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LAW 2015/38  
Department of Law

The need for a *ius in interregno*.

Why international law should focus more  
on domestic interim governance

Emmanuel De Groof



European University Institute  
**Department of Law**

**THE NEED FOR A IUS IN INTERREGNO.**

**WHY INTERNATIONAL LAW SHOULD FOCUS MORE ON DOMESTIC  
INTERIM GOVERNANCE**

Emmanuel De Groof

EUI Working Paper **LAW** 2015/38

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ISSN 1725-6739

© Emmanuel De Groof, 2015

Printed in Italy  
European University Institute  
Badia Fiesolana  
I-50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu](http://www.eui.eu)  
[cadmus.eui.eu](http://cadmus.eui.eu)

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## **Abstract**

In the post-Cold-War era domestic interim governance ('DIG') has become a matter of international interest. DIG is observed by provisional governments, transitional councils, etc. ('domestic transitional authorities') in countries said to be in transition. The so-called international community increasingly relies on DIG, which has become a recurrent politico-legal reality today. This paper unveils the reasons behind the success of DIG, observes how DIG is increasingly being internationalized, questions the legal rationales that may be invoked in support of DIG, and ends with discussing the paradoxes underlying DIG. The paper argues that a comprehensive analysis of how international law applies to transitions –a *ius in interregno*– should be undertaken in order to deconstruct these paradoxes from a legal perspective, and guards against some traps to be avoided in the elaboration of such a *ius in interregno*.

## **Keywords**

Domestic interim governance, states in transition, peace-through-transition paradigm, proxy interim governance, *ius in interregno*

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## Introduction

Since time began, the constitutional and institutional structures of states, empires or other systems of political organization have, at lesser or greater intervals, been profoundly modified. As such modifications cannot be realized overnight, interim political structures are generally set up to manage the transition. This paper discusses how domestic interim governance ('DIG') has evolved over time, why it has become popular, and which legal paradoxes are inherent to it. It argues that a comprehensive analysis of how international law applies to transitions –which, for ease of reference, may be called a *ius in interregno*– should be developed to grasp these paradoxes and to account for the modern nature and function of DIG. This paper does not yet fully address questions about the contents and normative value of a *ius in interregno*. It is divided in four parts. It (a) explains why DIG is on the rise, (b) illustrates the various ways in which DIG has become internationalized, (c) analyzes which legal rationales could be invoked to corroborate its success, and, lastly, (d) suggests that, in the elaboration of a *ius in interregno*, these rationales be further deconstructed.

## The rise of domestic interim governance

History is replete with instances of DIG. These range, only to give random examples spanning three continents and more than two millennia, from the one-year interregnum after Romulus' death (ca. 717 BC)<sup>1</sup>, the Ottoman Interregnum (1402-1413)<sup>2</sup> and the institutionalized interregna of the Loango Kingdom in the basin of the Kouilou and Niari rivers<sup>3</sup> (18<sup>th</sup> century), to the Talleyrand French provisional government (1814). Each of these cases relate, in the first place, to issues of *succession*.

During the 20<sup>th</sup> century the function of DIG diversified. Throughout this century interim structures were created, successfully or not, to deal with matters of regime or personal succession<sup>4</sup>, to overthrow or restore political regimes<sup>5</sup>, to resist foreign occupation<sup>6</sup> or protest against international border

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<sup>1</sup> This interregnum by the Senate (on rotational basis) was due to disagreement about whether a Sabine or Roman king should succeed to Romulus. In 715 BC a compromise was finally reached about Numa Pompilius as the successor king. After his death in 673 BC, another one-year interregnum followed.

<sup>2</sup> The interregnum was observed by a triumvirate in the context of a war of succession following the defeat of Sultan Bayezid I by Turco-Mongol warlord Timur. See D. J. Kastritsis, *The Ottoman Interregnum (1402-1413): Politics and Narratives*

<sup>2</sup> The interregnum was observed by a triumvirate in the context of a war of succession following the defeat of Sultan Bayezid I by Turco-Mongol warlord Timur. See D. J. Kastritsis, *The Ottoman Interregnum (1402-1413): Politics and Narratives of Dynastic Succession*, Harvard University, 2005, for a detailed account.

<sup>3</sup> Abbé Proyart explains in 1776 how interregna were institutionalized in this African kingdom: “à la mort de chaque Roi, il y a toujours un interrègne pendant lequel on célèbre les obsèques du défunt [...] Le Royaume alors est gouverné par un Régent, qui prend le titre de *Ma-Boman*, c'est-à-dire, *Seigneur de la terreur*, parce qu'il a droit de se faire craindre par tout le Royaume. C'est le Roi qui de son vivant nomme le *Ma-Boman*: la Loi même, pour prévenir les inconvénients de l'anarchie, l'oblige à en désigner deux, dont le second, en cas de mort du premier, est chargé des affaires, jusqu'à ce qu'on ait procédé à l'élection d'un nouveau Roi. C'est pendant cet interrègne que les Prétendants à la Couronne forment leurs brigues, et qu'à force de présents et de promesses, ils tâchent de se rendre les Electeurs favorables. Ces Electeurs font les Princes, les Ministres et le Régent”. L.-B. Proyart, *Histoire de Loango, Kakongo, et autres royaumes d'Afrique : rédigée d'après les mémoires des préfets apostoliques de la Mission française*, Bruyset-Ponthus, Lyon, 1776. The long interregnum starting in 1786 was the result of conflicts over the distribution of powers, and announced the end of this kingdom in ca. 1800.

<sup>4</sup> 1917 Russian Provisional Government (Russian Republic as transition between Russian Empire and the Russian Federation); 1944-1950 Regency Prince Karel of Belgium (legal impossibility of King Leopold III to rule); 1989-1991 provisional governments in the context of the fall of communism.

<sup>5</sup> 1912 Chinese provisional government (Xinhai Revolution & overthrow imperial dynasty).

<sup>6</sup> 1919-1948 Provisional Government of Republic of Korea (resistance against Japanese empire); 1944 – 1946 Gouvernement provisoire de la République française (Resistance against German occupation).

settlements<sup>7</sup>, to struggle against domestic repression<sup>8</sup>, to strive for independence<sup>9</sup>, or to indirectly control foreign territory<sup>10</sup>. Denominations such as ‘provisional government’, ‘interim government’, ‘transitional council’ or more generally ‘transitions’ have been used in relation to all of these functions.

After 1989 the context, nature, and function of DIG changed dramatically. DIG became disassociated from decolonization, secession or dissolution processes, and emerged more frequently in the context of non-international rather than international armed conflicts<sup>11</sup>. Furthermore, while before 1989 DIG resulted either from ‘incremental, multi-channel constitutional regime changes’ (Eastern Europe) or from ‘quick clean breaks and new permanent constitutions under occupying forces’ (Japan, Germany), after 1989 it became more and more based on ‘interim constitutions in planned stages’<sup>12</sup>. DIG became a process whereby transitional authorities introduce a wholesale constitutional transformation on the basis of interim frameworks. Lastly, after the end of the Cold War, the international community started supporting the installation of interim political bodies intended to bring peace and security in conflict-riven states. As a result, “[d]espite the domestic character and significance of governance transitions, the assembly and maintenance of interim structures has increasingly become an international project”<sup>13</sup>. This remarkable evolution will be sketched in the following lines.

Modern-day DIG can be defined as follows. It is a staged form of DIG introducing a reconstitutionalization process based on a supraconstitutional interim framework. The intellectual foundation of this model is partly tributary to the well-known and much-analyzed South African interim experience (April 1994 - February 1997)<sup>14</sup>. DIG has become particularly popular since the

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<sup>7</sup> 1913 Provisional Government of Western Thrace (protest against border settlement of the 1913 Treaties of Bucharest and Constantinople); 1914 Autonomous Republic of Northern Epirus (protest against Protocol of Florence to the 1913 Treaty of London).

<sup>8</sup> 1915-1918 Armenian ‘Republic of Van’ (resistance against Ottoman rule during Russian occupation).

<sup>9</sup> 1915 Nationalist Provisional Government of India (independence from British rule); 1918 Estonian Provisional Government (independence from Russian Federation / German occupation); 1918 Latvian Provisional Government (independence from Russian Federation / German occupation); 1922 Provisional Government of Ireland (transition towards independence from Great Britain after Anglo-Irish Treaty); 1946-1947 Interim government of India (decolonization); 1948-1949 Provisional Government of Israel; 1954-1962 Provisional Government Algerian Republic (decolonization); 1971-1972 Provisional Government of the People's Republic of Bangladesh

<sup>10</sup> 1937-1940 Provisional Government of the Republic of China (vassal government of Japanese Empire).

<sup>11</sup> “[m]ost civil wars today end in negotiated settlements, and in most instances part of such agreements is agreement on a defined political pathway through which a transitional process to consolidate peace is to unfold. These transition paths often feature the formation of transitional governments, sometimes constitution-making processes, and, at some point, an electoral process and event to give post-war governance a new sense of legitimacy. The transition sequences and institutional choices made in war-settlement negotiations often determine the nature and timing of initial post-war elections; in turn, these electoral processes deeply affect the nature of the state that emerges for years to follow”. T. D. Sisk, ‘Elections and Statebuilding after Civil War, Lurching toward legitimacy’ in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, Routledge, London, New York, 2013, p. 259.

<sup>12</sup> V. C. Jackson, ‘What’s in a name? Reflections on timing, naming, and constitution-making’, 49 *Wm. & Mary L. Rev.*, 2007-2008, pp. 1249-1305.

<sup>13</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, United States Institute of Peace Press, Washington D.C., 2007, p. 3.

<sup>14</sup> The intellectual ownership of this model can most probably be attributed to the Constitutional Committee of the African National Conference, and to Suzuki Yasuzo. See A. Sachs, ‘South Africa’s Unconstitutional Constitution: the Transition from Power to Lawful Power’, *Saint Louis University Law Journal*, vol. 41, pp. 1249-1258, and p. 1255, where Sachs explains that the two-staged model of interim governance was an instrument to reconcile divergent approaches between the ANC (elections for a constituent assembly) and the then South African government (constitution seen as a safeguard against retaliation): “[o]ur answer was to have a two-stage process of Constitution making. The first stage was to agree on the process of transition including elections and the basis for the elections; to establish a new government, a new Parliament which would elect a new president; and, to have a Bill of Rights that would function in the meanwhile to protect fundamental rights. The second stage would be to entrust the new Parliament with a Constitution-making function

South African staged transition from Apartheid to post-Apartheid based on the 1994 interim constitution, yet was not always accompanied with equally successful results. Since the South African transition, DIG continued to be deployed in various states nonetheless. DIG remained by definition domestic but became increasingly influenced by international diplomacy. A well-known example in this regard concerns the adoption at an international conference of the 2001 Bonn Agreement, which provided an interim constitutional framework to regulate DIG in Afghanistan. In its basic structure, the model of internationally assisted DIG was replicated in various other countries like the DRC (2002), Côte d'Ivoire (2003), Somalia (2004), Iraq (2004), Sudan (2005), Nepal (2007), Guinea (2010), Kyrgyzstan (2010), Libya (2011), Yemen (2011), Guinea-Bissau (2012), Mali (2012), Central African Republic (2013), Burkina Faso (2014), Ukraine (2015) and perhaps Syria (2015). The success of internationally assisted DIG can probably be explained by the relative diminution of state creation and the unsustainability of direct ITA. These are the two main material historic-economic reasons accounting for the turn to DIG.

Recent (and sometimes forcible) attempts to redraw the borders of Ukraine or of states in the Middle-East/North Africa region (e.g. Libya, Egypt, Syria, and Iraq) do not amount to state creation. Less recent attempts to create new states like Kosovo, Abkhazia or South Ossetia are not only rare but also controverted and legally unsettled, contrary to the successful and now uncontroverted state creation generated by the dissolution of the USSR and the decolonization process. Compared to the second half of the twentieth century, the creation of new states in the twenty-first century has thus become relatively rare. If geopolitics are to follow the path of lesser resistance, state creation is not really an option anymore as its zenith is now passed. This is one reason why, from a geopolitical viewpoint, DIG nowadays is attracting more interest.

Compared to the millennium turn, instances of foreign or direct ITA (1999-2002), whether or not in conjunction with belligerent occupation, are decreasing, yet continue to receive much scholarly attention<sup>15</sup>. All trusteeship operations were suspended in 1994, and today “there is no support for the formal revival of a system of UN trusteeship”<sup>16</sup>. In the late 1990s, ITA was deployed in Kosovo and East Timor, yet this form of administration became severely criticized both on normative and material grounds. The normative critique relates to the democracy/accountability deficit and neo-colonialist function reproached to ITA<sup>17</sup>. The costly and ponderous nature of ITA, requiring the UN (almost) to substitute itself to states<sup>18</sup>, constitutes the material ground on which ITA is criticized<sup>19</sup>. Faced with this

(Contd.)

within a framework of agreed-upon principles”. For the Japanese intellectual origin of staged DIG, see S. B. Hamano, ‘Incomplete Revolutions and not so Alien Transplants: the Japanese constitution and human rights’, 1 U. Pa. J. Const. L. 415 (1998-1999), p.428: “[a]lthough Suzuki advocated a republican government, he thought that a transitional phase was essential and so argued for a two-step approach beginning with a democracy retaining the emperor system followed by a reconsideration of this choice when the country had gained experience with democracy”.

