Plan, three seats on the working group were reserved for the Kosovo Serb community; however, those members did not come to its meetings.[81] There was some level of international, and especially US, input by facilitating dialogue between the various minority groups; however, the Working Group retained control of the drafting itself.[82]

Key decisions about the internationalized nature of the constitution, however, had already been made. The Ahtisaari Plan foresaw 'international supervisory structures' for the initial period of Kosovo's independence, and laid out detailed provisions for its constitution and various aspects of government.[83] These arrangements were the conditions placed by the international community on Kosovo's independence, and it was understood they were necessary to facilitate recognition of Kosovo by other states.[84]

5.3. Use of consociational power-sharing arrangements

Consociational constitutional arrangements are one way to manage the sharing of power between different ethnic, national, or religious groups within a state. According to Lijphart, consociational democracy is a response to 'the internal crisis of fragmentation into hostile subcultures', and is constituted by any 'deliberate joint effort by the elites to stabilise the system'.[85] This may take the form of a grand coalition cabinet, co-participation in the executive, or different posts assigned to different groups.[86] Because states with internal conflict are often characterized by deep cleavages between ethnic and religious groups, consociational power sharing is often considered as the best, or indeed the only, solution in the post-conflict context.[87] As Lijphart explains, however, the success of consociationalism depends on the elites having the ability to transcend cleavages, and being committed to a cohesive, stable system over political fragmentation.

The internationalized constitutions of Iraq and Kosovo both utilize consociational arrangements, and in both cases some of the above conditions of success are missing, with negative consequences for those constitutional orders. Whether there was any other option is open to debate, but at least more attention should be paid to the distorting effect of international efforts to broker artificial peace among groups that have no underlying commitment to a unified system. Because that artificial peace will be recorded in a constitution intended to last indefinitely, it is also necessary

80 J. Tunheim, 'Rule of Law and the Kosovo Constitution', (2009) 18 *Minnesota Journal of International Law* 371, at 376.
81 Interview with Louis Aucoin, 'On Constitution-Writing: The Case of Kosovo', (2008) 23 *Praxis: The Fletcher Journal of Human Security* 123, at 125.
82 Ibid., at 124; J. Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective', (2008) 33 *Review of Central and East European Law* 437, at 442; Tunheim, *supra* note 80, at 377.
83 See Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, *supra* note 39, at 2; Ahtisaari Plan, Comprehensive Proposal for the Kosovo Status Settlement, UN Doc. S/2007/168/Add.1. Ann. I–XII.
84 Interview with Louis Aucoin, *supra* note 81, at 125.
85 A. Lijphart, 'Consociational Democracy', (1969) 21 *World Politics* 207, at 213, 215.
86 Ibid., at 214.
87 A. Lijphart, 'Constitutional Design for Divided Societies', (2004) 15 *Journal of Democracy* 96, at 97.

to consider the long-term consequences of cementing those social divisions and creating central governments with extremely weak powers.

5.3.1. Iraq

The initial failure, on behalf of the US in particular, to realize that a constitution in Iraq would be more a Bosnia and Herzegovina or Sudan than a Timor-Leste or Afghanistan, meant that expectations were mismatched to any likely outcome of the process.[88] At some point, though, the reality became clear and the US did not push for an imposed integrationist model. The consociational constitution was the result of strong Kurdish involvement in the draft, and Sunni absence. The Constitution created a kind of lopsided federalism, with considerable autonomy for the region of Kurdistan, and the right for other governates to organize themselves into a region if they so wish.[89] A range of different views on Iraq's future as an integrated or divided state have been expressed, illustrated by reference either to rosy examples of new co-operation, or to ongoing violence and distance between groups. As there are abundant examples of both, it seems the situation is too fluid to determine the ultimate fate of consociationalism in Iraq. Some believe dissolution into separate states is inevitable, while others believe that the sharp divisions are in part a Western construction and centralization is the only solution to the conflict.[90] Some warning may be heeded, however, from Lijphart's conditions for success. It is not clear that Iraqi elites fulfil any of the conditions he posits; particularly lacking is a commitment to the maintenance of the system and to the improvement of its cohesion and stability. Even the Kurds, the strongest supporters (and the biggest winners) of the current constitutional arrangements, may be less invested in stability than in inching towards independence.[91] It seems there is no joint vision among Iraqi elites as to whether centralization or decentralization is in the best interests of all.[92] Due to the rushed process which Sunni Arabs did not buy into, it is fitting to describe the Iraqi Constitution, initially at least, as 'the product of a Kurdish agenda to which the Shiites signed on'.[93] Today the position is less clear, as the insurgency continues but Sunni Arabs are also actively engaged with the political process, and for now Kurdish politicians do seem committed to the unified Iraq foreseen in the Constitution.[94] The liberal style of consociationalism adopted in the Constitution, where different regions can choose their relationship with the central government in the future, and where federal government positions are not rigidly based on group identities, provides useful flexibility for the system to evolve.[95] If

