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The Two Faces of the Internationalized *pouvoir constituant*: Independence and Constitution-Making Under External Influence in Kosovo

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Abstract

This article discusses the concept of the internationalized *pouvoir constituant* with regard to the ICJ's Advisory Opinion on Kosovo. It argues that independence and constitution-making under external influence in Kosovo represent two faces of the same internationalized constituent power aspiring for self-determination. It is submitted here that the ICJ's Opinion implicitly recognizes the constitutional law concept of *pouvoir constituant* and its relevance in international law. While the Court's reasoning is limited to the legality of the declaration of independence, international involvement in constitution-making in Kosovo equally raises questions of legality and legitimacy under international law. The paper discusses some of these questions by drawing from constitutional law and theory. In order to do so, the article briefly sets out the historical and political context, before describing how the two faces of the internationalized *pouvoir constituant* evolved during the period of international administration in Kosovo. In the next step, it analyzes the treatment of the constituent power in the ICJ's Advisory Opinion, and then attempts to assess the legality of international involvement in constitution-making in Kosovo. Finally, it discusses some potential standards of legitimacy for the internationalized *pouvoir constituant*.

A. Introduction

Traditionally, constitutional law and international law have been regarded as distinct legal orders and as distinct disciplinary fields of study. These distinctions have been eroding for some time. Three trends contribute to that erosion process: First, scholars have increasingly investigated the influence of international law on existing domestic constitutional regimes, notably with respect to human rights and democratization.[1] A second trend

[1] See for instance B.-O. Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003), 61; J. A. Frowein, 'The transformation of constitutional law through the European Convention on Human Rights', 41 *Israel Law Review* (2008), 489; T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46. On transition states, see the contributions by G. Nolte, G. Malinverni & J. Rubenfeld in 'The International Influences on National Constitutional Law in States in Transitions', 96 *ASIL Proceedings* (2002), 389. On Eastern Europe, see in particular P. Sonnevend, 'International Human Rights Standards and the Constitutional

is the discourse on constitutionalization of international law, which attempts to enrich the international legal order with principles familiar from domestic constitutionalism.[2] Finally, the international community has increasingly been involved in processes of state-building in recent years, and these processes have often included the creation of altogether new constitutional orders. Although this is not an entirely new phenomenon, state-building and internationalized constitution-making have gained particular momentum since the mid-1990s, notably in Bosnia, East Timor, Sudan, Afghanistan and Iraq – and most recently, Kosovo.[3]

The ICJ's Advisory Opinion on Kosovo stands at this crossroads between constitutional and international law, where ideas from both legal orders intersect, collide and sometimes merge into new concepts. One such new concept is the idea of the "internationalized *pouvoir constituant*"[4], which is the main theme of this article. Hence, this paper will describe the two faces of this internationalized constituent power in Kosovo, and address its legal framing and taming in international law. In doing so, the article will make three main arguments: First, it is submitted here that the ICJ Advisory Opinion presupposes the appearance of an internationalized Kosovar *pouvoir constituant* on the stage of international law. Arguably, the Court's reasoning mainly rests on the distinction between the *pouvoir constitué* established by international law and the *pouvoir constituant* emerging from both international and constitutional law.

Second, I hope to show that the internationalized constituent power has two faces, one turned to the outside and one to the inside: It has shown its first face when declaring independence, which can be seen as the external exercise of popular sovereignty by a Kosovar *pouvoir constituant*,

Jurisprudence of Transition States in Central and Eastern Europe', 96 *ASIL Proceedings* (2002), 397.

2 Bryde, *supra* note 1; J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *Berichte der deutschen Gesellschaft für Völkerrecht* (2000), 427; J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law*, 2009.

3 For an overview, see A. v. Bogdandy *et al.*, 'State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches', in: A. v. Bogdandy & R. Wolfrum (eds), 9 *Max Planck Yearbook of United Nations Law* (2005), 579, and further contributions in that volume; S. Chesterman, *You, the People. The United Nations Transitional Administration, and State-Building* (2004); N. Feldman, 'Imposed Constitutionalism', 37 *Connecticut Law Review* (2004-5) 4, 857, and the responses to his contribution in the same issue.

4 P. Dann & Z. Al-Ali, 'The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor', in: A. v. Bogdandy & R. Wolfrum (eds), 10 *Max Planck Yearbook of United Nations Law* (2006), 423.

engineered by members of the international community. It has shown its second face when enacting a constitution, which can be considered as the internal manifestation of the constituent power. This manifestation was equally internationalized, because the international community has also accounted for a prolonged process of constitutionalization in Kosovo. This international involvement in constitution-making can be seen as the flipside of independence, which remains, in that sense, "supervised". While this intuitively seems to be a fair tradeoff for Kosovo, such international involvement does raise questions of legality and legitimacy under international law.

Hence, my third argument is that not only the external, but also the internal manifestation of the internationalized *pouvoir constituant* deserves attention when it comes to assessing its legality and legitimacy under international law. For the enactment of a constitution is not only one of the core attributes of sovereignty, but is also regarded as an inherently democratic exercise, at least in the liberal tradition of constitution-making. Consequently, the involvement of international actors in such constitutionalization processes raises the question of the legality and legitimacy of such external influence. In fact, it is submitted here that the ICJ's recognition of the internationalized *pouvoir constituant* in Kosovo draws attention to the fact that self-determination is not only about independence, but also about constitution-making.

While acknowledging the various understandings of the notion of *pouvoir constituant*,[5] and in particular a longstanding positivist tradition,[6] this article employs a more substantive concept and follows the tradition of liberal constitutionalist thinking. This tradition accentuates the values of individual and collective autonomy in constitution-making – a view which is not necessarily referring to natural law,[7] but can increasingly be grounded in evolving international law standards of human rights and democratic governance.[8]

In the following sections, I will first describe briefly the historical and political context and will then demonstrate how the two faces of the

5 On the notion, see C. Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation', in: A. v. Bogdandy_& J. Bast (eds), *Principles of European Constitutional Law* (2006) 183.

6 H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960), 201.

7 See for instance H. Maurer, 'Verfassungsänderung im Parteienstaat', in: K. Kästner, K. Nörr & K. Schlaich (eds), *Festschrift für Martin Heckel* (1999), 828.

8 Cf. *supra* note 1.

internationalized *pouvoir constituant* have evolved during the period of international administration (B). The next step analyzes the treatment of the constituent power in the ICJ's Advisory Opinion, and then attempts to assess the legality of international involvement in constitution-making in Kosovo (C.). The conclusion discusses some potential standards of legitimacy for the internationalized *pouvoir constituant* (D.).