<sup>15</sup> See, for example, E. De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*, Martinus Nijhoff Publishers, 2009; B. Knoll, *The legal status of territories subject to administration by international organizations*, Cambridge University Press, 2008.

<sup>16</sup> M. Berdal, S. Economide (eds.), *United Nations Interventionism, 1991-2004*, Cambridge University Press, p. 31.

<sup>17</sup> R. Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away*, Oxford University Press, 2008. See also C. Bull, *No Entry Without Strategy – Building the Rule of Law under UN Transitional Administration*, United Nations University Press, Tokyo, New York, Paris, 2008.

<sup>18</sup> Y. Daudet, ‘L’exercice de compétences territoriales par les Nations Unies’, <http://www.oas.org/dil/esp/4%20-%20yves%20daudet.17-64.pdf>, pp. 54, 58 : « [I]es opérations conduites dans ces territoires, après celle du Cambodge, sont lourdes tant au point de vue quantitatif par les personnels déployés et les coûts engendrés qu’au point de vue qualitatif par les missions entreprises et les résultats obtenus. Dès lors que les Nations Unies se substituent à des Etats défaillants ou remplissent sur des territoires non autonomes des missions comparables à celles dont étaient investies des puissances mandataires ou chargées d’une tutelle, les compétences dont elles disposent sont celles d’Etats souverains ».

<sup>19</sup> C. Bull, *No Entry Without Strategy – Building the Rule of Law under UN Transitional Administration*, op. cit. About UNTAET, see S. Chesterman, ‘East Timor’, in M. Berdal, S. Economide, (eds.) *United Nations Interventionism, 1991 – 2004*, op. cit., p. 192: “East Timor presents two contradictory stories in the history of UN peace operations. On the one

double critique, the UN, for the first time in Afghanistan, opted for a ‘light footprint’ approach<sup>20</sup>, the effectiveness of which depended on DIG. Ponzio observes that it was “the first time that domestic transitional authorities of this kind [i.e. the Afghanistan Interim, then Transitional Authorities] were instituted during an international peacebuilding operation”<sup>21</sup>. Under the light footprint approach, the UN, acting as a broker rather than a guarantor of international peace and security, was expected (only) to assist states in transition rather than to (directly) administer them. Writing about the UN mission in Afghanistan, Afsah & Guhr remarked that “emphasis has been placed on ensuring Afghan ownership of the reconstruction process”<sup>22</sup>.

The light footprint was intended to rectify the prevalent ‘heavy international footprint’<sup>23</sup>. It conforms to the 2000 Brahimi report, which questioned whether the UN should be further involved with ITA, even whether it “should be in this business at all”<sup>24</sup>. Light footprint proponents “decry the enormous, unsustainable costs associated with twenty-first-century peace operations, the endless nature of missions that fail to define their exit strategy from the outset, and the culture of dependency that arises in populations under international administration or an excessive international presence”<sup>25</sup>. Assisting domestic transitions rather than bearing direct responsibility for ITA was seen as a “possible correction to the trend towards ever-expanding [UN transitional] mandates [...]”<sup>26</sup>, or as a reaction to the “well-known set-backs and over-extension of UN peace operations in the early 1990s”<sup>27</sup>. These circumstances generated a revisitation of prevalent practices. The light footprint approach was thus “hailed as a major conceptual revolution in United Nation thinking, developed out of the perceived failures in Kosovo, East Timor and elsewhere”<sup>28</sup>. Fundamentally, the novelty of the light footprint approach consisted in letting domestic transitions henceforth be internationally assisted.

Yet, according to the former UN Representative for Afghanistan, L. Brahimi, this ‘conceptual revolution’ was never correctly implemented: “the United Nations, continued to operate, far too often, through parallel structures that did provide some services to the population but undermined rather than

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hand, it is an outstanding success. In two and a half years, a territory that had been reduced to ashes after the 1999 referendum on independence held peaceful elections and celebrated independence. On the other hand, however, East Timor can be seen as a series of missed opportunities and wastage. Of the UN Transitional Administration’s annual budget of \$500 million, only around one-tenth actually reached the East Timorese”.

<sup>20</sup> Report of the Secretary-General, ‘The situation in Afghanistan and its implications for international peace and security’, A/56/875-S/2002/278 dd. 18 March 2002, p. 16: “UNAMA should aim to bolster Afghan capacity (both official and non-governmental), relying on as limited an international presence and on as many Afghan staff as possible, and using common support services where possible, thereby leaving a light expatriate ‘footprint’”. The term was coined by John Renninger. See K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, Penguin Books, London, p. 338.

<sup>21</sup> R. Ponzio, *Democratic Peacebuilding, Aiding Afghanistan and other Fragile States*, Oxford University Press, 2011, p. 118.

<sup>22</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *Max Planck Yearbook of United Nations Law*, 9, 2005, p. 382. In the same sense: E. De Brabandere, *Post-Conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*, *op. cit.*, p. 42: “that Afghanistan would not be a ‘full’ UN-led international administration like UNMIK or UNTAET. [...] [T]he focus was on the greatest possible participation of local actors and less international involvement. [...] [T]he Bonn Agreement did not give the UN a mandate to exercise administrative authority over the territory, nor a direct responsibility for the administration of the territory”.

<sup>23</sup> E. Newman opposes this to the ‘heavy international footprint’. E. Newman, ‘Liberal peacebuilding debates’ in E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, United Nations University Press, Tokyo, New York, Paris, 2009, p. 32.

<sup>24</sup> A/55/305 – S/2000/809 dd. 21 August 2000 (the ‘Brahimi Report’), § 78.

<sup>25</sup> R. Ponzio, *Democratic Peacebuilding, Aiding Afghanistan and other Fragile States*, *op. cit.*, p. 214.

<sup>26</sup> S. Chesterman, *You, The People, The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2004, p. 49.

<sup>27</sup> M. Griffin, B. Jones, ‘Building peace through transitional authority: new directions, major challenges’, *International Peacekeeping*, 7:4, pp. 75-90.

<sup>28</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 382.

helped the state establish and sustain its credibility”<sup>29</sup>. For Afsah & Guhr, too, “[t]he UN sometimes appear[ed] to be operating like a parallel administration”<sup>30</sup>. Despite the light footprint approach, international actors went well beyond acts of assistance and exercised significant leverage on the Afghan transition and statebuilding process. In the same vein, Schoiswohl writes: “[a]s a consequence of the international engagement that ultimately led to the ousting of the Taliban regime, the state-building processes themselves are not purely domestic, *but closely tied to the assistance* provided by individual donors in conjunction with the United Nations and other organizations”<sup>31</sup>. Because international states and organizations provided, to use the words of the 2011 International Afghanistan Conference, “direct service delivery”<sup>32</sup> and were closely involved in the transition, their involvement triggered dependency schemes resulting in Afghanistan becoming a rentier state<sup>33</sup>. This was the result of an unbalanced interaction between (formal) domestic ownership and (overstretched) international assistance, an issue that is not irrelevant for other cases, also from a legal perspective, and to which we shall come back further below.

These realities can hardly be associated to a light footprint approach. Such approach becomes a fiction when “formal authority remains with domestic actors but governance is dependent on international actors”<sup>34</sup> (the ‘between trusteeship and partnership model’<sup>35</sup>). In spite of this, the conceptual turn represented by the light footprint approach at the dawn of the new millennium had a tremendous ideological effect. As DIG was deployed in a country that had known war for at least two decades, it became associated with its now generally accepted pacificatory function. International assistance to DIG increasingly came to fulfill the collective security function previously attributed to ITA<sup>36</sup>.

If measured by its outcome, DIG in Afghanistan only produced mixed results, at best. The present security and political situation in Afghanistan leaves much to be desired. In other countries, international assistance to DIG was not more successful. Transitions in the Democratic Republic of Congo (‘DRC’) (2002 - 2005), Iraq (2004 - 2005), Libya (2011 - ?), Yemen (2011 - ?) and Syria (2015 perhaps - ?) did not bear fruit, if they were initiated at all. Yet, as we shall see, the conviction that internationalized DIG can bring peace in an uncertain world remains deeply entrenched in

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<sup>29</sup> L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, 7<sup>th</sup> Global Forum on Reinventing Government Building Trust in Government, 26-29 June 2007, Vienna, p. 17.

<sup>30</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 418.

<sup>31</sup> M. Schoiswohl, ‘Linking the International Legal Framework to Building the Formal Foundations of a State at Risk: Constitution-Making and International Law in Post-Conflict Afghanistan’, *Vanderbilt Journal of Transnational Law* 39 (2006), pp. 861. About the Bonn Agreement: “[i]n attempting to strike a balance between the detrimental effects on the sustainability of reform attached to full-fledged international (U.N.) administration and the political risks associated with insufficient international involvement, the Bonn Agreement reflects a compromise between a domestic program for the consolidation of power and specific benchmarks to ensure that the state-building agenda evolves in a manner acceptable to the international community. In the latter regard, the international community acts as a watchdog of democracy, whose financial means in the form of bilateral and multilateral ‘benevolence’ entail significant leverage to inform the way by which Afghanistan is to rise to the circle of democratic states”. For a detailed description of the UN’s role in Afghanistan, see R. Ponzio, *Democratic Peacebuilding, Aiding Afghanistan and other Fragile States*, *op. cit.*, p. 119.

<sup>32</sup> ‘Conference Conclusions of the International Afghanistan Conference entitled ‘Afghanistan and the international community: from transition to the transformation decade’, A/66/597–S/2011/762 dd. 9 December 2011, p. 3.

<sup>33</sup> A. Suhrke, *When More is Less: the international project in Afghanistan*, Columbia University Press, 2011.

<sup>34</sup> M. Saul, ‘The Search for an International Legal Concept of Democracy: Lessons from the Post-Conflict Reconstruction of Sierra Leone’, *Melbourne Journal of International Law*, Vol. 13, No. 1, 2012, p. 7. See also Nora Roehner, *UN Peacebuilding - Light Footprint or Friendly Takeover?*, CreateSpace Independent Publishing Platform, Berlin 2012.

<sup>35</sup> *Id.*

<sup>36</sup> It is right that “[i]n the context of post-conflict peacebuilding, transitional administration represents *an* international response to an [internal] conflict whose belligerents are unable to arrive at or to implement a peace settlement or to govern themselves peacefully”. R. Caplan, ‘Transitional Administration’ *in* V. Chetail (ed.), *Post-Conflict Peacebuilding, A Lexicon*, Oxford University Press, p. 359. The use of the indefinite article indicates that other options are open as well.

international legal culture<sup>37</sup>. This is why, at the time of writing, we are witnessing more and more instances of DIG based on interim constitutional frameworks.

The relevance of DIG has thus all but diminished anno 2015, even if scholarship has primarily dealt with transitional justice as one of its expressions or consequences. With the evolving of the international political context, the nature and function of DIG, too, has changed to a substantial degree. As before, DIG is limited in time, supersedes existing constitutional rules and procedures, and is observed by national actors. In short, it is temporal, nonconstitutional<sup>38</sup> and domestic. Post-Cold War DIG, however, is characterized by two distinctive features.

First, partly because DIG is mostly observed in anocracies, i.e. regime types where power is not firmly vested in public institutions but spread amongst elite groups constantly competing for power<sup>39</sup>, transitions “have become more complicated and, so, require greater and more protracted effort, and support, to accomplish and consolidate. Transition periods, and the anocratic regimes associated with such transitions, then, tend to last longer than they had in the past”<sup>40</sup>. The complexity of post-Cold War transitions translates into detailed supraconstitutional interim frameworks intended to govern two- or multi-staged transitions.

Second, because DIG has been ascribed an ambitious, overarching function –that of bringing peace– actors from the international community increasingly monitor and/or co-define the supraconstitutional norms and procedures for reconstitutionalizing post-conflict countries, and do so with greater intensity. This is so even if DIG is observed by domestic actors. DIG is qualified as domestic not because its impact can be felt ‘on the ground’ (which obviously is the case with ITA and belligerent occupation, for instance, too) but in light of the non-international character or identity of the (main) stakeholders and beneficiaries appointed in the transition procedure. The signatories and/or ratifying parties of the instruments founding the transition (‘transition instruments’), and their main stakeholders and beneficiaries, are domestic actors. The qualification ‘domestic’ can be used notwithstanding the internationalization of DIG (e.g. the international impact on the creation of DIG or the international monitoring of DIG), or the international context in which the transition is triggered (e.g. an international conference or internationally brokered negotiations)<sup>41</sup>. It is to this issue, the internationalization of DIG, that we turn now.

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<sup>37</sup> “a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward [law]”, paraphrasing C. J. Geertz’ definition of culture. C. J. Geertz, *The Interpretation of Cultures: Selected Essays*, Basic Books, New York, 1973, p. 89.

