



# Domestic Interim Governance under International Law

***Towards a *ius in interregno* for regulating conflict-related transitions***

Emmanuel De Groof

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

Florence, 3 June 2016



European University Institute  
**Department of Law**

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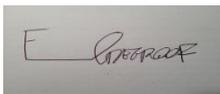
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State creation and direct international territorial administration are now beyond their zenith. At present we increasingly witness how, under the impact of various forms of external influence, important changes affect institutional and constitutional structures within the state, i.e. without creating new states or without affecting the state's territorial integrity. These changes are often paired with the introduction of a new constitution and of a transitional period ('interregnum') at the end of which a new constitution enters into force ('reconstitutionalization'). The thesis represents the first attempt to systematically analyze conflict-related domestic interim governance ('DIG') –public power exercised by interim governments, transitional councils, etc., in states said to be in transition ('transitional authorities')– from an international legal perspective. It introduces and develops the concept of *ius in interregno*, which refers to the body of legal norms applicable to conflict-related DIG. Despite the wide variety of sources and contexts, it is possible to carve out a rudimentary but coherent *ius in interregno* applicable to DIG. The analysis focuses on norms and practices of the interregnum itself, while making largely abstraction of the origin and outcome of 'transitions': the journey becomes the destination. Based on a close observation of several transitions, the thesis unveils which norms apply to DIG. These norms concern, inter alia, limitations *ratione temporis* and *ratione materiae* to DIG; and the 'inclusivity' of DIG en lien with the principle of internal self-determination. To the extent that a *ius in interregno* crystallizes as a body of norms, transitional authorities cannot act as they please: they are not *legibus soluti*. Finally, the thesis argues that third states that wish to interact with transitional authorities must also respect the core of a *ius in interregno*. States increasingly conduct constitutional geopolitics by trying to impact the constitutional structure of another state, even without forcible intervention, and by hand-picking their favored oppositional transitional authority. Revisiting the principles of self-determination and non-intervention, a *ius in interregno* also tackles the delicate issue of indirect (non-forcible) regime change.



## ACKNOWLEDGEMENTS

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This thesis builds on the inspiration I have received from lawyers worldwide since I started my studies in law, in 2001 at the *Facultés universitaires Notre-Dame de la Paix* in Namur. The warm welcome I received as a Flemish boy in Namur encouraged me to continue my law studies. First at the Katholieke Universiteit Leuven, where Prof. J. Wouters introduced me to international law as he gave me the opportunity to participate in the M. Lachs international law moot court competition. Then at the Université libre de Bruxelles (ULB), where Prof. O. Corten gave me another opportunity to plead in a moot court competition, the Concours C. Rousseau. Prof. E. David, from the same university, was our team's spiritual coach during this rich experience; his wit and knowledge continue to inspire me. At the Concours C. Rousseau, I met Prof. Y. Daudet who facilitated my attendance to the Special Courses at the The Hague Academy of international law, an important step in my curriculum. After the LLM at the ULB, I was invited to clerk for Justice A. Sachs. I am greatly indebted to Albie, not only on the intellectual level –the thesis argument partly builds on his design of the constitutional transition in South Africa– but also on the personal level. Albie taught me how to remain calm and efficient in tense situations, a skill I extensively relied on to assist my parents when they were unjustly accused, in December 2008, for one of the most obscure politico-legal scandals my country has ever experienced. This dissertation is dedicated to them.

The EUI is an intellectual paradise on earth. I am grateful to the Institute and the city and country where it is hosted, to its staff and professors, and to my colleagues. Discussions with F. Delerue, J. Devaney, S. Galand, E. Nyhan, S. Pantazopoulos, C. Wiesener, and several other researchers are greatly acknowledged. Prof. N. Bhuta was supportive of my research initiatives since he arrived at the EUI, and kindly accepted to be part of the jury panel. Together with A. Bremner, J. Davies and V. Spiga from the Academy of European Law, he supported the organization of an International Expert Seminar on State Transformation & Interim Governance at the EUI, also sponsored by the University of Copenhagen and Harvard Law School. During '13–'14, I was admitted as a Visiting Doctoral Researcher to the NYU Law School. The support of the Fulbright-Schuman Commission and Prof. P. Alston are greatly acknowledged. I am also grateful for the discussions with the wider JSD community, and for the insights from Prof. B. Kingsburry. Towards the end of my stay in New York and ever since, Çiğdem Aybar much encouraged me in my work; I remain grateful to her. Before and after my stay in New York, I had the opportunity to engage with E. Afsah, O. Hamady, K. Gluck, C. Murray, M. Böckenförde, and of course M. Wiebusch, my *compagnon de thèse*. Finally, I would also like to thank the external jury members, Prof. A. Peters and Prof. J. d'Aspremont, for taking the time to read and engage with this study. From the outset, Prof. F. Francioni, my Supervisor at the EUI, has inspired the approach of this study. It is an honor to be among his last pupils from the EUI. Without his support, patience and constructive questioning, this thesis would not have been written.



## PREFACE

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This dissertation on *ius in interregno* –the law applicable to domestic interim governance– originates from the thorough revision of a research proposal, drafted in 2011, on the comparative study of transitional justice (‘TJ’) mechanisms worldwide. The hypothesis of the initial research proposal was that, if TJ practices are recurrent and were based on a shared *opinio iuris*, the development of a coherent set of rules regarding post-conflict TJ could be underway. If confirmed, this set of rules could have filled a lacuna identified in a 2004 report of the UNSG, i.e. the lack of a common international legal basis for TJ mechanisms<sup>1</sup>.

Together with my Supervisor Prof. F. Francioni, I however decided to reorient the research by focusing on the institutional aspects and mechanisms surrounding ‘transitions’ generally. This reorientation was the result of a number of theoretical considerations and of the observation of (then) recent events: the wave of demonstrations during 2011 known as the ‘Arab Spring’ which, in some cases, were accompanied by the creation of noteworthy ‘transitional councils’ or ‘transitional authorities’. When I arrived at the European University Institute in September 2011, the witnessing, even from a distance, of transitional institutions and procedures set up to (purportedly) steer a regime change in Arab Spring countries triggered my reflections on the topic of transitions, generally, under international law. My curiosity continued when transitional institutions were also created in sub-Saharan Africa, notably in Mali (2012), the Central African Republic (2013) and Burkina Faso (2014), with some commentators suggesting they spelled the arrival of a ‘Black Spring’<sup>2</sup>.

The research first concentrated on transitional institutions with oppositional origins, but was then extended to consensus-based transitional institutions derived from an agreement between the incumbent and opposition powers. Regardless of their oppositional or consensual origins, ‘transitions’, like many other political realities, can be read through the lens of international law. While, at first sight, (comparative) domestic constitutional law would seem most relevant for carrying out such an analysis, this dissertation suggests that domestic interim governance is far from being devoid of international legal significance. The possibility to analyze conflict-related transition procedures from a legal perspective has become, in my view, a necessity: in recent times the so-called international community has taken a keen interest in domestic interim governance, which, arguably, is becoming the center piece of the international collective security system<sup>3</sup>.

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<sup>1</sup> ‘The rule of law and transitional justice in conflict and post-conflict societies’, S/2004/616 dd. 23 August 2004.

<sup>2</sup> ‘African protesters launch ‘Black Spring’ in Burkina Faso’, The Telegraph, 30 October 2014. The ‘Black Spring’ was partly inspired by the Arab Spring. K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, Penguin Books, London, 2012, p. 371.

<sup>3</sup> E. De Groof, ‘Domestic interim governance: the new center piece of the international collective security system’, *Journal of Business, Economics and Political Science*, Vol. 5, nr. 9, April 2016.

The legal analysis carried out in this dissertation is based on complex realities. Yet, even in their complexity we shall see that these realities share a number of common points. A limited number of legally sanctioned practices are common to transitions. Observing these practices, I will develop the notion of *ius in interregno*, i.e. the law –still in its infancy– applicable to transitions. Because legally sanctioned practices on the occasion of domestic interim governance are rather rudimentary, the *ius in interregno* developed in this thesis, too, is rudimentary. It will nonetheless be argued specific international legal norms to discipline not only domestic transitions but also the role of external parties in providing assistance to domestic interim governance are currently under development.

International law, thus, is progressively providing benchmarks other than ‘legitimacy’ or ‘democracy’ to assess, both from a domestic and international perspective, the limits and capabilities of domestic interim governance. At the same time, rather than naively reducing complex realities to unwarranted simplicities, the dissertation accepts, in light of the rudimentary nature of *ius in interregno* and unless further research or subsequent practice indicate the contrary, that several aspects of domestic interim governance are not governed by international law, especially since a *ius in interregno* is itself evolving. Yet, where *ius in interregno* is applicable, it cannot lightly be ignored. Where it is least controverted, it can contribute to enhanced legal security in the realm of post-conflict domestic interim governance.

## ABBREVIATIONS

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CAR:	Central African Republic
CIAT:	<i>Comité international d'accompagnement de la transition</i>
CPA:	Comprehensive Peace Agreement
CUP:	Cambridge University Press
DASR:	ILC Draft articles on state responsibility
DARIO:	ILC Draft articles on the responsibility of international organizations
DDR:	Disarmament demobilization and reintegration
DIG:	Domestic interim governance
DRC:	Democratic Republic of Congo
ECHR:	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOWAS:	Economic Community of West African States
EU:	European Union
GCC	Agreement: 2011 Gulf Cooperation Council Agreement for Yemen
ICC:	International Criminal Court
ICCPR:	1966 International Covenant on Civil and Political Rights
ICESCR:	1966 International Covenant on Economic, Social and Cultural Rights
ICG:	International Crisis Group
ICTJ:	International Center for Transitional Justice
IDI:	Institut de droit international
IPCPR:	International Pact on Civil and Political Rights
Int'l:	International (only in the <i>marginalia</i> )
ITA:	International territorial administration
IO:	International organization
MPEPIL:	Max Planck Encyclopedia of Public International Law
NLM:	National liberation movement(s)
OAU:	Organization of the African Union
OUP:	Oxford University Press
PBC:	Peacebuilding Commission
PSC:	The Peace and Security Council of the African Union.
TA:	Transitional authorities (only in the <i>marginalia</i> )
TAL:	Law of Administration for the State of Iraq for the Transitional Period
TEU:	Treaty on European Union
TJ:	Transitional justice
TNC:	Transitional National Council
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNSC:	United Nations Security Council
UNSG:	United Nations Secretary-General
VCLT:	Vienna Convention on the Law of Treaties



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## **INTRODUCTION: DOMESTIC INTERIM GOVERNANCE TODAY**

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Of regime transitions there is no end. Since time began, constitutional and institutional structures of states, empires or other systems of political organization have, at lesser or greater interval, been profoundly modified, for different reasons and in various circumstances. In this introduction, we shall expose the current relevance and features of ‘transitions’ (Section A), and discuss this dissertation’s outline and approach (Section B).

### **Section A. Features of modern domestic interim governance**

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**HISTORIC INSTANCES OF DIG** – History and legends are replete with instances of interim governance<sup>4</sup>. These range, only to give a couple of examples spanning three continents and more than two millennia, from Numa Pompilius’ one-year interregnum after the death of Romulus’ in Rome in 717 BC, the so-called Scythian interregnum in Median dynasty history between 653 to 625 BC bridging the reigns of Phraortes and Cyaxares in Persia, and the Ottoman Interregnum (1402-1403), to the interregnum of the Kingdom of Loango in the basin of the Kouilou and Niari rivers (1786).

**ASSOCIATIONS MADE WITH THE WORD TRANSITION** – What is a transition? And what is a state said to be ‘in transition’? A transition can be defined as “the process or a period of changing from one state or condition to another”<sup>5</sup>, and evokes the idea of passage rather than rupture. In psychoanalysis, the transitional object allows the child to gain conscience of the external world, and as such contributes to the evolution to adulthood. In political science ‘transitology’ has searched for explanations for the collapse of communist regimes in Eastern Europe and the USSR, and has analyzed how society evolved from there. In law, the word transition is most frequently used in the field of TJ, which, according to its commonly accepted understanding, examines how society (best) deals with questions of individual and societal responsibility after widescale violent conflict. Both in scholarly and vernacular language, the word ‘transition’ is associated with process and time, and seems to be incompatible with the idea of quick fixes or short-term solutions. Leaving these indeterminate introductory considerations aside, the term ‘transition’, and associated terms such as ‘transitional period’, ‘interregnum’, and ‘domestic interim governance’, will be used in this dissertation in a specific, technical, sense, hoping thus to reduce some of the ambiguities characterizing this term.

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<sup>4</sup> Historically, interregna have not been studied from an international legal perspective. In one paragraph entitled ‘Ministers sent during an interregnum by the nation itself or by regents’, Vattel briefly mentions that diplomats appointed during an interregnum have the same rights as those appointed outside of such context. E. de Vattel, *Le Droit Des Gens, Ou, Principes de La Loi Naturelle, Appliqués À La Conduite et Aux Affaires Des Nations et Des Souverains*, Buffalo, N.Y: W.S. Hein, 1995, p. 62.

<sup>5</sup> Oxford Learner’s Dictionary.

**DEFINING TRANSITIONAL PERIOD, INTERREGNUM, INTERIM RULE & DIG** – This dissertation focuses on the period during which a state’s constitution and institutional structures are held in abeyance because a transition takes place after or against the background of an armed conflict, or of a threat to international peace and security. This period will be called the *transitional period* or *interregnum*, the latter term being generally understood as the “interval of time between two successive reigns”<sup>6</sup>. These terms are used interchangeably. The term *interim rule* refers to “temporary authority or rule exercised during a vacancy of the throne or a suspension of the usual government”<sup>7</sup> or, in short, to domestic interim governance (‘DIG’). More accurately, DIG refers to the exercise of public powers *ad interim*, including through two- or multi-staged constitutionmaking procedures<sup>8</sup>, as constrained by a set of (secondary) norms enshrined in legal instruments like pre-constitutional texts or interim constitutions and agreements.

**DEFINITION OF TRANSITION** – For the present purposes, the word transition does not refer to a market transition (e.g. from a centrally planned economy to a market economy) or a security transition (e.g. from NATO to national security forces in Afghanistan). Not even does it refer to the so-called democratic transition paradigm, the end of which was declared more than ten years ago<sup>9</sup>. In a more neutral sense, it refers to the procedures followed during the interregnum to generate a profound renaissance or transformation (almost akin to a creation) of a state’s constitutional and institutional system. In more detail, it refers to (a) the transformation of a state’s regime (the latter word being understood, without any negative or positive connotation, as ‘the institutional structure of the state and government’<sup>10</sup>) (b) by nonconstitutional means, (c) on the basis of legal instruments or of texts aspiring to such status, (d) regardless of their form (international agreements<sup>11</sup>, domestic intra-state agreements<sup>12</sup>, interim or transitional constitutions<sup>13</sup>, domestic/unilateral acts or declarations<sup>14</sup>, or a combination thereof), (e) and regardless of their consensual or oppositional origin.

**CONTEMPORARY RELEVANCE OF DIG** – Since the end of the Cold War, the international community increasingly supports DIG with the intention of bringing peace and security in conflict-riven

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<sup>6</sup> The American Heritage Dictionary.

<sup>7</sup> Oxford English Dictionary.

<sup>8</sup> IDEA, ‘Constitutionbuilding after Conflict: External Support to a Sovereign process’, Policy Paper, May 2011, p. 11: “constitution building is often *one element in a larger process of change* that affects the constitution”.

<sup>9</sup> T. Carothers, ‘The End of the Transition Paradigm’, *Journal of Democracy* 13, no. 1, 2002, pp. 5–21. Cf. also the discussion under Chapter 2, Section B.

<sup>10</sup> Cf. Arato’s analytical distinction between regime and government: a regime is the institutional structure of the state and government. A government refers to the functional branches of political power and the persons who control them. A. Arato, *Constitution Making Under Occupation*, Columbia University Press, New York, 2009.

<sup>11</sup> E.g. the Pretoria Agreement dd. 16 December 2002, the Sun City Agreement dd. 19 April 2002 regarding the transition in the DRC.

<sup>12</sup> E.g. the Bonn Agreement dd. 5 December 2001 for Afghanistan, the Arusha agreement dd. 28 August 2000 for Burundi, but also the Accra Accord dd. 17 June 2003 for Liberia, the Lomé Accord dd. 7 July 1999 for Sierra Leone, and the Abuja Accord dd. 1 November 1998 for Guinea-Bissau. About the domestic nature of these accords, cf. J. I. Levitt, *Illegal Peace in Africa – An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta*, CUP, 2012, p. 5.