B. The Historical Context and the Evolution of the two Faces of the Internationalized *pouvoir constituant* in Kosovo

The internationalized constitution-making in Kosovo did not take place in a vacuum, but in the context of Kosovo's earlier constitutional status within Yugoslavia and of the armed conflict in the late 1990s. I will briefly recall this context before setting out the internationalization of constitutional developments in Kosovo in more detail.

I. The Historical and Political Context

The story of Kosovo's status in former Yugoslavia and of the violent conflict need not be recounted again here in detail.[9] Suffice it to say that under the constitutional system of the Federal Republic of Yugoslavia and the Republic of Serbia, Kosovo had enjoyed considerable autonomy as an autonomous province since 1974. In 1989/90, a constitutional reform largely abrogated these prerogatives. In reaction, the former ethnic Albanian members of the Kosovo Assembly declared Kosovo an independent sovereign state, the 'Republic of Kosova', in September 1991. However, Albania was the only country to recognize this declaration of independence.[10]

The ensuing Kosovo conflict displayed at least three relevant characteristics which are important for the context of later internationalized constitution-making in the territory. The first aspect is the conflict's nature as an armed conflict in the international law sense, which has to be

9 For detailed accounts, see I. Cismas, 'Secession in Theory and Practice: The Case of Kosovo and Beyond', 2 *Goettingen Journal of International Law* (2010) 2, 531; L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (2002); Independent International Commission on Kosovo, *Kosovo Report. Conflict, International Response, Lessons Learned* (2000), Part I.; N. Malcolm, *Kosovo: A Short History* (1998).

10 Cismas, *supra* note 9, 555-580; Sell, *supra* note 9, 65-93.

considered when looking for potential international law standards for the *pouvoir constituant*. The second characteristic is the ethno-political nature of the conflict. Figures concerning current population shares in Kosovo vary, but range from 88-92% Albanian, 5-8% Serb and 4-5% others, with a total population of roughly two million inhabitants.[11] These demographics, and the prolonged history of inter-ethnic violence, had to be taken into account by any constitution-maker seeking to integrate a divided multi-ethnic society into one political polity.

The third aspect relevant to later constitution-making is the internationalization of the conflict. As is well known, Security Council Resolution 1244[12], adopted on the basis of Chapter VII on 10 June 1999, authorized an international peacekeeping force to deploy in Kosovo, placed the territory under UN interim administration and resulted in the establishment of numerous international presences, taking over basic governmental functions.[13] Hence, further constitutional developments in Kosovo took place in a highly internationalized setting, both in terms of applicable law and the nature of the actors involved.

II. Internationalizing the two Faces of the *pouvoir constituant* in Kosovo

During the following period of international administration, the two faces of the internationalized *pouvoir constituant* developed in parallel. Before analyzing the notion of *pouvoir constituant* in more detail, I would like to set out the factual developments. These were marked by four documents of constitutional relevance: First the "Constitutional Framework

11 Cf. UNMIK/Kosovo Ministry of Public Services, 'Kosovo in Figures' (2005), 9, available at http://web.archive.org/web/20080309073836/http://www.ks-gov.net/esk/esk/pdf/english/general/kosovo_figures_05.pdf (last visited 10 December 2010); CIA, 'World Factbook, Kosovo', available at https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html#People (last visited 17 November 2010).

12 Available at http://www.unmikonline.org/misc/N9917289.pdf (last visited 17 November 2010).

13 On international territorial administration, see for instance J. Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty', in: A v. Bogdandy & R. Wolfrum (eds), 9 *Max Planck Yearbook of United Nations Law* (2005), 225; C. Stahn, 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead', 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001), 107.

for Provisional Self-Government of Kosovo" promulgated in May 2001[14]; second, the "Comprehensive Settlement Proposal" put forward by Martti Ahtisaari in March 2007[15]; then the Unilateral Declaration of Independence (UDI) issued in February 2008; and finally the Constitution of the Republic of Kosovo which entered into force in June 2008.[16]

International involvement in these steps, and hence the internationalization of both faces of the *pouvoir constituant*, can be analyzed according to three criteria: First, the degree of international influence, which can be total, partial, or marginal. The second criterion regards the object of the influence, which can either be the procedure of the constitution-making or the substantive outcome of the process. A final distinction concerns the actors involved in the process, which can be either local, or individual states, or multilateral institutions.[17] Through the lens of this categorization, it will be seen that international actors initially were in full control of the process, but ceded power to local representatives over time, without however giving up their influence altogether.

1. Creating the International *pouvoir constitué* and Preconfiguring the *pouvoir constituant*

a) The Constitutional Framework for Provisional Self-Government of Kosovo

A first cautious step in the transfer of power to Kosovar authorities is represented by the "Constitutional Framework for Provisional Self-Government of Kosovo".[18] It was contained in UNMIK Regulation 2001/9 of 15 May 2001 and promulgated by the Special Representative of the Secretary General (SRSG) in Kosovo, who held broad legislative, executive and judicial powers under Security Council Resolution 1244.[19] These

14 Available at http://www.unmikonline.org/constframework.htm (last visited 17 November 2010).

15 Available at http://www.unosek.org/unosek/en/statusproposal.html (last visited 17 November 2010).

16 Both available at http://www.assembly-kosova.org (last visited 17 November 2010).

17 On these categories, see Dann & Al-Ali, *supra* note 4, 428-430.

18 On the Framework in detail, see C. Stahn, 'Constitution Without a State: Kosovo Under the United Nations Constitutional Framework for Self-Government', 14 *Leiden Journal of International Law* (2001) 3, 531.

19 Cf. SC Res. 1244 (1999), operative clauses 6, 10, 11; Friedrich, *supra* note 13, 233-242; Stahn, *supra* note 13, 134, 150.

included the responsibility to promote substantial autonomy and self government in Kosovo by "[o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government" and transferring administrative responsibilities to these institutions.[20] The only real actor in constitution-making at this stage, however, was the SRSG, who retained total control over both procedure and substance of the law-making.[21]

Whether the Framework represents a constitution at all, has been disputed.[22] On the one hand, the Framework regulates matters which are ordinarily the subject of internal constitutional law: It contains provisions on human rights protection and the organization of government, including a rudimentary separation of powers among the PISG themselves and judicial review of acts of Parliament, and takes particular care to ensure participation of all ethnic communities in political affairs – notably of the Serb community, who had transformed from a majority within Serbia to a minority within Kosovo. In that sense, the Framework establishes a *pouvoir constitué* with classical features of government.

