1 Introduction

Emmanuel De Groof and Micha Wiebusch

This volume analyzes transitional governance arrangements from an international legal perspective. Transitional governance is understood in this volume as public power exercised by interim governments or other forms of transitional authority governed by transitional legal regulations (such as interim constitutions or transitional charters) in the context of conflict or large-scale political unrest. Transitional governance aims at overhauling the institutions and constitution within the state, without affecting its territorial integrity. Such changes are often paired with the development of a new constitution during a transitional period ("interregnum"), at the end of which a new constitution enters into force. We delimit transitional governance as the temporary, supraconstitutional, and internationalized exercise of domestic public powers after a non-constitutional rupture. A more refined conceptual and historical contextualization is reserved for the following chapter.

We argue that transitional governance can rightfully be characterized as an international legal practice, and analyzed as such, considering the growing internationalization of interim governance arrangements in two regards: they are increasingly subjected to different bodies of international law, and to the intimate involvement of international actors. Rather than focusing on what precedes or succeeds the transition, this volume focuses on the actors and practices of the transitions and the variable international influence the transition is subjected to. In other words, as Sachs suggested in his preface: the journey becomes the destination. Specifically, we ask how this journey is shaped and constrained by international law and its embedded yet fluctuating norms, principles, practices, and forms of expertise.

Bringing together practitioners with extensive experience in supporting transitional governance processes and renowned academics in the domains of international, comparative, and constitutional law, this book aims to share their views and knowledge about the international legal dimensions of a state going through its own renaissance, moving from one constitutional era to the next. Written by a diverse group of authors from the Global South and North, this volume offers a variety of (critical) legal perspectives on transitional governance.

In this introductory chapter, we provide the reader with a foretaste of the various contributions. In the following, second chapter on "The features of transitional

governance," we offer a conceptual delimitation of the topic of this volume. It defines the features of contemporary transitional governance and purports to justify the international legal perspective taken in this volume.

The third chapter by Adam Day and David Malone "Contextualizing transitional governance since 1989" explains in more depth the historical context of the rise of transitional governance in the post-Cold War period. The authors describe four key shifts that have driven the development of transitional governance into a dominant mode of international engagement in post-conflict settings: the improvement in relations among the major world powers immediately following the Cold War, triggering an era of activism by the UN Security Council; the challenging experiences of international territorial administration (ITA) in East Timor and Kosovo, resulting in a call for more cost-effective processes; the turn to a "light footprint" approach in Afghanistan, which has created the model for subsequent international support to transitional governance; and several important changes in the nature of armed conflict which has complicated sustainable transitions out of conflict.[1] These related developments have allowed domestically-driven, internationally-supported transitional governance to become the preferred response to conflicts worldwide. But, as Day and Malone acknowledge, this model is not without challenges. Long-standing conflicts in places like Afghanistan, the Democratic Republic of the Congo, Libya, and Iraq highlight the difficulties in implementing viable exit strategies. In fact, a historical perspective of the rise of transitional governance demands that many of the international community's assumptions when supporting domestic transitional governance be fundamentally questioned.

Having outlined the broader context explaining the rise of transitional governance, we then move on to identify specific constitutional patterns of transitional governance in the fourth chapter "Constituting transitions: predicting unpredictability." This chapter by Christine Bell and Robert Forster examines how transitional governance arrangements can, and should, factor in path dependency. As transitional governance arrangements establish forms of government, they need to be "constituted" in some way, often in a context where an existing constitution is already in place. A number of options exist, with different consequences for how the transition is institutionalized and how the dilemmas of the transition can be managed. The authors map the relationship between the legal "constitutionalization" of the transition, and the political tasks and dilemmas of transition management. Based on a review of peace and transition arrangements between 1990 and 2015, they set out the five main options for constituting such transitions, and examine the distinctive transitional tasks and timelines established in these constitutional instruments. They argue that the interaction between five factors, rather than any one factor, drives the legal form. They then consider the "predictable unpredictability" of transitional governance, i.e., the idea that transitional arrangements need to be amended and adapted over time, which in turn depends on the legal form chosen which can both enable and limit capacity for adaptive transition management in response to new political events. In sum, the constitutionalization of transitions should factor in "adaptive management" allowing for constitutional re-iterations over time.

The fifth chapter by Sumit Bisarya, "No strings attached? Constraints on external advice during transitional constitution-making," provides a brief overview of different forms of foreign assistance to constitution-making. Through concrete examples, Bisarya examines how both explicit and implicit constraints shape these different forms. Recognizing the centrality of constitution-making to political transitions, Bisarya emphasizes the regional and global interest in peace, human rights protection, and inter-state comity, and explains how international actors have increasingly sought to influence the choices being made domestically. As he usefully reminds us, external assistance is not a new phenomenon – for example, German scholars already assisted the Japanese drafters of the Meiji Constitution in 1889. However, the past two decades have seen an increasing institutionalization of this aspect of international action in transitional governance. This institutionalization has brought with it the consequence that external advice is often not entirely free to be tailored to the best needs of the context at hand but is limited by legal constraints and standards developed in, by, and for other national or transnational contexts.