<sup>13</sup> E.g. the *Charte de la Transition* dd. 13 November 2014 for Burkina Faso or the Interim Constitution dd. 27 April 1994 for South Africa.

<sup>14</sup> E.g. the Constitutional Declaration dd. 3 August 2011 for Libya.

states. This model of governance has become particularly popular after the South African two-staged transition from Apartheid to post-Apartheid (1994-1997), based on the 1994 interim constitution<sup>15</sup>. Since then, international assistance to DIG has been deployed in various other states. Further below, we shall discuss the reasons for this proliferation<sup>16</sup>.

During the course of the last two decades, we are witnessing more and more instances of DIG. In its basic structure, the model of internationally assisted DIG was replicated in countries like Afghanistan (2001); Burkina Faso (2014); Burundi (1998); Cambodia (1991); Central African Republic (2013); Comoros (2001); Côte d'Ivoire (2007); the DRC (2002); Guinea (2010); Guinea-Bissau (2012); Iraq (2004); Kyrgyzstan (2010); Liberia (2003); Libya (2011); Mali (2012); Nepal (2006); Rwanda (1994); Sierra Leone (1999); Somalia (2004); South Africa (1993); Sudan (2005); Ukraine (2014); and Yemen (2011)<sup>17</sup>. The salience of DIG has not diminished anno 2016 as, at the time of writing, a transition is being proposed to end the war in Syria<sup>18</sup>.

**POTENTIAL FAILURE OF DIG** – While in the South African context the two-staged transition procedure is generally deemed successful –an evaluation which depends of course on the yardsticks used to measure ‘success’<sup>19</sup>– in other contexts this model is considered to be less effective. This model was not accompanied with equally successful results, to say the least, in countries like Afghanistan, DRC, Iraq, Libya, and Yemen<sup>20</sup>. Efforts to end or resolve conflicts through DIG can fail, and have failed. Anno 2016, the disillusioning situation in these countries testifies to this. The fragility of new state institutions, or the delicacy of the context they operate in, partly account for this:

“[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

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<sup>15</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. 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). See, for the Japanese origin, 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>16</sup> Chapter 1, Section A.

<sup>17</sup> Cf. Table 2 (overview of relevant transition instruments) and Table 3 (provisions on nonconstitutionality).

<sup>18</sup> Cf. the [Statement of the International Syria Support Group dd. 17 May 2016](#), especially the last part on ‘advancing a political transition’, with reference to the [Mediator’s Summary of the 13-27 April Round of UN Facilitated Intra-Syrian Talks](#) and to S/RES/2254 dd. 18 December 2015.

<sup>19</sup> The yardstick to measure success depends of course on which perspective one takes. From a purely formal legal perspective, the Yemeni transition starting in 2011 was a success, even though at the time of writing the country has become a war zone. From a legal and cultural perspective, the South African is deemed to be a success, but the country still suffers from high crime rates.

<sup>20</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.

institutions, or a more violent resolution of disputes”<sup>21</sup>; “*transitions are often more unstable and insecure than even the preceding periods of conflict*”<sup>22</sup>.

Transitional institutions are often set up in so-called anocracies, i.e. countries where power is not firmly vested in institutions but spread amongst competing elite groups<sup>23</sup>. The combination of fragile transitional structures and a context of competition for power is often a recipe for failure. Yet, the conviction that DIG can bring peace in conflict-riven countries remains deeply entrenched in legal culture<sup>24</sup>. In the following lines, we shall see that this conviction is one of the main features of DIG.

**FOCUS ON & FEATURES OF MODERN DIG** – Over the course of the last two decades or so (1995-2016), DIG has distinguished itself from prior forms of interregnum. Unlike other, and mainly older, forms of interim governance, the interim rule is generally:

- Internationally relevant and susceptible to external influences: DIG not only intends to introduce a new regime but also to cope with a situation of armed conflict or threat against international peace and security. Its instrumentality builds on the widespread conviction that the transition can be conducive to peace. This will be called the *peace-through-transition paradigm*;
- Self-regulated and provisional: the interregnum is guided by a set of domestically valid secondary norms and institutions, enshrined in legal instruments like peace agreements, transitional constitutions or unilateral declarations;
- Nonconstitutional: the transition procedure does not follow the rules and procedures foreseen by the existing constitution;
- Domestic: it primarily befalls on domestic actors to pursue DIG.

Let us discuss each of these features in turn, and then conclude with a reflection on the novelty of DIG.

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<sup>21</sup> C. L. Sriram, M.-J. Zahar, ‘The Perils of Power-Sharing: Africa and Beyond’ in *Africa Spectrum*, 44, 3, 11-39.

<sup>22</sup> *Id.*

<sup>23</sup> This is the definition by Systemic Peace: “[a]lso included in the anocracy category in this treatment are countries that are administered by transitional governments (coded “-88” in the Polity IV dataset)”; “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”. M. G. Marshall, B. R. Cole, Center for Systemic Peace, ‘[Global Report 2014, Conflict, Governance, and State Fragility](#)’, p. 21. Emphasis added. In the same sense, K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, United States Institute of Peace Press, Washington D.C., 2007, p. 4.

<sup>24</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 Geertz’ definition, C. J. Geertz, *The Interpretation of Cultures: Selected Essays*, Basic Books, New York, 1973, p. 89.

## 1. Peace through transition

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**A WIDESPREAD PARADIGM** – In our day and age, armed conflicts or threats to peace and security are commonly addressed –successfully or in vain– by the installation of *domestic* transitional procedures resulting in the wholesale constitutional and institutional reconfiguration of a country, a state *renaissance* (in the literal sense of *re-birth*), so to speak. The peace-through-transition paradigm posits that state reconfiguration is a means of coping with violent conflict. This paradigm translates into a socialized discursive practice based on the belief that the redefinition of the social contract is an effective conflict resolution mechanism. Although the 2015 Review of the UN Peacebuilding Architecture seems to suggest that this is a rather naive stance<sup>25</sup>, this paradigm is so widespread that some commentators consider that DIG could also function as a preventive measure in countries where war looms large<sup>26</sup>.

**ILLUSTRATIONS PEACE-THROUGH-TRANSITION PARADIGM** – As it may constitute the *raison d'être* of modern DIG, at least a flavor of its relevance should be shared at this stage. Official statements with regard to Syria, Guinea-Bissau, Yemen and Libya (reverse chronological order) 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>27</sup>. In December 2015<sup>28</sup> and May 2016<sup>29</sup>, this call was repeated.
- 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 process”<sup>30</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>31</sup>.

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<sup>25</sup> 2015 Review of the UN Peacebuilding Architecture dd. 30 June 2015, A/69/967-S/2015/490, §§ 31, 32, and 33. Cf. also the criticism under Chapter 6, Section 2.1.2.

<sup>26</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.

<sup>27</sup> S/PRST/2015/15 dd. 17 August 2015, § 9.

<sup>28</sup> S/RES/2254 dd. 18 December 2015.

<sup>29</sup> Cf. the [Statement of the International Syria Support Group dd. 17 May 2016](#), especially the last part on ‘advancing a political transition’, with reference to the [Mediator's Summary of the 13-27 April Round of UN Facilitated Intra-Syrian Talks](#) and to S/RES/2254 dd. 18 December 2015.

<sup>30</sup> S/PRST/2013/19, Statement by the President of the UNSC dd. 9 December 2013. Emphasis added.

<sup>31</sup> See also S/RES/2048 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 dd. 22 May 2013, S/RES/2157 dd. 29 May 2014, S/RES/2186 dd. 25 November 2014, and S/RES/2203 dd. 18 February 2015.

- From late 2011 onwards, the UNSC followed the transition in Yemen, indicating that it did so “mindful of its primary responsibility for the maintenance of international peace and security”<sup>32</sup>. Acting under Chapter VII of the UN Charter, the UNSC insisted in February 2015 on “the full and timely implementation of the political transition”<sup>33</sup>.
- After the uprisings in Libya in early 2011, the UNSC<sup>34</sup> and, shortly after, the AU<sup>35</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 UNSC<sup>36</sup> and AU<sup>37</sup> proposals both committed to the peace-through-transition paradigm, 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>38</sup>.

**PREEMINENCE PEACE-THROUGH-TRANSITION PARADIGM** – These excerpts and examples confirm the strong conviction that there is a direct causality between DIG and peace. They show how the peace-through-transition discourse is appropriated 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>39</sup>, UNSC resolutions

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<sup>32</sup> S/RES/2051 dd. 12 June 2012, Preamble. See also 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”.

<sup>33</sup> S/RES/2204 dd. 24 February 2015, § 1.

<sup>34</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 dd. 17 March 2011, Preamble.

<sup>35</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.

<sup>36</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. Cf. S/RES/2009 dd. 16 September 2011, §§ 2 a.f.

<sup>37</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, under reference EXT/ASSEMBLY/AU/DEC(01.2011)). Own emphasis.

<sup>38</sup> V. Sripathi, ‘United Nations Constitutional Assistance in Statebuilding’ in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, Routledge, London, New York, 2013, p. 143.

<sup>39</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

often provide in detail how transitions are to deal with such threats, or explicitly endorse transition agendas defined elsewhere<sup>40</sup>. The UNSC has adopted resolutions under Chapter VII of the UN Charter with regard to (projected) transitions in South Sudan<sup>41</sup>, Somalia<sup>42</sup>, Libya<sup>43</sup>, Mali<sup>44</sup>, Côte d'Ivoire<sup>45</sup>, Central African Republic ('CAR')<sup>46</sup>, Yemen<sup>47</sup>, Guinea-Bissau<sup>48</sup>, Libya<sup>49</sup>, Haiti<sup>50</sup>, and Afghanistan<sup>51</sup> (reverse chronological order). The UNSC furthermore reserves the power to take sanctions against anyone impeding transitions<sup>52</sup>. The UNSC has no monopoly over the peace-through-transition paradigm. In November 2014, for example, "the presidents of Ghana, Nigeria and Senegal have urged Burkina Faso to appoint a transitional government"<sup>53</sup>. The peace-through-transition paradigm has become common currency.

**TRANSITION INSTRUMENTS PROCLAIMING PEACE-THROUGH-TRANSITION PARADIGM** – The peace-through-transition paradigm is often expressed in the instruments triggering DIG. The written instruments that are constitutive of nonconstitutional DIG, i.e. the '*actes fondateurs de la transition*' in Youssef's classification<sup>54</sup>, will be referred to as *constituent transition instruments* or simply *transition instruments*. Transition instruments in Burundi, Côte d'Ivoire, DRC and Nepal, for instance, explicitly enshrine the peace-through-transition paradigm.

- The 2000 Arusha Agreement mentions the "institution of a new political, economic, social and judicial order in Burundi"<sup>55</sup> following the "speedy establishment of the transitional institutions"<sup>56</sup> under the chapter 'solutions'<sup>57</sup> immediately following the chapter 'nature

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and security in the twenty-first century include not just international war and conflict but civil violence, organized crime, terrorism and weapons of 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>40</sup> See for example S/RES/2118 dd. 27 September 2013 in which the UNSC endorses the transition agenda of the Geneva Communiqué dd. 30 June 2012.

<sup>41</sup> S/RES/2187 dd. 25 November 2014.

<sup>42</sup> S/RES/2182 dd. 24 October 2014.

<sup>43</sup> S/RES/2174 dd. 27 August 2014.

<sup>44</sup> S/RES/2164 dd. 25 June 2014.

<sup>45</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>46</sup> S/RES/2149 dd. 10 April 2014.

<sup>47</sup> S/RES/2140 dd. 26 February 2014.

<sup>48</sup> S/RES/2048.

<sup>49</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>50</sup> S/RES/1529 dd. 29 February 2004 § 1.

<sup>51</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, cf. T. Maruhn, 'Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus', Archiv des Völkerrechts, Bd. 40 (2002), p. 496.

<sup>52</sup> Chapter 7, Section B.2.

<sup>53</sup> "Thousands gather in Burkina Faso to denounce 'military coup'", The Guardian, 2 November 2014.

<sup>54</sup> N. Youssef, *La transition démocratique et la garantie des droits fondamentaux*, Publibook, Paris, 2011, p. 110.

<sup>55</sup> Arusha Agreement, art. 5.1.

<sup>56</sup> *Id.*, art. 5.3.

<sup>57</sup> *Id.*, Chapter 2.

and historical causes of the conflict'<sup>58</sup>, leaving no doubt as to the conflict resolution function of DIG.

- 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*"<sup>59</sup>.
- Similarly, the 2002 Pretoria agreement mentions among its 'transition objectives', "the setting up of structures that will lead to a new political order"<sup>60</sup> in the DRC.
- In Nepal, the "progressive restructuring of the state" is a principal component of the 2011 Comprehensive Peace Agreement<sup>61</sup>.

**SHIFT TO LEGAL-REGULATORY APPROACH** – The peace-through-transition paradigm transpires in manifold other references made throughout this study. The illustrations and references above seem to confirm the shift "from a mainly politico-military approach to international peace and security to a greater reliance on a *legal-regulatory approach*"<sup>62</sup>. Whether effective or not, at the time of writing this model is being actively promoted as a problem-solving tool, both at the global and regional level. It increasingly supplants, we shall see below<sup>63</sup>, the model of direct international territorial administration<sup>64</sup>. The peace-through-transition paradigm heavily relies on the self-regulatory and provisional nature of DIG, which will be addressed now.

## 2. Self-regulation & temporality

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**TRANSITION INSTRUMENTS AS SECONDARY NORMS** – The interregnum is characterized by a degree of self-constraint, in two regards. Particularly innovative about the instruments regulating the transitions under scrutiny is not only that they "proclaim themselves to be transitional or interim in character"<sup>65</sup> (limitations *ratione temporis*<sup>66</sup>), but also, beyond these self-evident temporal limits, that the scope and exercise of public powers during the transitional period is otherwise confined (limitations *ratione materiae*<sup>67</sup>). A set of institutions (either *in situ* or in

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<sup>58</sup> *Id.*, Chapter 1.

<sup>59</sup> The Linas-Marcoussis Accord dd. 13 January 2003, art. 3.a.

<sup>60</sup> Pretoria Agreement, II.5.

<sup>61</sup> Between the Government of Nepal and the Communist Party of Nepal dd. 22 November 2011, Preamble.

<sup>62</sup> P. Chitalkar, D. M. Malone, 'The UN Security Council and Iraq', UNU Working Paper Series, Nr. 1, November 2013, p. 4. Emphasis added.

<sup>63</sup> Chapter 1, Section A.

<sup>64</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*, OUP, p. 359. Note the use of the indefinite article.

<sup>65</sup> C. Jackson, 'What's in a name? Reflections on timing, naming, and constitution-making', 49 *Wm. & Mary L. Rev.*, 2007-2008, p. 1260.

<sup>66</sup> Chapter 4, Section A.2; Chapter 5, Section A.

<sup>67</sup> Chapter 5, Section B.

exile) and rules govern the transition period itself<sup>68</sup>. These rules, also called transitional provisions<sup>69</sup>, are mainly secondary (power-conferring) norms in the Hartean sense.

ANALOGY TO DESCRIBE CONSTITUTIONALISM – DIG purports to avoid a legal hiatus between the demise of the old regime and the establishment of a new order. It is for this reason that the transitional period is subject to rules and procedures. The self-regulation and temporality inherent to DIG result in transition states having, at least to some degree, their ‘hands tied’. An analogy to describe the self-regulatory nature of modern DIG can be found in mythology, notably the story of how Ulysses managed to resist temptation by the Sirens. To emphasize the utility of durable constitutions, Varol summarizes this story as follows:

“To avoid the temptation to succumb to the enchanting, but fatal, songs of the Sirens, Ulysses orders his men to bind him to the ship’s mast with tight chafing ropes and to fill their own ears with beeswax. Upon hearing the Sirens, Ulysses signals the crew to set him free, but the men, adhering to his earlier instructions, refuse to obey his orders and continue sailing until the ship is out of danger. Ulysses is saved by his earlier foresight to constrain himself against his human temptations”<sup>70</sup>.

