International Role in State-Making in Ukraine: The Promise of a Two-Stage Constituent Process

By Andrew Arato[*]

A. Introduction

The conflict in the Ukraine—barely placated by a fragile truce that temporarily froze its territorial fault lines—remains one of the gravest threats to both regional and international peace since the end of the Cold War. The present de facto territorial arrangements in Ukraine remain highly unstable—as well as entirely unacceptable—to at least one of the parties to the conflict. With the fate of the second Minsk Agreement in question, neither the parties involved in the conflict nor the powers that support them have been able to propose mutually-acceptable, comprehensive solutions that would significantly diminish the danger of a renewed violent confrontation. In such a situation, the wider international community could play a helpful role in achieving a lasting political settlement.

Given that the conflict in Ukraine concerns the territorial structure of the State and its internal constitutional arrangements, external actors cannot restrict themselves to a mere *pouvoir irritant*—as defined recently in an important article by Nico Krisch[1]—but should actively participate in achieving a substantive constitutional settlement. In defending this stance, this article will tackle two fundamental questions: (1) How interventionist should the role of international actors be, and in which constituent processes would it be legitimate for them to intervene? (2) Should their aim be to restrict the scope of action of

[*] Dorothy Hart Hirshon Professor of Political and Social Theory, The New School. Email: Arato@newschool.edu. I want to thank Zoran Oklopcic for encouraging me to write this article, as well as for his helpful comments on the penultimate draft. I also want to thank Julian Arato for correcting at least some of my mistakes regarding international law. I alone remain responsible for the final product.

[1] Nico Krisch, *Pouvoir Constituant and Pouvoir Irritant in the Post-National Order*, SOC. SCI. RES. NETWORK, http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2431266_code812324.pdf?abstractid=2430128&mirid=1. For Krisch, in an post-national world, constituent power "operates merely as an 'irritant' of an order which, in its normal operation, leaves little room for popular sovereignty, or even political agency." *Id.* at 2. However, the constituent power that acts "as an irritant may still be an important role. It may help to disturb the institutionalization of the world along merely technocratic, power-driven lines, and it may also help to keep the idea of agency present in the postnational space." *Id.* at 19. In going beyond understanding external powers as (co-)constituent, this article goes beyond their "irritating" role, this article seeks to capture one important way in which external actors can, and generally should, influence domestic constitutional developments. But it does not capture either the variety of factual forms, nor the possible justification of forms of intervention that legitimately rely on power, as well as influence.

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domestic actors in a constituent process or to empower these actors to design their own solutions to their own conflicts?

This paper will begin addressing these questions by first drawing a series of distinctions that illuminate the choices involved in international intervention, setting the stage for its prudential and normative defense. Such intervention should go well beyond ineffectual pronouncements of international public opinion, but should nonetheless be limited by political and moral imperatives of contemporary international order. In recognizing that the international community cannot—and ought not—absolve itself from the responsibility that accompanies state- and constitution-making in the context of deeply divided societies, this article will also insist on the enduring ideal of constitutional autochthony. The second part of the paper will discuss the promise of an alternative approach for a possible international role in the context of the conflict in Ukraine.

B. Framing the Debate About the International Role in Domestic Constitution Making

The idea of an international *pouvoir constituant*[2]—as proposed by Zaid al-Ali with Philip Dann[3] and, more recently, in several forceful pieces by Zoran Oklopcic[4]—is increasingly receiving attention in debates about externally influenced constituent processes. Beyond recent debates in theory, the practice of international *pouvoir constituant*—if not under that term—has its historical origins in the period of the dissolution of empires after the First World War. It includes post-Second World War occupations and constitutional transformations in Japan and Germany, as well as the UN involvement in ending the Palestine mandate in 1947. International constituent power continued to be exercised throughout the period of decolonization, including the recent cases of the UN-sponsored international involvement in post-conflict constitution making in Namibia, Cambodia, East Timor, Bosnia, Afghanistan, and even Iraq.

As the ongoing conflicts in Israel, Palestine, and, most recently, Ukraine amply demonstrate, the contemporary political relevance of an international role in reconstituting troubled polities is by no means exhausted, making its theoretical articulation an urgent task for constitutional theory and its adjacent disciplines. The rising threat of authoritarianism in a number of countries, such as Hungary or Turkey,

[2] In this article, I consider the external as international, though legal and legitimate only when there is international law authorization, or at least principle, supporting it, and when the intervening actor has been suitably, generally pluralistically constituted by a legitimate international authority. On this, *see*, *infra*.

[3] Philip Dann & Zaid Al-Ali, *The Internationalized Pouvoir Constituant—Constitution-Making Under External Influence In Iraq, Sudan and East Timor*, *in* 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 423 (2006).

[4] *See generally* Zoran Oklopcic, *The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN L.J. 658 (2015). Oklopcic applies the argument to the case of the Ukraine in this issue of GLJ.

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demonstrates that the international role cannot—and should not—be simply reduced to the idea of external constitutional involvement as *pouvoir irritant*, a mere power to verbally influence domestic political processes of countries that undergo profound political re-constitution.[5]

In order to approach the question of a legitimate international role in the making of States and constitutions productively, the vocabulary of international constituent power deserves to be complicated. A number of interpreters, for example, stress the difference between various levels of intervention, ranging from "hard" to "soft,"[6] or what otherwise might be called "power" and "influence." Yet, the idea of international constituent power itself papers over five important distinctions and one important question, each of which is key to finding a more principled solution for the legitimate international role in the making of States and constitutions.[7]

The distinctions are: (1) Between power and authority; (2) between legality and legitimacy; (3) between state-making and constitution-making; (4) between original state-making (founding) and the re-foundation of existing polities; and (5) between procedure and the substance of international involvement in domestic constituent processes. The sixth point concerns the paramount question: Who should legitimately intervene, and what should be the composition of such an international body? Before turning to the problem of the Ukraine, let me elaborate more closely on these six points.

I. Power and Authority

The distinction between the constituent as *power* and the constituent as *authority* is important, despite the systematic ambivalence concerning this issue in most classical texts

[5] For an argument in favor of a more engaged role of the international actors in preventing democratic backsliding in Hungary, see Erin Jenne & Cass Mudde, *Can Outsiders Help?*, 23 J. DEMOCRACY 147, 153 (2012). For claims that the weakening of the EU conditionality weakened Turkish constitutional reform process, see Firat Cengiz, *The Future of Democratic Reform in Turkey: Constitutional Moment or Constitutional Process?* 49 GOV'T & OPPOSITION 682, 697–98 (2014).