<sup>38</sup> Suffice here to say that nonconstitutionality refers to the adoption of texts, or to the execution of actions, which are, if not *contra constitutionem* then at least *praeter constitutionem*. Nonconstitutionality can refer to the modification of the constitution without following explicitly foreseen constitutional (amendment or revision) procedures, or to the establishment of (transitional) institutions not foreseen by the constitution, either to transform the existing constitutional order (this would be both *praeter constitutionem* and unconstitutional) or to restore it (this would be *praeter constitutionem* without necessarily being unconstitutional).

<sup>39</sup> “Also included in the anocracy category in this treatment are countries that are administered by transitional governments”; “Research indicates that anocracies have been *highly unstable and transitory regimes*, with over fifty percent experiencing a major regime change within five years and over seventy percent within ten years”, <http://www.systemicpeace.org/GlobalReport2011.pdf>. Emphasis added. In the same sense, K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 4.

<sup>40</sup> *Id.* Own emphasis.

<sup>41</sup> The institutional bases for the transitions in Afghanistan and Burundi, for example, were negotiated in international conferences (the 2001 Bonn Conference and the Arusha peace process, respectively), yet these countries were never considered to be under ITA. Even though their interregnum was internationalized, their transitions were formally domestic.

## **The internationalization of domestic interim governance**

In the last couple of decades, the international community has placed a heavy burden on DIG. It has, in a sense, *aggrandized* its core function. In line with a widespread discourse and conviction, DIG has been assigned the challenging task of bringing peace to post-conflict countries. This is why in recent history the so-called international community has shown a keen interest in domestic reconstitutionalization processes carried out by transitional authorities. In 2007 Guttieri & Piombo already wrote that “[b]y the late 1990s and early 2000s [...] the role of the international community increased. Great powers and international institutions –no longer stymied by Cold War rivalry– took in expanded and more direct roles in the creation and maintenance of interim governments”<sup>42</sup>. The conviction and discourse that transitions are conducive to peace transpires in the practice of various actors operating at the global, regional and state level. Unsurprisingly, DIG is the preferred option for peace processes. The 2015 Review of the UN Peacebuilding architecture also remarks this, and describes as follows how DIG has become part and parcel of the international community’s conflict resolution toolbox:

“Over the last couple of decades, a rough template seems to have emerged for international response to post-conflict challenges. First, mediators achieve a peace agreement, usually fragile and not always sufficiently reflective of the local dimensions of the conflict. This is followed by a limited “Transition” period, often accompanied by temporary power-sharing arrangements and/or some form of “National Dialogue” process. Within a year or so, a new constitution is drafted and adopted. The culmination is the holding of new and democratic elections – usually a massive logistical exercise. This sequence obviously has as its intention the suturing of societal wounds and the careful installation of new national authorities with a democratic mandate to act as primary interlocutor with international partners for subsequent peacebuilding. But all too frequently this model breaks down”<sup>43</sup>

The socialized conviction that transitions bring peace may be called the peace-through-transition paradigm. It is now widespread to the extent that, in spite of its deficiencies, some commentators consider that DIG could also function as a preventive measure in countries where war looms large<sup>44</sup>. The peace-through-transition paradigm translates into a socialized discursive practice based on the belief that the redefinition of the social contract is an effective conflict resolution mechanism. The 2015 Review of the UN Peacebuilding Architecture seems to suggest that this is a rather naive stance<sup>45</sup>. Without engaging with the question whether DIG is to be commended or not, this section merely observes that several strata of the so-called international community have recourse to DIG or promote it as a problem-solving tool.

The internationalization of DIG operates on various levels, and is generated both by non-governmental and governmental actors. Within the last category not only the UN / UN Security Council and regional organizations but also diplomatic coalitions and individual states show a keen interest in influencing the redefinition of the social contract –in short, the reconstitutionalization– of countries said to be in transition. As actors engaged with DIG operate on different levels and in various constellations, the internationalization of DIG is multifaceted or even fragmented.

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<sup>42</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*

<sup>43</sup> 2015 Review of the UN Peacebuilding architecture dd. 29 June 2015, § 31.

<sup>44</sup> The fragile contexts of apparent calm but with a risk of renewed violence –as in Côte d’Ivoire anno 2015– would justify a transition phase, so as to “prioritize the birth of a new [social] contract” as a preventive measure. See ‘Côte d’Ivoire: Ivory Coast Needs a Transition Phase’, AllAfrica, 24 March 2015, <http://allafrica.com/stories/201503302819.html>.

<sup>45</sup> 2015 Review of the UN Peacebuilding Architecture, *op. cit.* See for example §§ 31, 32, 33.

## *The multitude of actors influencing interim governance*

### The UN

In order to accompany states through a stage of convalescence, the UN often relies on DIG. One of the UN's approaches in post-conflict countries is to help install transitional governments, Ottawa & Lacina observed in 2003<sup>46</sup>, or to assist countries in triggering domestic transition procedures. For Sripathi, “following the Cold War, [the UN] assisted conflict-prone sovereign and independent states in sculpting new constitutions and in shaping political institutions. It now engages in internal governance not to decolonize, but to prevent conflicts and build peace”<sup>47</sup>. To this end, the UN Peacebuilding Commission, UN Peacebuilding Trust Fund and UN Secretariat<sup>48</sup> increasingly turn their attention to countries experiencing a form of DIG. Further testament to the UN's interest in DIG is that, within the UNDP, a constitutional focal point (‘CFP’) was “established in 2013 in response to increased demand for UN assistance in constitution-making processes”<sup>49</sup>. The CFP centralizes knowledge with regard to constitutional transitions worldwide.

The UN Security Council (‘UNSC’) bears the “primary responsibility for the maintenance of international peace and security”<sup>50</sup>. More and more, the UNSC tries to discharge this obligation by having recourse to DIG. In line with the peace-through-transition paradigm, DIG is assigned the task not (only) of dealing with regime succession but also, and more ambitiously<sup>51</sup>, of coping with armed conflicts or threats against international peace and security. Bearing this in mind, the UNSC increasingly supports and monitors DIG. From the UNSC perspective, the pacificatory function of DIG comes to overarch and overshadow the functions historically attributed to DIG (e.g. succession, resistance, preparation for independence). Official statements with regard to Syria, Guinea-Bissau, Yemen and Libya clearly illustrate how deeply the peace-through-transition paradigm is entrenched in legal and diplomatic culture.

- In August 2015, the UNSC demanded that all parties in the Syrian conflict “work urgently towards [...] launching of a Syrian-led political process leading to a political transition” so as to enable the Syrian people to determine their future “through the establishment of an inclusive transitional governing body”<sup>52</sup>.
- In December 2013, the UNSC President affirmed that “the consolidation of peace and stability in Guinea-Bissau can *only* result from a consensual, inclusive and nationally owned transition

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<sup>46</sup> M. Ottaway, B. Lacina, ‘International intervention and Imperialism: Lessons from the 1990s’, SAIS Review, Volume 23, Number 2, Summer-Fall 2003, pp. 71-92: “UN post-conflict interventions have followed one of three basic approaches, which vary greatly in the way in which they interfere with existing power structures. In most cases, missions have simply relied on the existing administrative and even political structures; *in others, the missions have helped to install a local transitional government instead*; in the most invasive cases, the UN has set up international transitional administrations to run the country for a period of time”.

<sup>47</sup> V. Y. Sripathi, ‘UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989 – 2011’, International Peacekeeping, 19:1, p. 94.

<sup>48</sup> The UNSG was for example closely involved in the constitutional transformation of Kenya where it mediated “a transitional arrangement that was to lead to a full process of root-and-branch constitutional reform”. K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, Penguin Books, London, p. 202.

<sup>49</sup> <http://peacemaker.un.org/sites/peacemaker.un.org/files/Constitutions-2015.pdf>.

<sup>50</sup> UN Charter, art. 24.

<sup>51</sup> This depends on the interpretation of ‘peace’ one chooses. There is no doubt that the exigencies of ‘absence of war’ are less high than the exigencies of substantive democracy. On the other hand, peace and democracy also belong to different conceptual categories, and a comparison is therefore not always possible.

<sup>52</sup> S/PRST/2015/15 dd. 17 August 2015, § 9.

process”<sup>53</sup>. After determining that the situation in Guinea-Bissau constituted a potential threat to international peace and security, the UNSC actively monitored the transition<sup>54</sup>.

- After the uprisings in Libya in early 2011, the UNSC<sup>55</sup> and, shortly after, the AU<sup>56</sup> observed that the situation posed a threat to international peace and security. Both at the global and regional level the answer to this threat consisted in the formulation of detailed DIG proposals. Although differing on some points, the two proposals thus committed to the peace-through-transition paradigm. The UNSC<sup>57</sup> and the AU<sup>58</sup> were both convinced that DIG was the only way to remedy the threat to international peace and security. As a result, Libya swiftly received UNSC-mandated constitutional assistance<sup>59</sup>.
- From late 2011 onwards, the UNSC closely followed the transition in Yemen, indicating that it did so “[m]indful of its primary responsibility for the maintenance of international peace and security”<sup>60</sup>. Acting under Chapter VII of the UN Charter, in February 2015 the UNSC further insisted on “the full and timely implementation of the political transition”<sup>61</sup>.

These short descriptions confirm the strong conviction that there is a direct causality between DIG and peace. They show how the UNSC appropriated the peace-through-transition discourse to remedy or anticipate a threat to international peace and security. These are not exceptions. Comforted by the conceptual expansion of the definition of threats to international peace and security<sup>62</sup>, UNSC

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<sup>53</sup> S/PRST/2013/19, Statement by the President of the Security Council dd. 9 December 2013. Emphasis added.

<sup>54</sup> See also S/RES/2048 (2012) dd. 18 May 2012, Preamble. On this date the UNSC, “[m]indful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations”, seized itself of the matter. See furthermore S/RES/2103 (2013) dd. 22 May 2013, S/RES/2157 (2014) dd. 29 May 2014, S/RES/2186 (2014) dd. 25 November 2014, and S/RES/2203 dd. 18 February 2015.

<sup>55</sup> On 17 March 2011, the UNSC determined in its resolution 1973 that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security. See S/RES/1973 (2011) dd. 17 March 2011, Preamble.

<sup>56</sup> On 26 April 2011, The AU Ad-Hoc High-Level Committee on Libya “stressed the serious *threat that this situation poses for peace, security and stability in the region as a whole*, and reaffirmed AU’s conviction on the need for an urgent African action”. See ‘Report of the chairperson of the commission on the activities of the AU High Level Ad Hoc Committee on the situation in Libya’, 26 April 2011, § 15, available on <http://www.peaceau.org/uploads/275reportonlibyaeng.pdf>.

<sup>57</sup> On 16 September 2011, the UNSC looked forward to the establishment of a transitional Government of Libya, and communicated a number of guidelines that were to be followed by the National Transitional Council. In so acting, the UNSC seconded the basic idea underpinning the proposals and exhortations previously made by the AU.

<sup>58</sup> On 26 April 2011, the AU Ad-Hoc High-Level Committee on Libya had “reaffirmed the relevance of the elements of the Roadmap articulated by the Council. It invited the Libyan authorities and the TNC to a meeting to be convened, as soon as possible, in Addis Ababa or in any other venue agreeable to the parties, *to discuss this Roadmap, in particular the establishment and the management of an inclusive transitional period* that would lead to political reforms meeting the aspirations of the Libyan people” (‘Report of the chairperson of the commission on the activities of the AU High Level Ad Hoc Committee on the situation in Libya’, *op. cit.*, § 17.2. Own emphasis). On 25 May 2011, the Assembly of the AU again “stressed that the ceasefire should lead to *the establishment of a consensual and inclusive transitional period* during which the necessary reforms to meet the legitimate aspirations of the Libyan people would be carried out, culminating in elections that would enable the Libyans to choose freely their leaders” (‘African Union Decision on the Peaceful Resolution of the Libyan Crisis’ dd. 25 May 2011. Own emphasis).

<sup>59</sup> V. Sripathi, ‘United Nations Constitutional Assistance in Statebuilding’ in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, *op. cit.*, p. 143.

<sup>60</sup> S/RES/2051 dd. 12 June 2012, Preamble. See also S/RES/2140 (2014) dd. 26 February 2014, in which the UNSC “determin[ed] that the situation in Yemen constitutes a threat to international peace and security in the region”, “[w]elcomes the recent progress made in the political transition of Yemen and expresses strong support for completing the next steps of the transition”.

<sup>61</sup> S/RES/2204 dd. 24 February 2015, § 1.