88 Morrow, *supra* note 50, at 567.
89 Constitution of Iraq, Arts. 111, 115, 117, 119, 121, 141.
90 For an outline of different views see J. McGarry and B. O'Leary, 'Iraq's Constitution of 2005: Liberal Consociation as Political Prescription', (2007) 5 *International Journal of Constitutional Law* 670, at 8.
91 Interview with Mr Jonathan Morrow, expert consultant in comparative constitutional law, Hills Stern LLP, 10 May 2012.
92 McGarry and O'Leary, *supra* note 90, at 683–4.
93 D. L. Horowitz, 'The Sunni Moment', *Wall Street Journal*, 14 December 2005, A20.
94 Interview with Mr Guillermo Martinez Erades, head of political section, European Union Delegation to Iraq, 10 November 2012.
95 McGarry and O'Leary, *supra* note 90, at 687, 692.

Sunni provinces decided to become a region under the Constitution, which they periodically express interest in, the system of government could be said to reflect their chosen vision of participation. So far, however, their expressions of interest have been met with opposition from Baghdad and violence from armed groups.[96] Other questions left unresolved by the Constitution, such as Article 140 on disputed territories, including Kirkuk, are a continuing basis for violence between Kurdish and central government troops.[97] As it stands, the Iraqi Constitution remains an incomplete attempt to contrive consociational arrangements among groups with little shared vision of an Iraqi state.

5.3.2. Kosovo

The Kosovo Constitution reflects many lessons learned from the Bosnia and Herzegovina case, where the consociational structures created an extremely weak central government and many problems with executive and legislative decision-making processes.[98] Nevertheless, the Constitution of Kosovo contains far more rigid consociational arrangements than that of Iraq, even though the biggest minority group of Kosovar Serbs is only an estimated 5–8 per cent of the population.[99] Twenty of the 120 seats in the Assembly are reserved for minority communities, with at least ten for the Kosovo Serb community, and another ten guaranteed to other minorities, including Roma, Ashkali, Egyptian, Bosnian, Turkish, and Gorani.[100] Minority presence on government ministries, the Supreme Court, and the office of the Ombudsperson is also provided for in quotas.[101] Complex voting rules prevent majoritarianism. An amendment to the Constitution requires a two-thirds vote of the Assembly as well as two-thirds of the reserved minority seats.[102] Laws of 'vital interest' similarly require a majority of the Assembly and a majority of votes from the minority communities.[103] Unlike in Bosnia and Herzegovina, however, the laws characterized as of vital interest are exhaustively listed in the Constitution, which has caused less 'ethnic blockage' in the executive and legislative processes than has been experienced in Bosnia and Herzegovina.[104]

The power-sharing provisions form part of the price of independence imposed upon Kosovo by the international community, rather than reflecting an elite power-sharing bargain with the Kosovar Serbs, a fact which has been detrimental to their implementation.[105] The lack of common interest in forming part of a unified

96 International Crisis Group, 'Iraq's Secular Opposition: The Rise and Decline of Al-Iraqiya', Middle East Report No. 127, 31 July 2012, at 2–4. Available at www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Iraq/127-iraqs-secular-opposition-the-rise-and-decline-of-al-iraqiya (last visited on 6 November 2013).

97 'Iraq Kurds Put Security Forces on High Alert' *AFP*, 17 November 2012; M. Ibrahim, 'New Iraq Army HQ Fuels Arab-Kurd Row', *AFP*, 16 November 2012.