[6] *See* Dann & Al-Ali *supra* note 3, whose analysis features a case between "domestic" and "international" constituent power among their case-studies.

[7] Though I go beyond oversimplified invocations of constituent power in the sphere of international involvement in constitution-making, I also disagree with the attempts to abandon this concept for the sake of concerns of liberal legal theory. For that approach, see generally David Dyzenhaus, *Constitutionalism in an Old Key: Legality and the Constituent Power*, GLOBAL CONSTITUTIONALISM 1, 2 (2012). His argument ultimately rests on the belief that only the constitutional result matters, not the process of making. I disagree with this assessment on both normative and empirical grounds. For another critique of Dyzenhaus' approach, see also Zoran Oklopcic, *Three Arenas of Struggle: A Contextual Approach to the Constituent Power of "The People," in* 2 GLOBAL CONSTITUTIONALISM 200 (2014). *See also* ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING (forthcoming); ANDREW ARATO, ADVENTURES IN THE CONSTITUENT POWER (forthcoming).

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on *pouvoir constituant*.[8] On the one hand, the concept of power belongs to the realm of facts. In that regard, Hannah Arendt's remarks in *On Revolution* have been partially right; power is ultimately generated from the interaction among a relatively large number of people.[9] While Arendt developed her vision of "constituent" power in the context of a worthy political enterprise of "the constitution of liberty," political power need not arise from a legally or ethically justifiable form of interaction.[10] Irrespective of political aspirations, theorizing external involvement in—the making of States and constitutions—or any form of constitution-making, for that matter—should never lose sight of the Weberian understanding of power, which exists only when there is an ability to carry out projects despite resistance.[11]

On the other hand, authority is a normative concept, irrespective of whether it is conceived in a legal or an ethical sense. In fact, the entire discourse of the *pouvoir constituant* has always implied something more, namely that the agent establishing a constitution must also be normatively justified in doing so. The rarely used concept of constituent authority expresses this requirement.[12]

While the power and the authority to make a constitution can refer to a single, unified actor—as in the conception famously advanced by Sieyès, and later on by Carl Schmitt—there can also be possessed power or claimed authority by a plurality of actors acting in concert, simultaneously, successively, or antagonistically. Therefore, the idea of an international *pouvoir constituant* can refer to external actors establishing a constitution, or in combination with domestic actors.

The starting point for comparative analysis should be the fact that a host of varied international actors can and do intervene in internal constitution making. Not only the Japanese case in 1946-7, but the creation shortly thereafter of regimes and constitutions

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[8] The best examples of this ambiguity are in CARL SCHMITT, VERFASSUNGSLEHRE (1928). On this problem in Schmitt's work, see the first chapter of my forthcoming POST-SOVEREIGN CONSTITUENT POWER. ANDREW ARATO, POST-SOVEREIGN CONSTITUENT POWER (forthcoming). In Sieyès, the problem never came up, but undoubtedly he thought of the people or the nation as an entity that had the factual ability as well as the normative authority to enact and establish a constitution. Since such an agency has never been found, it is unsurprising that the two dimensions came to be unstuck. Schmitt's ambivalence is based on the derivation of the concept from Sieyès, and his implicit realization that the claim to speak on behalf of the people must be independently justified.

[9] HANNAH ARENDT, ON VIOLENCE 44 (1969).

[10] HANNAH ARENDT, ON REVOLUTION 141 (1963).

[11] *See* MAX WEBER, ECONOMY AND SOCIETY 16 (1978); Jürgen Habermas, *Hannah Arendt's Communications Concept of Power*, 44 SOC. RES. 3 (1977).

[12] *See generally* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 11 (1998). Here, Ackerman juxtaposes constituent authority with constituent power, whereas I would like to speak of power *and* authority. *See also* Richard Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 743–55 (2011).

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for six post World War II people's democracies in the occupied countries of Central and East Europe proves this beyond doubt. The same cases however raise the question of justification or authority. A mere "pouvoir irritant" exercised in the international public sphere may not have any problems of justification, but could massive external interventions by colonial, mandatory, occupying powers, or even powerful organs of the international community, be possibly be justified? The keeping secret of the Japanese process indicates that at least the US drafters in Tokyo had serious doubts on this score, fueled by the Hague Convention of 1907.[13]

In the modern-day era, the historically variegated constellations of power and authority in externally-imposed or facilitated-processes of state-making and constitution-making have increasingly been structured by the overarching ideal of *constitutional autochthony*. In international law, this ideal has been prominent at least since the influential contributions of Emer de Vattel, who contends that constitution-making must be seen as the highest mark of sovereign statehood.[14] In constitutional law, the principle of *autochthony* has been dominant at least since Sieyès' influential account of constituent power, which implied that the power to constitute, or reconstitute, a polity ought to be exercised by the *domestic* political community, or, in Sieyès' terms, "the nation."

Beyond the works of theorists, the echoes of the ideal of *constitutional autochthony* have been visible in influential international legal documents, even before the ultimate global victory of the principles of self-determination and popular sovereignty. The Hague Convention concerning belligerent occupation stipulated, for example, that after

> the authority of the legitimate power [has] in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[15]

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[13] *See generally*, KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POST WAR CONSTITUTION (1997).

[14] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, *in* THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY ch. 1, sec. 1 (2008).

[15] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3741EAB8E36E9274C12563CD00516894. This stance was further reaffirmed by the more detailed provisions of the Fourth Geneva convention in 1949. *See* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 47, http://webcache.googleusercontent.com/search?q=cache:ILi_x7Z4Rm0J:https://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/AE2D398352C5B028C12563CD002D6B5C/FULLTEXT/ATTXSYRB.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=safari ("Protected persons who are in occupied territory shall

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After the First World War, the victorious powers in Versailles imposed minority treaties exclusively on the defeated and newly formed states. This imposition was criticized, even at that time as a blatant case of victor's justice, devoid of legality and legitimacy.[16] The idea of authocthony, already present in the diffuse aversion towards externally imposed constitutional settlements after the First World War, has, after the Second World War, been widely embraced within international society, even in contexts of thorough military defeat, where the victors enjoyed absolute constitutional dominion over the vanquished, such as in post-War Japan. The worries of the US constitutional drafters in Tokyo in 1946–1947 about the legal expanse of their role in light of the limiting norms of the Hague Convention,[17] can thus be seen as manifestations of the paramount role of *constitutional autochthony* not only in uncontroversial cases of domestic constitution-making in politically stable societies, but also in those liminal cases where the international role in state-making and constitution-making is either unavoidable or even desirable.[18] Still, in having divorced power and authority, and submitting them to the regulative ideal of *constitutional autochthony*, we confront the question of how to justify concrete attempts to negotiate the fact of external constituent involvement with the putative authority of an autochthonous constitutional enactment.