On the other hand, the Constitutional Framework reserved considerable discretionary powers to the SRSG, without subjecting him to any form of review. Also, there is no normative hierarchy with regard to other acts of the SRSG, who could at any time explicitly or impliedly repeal any aspect of the Framework. In addition, the SRSG could not be considered as a representative of those subjected to the legal order he created. As a consequence, the entire Framework lacks important material aspects of a constitution as understood in liberal constitutional theory.

Hence the *pouvoir constituant* in Kosovo was largely absent in the interim period – at least if understood in the liberal sense, which requires it to be connected in some way to the will of the people. Still, the Framework may contain a hint at the potential subject of future constitution-making: The preamble notes "the legitimate aspirations of the people of Kosovo

20 SC Res. 1244 (1999), operative clause 11 (a), (c), (d).

21 Friedrich, *supra* note 13, 256-260; A. Borgolivier, 'Behind the Framework', UNMIK/FR/0040/01 (25 May 2001), available at http://www.unmikonline.org/pub/features/fr040.html (last visited 17 November 2010); V. Morina, 'The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns', 35 *Review of Central and East European Law* (2010), 129, 131.

22 Cf. Friedrich, *supra* note 13, 260; Stahn, *supra* note 18, 543-549. Indeed, UNMIK resisted Kosovar desires to enact a proper constitution, pointing to Kosovo's unsettled status and SC Res. 1244, Borgolivier, *supra* note 21.

[…]", and Art. 1.1 holds that "Kosovo is an entity under international administration which, with its people, has unique historical, legal, cultural and linguistic attributes". While this clause can be interpreted in different ways, it can be read to acknowledge common attributes of a nation, the "people of Kosovo",[23] from which a *pouvoir constituant* may later emanate – after having gone through an internationalized status settlement process.

b) The Comprehensive Proposal for the Kosovo Status Settlement

The status settlement process launched in 2005 culminated in the "Comprehensive Proposal for the Kosovo Status Settlement" (CSP/Ahtisaari Plan). The CSP was submitted by the Special Envoy of the UN Secretary-General, Martti Ahtissaari, on 26 March 2007.[24] It framed both faces of the *pouvoir constituant*: First, it recommended supervised independence as the only viable solution for the Kosovo conflict. At the same time, the Ahtisaari Plan contained seven pages of detailed prescriptions for the future constitutional order of the new Republic of Kosovo (CSP Art. 1-3, 10 and Annex I). These pertained to the substance of the constitutional document as well as to the procedure according to which it was to be drafted and enacted. It envisaged a parliamentary republic with a modern human rights catalogue including directly applicable international human rights instruments, as well as a sophisticated system of minority protection and participation mechanisms, to be enforced by a constitutional court and, if need be, by an "International Civilian Representative" (ICR) replacing the SRSG.[25]

[23] This would, however, be problematic in as much as it excludes the non-Albanian communities, who do not share the linguistic and cultural attributes, from the "people of Kosovo".

[24] For detailed accounts of the status settlement process see H. Perrit, *The Road to Independence for Kosovo. A Chronicle of the Ahtisaari Plan* (2010); M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (2009).

[25] On the international governance structures established by the CSP, see R. Muharremi, 'The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law', 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010) 2, 357; M. Spernbauer, 'EULEX in Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date', 11 *German Law Journal* (2010) 8, 769; E. de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of Eulex', 103 *American Journal of International Law* (2009) 1, 83.

The CSP was the result of prolonged diplomatic negotiations between delegations from Serbia and Kosovo, which comprised ministers and government officials on the Serbian side, while Kosovars were represented by a "Unity Team" mainly formed by political party leaders. The composition of the Kosovar delegation was influenced by the SRSG and was largely determined by the success of each respective party in the free elections held earlier in Kosovo. The negotiations touched upon all major issues of dispute between the parties, including such sensitive constitutional issues as local self-government and minority protection and participation.[26] Yet the two sides did not reach agreement, and Ahtisaari unilaterally submitted a final draft of the CSP to the Secretary-General. Due to disagreements with Serbia and Russia, it was neither included in an international agreement nor endorsed in a Security Council resolution, but only adopted by the Kosovo Assembly in 2007.[27]

In this phase, international involvement receded to partial influence, exerted mainly by Ahtisaari and his team, who had been appointed by the UN Secretary-General. It was largely multilateral and took the form of mediation in the beginning, but also involved some substantive decision-making in deadlock situations and towards the end of the process. In addition, some individual states represented in the so-called "Contact Group" and the "Troika" influenced the process, with the US inclined to push for independence and Russia tending to oppose it.[28] Other actors were Serbian diplomats, representing one individual state pursuing a particularly strong interest of preserving its own sovereignty, and representatives from Kosovo, mainly drawn from the Albanian majority population. As a consequence, Kosovo Serbs sometimes felt underrepresented in the negotiations.[29] The diplomatic modus also meant that the talks were mainly held behind closed doors, and consultations with other actors in Kosovo not directly taking part in the negotiations seem to have been rare. The substantive outcome reflected the international's and Serbia's commitment

[26] Perrit, *supra* note 24, 119-161.

[27] *Id.*, 171; 'Declaration of the Assembly of Kosovo in accordance to the Report Martti Ahtisaari' [*sic*] (5 April 2007), reprinted in English, in: OSCE, *Assembly Support Initiative Newsletter*, No. 27, (May 2007), 5, available at http://www.osce.org/publications/mik/2007/04/24145_831_en.pdf (last visited 17 November 2010).

[28] Perrit, *supra* note 24, 119-122, 128-131.

[29] *Id.*, 141, 145.

to minority protection, and did take over a number of important features from the Constitutional Framework.[30]

The CSP represented a significant step in the internationalization of both faces of the nascent *pouvoir constituant* in Kosovo. It was for the "people of Kosovo" that the CSP envisaged independence, while at the same time attaching conditions to such "supervised" independence. These conditions pertained in particular to constitutional standards for the internal organization of a future independent polity. These standards were mostly inspired by, or even identical with, widely accepted international human rights instruments and mechanisms for minority protection and participation.