EXTENSION ANALOGY TO DIG – Ulysses demonstrated wisdom and self-constraint before entering the Strait of Messina between Scylla and Charybdis. This allowed him and his crew to transit from the Ionian Sea to the Tyrrhenian Sea. This parable –part of the established imaginary in constitutional literature<sup>71</sup>– can be used to symbolize the utility not only of ‘permanent’ constitutions, but also, and perhaps even more so, of *interim* constitutionalism and *interim* governance: the need for self-regulation or, to use Sachs’ words, “structured caution”<sup>72</sup> in tempestuous times. Arato observes the utility –and novelty– of interim constitutionalism in a similar sense:

“[t]he existence of a fully developed, explicitly interim constitution is the most important component and documentary evidence of the *new paradigm of constitution-making*. It successfully combines the need of a provisional government with the requirement of subjecting this form to constitutional limitations, and connects the need of constitutional learning in the early stages of constitution-making with the requirement that the new constitution be insulated against easy alteration”<sup>73</sup>.

In the era of DIG, constitutionmaking is thus itself subjected to constitutionalism. Arato conceded that this model of ‘post-sovereign constitutionmaking’ –also called ‘postimperial constitutionalism’<sup>74</sup>– did not bear fruit in Iraq<sup>75</sup>. Furthermore, in the above excerpt, Arato

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<sup>68</sup> Chapter 3, Section B.2 about the purpose of transition instruments, under ‘self-limitation’.

<sup>69</sup> Democracy Reporting International (DRI), [‘Ensuring a Smooth Transition to the new Constitutional Order: Transitional Provisions in the Libyan Draft Constitution and Political Agreement’](#), January 2016.

<sup>70</sup> O. O. Varol, ‘Temporary Constitutions’, *California Law Review*, Vol. 102, Issue 2, Article 5, p. 410.

<sup>71</sup> Cf. J. Elster, *Ulysses Unbound*, CUP, 2000; cf. especially how Elster defines the upstream and downstream constraints, bound mandates and rules of deliberation.

<sup>72</sup> A. Sachs, ‘South Africa’s Unconstitutional Constitution’, *op. cit.*, p. 1252.

<sup>73</sup> A. Arato, *Constitution Making Under Occupation*, *op. cit.* Own emphasis.

<sup>74</sup> J. Tully, ‘Strange Multiplicity: Constitutionalism in an Age of Diversity’, John Robert Seeley Lectures, CUP, 1995.

limits his observations to interim constitutions without mentioning the broader context of DIG, which may be based on legal instruments *other* than constitutions proper. His words nonetheless adequately grasp the function and novelty not only of ‘transitional constitutionalism’<sup>76</sup>, but also of interim governance *sensu lato*.

### 3. Nonconstitutionality

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**DEFINITION NONCONSTITUTIONALITY** – Nonconstitutionality, the third feature of DIG, 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 the constitutional (amendment) 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). The scope of this dissertation is limited compared to the scope of any general study on constitutional changes (‘*Verfassungsänderungsprozessen*’<sup>77</sup>) or ‘constitutional transitions’ broadly defined as “political transitions marked by *constitutional replacements of significant reform*”<sup>78</sup>. The significance of the reform is not enough; a nonconstitutional *rupture* must have taken place. This rupture can for example take place against the background of a revolution, an agreement between warring factions, an external intervention, or a restoration of an older (constitutional) regime. A constitutional rupture is clearly consumed when transition instruments (aspire to) have higher legal force than the existing constitution (‘supraconstitutionality’). The nonconstitutional origin of DIG will be addressed in more detail under Chapter 3<sup>79</sup>.

**STAGED STATE TRANSFORMATION** – Recent transitions are characterized by secondary interim frameworks which depart from the previous constitutional order with the view of introducing a new one. 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’ (Germany and Japan), after 1989 it became more and more based on ‘interim constitutions in planned stages’, to use Jackson’s terminology<sup>80</sup>. DIG thus became a process whereby, in two or more stages, transitional authorities introduce a constitutional transformation, *as regulated by an interim framework*.

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<sup>75</sup> ‘The Struggle for Iraq’s Future’, panel discussion on 5 March 2014, NYU Center for Constitutional Transitions.

<sup>76</sup> Chapter 3, Section B.2 where the concept of ‘transitional constitutionalism’ will be introduced. It covers not only (interim) constitutions but also other documents potentially fulfilling a constitutional role like (peace) agreements or declarations.

<sup>77</sup> M. Böckenförde, ‘Die Einbindung der Bevölkerung in Verfassungsänderungsprozessen – Ein Überblick’ in H. P. Hestermeyer, Nijhoff (et al) (eds.), *Coexistence, cooperation and solidarity*, Leiden, pp. 1107-1123.

<sup>78</sup> IDEA, *Constitutional Transitions and Territorial Cleavages*, 2015, p. 6. Emphasis added.

<sup>79</sup> Chapter 3, Section A.

<sup>80</sup> V. C. Jackson, ‘What’s in a name? Reflections on timing, naming, and constitution-making’, *op. cit.*, pp. 1249-1305.

## 4. Domestic nature

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Interim governance is qualified as domestic when two conditions are cumulatively fulfilled: the (main) stakeholders and beneficiaries are domestic actors (4.1), and the transition does not give rise to a new state (4.2).

### 4.1. Domestic stakeholders

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**DOMESTIC ACTORS AS MAIN STAKEHOLDERS** – Interim governance is to be qualified as domestic not because its impact can be felt ‘on the ground’ (which obviously is the case with international territorial administration, too) but in light of the non-international character or identity of the (main) stakeholders and beneficiaries appointed in the transition procedure, as shall be detailed under Chapter 4<sup>81</sup>. This qualification will be used notwithstanding the possible *internationalization of the (domestic) interregnum*<sup>82</sup>. The latter concept refers to (a) the international context in which the transition is triggered (e.g. an international conference or internationally brokered negotiations) and to (b) the international assistance during the transition (the ‘assistance model’<sup>83</sup>). The *legal* internationalization of the interregnum, notably through the increased reliance on international law during the interregnum, will be discussed under Chapter 7.

**RESPONSIBILITY OF DOMESTIC ACTORS** – Domestic actors are primarily responsible for carrying out the transition procedure, also if they receive substantial international assistance. Transition states bear the final responsibility over DIG. As we shall see below<sup>84</sup>, the end-responsibility for the transition procedure lies by default with (sovereign) domestic actors, even if regional or international assistance (notably from the UN) leaves a huge imprint on the interregnum. Such an international imprint does not amount to direct international territorial administration (‘ITA’) if the signatories and/or ratifying parties of the transition instruments, and its main stakeholders and beneficiaries, are domestic actors.

**ILLUSTRATIONS** – 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. There are of course grey zones, as a detailed analysis under Chapter 4 will show<sup>85</sup>.

### 4.2. No state creation

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<sup>81</sup> Chapter 4, Section A.1.

<sup>82</sup> Chapter 1, Section B.

<sup>83</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.

<sup>84</sup> Chapter 1, Section A.2.3.

<sup>85</sup> Chapter 4, Section A.1.3.

DIG OUTSIDE CONTEXTS OF DECOLONIZATION, SECESSION OR DISSOLUTION – DIG *within* states has become frequent. We shall see in Chapter 1 why this is the case. If current trends are confirmed, the model of state-internal interim governance is likely to be repeated in the future. This study therefore does not focus on transitions giving rise to *new* states<sup>86</sup>. On the assumption that the processes of decolonization, but also of state dissolution directly or indirectly related to the fall of communism, are now (largely) part of history, *transitions not (directly) giving rise to the establishment of new states* will have our priority. This study consequently does not purport to re-introduce a theory of state creation or succession.

This is not to underestimate the kinship between the creation of a new state and the foundation of a new constitutional and institutional structure in a post-transition state (hence the occasional reference to a state *renaissance*). Actually, this resemblance led Shain and Linz to name their book about interim governments, ‘Between States’<sup>87</sup>. Further, with regard to peace agreements, for instance,

“these situations, though occurring within the confines of predefined states [...] often appear to be *akin to the creation of states*, as the power structures within the state are hugely altered and it is through those peace agreements that the actors and the conditions upon which this takes place are more or less determined”<sup>88</sup>.

The transitions under scrutiny profoundly alter the state structure without however challenging its existence or legal continuity. The analysis focuses on the law with regard to transitions occurring *outside* of the contexts of decolonization, state dissolution, state succession or secession<sup>89</sup>. In this sense, too, the transitions under scrutiny are ‘domestic’. Transitions in the context of the disintegration of Yugoslavia (1990s), the dissolution of the Soviet Union (1991) or the decolonization process in Africa (1960s and 1970s) raise different legal questions, e.g. with regard to state succession. These questions are not directly relevant for this study.

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<sup>86</sup> For example, the rights and obligations of the *Gouvernement provisoire de la république algérienne*, the government-in-exile of the Algerian National Liberation Front (NLF) during the latter part of the Algerian War of Independence (1954–62), are not examined, even if in a sense this government was to manage a transition process *sensu lato*. For the same reason, neither the transition in Ethiopia/Eritrea leading to the independence of Eritrea in May 1993, nor the transition in Sudan on the basis of the (‘Naivasha Agreement’) giving rise to the creation of South Sudan in 2011, are examined in depth.

<sup>87</sup> Y. Shain, J. Linz, *Between States – Interim Governments and Democratic Transitions*, CUP, 1995.

<sup>88</sup> K. Stathopoulou, ‘Self-determination, peacemaking and peace-building: recent trends in African intrastate peace agreements’ in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law*, CUP, 2013, p. 283. Emphasis added.

<sup>89</sup> The thesis thus disregards interim settlements that ‘resolve[s] the self-determination conflict by establishing the secessionist unit as a constitutional self-determination entity’, as in Kosovo and South Sudan. See M. Weller, ‘Self-governance in interim settlements – The case of Sudan’ in M. Weller and S. Wolff, eds., *Autonomy, Self Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*, Routledge, 2008, p. 138.

## 5. Novelty of domestic interim governance, and scope of the thesis

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The principal features of DIG thus are (a) its international relevance in light of the peace through transition-paradigm, (b) its self-regulation and temporality, (c) its nonconstitutionality, and (d) its formal domestic nature. Its susceptibility to international influences will be discussed in a separate section<sup>90</sup>. Cumulatively combined, these features characterize post-1989, or what we may call *modern* DIG (5.1), a characterization which limits the scope of this study (5.2).

### 5.1. Distinction with other forms of interim governance

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The manner in which state transformations are carried out has, itself, arguably changed in recent times. Cumulatively combined, the distinctive features of modern DIG –in their teleological, procedural and contextual aspects– were generally absent in prior forms of interim governance. They were largely absent, for example, in (a) post-Second World War transitions (e.g. Germany and Japan are usually regarded as externally determined transitions), (b) decolonization transitions, or (c) the ‘third wave’ of multiparty/democratization transitions related to the collapse of communism, i.e. the post-1989 market-reform-oriented multiparty transitions of the African continent and the ‘pacted constitutional transitions’ of the 1989 Autumn of Nations in Eastern and Central Europe.

CONTRAST WITH INTERIM GOVERNANCE SENSU LATO – The 1989 transitions in Eastern and Central Europe, for example, were neither nonconstitutional nor self-regulated. As Jackson observed, they “proceeded in a more piecemeal fashion, guided by round table discussions whose conclusions were acted upon by legislative bodies in *formal compliance* with the amendment process of prior constitutions”<sup>91</sup>. In the context of the Autumn of Nations, thus, “round table discussions produced agreements for *piecemeal amendments to the existing constitution*”<sup>92</sup>. Also, to my knowledge, the Autumn of Nations transitions were not governed by secondary rules<sup>93</sup>. Neither in the context of other pre-Cold War transitions, e.g. in Latin America, was the transition regulated by specific rules, or governed by institutions set up for that specific purpose<sup>94</sup>. Other categorizations of transitions between 1945 and 1989 are possible, of course<sup>95</sup>. Whichever categorization one chooses, to my knowledge none, or few, of these

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<sup>90</sup> Chapter 1, Section B.

<sup>91</sup> V. C. Jackson, ‘What’s in a name?’, *op. cit.*, p. 1267.

<sup>92</sup> *Id.*, p. 1266. Emphasis added. In the same sense, R. Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’, *The Yale Law Journal*, Vol. 106, No. 7, 1997, p. 2068.

<sup>93</sup> Note that there was a coalition government with elements both from the communist party and the opposition in Czechoslovakia ruling the country in the months following the Velvet Revolution. But to my knowledge the functioning of this government was not subject to a particular set of rules governing the interim period, even if the whole constitutional system was altered.

<sup>94</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, Discussion Report, 4-5 December 2014’, p. 16: “[w]ith two exceptions (Nicaragua and Guatemala, both of which are deemed unrepresentative cases), Latin American countries have not used interim constitutions” (observation by J. Couso).

<sup>95</sup> See, for example, Balcerowicz’ nomenclature, who drew a distinction between ‘classical transitions’ (“extension of democracy in advanced capitalist countries between 1860 and 1920”), ‘neoclassical transitions’ (“democratizations

transitions were characterized by the setting up of transitional institutions or formal transition periods. If, in this thesis, transitions broadly speaking are mentioned –including pre-1989 instances of interim governance–, they will be referred to as transition processes *sensu lato*.

## 5.2. Scope of the thesis

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Nonconstitutional transitions mostly occur when there is either an armed conflict or a threat to international peace and security. This is because “current constitutional legitimacy is ultimately based in violence”<sup>96</sup>. The association between nonconstitutional change and violence is almost natural, one could cynically say.

**EXCLUSION NON-VIOLENT OR CONSTITUTIONAL TRANSITIONS** – Occasionally, however, non-violent crises are addressed by a *nonconstitutional* transition process led by an interim government or a technocrat government. For the purposes of this thesis, the peace-through-transition paradigm does not refer to the resolution of non-violent crises. This dissertation leaves the analysis of non-violent nonconstitutional transitions (e.g. the case of a bloodless coup) aside, not only for the proverbial reasons of time and space, but also because the international (law) relevance seems to decrease when DIG is pursued in a non-violent context. *A fortiori*, peaceful large-scale institutional modifications in line with the existing constitutional order fall outside the scope of the research. Such modifications are neither violent nor nonconstitutional. Cases in which the politico-legal constitutional regime itself remains constant or largely unquestioned, even if important constitutional modifications occur (e.g. Belgium’s step-by-step evolution from a unitary State in 1831 to a federal State in 1993) or political powers are temporarily exercised by a caretaker or technical government (e.g. Belgium’s administration *en affaires courantes* from June 2010 until December 2011), are thus disregarded.

**FINE LINE BETWEEN DISTURBANCES & ARMED CONFLICT** – The line has to be drawn somewhere. On the assumption that they are of lesser international (legal) relevance, transitions in the context of mere “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”<sup>97</sup> which do not pose a threat to international peace

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in basically capitalist countries after the Second World War (West Germany, Italy, and Japan in the 1940s; Spain and Portugal in the 1970s; some Latin American countries in the 1970s and 1980s; South Korea and Taiwan in the 1980s”), ‘market-oriented reform’ in non-communist countries (West Germany and other Western countries after the Second World War; South Korea and Taiwan in the early 1960s; Chile in the 1970s; Turkey and Mexico in the 1980s; Argentina in the 1990s), and ‘Asian post-communist transitions’ (China since the late 1970s and Vietnam since the late 1980s). L. Balcerowicz, ‘Understanding post-communist transitions’ in W. Kostecki, K. Zukriwska, B. J. Goralczyk, *Transformations of Post-Communist States*, Macmillian Press, 2000, pp. 227-228.

<sup>96</sup> A. A. i Ninet, *Constitutional Violence: Legitimacy, Democracy and Human Rights*, Edinburgh University Press, 2012, p. 3. The paradox that foundational constitutional moments often presuppose violence need not be further addressed here. It is simply accepted as is, because DIG will be analyzed in the context of armed conflict or, at minimum, of a threat to international peace and security. The state as legitimated in a national constitution has the legitimate monopoly on exercising power (violence/use of force to suppress revolt or enforce law. Thus, nonconstitutional change is often associated with violence – as it is usually the result of a bloody revolution. Hence, the Czech velvet revolution is cited as an exception. The association is not absolute of course.

<sup>97</sup> Protocol Additional to the Geneva Conventions dd. 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art. 1.2.

and security will generally be disregarded. Admittedly, the line between internal disturbances and armed conflicts is sometimes difficult to draw. As Dinstein notes, internal disturbances:

“may be large-scale and rife with violence, perhaps inflicting incalculable human fatalities and/or colossal damage to property, but they do not become a non-international armed conflict as long as they are isolated and sporadic, i.e. they are not coordinated and sustained over a stretch of time”<sup>98</sup>.