II. Legality and Legitimacy

In tackling this question, we should remember that authority's justification has more than one possible source. Authority can be based on legality, legitimacy, or preferably a combination of the two. The traditional conception of constituent power assumed that given the legal rupture that occurred, legal justification or authorization of a new constitutional order must likewise be absent. This view, however, is problematic, both factually and conceptually.

On the one hand, the traditional understanding of constituent power neglects the fact that there has been a number of radical constitutional changes in history—including those featuring external constituent involvement—that have existed in the ambient of legal continuity and were thus, partially, legally authorized. From Canada in the 1860s, to the

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not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory.").

[16] *See generally* HANNAH ARENDT, ORIGINS OF TOTALITARIANISM (1951).

[17] *See*, *supra note* 13.

[18] Thus it is strongly claimed in many situations where an external power did play a significant role, e.g. India. *See* KENNETH C. WHEARE, THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH ch. 4 (1960). In India this made sense, since the constituent assembly, though elected under British rule, could no longer be influenced and dissolved by the old colonial power. *Id.*

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British India Act of 1935 and beyond, the United Kingdom either produced or played a key role in the constitution-making of its colonies on the eve of their independence. A similar role was also played by the United States with respect to the Philippines in the 1930s.[19] After the Second World War, at Lancaster House in London, several constitutions were produced or negotiated for newly independent states such as Kenya, Malaya, Nigeria, Tanzania, Uganda, Zambia, and Zimbabwe.[20] Under international law as it stood, lawmaking in the peripheries was a domestic affair of the colonial state, which implied that until independence was granted through the imperial power's legislation, the dominion, or colony, was neither a new sovereign state—the working fiction upheld in Canada until 1982—nor was its constituent power "patriated."

A bit more complicated was the problem of the League of Nations' Mandates, formally existing outside of the purview of imperial sovereignty. In those cases, the League of Nations' authority enabled mandatory powers to make "interim" constitutional arrangements in the relevant territory,[21] a role exercised in part by the United Nations after the end of the Second World War.[22] In the context of the formation of Israel and Palestine immediately after the war, one could argue that the UN established itself as a decisive external actor in the process of state-making and constitution-making. The failed outline of the constitutional settlement—proposed by General Assembly Resolution 181—contained the provisions that concerned non-discrimination, the management of Jerusalem and holy sites, provisional governments in both states, the constitution of constituent assemblies, citizenship and voting rights, economic union of the three entities, religious and minority rights, rights of education for minorities, preservation of personal status, and family law for minorities.[23] The overarching purpose of both regimes, however, was *constitutional autochthony*: Empowerment of relevant populations to be the "owners" of their constituent processes after independence.

The end of colonialism strongly re-inforced an enduring political aspiration towards *constitutional autochthony* even though it changed the modalities within which the

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[19] *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 280–91 (2004).

[20] *See generally*, John Darwin, *British Decolonization Since 1945: A Pattern or a Puzzle?* 12 J. IMPERIAL & COMMONWEALTH HISTORY (1984).

[21] The text of the Palestine Mandate speaks of full powers of legislation, *Art 1., in* THE ARAB-ISRAELI READER 31 (Walter Laqueur & Barry Rubin eds., 2008). Given the supposed purpose of the Mandate, the implication had to be only for the period of the mandate itself, that was understood as preparation for full self-government. For an example of such constitution making by the Mandatory Power, see *The White Paper of 1939*, *in* THE ARAB-ISRALEI READER 45 (Walter Laqueur & Barry Rubin eds., 2008).

[22] For the role of UN in resolving early conflicts over self-determination in the 1950s, see generally HAROLD S. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS (1967).

[23] *Id.*

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international role in state-making and constitution-making manifested itself. The 1982 constitutional principles for the former mandate Namibia[24], generally considered to have been authorized by the UN Security Council Resolution 435, also combined the emphasis on an autochthonous process with limitations designed by the United Nations. [25]

In questioning the traditional accounts of constituent power that have continued to rely on a simplistic relationship between power and authority, this brief historical sketch demonstrates that external constitutional roles frequently existed within a larger structure of legal authority. This claim can be put in even stronger terms, not only a matter of historical contingency but also as a matter of conceptual and normative necessity. As Hans Kelsen argued, even radical constitutional ruptures must presuppose a larger international legal framework, which structures what counts as "the people," and the exercise of its constituent power.[26] In other words, by postulating an already existing people, constituent power recognizes the validity of a larger normative structure. That structure can be understood modestly, following Kelsen,[27] or can be embraced in its richer normative texture.

If we followed this later route, we will notice that this normative texture has been itself changing. In the early twentieth century, the Hague Convention seriously limited external intervention in domestic constitution-making, even though the phrase "unless absolutely prevented" left a minute escape hatch for an occupying power. In contrast, contemporary resolutions of the UN Security Council, read in conjunction with the relevant provisions of the UN Charter itself, have broadened the field for the legality of such external intervention. Article 103 of the Charter states clearly that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the

[24] There the mandate was ended by successive UN decisions, not recognized by the mandatory, namely South Africa. *See*, *supra* note 20 .

[25] *See* Marinus Wiechers, *Namibia's Long Walk to Freedom*, *in* FRAMING THE STATE: CASE STUDIES IN CONSTITUTION MAKING (Laurel E. Miller & Louis Aucoin eds., 2010). *See also* S.C. Res. 435, U.N. Doc. S/RES/435 (establishing UNTAG) (Namibia). For other examples *see also* S.C. Res. 745, U.N. Doc. S/RES/745 (establishing UNTAC) (Cambodia); S.C. Res. 1272, U.N. Doc. S/RES/1272 (establishing UNTAET) (East Timor); S.C. Res. 1378, U.N Doc. S/RES/1378, S.C. Res. 1483, U.N. Doc. S/RES/1483 (the latter establishing UNAMA), S.C. Res. 1483, U.N. Doc. S/RES/1483 (Afghanistan); S.C. Res. 1500, U.N. Doc. S/RES/1500 (the latter establishing UNAMI); S.C. Res. 1511, U.N. Doc. S/RES/1511, S.C. Res. 1546, U.N. Doc. S/RES/1546 (Iraq). The various UN organizations under these monotonous acronyms played different roles, ranging from the active in East Timor (with respect to establishing procedures) to the rather passive in Iraq.