To sum up, constitution-making was largely preconfigured by, and partly occurred in the guise of, diplomatic negotiations on independence. Independence was made conditional upon a constitutional order largely prescribed by the international community, or in other words: The *pouvoir constituant* in Kosovo was allowed to break free and declare independence if and when it subjected itself to the bonds of liberal constitutionalism and international law, with particular emphasis on minority protection. Thus, internationalization necessarily concerned both faces of the *pouvoir constituant*.

2. Exercising the *pouvoir constituant*

a) The Unilateral Declaration of Independence

During 2007, it became clear that neither a negotiated solution nor a Security Council resolution in relation to Kosovo's status were feasible. Since prolonging the dissatisfactory situation of international administration was seen less and less as a viable option, international actors were looking for an alternative solution. This solution was represented by the exercise of the local *pouvoir constituant*, albeit supervised in both of its faces by the international community.[31]

The result was the Unilateral Declaration of Independence (UDI) promulgated in Pristina on 17 February 2008. It was adopted in an extraordinary session of the members of the Assembly of Kosovo, who had been elected in largely free and fair elections under the Constitutional

30 On the details of the plan, see *id*., 163-170.

31 On the political options and decision making, see *id.*, 177-189.

Framework, supervised by the international community. All 109 deputies present at that session voted in favor, including nine representatives of non-Serb minority communities. Eleven deputies representing Serbian national minority boycotted the proceedings, so that the Serb minority population in Kosovo was not represented in the final vote.[32]

The language of the UDI itself makes no mention of the Assembly as a Provisional Institution of Self Governance. Rather, its authors identify themselves as the "democratically elected leaders of our people", who "declare Kosovo to be an independent and sovereign state", which "reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement". Hence the deputies claimed some sort of democratic legitimacy for themselves, aspiring to be the "representatives of the people" and a *pouvoir constituant* also in the liberal democratic sense.

Furthermore, the signatories of the declaration announce that "[w]e shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. The Constitution shall incorporate all relevant principles of the Ahtisaari Plan and be adopted through a democratic and deliberative process." Finally, they "affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. […] We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship".

It emerges from the UDI's language that its authors consider themselves to be, at the same time, the framers of a future constitution, thereby equalizing the *pouvoir constituant* declaring independence and adopting the constitution. It becomes clear from the UDI's text that its framers were fully cognizant of the internationalized context, and the "supervised" nature, of their exercise of the *pouvoir constituant*. At this stage, the international community had stepped backstage and let local actors take the floor, while still retaining a partial influence over procedure and substance through the Ahtisaari Plan requirements and their inclusion in the UDI.

[32] See the official transcript of the Kosovar Assembly session, available in Albanian at http://www.assembly-kosova.org/common/docs/proc/trans_s_2008_02_17_al.pdf (last visited 17 November 2010).

b) The Constitution of the Republic of Kosovo

The final step in the exercise of the internationalized constituent power was the adoption of the "Constitution of the Republic of Kosovo". Formally, the constitution-making process meticulously followed the procedure set out in the CSP[33]: Two days after independence was declared, a Constitutional Commission was convened by the President of Kosovo. It elaborated a draft constitution, held a series of public debates and submitted a final draft in April. According to the CSP, this draft had to be "certified" by the ICR, which had largely replaced the SRSG. In his assessment, the ICR relied namely on expert advice from the Venice Commission, which represents another noteworthy form of multilateral involvement in constitution-making. Only after certification was the draft adopted by the Assembly, and entered into force on 15 June 2008. Its content reflected the substantive prescriptions of the CSP, sometimes even to the letter, including the normative supremacy of the Ahtisaari Plan over the Constitution in case of norm collisions as well as supra-constitutional prerogatives of the ICR.[34]

While the official process closely followed the procedure foreseen in the CSP, constitutional developments had in reality been set in motion already in March 2007 in parallel to the political discussions about the CSP.[35] Kosovar members of the Constitutional Commission were selected in early 2007 in consultation with international advisors, including the US Agency for International Development (USAID) and other donors. These advisors accompanied the drafting process and acted as mediators when Kosovar representatives were unable to reach an agreement. The subsequent draft texts were kept confidential pending a diplomatic settlement of Kosovo status, and even though a draft was ready by December 2007, it was published on a website only some hours after the declaration of independence.[36]

The role of the international community in the drafting process was twofold: First, it was involved in the selection of the Commission members,

33 Cf. Art. 10 and 11 of the CSP and the official website of the Constitutional Commission at http://www.kushtetutakosoves.info/?cid=2,1 (last visited 17 November 2010).

34 On the substance of the constitution see in detail J. Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective', 33 *Review of Central and East European Law* (2008) 4, 437.

35 J. Tunheim, 'Rule of Law and the Kosovo Constitution', 18 *Minnesota Journal of International Law* (2009), 371, 374-375.

36 *Id.*, 376-378.

ensured the Ahtisaari Plan procedure was followed and provided technical assistance and legal expertise to the drafters. Second, it made sure that the substantive prescriptions of the CSP, to which the UDI had committed the Republic of Kosovo, were duly integrated into the new constitutional document. International influence remained partial and was exercised formally through the multilateral institutions created in Kosovo, namely the ICR and the Venice Commission, who retained a veto right over the final constitution. At the same time, the European Union and some individual states yielded more influence in the process than others. For instance, USAID provided strong technical support to the Constitutional Commission, and the Constitution's language is at times reminiscent of US constitutional law terminology, without however adopting other features such as the presidential system.[37]

In short, while the ultimate decision-making power in both independence and constitution-making lay with the representatives of the Kosovar population, these representatives were acting within the procedural and substantive limits set by the international community – and hence embodied the internationalized *pouvoir constituant*.

C. Assessing the Legality of the Exercises of the Internationalized *pouvoir constituant* in Kosovo

This article departed from the proposition that Kosovo represents an instance of the internationalized *pouvoir constituant* at work. The following part will substantiate that proposition. I would like to show that the ICJ implicitly recognized the internationalized *pouvoir constituant* in Kosovo, and inquire into the legality of its exercise, first with regard to independence, and second with regard to constitution-making. Since the legality of the declaration of independence has been covered widely elsewhere[38], I will mainly focus on standards for international involvement in the constitutionalization process.