98 See Grewe and Riegner, *supra* note 53.

99 Ibid., at 10.

100 Art. 64(2), Constitution of the Republic of Kosovo. Available at http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf (last visted on 6 November 2013).

101 Ibid., Arts. 96, 103, 133.

102 Art. 65(2).

103 Art. 81.

104 Grewe and Riegner, *supra* note 53, at 36.

105 Ibid., at 15.

government, even a decentralized one, is evident today. Kosovo's Serbs live primarily in an enclave north of the Ibar river, over which the central government has little or no de facto control.[106] Since the Constitution came into effect, the divisions between the minority Serbs and the majority Albanian Kosovars have only hardened, with radicalization of the Serbs and high tension over the central government's attempts to assert sovereignty in the north.[107] In May 2012 the central government announced plans to open its first administrative office in the north.[108] On 1 June 2012, armed violence occurred between Kosovar Serbs and KFOR troops attempting to dismantle roadblocks near Mitrovica.[109] As in Iraq, many of the elements of successful consociational democracy are absent. There is no manifest sentiment among Kosovar Serbs that unity is better than fragmentation, and no commitment to the system. The extent of Serbian influence in the north has led some to label the territory as under 'dual sovereignty', and the multi-ethnic state envisioned by the Constitution remains an aspiration at this point.[110] These dynamics are still evolving, as they are closely linked to Kosovar Serb relations with Serbia, and the prospects of EU candidacy for both Serbia and Kosovo.

The consociational arrangements in Kosovo demonstrate both the value and the danger of an internationalized constitution. While the arrangements provide a strong basis for minority involvement without many of the pitfalls seen in Bosnia and Herzegovina, the fact that the power-sharing arrangements have been crafted externally rather than arrived at between the parties may render the Constitution irrelevant. As time passes and Kosovar Serbs continue to exclude themselves from involvement in the political order set out in the Constitution, the value of that Constitution is weakened.

5.4. International authority

Since international involvement in governance and the administration of territory became attached to peacebuilding operations in Cambodia, Bosnia and Herzegovina, and Timor-Leste, there has been much commentary around the ability of such undemocratic operations to pave the way for good governance and lasting peace.[111] The cases of Kosovo and Iraq show how international actors do have some sensitivity to the implications of international executive rule under a constitution. They also show, however, the limits of that sensitivity. The undemocratic nature of

106 International Crisis Group, 'Kosovo and Serbia: A Little Goodwill Could Go a Long Way', Europe Report No. 215, 2 February 2012, at 1. Available at www.crisisgroup.org/~/media/Files/europe/balkans/kosovo/215%20Kosovo%20and%20Serbia%20-%20A%20Little%20Goodwill%20Could%20Go%20a%20Long%20Way.pdf (last visted on 6 November 2013).

107 Ibid., at 6.

108 M. Brajshori, 'ICO Exit from Kosovo Is a Step towards Integration',*Southeast European Times*, 15 June 2012.

109 UN Daily News Centre, 'UN Mission Appeals for Calm and Restraint after Incident in Northern Kosovo', UN Daily News Centre, 1 June 2012. Available at http://www.un.org/news/dh/pdf/english/2012/01062012.pdf (last visited on 6 November 2013).

110 Grewe and Riegner, *supra* note 53, at 28, 37.

111 See, for example, Chesterman, *supra* note 68, at 339; Cox, *supra* note 47, at 272; C. Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm', (2004) 27 *Houston Journal of International Law* 311, at 324; M. Cogen and E. De Brabandere, 'Democratic Governance and Post-Conflict Reconstruction', (2007) 20 LJIL 669, at 674.

international authority in Iraq and Kosovo left its mark on the resulting constitutions in different ways. The issue of whether international authority has strengthened or doomed rule of law and constitutionalism in those countries remains an open question.