[26] *See* HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 37 (1950).

[27] *Id.*

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present Charter shall prevail."[28] While it still remains a question as to whether a vague authorization of international intervention like UN General Assembly Resolution 1483 concerning Iraq can derogate from the clarity of the Hague Convention,[29] a strong case can nonetheless be made that the contemporary UN system allows for a robust international role in state-making and constitution-making of states torn by civil conflict.

Though the traditional vocabulary of constituent power cannot be deployed to deny the partial legal quality of external constituent involvement, the question of legitimacy remains. If the UN's legal framework makes such a role legal under certain circumstances, what makes it legitimate? In other words, what are the legitimating and countervailing principles that limit the exercise of constitutional autochthony?

In justifying the international law in state-making and constitution-making processes in certain societies, one should rely on the qualified acceptance of the normative legitimacy of contemporary international order. It is qualified because the empirical track record demonstrates that the external constituent involvement has been quite *un*successful at engendering sociological legitimacy of imposed constitutional settlements outside of Japan or Germany. For example, the life span of constitutions imposed by colonial powers after the Second World War has been astonishingly short.[30]

The best case for the legitimacy of an international role in state-making and constitution-making stems from the normative promises of the UN system itself, the purpose of which is the preservation and restoration of peaceful relations among sovereign states. The UN Charter specifically authorizes the Security Council to take binding measures to "maintain or restore international peace and security."[31] While there are no specific provisions allowing the Security Council to intervene in civil wars, it is increasingly understood that civil wars involve the peace and security of many other states, either due to their spillover effects or because of interventions by outsiders. Finally, the gravest challenges to domestic

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[28] Julian Arato, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 INT'L J. CONST. L. 627 (2012).

[29] See the contrary arguments in ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION (2009) and EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993). Julian Arato argues that it is important to look at the kind of treaty we are presumably derogating from in order to determine how strongly we should resist *lex posterior* when there is a problem of *lex specialis*. Treaties like the Hague convention are integral, absolute obligations—very different from merely reciprocal agreements like trade treaties. *See generally* Julian Arato, *Accounting for Difference in Treaty Interpretation over Time*, *in* INTERPRETATION IN INT'L LAW (D.C. Peat et al. eds., 2015).

[30] As an example, the BIA of 1935 was, at best, only partially instituted in India because of the resistance of the princely states. *See* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION (1966). *See generally* Julian Go, *Globalizing Constitutionalism: View from the Post-Colony 1945-2000*, *in* CONSTITUTIONALISM AND POLITICAL RECONSTRUCTION (Samir A. Arjomand ed., 2007).

[31] U.N. Charter art. 39.

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constitutions, namely revolution and secession, are the very forms of political conflict that involve—or at least tend to lead to—civil war, as we have recently witnessed in the case of Ukraine. This overarching *telos* justifies the interest of the international community in avoiding or resolving civil wars, even by actively engaging in the domestic constituent processes of the polities, which endangers international peace and security.

III. State and Constitution: The Two-Stage Process

One thing bears repeating, however: The assertion of a significant international interest does not cancel out the principle behind autochthonous domestic constitution-making, namely sovereign equality. Sovereign equality as the central commitment of contemporary international law militates against constitution-making whereby a domestic political community becomes simply the ward of other states or even of the international community and its organs.

There are a variety of possible solutions to the normative conflict involved between legitimate external intervention on the one hand and constitutional autochthony, grounded in sovereign equality, on the other hand. One of the advantages of the South African *two-step* method of constitution-making is the analytical differentiation between state-making and constitution-making.[32]

This idea is equally promising when international actors are involved in constituent processes of polities marred by civil strife that endangers international peace and security. In that context, the international role should—in principle—be restricted to state-making, in the sense of its involvement in the territorial definition as well as the identification of the relevant population of the state in question.

While the domestic constituent power would certainly be affected by such a first stage of state-making, it would gain full control over the second stage.[33] In fact, this idea is consistent with Carl Schmitt's thesis that the possibility of the nation as the bearer of constituent power is previously completed during the process of state formation. Though Schmitt seemed to consider state-formation as an exclusively domestic affair—even for the examples he had in mind in *Verfassungslehre*—the international dimension of state-making was always implicitly present, implicating emergent states in a larger international field of struggles and alliances with their territories carved out as the result of this complex process.

Though positing a clear analytical and normative distinction between the two stages in the constituent process is useful, it is difficult to maintain in practice. Consider, for example,

[32] *See* ARATO, *supra* note 29 and accompanying text.

[33] *See* SCHMITT, *supra* note 8, at 21–22; 6: II: 2-3, 47-49.

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the interim constitutions of Iraq—which was a *complete* constitution—where external involvement was hardly restricted to the stage of state-making alone. In Iraq, the US actors that have played a critical role in adopting the Transitional Administrative Law were equally interested in constitutionally entrenching a particular version of federalism, governing institutions, and fundamental rights.[34] From a practical point of view, then, it is important to emphasize the role of prudence and self-limitation. It is possible, even for an occupying power, to impose self-limitations on its involvement in constitution-making abroad. In the case of occupied Germany, for example, the Allied commanders-in-chief insisted on a more federal-like structure than the majority of makers of the *Grundgesetz* at Chiemsee were initially ready to establish, but nonetheless resisted the temptation to interfere with the form of government and other constitutional issues, including the status of the process, and its final outcome.[35]

At the very least then, the distinction between state- and constitution-making linked to a two stage process could mean that external actors should restrict their input to the first stage,[36] and even then to a few topics that clearly pertain to the territorial structure of the state. Admittedly, this would leave out human rights, a key concern of the international community today. Nevertheless, there is an independent basis to insist on the inclusion of an extensive table of fundamental rights in both interim and final constitutions. Here, the interplay between state succession and state recognition should enable the entrenchment of human rights obligations in the constitutions of the new, or reconstituted states. Human rights obligations remain obligations of old states that are engaged in the making of new constitutions, just like the financial obligations that survive revolutions. The same is partially true in the case of secession, partition, and state fragmentation—at least to the extent that there is usually a successor state inheriting the obligations. While the same may not be true for all the succeeding states, and especially entirely new states created by secession, here, the conditionality of international recognition can and should require accession to all human rights treaties and conventions that find their way into new constitutions.[37]

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[34] *See* NOAH FELDMAN, WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING 66 (2009).