On the basis of this criterion, the large-scale and violent disturbances in Egypt during 2011, for example, leading to the resignation of President Mubarak and the installation of the interim cabinet of the Egyptian Supreme Council of the Armed Forces in February 2011, constituted internal disturbances. Dinstein extends this conclusion to the 2013 disturbances that followed the ousting of President Morsi<sup>99</sup>.

COUNTER-EXAMPLES - The context of internal disturbances and tensions characterizes the relatively peaceful revolutions of 1989 in various Central and Eastern European States (‘Autumn of Nations’)<sup>100</sup>, as well as the regime changes in Greece (1974), Portugal (1974), Spain (1975), Brazil (1985), Uruguay (1985), and Argentina (1973). These situations did not reach the level of armed conflict and, given the relative inactivity of the UNSC during the Cold War, were never considered to pose a threat to international peace and security. The relatively stable multiparty transitions that took place in a number of African countries, e.g. in Benin<sup>101</sup>, Burkina Faso<sup>102</sup>, Cameroon<sup>103</sup>, Cape Verde<sup>104</sup>, and Ghana<sup>105</sup>, also constitute ‘mere’ internal disturbances and tensions. More recently, neither the creation of the *Gouvernement d’union nationale de la transition* in Madagascar on the basis of the Maputo Agreement dd. 8 August 2009 (following the 2009 Malagasy political crisis marked by an unconstitutional change of government), nor the installation of the national coalition government in Greece in November 2011 (following calls from the EU in light of the sovereign debt crisis) are included

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<sup>98</sup> Y. Dinstein, *Non-International Armed Conflict in International Law*, CUP, 2014, p. 21.

<sup>99</sup> *Ibid.*

<sup>100</sup> L. Balcerowicz, ‘Understanding post-communist transitions’ in W. Kostecki, K. Zukriwska, B. J. Goralczyk, *Transformations of Post-Communist States*, *op. cit.*, pp. 227-228: “[a] [fourth] exceptional feature of East-Central European economic and political transitions is their lack of violence [...] ECE has undergone a peaceful revolution, with massive changes in political and economic institutions resulting from negotiations between the surviving communist elite and the leaders of the opposition”. Cf. also J. Elster, C. Offe, U. K. Preuss, *Institutional Design in Post-communist Societies – Rebuilding the Ship at Sea*, CUP, 1998, p. 3: “non-military and non-violent nature of the collapse and transition”. The exception of the Romanian transition, which was violent, should be mentioned.

<sup>101</sup> Interim administration (Emile Zinsou). Military governments but at first sight no war (no entry for post-WW era in M. Clodfelter, *Warfare and Armed Conflicts, A Statistical Encyclopedia of Casualty and Other Figures, 1494-2007*, Third Edition, McFarland & Company, 2007. Benin led the way in the wave of democracy movements in West Africa in the early 1990s.

<sup>102</sup> Military coups and military regimes alternating with other forms of government, but no armed conflict (1985: short ‘Christmas War’). No entry for post-WW era in M. Clodfelter, *op. cit.*

<sup>103</sup> Only the Cameroon Insurgency (1955-1960) is mentioned in M. Clodfelter, *op. cit.* In 1991, more than 100 people are killed in riots. Calls are made for political amnesty, and a general strike takes place.

<sup>104</sup> No entry for post-WW era in M. Clodfelter, *op. cit.*

<sup>105</sup> *Id.*

in the research<sup>106</sup>. That is because these transitions took place in the context of protests and riots.

LEGAL-REGULATORY ASPECTS OF DIG – The threat to international peace and security or the existence of armed conflict define the context in which DIG, as understood in this study, unfolds. Yet, this study does not deal with the use of force as such in relation to DIG, except for a brief discussion about the conditions under which transitional authorities can legitimately invite third states to deploy force on their territories in light of the consent theory<sup>107</sup>. The focus is neither on the conditions under which the deployment of force may be lawful under the UN Charter<sup>108</sup> (*ius ad bellum*), nor on the question how transitional authorities, if also belligerent parties, should behave under international humanitarian law (*ius in bello*). As further explained under the next section and under Chapter 3, our attention will be directed to the legal-regulatory rather than military aspects of DIG<sup>109</sup>, also where the dissertation deals with imposed regime change<sup>110</sup>.

## Section B. Thesis approach

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The last section of the introduction is dedicated to the thesis approach (1) and the outline of the thesis (2).

### 1. International law approach

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DIG FROM AN INT'L LAW PERSPECTIVE – Few have scrutinized, at least under international law, how the South African two-stage transition was repeated in other contexts; and how this model became increasingly influenced by external actors; and what the consequences are of this recurrence and internationalization under international law<sup>111</sup>. This dissertation represents a first attempt in this regard. It intends to complement the political science literature on DIG in conflict-riven states from an international legal perspective. Because such a perspective is adopted, the goal is not to make an assessment of the political successes and failures of DIG, but rather to assess its relevance under international law.

THESIS PROBLÉMATIQUE – The general *problématique* this dissertation seeks to address is the following. Without a clear understanding of DIG from an international legal perspective, the impression –whether justified or not– persists that this mode of governance (a) entirely

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<sup>106</sup> In any event, and as was already observed above, the transitions mentioned in passing in this subsection – except for the Egyptian case– were not regulated by secondary rules, thus do not respond to the definition of modern DIG developed above.

<sup>107</sup> Chapter 8, Section A.2.

<sup>108</sup> O. Corten, *The Law Against War – The Prohibition on the Use of Force in Contemporary International Law*, Hart Publishing, Portland, 2012.

<sup>109</sup> Chapter 4, Section B.1.1.4 about the severability between civilian/political and forcible/military aspects of DIG. Cf. also the notion of *civilian* transitional authorities under Chapter 4, Section B.1.1.

<sup>110</sup> Chapters 9 and 10.

<sup>111</sup> B. Bowden, H. Charlesworth, J. Farrall (eds.), *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations*, CUP, 2009; N. Youssef, *la transition démocratique et la garantie des droits fondamentaux*, *op. cit.*

depends on domestic political contingencies and (b) constitutes a playfield on which international actors may intervene *legibus soluti*, even when they influence the constitutional transformation of states said to be in transition (‘constitutional geopolitics’<sup>112</sup>), or endorse a particular post-conflict interim government. The question thus becomes whether law has an “essential role to play in informing and regulating [...] transitional political arrangements”<sup>113</sup>. The thesis addresses this question by gauging whether consistent practices and particular norms inform us about how DIG must be carried out.

COMPARING DIG PRACTICES – Resort will be had to applied (as opposed to descriptive) comparative law<sup>114</sup>. DIG practices will be compared in order to define their lowest common denominator. The aim is to verify whether a (minimum) rudimentary legal framework applicable to DIG may currently be germinating. Such a framework would be inferred from shared DIG practices, to the extent that they are sanctioned in law. It would thus, in other words, be based on a *skeletonization* of DIG practices. Even if it depends on *superficial* commonalities of DIG practices, the emergence of such a legal framework would not be trivial. If, in the future, its development is confirmed, it can inform us about possible limitations to the powers not only of the domestic actors governing a country during a transition, but also of international actors engaging with them on that occasion.

RESEARCH HYPOTHESIS – Arguably, international law increasingly prescribes how states said to be in transition as well as third actors assisting them in this endeavor ought to behave. Thus, to borrow an analogy from d’Aspremont, while international law does not prescribe the gender of the post-transition ‘newborn child’, it broadly defines the rules governing the birth process itself (i.e. the regeneration or renaissance of a state following a nonconstitutional transition)<sup>115</sup>. This hypothesis will be tested from a general international legal perspective, and with reference to international practice and transitions concerning approximately twenty countries, which serve as samples rather than as full-fledged case studies<sup>116</sup>.

FOCUS ON HOW INT’L LAW IS CURRENTLY DEVELOPING WITH REGARD TO DIG – The research hypothesis just enunciated will be verified, but only in part as the thesis will argue that an international rule of law with regard to DIG is only germinating (rather than in existence at the time of writing), at least where recent nonconstitutional transitions constitute a response to an armed conflict or to a threat to international peace and security. The terms ‘international rule of law’

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<sup>112</sup> There is no doubt that current geopolitics increasingly affect the realm of constitutional transformation of states said to be ‘in transition’. See Chapter 1, Section B.

<sup>113</sup> J. I. Levitt, *Illegal Peace in Africa*, *op. cit.*, p. 43.

<sup>114</sup> H. C. Gutteridge, *Comparative Law. An Introduction. The Comparative Method of Legal Study and Research* 8 et seq., 1949.

<sup>115</sup> J. d’Aspremont, [‘Les administrations internationales de territoire et la création internationale d’Etats démocratiques’](#), p. 1. The imagery is used in quite a different sense: in instances of ITA, the international community “cannot entirely control the birth of states [but] strives to choose the gender of the ‘newborn child’”. While the question of *control* over the birth process is left unaddressed, this thesis argues that *international legal rules* concerning the birth process itself are currently developing.

<sup>116</sup> Cf. list under Introduction, Section A. This is without counting references to legal opinions of other states. In future research, the coherence of these samples must be enhanced.

are to be understood restrictively here, i.e. to say that the (political) arbitrariness of DIG is progressively reduced as it is increasingly being subjected to international (legal) regulation<sup>117</sup>. The thesis does not argue that a legal framework *should* be developed in this field, but rather that, *volens volens*, such a framework is possibly *in the make*, regardless of the moral or political desirability *vel non* of this evolution. The question is thus not whether international law, *de lege ferenda*, should or should not remain silent on the issue of DIG, but rather whether it is now transitioning itself, i.e. progressively developing towards a law *de lege lata*. This thesis does not promote the immediate ascendance into law of DIG practices, but merely argues that, as the title of the dissertation reflects, we are going *towards* a *ius in interregno* that is neither *in statu nascendi* nor merely a project *de lege ferenda*.

LIMITED NORMATIVE AGENDA: USE OF INT'L LAW TO DEBATE DIG – The normative or jurisgenerative ambition of this thesis is limited<sup>118</sup>. Observing the current development of norms (in a general sense) with regard to DIG should not be confused with promoting the legalization of such norms. The lack of a norm entrepreneurship in this study is further underscored by the agnostic perspective it adopts about the outcome of DIG, we shall see below<sup>119</sup>. The only normative goal pursued here consists in defending the proposition that, as one among many registers, international law should be used as a tool for analyzing DIG, and should contribute to changing the *mode* of debating this oft polemical topic<sup>120</sup>. There is no reason to deny that this enterprise stems from a normative choice and pursues a normative goal. The thesis indeed builds on the assumption that interpreting DIG through international law is a welcome change.

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<sup>117</sup> This is so by virtue of the legal internationalization of DIG, and of consistent practices, which, together with *opinio iuris*, amount to custom, or are otherwise sanctioned as law (Chapter 7). Chesterman writes that “consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning”, and ultimately adopts a functionalist understanding of the international rule of law (S. Chesterman, ‘An International Rule of Law?’, *The American Journal of Comparative Law*, Vol. 56, No. 2, 2008, pp. 331-361). I do accept that the notion is flexible. With ‘international rule of law’, I refer mainly to the first element of the core definition developed by Chesterman: “the power of the State may not be exercised arbitrarily. This incorporates the rejection of ‘rule of man’, but does not require that State power be exercised for any particular purpose. It does, however, require that laws be prospective, accessible, and clear” (*id.*, p. 342). DIG is progressively removed from the *exclusive* sphere of politics; it becomes legally limited. Although I do not equate the rule of law to ‘legality’, I adopt a formal understanding of the rule of law, i.e. a thin theory describing “instrumental limitations on the exercise of state authority” (*id.*, p. 340). For an article advocating a reductionist view of the rule of law in conjunction with constitutionalism, see F. Venter, ‘The Rule of Law as a Global Norm for Constitutionalism’ in J. R. Silkenat, J. E. Hickey Jr, and P. D. Barenboim, eds., *The Legal Doctrines of the Rule of Law and the Legal State*, New York, Springer, 2014, pp. 91-104. From a functional perspective, Chesterman, together with Waldron, observes that the rule of law has “also been used to establish non-violent mechanisms for resolving political disputes”. It is in this sense that one can associate international rule of law with the peace-through-transition paradigm, explained below (Introduction, Section A.1). For Saul, “the centrality of the term rule of law in post-conflict settings, in spite of its contested meaning, can be explained by the promise it brings that actors with authority will be held accountable” (M. Saul, *Popular Governance of Post-Conflict Reconstruction*, CUP, 2014, p. 19). I use the term more generally: to the extent that the norms of this *ius in interregno* are prospective, accessible, and clear, an international rule of law with regard to DIG is developing.

<sup>118</sup> Cf. also the notion of ‘committed argument’, a concept developed by O. Fiss and briefly discussed in G. I. Hernández, ‘The Activist Academic in International Legal Scholarship’, *ESIL Reflections*, Vol. 2, Issue 11, 16 December 2013.

<sup>119</sup> Chapter 2, Section B.

<sup>120</sup> Cf. also Part I, Conclusion, 2.2 about the international legal approach; and the general conclusion of the thesis.

In this sense, it is part of a “project for the advancement of international law”<sup>121</sup>. Yet, the thesis is not a blind attempt to maximize the regulatory grip of international law on an important aspect of international life, state transformation<sup>122</sup>. The limits of the role of international law for DIG will be explicitly recognized in this thesis; international law is not ubiquitous. In other words, the normative choice of analyzing DIG under international law (surely a normative project) does not spill over in regulatory entrepreneurship when it comes to identifying a (currently evolving) legal framework in relation to DIG; the thesis indeed concludes that such a framework has not fully developed, that its current germination may be halted, and that, if its existence is confirmed in the future, it would not constitute a new category of law or a new (autonomous or self-containing) legal regime.

FOCUS ON LEGAL-REGULATORY ASPECTS OF DIG – The *legal-regulatory* rather than politico-military aspects of DIG are analyzed. This study conceptually separates the analysis of post-conflict transitions from questions related to the use of force. International legal scholarship has already addressed these questions, including in relation to state transformation processes (e.g. the issue of transformative occupation). And there are two additional reasons why the analysis of non-forcible aspects of DIG is favored:

(1) FOCUS ON LEGAL LEEWAY WITHIN THE RANGE OF NONFORCIBLE ACTIVITIES: PROHIBITION USE OF FORCE – The recourse to violence, even in the name of international peace and security, whether by the UNSC, regional organizations or individual states, has been a measure of last resort under international law ever since war was outlawed, under the 1928 Briand-Kellogg Pact, as a means for resolving international disputes. This remains true after the R2P framework was developed<sup>123</sup>. For this reason, it is useful to investigate what international law allows for *within* the range of non-forcible (yet sometimes coercive) measures to maintain or restore international peace and security; and to narrow this investigation down to DIG, which, as an instrument to address (especially intra-state) disputes, is often favored over military action.

(2) FOCUS ON LEGAL LEEWAY WITHIN THE RANGE OF NONFORCIBLE ACTIVITIES: SELF-DETERMINATION & DIG – In the post-decolonization era, less legal options are available to states or organizations intending to support struggles for (internal) self-determination<sup>124</sup>. During the decolonization era, forcible support to national liberation movements was arguably permissible<sup>125</sup>. Today, it

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<sup>121</sup> J. d’Aspremont, *Epistemic Forces in International Law*, Elgar International Law, 2015, p. 42.

<sup>122</sup> There is no ‘wishful thinking’ in this regard, as described by Pellet: “une certaine tendance à prendre leurs désirs pour des réalités et à tenir pour vérités juridiques des tendances encore balbutiantes ou, pire, qui n'existent que dans leurs espoirs”. A. Pellet, ‘[Droits-de-l’homme et droit international](#)’, Conférence commémorative Gilberto Amado, 18 juillet 2000.

<sup>123</sup> Also under the ‘responsibility to react’, military intervention is seen as a last resort remedy: “military intervention for human protection purposes is an exceptional and extraordinary measure”; it “can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored”. ICISS Report of the International Commission on Intervention and State Sovereignty, p. XII.

<sup>124</sup> Cf. especially Chapters 9 & 10.