5.4.1. Iraq

While the occupation of Iraq by foreign forces cannot realistically be described as a sensitive use of international authority, there was nevertheless an appreciation that the constitution should be an Iraqi creation. This attitude fits within the 'light-footprint' approach also taken in Afghanistan.[112] When push came to shove, however, it became clear that a light footprint is still a footprint, and US priorities prevailed. The impact of the US deadline of 15 August significantly distorted the constitution-drafting process, and the extent to which it could be regarded as homegrown. Importantly for fostering the rule of law and a culture of constitutionalism, parts of the process were arguably illegal. The draft of the Constitution was submitted for public consultation while negotiations were still ongoing on the text itself, and several changes were made which the public was not informed of before voting in the referendum of 15 October 2005.[113] Further, the Assembly missed the 15 August deadline set by the TAL and, as the Assembly had not extended it, technically the Assembly should have been automatically dissolved.[114] Instead the Assembly made a series of ad hoc decisions to allow themselves more time, in ways which were not clearly contemplated by the TAL.[115] All of these irregularities led to accusations that the constitutional procedures were illegal, and further undermined the legitimacy of the international authority and the Constitution.[116]

Another dynamic of international authority in Iraq which left its legacy in the Constitution was the complete exclusion of voices from the public and civil society. By 2005 internationalized constitutions in Cambodia, Timor-Leste, and Afghanistan had at least undergone the pretence of public participation in the drafting process in one form or another. Among the many important lessons learned from Bosnia and Herzegovina, ten years earlier, was that a blatantly undemocratic constitutional process undertaken amidst ongoing violence was hard to justify except that in that case it ended the war.[117] In Iraq, where the context of recent occupation reeked of imposition, with none of the 'benevolence' sometimes ascribed to UN administrations, little or nothing was done to facilitate local ownership. Civil-society groups were virtually excluded from the process, especially after the negotiations shifted to the

112 E. Afsah and A. H. Guhr, 'Afghanistan: Building a State to Keep the Peace', (2005) 9 *Max Planck Yearbook of International Law* 373, at 382.

113 A. Arato, 'Post-Sovereign Constitution-Making and Its Pathology in Iraq', (2006) 51 *New York Law School Law Review* 536, at 551.

114 Art. 61(G) of the TAL: 'If the National Assembly does not complete writing the draft permanent constitution by 15 August 2005 and does not request extension of the deadline in Article 61(D) above, the provisions of Article 61(E), above, shall be applied'. Under Article 61(E) the Assembly would be dissolved and new elections would be held on 15 December 2005.

115 Morrow, *supra* note 50, at 582.

116 Ibid.

117 O'Brien, *supra* note 47, at 345.

informal Leadership Council.[118] The public consultation exercise was a failure. An outreach unit within the drafting committee was under-resourced and had a mere eight weeks to conduct an exercise that takes months even in rushed circumstances, in an environment of high insecurity. A public questionnaire on the Constitution was distributed in late July, but there was not enough time to process the results, so no written submissions reached the committee before it was unofficially disbanded in August. There was no public education process, and only minimal contributions were received from Kurdistan and Sunni Arab areas. By the time the outreach unit had prepared a report, on 13 August, the draft of the Constitution was relatively settled. In the end the 400,000 submissions received were not taken into account.[119] The demise of the public participation process, which was required under the TAL, is directly attributable to international authority. It was the tight schedule imposed by the US that caused the drafting committee to be sidelined, also excluding civil-society views, and preventing meaningful public consultation and education from being carried out. The failure to engage a range of voices in the constitutional process is so significant because it was another obstacle to Iraqis, feeling bound by, or invested in, the Constitution. The Iraqi context called for far more sensitivity to this issue, in order to produce a Constitution which the Iraqi people could feel represented a social contract between them and their government.[120]

5.4.2. Kosovo

Until September 2012, the Constitution of Kosovo vested final authority in the 'International Civilian Representative' (ICR) to oversee the implementation of the Ahtisaari Plan, which under Article 143(2) of the Constitution 'shall take precedence over all other legal provisions in Kosovo'. A similar arrangement in Bosnia and Herzegovina's Constitution had been used quite intensively to impose laws and dismiss public officials, going beyond the securing of peace and stability to engineering of the democratic process.[121] Conscious of the Bosnia and Herzegovina precedent, where many felt that international authority went too far, the ICR in Kosovo showed restraint in the visible exercise of power. The ICR never used his mandate to openly overrule a Kosovar law. Instead, the International Civilian Office (ICO) would get involved at the ministry level before a law was put before Parliament.[122] The ICR's power was useful leverage to ensure that the views of international actors were taken seriously and included at that stage, to avoid being overruled by the ICR later. Before the International Court of Justice had issued its advisory opinion on Kosovo's declaration of independence in July 2010, the pending opinion was also incentive