<sup>62</sup> 2005 World Summit Outcome, UNGA Res. 60/1 (24 October 2005), §§ 6 and 69. See also ‘In Larger Freedom: Towards Development, Security and Human Rights for All’, UN Doc/59/2005, 24–5: “threats to peace and security in the twenty-first century include not just international war and conflict but civil violence, organized crime, terrorism and weapons of

resolutions often provide in detail how transitions are to deal with such threats, or explicitly endorse transition agendas defined elsewhere<sup>63</sup>. The UNSC has adopted resolutions under Ch. VII of the UN Charter with regard to (projected) transitions in South Sudan<sup>64</sup>, Somalia<sup>65</sup>, Libya<sup>66</sup>, Mali<sup>67</sup>, Côte d'Ivoire<sup>68</sup>, Central African Republic ('CAR')<sup>69</sup>, Yemen<sup>70</sup>, Guinea-Bissau<sup>71</sup>, Libya<sup>72</sup>, Haiti<sup>73</sup>, and Afghanistan<sup>74</sup> (reversed chronological order). Seven of these resolutions were adopted in 2014. The UNSC furthermore reserves the power to take sanctions against anyone impeding transitions. It has created sanction regimes, and regularly threatens to apply sanctions against so-called spoilers of DIG. During this decade the UNSC has done so against (potential) transition spoilers in Burkina Faso<sup>75</sup>, Yemen<sup>76</sup>, CAR<sup>77</sup>, Somalia<sup>78</sup>, and Côte d'Ivoire<sup>79</sup>.

In addition, the UNSC establishes UN missions to monitor transitions, sometimes in collaboration with the UN Development Programme ('UNDP'). In different cultural and political settings, such missions are mandated to keep a close eye on DIG. The UN itself observes that "[a]lthough each UN

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mass destruction. They also include poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences. All of these threats can cause death or lessen life chances on a large scale. All of them can undermine States as the basic unit of the international system".

<sup>63</sup> See for example S/RES/2118 (2013) dd. 27 September 2013 in which the UNSC endorses the transition agenda of the Geneva Communiqué dd. 30 June 2012.

<sup>64</sup> S/RES/2187 dd. 25 November 2014.

<sup>65</sup> S/RES/2182 dd. 24 October 2014.

<sup>66</sup> S/RES/2174 dd. 27 August 2014.

<sup>67</sup> S/RES/2164 dd. 25 June 2014.

<sup>68</sup> S/RES/2153 dd. 29 April 2014 in which the UNSC refers to the Ouagadougou Agreement and "[d]ecides that the Ivoirian authorities shall submit biannual reports to [a] Committee [...] on progress achieved in relation to DDR and SSR".

<sup>69</sup> S/RES/2149 dd. 10 April 2014.

<sup>70</sup> S/RES/2140 dd. 26 February 2014.

<sup>71</sup> S/RES/2048 dd. 18 May 2012.

<sup>72</sup> S/RES/2009 dd. 16 September 2011 in which the UNSC directly addressed itself to the National Transitional Council on the topic of the transition.

<sup>73</sup> S/RES/1529 dd. 29 February 2004 § 1.

<sup>74</sup> S/RES/1386 dd. 20 December 2001 in which the UNSC refers to the Bonn Agreement, which regulates the transition in Afghanistan. The Bonn agreement refers to S/RES/1378. For a discussion, refer to T. Maruhn, 'Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus', Archiv des Völkerrechts, Bd. 40 (2002), p. 496.

<sup>75</sup> In February 2015, the Under-Secretary-General for Political Affairs J. Feltman declared with regard to Burkina Faso that "the international community will not tolerate any obstacle to the transition. Those who threaten the transition should be aware that the international community is watching and will hold them accountable". UN News Centre, 'International community 'will not tolerate' obstacles to Burkina Faso transition, says UN political chief', 4 February 2015.

<sup>76</sup> See S/RES/2140 dd. 26 February 2014, in which the UNSC "determin[ed] that the situation in Yemen constitutes a threat to international peace and security in the region", "[w]elcomes the recent progress made in the political transition of Yemen and expresses strong support for completing the next steps of the transition", and even establishes a sanction committee monitoring the activities of individuals or entities that may threaten the peace, security or stability of Yemen by "[o]bstructing or undermining the successful completion of the political transition". See also S/PRST/2014/18, Statement by the President of the Security Council dd. 29 August 2014. Already in June 2012, the UNSC was "expressing concern at the recent deterioration of cooperation among some political actors and actions that could adversely affect or delay the political transition process" (S/RES/2051 dd. 12 June 2012). See also S/RES/2216 dd. 14 April 2015, Annex, § 2. See also S/RES/2204 dd. 24 February 2015 in which the UNSC emphasized the critical importance of the sanctions regime.

<sup>77</sup> S/RES/2127 dd. 5 December 2013, § 10; S/RES/2149 (2014) dd. 10 April 2014.

<sup>78</sup> S/RES/1844 dd. 20 November 2008, § 8.a.

<sup>79</sup> "Decides that all States shall take the necessary measures, for a period of twelve months, to prevent the entry into or transit through their territories of all persons designated by the Committee established by paragraph 14 below, who constitute a threat to the peace and national reconciliation process in Côte d'Ivoire, in particular those who block the implementation of the Linas-Marcoussis and Accra III Agreements", S/RES/1572 dd. 15 November 2004, § 9.

peacekeeping operation is different, there is a considerable degree of consistency in the types of mandated tasks assigned by the Security Council<sup>80</sup>. A UN mission's mandate typically includes assisting states in transition with their reconstitutionalization process. This task is either directly foreseen in UNSC resolutions or results from the circumstance that UN missions are required to monitor or assist the implementation of a (peace) process itself stipulating that the assisted country be reconstitutionalized. This task may also be associated to practices known under denominators such as peacebuilding<sup>81</sup>, rule of law assistance<sup>82</sup> or electoral reform<sup>83</sup>. In short, assistance to reconstitutionalization has become a central part of the portfolio of UN missions. Since the end of the Cold War the UN –through UNSC, UN missions and/or UNDP– has been closely involved in at least thirty reconstitutionalization processes<sup>84</sup>.

This trend confirms that the UN, in particular the UNSC, continues shifting “from a mainly politico-military approach to international peace and security to a greater reliance on a *legal-regulatory* approach”<sup>85</sup>, now more and more based on UN assistance to DIG, especially when it comes to reconstitutionalizing countries. Rather than deploying ITA or (exclusively) relying on blue helmets or military intervention to confront armed conflicts or threats to peace, the UNSC increasingly places its confidence in DIG.

In light of the historic-economic context of the peace-through-transition paradigm already sketched above, there is no doubt that the wholesale constitutional and institutional reconfiguration of a country –the renaissance of a state– nowadays is seen as an instrument for advancing collective security. It comes as no surprise, thus, that in recent years constitutional assistance has become an “established field”<sup>86</sup> within the UN, even though the UN has no monopoly over the peace-through-transition paradigm.

### Regional organizations

The peace-through-transition paradigm was also appropriated by a number of regional or sub-regional organizations. The most elaborate provisions with regard to domestic nonconstitutionality are part of

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<sup>80</sup> <http://www.un.org/en/peacekeeping/operations/pkmandates.shtml>.

<sup>81</sup> The UN 2006 Peacebuilding Capacity Inventory includes constitutionmaking under the heading of governance and participation.

<sup>82</sup> The 2000 Brahimi report advocated a doctrinal shift in the use of rule of law elements in peace operations. Constitutional reform can be regarded as a reform area of UN rule of law assistance. See R. Sannerholm, ‘The United Nations Security Council, Peacekeeping and the Rule of Law’, working paper available on [http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/Sannerholm\\_3.2\\_\\_1\\_0.pdf](http://regnet.anu.edu.au/sites/default/files/publications/attachments/2015-05/Sannerholm_3.2__1_0.pdf).

<sup>83</sup> Sripati rightly notes that “the UN has long used the generic term ‘electoral assistance’ to cover for constitutional assistance, thereby indicating that it has merely a facilitating rather than a directing or overseeing role. More significantly, in this way it has obscured the potentially paternalistic nature of constitutional assistance”. V. Sripati, ‘United Nations Constitutional Assistance in Statebuilding’ in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, *op. cit.*, p. 144.

<sup>84</sup> Afghanistan, Bhutan, Burundi, Cambodia, DRC, East Timor, Ecuador, Egypt, Eritrea, Gambia, Guyana, Haiti, Iraq, Kosovo, Liberia, Libya, Malawi, Maldives, Namibia, Nauru, Nepal, Rwanda, Sierra Leone, Solomon, Islands, Somalia, South Sudan, Sudan, Tokelau, Tunisia, Zambia, Zimbabwe. See V. Y. Sripati, ‘UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989 – 2011’, *op. cit.*, pp. 93 – 113 & V. C. Franke & A. Warnecke (2009), ‘Building peace: an inventory of UN Peace Missions since the end of the Cold War’, *International Peacekeeping*, 16:3, 407-436 for overview and context. The list in this paper is an aggregation of the countries under international constitutional assistance mentioned in both articles.

<sup>85</sup> P. Chitalkar, D. M. Malone, ‘The UN Security Council and Iraq’, UNU Working Paper Series, Nr. 1, November 2013, [https://collections.unu.edu/eserv/UNU:5/wp01\\_theunscandiraq1.pdf](https://collections.unu.edu/eserv/UNU:5/wp01_theunscandiraq1.pdf), p. 4.

<sup>86</sup> V. Y. Sripati, ‘UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989 – 2011’, *op. cit.*, p. 93.

the African regional legal framework as developed after the decolonization process<sup>87</sup> (before that, the OAU often supported nonconstitutional transitions as a way of realizing self-determination<sup>88</sup>). Since its 2000 Constitutive Act, the AU has adopted a policy of condemning any unconstitutional change of government<sup>89</sup>. This policy indirectly favors DIG as it obliges any group or government coming into being on an unconstitutional basis to relinquish power, a process which can take months or years and, again, is often accompanied by a reconstitutionalization process. Further testament to the reliance on DIG at the AU is that a CFP, already realized at the UN level, may soon be replicated within the AU structures. Also with the aim of creating an institutional memory on constitutional transitions, the AU is now considering the creation of a CFP within its Peace and Security Council<sup>90</sup>.

Furthermore, a number of subregional organizations have been strongly encouraging and monitoring DIG. The Economic Community of Central African States (ECCAS) deeply impacted the transition in the CAR. Although the transition there was based on a domestic agreement (the 2013 Libreville Agreement) ECCAS “quickly took responsibility for the political management of the crisis and masterminded the 11 January 2013 Libreville Agreement, almost appearing to place the CAR ‘under its supervision’”<sup>91</sup>. ECCAS was also involved in setting up the ‘National Transitional Council’ responsible for managing the transition in the CAR<sup>92</sup>. On the same continent, no one is in doubt that the Economic Community of West African States (ECOWAS) strongly influenced the transition in Burkina Faso, Guinea, Guinea-Bissau, Liberia, and Mali. The Gulf Cooperation Council (GCC), lastly, had a heavy hand in the (unsuccessful) transition in Yemen. It was at the origin of the 2011 Agreement which provided in detail how this transition was supposed to unfold.

#### Diplomatic coalitions / contact groups

In spite of their adherence to the peace-through-transition paradigm, international organizations are not always effective in monitoring DIG. In order to fill the gaps left by the lack of global/regional leadership, states and organizations gather in *ad hoc* diplomatic coalitions (‘contact groups’ or ‘friends of groups’) with a view to steering or monitoring transitions. The circumstance that the UN “increasingly giv[es] free reign to self-selected ‘coalitions of the willing’ to set their own conditions on when and how interventions should take place”<sup>93</sup> thus applies not only to forcible interventions but also, more subtly, to non-forcible interventions in state transformation processes.

The International Contact Group on Guinea, for example, reportedly “adopted a very firm position setting out the list of measures to be taken to allow Guinea to resume her transition process”<sup>94</sup>. In the DRC, the *Comité international d’accompagnement de la transition* (‘CIAT’), representing UNSC

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<sup>87</sup> M. Olivier, ‘The emergence of a right to democracy – an African perspective’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2013.

<sup>88</sup> A historical example whereby a regional organisation tried to trigger a nonconstitutional transition in the specific context of a liberation struggle is provided by the 1989 Harare Declaration, i.e. the ‘Declaration of the OAU Ad-hoc Committee on Southern Africa on the question of South Africa’ which states that “permanent peace and stability in Southern Africa can only be achieved when the system of apartheid in South Africa has been liquidated and South Africa transformed into a united, democratic and non-racial country”. Harare Declaration dd. 21 August 1989, Preamble, § 4. The same declaration provides that “the outcome [of such a process] should be a new constitutional order” (*id.*, nr. 16).

<sup>89</sup> The 2000 African Union Constitutive Act. See also the 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government and the 2007 African Charter on Democracy, Elections and Governance.

<sup>90</sup> Initiative by Micha Wiebusch.

<sup>91</sup> International Crisis Group Report nr. 203, 11 June 2013, ‘Central African Republic: Priorities of the Transition’, p. 11.

<sup>92</sup> *Id.*

<sup>93</sup> D. Chandler, *Empire in Denial – The Politics of State-building*, Pluto Press, London, 2006, p. 60.