The sixth chapter "The gap between international legitimacy and legality of transitional regimes" examines the *lex lata* on recognition of the legitimacy of transitional governments. Noam Wiener begins by defining legality and internal and external legitimacy, and by addressing definitions of democratization. The author then notes that governments of both democratic and non-democratic regimes may enjoy external and internal legitimacy notwithstanding how they came to power. He concludes that state practice demonstrates that neither democratization or legality are required for the recognition of the legitimacy of "normal" governments, and that recognition of the legitimacy of transitional governments should not be subject to stricter standards. On the contrary, he argues, because of the importance of internal legitimacy and effective statebuilding, sovereign powers should almost automatically grant external legitimacy to transitional governments.

The seventh chapter, "Legitimizing transitional authorities through the international law of self-determination," by Matthew Saul, also discusses the legitimacy of transitional regimes but from a different perspective. Saul examines the significance of the international law of self-determination for the legitimacy of a transitional authority. Transitional authorities often have a weak claim to represent the will of the people. Therefore, a commitment to the international law of self-determination may help a transitional authority to persuade its domestic and international audiences that its purpose is advancement, rather than denial, of governance by and for the people. Such commitment may then increase both their internal and external legitimacy although the content of the law of self-determination remains subject to contestation. The analysis in this chapter covers several features of the self-determination practice of transitional authorities: establishing a transitional authority; developing space for political communication; and creating a popular mandate. The chapter argues that international law offers a transitional authority a means to articulate its normative vision of self-determination, but also to operate lawfully without fully delivering

this vision. This reduces the weight of a commitment to the law as part of a justification for domestic and international audiences to recognize that a transitional authority has the right to rule. On the other hand, it increases the importance of ad hoc instruments for the regulation of transitional periods: peace agreements, aid agreements, and UN Security Council resolutions.

In the eighth chapter, Zinaida Miller asks "when does a transition end?" Under the title "The end(s) of transition," she argues that the determination of an end to a transitional or post-conflict stage is itself embedded in a series of debates about the nature of and need for such a stage at all. Those ideas build on and intertwine with a series of legal and policy practices of external rule, intervention, and accountability. Such practices include occupation, emergency, international criminal law, *jus post bellum*, and transitional justice. Contemporary regimes of transitional and external governance share certain assumptions, and sometimes common deformations: claims to temporariness, linear progress narratives, and the association of political contestation with local knowledge and neutrality with international expertise. The chapter suggests that while defining a transitional period may be necessary for purposes of analysis or institutional assistance, it is inevitably a discursive act with significant consequences for both governors and governed. Determining an end to transition will inevitably require establishing the "ends" of transition.

In the ninth chapter "The ambitions and traumas of transitional governance: expelling colonialism, replicating colonialism," Vasuki Nesiah looks back to history, yet finishes with a forward-looking perspective. She draws analogies between discourses surrounding colonization and those concerning postcolonial transitions. Despite being the most significant political transition for most of the world, "transitions" from colonialism are largely invisible to the transitional governance field. Some of the ideas and conceptions underpinning the seminal transition of the twentieth century are in a way reiterated through transitional governance, through the backdoor so to speak. Nesiah suggests that transitional governance could thus function as the Trojan horse for hegemonic agendas and replicate colonial approaches to governance. This relationship between the denial of colonialism, and its replication is the launching point for this chapter. It analyzes the theories and practices of the transitional governance field not as a guide to better and more effective transitions, but to understand how the field grapples with the dual drive to expel colonialism and replicate it. Approaching the field from this perspective, the author explores the field's adverse impacts, including the entrenching and legitimating of the dominant order. In doing so she draws on postcolonial theories and struggles that foreground colonialism and the contesting of colonial legacies to challenge historicist notions of transition, and "governance" approaches to democracy.

In our final chapter, "The future(s) of transitional governance and international law," we critically reflect on the main dynamics, tensions, and indeterminacies discussed in the book. First, we return to the often-questionable results of transitional governance, especially since its primary goal – bringing peace to a conflict-afflicted society – is regularly not achieved. The situation in Yemen,

Afghanistan, and Iraq, for example, are cases in point. This leads us to question some of the implicit assumptions underlying the practice and suggest some alterations to the current modus operandi of transitional governance. We discuss the need for more transparency concerning the political interests of the actors involved in transitional governance; the risks of a too limited problematization of the underlying dynamics shaping transitional governance; and the mutual effect of widespread transitional governance practices on the progressive development of international law.

Note

1 The second and third shifts are described in detail in E. De Groof, *State Renaissance for Peace: Transitional Governance under International Law*, Cambridge University Press, 2020.