118 Morrow, *supra* note 50, at 584.
119 Ibid., at 585–6.
120 Interview with Ms Laila Al-Zwaini, Sharìa and Arab law expert, 20 June 2012.
121 Cox, *supra* note 47, at 272.
122 Interview with Ms Maria Fihl, European External Action Service Civilian Planning and Conduct Capability, former special adviser to the International Civilian Representative/European Union Special Representative in Kosovo, 7 May 2012.

for the Kosovars to appear as independent of international authority as possible, and to avoid a situation where the ICR might use his powers under the Constitution.[123]

While the use of authority by the ICR and ICO in Kosovo was still less than democratic, keeping a lower profile and avoiding the blunt use of powers under the Ahtisaari Plan avoided the more unfortunate impression of international authority overruling local laws. Also, because national actors were incorporating international views for reasons that included their own self-interest, the chances of implementation were greater and local ownership of the constitutional arrangement was bolstered. International authority in Kosovo, however, did not manage to completely avoid becoming a player in local politics. International actors were involved in daily bargaining with the Kosovar government which was anxious for full independence but still dependent on outside help in many ways.[124]

5.5. Over-inclusion/under-inclusion of human rights

The issue of human rights in internationalized constitutions remains contested, even though the importation of such standards is one of the fundamental rationales behind international involvement. On the one hand there is now general consensus on the inclusion of a bill of rights in any internationalized constitution, as part of the 'standard script of peace-building'.[125] On the other hand is the risk that such an automatic inclusion of a common set of international standards may be insufficient, or even counterproductive, in guaranteeing those rights. Treating the bill of rights as a given, as a kind of precondition of international involvement in drafting a constitution, is understandable but there is a need for more serious consideration of the consequences. Choudry points out that the effectiveness of a bill of rights may be undermined by politicized judiciaries, constitutional under-enforcement, and the *ex post* nature of judicial review.[126] Feldman similarly elaborates on how human rights standards may be ignored by elites who never intended to enforce them, discrediting the entire constitutional order.[127] To be effective, Feldman argues, human rights standards should be adopted by local elites when they believe it is in their interests to do so.[128] The issue of human rights is a potent example of the inadequacy of a purely textual approach to constitution drafting, which creates institutions but cannot by itself create a culture of respect for human rights.

5.5.1. Iraq

Iraq typifies the dynamics of over- and under-inclusion of human rights. Human rights advocates, particularly women's groups in Iraq, were disappointed with the final document.[129] There is a bill of rights within the Constitution with a range

123 Ibid.
124 Interview with Mr Hupin, *supra* note 22.
125 S. Choudry, 'After the Rights Revolution: Bills of Rights in the Post-Conflict State', (2010) 6 *Annual Review of Law and Social Science* 301, at 303.
126 Ibid., at 311.
127 Feldman, *supra* note 53, at 872.
128 Ibid., at 873.
129 N. Al-Ali and N. Pratt, 'Women's Organizing and the Conflict in Iraq since 2003', (2008) 88 *Feminist Review* 74, at 76.

of human rights protections including civil and political as well as economic social and cultural rights.[130] The inclusion of these rights was seen as reassuring by those concerned to counterbalance the effect of other, inevitably religious, provisions in the Constitution.[131] There is ambiguity, however, in how the human rights provisions interact with other parts of the Constitution, putting the effectiveness of those rights in question. Under the Constitution Islam is the official religion of the state and is a source of legislation, and the judges of the Federal Supreme Court shall include experts in Islamic jurisprudence.[132] Under Article 41, 'Iraqis are free in their commitment to their personal status according to their religions, sects, belief, or choices, and this shall be regulated by law'. While it may sound relatively innocuous, this provision was a major sticking point in negotiations and was strongly opposed by the Kurds and by women's advocacy groups.[133] Matters of personal status include inheritance, marriage, custody, maintenance, and divorce. Leaving these areas for regulation by religious law, without a statement that such laws must conform to other constitutional guarantees of human rights, could lead to laws which discriminate against women, contrary to the human rights included in the Constitution.[134]