<sup>125</sup> A/RES/29/3314 dd. 14 December 1974, art. 7. N. Ronzitti, *Le guerre di liberazione nazionale e il diritto internazionale*, Pacini, Pisa, 1974. N. Ronzitti, Resort to Force in Wars of National Liberation in A. Cassese (ed.), *Current Problems of International Law, Essays on U.N. Law and on the Law of Armed Conflict*, Giuffrè editore, Milano, 1975.

can hardly be argued that (external) forcible support to movements purporting to realize internal self-determination is permissible under international law<sup>126</sup>. For this reason, the support to such movements, or to any political organization aiming to re-determine the political order of its country through DIG, must be analyzed *from a different angle*. This analysis needs to revolve around the question under which conditions nonforcible –but, possibly, coercive– support to such movements or political organizations is allowed under international law. Although the military/forcible aspects in relation to DIG thus are largely disregarded, this study will also incidentally deal with the procedural safeguards deemed relevant when transition procedures risk to be vitiated by acts of *coercion* short of force<sup>127</sup>, an issue that will be examined below<sup>128</sup>. The analysis of DIG under coercion –especially in relation to imposed regime changes– however represents only a small corner of the thesis.

**SEVERABILITY CIVILIAN/POLITICAL AND FORCIBLE/MILITARY ASPECTS DIG** – Undeniably, the analysis of (especially post-conflict) DIG often relates to the use of force. Yet, this thesis builds on the premise that, more often than not, one can sever the civilian/political aspects of institutional and constitutional transitions from the military context in which such transitions take place. One is capable of analyzing and judging the non-forcible aspects of DIG on their own merits, i.e. independently of parallel military actions.

**METHODOLOGY (RENVOI)** – The general international law perspective adopted in this thesis will be discussed at the end of Part I, which explains why general international law ought to be applied to DIG. The choice of adopting a generalist perspective stems from the observation that, although DIG is proliferating, the current literature falls short in addressing this phenomenon comprehensively.

## 2. Outline

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The dissertation is divided into four parts. The first part argues that it is necessary to unveil how international law relates to DIG, and introduces, for ease of reference, the concept of a *ius in interregno*. The second part examines the actors and foundation of DIG. The third part unveils the core of a currently evolving *ius in interregno*. The fourth part, finally, analyzes the

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<sup>126</sup> A/RES/2625 dd. 24 October 1970 ('1970 Friendly Relations Declaration'). Cf. also Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403, §§ 80-81.

<sup>127</sup> That is, when policy-makers and decision-makers do not shy away from defending the idea of 'imposed democracy' despite the fact that "the survival of imposed democracy is by no means assured". A. J. Enteline and J. M. Greig, 'Against All Odds? The History of Imposed Democracy and the Future of Iraq and Afghanistan', *Foreign Policy Analysis*, 2008, 4, 321–347. About the coercive [rather than forcible] "replacement by external actors of the elite and/or governance structure of a state so that the successor regime approximates some purported international standard of governance", cf. M. Reisman, 'The Manley O. Hudson Lecture: Why Regime Change Is (Almost Always) a Bad Idea', *The American Journal of International Law*, Vol. 98, No. 3, 2004, pp. 524-525.

<sup>128</sup> Part IV.

limits to external involvement in DIG (considering that these limits only acquire legal status to the extent that a *ius in interregno* itself acquires that status).

Part I sets the stage of the thesis, and attempts to explain why a legal analysis of DIG is timely, and why this analysis is best carried out from a general international legal perspective. The subsequent parts address DIG from an internal and external perspective. Parts II & III adopt a *domestic perspective*, i.e. the perspective of transitional authorities. Such authorities are known as ‘interim governments’, ‘transitional councils’, ‘provisional authorities’, etc. Part IV examines DIG from an *international perspective*, and addresses the question of how the so-called international community relates to transitional authorities.

**Part I: An invitation to analyze domestic interim governance from an international legal perspective**

Chapter 1 observes the rise and internationalization of DIG.

Chapter 2 explains why current literature or specific concepts cannot be used for the analysis of DIG under international law.

**Part II: Foundation & Actors of domestic interim governance**

Chapter 3 discusses the foundation of DIG.

Chapter 4 discusses the concept of transitional authorities.

**Part III: The core of a *ius in interregno***

Chapter 5 discusses the temporal and substantive limits to DIG.

Chapter 6 analyzes the role of internal self-determination for DIG.

Chapter 7 discusses the legal internationalization of DIG.

**Part IV: External influence on domestic interim governance**

Chapter 8 analyzes the legal limits to consensual DIG.

Chapter 9 analyzes the legal limits to oppositional DIG.

Chapter 10 discusses whether oppositional DIG can be triggered as a response to *ius cogens* violations.



## PART I – AN INVITATION TO ANALYZE DOMESTIC INTERIM GOVERNANCE UNDER INTERNATIONAL LAW

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“Le rôle de la science de droit est de suivre la germination lente et la croissance, toujours contrariée, de la norme internationale dans un milieu hétérogène”<sup>129</sup>

The first part of the thesis argues that it is necessary to analyze DIG from a general international legal perspective in light of its proliferation and internationalization in the two last decades (Chapter 1). The existing literature does not offer sufficient guidelines for analyzing DIG, and it is therefore necessary to resort to existing legal standards and a perusal of state and UNSC practice, which will be treated together under the concept of *ius in interregno* (Chapter 2).

### CHAPTER 1. THE RISE & INTERNATIONALIZATION OF DOMESTIC INTERIM GOVERNANCE

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Recent history is rife with instances of modern DIG, which has “become more *complicated* and, so, require[s] 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>130</sup>. Transitions are becoming not only more complicated and longer, but also more numerous. It is actually difficult to keep up with the rhythm by which interim arrangements pop up. In addition, they have become a matter of international concern. This chapter sets the scene for the remainder of the thesis. It relies on factual observations combined with a critical legal analysis of the discourse underpinning the increased recourse to DIG. Concretely, it problematizes the proliferation (Section A) and internationalization (Section B) of DIG.

#### Section A. The proliferation of domestic interim governance

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This section situates the proliferation of DIG in its historic-economic context (1), and problematizes the legal grounds that might be prayed in aid to justify this trend (2).

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<sup>129</sup> R.-J. Dupuy, Leçon inaugurale faite le Vendredi 22 Février 1980, Collège de France, Chaire de Droit International, 1980, pp. 16-17.

<sup>130</sup> M. G. Marshall, B. R. Cole, Center for Systemic Peace, ‘[Global Report 2014, Conflict, Governance, and State Fragility](#)’, p. 25. Own emphasis.

## 1. The turn to the 'light footprint'

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“We decided that the UN could be the *midwife* for the birth of an interim Afghan government as the first step in an agreed process of transition, and should provide discreet support to the Afghans in building better governance from an extremely low base. But we would have no pretensions to run Afghanistan”<sup>131</sup>

The (i) relative diminution of state creation and the (ii) unsustainability of direct ITA are the historic-economic reasons accounting for the rise of modern DIG.

(1) DECREASE STATE CREATION – Compared to the second half of the twentieth century –after the epoch of decolonization and the dissolution of the USSR and ex-Yugoslavia– the creation of new states in the twenty-first century has become relatively rare. 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 states like Kosovo, Abkhazia or South Ossetia are highly controverted and legally unsettled to this date, and can in no way be compared to the general consensus (admittedly sometimes *ex post*) concerning the dissolution processes of the USSR<sup>132</sup> and Yugoslavia<sup>133</sup>, or concerning the decolonization processes of the 1960s and 1970s (notwithstanding individual<sup>134</sup> or late objectors<sup>135</sup>). Compared to the second half of the twentieth century, the creation of states in the twenty-first century has thus become 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.

(2) DECREASE ITA – Compared to the turn of the millennium (1999-2002), instances of direct international/foreign territorial administration, whether or not in conjunction with belligerent occupation, are decreasing, yet continue to receive considerable scholarly attention<sup>136</sup>. All trusteeship operations were suspended in 1994. Since then, most instances of ITA have been severely criticized both on normative<sup>137</sup> and material (costs and ponderousness<sup>138</sup>) grounds, especially those in East Timor (UNTAET) and Kosovo (UNMIK). ITA in these countries was

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<sup>131</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 338. Emphasis added.

<sup>132</sup> For the consensual basis of the dissolution, cf. The Belavezha Accords dd. 8 December 1991, and the Alma-Ata Protocols dd. 21 December 1991.

<sup>133</sup> Cf. conclusions of Arbitration Commission of the Peace Conference on Yugoslavia (‘Badinter Commission’).

<sup>134</sup> Serbia in the case of Yugoslavia’s dissolution.

<sup>135</sup> Portugal in the decolonization process. Colonizing states absented their vote on the ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’.

<sup>136</sup> See e.g. 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*, CUP, 2008.

<sup>137</sup> R. Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away*, OUP, 2008. Cf. 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>138</sup> C. Bull, *No Entry Without Strategy – Building the Rule of Law under UN Transitional Administration*, *op. cit.*

heavy as it required the UN almost to substitute for a sovereign state, Daudet notes<sup>139</sup>; “we had almost assumed the responsibilities of a sovereign government”, Annan confirms<sup>140</sup>.

**LIGHT FOOTPRINT APPROACH: EMPHASIS ON DOMESTIC APPROACH** – The UN changed its method for the first time in Afghanistan by opting for a ‘light footprint’ approach<sup>141</sup>. Writing about the UN mission in Afghanistan, Afsah and Guhr noted that the “emphasis has been placed on ensuring Afghan ownership of the reconstruction process, rather than imposing an international administration”<sup>142</sup>. Under the light footprint approach, the UN is expected (only) to *assist* states in transition, rather than to (directly) administer them.

**RATIONALE LIGHT FOOTPRINT APPROACH** – The reason for adopting the light footprint approach was to correct the ‘heavy international footprint’<sup>143</sup>. Assisting DIG rather than bearing direct responsibility for conducting ITA must be seen as a “possible correction to the trend towards ever-expanding [UN transitional] mandates”<sup>144</sup>, or as a reaction to the “well-known set-backs and over-extension of UN peace operations in the early 1990s”<sup>145</sup>. These circumstances generated an adjustment of the New York consensus about statebuilding and peacebuilding<sup>146</sup>. The new approach was “hailed as a major conceptual revolution in United Nation thinking, developed out of the perceived failures in Kosovo, East Timor and elsewhere”<sup>147</sup>. The novelty of the light footprint approach consisted in combining a two-staged domestic transition –akin to the South African model– with international assistance.

**LIGHT FOOTPRINT APPROACH CONTRADICTED BY REALITY** – According to former UN Representative for Afghanistan Mr. Brahimi, this conceptual revolution was never correctly implemented in

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<sup>139</sup> Y. Daudet, *L'exercice de compétences territoriales par les Nations Unies*, pp. 54, 58 : « [L]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>140</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 338.

<sup>141</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’”.

<sup>142</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*, *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>143</sup> E. Newman opposes the ‘light footprint’ this 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, p. 32.

<sup>144</sup> S. Chesterman, *You, The People, The United Nations, Transitional Administration, and State-Building*, OUP, 2004, p. 49.

<sup>145</sup> M. Griffin, B. Jones, ‘Building peace through transitional authority: new directions, major challenges’, *International Peacekeeping*, 7:4, 75-90.

<sup>146</sup> M. Kahler, ‘Statebuilding after Afghanistan and Iraq’ in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, Routledge, London, New York, 2009, p. 288.

<sup>147</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 382.

practice<sup>148</sup>. Despite the light footprint approach, international actors went beyond acts of assistance and exercised significant leverage on the Afghan transition and state-building process. Schoiswohl writes:

“As 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. This assistance is not imposed, *at least technically*, but provided on the basis of the normative framework enshrined in the 2001 Bonn Agreement”<sup>149</sup>

For Brahimi, “the United Nations, continued to operate, far too often, through parallel structures that did provide some services to the population but undermined rather than helped the state establish and sustain its credibility”<sup>150</sup>. Because states and IOs provided, to use the words of the 2011 International Afghanistan Conference, “direct service delivery”<sup>151</sup> and were closely involved in the transition, their involvement triggered dependency schemes resulting in Afghanistan becoming a rentier state<sup>152</sup>. Thus, “the UN sometimes appear[ed] to be operating like a parallel administration”<sup>153</sup>. One can hardly associate such circumstances to a ‘light footprint’ approach, which becomes a fiction when “formal authority remains with domestic actors but governance is dependent on international actors”<sup>154</sup>. The international influence on DIG in Afghanistan was palpable, an issue which concerns other countries, too, as shall be discussed further below<sup>155</sup>.

Arguably, the diminution of state creation and the unsustainability of direct ITA explain the correlative rise of DIG. This type of governance is associated with UN *assistance* to transitions otherwise domestically owned. This is proverbially known as the light footprint approach. Besides these historic-economic reasons, the current traction for DIG may also be

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<sup>148</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, Austria, p. 17.

<sup>149</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, p. 861. Emphasis added. He writes 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”.

<sup>150</sup> L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 6.

<sup>151</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>152</sup> A. Suhrke, *When More is Less: the international project in Afghanistan*, Columbia University Press, 2011.

<sup>153</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 418.

<sup>154</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. Cf. also N. Roehner, *UN Peacebuilding - Light Footprint or Friendly Takeover?*, CreateSpace Independent Publishing Platform, Berlin, 2012.

<sup>155</sup> Chapter 1, Section B.

explained on psychological grounds, i.e. the circumstance or at least impression that a number of legal rationales seem to be available to international actors purporting to explain their choice of assisting DIG. The following lines address this issue.

## 2. Prima facie legal reasons behind the rise of domestic interim governance

Besides the historic-economic considerations discussed above, international legal considerations, too, might be invoked to explain the increased recourse to DIG. At first sight, three legal reasons can be invoked to explain the proliferation of, or inform the choice for, DIG. First, DIG may constitute an alternative option when, in light of the principle of equal sovereignty, the possibility of applying ITA is limited (2.1). Second, DIG may allow international actors to influence the interregnum with lesser legal constraints (2.2). Third, the promotion of DIG may be seen as a means for avoiding shared international responsibility between the domestic and international constituencies involved in the transition (2.3).

While the second and third reasons concern (legal) opportunity, the first reason is one of (legal) necessity. Each of these *prima facie* legal grounds will be briefly presented, and immediately nuanced. They are deliberately formulated in a superficial way, i.e. as *prima facie* arguments. The piercing of this superficiality will underscore the subtlety and difficulty of analyzing DIG under international law.

### 2.1. International territorial administration as a last resort; DIG as the alternative

Not only historical context but also legal considerations –proportionality, subsidiarity, state sovereignty and self-determination– can be invoked to explain or justify the rise of modern DIG. As a response to serious crises and conflicts, the UN, regional organizations and states increasingly empower or even create domestic transitional institutions. In light of said considerations, this approach may seem to be preferable, also on legal grounds.

DIG AS A LAW-ABIDING ALTERNATIVE? – It has been argued indeed that direct ITA, involving “international actors [notably the UN] assuming direct responsibility for governance”<sup>156</sup>, may *only* take place under certain conditions. According to Maruhn, the option of ITA is limited by the principles of proportionality and subsidiarity: it must be inversely proportional to possible restrictions on state sovereignty; it can only be used if it is not possible to achieve peace and security by other means than imposing direct ITA<sup>157</sup>. If the principles of proportionality and subsidiarity legally limit the possibility of creating ITA, which thus

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<sup>156</sup> M. Saul, 'The Search for an International Legal Concept of Democracy: Lessons from the Post-Conflict Reconstruction of Sierra Leone', *op. cit.*, p. 7; in German: 'VN-Übergangsverwaltung'.

<sup>157</sup> T. Maruhn, 'Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus', *op. cit.*, pp. 480 – 511.

becomes a “*solution de dernier recours*”<sup>158</sup>, assisting domestic transitional authorities could be presented as an alternative solution for transforming regimes.

NUANCE – The deference to the principles of state sovereignty and self-determination might be invoked to explain why DIG should be preferred over ITA. By executing domestic, i.e. nationally owned transition procedures, compliance with the principle of self-determination seems guaranteed. The risk of violating this principle seems less high. In reality, however, the choice for DIG does not annihilate this risk. A thorough legal assessment should consider *how* DIG is pursued, *who* offers international assistance to DIG, and at *what point in time*. The state practice perused in this dissertation will inform us on the interaction between the principle of self-determination and DIG: Part III argues that transitional authorities are to steer the transition in compliance with this principle, and Part IV explains that international actors must not hinder a self-determination-compliant transition.

## 2.2. Less constraints under international (humanitarian) law

CONSTRAINTS ON BELLIGERENT OCCUPANTS – When external influence is being channeled via domestic transitional authorities in the absence of, *or independently from*, belligerent occupation, the leverage to influence the legal and institutional structure of a state becomes enormous. In the 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, “unless absolutely prevented”, respect the laws in force in the country”<sup>159</sup>. As a result, “the 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”, Stahn writes<sup>160</sup>. Belligerent occupation must be “order-preserving” because it is “constrained in its order-constitutive authority”, Bhuta summarizes<sup>161</sup>.