37 On US-American influences and respective criticism see Marko, *supra* note 34, 442, 446.

38 See, *inter alia*, M. Vashakmadze & M. Lippold, '"Nothing but a Road Towards Secession"? – The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo', 2 *Goettingen Journal of International Law* (2010) 2, 619; M. Bothe, 'Kosovo – So What? The Holding of the International Court of Justice is not the Last Word on Kosovo's Independence', 11 *German Law Journal* (2010) 8, 837; R. Howse & R. Teitel, 'Delphic Dictum: How Has the ICJ Contributed to the Global Rule of

I. Independence and the *pouvoir constituant* in the ICJ's Advisory Opinion

While the distinction between *pouvoir constituant* and *pouvoir constitué* is well established in constitutional theory, international law's relationship to the two concepts is less clear. However, it is argued here that the distinction between the two ideas is at the very heart of the ICJ's Advisory Opinion. This is less apparent in the first part of the Court's reasoning on the accordance of the UDI with general international law. However, when assessing whether the UDI is in violation of Security Council Resolution 1244 and the Constitutional Framework, the Court enters the crossroads between international and constitutional law in order to distinguish between the *pouvoir constitué* and the *pouvoir constituant*.

1. The Law Applicable to the Internationalized *pouvoir constitué* in Respect of the Declaration of Independence

When determining the law applicable to the UDI, the Court first had to make an important decision. While it was uncontroversial that Resolution 1244 was crucial in assessing the legality of the UDI, there was some dispute during the proceedings as to whether the Constitutional Framework was an act of internal law or of international law.[39] The Court explicitly ruled on this question and found that the Constitutional Framework possessed international legal character, because it derived its binding force from Resolution 1244 and ultimately the UN Charter.[40] In that sense, the Constitutional Framework represented an "international law constitution" for Kosovo, even if it lacked some attributes of liberal constitutionalism.

Law by its Ruling on Kosovo?', 11 *German Law Journal* (2010) 8, 841; R. Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo', 11 *German Law Journal* (2010) 8, 867; H. F. Koeck, D. Horn & F. Leidenmuehler, *From Protectorate to Statehood* (2009); R. Muharremi, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited', 33 *Review of Central and East European Law* (2008) 4, 401; K. Wirth, 'Kosovo am Vorabend der Statusentscheidung: Überlegungen zur rechtlichen Begründung und Durchsetzung der Unabhängigkeit', 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007), 1065; C. Tomuschat (ed.), *Kosovo and the International Community* (2002).

39 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, International Court of Justice, Advisory Opinion of 22 July 2010, ("Kosovo-Opinion"), para. 88.

40 *Id.*, para.88, 93.

This finding is an important step in the Court's reasoning for two reasons: First, the Constitutional Framework thus establishes an international *pouvoir constitué* and determines its shape, which is a prerequisite for being able to distinguish it from other actors involved in the process. Second, the international nature of the Framework enables the Court to argue that it established standards of legality only for the *pouvoir constitué*, because this is an international law institution. In contradistinction, according to the Court, international law does not set standards to assess the legality of declarations of independence by other actors.

Hence, an important next step in the Court's reasoning was to determine who, then, the authors of the UDI were. Were they to be identified with the PISG established by and under international law, or were they someone, or something, else? If the declaration had indeed been issued by the PISG, then they were surely bound by the legal framework which had established them, namely Resolution 1244 and the Constitutional Framework. Consequently, had the PISG themselves authored the UDI, the declaration would have been an act of the *pouvoir constitué* instituted by international law. Inevitably, the declaration would then have been *ultra vires*, because the legal order which had created the PISG did not allow them to declare independence unilaterally.

The Court however does not go down that avenue. Rather, it takes the view that the UDI was not an act of the *pouvoir constitué* in Kosovo: "[T]he Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established by Resolution 1244 and the Constitutional Framework] but, rather, set out to adopt a measure the significance and effects of which would lie outside that order."[41] The distinction between the *pouvoir constitué* and actual authors thus seems to rest on one decisive criterion: The authors' subjective intent to act, and to produce effects, outside the Constitutional Framework. Even though the Court proceeds to make an additional argument with regard to the language of the UDI and the special procedure chosen for adoption of the declaration[42], these factors are ultimately in the hands of the authors of the UDI themselves. So far, the subjective intent not to act as *pouvoir constitué* seems decisive.

41 *Id.*, para. 105.
42 *Id.*, para. 107.

This is question-begging, since the mere intent to evade an otherwise applicable legal order is generally insufficient to actually render it inapplicable. Even more importantly, it leaves open the question who, or what, the authors of the UDI were instead, if not the *pouvoir constitué*.

2. Identifying the *pouvoir constituant* as Author of the Declaration of Independence

In fact, the ICJ itself seems to feel uneasy with its focus on subjective intent, and provides two more arguments to back up its reasoning. These two arguments, taken together with the intent criterion, support the view that it was in fact the *pouvoir constituant* which declared independence of Kosovo.[43] Firstly, as regards intent, the finality of the UDI was not simply to "act outside" the Constitutional Framework. The declaration's language is unambiguous in that its intent is to effect independence and become a sovereign state. The UDI is an act of self-determination, and as such, an act of the *pouvoir constituant* if understood in the liberal sense.

This leads to the second criterion used by the ICJ: Popular sovereignty and democratic legitimacy. The Court holds that "the authors of the declaration of independence [acted] as persons […] in their capacity as representatives of the people of Kosovo outside the framework of the interim administration"[44]. The authors are not the *pouvoir constitué* but the "representatives of the people of Kosovo". This language is indeed reminiscent of liberal constitutional terminology, which requires the *pouvoir constituant*, if legitimate, to be connected in some way to the will of the people. Consequently, observers have noted that the Court itself seems to "flirt with ideas of popular sovereignty and *pouvoir constituant*"[45].

This view is supported by the language of the declaration itself: Its authors identify themselves as the "democratically-elected leaders of our people" and declare Kosovo "an independent and sovereign state". This aspect of democratic legitimacy is crucial, and it is one factor (among many others) which distinguishes the case of Kosovo from other secessionist movements. Another distinguishing factor is the internationalization of the process, which was crucial in creating the democratic legitimacy claimed by

43 In that sense, see also Z. Oklopcic, 'Preliminary Thoughts on the Kosovo Opinion', *EJIL Talk* (26 July 2010) available at http://www.ejiltalk.org/preliminary-thoughts-on-the-kosovo-opinion/ (last visited 17 November 2010).

44 Kosovo-Opinion, *supra* note 39, para 109.

45 Oklopcic, *supra* note 43.

the "representatives of the people": It was the international territorial administration that first established the basic requirements for a free and democratic system of government, which could then midwife a *pouvoir constituant* seen by many as legitimately representing the will of the majority of the Kosovo people.