These unresolved questions will depend on future legislation, as well as judicial interpretation of the Constitution.[135] Article 41 has not been implemented and therefore Iraq's 1959 Personal Status Law continues to apply. No serious attempt has been made to bring a comprehensive new Personal Status Law into force; only Kurdistan has brought in amendments in 2008, which improved the situation of women.[136] As the 1959 law is relatively progressive by regional standards, there is reluctance to revise it and risk backtracking on the rights already secured. For now, therefore, Article 41 remains an open question and changing the Personal Status Law is not on the political agenda.[137] The question of how personal status issues relate to other human rights provisions in the Constitution will then come down to constitutional interpretation by the judiciary. As for any constitution, subsequent interpretation determines much of how the provisions come to life in an everyday context. The Iraqi Constitution is by no means unique in containing vague or seemingly contradictory provisions, but for those who wanted to seize the opportunity to secure solid human rights protections, the risk of leaving it up to later laws and judgments is unsatisfactory. Some promise can be found, however, in the approach taken by the Federal Supreme Court in cases so far, for example a

130 See Arts. 14–46, Constitution of Iraq, *supra* note 89.
131 H. Ludsin, 'Relational Rights Masquerading as Individual Rights', (2008) 15 *Duke Journal of Gender Law and Policy* 195, at 208; Feldman, *supra* note 53, at 871.
132 Arts. 2, 92, Constitution of Iraq, *supra* note 89.
133 Deeks and Burton, *supra* note 77, at 21.
134 Ludsin, *supra* note 131, at 213.
135 M. Y. Mattar, 'Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash between "Human Rights" and "Islamic Law" be Reconciled in Future Legislative Enactments and Judicial Interpretation?', (2006) 30 *Fordham International Law Journal* 126, at 157.
136 Act No. 15 of 2008, The Act to Amend the Amended Law No. 188 of 1959; Personal Status Law, in Iraq Kurdistan Region.
137 Interview with Mr Sermid D. Al-Sarraf, executive director, IIRL (International Institute for the Rule of Law), 27 October 2012.

ruling that a parliamentarian could not be criminally charged for visiting Israel, as the Constitution guarantees freedom of travel.[138]

As it stands, the Constitution of Iraq shows that the inclusion of the standard bill of rights in a Constitution is not sufficient to guarantee the protection of those rights. In the future more attention should be paid to the context of the Constitution, especially potentially conflicting provisions, although, as pointed out by Laila Al-Zwaini, perhaps it was not lack of attention that resulted in the current text but a conscious bargain in which human rights were traded away. [139] In that case, as Feldman warns, we should beware 'the bad conscience of premature rights triumphalism'.[140]

5.5.2. Kosovo

Kosovo's Constitution contains even stronger human rights protections than Iraq's. Chapter II contains 35 articles on Fundamental Rights and Freedoms, while Chapter III concerns the Rights of Communities and Their Members, largely reproducing parts of the Ahtisaari Plan. Under Article 22, a range of human rights instruments are declared to be directly applicable in Kosovo, and in case of conflict they have priority over other laws or government acts. Under Article 53, the rights guaranteed in the Constitution 'shall be interpreted consistent with the court decisions of the European Court of Human Rights'. As in Iraq, the blanket incorporation of human rights provisions takes on an artificial quality as they have been included in order to ensure conformity with the Ahtisaari Plan and to satisfy international actors, rather than necessarily reflecting the determination of a new state to be a beacon of human rights protection in the region. For example, Article 37 states that 'based on free will, everyone enjoys the right to marry and the right to have a family as provided by law'. Read together with Article 24(2) which forbids discrimination, including on the grounds of sexual orientation, the Constitution arguably protects same-sex marriage.

The very progressive human rights provisions in the Constitution, especially the extensive protections granted to minority groups, risk being seen as outside impositions, an impression which is strengthened by the lack of implementation.[141] The 2011 US State Department report states that during that year, ethnic minorities faced 'varied levels of institutional and societal discrimination, in areas such as employment, education, social services, language use, freedom of movement, IDPs' right to return, and other basic rights'.[142] The human rights protections in Kosovo, and particular protection of minority rights, raise a kind of chicken – egg dilemma about whether these legal guarantees can help foster an environment of respect, or whether genuine will to respect human rights is required before legal guarantees

138 Legal case against Speaker of the Iraqi Council of Representatives in which the claimant asks for non-legitimacy of the procedure adopted by the Council of Representatives on 28/4/2007 when it formed Council of the Higher Independent Electoral Commission (24 November 2008), Federal Supreme Court, 9/Federal/2008.