LESS CONSTRAINTS FOR DIG? – In the absence of belligerent occupation, or when legislative changes are carried out by domestic transitional authorities, neither of said conventions is applicable, and their legal requirements cannot be violated. The international involvement with DIG can trigger constitutional changes that are constitutive of a new politico-legal order.

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<sup>158</sup> K. Ardault, C.-M. Arion, D. Gnamou-Petauton, M. Yetongnon, ‘L’administration internationale de territoire à l’épreuve du Kosovo et du Timor oriental: la pratique à la recherche d’une théorie’, *Revue belge de droit international*, 2005/1-2, p. 301.

<sup>159</sup> 1907 The Hague Convention, art. 43: “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”. Cf. also the Fourth 1949 Geneva Convention, art. 64.

<sup>160</sup> C. Stahn, *The Law and Practice of International Territorial Administration*, Cambridge Studies in International and Comparative Law, 2010, p. 115. Stahn adds: “the laws of occupation are not intended to provide a general framework for reconstruction and law reform” (*id.*, p. 119).

<sup>161</sup> N. Bhuta, ‘Antinomies of Transformative Occupation’, *EJIL*, Vol. 16 no. 4, 2005, p. 727.

The aim of constituting a new order could, then, be achieved not only to a lesser cost<sup>162</sup> but also with a seemingly lower risk of legal noncompliance, given the non-applicability of the order-preserving legal instruments just mentioned<sup>163</sup>.

**NUANCE** – The contention that the proliferation of DIG may be expedited by the lack of legal constraints will be strongly nuanced in this thesis. Even if order-preserving international legal instruments do not apply to DIG, one can question whether transitional authorities or external actors enjoy absolute freedom when it comes to re-defining the social contract of a country in transition. There must be limits to this, notably under the principle of self-determination. The thesis will argue that neither domestic transitional authorities nor external actors enjoy an absolute freedom in reconfiguring the state order.

### 2.3. Primary responsibility of transitional authorities

Another reason for explaining the reduction of ITA and the correlative rise of DIG may be linked to the regime of international responsibility. DIG is often (misleadingly) portrayed as falling under the primary responsibility of transitional authorities. Even if receiving international assistance, domestic transitional authorities are deemed to be responsible for ‘their’ peacebuilding and statebuilding enterprises (2.3.1). This monolithic vision will lead us to question whether, under such an assumption, the responsibility regime of DIG would constitute an improvement compared to the much-criticized responsibility regime under ITA (2.3.2).

#### 2.3.1. Monolithic vision of UNSC, UNGA and PBC on responsibility for DIG

**UNGA & PBC EMPHASIZE DOMESTIC RESPONSIBILITY FOR DIG** – 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 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:

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<sup>162</sup> It would not involve the various (financial, material and human capital) costs that usually flow from military occupation.

<sup>163</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]he consensual basis removes any question of the law of occupation applying. The law of occupation applies, when a state comes into uninvited effective control of the territory of a third state, to regulate the administration of the occupied territory. Its rationale, which includes the preservation of the occupied states’ sovereignty and the humanitarian well-being of the people, explains a strict emphasis on conservation of the state and civil infrastructure. That *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’, *op. cit.*, p. 140.

“affirm[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>164</sup>.

Echoing a 2007 statement by Brahimi that “foreign assistance is just that: assistance; it can in no way be a substitute for a national agenda aiming at rebuilding the national state”<sup>165</sup>, the 2009 ‘Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict’ emphasized the imperative of local ownership and responsibility<sup>166</sup>. Mid-2014 the PBC again referred to the “principle of national responsibility”<sup>167</sup>.

UNSC EMPHASIZES DOMESTIC RESPONSIBILITY FOR DIG (CAR; IRAQ) – The principle of national ownership and responsibility is consistently being recalled by the UNSC too<sup>168</sup>. On 14 January 2015, the UNSC “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>169</sup>. The UNSC confirmed this principle in various cases, for example with regard to transitions in Central African Republic (‘CAR’) and Iraq. Even if, undoubtedly, the transition in the CAR is influenced by international monitoring activities and other external factors, the UNSC “underscores the primary responsibility of the Central African authorities”<sup>170</sup>, e.g. to provide security and protect the law. The UNSC furthermore called on the CAR transitional authorities to complete their transition in line with the ‘Transitional Framework’<sup>171</sup>. In Iraq, too, the UNSC repeatedly affirmed the domestic responsibility for DIG<sup>172</sup>.

CONTACT GROUPS EMPHASIZE DOMESTIC RESPONSIBILITY FOR DIG (CAR) – Contact groups and diplomatic coalitions –the weight of these relative newcomers on the international scene will be explained further below<sup>173</sup>– also emphasize that domestic transitional authorities are responsible for DIG. The CAR international contact group, representing more than thirty-five

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<sup>164</sup> A/RES/60/180 dd. 30 December 2005, Preamble and § 10.

<sup>165</sup> L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 6.

<sup>166</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>167</sup> S/PV.7217, Report of the Peacebuilding Commission on its seventh session (S/2014/67) dd. 15 July 2014, p. 14.

<sup>168</sup> S/RES/2149 dd. 10 April 2014 in which the UNSC welcomes the designation of the transitional authorities in CAR and “urges” 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>169</sup> S/PRST/2015/2 dd. 14 January 2015.

<sup>170</sup> S/RES/2121 dd. 10 October 2013, § 6. Cf. also S/RES/2149 dd. 10 April 2014.

<sup>171</sup> S/RES/2127 dd. 5 December 2013, S/RES/2134 dd. 28 January 2014, S/RES/2149 dd. 10 April 2014.

<sup>172</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]eaffirm[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>173</sup> Chapter 1, Section B.1.3.

states and organizations<sup>174</sup>, for instance, “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>175</sup>.

DOMESTIC RESPONSIBILITY FOR DIG DESPITE DEEP INVOLVEMENT CONTACT GROUP (DRC) – The responsibility of transitional authorities for DIG is emphasized even when contact groups and diplomatic coalitions are deeply involved in the transition. With regard to the DRC, for instance, the *Comité international d’accompagnement de la transition* (‘CIAT’), representing several states and IOs<sup>176</sup>, was particularly active during the interregnum. It saw itself as a representative of the so-called international community, and was massively involved in the Congolese transition<sup>177</sup>. Yet, “the primary responsibility for fulfilling the above objectives [restoration of security; territorial and administrative unification; the adoption of a transitional legislative framework; holding of elections] rests with the Transitional Government”, the Secretary General noted<sup>178</sup>.

DIG AS PROXY GOVERNANCE – These examples –among many others<sup>179</sup>– indicate that domestic transitional authorities operate under the guidance and impulsion of the UNSC or other regional/international organizations or diplomatic coalitions. At the same time, these authorities are considered to be themselves internationally responsible for the most important components of the transition. Under Chapter 5, we shall see that, across the globe, this responsibility consistently concerns the execution of the transition roadmap itself as well as the safeguarding of safety and order, even in the context of armed conflict<sup>180</sup>. With the decrease of ITA and the increased recourse to DIG, difficult questions seem to be avoided by holding domestic transitional authorities systematically responsible for ‘their’ transition.

By relying on DIG as a form of (discrete and cost-efficient) proxy governance, IOs and states can exercise a considerable influence on the ground without exercising territorial control or deploying ITA. Notwithstanding their “massive international involvement”<sup>181</sup>, organizations and states would avoid the risk of being held accountable for possible wrongful acts committed at the occasion of DIG. The question then arises whether the identification of

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<sup>174</sup> Consult the list [here](#).

<sup>175</sup> [Conclusions of the fourth meeting of the International Contact Group on the Central African Republic](#) dd. 21 March 2014, § 9.

<sup>176</sup> UNSC members as well as representatives from Angola, Belgium, Canada, Gabon, South Africa, Zambia, the AU, the EU and the UN.

<sup>177</sup> Chapter 1, Section A.2.3.1.

<sup>178</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 (“Third UNSG Special Report on DRC Mission”).

<sup>179</sup> Chapter 5, Section B.3. Cf., for instance, regarding Iraq: 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.

<sup>180</sup> Chapter 5, Section B.3.

<sup>181</sup> M. Brandt, J. Cottrell, Y. Ghai, and A. Regan, ‘[Constitution-making and Reform - Options for the Process](#)’, 2011, 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)”.

domestic institutions as being primarily responsible for transitional procedures would constitute an improvement compared to the responsibility regime of ITA.

### 2.3.2. Correction of ITA accountability gap?

Is 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 transitional authorities always carry this weight– sustainable? In the following lines we first ask whether this vision, if it were accurate, would constitute an improvement of the ITA responsibility regime; and then challenge the conceptual simplicity inherent to this vision.

COMPARISON RESPONSIBILITY REGIME ITA & DIG – Can the delegation of responsibility from the international to the domestic level be considered as a (partial) redress for the shortcomings inherent to ITA? ITA is a direct ‘outgrowth’ of the UNSC, and seems to enjoy a privileged position vis-à-vis it. Given its link with the UNSC, it is not sure whether there is a direct legal relationship between ITA and the state’s citizens. Overall, it is not clear which responsibility regime, if any, applies to ITA. The lack of a (clear) responsibility regime and of (efficient) oversight mechanisms in relation to ITA have been severely criticized in literature<sup>182</sup>. Wilde argues that ITA represented a regression even from the older mandate (1919 – 1945) and trusteeship (1945 – 1994) systems<sup>183</sup>. By contrast, domestic transitional authorities are directly accountable both to the state’s citizens and to the UNSC. Thus, contrary to ITA, transitional authorities, when acting as state agents, are directly accountable to their citizens<sup>184</sup>. Further, as they act under the international legal restraints applicable to states generally, they also owe deference to the UNSC<sup>185</sup>. The Bonn Agreement, for instance, provided that the “actions taken by the Interim Authority shall be consistent with [...] relevant Security Council resolutions”<sup>186</sup>.

DIG: SIMPLIFICATION OF RESPONSIBILITY REGIME? – The increased recourse to DIG seems to have a beneficial side-effect. It brings with it a welcome simplification of the responsibility regime in times of state transformation. Given the generalized 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

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<sup>182</sup> Cf. e.g. Y. Daudet, ‘L’exercice de compétences territoriales par les Nations Unies’, *op. cit.*, p. 58.

<sup>183</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>184</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>185</sup> UN Charter, art. 24 and Chapter II.

<sup>186</sup> Bonn Agreement, Section V.5.

DIG. In addition, the emphasis on domestic responsibility in the context of DIG appears to be laudable from a policy perspective: it can be viewed as challenging a culture of dependency<sup>187</sup>.

TENSION INHERENT TO DIG UNDER INTERNATIONAL ASSISTANCE – Yet, the conceptual simplicity of the DIG responsibility regime barely conceals the tensions underlying the –proverbial– light footprint approach. The impact of international actors on the institutional and constitutional renaissance of transition states can be enormous, we shall see in the following section. The tension inherent to *externally* assisted *domestic* interim governance is unavoidable when “the responsibilities or leadership or ownership lie with the domestic state but their partners (or joint stakeholder) decode the policies”<sup>188</sup>; in short, when there is a “complete separation between power and accountability”<sup>189</sup>, as Chandler writes, or a “disaggregation of power [...] through *internationalization of domestic governance* [...] often presented as ‘transitional’ to a future agreed alternative”<sup>190</sup>, as Bell remarks. This study addresses this tension and argues that not only domestic transitional authorities but also external states and organizations may, under specific circumstances, engage their responsibility when violating *ius in interregno*<sup>191</sup>. This issue is all the more important given the susceptibility of DIG to international influences, which will be addressed now.

## Section B. The internationalization of domestic interim governance

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WIDE AMBIT INTERNATIONALIZATION DIG – The international impact on DIG is evident in most areas of state reconstruction. There are manifold ways in which states and organizations influence the interregnum, in virtually all its (statebuilding-related) aspects, ranging from justice and security reform and economic and fiscal policies to the very origins and structures of the transitional procedures. As was already hinted at, this thesis focuses on the legal-regulatory (constitutional, legislative and procedural) aspects of DIG.

INTERNATIONALIZATION OF THE INTERREGNUM – The broad impact international actors have on various components of statebuilding, the enormous budgets allocated to transition procedures<sup>192</sup>, and the international assistance well-nigh systematically offered to states in

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<sup>187</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 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>188</sup> D. Chandler, *Empire in Denial – The Politics of State-building*, Pluto Press, London, 2006, p. 39.

<sup>189</sup> *Id.*, p. 44. For Chandler, this goes together with a “marginalisation of the domestic political sphere” (p. 53). For a general discussion about the devalorization of the political sphere, cf. A. Comte-Sponville, *Le capitalisme est-il moral?*, Albin Michel, 2004.

<sup>190</sup> C. Bell, *On the Law of Peace – Peace Agreements and the Lex Pacificatoria*, OUP, 2008, p. 117. Emphasis added.

<sup>191</sup> Chapter 7, Section C; Part IV.

<sup>192</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: “the international

transition allow us to speak of the *internationalization of the interregnum*. This concept was already introduced above<sup>193</sup>, not only to indicate that transitions –both their founding instruments and the ensuing procedures– are often generated in international contexts (and, unsurprisingly, contain manifold references to international law<sup>194</sup>) but also to refer to international assistance to DIG more broadly, regardless of the exact balance of power or division of labor. Nearly without exception, DIG goes hand in hand with some form of international assistance, also in the absence of direct ITA.

INTERNATIONALIZATION INTERREGNUM & PEACE THROUGH TRANSITION – The internationalization of the interregnum broadly relates to the circumstance that “despite the domestic character and significance of governance transitions, *the assembly and maintenance of interim structures has increasingly become an international project*”<sup>195</sup>. The thesis is concerned with the role of (consensual or oppositional) *domestic* institutions in *domestic* transitions that are unrelated to decolonization, secession or dissolution processes. But such transitions are clearly not only an internal matter. The installation and monitoring of interim governance structures by the ‘international community’ is often viewed, sometimes erroneously, as a panacea for solving all kinds of problems. 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 –the peace-through-transition paradigm– DIG has been assigned the challenging task of bringing peace to post-conflict countries. The 2015 Review of the UN Peacebuilding architecture also remarks this, and describes as follows how DIG has become an established 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”<sup>196</sup>

This section examines the various levels on which DIG became internationalized (1), and critically engages with the proposition that external actors only *assist* DIG (2).

### *1. The multitude of actors influencing interim governance*

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The internationalization of DIG operates on various levels. The conviction and discourse that transitions are conducive to peace transpires in the practice of various actors operating at the

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community continues to allocate vast resources to support interim regimes”. For details, see Part III, Introductory caveats, under 2.

<sup>193</sup> Introduction, Section A.4.1.

<sup>194</sup> This relates to the *legal* internationalization of the interregnum. Cf. Chapter 7.

<sup>195</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 3. Emphasis added.

<sup>196</sup> 2015 Review of the UN Peacebuilding architecture, *op. cit.*, § 31.

global, regional and state level. The peace-through-transition paradigm suggests that DIG – including the redefinition of a country’s constitution (‘reconstitutionalization’)– is widely seen as a way to cope with international armed conflict and/or threats to peace and security. This explains why, in the cases under scrutiny, several actors offer their *assistance* in installing, monitoring or completing domestic transition procedures, at the service of peace:

“by 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>197</sup>.

Which are the actors showing a keen interest in influencing the redefinition of the social contract of countries in transition? Both the UN (1.1), regional organizations (1.2), diplomatic coalitions or contact groups (1.3), and individual states (1.4) contribute to the internationalization of DIG.

### 1.1 The UN

UN, PBC, TRUST FUND, CFP – 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>198</sup>, or to assist countries in triggering transitions. For Sripati, “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>199</sup>. To this end, the PBC and the UN Peacebuilding Trust Fund (and also the UN Secretariat<sup>200</sup>) increasingly turn their attention to countries experiencing a form of DIG. This is remarkable because their initial aim was to ensure a more comprehensive approach towards situations administered by international rather than domestic transitional administrations<sup>201</sup>. Further testament to the UN’s interest in DIG is that, within the UNDPA, a constitutional focal point (‘CFP’) was “established in 2013 in response to increased demand for UN assistance in constitution-making processes”<sup>202</sup>. The CFP centralizes knowledge with regard to constitutional transitions worldwide.

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<sup>197</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*

<sup>198</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>199</sup> V. Y. Sripati, ‘UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989 – 2011’, *International Peacekeeping*, 19:1, p. 94.