<sup>94</sup> Press statement available on <http://www.franceonu.org/france-at-the-united-nations/press-room/speaking-to-the-media/press-releases/article/13-october-2009-meeting-of-the>. Only available *en cache*.

members as well as representatives from six other states<sup>95</sup> and three organizations<sup>96</sup> exercised enormous leverage during the transition. A former member of CIAT testified that this committee “was a very important instrument to help the Congo to move forward. It also helped the international community to work as a unified entity, in dealing with the Congolese problem”<sup>97</sup>. According to another source, CIAT was “widely credited as a beneficial and needed force to maintain progress”<sup>98</sup>. Further indicative of CIAT’s influence is the fact that “Jean Pierre Bemba had [...] [asked] for CIAT intervention to resolve the political impasse over allocation of the state companies’ senior positions”<sup>99</sup>. As evidenced in various diplomatic cables, CIAT was involved in virtually all aspects of the DRC state renaissance<sup>100</sup>.

Contact groups are not without antecedents in history<sup>101</sup>. But their number has sharply risen over the last two decades. Interestingly, this broadly coincides with the period during which DIG, too, has increased almost exponentially. For Saul, “[p]articularly noticeable are the conferences of friends at which the reconstruction targets of the state are mapped out and international assistance promised on this basis”<sup>102</sup>. Contact groups were thus created to monitor DIG not only in Guinea and the DRC but also in countries such as Afghanistan, Burkina Faso, Burundi, CAR, Guinea-Bissau, Liberia, Libya, Mali, Rwanda, Sierra Leone, Somalia, Syria, Sudan, Tajikistan, and Yemen. In addition, implementation committees can be set up specifically to control whether and how transition arrangements are implemented.

As temporary coalitions<sup>103</sup>, contact groups have evolved from “ad hoc group[s] of senior diplomats and/or foreign ministers from three or more states created to coordinate their *mediation* of a conflict”<sup>104</sup> to “ad hoc group[s] of senior diplomats and/or foreign ministers established to coordinate the *policy* of a *coalition*”<sup>105</sup>. In line with the latter description, Whitfield defines contact groups as “groups of the major powers interested in the outcome of a conflict”, and notes that they have been “vehicles for these powers’ direct diplomacy in a variety of different peace processes”<sup>106</sup>. Contact groups are mostly “self-selecting”<sup>107</sup> or “self-serving”<sup>108</sup> as they include “states with an overriding strategic interest in the outcome of a particular conflict, or [with] a proxy relationship with one of the

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<sup>95</sup> Angola, Belgium, Canada, Gabon, South Africa, Zambia.

<sup>96</sup> The AU, the EU and the UN.

<sup>97</sup> See interview with Eoin Young, former member of CIAT: ‘South African Ambassador: The CIAT was a very important instrument for the DRC’, 12 December 2006, Reliefweb, <http://reliefweb.int/report/democratic-republic-congo/south-african-ambassador-ciat-was-very-important-instrument-drc>.

<sup>98</sup> Cable by Amb. Roger Meece dd. 5 November 2004, available on [https://wikileaks.org/plusd/cables/04KINSHASA2047\\_a.html](https://wikileaks.org/plusd/cables/04KINSHASA2047_a.html).

<sup>99</sup> Cable by Amb. Roger Meece dd. 30 November 2004, available on [https://wikileaks.org/plusd/cables/04KINSHASA2183\\_a.html](https://wikileaks.org/plusd/cables/04KINSHASA2183_a.html).

<sup>100</sup> See, for example, Cable by Amb. Roger Meece dd. 5 November 2004, *op. cit.*

<sup>101</sup> See for example the role of the Western Contact Group for the transition to independence of Namibia.

<sup>102</sup> M. Saul, ‘From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law’, *International Community Law Review* 11, no. 1, 2009, p. 131.

<sup>103</sup> P. Dobb, ‘The future of international coalitions: How useful? How manageable?’, *The Washington Quarterly*, 25:2, 2002, pp. 129-144.

<sup>104</sup> G. R. Berridge, A. James, L. Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy*, Palgrave Macmillan, 2012. Own emphasis.

<sup>105</sup> *Ibid.* Own emphasis.

<sup>106</sup> T. Whitfield, ‘Working with Groups of Friends’, United States Institute of Peace, Washington, D.C., [http://www.usip.org/sites/default/files/PMT\\_Groups\\_of\\_Friends1.pdf](http://www.usip.org/sites/default/files/PMT_Groups_of_Friends1.pdf), p. 33.

<sup>107</sup> *Id.*, p. 6, p. 26.

<sup>108</sup> *Ibid.*

parties”<sup>109</sup>. It is arguably in this sense that contact groups, with the strong presence or marked absence of some powers, have supported oppositional transitional authorities in Libya and Syria<sup>110</sup>.

Collaboration with contact groups is generally seen in a positive light, e.g. in Afghanistan<sup>111</sup>, the CAR<sup>112</sup>, DRC<sup>113</sup> and Yemen<sup>114</sup>. This should not obscure the fact that such groups mostly assume the role of partial policy coordinators rather than impartial conflict mediators. It is inaccurate, even misleading, to portray such groups as agents of the international community<sup>115</sup>. Yet, being powerful policymakers, contact groups have the potential of catalyzing constitutional and/or regime change in conflict-striven countries<sup>116</sup>, even without being mandated to do so (note however that, at the stage of implementation, designated committees, often linked to contact groups, may have a formal role in monitoring compliance with the transition procedure).

By triggering or endorsing constitutional and/or regime change, contact groups thus “risk replicating the conflict dynamics”<sup>117</sup> in the realm of DIG, and beyond that. When conflict or crisis is followed by a contact group’s involvement with (self-proclaimed) transitional institutions, this may result in fundamental polity modifications of the ‘target country’ even in the absence of any boots on the ground. This can leave a permanent imprint on the state order of a country in transition, also beyond the interregnum. It is this kind of influence that individual states, too, sometime seek to exercise.

### Individual states

Within the wide array of actors professing the peace-through-transition paradigm and impacting DIG, one should of course mention individual states. Examples are legion. Among other countries, the US

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<sup>109</sup> *Id.*, p. 37.

<sup>110</sup> G. R. Berridge, A. James, L. Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy*, *op. cit.*

<sup>111</sup> With regard to the transition in Afghanistan, finally, the participants of the Bonn Conference took “note with appreciation of the close collaboration of the International Contact Group with the Afghan Government and their work, and encourage them to continue their joint efforts”. Conference Conclusions of the International Afghanistan Conference entitled ‘Afghanistan and the international community: from transition to the transformation decade’, A/66/597–S/2011/762 dd. 9 December 2011, p. 4.

<sup>112</sup> S/RES/2149 dd. 10 April 2014, § 10: “[e]ncourages the Transitional Authorities with the support of key members of the International Contact Group to take immediate measures to revitalize the political process by agreeing on certain key parameters, which could include *the possible creation of an international mechanism which would include key stakeholders, including the AU, ECCAS, the United Nations and the EU, as well as the International Financial Institutions (IFIs) as appropriate, to accompany the transition while respecting the sovereignty of the CAR*, and requests the Secretary-General to report to the Council on progress taken in this regard”.

<sup>113</sup> M. de Goede, C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *African Security* 1, no. 2, 2008. The CIAT (International Committee in Support of the Transition) has been described as playing “an essential role in the extremely complex transition process”, “an important role in reducing the opportunities for the unruly transitional government to manipulate the peace process”.

<sup>114</sup> S/PRST/2012/8 dd. 29 March 2012. With regard to the transition in Yemen, the UNSC affirmed the crucial role of the ‘Friends of Yemen’ by “affirm[ing] their view that the Friends of Yemen have a particularly important role to play by bringing together the main international actors in a common endeavor to support Yemen’s overall transitional plans during the next two years”.

<sup>115</sup> For de Goede and van der Borgh, for example, CIAT, the contact group monitoring the transition in the DRC, “enabled the international community to speak with one voice [...] [as] it was very well understood that a firm and united position from the international community would be key to the implementation of the transitional agenda”. See M. de Goede, C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *op. cit.*

<sup>116</sup> For a critique, see M. D. Nazemroaya, ‘With ‘Friends’ like these...: America’s ‘Contact Group Industry’ is Overthrowing Governments’, 2012, available on <http://www.globalresearch.ca/with-friends-like-these-americas-contact-group-industry-is-overthrowing-governments/5302391>.

<sup>117</sup> United Nations Guidance for Effective Mediation, available on <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf>, p. 19.

has developed a bilateral assistance-to-transition policy<sup>118</sup>, and has tried to bear on the reconstitutionalization of South Sudan, Sri Lanka and Ukraine, *inter alia*. Not long after civil war erupted in South Sudan, its overall constitutional structure was reconsidered, both within and outside the country. During a meeting of the UNSC in August 2014, the US ambassador “reiterated the need for both leaders [of the civil war] to put together a transitional authority”<sup>119</sup>. In Sri Lanka, the US closely followed the transition because it was “keen to bolster ties with countries throughout Asia as part of its effort to *counterbalance* an increasingly powerful and assertive China, which has sought strategic influence in Sri Lanka”<sup>120</sup>. In Ukraine, the transition was purportedly influenced not only by the US<sup>121</sup> but also by the so-called Weimar Triangle (composed of Poland, Germany and France) which unsuccessfully brokered an agreement<sup>122</sup> calling for a national unity government. After President Yanukovich’s nonconstitutional ouster<sup>123</sup>, the Yatsenyuk interim government received financial support from the EU<sup>124</sup>, Canada<sup>125</sup>, and the US<sup>126</sup>. After Crimea seceded, Russia, too, raised her voice about how Ukraine should rethink its constitutional structure<sup>127</sup>.

Examples on the African continent or in the Middle East also abound. In 2012 the UN Secretary General called on the members of UNSC, and all countries with influence on Syria, to exert joint pressure for a transition to a legitimate government<sup>128</sup>. In 2014, “[t]he presidents of Ghana, Nigeria and Senegal urged Burkina Faso to appoint a transitional government”<sup>129</sup> to lead a transition which was briefly interrupted by a coup in September 2015 but subsequently restored. In 2015, Iran pushed for a unity government to initiate a transition in Yemen<sup>130</sup>. All these examples testify to the fact that, in our day and age, individual states increasingly (purport to) bear upon DIG in other countries.

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<sup>118</sup> US National Security Strategy, February 2015, [http://www.whitehouse.gov/sites/default/files/docs/2015\\_national\\_security\\_strategy\\_2.pdf](http://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf), see the section about ‘Supporting Emerging Democracies’ (pp. 20-21).

<sup>119</sup> ‘Security Council concludes South Sudan visit’, UNMISS, 13 August 2014, <http://unmiss.unmissions.org/Default.aspx?tabid=3465&ctl=Details&mid=6047&ItemID=4870229&language=en-US>.

<sup>120</sup> ‘US security adviser Rice pledges help for Sri Lanka ‘transition’, Reuters, 7 February 2015, <http://in.reuters.com/article/2015/02/06/usa-srilanka-idINKBN0LA2KQ20150206>.

<sup>121</sup> Obama told CNN’s Zakaria that Washington “had brokered a deal to transition power in Ukraine”. Interview published on 1 February 2015, available on <http://cnnpressroom.blogs.cnn.com/2015/02/01/pres-obama-on-fareed-zakaria-gps-cnn-exclusive/>.

<sup>122</sup> Available on [http://www.auswaertiges-amt.de/cae/servlet/contentblob/671350/publicationFile/190051/140221-UKR\\_Erklaerung.pdf](http://www.auswaertiges-amt.de/cae/servlet/contentblob/671350/publicationFile/190051/140221-UKR_Erklaerung.pdf).

<sup>123</sup> Even those who defend the Ukrainian revolution write that “there were no constitutional grounds for shortening the presidential term”. See <http://euromaidanpr.wordpress.com/2014/03/15/the-ousting-of-yanukovich-was-legal/>, 15 March 2014. It seems that the impeachment votes did not reach the required three quarters of the 449-seated parliament. See <http://www.lawfareblog.com/2014/03/russia-in-ukraine-a-reader-responds/>, 5 March 2014, where A. Deeks argues that “Yanukovich is still the incumbent and legitimate President of the Ukraine”.

<sup>124</sup> ‘EU offers Ukraine \$15 billion, but help hinges on IMF deal’, Reuters, 5 March 2014, <http://www.reuters.com/article/2014/03/05/us-eu-ukraine-support-idUSBREA240V020140305>.

<sup>125</sup> ‘Ukraine to get \$220M in financial support from Canada’, CBC News, 13 March 2014, <http://www.cbc.ca/news/politics/ukraine-to-get-220m-in-financial-support-from-canada-1.2571510>.

<sup>126</sup> ‘fact sheet: International Support for Ukraine’, <http://www.whitehouse.gov/the-press-office/2014/03/04/fact-sheet-international-support-ukraine>.

<sup>127</sup> ‘Russia says it wants east Ukraine to stay with Kiev under reformed constitution’, Constitutionnet, <http://www.constitutionnet.org/news/russia-says-it-wants-east-ukraine-stay-kiev-under-reformed-constitution>, 16 December 2014.

<sup>128</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 369.

<sup>129</sup> ‘Thousands gather in Burkina Faso to denounce ‘military coup’’, The Guardian, 2 November 2014, <http://www.theguardian.com/world/2014/nov/02/burkina-faso-thousands-denounce-military-coup>.