[35] *See* PETER MERKL, THE ORIGIN OF THE WEST GERMAN REPUBLIC (1963). The commanders preferred a constituent assembly and a final constitution; the German actors preferred the reduced status of a Parliamentary council, and a supposedly interim "basic law."

[36] Oklopcic, too, uses the idea of "early" against "late" intervention that has the advantage of applicability to one stage processes, or those where the distinction among stages is less than clear cut. But he seems to be less demanding in terms of the restriction of the power to only certain topics. *See generally*, Zoran Oklopcic, *Introduction: The Crisis in Ukraine Between Law, Power, and Principle*, 16 GERMAN L.J. 350 (2015); Oklopcic, *supra* note 4.

[37] Here, another aspect of intervention comes into play—recognition. States can intervene in the negative—at least during state creation—by refraining from recognizing the existence of the putative state until certain concopditions are met. This is a legal and normal part of the state formation process.

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As demonstrated by the history of post-Communist transitions in Central and Eastern Europe, a more extensive external role in constitution-making can be justified if existing states seek to join treaty organizations, or larger, hybrid political structures such as the EU. While the international community does not require representative democracy and the rule of law from its member states, the EU, or the Council of Europe, does require them.[38] At the very least, the voluntary pursuit of membership on behalf of those states legitimates extensive external "advice" concerning the content of their constitutions as the precondition of their ongoing participation in those institutions.[39] Rather than a *pouvoir irritant,* the external constituent involvement in the constitutional affairs of these countries involves the exercise of power to the extent that admission—or non-admission—is a serious form of political sanction, capable of effecting meaningful constitutional change.

IV. Foundation and Re-Foundation

The difference between the foundation and the re-foundation of states further refines the distinction between the first state-making and the second stage constitution-making in the *two-step* constituent process. In the context of founding a new state, the role of the external actors in the constituent process is necessarily more pronounced. In certain contexts, such as in Iraq, one conceptual question and one normative question mutually overlap between foundation and re-foundation.

The conceptual question presents itself in contexts where a polity is only re-founded and the external constituent role nonetheless operates at the stages of both state-making and constitution-making. Consider Iraq, for example. In spite of the destruction of its governmental apparatus following the 2003 invasion, there was never any doubt about the continuation of Iraq's sovereign statehood in its internationally recognized boundaries.[40] One could understand the "regime-change" as the replacement of Iraq's formal—as well as material—authoritarian constitution by new constitutional structures. The role of external actors should have been seriously limited, given that the re-foundation of Iraq was not a case of state-making.

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[38] See, for example, the so-called Copenhagen Criteria, *Presidency Conclusions,* COPENHAGEN EUROPEAN COUNCIL (Jun. 21–22, 1993), http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf (last visited Jun. 5, 2015). *See also* Statute of the Council of Europe, May 5, 1949, 1949 O.J. art. 3.

[39] *See* Statute of the Council of Europe, May 5, 1949, 1949 O.J. art. 8.; *see also* Treaty on European Union, Feb. 7, 1992, 1992 O.J. art. 7.1.

[40] Stuart Elden, *Territorial Integrity and the War on Terror*, 37 ENVIRONMENT AND PLANNING A 2083, 2084 *passim* (2005).

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The fall of the authoritarian Iraqi regime also brought down its highly centralized territorial structure, encouraging many previously suppressed political forces to demand the re-foundation of Iraq as a decentralized, federal, or even confederal state.[41] These political forces conflicted directly with those that remained deeply committed to the maintenance of a unitary state under the heading of the integrity of Arab Iraq. The struggle between these forces took place under the threats of secession by the Kurdish enclave that established itself as the Kurdistan Regional Government.[42] Acknowledging the early calls for the partition of Iraq, some version of federalism seemed to be the only solution on which the peace of the country and even region would depend, but it was hard to see how an acceptable "second best" formula for all the relevant sides could be arrived at. Under these circumstances, by no means unique, the regional and international communities' interest in Iraqi state re-foundation was possible to demonstrate and document. But could that interest leading to outside inputs be normatively justified?

The intervention that actually that took place in Iraq would be difficult to justify in terms of the normative considerations offered here.[43] For one thing, it did not limit itself to state re-formation nor even to fundamental rights.[44] Nor did it merely concern the first stage of transformation. The normative question presents itself more glaringly in the context of the founding of the state, where the object of external constituent involvement is determining the territorial scope of a new polity. In that context, questions of normative justification shape the attitude and the behavior of external actors during the foundation of a new state. Should they support demands for secession, as in the context of Iraqi Kurdistan? Should they support partition or the maintenance of its independent federal state? Here, neither the idea of *constitutional autochthony* nor the ideals of sovereign equality can independently determine the legitimate scope and direction of external constituent involvement.

The only relevant literature that addresses this problem, if peripherally, concentrates on the normative-ethical analysis of the problem of secession.[45] While secession and constitutional intervention are analytically separate problems, they meet in the context of

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[41] The federalization of Iraq would have—and indeed has—occurred by devolution as in "holding together" variants, rather than by a contract of pre-existing "states" as in "coming together federations." For this distinction, see ALFRED STEPAN, ARGUING COMPARATIVE POLITICS 320 (2001).

[42] Sujit Choudhry, *Old Imperial Dilemmas and the New Nation Building: Constitutive Constitutional Politics in Multinational Polities*, 37 CONN. L. REV. 933, 941 (2005).

[43] See ARATO ,*supra* note 29.

[44] In terms of other criteria argued here, there was also no limitation of the intervention to procedure, beyond the question of rights, and it was mainly unilateral under a very vague enabling SC Resolution (1483).

[45] For one such approach, see generally, Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 GERMAN L.J 581 (2015).