<sup>200</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*, *op. cit.*, p. 202.

<sup>201</sup> ‘A More Secure World: Our Shared Responsibility’, Report of the High-level Panel on Threats, Challenges and Change, A/59/565 dd. 2 December 2004.

<sup>202</sup> See the [one-pager](#) presenting the CFP.

UNSC – The UNSC bears the primary responsibility for the maintenance of international peace and security<sup>203</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>204</sup>, of coping with armed conflicts or threats against international peace and security. This is the reason why the UNSC regularly supports and monitors DIG. The pacificatory function of DIG thus comes to overarch and overshadow the functions historically attributed to DIG (e.g. regime succession, resistance, preparation for independence)<sup>205</sup>.

COUNTRY MISSIONS – 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 “although each UN peacekeeping operation is different, there is a *considerable degree of consistency* in the types of mandated tasks assigned by the Security Council”<sup>206</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 requiring that the assisted country be reconstitutionalized. This task may also be associated to practices known under denominators such as peacebuilding<sup>207</sup>, rule of law assistance<sup>208</sup> or electoral reform<sup>209</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>210</sup>.

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<sup>203</sup> UN Charter, art. 24.

<sup>204</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>205</sup> Introduction, Section A.1.

<sup>206</sup> See the page on [‘Mandates and the legal basis for peacekeeping’](#). Emphasis added.

<sup>207</sup> The UN 2006 Peacebuilding Capacity Inventory includes constitutionmaking under the heading of governance and participation.

<sup>208</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 No. 3.2., 2012.

<sup>209</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>210</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, pp. 407-436. This list is an aggregation of the countries under international constitutional assistance mentioned in both articles.

This trend confirms that the UN, in particular the UNSC, continues to base its *legal-regulatory* approach to international peace and security on DIG. 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 sketched above, the renaissance of a state is nowadays 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>211</sup> within the UN.

## 1.2. 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 the African regional legal framework as developed after the decolonization process<sup>212</sup> (before that, the OAU often supported nonconstitutional transitions as a way of realizing self-determination<sup>213</sup>). Since its 2000 Constitutive Act, the AU has adopted a policy of condemning any unconstitutional change of government<sup>214</sup>. This policy indirectly favors DIG as it obliges any government or political organization coming into being on an unconstitutional basis to relinquish power; this 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, also with the aim of creating an institutional memory on transitions.

Furthermore, a number of subregional organizations have been encouraging and monitoring DIG. The Economic Community of Central African States (ECCAS) deeply impacted the transition in the CAR. 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>215</sup>. It was also involved in setting up the ‘National Transitional Council’ responsible for managing the transition in the CAR<sup>216</sup>. On the same continent, no one is in doubt that the Economic Community of West African

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<sup>211</sup> V. Y. Sripati, ‘UN Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory 1989 – 2011’, *op. cit.*, p. 93.

<sup>212</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>213</sup> A historical example whereby a regional organization 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’: “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>214</sup> The 2000 African Union Constitutive Act. Cf. 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>215</sup> ICG Report nr. 203, 11 June 2013, ‘Central African Republic: Priorities of the Transition’, p. 11.

<sup>216</sup> *Id.*

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.

### 1.3. Contact Groups: a new international coordination mechanism?

**INCREASED ROLE CONTACT GROUPS** – In spite of their adherence to the peace-through-transition paradigm, IOs are not always effective in monitoring DIG. In order to compensate ineffective global/regional leadership, states and IOs 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>217</sup> applies not only to forcible interventions but also, more subtly, to non-forcible interventions in state transformation processes. Contact groups are not without antecedents in history<sup>218</sup>, yet are relative newcomers<sup>219</sup>; the CIAT, for instance, was described as “a new form of an international coordination mechanism”<sup>220</sup>. Their number has sharply risen over the last two decades. This broadly coincides with the period during which DIG, too, has increased almost exponentially.

Contact groups were created to monitor DIG in Afghanistan, Burkina Faso, Burundi, CAR, DRC, Guinea, 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. The following table provides a tentative overview of recent contact groups, implementation committees, and, in addition, UN/regional missions.

**TABLE 1: Internationalized interregnum (focus on contact groups, implementation committees and UN missions)**

	UN missions / regional missions	contact groups, diplomatic coalitions, int’l conferences	implementation committees / follow-up
<b>Afghanistan</b>	UNAMA	Contact Group on Afghanistan and Pakistan	UN Special Representative “monitor and assist in the implementation” <sup>221</sup> of Bonn Agreement.

<sup>217</sup> D. Chandler, *Empire in Denial – The Politics of State-building*, *op. cit.*, p. 60.

<sup>218</sup> Cf. e.g. the crucial role of the Western Contact Group for the transition to independence of Namibia. The constitutional principles of Namibia’s 1990 constitution “had emerged from negotiations between the Western Contact Group, ‘front line’ states, the then Soviet Union and Namibian ‘discussants’”. IDEA, ‘Constitutionbuilding after Conflict: External Support to a Sovereign process’, *op. cit.*, p. 13.

<sup>219</sup> M. Saul, ‘From Haiti to Somalia’, *op. cit.*, p. 131: “particularly 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>220</sup> M. de Goede and C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions? The Case of the International Committee in Support of the Transition in the Democratic Republic of the Congo’, *African Security* 1, no. 2, 2008.

<sup>221</sup> Bonn Agreement, Annex II, art. 2.

<b>Burkina Faso</b>	Joint UN-AU-ECOWAS mission	International Contact Group for Burkina Faso <sup>222</sup> or ‘International follow-up and support group for the transition in Burkina Faso’ <sup>223</sup> .	Monitoring implementation transition by ECOWAS <sup>224</sup>
<b>Burundi</b>	ONUB	International Contact Group on Great Lakes. No country-specific contact group at the time of the 2000 Arusha Agreement.  In 2014, the creation of a contact group had been proposed by the US government, but was not materialized <sup>225</sup> .	Implementation Monitoring Committee <sup>226</sup>
<b>Cambodia</b>	UNTAC	Paris Conference on Cambodia <sup>227</sup>	Request for assistance in the implementation <sup>228</sup>
<b>Central African Republic</b>	MINUSCA, explicitly mandated with the “ <i>support for the implementation of the transition process</i> ” <sup>229</sup> .	International Contact Group on the Central African Republic or ‘ICG-CAR’	MINUSCA
<b>Comoros</b>		No contact group at the time of the 1999 Accords d'Antananarivo.	<i>Comité de suivi présidé par l'OUA et composé des Parties comoriennes signataires du présent Accord et des observateurs officiels</i> <sup>230</sup>
<b>Côte d'Ivoire</b>	UNOCI	Conference of Heads of State on Côte d'Ivoire <sup>231</sup>	Comité d'évaluation et d'accompagnement (CEA) <sup>232</sup>  Monitoring Committee <sup>233</sup> .
<b>DRC</b>	MONUC	CIAT ( <i>Comité international d'accompagnement de la transition</i> )	‘International committee to guarantee the Proper implementation of this Agreement and to support the program for transition in the DRC’ <sup>234</sup> / Committee for Follow-up of the Agreement <sup>235</sup> .

<sup>222</sup> [Set up by UN, AU and ECOWAS](#). Composition: Senegal, Ghana, Togo.

<sup>223</sup> Cf. Conclusions dd. 30 March 2015 of the international follow-up and support group for the transition in Burkina Faso.

<sup>224</sup> Cf. ‘[ECOWAS to monitor implementation of one-year transition in Burkina Faso](#)’, News Agency of Nigeria, 6 November 2014.

<sup>225</sup> See the declassified document dd. 18 March 2014 on the ‘[Elements of a regional solution to the crisis in Burundi](#)’.

<sup>226</sup> Arusha Agreement, Protocol V. The Implementation Monitoring Committee is also composed of representatives of the UN and the (then) OAU.

<sup>227</sup> 1991 Paris Accords, Preamble: Australia, Brunei Darussalam, Cambodia, Canada, the People's Republic of China, the French Republic, the Republic of India, the Republic of Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the Socialist Republic of Viet Nam and the Socialist Federal Republic of Yugoslavia.

<sup>228</sup> Paris Agreement, art. 26: “[t]he Signatories request other States, international organizations and other bodies to cooperate and assist in the implementation of this Agreement and in the fulfillment by UNTAC of its mandate”.

<sup>229</sup> UNSC/RES/2149 dd. 10 April 2014.

<sup>230</sup> Accords d'Antananarivo, art. 4.

<sup>231</sup> S/2003/99 dd. 27 January 2003, Annex II, § 6.

<sup>232</sup> *Accord Politique de Ouagadougou*, art. 7.2.

<sup>233</sup> Linas-Marcoussis Accord dd. 13 January 2003, art. 4.

<sup>234</sup> Pretoria Agreement, Annex IV.

<sup>235</sup> Pretoria Agreement, Annex III.

<b>Guinea</b>	/	International Contact Group on Guinea <sup>236</sup>	The signatories of the 2010 Ouagadougou declaration “insistently invited the international community to provide political, financial and technical assistance for [its] enforcement” <sup>237</sup> .
<b>Guinea-Bissau</b>	UNIOGBIS	the reactivation of the International Contact Group on Guinea Bissau (10th meeting held on 18 November 2014)	No specific provision regarding the implementation of the 2012 Pacto de Transição Política.
<b>Iraq</b>	UNAMI	The creation of a contact group would have been proposed <sup>238</sup> , but to my knowledge never materialized.	2004 Law of Administration for the State of Iraq for the Transitional Period provides for a possible consultation with the UN for implementing the first phase of the transition.
<b>Kyrgyzstan</b>	/	No country-specific contact group.	No specific international implementation mechanism.
<b>Liberia</b>	UNMIL	International Contact Group on the Mano River Basin (ICG-MRB) <sup>239</sup>	Implementation Monitoring Committee / Joint Monitoring Committee (JMC) established under the terms of the Ceasefire Agreement, and composed of representatives of ECOWAS, the UN, AU, ICGL and Parties to the Ceasefire Agreement <sup>240</sup> .
<b>Libya</b>	UNSMIL	International Contact Group for Libya	/
<b>Mali</b>	MINUSMA	Support and Follow-Up Group in Mali	Support and Follow-Up Group in Mali
<b>Nepal</b>	UNMIN	No country-specific contact group.	Monitoring of HR-related provisions by United Nations Office of the High Commissioner Human Rights, Nepal <sup>241</sup> .
<b>Rwanda</b>	UNAMIR	International Contact Group on Great Lakes. To my knowledge, no country-specific contact group at the time of the 1993 Arusha Agreement.	No specific implementation mechanism.
<b>Sierra Leone</b>	UNAMSIL	International Contact Group on the Mano River Basin (ICG-MRB) <sup>242</sup>	Joint Implementation Committee <sup>243</sup> and call for international support: “call on the International Community to assist them in implementing the present Agreement” <sup>244</sup> .
<b>Somalia</b>	UNOSOM	International Contact Group on Somalia <sup>245</sup>	Follow-up by ICG-S, and by High Level Meeting on Somalia <sup>246</sup> .

<sup>236</sup> Cf. e.g. S/2009/140 dd. 12 March 2009.

<sup>237</sup> 2010 Ouagadougou Declaration, art. 11.

<sup>238</sup> K. Katzman, ‘Iraq: Post-Saddam Governance and Security’ in S. J. Costel (ed.), *Surging out of Iraq?*, Nova Science Publishers, New York, 2007, p. 101.

<sup>239</sup> Cf. e.g. the [conclusions of the International Contact Group on the Mano River Basin](#) dd. 21 March 2005.

<sup>240</sup> CPA, art. III.3 2003 CPA. Cf. also art. IV.1.

<sup>241</sup> 2007 Interim Constitution, art. 9.1.

<sup>242</sup> Cf. e.g. the Secretary-General's message to the 12th session of the International Contact Group on the Mano River Basin, *op. cit.*

<sup>243</sup> 1999 Lomé Agreement, Part VI.

<sup>244</sup> 1999 Lomé Agreement, art. XXXV. Composition: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Liberia, Libyan Arab Jamahiriya, Mali, Nigeria, Togo, the United Kingdom and the United States of America, the UN, the OAU, ECOWAS and the Commonwealth of Nations.

<sup>245</sup> A description, including the composition, can be found on [Oceans Beyond Piracy](#).

<b>South Africa</b>	/	/	/
<b>Syria</b>	UNSMIS (abandoned)	Group of Friends of the Syrian People	/
<b>Sudan</b>	UNMIS	Sudan Contact Group (2009) <sup>247</sup>	See Implementation Agreements to the CPA <sup>248</sup> and annexure II to CPA which <i>inter alia</i> sets up a Constitutional Task Team. Follow-up by IGAD.
<b>Tajikistan</b>	UNMOT	Contact Group <sup>249</sup>	See Protocol on the guarantees of implementation of the General Agreement on the Establishment of Peace and National Accord in Tajikistan, signed at Tehran on 28 May 1997 <sup>250</sup> .
<b>Ukraine</b>	/	Weimar Triangle / New contact group is being established (Ukraine, Russia, OSCE) <sup>251</sup>	Supervision and monitoring of Minsk Agreement by OSCE <sup>252</sup> .
<b>Yemen</b>	/ [UN Envoy to Yemen]	Friends of Yemen Group	UNSG, Secretary-General of GCC, members of GCC, permanent members of the United Nations Security Council, the European Union and the League of Arab States are called on to support implementation of the GCC Agreement <sup>253</sup> .

CONTACT GROUPS (DEFINITION & COMPOSITION) – As temporary coalitions<sup>254</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>255</sup> to “ad hoc group[s] of senior diplomats and/or foreign ministers established to *coordinate the policy of a coalition*”<sup>256</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>257</sup>. Contact groups

<sup>246</sup> Cf. [Chairman’s Summary of High Level Meeting on Somalia](#) dd. 23 September 2011.

<sup>247</sup> In 2007 this contact group was only crystallizing. See ICG, ‘A Strategy for Comprehensive Peace in Sudan’, Africa Report N° 130, 26 July 2007, pp. I and 10. Composition: “U.S., EU, Arab League, Libya, Chad, Eritrea, Egypt and other donor countries who participated in the Tripoli and Paris meetings”.

<sup>248</sup> For instance the Agreement Between the Government of the Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/SPLA) on Implementation Modalities of the Protocols and Agreements’ dd. 31 December 2004.

<sup>249</sup> Composition: OSCE, Europe, Russia, Kyrgyzstan, Kazakhstan, Iran, Afghanistan and Uzbekistan. Cf. [‘Contact group calls for support for Tajikistan peace process’](#), Agence France-Presse, 1 May 1999.

<sup>250</sup> [Protocol on the guarantees of implementation of the General Agreement on the Establishment of Peace and National Accord in Tajikistan](#), Tehran, 28 May 1997.

<sup>251</sup> [‘New round of peace talks on Ukraine to be held soon: Kiev’](#), Reuters, 14 January 2015..

<sup>252</sup> Minsk Agreement, artt. 3 & 10.

<sup>253</sup> 2011 GCC Agreement, artt. 28-30.

<sup>254</sup> P. Dibb, ‘The future of international coalitions: How useful? How manageable?’, *The Washington Quarterly*, 25:2, 2002. pp. 129-144.

<sup>255</sup> G. R. Berridge, A. James, L. Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy*, Palgrave Macmillan, 2012. Own emphasis.

<sup>256</sup> *Ibid.* Own emphasis.

<sup>257</sup> T. Whitfield, [‘Working with Groups of Friends’](#), United States Institute of Peace, Washington, D.C., p. 33.

are generally composed of several representatives of states and IOs, including the UN<sup>258</sup>. Regional organizations like the AU, ECCAS, ECOWAS and the EU are also regularly part of these groups.

**FUNCTIONS OF CONTACT GROUPS** – Various functions have been ascribed to contact groups. These include preventing nonconstitutional changes of government<sup>259</sup>, preparing and monitoring transition procedures, negotiating constitutions<sup>260</sup>, implementing peace processes<sup>261</sup>, and the classical mediation between warring parties<sup>262</sup>. All of these functions are relevant for transitions. Contact groups may have regulatory powers as they often exercise financial leverage<sup>263</sup> or apply accountability/monitoring mechanisms<sup>264</sup>. They may be deployed to support initiatives by the UNSG<sup>265</sup>. For the UNSG, contact groups are powerful, indispensable global actors, and can “act as a multiplier of diplomatic efforts, bringing collective influence, resources and expertise to bear”<sup>266</sup>.