However, even these two criteria seem insufficient to see the authors as the *pouvoir constituant*. In fact, the Court hints at a third criterion when discussing the acquiescence of the SRSG with the UDI, a criterion which is factual in nature: A sufficient degree of social acceptance of, or at least acquiescence in, the exercise of constituent power. In the words of the legal philosopher Hans Lindhal: The act of the constituent power must be "taken up", the "normative innovation must catch on"[46], or, put differently: The revolution must be successful, and for it to be successful it must trigger a certain degree of social acceptance. This points to a factual element in this context, which seems to be a common feature in the formation of new states and in the revolutionary tradition of constitution-making and tends to be relevant to constitutional theory and international law alike: While constitutional theory seems to accept the establishment of a new constitutional order by the constituent power retrospectively if it has become successful,[47] international law attaches importance to the effectiveness of governmental functions within an entity purporting to be an independent state, and, to some extent, recognition by other subjects of the international legal order.[48]

In the case of Kosovo, the exercise of the constituent power had triggered 71 recognitions by October 2010, a fact which clearly distinguishes the UDI from earlier declarations of independence and many other such attempts worldwide. What is more, the ICJ itself does hint at that factual element when it notes, in order to support its reasoning on authorship, that the SRSG did not take any action to revoke or repress the declaration of independence.[49] The Court takes this as evidence supporting the view that the UDI was not an act of the PISG. However, it can also be seen as the acceptance of a successful exercise of the *pouvoir constituant* – the representative of the old order gives way to a new order, instituted by

46 H. Lindahl, 'Acquiring a Community: The *Acquis* and the Institution of European Legal Order', 9 *European Journal of International Law* (2003) 4, 433, 441.

47 *Id.*, 442.

48 On state formation and recognition see generally J. Crawford, *The Creation of States in International Law* (2006).

49 Kosovo-Opinion, *supra* note 39, para. 108.

representatives claiming for themselves a higher degree of representativeness with regard to the will of the people.

3. No International Law Standards for Assessing the Legality of the Exercise of the *pouvoir constituant* with Regard to Independence

However, while the Court takes great pains to distinguish the authors of the UDI from the *pouvoir constitué*, it does not draw any consequences from its "off-the-cuff remark" on "the people of Kosovo"[50]: It simply goes on to find that the UDI is legal because neither general international law nor the legal framework of UN territorial administration contain a prohibition on declarations of independence by representatives of "the people of Kosovo". This refusal to draw any consequences from the *pouvoir constituant* concept begs the somewhat ironic question to what extent it would have damaged the Court's reasoning if independence had been declared "by envoys from the Planet Zoltar"[51].

Significantly, it seems that the high degree of internationalization of the entire process leading to independence, and a considerable international legal framing of the *pouvoir constituant*, are of no consequence at all for the regime of international law governing independence and secession. The international nature of the *pouvoir constitué* has no consequences for the *pouvoir constituant*, whose internationalization is equally obvious from the text of the UDI and its reference to its own preconfiguration by the Ahtisaari Plan. As a result, one is left with the impression that, according to the ICJ, international law is largely indifferent to the exercise of popular sovereignty by the *pouvoir constituant*, even if brought about by strong international involvement in a highly internationalized legal setting.

In short: Even though the *pouvoir constituant* is being framed by international law, this does not mean that it is necessarily being tamed by international law – at least in the view of the ICJ. While this reasoning of the ICJ with regard to independence has attracted much criticism,[52] I would now like to draw the attention here to the fact that not only independence,

50 Oklopcic, *supra* note 43.

51 *Id.*

52 See for instance the dissenting opinion of Judge Simma attached to the Kosovo-Opinion, available at http://www.icj-cij.org/docket/files/141/15993.pdf (last visited 1 December 2010); Vashakmadze & Lippold, *supra* note 38, 619; Bothe, *supra* note 38; Howse & Teitel, *supra* note 38; Muharremi, *supra* note 38; Oklopcic, *supra* note 43.

but also international involvement in *constitution-making* in Kosovo raises questions of legality and legitimacy under international law.

II. Potential Standards of Legality for the Internationalized *pouvoir constituant* with Regard to Constitution-Making

In the liberal tradition of the *pouvoir constituant*, the adoption of a constitution is not only one of the core attributes of sovereignty, but is also regarded as an inherently democratic exercise. Consequently, the involvement of external actors in such constitutionalization processes raises the question of the legality and legitimacy of such external influences. Hence, the well-known constitutional law debate on whether the *pouvoir constituant* is bound or unbound by law also arises in, and inspires, international law.[53]

Raising these questions is not tantamount to outright rejection of international involvement in constitution-making. To the contrary, it is widely accepted that the success or failure of a new a constitutional order depends at least partly on its legitimacy, or perceived legitimacy, which in turn is influenced by its legality. Inquiring into potential standards for the legitimacy and legality of internationalized constitution-making may thus prove to be important for the success of such constitutionalization efforts in Kosovo and beyond.

The legal regime governing international influences over the constitution-making process might be derived from at least three sources. A first set of norms potentially affecting the legality of external influences over constitution-making is the international law of belligerent occupation. Second, UN Security Council Resolution 1244 laid down obligations and limitations with regard to constitution-making. Third, the Ahtisaari Plan, although in itself not a source of international law, became binding upon Kosovo by virtue of its unilateral adoption in the UDI.

1. International Law of Belligerent Occupation as a Standard for Internationalized Constitution-Making?

Since Kosovo emerged from an international armed conflict between NATO and Serbia, the law of belligerent occupation is one potential source

[53] Cf. Möllers, *supra* note 5 and Kelsen, *supra* note 6; C. Sunstein, *Designing Democracy* (2001).

of (il)legality. In particular the Fourth Geneva Convention provides that where one state occupies another, the occupant must maintain an orderly system of governance; that the occupant has limited legislative powers and may not make permanent changes in fundamental institutions; and that it must utilize already existing local laws where possible.[54] Under this regime, instituting a new constitutional framework and institutions of (self-) government would probably be illegal, as has been argued for instance with regard to transitional constitutional arrangements in occupied Iraq.[55]

However, this set of norms is limited to situations where there is an occupation by a state bound by the Geneva Conventions. On the face of it, the international presence in Kosovo may look like an occupation, but the fundamental difference to Iraq, for instance, is the thorough multilateral foundation of the international presence in Resolution 1244. Since Resolution 1244 explicitly aimed to promote autonomy and self-government in Kosovo for an interim period, the law of belligerent occupation does not apply to the extent that the UN administration established the PISG under the Constitutional Framework for a transitional period – be it by virtue of Article 103 of the UN Charter or the *lex specialis* principle. Had the occupying powers attempted to institute a permanent order themselves, declared independence themselves, or annexed the territory, such actions would probably have been illegal under, *inter alia*, the law of belligerent occupation. This is not the case however, as the UDI and the Constitution are still attributable to the local, if internationalized, *pouvoir constituant.*

2. Security Council Resolution 1244

A second set of standards can be found in Resolution 1244, which contains three main requirements for the new international legal order established in Kosovo: It must, first, establish "substantial autonomy and self-government", second this self-government must be "democratic", including the holding of elections, and third the new order must be "provisional", pending a final settlement.[56] These were mainly requirements for the first step in the Kosovo constitutionalization process, i.e. the Constitutional Framework, but they have some bearing on later steps, too.