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the delineation of the legitimate international role in the context of state re-foundation. Without an ambition to defend the relevance of normative theorizing for post-conflict constitution-making, this essay hazards six propositions that should guide—and limit—the behavior of the external actors when they exercise their power of intervention in the context of founding new—and re-founding existing—states:[46]

> 1. There are strong moral arguments for the legitimacy of unilateral secession, only under the circumstances of present or relatively recent past injustices. Examples of those injustices include colonialism, military occupation, or grave and persistent oppression and political discrimination on behalf of the extant government.
>
> 2. Unilateral secessions are not justified and should be opposed by external parties if present and past political injustices can be remedied through less radical forms of intrastate constitutional protection. In that case, international interveners should throw their weight behind such constitutional proposals during the second stage in the two-step process.
>
> 3. Federal constitutional systems are among the most suitable forms of remedying past injustices, especially in multinational, deeply divided societies.
>
> 4. As it currently stands, international law is relatively hostile towards unilateral secession for robust consequentialist reasons.[47] International interveners should respect this stance, irrespective of their normative visions of international legal order.
>
> 5. While international law remains hostile to unilateral secession, the external actors involved in a two-step constituent process should not lose sight of the ideal of constitutional autochthony. Though its meaning in deeply divided societies remains disputed, *Reference Re Secession of Quebec* of the Supreme Court of Canada points in a useful direction.[48] By

[46] *See* Diane Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?*, *in* SECESSION AND SELF DETERMINATION 19 (Allen Buchanan & Stephen Macedo eds., 2004); Allen Buchanan, *The Quebec Secession Issue: Democracy, Minority Rights and the Right to Secede*, *in* SECESSION AND SELF DETERMINATION 238 (Allen Buchanan & Stephen Macedo eds., 2004). For the exception in this volume, see Donald Horowitz, *A Right to Secede?*, *in* SECESSION AND SELF DETERMINATION 50 (Allen Buchanan & Stephen Macedo eds., 2004), who provides strong political arguments that implicitly explain and even justify the bias against secession in international law.

[47] *See* Oklopcic, *supra* note 4.

[48] *See* Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

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> mandating the process of constitutional negotiations over the destiny of polity's territory, the Supreme Court of Canada has rejected the unilateral imposition of constitutional solutions by either side in the conflict.[49] Such constitutional negotiations should be supported by interested international actors, as well.
>
> 6. International law is, or at least should be, open to unilateral secession where claims of injustice convincingly resemble the conditions of colonized, namely political dispossession and heteronomy. Even in such cases, there could and perhaps should be an international bias against secession if other avenues of self-determination, such as federalization or the establishment of cultural autonomy, can be negotiated.

Secession and federalist devolution are obviously related problems. If the international community has a bias against unilateral secession that could endanger the peace and security of a region and beyond, this would imply a preference for federal solutions remedying injustice, removing the source of conflict while preserving territorial boundaries of the existing states. In that case the same community has an interest that can justify intervention in debates concerning the structure of states or federal polities that are designed to avoid, or legitimately substitute for secession. This interest, then, implicates international actors also in re-foundations; under conditions of serious social division, where there is a secession threat.

V. Substance and Procedure (and the Procedures for Intervention)

While external participation in the *two-step* constituent process in the context of deeply divided and other troubled states is justified on normative and prudential grounds, it leaves open important questions of the substance versus the procedure of the intervening participation. Emphasizing procedures over substance can increase the legitimacy of the international role, especially if the final settlement is achieved under a certain veil of ignorance.[50] External involvement focusing on the procedures is also more likely to empower domestic actors during both stages of the constituent process.

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[49] *See id.* The condition being a clear vote of the province on a clear question. The purpose of clarity was subsequently highly disputed. David Haljan has recently argued that clear majority only triggers the negating process the direction of which remains subject to negotiations themselves. *See* DAVID HALJAN, CONSTITUTIONALISING SECESSION 343 (2014). For a critique of this position, emphasizing that the clear majority must logically the duty of the government to enter into negotiations towards the satisfaction of the demand to secede see Zoran Oklopcic, *The Anxieties of Consent: Theorizing Secession between Constitutionalism and Self-Determination*, 22 INT'L J. ON MINORITY & GRP. RTS. 259, 268 (2015).

[50] The case of East Timor, according to Dann & Zaid, *supra* note 3, indicates that such a distinction is possible. Alternative procedures can also have different substantive consequences. In East Timor, the procedures imposed had strongly majoritarian outcomes. *See also* Louis Aucoin & Michelle Brandt, *East Timor's Constitutional Passage*

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The constituent process should bring together all relevant domestic actors elected using the system of proportional representation. The constitutional settlement should be adopted by consensus, avoiding, to the extent possible, majoritarian decision-making. Power-sharing mechanisms and sunset clauses should accompany the settlement, reconciling the dominant imperatives of inclusion at the first stage and effective decision-making at the second stage. To this end, the adoption of an intermediary step—an interim constitution—may contribute to the legitimacy of the final constitutional settlement.

Note, however, that the shift towards procedure does not, in itself, solve the problem of the extent and limits of legitimate intervention. A case in point are the actions of the U.S. Ambassador Khalilzad, who, under the instructions of the State Department, engineered Sunni inclusion in the second stage of the constituent process in Iraq, after the aspirations of this group have been neglected, or avoided, during the first stage of this process, under American supervision. However, such very high level of procedural intervention on behalf of the United States could not be seen as legitimate (i.e. in the sociological sense of legitimacy), after the free elections in Iraq have already taken place (even given the unwise choice of electoral rules by UN advisors[51])—and the results were disastrous.[52] In other words, what may have been possible and appropriate during the first phase of state making was no longer possible during the final stage of constitution making. The important lesson here is that even *procedural* external intervention must recognize important limits, especially since all procedures have distributional consequences, and are often assumed to have substantive implications by important domestic actors, who may have preferred alternative procedures.

VI. Who Has the Right to Intervene?

A summary of the previous five points provides important context for discussing the intervention of external actors. International participants in the domestic constituent process must respond to the imperative of legality. From that vantage point, the normative justifications for this involvement have been diverse, including imperial sovereignty, international delegation, and UN resolutions. Historically, a myriad of external actors—individual states, colonial or occupying powers, and regional and international

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to Independence, *in* FRAMING THE STATE: CASE STUDIES IN CONSTITUTION MAKING 265–68 (Laurel E. Miller & Louis Aucoin eds., 2010).

[51] Influencing electoral rules for the making of the final constitutions seems to be a legitimate area of external role. Indeed the fairest constituent assembly electoral rule is, other things equal, a highly proportional rule such as a single district rule with no thresholds. Under Iraqi conditions of civil war in Sunni areas such a rule was however disastrous. International inputs can be just as mistaken as domestic choices. ARATO, *supra* note 29, at 208-210.

[52] *Id.*

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organizations—exercised their power in the process of constitution-making in other polities.

Irrespective of the legal framing of the external constitutional involvement, and the concrete identity of the external actors, their involvement must in any event respond to the ideal of legitimacy, more specifically, *constitutional autochthony*. In other words, external constituent involvement should occur only when the peace and security of the international community is at stake, and should, with the main exception of human rights be restricted to the stage of state-making, leaving the stage of constitution-making to domestic actors themselves.[53] Restricted in such a way, external actors should focus more on procedures rather than on constitutional substance.