<sup>130</sup> Iran says working to help Yemen form unity government to fix crisis, Reuters, 8 April 2015.

### ***The multifaceted internationalization of interim governance***

DIG is influenced by the UN peacebuilding architecture, the UNSC and the missions it established, regional organizations, contact groups & implementation committees, and individual states. Of course, there is no doubt that transitions can be maneuvered by several actors at the same time. Multilateral, collective and state-to-state assistance to DIG are often exercised in tandem. The multitude of actors concurrently influencing DIG is palpable in various countries such as Afghanistan and Nepal. In Afghanistan, there were at least ‘six communicative circles of empire’ during Afghanistan’s interregnum (2001 – 2004), including the interim government and three ‘international community actors’ (the ‘six-plus-two group’, the UN mission and the UNSC)<sup>131</sup>. In Nepal, “[w]hile the peace process is largely domestically driven, it has been accompanied by wide-ranging international involvement, including initiatives in peacemaking by NGOs, the United Nations, and India, which, throughout the process, wielded considerable political influence; significant investments by international donors; and the deployment of a Security Council-mandated UN field mission”<sup>132</sup>.

Several strata of the international community have an interest in promoting DIG, and for diverging reasons. From an optimistic perspective, the UN and regional organizations have recourse to DIG for rational reasons, i.e. to efficiently delegate their responsibility for the maintenance of international peace and security; and contact groups and individual states would do so for selfless reasons, i.e. in the best interest of the states concerned. From another perspective, the UN and regional organizations promote DIG only to free themselves from their responsibilities by unsuccessfully placing this burden on DIG, which has a tendency towards failure; and contact groups and individual states would do so only for strategic interests, i.e. to bolster ties with countries or to counterbalance geopolitical ambitions of their peers. The circumstances of each case dictate a different perspective. In sum, external assistance to DIG vacillates between *bona fide* multilateral state transformation and interest-based unilateral constitutional proxy politics.

Whichever perspective is taken or preferred, the multilayered international community continues to portray the installation and/or monitoring of transitional institutions as a panacea for many problems. At all levels do external/international actors explicitly or implicitly rely on the peace-through-transition discourse in order to justify their involvement with DIG, often in the name of the international community. It thus comes as no surprise that DIG has been internationalized in two interrelated senses: the international impact on DIG and the porosity of DIG to external influences are two sides of the same coin.

#### The international impact on DIG

International assistance in the context of DIG can easily evolve into something more than just that. It can fill a governance gap –frequently ascribed to the failing nature of a state– of such nature that, notwithstanding the nominal ownership of transitional authorities, the international community finds itself performing “quasi-governmental functions in war-shattered states, or what Fen Osler Hampton calls ‘proxy governance’, which involves international actors serving as ‘stand-ins’ for local authorities who are unable or unwilling to perform the needed administrative tasks themselves”<sup>133</sup>. In the context of DIG this may be called ‘proxy interim governance’.

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<sup>131</sup> M. Bothe, A. Fischer-Lescano, ‘Protego et oblige, Afghanistan and the Paradox of Sovereignty’ in R. A. Miller, P. C. Zumbane, *Comparative Law as Transnational Law, A Decade of the German Law Journal*, Oxford University Press, 2012, pp. 291 – 299.

<sup>132</sup> S. von Einsiedel, D. M. Malone, and S. Pradhan, eds., *Nepal in Transition: From People’s War to Fragile Peace*, Cambridge University Press, New York, 2012.

<sup>133</sup> R. Paris, ‘International Peacebuilding and The Mission Civilatrice’, *Review of International Studies* 28, n. 4, 2002, p. 645.

This is not to deny that regime trajectories sometimes undergo strong domestic influences. Köhler thus argues that, in the context of the Arab Spring, regime trajectories were much influenced by domestic military elites or defectors from the military<sup>134</sup>. Yet, such domestic influences, in this and other contexts, form only one (yet far from negligible) part of the picture. Regardless of the exact balance of power or division of labor, DIG generally goes hand in hand with some form of international – multilateral, collective or bilateral – assistance, also in the absence of ITA. Saul describes this as the ‘assistance model’<sup>135</sup>. The assistance model has led some authors to develop notions like ‘co-sovereignty’ and ‘shared sovereignty’<sup>136</sup>, or even ‘suspension of sovereignty’, notions which, from a legal perspective, were rightly dismissed as “awkward”<sup>137</sup>. In any event, the influence of external actors on DIG can be felt to varying degrees. It was felt strongly in Burundi and the DRC, for example:

“[i]n the cases of Burundi and the Democratic Republic of the Congo, regional actors and organizations pushed forward the peace process. While domestic actors managed these interim governments, external actors had significant input as to who could participate in the peace talks leading to the creation of the temporary regimes and who could lead those transitional governments once they were created. In this way, external facilitation in creating peace agreements left a strong imprint on the character and functioning of the subsequent domestic regime”<sup>138</sup>.

During the interregnum, enormous leverage can be exercised on a country’s reconstitutionalization. This trend was observed at the occasion of the Arab Spring. Since 2011, a number of transitional institutions were created under different forms and denominations in countries like Libya, Syria and Yemen. Maybe inspired by the hope of a revival of the democratic entitlement doctrine, public reports and press articles portrayed such institutions under an almost naively positive light. What is more, they were sometimes anticipatively entrusted (by their domestic constituencies, international actors, or both) with a formal incl. constitution-building role in the transition of their respective countries.

#### The porosity of DIG to external influences

In light of the above it is not surprising that DIG is much permeable to external influences. This is particularly evident from the reconstitutionalization of a country, a central aspect of DIG. International actors directly impact supraconstitutional interim frameworks (such as intrastate peace agreements or interim constitutions) regulating transitions (‘transition instruments’). The manifold references to international law in transition instruments are a clear expression of how DIG has become extremely porous to the influence of external actors. Whenever there is a power vacuum, such actors tend to rely

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<sup>134</sup> K. Köhler, *Military Elites and Regime Trajectories in the Arab Spring – Egypt, Syria, Tunisia and Yemen in Comparative Perspective*, EUI Thesis, 2013. This thesis argues that “military elite behavior shaped regime trajectories in the Arab Spring. Where the armed forces as an institution defected from the incumbent, the presidency immediately collapsed; where at least some military elites remained loyal, the respective chief executives survived in office for a significantly longer period” (p. 1).

<sup>135</sup> M. Saul, ‘From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law’, *op. cit.*

<sup>136</sup> For the development of the concept of ‘shared sovereignty’, see S. D. Krasner, ‘Sharing Sovereignty – New Institutions for Collapsed and Failing States’, *International Security*, Vol. 29, No. 2, pp. 85-120: “[s]hared sovereignty would involve the engagement of external actors in some of the domestic authority structures of the target state or an indefinite period of time” (p. 108).

<sup>137</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 4: “[o]ne of the contradictions in this process rests in the awkward attempt to create a sovereign state by suspending sovereignty. Most recent state-building attempts entail removing a state’s ability to govern itself in order to reconstruct a new, sovereign state from without”.

<sup>138</sup> D. Curtis, ‘Transitional Governance in Burundi and the Democratic Republic of the Congo’, in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 171.

on international legal references. This is because, for domestic transitional authorities too, international law is seen as the residual legal system whenever a domestic legal system is being transformed. A perusal of post-Cold War transition instruments would thus most probably confirm that international law directly influences both their general *ratio legis* and individual provisions<sup>139</sup>. More generally, the peace-through-transition discourse transpires in transition instruments concerning Burundi<sup>140</sup>, Côte d'Ivoire<sup>141</sup>, DRC<sup>142</sup> and Nepal<sup>143</sup>, for example.

#### The absence of a homogeneous international community

By entrusting DIG with a pacificatory function, the peace-through-transition paradigm has significantly reinforced the international relevance of DIG. Even if unrelated to decolonization, secession or dissolution processes, DIG is more than ever a matter of international concern. The international impact on DIG and its porosity to external influences jointly define the internationalization of DIG. As noted earlier, this reflects the shift from a politico-military to a legal-regulatory vision of international peace and security. This vision is propagandized not only by the UNSC but nearly by all components of the international community.

This apparent teleological commonality however hardly conceals underlying disparities. Such disparities are unavoidable given the diversity of goals pursued by a vast array of actors engaged with DIG. The international attention for DIG was, therefore, never undivided or one-dimensional. This is so not only because of the multitude of actors influencing DIG, but also, and more fundamentally, given the absence of a true, homogeneous international community. Also when it relates to DIG, global governance is polycentric and heterarchical. In spite of the appearances conveyed by the peace-through-transition paradigm, DIG is not a common goal pursued by a real international community, which, except as a categorical imperative, does not exist. In 1980 already, R.-J. Dupuy warned against the misleading words 'communauté internationale'<sup>144</sup>. For lack of homogeneity, shared vision and

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<sup>139</sup> International assistance to interim governance is more likely to yield effects when there actually is a secondary interim legal framework that can be influenced. An interregnum that is not based on such a framework is less prone to international influence.

<sup>140</sup> Thus, under Ch. II 'solutions', which immediately followed Ch. I 'nature and historical causes of the conflict', the 2000 Arusha Agreement mentioned the "[i]nstitution of a new political, economic, social and judicial order in Burundi" (art. 5.1) following the "[s]peedy establishment of the transitional institutions" (art. 5.3).

<sup>141</sup> With respect to the transition in Côte d'Ivoire, the 2003 Linas-Marcoussis Accord provides: "[a] Government of National Reconciliation will be set up immediately after the conclusion of the Paris Conference to ensure a return to peace and stability". The Linas-Marcoussis Accord dd. 13 January 2003, art. 3.a.

<sup>142</sup> Similarly, under II.5 the 2002 Pretoria agreement mentioned among its 'transition objectives', "the setting up of structures that will lead to a new political order".

<sup>143</sup> In Nepal, the "progressive restructuring of the state" is a principal component of the 2011 Comprehensive Peace Agreement. Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal dd. 22 November 2011, Preamble.

<sup>144</sup> R.-J. Dupuy, Leçon inaugurale faite le Vendredi 22 Février 1980, Collège de France, Chaire de Droit International, 1980. "[q]uand on observe que la communauté internationale est également fréquemment prise à témoin ou présentée comme l'entité suprême de référence par les gouvernements, on mesure de quelles équivoques ce vocable est encombré" (p. 9). Dupuy distinguishes between a 'communauté internationale historique' and a 'communauté mythique'. Dupuy remarks that international law is evolving from a 'droit de procédure' to a 'droit réglementaire'; "[l]a communauté internationale est une stratégie [...] le mythe communautaire doit être pris au sens où l'entendait Georges Sorel, celui d'un faisceau d'images motrices, animant une action politique et informant l'évolution du droit. [...] En vérité la communauté se trouve elle-même au coeur d'une tension entre la solidarité et l'individualité [...] Il apparaît que le concept de communauté se situe lui-même à l'intérieur de la compétition. Toute communauté est conflictuelle: comment la communauté internationale établie sur un monde uni et déchiré, ne le serait-elle pas? [...] C'est ici qu'apparaît la mission majeure de la communauté mythique: elle est la source constamment renouvelée d'une contestation permanente au sein même de la communauté historique [...] La communauté mythique fait de la communauté historique une négociation continue" (pp. 24 – 26).

shared responsibility, today's pluralist international society can hardly be called a 'community'<sup>145</sup>. One can therefore not assume that all international community actors have the same interest in relying on the peace-through-transition paradigm. While this paradigm suggests that DIG is an adequate instrument for coping with international armed conflict or threats to peace and security, a more realistic reading prevents us from accepting this as given.

These observations are also relevant from a legal point of view. A legal assessment of international assistance to DIG cannot depend on 'the international' viewed as a monolithic bloc. Because the internationalization of DIG is multifaceted, the formulation of a *ius in interregno* as to how external actors may impact DIG should consider *how when which* of these actors purport to do so. Any comprehensive international legal analysis of DIG should thus be mindful of the fact that this form of governance, especially when interacting with heterarchical global governance, tends to vacillate between two extremes: multilateral state renaissance and unilateral constitutional geopolitics. This caveat is crucial because a central part of DIG –the reconstitutionalization process– intimately touches upon the transition state's *domaine réservé*. On another occasion, these reflections –along with the following exploratory analysis of legal grounds potentially invoked to justify the increased resort to DIG– will be subject to deeper analysis<sup>146</sup>.

### **The prima facie legal rationales for privileging domestic interim governance**

A critical international legal analysis of DIG should give thought to the following question. Can the success of DIG be underpinned by legal rationales? In other words, are there any legal reasons for privileging DIG over other forms of governance? One can think of three legal arguments to justify the choice of (international assistance to) DIG. First, DIG constitutes an alternative option when, in light of the principles of state sovereignty and self-determination, ITA may be deployed only as a last resort. Second, DIG may allow international actors to influence the interregnum with lesser constraints under international (humanitarian) law. Third, opting for DIG may be seen as a means for avoiding shared international responsibility between the domestic and international constituencies involved in DIG. Of course, a *ius in interregno* should carefully examine these contentions.