Whereas the Constitutional Framework certainly established autonomy and some degree of self-government, the question arises whether

54 Cf. Dann & Al-Ali, *supra* note 4, 450.
55 *Id.*, 452-453.
56 SC Res. 1244 (1999), para 11 lit a), c).

the legal order it created satisfied the requirement that it must be "democratic". Since the Constitutional Framework has become, at least de facto, obsolete, such a discussion may seem somewhat academic. Suffice it to say here that the unelected SRSG's virtually unlimited powers seemed to be at odds with essential features of a liberal concept of democracy, if taken to include the separation of powers as a democratic requirement, not only as a postulate of the rule of law.[57] On the other hand, historical experience from Bosnia and elsewhere shows that premature democratization may be detrimental to the long-term governance of a political entity, as it may lock in political constellations and elite influence prevalent at the time of devolution of power. Consequently, it is probably most convincing to interpret the "democracy" postulate in Resolution 1244 as a teleological principle,[58] which requires the UN administration to continuously adopt steps to the progressive realization of more democratic forms of governance. In that respect, the evolution in Kosovo may have been slow, but not to the extent to make UN administration and the Constitutional Framework illegal.

Some doubts also pertain to the "provisional" nature of the Constitutional Framework. Even though it was formally designed to be an interim regime, it preconfigured later constitutional arrangements in the CSP and the Constitution, ranging from the basic form of government (parliamentary republic, not presidential system) to such important details as the number of seats in the Kosovo Assembly reserved for minority representatives (consistently 20 out of 120 in all documents). In that sense, it tended to establish a *fait accompli* with regard to basic features of the *pouvoir constitué* envisaged in later constitutional documents. It is doubtful however whether this makes the Constitutional Framework itself illegal. Rather, the "provisional" condition should be taken to require later actions by international representatives to allow for an open-ended discursive process on constitutional arrangements among the eventual framers, which does not preclude these framers from drawing inspiration from the Framework.

A second aspect of the "provisional" requirement pertains to the continued role of the international community in the making of a permanent Constitution of Kosovo: As outlined above, international actors were

57 On varying conceptions of democracy in the face of international law, see A. v. Bogdandy, 'Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme', 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003), 853.

58 N. Petersen, *Demokratie als teleologisches Prinzip* (2009).

instrumental in the negotiation of the CSP, they supervised the drafting process of the final Constitution and ensured compliance with the Ahtisaari Plan requirements. Even after this stage, the Constitution itself reserves to the ICR the authority to ensure compliance of the Constitution and actions there under with the Ahtisaari Plan, including the power to oust public officials and annul acts violating the CSP. While international involvement in the status settlement negotiations is covered by Resolution 1244, which explicitly envisages such a process, it is doubtful whether the making of a permanent constitution for an independent Kosovo including a more permanent international supervisory function can be based on the Resolution. However, even if one assumes for the moment that such a legal base in international law was needed, and that Resolution 1244 did not provide it, another source is at hand.

3. The Unilateral Commitment to the Ahtisaari Plan in the Declaration of Independence

In fact, such a legal basis can be found in the UDI, read together with the Ahtisaari Plan. The latter's legal nature initially remained unclear, because it was neither endorsed by a Security Council resolution nor included into any other legally binding instrument, unlike for instance the Dayton Agreements which included a constitution for Bosnia-Herzegovina. However, the UDI itself represents a unilateral commitment in the sense of the sources doctrine in international law. It commits Kosovo to abide by the Ahtisaari Plan, and thus creates obligations of international law. Consequently, Kosovo, if considered a subject of international law at all, is under an obligation towards other states to respect the provisions of the CSP. In addition, the UDI represents an invitation under international law for the international presences, including the ICR.

This construction has the advantage of retracing the international community's continued constitutional role in Kosovo to the democratically legitimated *pouvoir constituant*. It is sometimes criticized for making the continued international involvement dependent on Kosovar consensus and for risking permanent minority protection in Kosovo. This however can be countered by two arguments: First, although the legal consequences of unilateral commitments in international law are not fully clear, the UDI explicitly states that its unilateral commitment is "irrevocable". Second, international supervision and minority protection have an additional legal basis in the Constitution. Both elements are safeguarded against constitutional amendments by three devices within the text of the

Constitution[59]: First, the supremacy of the Ahtisaari Plan over the constitution; second, the role of the ICR; and third, a super-majority rule for constitutional amendments which requires minority consent for any constitutional reform, a procedure in turn protected by the equally internationalized constitutional court.

Hence, international involvement in the Kosovo constitution-making process has a double legal basis in international and constitutional law. This holds true for the period following the UDI and the adoption of the Constitution and provides not only arguments for legality, but also for the legitimacy of international involvement, since it is retraced ultimately to the democratically legitimized *pouvoir constituant*.[60] This line of arguments does not cover, however, the period before the UDI was adopted, namely the important decisions made in the drafting process in 2007. Although these may be based internally on the adoption of the Ahtisaari Plan by the Kosovo Assembly in 2007, one is left with a legal vacuum in the international legal sphere. There is no apparent international legal basis for this period, which begs the question whether such a basis is needed at all. If applying the ICJ's approach, one would probably have to look for a rule of international law *prohibiting* or at least *regulating* external interference with the *pouvoir constituant*. Again, applying the Court's reasoning, such a rule can hardly be found in Resolution 1244, nor have attempts to find such rules in general international law yielded results.[61]

D. Conclusion: Emerging Standards of Legitimacy for the Internationalized *pouvoir constituant*

The absence of generally applicable international legal standards for exercises of the internationalized *pouvoir constituant* does not mean, however, that one is left with a complete normative vacuum. Instead, it is submitted here that constitutional theory does offer normative standards, if not for assessing legality, then at least for discussing the legitimacy of external involvement with the *pouvoir constituant*. Even if legitimacy may be a less clear-cut standard than legality under international law, asking the legitimacy question enables us to draw from two other discourses at the

59 Articles 143; 146 and 147; 144 (2) of the Constitution of Kosovo.

60 Whether the absence of any mechanisms for legal control of the ICR is in line with liberal constitutional doctrine is doubtful, but goes beyond the scope of this paper.