In addition to considering the legal grounds for external constituent involvement, two other factors play an important role in determining who has a right to intervene today: (1) The complex interplay between sociological and normative legitimacy; and (2) the geopolitical interests of powerful external interveners. Such interveners often have vested national interests in a particular constitutional outcome, which may help protect them long after they have left the scene. In some cases, an external intervener may seek a strong ally and thus prefer a centralized constitutionalized structure for a state. In other cases, fearing a strong competitor or seeking to preserve a foothold for an ongoing political interference, an external actor may push for a high level of constitutional decentralization. While the interest of peace and regional security can sometimes legitimize the soft involvement of external actors in the second stage of the two-step constituent process, the national interests of rival or regionally dominant states does not.

The destructive consequences of the role of American interests in constitution-making in Iraq are fully on display today, a sad testament to the noxious role the national interests of external interveners can play in domestic constituent processes. We should be aware of these recent lessons even though untrammeled external constituent involvement has occasionally resulted in a constitutional happy end, such as in Japan. Be that as it may, those who might argue the question of normative legitimacy and public perception in the context of externally imposed constitution-making today should remember that the formal use of amending procedures under the Meiji Constitution kept the American-owned Japanese constitutional process a secret from the public.[54]

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[53] The selection of local participants should not rely on the formalistic understanding of domestic constitutional order. As Jennifer Widner argued, "Informal practices [in the process of constitution-making] may help promote a 'long view' too." Jennifer Widner, *Constitution Writing in Post-conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1518 (2008). For the importance of local political knowledge in endangering political order and stability, see generally Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 U. TORONTO L. J. 799 (2010).

[54] Tom Ginsburg, Zachary Elkins & James Melton, *Baghdad, Tokyo, Kabul: Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1161 (2007).

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Under the contemporary conditions of relative publicity, the unjust imposition of a constitution on behalf of an external intervener may reinforce rigid, uncompromising perspectives of involved domestic actors, leading to a widely perceived sense of constitutional illegitimacy in the sociological sense. Thus even a constitutional settlement—such as the *British India Act* of 1935,[55] which proposed a very reasonable federalist system that would have kept India together and went a long way to reconcile the expectations of two major contending sides[56]—might be and indeed was denounced from the beginning as illegitimate by domestic actors, even when they are unable to generate their 'horizontal' own constitutional compromise. More than a decade later, main parties were still unable to agree on another British attempt to preserve the constitutional unity of India, the Cabinet Mission Plan,[57] which might have prevented much of the bloodshed that ensued after the partition.

The limitations presented in this article can lessen opportunities for normative injustice to a certain extent, but the sociological problem of *perceived* injustice remains. For example, while it was normatively justified for the U.S. to seek to include an unelected Sunni contingent in the Iraqi constituent process, even in its second stage, this inclusion—perceived domestically through the lens of presumptive American political and military self-interest—was never accepted as legitimate by other actors, who ultimately excluded the co-opted Sunni participants from the most important stage of the process.[58] The cost, in the eyes of almost all Sunni activists, was the legitimacy of the constitutional settlement of 2005.

The question of external intervenor's bias and self-interest in the process of constitution making —whether genuine or perceived—leads us to nuance the character and the identity of the bearers of normatively legitimate external constitutional intervention. Various available documents show, for example, that from Sergio di Mello to Lakhdar Brahimi, UN missions offered better advice to Iraqi participants, though the UN too has made key mistakes concerning the choice of electoral rules in 2004. The lesson here is that the bodies that can be seen as representing genuine international interests, whose composition reflects the plurality of international community itself, are not only more

[55] Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8 c. 2 (Eng).

[56] As expressed in the (Motilal) Nehru Report (1928), https://sites.google.com/site/cabinetmissionplan/nehru-report-1928-full-text/doc1 (on file with author), proposing the dominion status for India and the Fourteen Points of Jinnah.

[57] For a detailed description of the emergence of the Indian constitution, see AUSTIN, *supra* note 30. For the political dynamic preceding and following the rejection of the Cabinet Mission Plan see Robert Johnson, *Britain's Decolonization of India and Pakistan*, *in* AT THE END OF MILITARY INTERVENTION: HISTORICAL, THEORETICAL AND APPLIED APPROACHES TO TRANSITION, HANDOVER AND WITHDRAWAL 86, 95–98 (Robert Jackson & Timothy Clack eds., 2015).

[58] ARATO, *supra* note 29, at 230.

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legitimate in both the normative and, the sociological sense, but are likely to be cognitively superior.

Equally, if wide inclusion of different and competing perspectives is important for domestic constitution makers[59], it is also important for the composition and procedures that concern external participation. Wrongly designed, even an international advisory mission may end up being seen as favoring one side over another, or as being biased towards a concrete constitutional proposal. Though we don't have access to alternative political universes, one could imagine that a lasting and more equitable constitutional outcome in Israel/Palestine might have been achieved had the federalist views of the UN Special Committee's minority proposal on the disposition of the Palestine Mandate been heeded in 1947.[60]

It is important to stress that settling the matter of who should intervene does not negate the thesis about limitations. It could of course be argued, pragmatically, that the better and more legitimate the external agency, the more leeway there is to go further, to intervene later, in matters of substance as well as procedures, and in the design of the regime as well as the state. However, easy admission of an "international pouvoir constituant", would negate all that should and could have been learned in recent constitution making experience, both from the stories of success as well as from the stories of externally-imposed constitutional failure. The most that should be said is that the balance between a procedurally legitimate form of intervention, the need to limit its role and constitutional result cannot be established once and for all, and would depend on the aspirations and experience of specific communities and their divided parts. With this in mind, I return to the problem of the external influence and (post-conflict) constitution making in present-day Ukraine.

C. The Role of International Actors and the Challenge of Constitution-Making in Ukraine

As with every conflict that calls for external constituent involvement, the crisis in Ukraine features conflicting political narratives. On the one hand, the Russian narrative has justified secessionist attempts by invoking the political disenfranchisement of pro-Russian citizens of Ukraine that resulted from the overthrow of the Ukrainian government, freely elected and supported by the democratic votes of the Eastern regions. Russia has invoked the will of the people, manifested in its referendum on independence, in support of the secession of Crimea. On the other hand, the narrative of Ukraine, supported by the EU and the United States, is diametrically opposite: The Maidan uprising was an act of liberation from a corrupt government supported by Russia, and the referenda held in the three enclaves,

[59] The elective affinity of wide inclusion with constitutionalism has been demonstrated by Tom Ginsburg with his insurance model. *See generally*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

[60] *See*, *supra* note 21, at 65, 69, for the majority and minority proposals, and resolution itself.