139 Interview with Ms Al-Zwaini, *supra* note 120, 11 July 2012.

140 Feldman, *supra* note 53, at 872.

141 E. Lantschner, 'Protection of Minority Communities in Kosovo: Legally Ahead of European Standards – Practically Still a Long Way to Go', (2008) 33 *Review of Central and East European Law* 141, at 488.

142 US Department of State, Bureau of Democracy, Human Rights and Labor, 'Kosovo', in Country Reports on Human Rights Practices for 2011.

will be of any use.[143] Any evaluation also depends on the measurement used. If, in the post-conflict context, the minimum aim is to prevent the resumption of war, then it can be argued the legal framework has been successful so far. Reports continue, however, of isolated violent incidents and the prospect of conflict has not disappeared.[144] If the aim is to enliven and nurture a vibrant culture of human rights, there is little evidence to suggest that objective is being met.

The example of Kosovo demonstrates the limits of a constitution as a document; the words contained within it are not always self-fulfilling. The focus in a constitution on building institutions and structures of government ignores the important role played by 'the governed' in bringing that text to life.[145] The social and political relationships between individuals, groups, and institutions are at least as important as the constitutional provisions. In terms of guidance for future internationalized constitutions, Kosovo reinforces Iraq's warning not to include human rights in a mere tick-box fashion. Strong human rights provisions have the potential to provide a legal framework of respect and the rule of law. There are many opportunities, however, for that aim to be defeated. In Kosovo the situation continues to evolve. The chance remains to develop a vibrant human rights culture based on strong constitutional guarantees, but there is also the risk that the entire framework is rendered meaningless through non-implementation and disrespect.

6. Conclusion

Internationalized constitutions reflect a convergence of political will and capacity of international actors to have an impact in a given situation. Fulfilling this agenda, however, is difficult in practice. The very nature of international action as external, with varying degrees of imposition, threatens to undermine the objectives. This article has argued that internationalized constitutions are not inherently legitimate or illegitimate, but have the potential to be either in any given situation. For this reason there is a need to develop and use accumulated expertise in this field, while also crucially remaining sensitive to local context. While they reinforce the importance of constitutional documents themselves as indicators of sovereignty, internationalized constitutions simultaneously legitimize a high degree of external influence in the creation and even implementation of those documents. Internationalized constitutions are creating new relationships between domestic and international legal regimes, and shedding rigid models in favour of transitional provisions and interim arrangements.

Internationalized constitutions offer rich material for evaluating how the everyday practices of international institutions and states are shaping international law before our eyes. If Kosovo and Iraq are to serve as examples for future internationalized constitutions, Iraq's lesson may be 'here is what *not* to do', while

143 Lantschner, *supra* note 141, at 488.
144 See International Crisis Group, *supra* note 106; US Department of State, Bureau of Democracy, Human Rights and Labor, 'Kosovo', 2011.
145 McConnachie and Morison, *supra* note 12, at 84–7.

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Kosovo's would be 'here is what can go wrong even if you do it right'. As case studies they provide many practical lessons for future situations, demonstrating the importance of both the process and substance of constitution making, and its limitations. As a document the constitution is just one piece of the puzzle, and in the ongoing process of creating a government and rule of law, it is not determinative of either success or failure. The nature and methods of involvement, however, still make an impact on the direction taken, and can help or hinder the realization of the rationales behind international action.

An international order where some states are created by virtue of facilitated self-determination, with high dependency on outside support, changes what it means to be a sovereign state and the criteria for recognition as such. By facilitating the self-determination of peoples, international actors distort both the process and the outcome. Recognition of this fact should inspire greater reflection and transparency about the role played by international actors, in order to allow the cross-cutting dilemmas to be addressed head-on. In the midst of other post-conflict peacebuilding solutions, they are at risk of becoming one more task to complete, without meaningful regard to the particularities of each context.