#### ***International territorial administration as a last resort***

Two fundamental legal principles –state sovereignty and self-determination– may inform the choice for DIG. We have seen that, as a response to threats to international peace and security, the UN, other international organizations, contact groups and states increasingly create, empower or monitor domestic transitional authorities. This course of action may actually be preferred over ITA as ITA requires international actors to directly administer regime change, for which they assume direct responsibility. In addition, ITA may only take place under certain conditions.

ITA must be inversely proportional to possible restrictions on state sovereignty and can only be used if it is not possible to achieve peace and security by other means<sup>147</sup>. If the principles of proportionality and subsidiarity legally limit the possibility of deploying ITA, then assisting DIG constitutes an

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<sup>145</sup> B. Urquhart, 'The International Community - Fact or Fiction?', Macalester International, 1995, Vol. 1, Article 7. Except, of course, if one advances a thin definition of international community. Thus, for Mosler, two elements were necessary for the existence of an international (legal) community: "the fact that a certain number of independent societies organised on a territorial basis exist side by side, and the psychological element in the form of a general conviction that all these units are partners mutually bound by reciprocal, generally applicable, rules granting rights, imposing obligations and distributing competences" (referring i.a. to the 'constitutional elements in the international community' and to *ius cogens*). H. Mosler, *The International Society as a Legal Community*, Sijthoff, 1980, p. 2.

<sup>146</sup> Cf. the author's doctoral dissertation soon to be defended at the *European University Institute* under the title 'Domestic interim governance in conflict-riven states – Towards a *ius in interregno* for regulating transitions'.

<sup>147</sup> T. Marauhn, 'Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus', *op. cit.*, pp. 480-511.

alternative means for managing regime changes and/or coping with threats to international peace and security. According to this line of reasoning, the general deference to the principles of state sovereignty and self-determination may justify the preference of DIG over ITA. Some could argue that these principles would, at first sight, be ‘out of the radar’ when domestic, nationally owned transition procedures solely receive international *assistance*<sup>148</sup>.

### ***Less constraints under international (humanitarian) law***

At first sight, international assistance to DIG, contrary to belligerent occupation for example, seems to be nearly unrestrained by international law. When external influence is being channeled via domestic transitional authorities in the absence of, or independently from, belligerent occupation, the leverage for influencing the legal and institutional structure of a state seems to be enormous indeed. In case of belligerent occupation, the Hague and Geneva Conventions require that domestic laws already in force be, in principle, further applied. The latter convention explicitly provides that “the occupant [...] shall [...] respect[ing], unless absolutely prevented, the laws in force in the country”<sup>149</sup>. Consequently, as Stahn remarks, “[t]he authority of the occupant is limited by specific constraints emanating from the inviolability of the rights of the territorial sovereign and the limited regulatory powers of the occupant over the occupied territory”<sup>150</sup>. Belligerent occupation is thus, as Bhuta summarizes, “order-preserving” because it is “constrained in its order-constitutive authority”<sup>151</sup>.

In the absence of belligerent occupation, however, or when legislative changes are carried out directly by domestic transitional authorities, neither of said conventions is applicable. *A fortiori* their legal requirements cannot be violated. This would imply that, given the non-applicability of the order-preserving legal instruments just mentioned, the *legibus solutus* international involvement with the reconstitutionalization of a country could lead to constitutional changes constitutive of a new politico-legal order<sup>152</sup>. According to this line of reasoning, the external constitution of a new politico-legal order could be achieved not only to a lesser cost<sup>153</sup> but also, so it seems, with a lower risk of legal noncompliance.

### ***Primary responsibility of transitional institutions***

The peace-through-transition paradigm heavily relies on the (formal) domestic nature of interim governance. Domestic actors are primarily responsible for observing DIG. This is at least what the so-called international community tirelessly repeats. At the UN level, especially, the primary

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<sup>148</sup> This idea was advanced by Saul with regard to ‘popular governance of post-conflict reconstruction’. See, in this sense, M. Saul, *Popular Governance of Post-Conflict Reconstruction*, Cambridge University Press, 2014, p. 26.

<sup>149</sup> Art. 43 of the 1907 The Hague Convention provides: “the authority of the legitimate power having 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”. See also art. 64 of the Fourth 1949 Geneva Convention.

<sup>150</sup> C. Stahn, *The Law and Practice of International Territorial Administration*, Cambridge Studies in International and Comparative Law, p. 115. Stahn adds: “the laws of occupation are not intended to provide a general framework for reconstruction and law reform” (p. 119).

<sup>151</sup> N. Bhuta, ‘Antinomies of Transformative Occupation’, *The European Journal of International Law*, Vol. 16 no. 4, 2005, p. 727.

<sup>152</sup> With a grain of irony, Saul also observes that, where domestic transitional authorities consent to international assistance, the ‘order-preserving’ legal instruments central to the law of occupation do not apply: “[t]hat this law does not apply in the assistance model can help project the international involvement as benevolent and of little threat to political independence because, one might reason, if there were a threat to political independence, surely the law of occupation would apply?”. M. Saul, ‘From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law’, *op. cit.*, p. 140.

<sup>153</sup> It would not involve the various (financial, material and human capital) costs usually flowing from military occupation.

responsibility of domestic transitional institutions has been consistently emphasized, *crescendo* over time. In the resolution by which the Peacebuilding Commission (‘PBC’) was established late 2005, the UNGA “[a]ffirm[ed] the primary responsibility of national and transitional Governments and authorities of countries emerging from conflict or at risk of relapsing into conflict [...] in identifying their priorities and strategies for post-conflict peacebuilding, with a view to ensuring national ownership”<sup>154</sup>. In 2009, the ‘Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict’ more strongly emphasized the imperative of local ownership<sup>155</sup>. Mid-2014 the PBC echoed the “principle of national responsibility”<sup>156</sup>.

The principle of national ownership and responsibility is consistently being recalled by the UNSC<sup>157</sup>, too. On 14 January 2015, it “underline[d] that the primary responsibility for successful peacebuilding lies with national governments and relevant local actors, including civil society, in countries emerging from conflict”<sup>158</sup>. The UNSC confirmed this principle in various cases, for example with regard to transitions in the CAR, the DRC and Iraq. Even if undoubtedly the transition in the CAR is influenced by international monitoring activities and other external factors, the UNSC nevertheless “underscores the primary responsibility of the Central African authorities”<sup>159</sup>, e.g. to provide security and protect the law, and never fails to “reaffirm[ing] its strong commitment to the sovereignty, independence, territorial integrity and unity of the CAR”<sup>160</sup>. The UNSC furthermore called on the CAR transitional authorities to complete their transition in line with the ‘Transitional Framework’<sup>161</sup>. In Iraq, too, the UNSC repeatedly affirmed the domestic responsibility for DIG<sup>162</sup>.

Contact groups, too, emphasize that domestic transitional authorities are responsible for DIG. The CAR international contact group, representing more than thirty-five states and organizations<sup>163</sup>, “recalled the primary responsibility of the CAR stakeholders in resolving the serious crisis facing the country, stressing that the role of the international community is to support national efforts and not replace them”<sup>164</sup>. With regard to the DRC, while the international community, often acting through the CIAT, was massively involved in the Congolese transition, the Secretary General did not fail to note that “[t]he primary responsibility for fulfilling the above objectives [restoration of security; territorial

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<sup>154</sup> A/RES/60/180 dd. 30 December 2005, Preamble and § 10.

<sup>155</sup> Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict dd. 11 June 2009, A/63/881-S/2009/304, § 7.

<sup>156</sup> S/PV.7217, Report of the Peacebuilding Commission on its seventh session (S/2014/67) dd. 15 July 2014, p. 14.

<sup>157</sup> S/RES/2149 dd. 10 April 2014 in which the UNSC welcomes the designation of the transitional authorities in the Central African Republic, and “[u]rges” the Transitional Authorities “to accelerate the preparations in order to hold free, fair, transparent and inclusive presidential and legislative elections” and to launch “an inclusive political dialogue”.

<sup>158</sup> S/PRST/2015/2 dd. 14 January 2015

<sup>159</sup> S/RES/2121 dd. 10 October 2013, § 6. See also S/RES/2149 dd. 10 April 2014.

<sup>160</sup> S/RES/2149 dd. 10 April 2014, S/RES/2134 dd. 28 January 2014, S/RES/2127 dd. 5 December 2013, S/RES/2121 dd. 10 October 2013, S/RES/2088 dd. 24 January 2013.

<sup>161</sup> S/RES/2127 dd. 5 December 2013, S/RES/2134 dd. 28 January 2014, S/RES/2149 dd. 10 April 2014.

<sup>162</sup> See for example S/RES/1723 dd. 28 November 2006 which repeatedly affirms the responsibility of Iraq (in various fields); or S/RES/1509 dd. 19 September 2003 which “[r]eaffir[s] that the primary responsibility for implementing the Comprehensive Peace Agreement and the ceasefire agreement rests with the parties, and urging the parties to move forward with implementation of these agreements immediately in order to ensure the peaceful formation of a transitional government by 14 October 2003”.

<sup>163</sup> For a list, see <http://www.peaceau.org/uploads/com-icg-car-08-07-2013eng.pdf>.

<sup>164</sup> Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, <http://www.peaceau.org/uploads/auc.conclusions.4th-mtg.icg.car.pdf>, § 9.

and administrative unification; the adoption of a transitional legislative framework; holding of elections] rests with the Transitional Government”<sup>165</sup>.

The examples above, among many others, indicate that domestic transitional authorities operate under the guidance and impulsion of the UNSC or other organizations and/or contact groups while being themselves internationally responsible for the most important components of the transition. This responsibility generally concerns the execution of the transition roadmap itself as well as the safeguarding of safety and order, also in the context of quasi-international conflicts or proxy wars. With the decrease of ITA and increased recourse to DIG, difficult questions of international responsibility seem to be avoided as domestic transitional authorities would in principle be responsible for ‘their’ transition. This would imply that, by relying on DIG as a form of (rather discrete and cost-efficient) proxy governance, international organizations and states can exercise a considerable influence on the ground even without exercising territorial control or deploying ITA. Notwithstanding their “massive international involvement”<sup>166</sup>, organizations and states would avoid the risk of being held accountable for possible wrongful acts committed at the occasion of DIG.

A nuanced *ius in interregno* would have to counterbalance the simplistic but wide-spread contention that domestic transitional authorities always bear the final responsibility for internationally assisted DIG. As noted earlier, DIG involves several actors, many policy fields and a complex division of labor. It is multifaceted. Would then, in spite of this, the end-responsibility for post-conflict transitions by default be attributed to domestic transitional authorities? Especially when regional or international assistance leaves a strong imprint on the interregnum, this premise seems rather paradoxical – a paradox carefully to be dissected from a legal perspective.

### **The paradox of internationalized domestic interim governance and the need for a *ius in interregno***

In light of the success of DIG, some thought was given to the following question: which legal rationales seem to be readily available to international actors purporting to explain their choice for assisting DIG? The three justifications given above were deliberately formulated in a rather superficial way, i.e. as *prima facie* arguments. By piercing this superficiality, the subtlety and difficulty of formulating a *ius in interregno* is further emphasized. In this sense, three particular difficulties can be identified which may be summarized as follows.

First, international assistance to DIG may be preferred over ITA because the risk of violating the principles of state sovereignty and self-determination may seem less high. The choice for DIG however does not annihilate this risk. A thorough legal assessment based on said fundamental principles should take into account who offers such assistance, and in which manner. Second, even if order-preserving international legal instruments do not apply to DIG, one can question whether transitional authorities or international organizations, contact groups and states enjoy an absolute freedom when it comes to re-defining the social contract of a country in transition. Surely there must be limits to this, notably under the principle of self-determination (or, one might say in the context of DIG, self-redetermination). The difficulty however lies in defining these limits with sufficient precision. Third, one can question whether the monolithic vision of the UNSC, UNGA and PBC –i.e. the absence of division of responsibility for internationally assisted DIG and the mantra that domestic

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<sup>165</sup> Third special report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo dd. 16 August 2004, S/2004/650, § 54.

<sup>166</sup> See <http://constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>, pp. 73-74: “[a] key factor is whether the process is driven by local or external factors. If external, there are two possibilities: (a) the country is taken into international care and the United Nations or a regional organization takes over management of state affairs (as in Cambodia, Kosovo, and Timor-Leste), or (b) there is massive international involvement (as in Afghanistan, Bosnia-Herzegovina, Iraq, and Namibia)”.

transitional authorities always carry this weight— is sustainable. In the following lines we will elaborate on the latter issue. We will ask whether a monolithic responsibility regime would constitute an improvement of the flawed ITA responsibility regime, question the conceptual simplicity of the prevalent DIG responsibility regime, and suggest that it be further dissected from an international legal perspective.