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as well as the subsequent elections in Donetsk and Luhansk, were unfree and entirely manipulated.

In defending its narrative, Ukraine rightly draws upon the principle of territorial integrity, one of the cornerstones of contemporary international law, which logically entails the ban on annexation of territory. International law bans annexation as a result of military conflict and occupation whether of the West Bank by Jordan, the Golan Heights and East Jerusalem by Israel, East Timor by Indonesia, Kuwait by Iraq, or the Crimea by the Russian Federation.[61] The UN General Assembly in a non binding resolution 68/262 (March 27, 2014) rejected the annexation of the Crimea. The Resolution reaffirmed the principle of territorial integrity in the context of the conflict in Ukraine by a vote of one hundred to eleven, although the vote surprisingly featured fifty-eight abstentions.[62] Yet, as several abstaining countries correctly noted in the assembly debate, the vote, in itself, will not help achieve a negotiated constitutional settlement.[63]

The international community should try to do better than pass resolutions in the support of one side, regardless of the apparent legal merits of either side's case. Though the international "verdict" about the illegality of Russian annexation is hardly disputed, legal considerations alone do not exhaust the question of the legitimacy of the secession of Crimea or the Donetsk and Luhansk oblasts. While international legal doctrine may favor clear-cut judgments, external actors involved in the re-foundation of Ukraine should pay careful attention to both competing political narratives, especially given the danger of new military confrontations and the possibility of another destructive Cold War.

Ukrainian authorities have already initiated a constituent process featuring a new constitutional commission, but proceeding with this project unilaterally will not, in all likelihood, resolve the political conflict over the scope and the extent of Ukrainian sovereignty.[64] Even if the commission offers important concessions to the Eastern regions of the country, these will likely be seen as inadequate if they are imposed by the

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[61] According to the article 47 of the Fourth Geneva Convention (1949), "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention ...by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory". According to the UN General Assembly Resolution 2625 (XXV) (24 October 1970) (also known as the Declaration on Friendly Relations), "territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force".

[62] *General Assembly Adopts Resolution Calling Upon States Not to Recognize Changes in Status of Crimea Region*, (2014), http://www.un.org/press/en/2014/ga11493.doc.htm (last visited June 18, 2015).

[63] *Id.*

[64] Presidential Decree No. 119/2015 on the Constitutional Commission, http://www.constitutionnet.org/vl/item/presidential-decree-constitutional-commission-ukraine-no-1192015.

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government of Ukraine. By the same token, the sociological legitimacy of the new constitutional settlement will be endangered if Ukrainian sovereigntists perceive internationally mediated process as violating the fundamental sovereignty of the Ukraine.

In contrast to doctrinal application of international law or the acceptance of unilateral constitutional impositions of whichever side in the conflict, an alternative course of action exists: the creation of an international commission. Supported both by the United States and Russia, the UN Security Council or the Council of Europe should appoint an international commission tasked with examining all competing claims in the conflict. This international commission should take seriously the allegations of oppression that have informed the demands for the secession of Crimea—and for territorial autonomy of Donetsk and Luhansk. If the allegations prove to be unjustified, the international commission should embrace the spirit of the approach to secession present in the Canadian *Secession Reference*. This would mean two things. First, the commission would be justified in insisting on new and, this time, procedurally legitimate referenda to establish the will of those regions desiring the change in their political status. Second, if the popular will in those referenda yield a clear majority in favor of secession—or federalization, as seems to be the primary demand of Luhansk and Donetsk[65]—the international commission would be justified in insisting on the opening of political negotiations which would put both sides under a duty to negotiate in good faith. In setting the stage for such negotiations, the procedural task of the commission would be to make sure that all main actors are included in the process of negotiations.

This brings us to the crucial point: What would be the exact task of such negotiations? International law has an implicit bias towards the maintenance of a territorial status quo, irrespective of its recent doctrinal fuzziness. Without entering into the salience of such a doctrinal stance, it acts to establish the scope of the international constituent involvement in the re-foundation of Ukraine. However, the bias of international law towards territorial integrity can be maintained while accommodating the political conflict in Ukraine along federalist lines. This is something that many among the secessionists in Luhansk and Donetsk claim to prefer, when they rebel against new authorities in Kiev. On the other hand, claiming to be animated by the fears of Russian hegemony, the authorities in Kiev insist on the maintenance of the unitary character of Ukraine and offer eastern regions a weaker form of autonomy instead.[66]

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[65] *See Luhansk Regional Council Head: Ukraine Needs Federalization, Decentralization not enough*, KYIV POST, May 17, 2014, http://www.kyivpost.com/content/ukraine/luhansk-regional-council-head-ukraine-needs-federalization-decentralization-not-enough-348254.html; *see also* Vladimir Socor, *Donetsk, Luhansk Propose Amendments to Ukraine's Constitution*, EURASIA DAILY MONITOR, May 19, 2015, http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=43927&cHash=8662cb5150445829740407118af00284#.VXSrFWRVikp.

[66] Gwendolin Sasse & James Hughes, *Building a federal Ukraine?*, WASHINGTON POST, Mar. 19, 2014. For an argument in favor of federalism in Ukraine, see KYIV POST, http://www.kyivpost.com/opinion/op-ed/ukraine-

Even within such radically opposing views on territorial autonomy, there is room for constitutional compromise. The concrete application of the federalist principle may lead to creative constitutional solutions, which may blur the sharp theoretical distinction between federalism and decentralization, alleviating the worries of the Ukrainian government in the process.

D. Conclusion

The conflict in Ukraine presents a challenge for post-conflict constitution-making and for the way in which we conceptualize the international role in domestic constituent processes. Clarifying the limits and parameters of the international role contributes to both the normative and sociological legitimacy of new constitutional settlements. Critical to structuring those limits and parameters has been the idea of a two-stage constituent process, restricting—with the important exceptions mentioned in this article—the external role to the first stage and allowing for a politically autochthonous second stage. In Ukraine, the final constitutional settlement—defining the territorial and constitutional structure of the country—must arise from the consensus among all relevant domestic parties to the conflict. As the *Minsk II* agreement testifies, however, without the activist international involvement, the preservation of Ukrainian territorial integrity of the state, even if upheld by positive international law, will remain even more dubious. More importantly, regional and international peace and security will remain seriously endangered without it.

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should-consider-federalism-11141.html. For an argument against federalism, claiming that a confederation would be a superior constitutional form for Ukraine, see RUSSIAN INSIDER, http://russia-insider.com/en/2015/02/04/3133.