61 On the absence of standards in general international law see Dann & Al-Ali, *supra* note 4, 451.

crossroads between international constitutional law, mentioned at the beginning of this article: First the debate on constitutionalization of international law, and public law approaches to international law,[62] and second, discussions of international law's influence on established domestic constitutional orders. I will focus here on the discussion of the legitimacy of external involvement in constitution-making,[63] which may also offer, *mutatis mutandis*, some guidance when it comes to international influence on independence processes.

A public law perspective contributes in several respects to the legitimacy question in respect of internationalized constitution-making: In the first place, it enables lawyers to ask the question of legitimacy at all. If one accepts that international law is also public law, then issues of legitimacy of the exercise of public authority by international actors come to the fore. And what could be a more essential exercise of public authority than the genesis of a constitution, and involvement in such a process? Second, a public law perspective provides ideas and concepts for framing the legitimacy debate, without however succumbing to all too easy domestic analogies.[64] For instance, the concept of popular sovereignty offers a number of insights on legitimate forms of outside intervention in constitution-making: It may for example inspire calls for external actors to be as unobtrusive as possible.[65] Furthermore, it supports arguments that involvement should be transparent and geared towards specific aims, which are legitimate in themselves and do not seek to impose the self-interest of the external actor.[66]

Second, a constitutional perspective may help to identify which aims of external involvement exactly could be considered legitimate. For constitutional law inspires a certain desire to avoid self-interested factions taking over politics, and constitutional politics in particular. Consequently, one such legitimate aim for external involvement would be to ensure the inclusiveness of and equal access to the constitution-making process. If one accepts that there is no naturalistic "will of the people", but that

62 See A. v. Bogdandy, P. Dann, & M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities', in: A. v. Bogdandy, *et. al.* (eds), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2009), 3.

63 For a similar treatment of other processes see Dann & Al-Ali, *supra* note 4, 454-455.

64 v. Bogdandy, Dann & Goldmann, *supra* note 62, 19-20, 24.

65 In that sense, Dann & Al-Ali, *supra* note 4, 460.

66 *Id.*, 459.

constitution-making always bears features of elite consensus, too, then international involvement can be an important counterbalance to disproportionate factional influence on the process.[67] This is particularly true in multi-ethnic polities characterized by violent conflict and domination of one particular ethnic group.[68] Even if external actors may not represent the local people, the insistence on inclusiveness advocated here does lend some sort of functional legitimacy to external involvement, somewhat comparable to the role of constitutional courts and their counter-majoritarian tendency. In this respect, the involvement in Kosovo, which tended to be geared towards ensuring equal representation in the constitutional process, was one of the more successful examples of the internationalization of the *pouvoir constituant*, even if it could have been even more inclusive with regard to ethnic minorities living within Kosovo during the decisive phase of the Ahtisaari-led negotiations.

If disproportionate factional influence on constitution-making is to be avoided, so is domination by self-interested external actors. In this respect, a comparative analysis of internationalized constitution-making processes seems to point into the direction that a limited, disinterested and clearly focused international involvement is more likely to occur if and when external actors are multi-lateral in nature, because they tend to be less driven by self-interest than individual states.[69] Of course, this holds true only to the extent that these actors themselves remain true to their multilateral vocation and do not become a vehicle of one individual state's interests. Also in this respect, the Kosovo process seems comparatively positive, although it is sometimes difficult to distinguish necessary political leadership from undue self-interested influence.

A less positive assessment is warranted as regards calls to the effect that involvement in the procedure should be transparent.[70] As set out above, the Ahtisaari process and constitution-making throughout 2007 were largely conducted behind closed doors. This may have been due to diplomatic constraints, but made the process and external involvement not very transparent. It also led to the fact that many of the substantive decisions had already been made when public consultations on the actual text began. This

67 *Id.*, 458; Feldman, *supra* note 3, 880-883.

68 S. Choudhry, 'Old Imperal Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities', 37 *Connecticut Law Review* (2005) 4, 933, 936-939.

69 Dann & Al-Ali, *supra* note 4, 460-461.

70 For such a view, see *id.*, 461.

leaves room for improvement in an otherwise relatively progressive process of internationalized constitution-making, when compared to other such instances.

As regards international involvement with the substance of the constitution, research on international law influences on existing domestic constitutional orders offers insights on what states appear to consider as acceptable substantive influences. This perspective tends to show that the imposition of certain substantive outcomes seems to be perceived as more legitimate when based on universally or at least regionally accepted multilateral instruments, rather than on the legal order of a particular state. Consequently, drawing and borrowing from international or regional human rights instruments or minority protection regimes seems helpful. If comparative constitutional law is used as a source of inspiration, then a comparative basis of more than one country seems more likely to avoid self-interested solutions. In this respect, reference to widely accepted multilateral human rights instruments in the Kosovo Constitution adds a modicum of legitimacy to the otherwise rather obtrusive influence on the substance of the Kosovo constitution, even though the list of directly applicable treaties seems to have an element of selectivity to it.[71]

While these considerations apply to the legitimacy of external involvement in *constitution-making*, it may be worthwhile to examine in future in how far these categories are equally valid for processes leading to *independence*. Suffice it to say here that an "earned sovereignty" approach is connected to constitutional standards, too, which may be considered as prerequisites for independence. For the time being, we can conclude that international law is evolving and increasingly framing both faces of the *pouvoir constituant*. When it comes to its taming however, international law offers little guidance, even if there is strong international involvement in its exercise. One is left with the less clear-cut category of legitimacy of external influences on the *pouvoir constituant*. In this respect, the crossroads of international law and constitutional law still offers important signposts pointing down a road towards even more legitimate and legally tamed exercises of the internationalized *pouvoir constituant*.

[71] For instance, the Covenant on Economic, Social and Cultural Rights is conspicuously absent from the list, which otherwise contains most building blocks of the "international bill of rights", notably the Universal Declaration of Human Rights. See on this point Marko, *supra* note 34, 447.