The (lack of a) responsibility regime or (lack of) oversight mechanisms for ITA have been strongly criticized in literature. Wilde argues that ITA even represented a regression from the older mandate (1919 – 1945) and trusteeship (1945 – 1994) systems<sup>167</sup>. Can the delegation of responsibility from the international to the domestic level be considered as a (partial) redress for the shortcomings inherent to ITA? It is true that in the case of DIG, domestic transitional authorities are directly accountable both to the state’s citizens and to the UNSC. Contrary to ITA, transitional authorities, when acting as state agents, are directly accountable to their citizens<sup>168</sup>. As they act under the international legal restraints applicable to states generally, they also owe deference to the UNSC<sup>169</sup>. The Bonn Agreement, for instance, provided that the “actions taken by the Interim Authority shall be consistent with Security Council resolution 1378 (14 November 2001) and other relevant Security Council resolutions”<sup>170</sup>. ITA, by contrast, is a direct ‘outgrowth’ of the UNSC and thus enjoys a position of privilege vis-à-vis it. It is consequently not clear which accountability regime, if any, applies to it. The increased recourse to DIG seems to bring a welcome clarification in this regard. Given the UN’s insistence on the domestic responsibility of transitional authorities, the issue of attribution of responsibility would now be unambiguous. This apparent straightforwardness may, in part, explain the traction of modern DIG.

The emphasis on domestic responsibility and national ownership in the context of DIG may appear to be laudable from a policy perspective: it can be viewed as challenging a culture of dependency<sup>171</sup>. Yet, the conceptual simplicity of the DIG responsibility regime barely conceals the underlying tensions of the –proverbial– ‘light footprint’ approach. Given the multifaceted internationalization of DIG, the impact of international actors on domestic transitions is enormous. This gives rise to a political tension whereby the “responsibilities or leadership or ownership lie with the domestic state but their partners (or joint stakeholder) decode the policies”<sup>172</sup>, in short, whereby there is a “separation between power and accountability”<sup>173</sup>.

Importantly, this tension is not only of political nature. It can be translated into the following legal question. Do transitional authorities systematically bear responsibility for mismanaged transitions, or internationally wrongful acts committed at the occasion of DIG? Is this also the case when they administer the country during the interregnum only in part or in name? The insistence on domestic

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<sup>167</sup> R. Wilde, 'From Trusteeship to Self-Determination and Back Again: The Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers', *Loyola of Los Angeles International and Comparative Law Review*, vol. 31, 2009, pp. 134-135: “[I]nternational territorial administration marks a step away from internationalization, in that, in certain respects, it is not subject to international scrutiny equivalent to that which operated with respect to the Mandate and Trusteeship arrangements, and, as far as the UN Charter is concerned, colonialism [...] Not only have ITA trusteeships not been subjected to much international oversight; [...] they have also been criticized on human rights grounds, for the lack of review mechanisms on the ground, and particular practices conducted”.

<sup>168</sup> This is reinforced by the not-so-innocent language of ‘failed states’. See R. Wilde, 'The Skewed Responsibility Narrative of the Failed States Concept', *ILSA Journal of International & Comparative Law*, vol. 9, 2002-2003, pp. 425-429.

<sup>169</sup> Art. 24 and Chapter II of the UN Charter.

<sup>170</sup> Bonn Agreement, Section V.5.

<sup>171</sup> Interview with Carlos Westendorp, cited in Y. Daudet, ‘L’exercice de compétences territoriales par les Nations Unies’, *op. cit.*, p. 30: « culture de la dépendance envers la communauté internationale ». It is also in this sense that M. Saul understands the concept of ownership, i.e. as opposed to international imposition. See M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 42-43.

<sup>172</sup> D. Chandler, *Empire in Denial – The Politics of State-building*, *op. cit.*, p. 39.

<sup>173</sup> *Id.*, p. 44. For Chandler, this goes together with a “marginalisation of the domestic political sphere” (p. 53).

responsibility for DIG should not obscure this uncomfortable puzzle. Because DIG is highly exposed to and malleable by international actors, it would be legitimate for a *ius in interregno* to critique the conceptual simplicity taken as a point of departure by the UN (UNSC, PBC, UNGA, UN Secretary-General) as well as other organizations or contact groups.

At three occasions, at least, states or organizations have actually challenged this vision by affirming that they are responsible or co-responsible for a successful transition. With regard to the purported transition in Syria, a number of states agreed that “[p]articipating States in Geneva II, in particular the permanent members of the Security Council, will *share the responsibility* for ensuring the full implementation of the political transition in Syria”<sup>174</sup>. Before being involved in the reconstitutionalization of Iraq, the US affirmed it would ensure that their intervention would bear fruit<sup>175</sup>. With regard to the transition in Afghanistan, finally, several states and organizations have indicated that, “[w]ith the conclusion of the Transition process, our *common responsibility* for Afghanistan’s future does not come to a close”<sup>176</sup>.

At some occasions, the affirmation that responsibility for DIG is always domestic was thus already nuanced. In the above cases, several state representatives seem to have acknowledged that their countries’ involvement with DIG may not be without legal consequences if internationally wrongful acts are committed at the occasion of DIG. Yet, these statements remain sporadic, and international practice has not unequivocally followed suit. This is precisely why a better understanding of how international law regulates, or relates to, DIG is needed. Pretensions of conceptual clarity, even in higher political or diplomatic spheres, should not form an impediment to the development of a nuanced *ius in interregno*. This is all the more important in light of the many failures associated to DIG.

Efforts to resolve conflicts through internationally assisted DIG can fail, and have failed. Anno 2015, the disillusioning situations in Afghanistan, Iraq, Libya, and Yemen, for instance, testify to this<sup>177</sup>. This is not surprising because “[p]eace processes and transitions are often more unstable and insecure than even the preceding periods of conflict”<sup>178</sup>. This fragility especially characterizes transitions in anocracies where DIG is based on power-sharing, or indeed any context in which new state institutions are created: “[n]ascent state institutions may be unable to manage conflict, or conflict may be managed in repressive ways. The result could be the collapse of a peace agreement, the failure of state institutions, or a more violent resolution of disputes”<sup>179</sup>. Creating transitional governance structures against the backdrop of political competition unsurprisingly constitutes a recipe for failure.

It is precisely because several transitions end up in disasters that the formulation of a *ius in interregno* is so timely. Law in a world without crisis or failure is devoid of much of its utility. Here the opposite applies. By offering more legal foreseeability, a *ius in interregno* would allow us to clarify the legal framework *de lege lata* that applies to external actors involved in DIG, which in turn may decrease the

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<sup>174</sup> See the ‘London 11 Final Communiqué’, available on <http://iipdigital.usembassy.gov/st/english/texttrans/2013/10/20131022284999.html#axzz212Mk2dgB>. Emphasis added. The London 11 consists of: Egypt, France, Germany, Italy, Jordan, Qatar, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom and the United States of America. See also below, under chapter 5.

<sup>175</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 352.

<sup>176</sup> Conference Conclusions of the International Afghanistan Conference entitled ‘Afghanistan and the international community: from transition to the transformation decade’, A/66/597–S/2011/762 dd. 9 December 2011, p. 4, § 12. This part of the conclusions concentrates on security issues.

<sup>177</sup> Pack is only one among many commentators observing that “[s]ince the Arab Spring began four years ago whole swathes of the Middle East have been transformed from authoritarian police states into ungoverned, and ungovernable, spaces”. J. Pack, ‘How to end Libya’s war’, *International New York Times*, 22 January 2015.

<sup>178</sup> *Id.*

<sup>179</sup> C. L. Sriram, M.-J. Zahar, ‘The Perils of Power-Sharing: Africa and Beyond’ in *Africa Spectrum*, 44, 3, 11-39. <http://hup.sub.uni-hamburg.de/giga/afsp/article/viewFile/190/190%5C>

risk of failure. To this end, it is crucial that a *ius in interregno* be critical towards the overstretch of the assistance model (sometimes amounting to proxy interim governance) and the artificial insistence on domestic responsibility for internationally assisted transitions. In sum, a *ius in interregno* should deconstruct the tension between international power and domestic responsibility at the occasion of DIG.

## Conclusion

Supported by the peace-through-transition paradigm, DIG has been increasingly advocated both as a preventive and curative measure to confront threats to international peace and security. DIG has arguably become a center piece of the international collective security system. This paper argues that, in light of its relevance and frequency today, DIG and its ideological basis –the peace-through-transition paradigm– should be deconstructed from an international legal perspective, too. A *ius in interregno* should be particularly attentive to (i) the multifaceted nature of the internationalization of DIG and (ii) the *prima facie* legal reasons prayed in aid of its success.

First, a *ius in interregno* should take into account *when* in the transition process, *which actors* (purportedly) influence the transition, and *how* they exercise this leverage, considering that the reconstitutionalization of a state concerns the core of its *domaine réservé*. Second, a *ius in interregno* should critically engage with three propositions that may be invoked by organizations, states and contact groups to justify their recourse to DIG: (a) because of the domestic nature of DIG, any legal assessment of international assistance in light of the principles of state sovereignty and self-determination would be redundant; (b) unrestricted by any order-preserving international legal instruments, transitional authorities or third states/organizations could act *legibus soluti* when contributing to the reconstitutionalization of states in transition; and (c) domestic transitional authorities would systematically bear responsibility for DIG.

A critical analysis of DIG should not be left in the hands of political science alone. A *ius in interregno* should also tackle this issue. A *ius in interregno* would lie at the intersection of comparative constitutional law and international law, and needs to be distinguished from *ius post bellum*<sup>180</sup> or *lex pacificatoria*<sup>181</sup> (as, in a nutshell, it should not be dependent on the qualification of armed conflict resp. the existence of peace agreements). A refined legal model for analyzing internationalized interim governance is almost overdue because DIG is recurrent today, and likely to be repeated in the future. Furthermore, the many actors involved with DIG will benefit from a clearer legal framework, especially given the significant budgets allocated to the assistance to DIG. Assistance to DIG may be less costly than ITA, it is not, of course, completely free. It is clear that “the international community continues to allocate vast resources to support interim regimes within peace-building programmes”<sup>182</sup>. The international involvement with DIG requires financial commitments by the so-called international community on the basis of aid agreements, conditionality programs or donations. The UNSC has underscored that peacebuilding in transition states requires sustained financial support<sup>183</sup>. This translates into considerable sums, also committed bilaterally, e.g. the \$875 million provided by the US

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<sup>180</sup> C. Stahn, J. K. Kleffner, *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace*, Springer Verlag, 2008.

<sup>181</sup> C. Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria*, OUP Oxford, 2008.

<sup>182</sup> J. Strasheim and H. Fjelde, 'Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies', *Democratization* 21, no. 2, 24 December 2012, p. 336.

<sup>183</sup> “The Security Council underscores that peacebuilding, in particular, institution building, the extension of State authority and the re-establishment of core public administration functions, requires sustained international and national attention, and financial and technical support in order to effectively build and sustain peace in countries emerging from conflict. The Security Council recognizes that the gaps in the provision of rapid and sustained financial support continue to hamper peacebuilding efforts. The Security Council welcomes the role played by the United Nations’ Peacebuilding Fund in filling these gaps and urges Member States to contribute to the Fund and other relevant multi-donor trust funds that support countries emerging from conflict in order to replenish them”, S/PRST/2015/2 dd. 14 January 2015.

to Yemen since the (failed) transition began in November 2011<sup>184</sup>, to give only one random example. In short, as one delegation put it at a UNSC debate, “[t]he international community has an important role to play in providing financial and technical support to transitional Governments”<sup>185</sup>.

This paper leaves the analysis of the financial repercussions of (international assistance to) DIG for another day. Also left for another occasion is the deeper analysis of the nature, contents and normative value of *ius in interregno* – an analysis to be anchored in international law *de lege lata* as applicable to DIG. By expressing a couple of caveats, this paper has taken an initial step in this regard, and encourages further thinking about how DIG can be analyzed from an international legal perspective. A number of traps should hereby be avoided: DIG is more complex and paradoxical than might seem at first sight. A nuanced *ius in interregno* should take this into account, and should consider that the following and final proposition is unlikely to be devoid of legal significance. The manner in which states in transition enjoy international assistance will influence in which direction the pendulum is swinging: multilateral state transformation or unilateral constitutional geopolitics.

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<sup>184</sup> “As ISIL and other regional crises continue to demand our attention, it is more important than ever that we don’t lose sight of what’s at stake in Yemen. It’s more important than ever that we continue to support the Yemeni people and the Yemeni government during this very fragile moment. And it’s more important than ever that we sustain practical, unified, and coordinated support. Over the past two months alone, the United States has provided over \$160 million in additional economic and humanitarian support, bringing our total assistance since the transition began in November 2011 to \$875 million”, Remarks at the Friends of Yemen Ministerial, 24 September 2014, available on <http://www.state.gov/p/nea/rls/rm/232128.htm>.

<sup>185</sup> The Egyptian delegation added that such support must continue for elected governments after the transition, and that the aim of the support was to establish “the necessary frameworks to provide for all of these elements, including special tribunals, truth commissions, information strategies to enable individuals and groups to recover from the conflict and move to a phase of peaceful coexistence, and effective disarmament, demobilization and reintegration programmes” (S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 9).