**PERCEIVED POSITIVE ROLE CONTACT GROUPS** – Collaboration with contact groups is generally seen in a positive light. For de Goede and van den Borgh, “coordination, in the form of friends groups or a lead role by specific actors, has in past cases *proved to have a positive effect* on the

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<sup>258</sup> This Chapter does not deal with the question how the participation of the UN in policy-oriented contact groups should be legally assessed. There is no doubt that the UN must respect the principle of non-intervention in domestic affairs (UN Charter, art. 2 § 7). For B. Conforti, this principle is more stringent for IOs. See B. Conforti, ‘The Principle of Non-Intervention’ in M. Bedjaoui, *International Law: Achievements and Prospects*, UNESCO and Martinus Nijhoff, Paris and Dordrecht, 1991.

<sup>259</sup> Vandeginste seems to suggest that ‘contact groups’ are used as a diplomatic tool by the AU to prevent unconstitutional changes of government. Cf. S. Vandeginste, ‘The African Union, Constitutionalism, and Power-Sharing’, Working Paper 2011.05, p. 12. Cf., in the same sense, the 2010 [Report of the chairperson of the Commission on the prevention of unconstitutional changes of government and strengthening the capacities of the AU to manage such situations](#), § 28.iii.

<sup>260</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, Max Planck UNYB 10, 2006, p. 430: “in Sudan, the process took the form of peace negotiations that were mediated by a regional organization and a group of states”.

<sup>261</sup> T. Whitfield, ‘Working with Groups of Friends’, *op. cit.*

<sup>262</sup> D. Chandler, *Empire in Denial*, *op. cit.*, p. 57: “the export of democracy has gone hand-in-hand with greater regulatory controls by international institutions or regulation by *ad-hoc* groups of self-selecting coalitions of the willing”.

<sup>263</sup> With regard to financial oversight exercised by the International Contact Group on Afghanistan, cf. e.g. the following excerpt: “[r]egarding oversight of Afghanistan’s transitional funds and procedures, Mr. Dobbins said the Contact Group was satisfied that the proper procedural steps were being followed”, Press Conference on Meeting of International Contact Group, 20 September 2013.

<sup>264</sup> In the case of Afghanistan, for example, the members of the International Contact Group on Afghanistan, together with the Afghani government decided to “establish a follow-up mechanism to review their mutual long-term commitments laid out in this Declaration and the Tokyo Framework, and to verify the fulfillment of these commitments based on the notion of mutual accountability”. Cf. Conclusions of the Tokyo conference on Afghanistan dd. 8 July 2012, § 25. Cf. also, Annex on the Tokyo Mutual Accountability Framework dd. 8 July 2012. The members of the International Contact Group on Afghanistan have recently agreed that the Tokyo Mutual Accountability Framework “continue[s] to serve as a reference for relations between donors and a new Afghan Government”, Chairman Statement’s International Contact Group Meeting, New Delhi, 16 January 2014, § 4.

<sup>265</sup> M. W. Doyle, N. Sambanis, *Making War and Building Peace*, *op. cit.*, p. 305: “[c]omposed of *ad hoc*, informal, multilateral diplomatic mechanisms that join together states in support of initiatives of the Secretary-General, it legitimates with the stamp of UN approval the pressures interested states can bring to bear the to further the purposes of peace and the UN”.

<sup>266</sup> UNSG report S/2011/552 dd. 26 August 2011. Emphasis added.

implementation of peace agreements”<sup>267</sup>. According to the UN Guidance for Effective Mediation, “groups of friends and international contact groups, when aligned with the goals of the mediation effort, will often be helpful”<sup>268</sup>.

**PERCEIVED POSITIVE ROLE CONTACT GROUPS (ILLUSTRATIONS)** – In countries like (i) the CAR, (ii) Yemen, (iii) the DRC and (iv) Afghanistan (in reverse chronological order), the role of contact groups for DIG was generally commended by diverse commentators. However, as shall be discussed below, this praise needs to be critically assessed.

(1) **CONTACT GROUP FOR THE CAR** – About one year following a recommendation by the PBC in April 2013<sup>269</sup>, the UNSC recommended to set up a contact group in the CAR in order to accompany the transition<sup>270</sup>. At the time of writing, the International Contact Group on the CAR convened at least six times, and continues to monitor the (extended) transition.

(2) **CONTACT GROUP FOR YEMEN** – 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>271</sup>.

(3) **CONTACT GROUP FOR THE DRC** – The CIAT has been described as playing “an essential role in the extremely complex transition process”<sup>272</sup>, “an important role in reducing the opportunities for the unruly transitional government to manipulate the peace process”<sup>273</sup>. This contact group was successful in keeping the transition on the rails. The UNSG called for “sustained dialogue between the CIAT and the Transitional Institutions”<sup>274</sup>, which may even have prevented the peace agreement and the whole transition procedure from collapsing<sup>275</sup>. The CIAT was “widely credited as a beneficial and needed force to maintain progress”<sup>276</sup>.

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<sup>267</sup> M. de Goede and C. van der Borgh, 'A Role for Diplomats in Postwar Transitions?', *op. cit.* Emphasis added.

<sup>268</sup> [2012 UN Guidance for Effective Mediation](#), 2012, p. 18.

<sup>269</sup> ‘Meeting of the CAR configuration of the Peacebuilding Commission’, 17 April 2013, § 5: “the creation of a contact group, or a group of friends of CAR under the auspices of the PBC, could have made a difference while also providing a bridge to the Security Council and other regional actors”.

<sup>270</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>271</sup> S/PRST/2012/8 dd. 29 March 2012.

<sup>272</sup> M. de Goede and C. van der Borgh, 'A Role for Diplomats in Postwar Transitions?', *op. cit.*, p. 115.

<sup>273</sup> *Id.*

<sup>274</sup> ‘Statement on the launch of the Joint Verification Mechanism to address DRC-Rwanda border security issues’ dd. 22 September 2004.

<sup>275</sup> *Id.*, p. 126.

<sup>276</sup> [Cable signed by Amb. Roger Meece](#) dd. 5 November 2004, available on Wikileaks.

(4) CONTACT GROUP FOR AFGHANISTAN – With regard to the transition in Afghanistan, 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”<sup>277</sup>.

CONTACT GROUPS, AGENTS OF THE INT’L COMMUNITY? – These acts of support for contact groups should not obscure the fact that, especially in recent times, such groups assume the role of partial *policy coordinators* rather than impartial *conflict mediators*. It is inaccurate, even misleading, to portray contact groups unqualifiedly as agents or representatives of the international community<sup>278</sup>, a term which “has an important political function in generating legitimacy for those who act in its name”<sup>279</sup> but which *in se* is not uncontroverted, as shall be emphasized below<sup>280</sup>. Contact groups are mostly “self-selecting”<sup>281</sup> or “self-serving”<sup>282</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 parties”<sup>283</sup>. It is arguably in this sense that contact groups, with the strong presence or much-remarked absence of some powers, have supported oppositional transitional authorities in Libya and Syria<sup>284</sup>, as we shall see under Chapter 9.

POLITICAL POWER OF CONTACT GROUPS – At the implementation stage of the interregnum, designated committees, linked to contact groups, are often mandated to monitor compliance with the transition procedure. CIAT was for instance given an explicit mediation role during the transition process: it “was mandated by the peace agreements and even given a formal role in the interim constitution of 2005”<sup>285</sup>, a practice recommended by Papagianni<sup>286</sup>. But contact groups often intervene at an earlier stage, even before the interregnum formally starts. As powerful policy coordinators, they can potentially catalyze constitutional and/or regime change in conflict-striven countries<sup>287</sup>, often without being mandated to do so.

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<sup>277</sup> Conference Conclusions ‘Afghanistan and the international community: from transition to the transformation decade’, *op. cit.*, p. 4.

<sup>278</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”. Cf. M. de Goede and C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *op. cit.* Admittedly, as seen above CIAT had a double legitimacy, which makes its representation as the embodiment of the international community less problematic.

<sup>279</sup> B. Buzan and A. Gonzalez-Pelaez, ‘International Community’ after Iraq’, *International Affairs* 81, no. 1, January 1, 2005, p. 31.

<sup>280</sup> Part I, Conclusion.

<sup>281</sup> T. Whitfield, ‘Working with Groups of Friends’, *op. cit.*, p. 6, p. 26.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*, p. 37.

<sup>284</sup> G. R. Berridge, A. James, and L. Lloyd, *The Palgrave Macmillan Dictionary of Diplomacy*, *op. cit.*

<sup>285</sup> *Id.*, p. 119.

<sup>286</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, Centre for Humanitarian Dialogue, OSLO Forum 2008, p. 47: “[i]t may also be helpful to include specific mechanisms in peace agreements that can trigger the involvement of third parties in the transitional process when the transition is faced with particularly tough obstacles”.

<sup>287</sup> For a critique, see M. D. Nazemroaya, ‘[With ‘Friends’ like these...: America’s ‘Contact Group Industry’ is Overthrowing Governments](#)’, *Russia Today*, 27 August 2012.

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>288</sup>. Their early involvement can permeate the whole transition. 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 when there are no boots on the ground<sup>289</sup>. By triggering or endorsing constitutional and/or regime change, contact groups thus “risk replicating the conflict dynamics”<sup>290</sup> in the realm of DIG, and beyond that. As shall be discussed under Part IV, such acts can leave a permanent imprint on the state order of a country, during and beyond the interregnum.

#### 1.4. Individual states

Within the wide array of actors professing the peace-through-transition paradigm and impacting DIG, individual states must also be mentioned. Examples are legion. Among other countries, the US has developed a bilateral assistance-to-transition policy<sup>291</sup>, and has tried to bear on the reconstitutionalization of South Sudan, Sri Lanka and Ukraine, among other countries. Thus, not long after civil war erupted in South Sudan, its overall constitutional structure was reconsidered. 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>292</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>293</sup>. In Ukraine, the transition was (allegedly) influenced not only by the US<sup>294</sup> but also by the so-called Weimar Triangle (composed of Poland, Germany and France), which unsuccessfully brokered an agreement calling for a national unity government<sup>295</sup>. After President Yanukovich’s nonconstitutional ouster<sup>296</sup>, the Yatsenyuk interim government

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<sup>288</sup> Press statement dd. 13 October 2009, only available [en cache](#).

<sup>289</sup> In some cases, the involvement by contact groups is paired with forcible intervention though. Cf. the NATO interventions in Libya (2011) and Yugoslavia (1999). Regarding the latter, see I. Brownlie and C. J. Apperley, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’, *The International and Comparative Law Quarterly*, Vol. 49, No. 4, 2000, pp. 878-905, §§ 82 a.f., cf. also § 7: “a major justification for the threat of force (in the first instance) and the aerial bombardment (subsequently, to fulfill the threats of force) was to induce Yugoslavia to accept the ‘demands’ of the Contact Group”, these demands referring to the peace talks at Rambouillet.

<sup>290</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 19.

<sup>291</sup> [US National Security Strategy](#), February 2015. Cf. the section about ‘Supporting Emerging Democracies’ (pp. 20-21). Cf. also policies and programs of the European Endowment for Democracy.

<sup>292</sup> [‘Security Council concludes South Sudan visit’](#), UNMISS press release, 13 August 2014.

<sup>293</sup> [‘US security adviser Rice pledges help for Sri Lanka ‘transition’](#), Reuters, 7 February 2015.

<sup>294</sup> Obama told that Washington “had brokered a deal to transition power in Ukraine”, [CNN interview](#), 1 February 2015.

<sup>295</sup> [Agreement on the Settlement of Crisis in Ukraine](#) dd. 21 February 2014.

<sup>296</sup> Even those who defend the Ukrainian revolution write that “there were no constitutional grounds for shortening the presidential term”. Cf. [‘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 [‘Russia in Ukraine: A Reader Responds’](#), Lawfareblog, 5 March 2014, a post in which A. Deeks argues that “Yanukovich is still the incumbent and legitimate President of the Ukraine”.

received financial support from the EU<sup>297</sup>, Canada<sup>298</sup>, and the US<sup>299</sup>. After Crimea seceded, Russia, too, raised her voice about how Ukraine's constitutional structure should be reconfigured<sup>300</sup>.

Examples on the African continent or in the Middle East also abound. In 2012, already, the UNSG called on UNSC members, and all countries with influence in Syria, to exert joint pressure for a transition to a legitimate government<sup>301</sup>. In 2014, “the presidents of Ghana, Nigeria and Senegal urged Burkina Faso to appoint a transitional government”<sup>302</sup>. In 2015, Iran pushed for a unity government to initiate a transition in Yemen<sup>303</sup>. These examples testify to the fact that, in our day and age, individual states increasingly (purport to) bear upon DIG in other countries. The constitutional structure of states, now more than ever, has become a matter of international interest or even *convoitise*.

## 2. Deconstructing the Assistance Model

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The assistance by international to domestic actors on the occasion of regime change trajectories has been referred to as the *assistance model*<sup>304</sup>. The more the external impact on DIG increases, the less the assistance model is compatible with the light footprint philosophy. We have seen that DIG is influenced by the UN peacebuilding architecture, the UNSC and its country missions, regional organizations, contact groups & implementation committees, and individual states. This subsection observes that these actors may act concurrently (2.1) and may go beyond offering mere assistance (2.2), with the result that so-called assistance to DIG vacillates between multilateral state transformation and unilateral constitutional geopolitics (2.3).

### 2.1. Concurring assistance

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. How transitions are influenced is a factor to be taken into account in the legal analysis of DIG<sup>305</sup>. The multitude of actors concurrently influencing DIG is palpable in Afghanistan and Nepal, for instance. In Afghanistan, there were at least ‘six communicative circles of empire’ during the interregnum

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<sup>297</sup> [‘EU offers Ukraine \\$15 billion, but help hinges on IMF deal’](#), Reuters, 5 March 2014.

<sup>298</sup> ‘Ukraine to get \$220M in financial support from Canada’, CBC News, 13 March 2014.

<sup>299</sup> White House fact sheet: [‘International Support for Ukraine’](#) dd. 4 March 2014.

<sup>300</sup> See, for example, [‘Russia says it wants east Ukraine to stay with Kiev under reformed constitution’](#), Constitutionnet, 16 December 2014. Also, reportedly Obama told CNN's Zakaria that Washington “had brokered a deal to transition power in Ukraine” following on the heels of the deadly “protests on Maidan and Yanukovich then fleeing”. See [‘Obama openly admits ‘brokering power transition’ in Ukraine’](#), 1 February 2015.

<sup>301</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 369.

<sup>302</sup> ‘Thousands gather in Burkina Faso to denounce ‘military coup’’, The Guardian, 2 November 2014.

<sup>303</sup> Iran says working to help Yemen form unity government to fix crisis, Reuters, 8 April 2015.

<sup>304</sup> A label borrowed from Saul. Cf. M. Saul, ‘From Haiti to Somalia’, *op. cit.*

<sup>305</sup> Chapter 8, Section A.1.

(2001-2004), including the interim government and three ‘international community actors’ (the ‘six-plus-two group’, the UN mission and the UNSC)<sup>306</sup>. In Nepal,

“while 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>307</sup>.

**CONCOURSE DOMESTIC & EXTERNAL INFLUENCE ON DIG** – This is not to deny that regime trajectories can undergo strong domestic influences. Köhler argues that, in the context of the Arab Spring, regime trajectories were much influenced by domestic military elites or defectors from the military<sup>308</sup>. Yet, such domestic influences, in this and other contexts, form only one (far from negligible) part of the picture.

To depict situations in which external influence is strong, some authors developed notions like ‘co-sovereignty’ and ‘shared sovereignty’<sup>309</sup>, or even ‘suspension of sovereignty’, which have been dismissed as awkward by other authors<sup>310</sup>. From a legal perspective, distinctions made in scholarship between ‘empirical’ and ‘juridical’ sovereignty are also irrelevant in this regard<sup>311</sup>.

## 2.2. Beyond assistance

Assistance to DIG is often represented as a service. This is also what a UNSG report emphasized in relation to mediation: “it is a *service* that the organization offers and [...], rather than representing outside interference, it is, instead, a form of *professional assistance*”<sup>312</sup>. But UN assistance or, more generally, outside assistance in the context of DIG easily evolves into something more than that. It often fills a governance gap –frequently ascribed to the failure of

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<sup>306</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*, OUP, 2012, pp. 291 – 299.

<sup>307</sup> S. von Einsiedel, D. M. Malone, and S. Pradhan, eds., *Nepal in Transition: From People’s War to Fragile Peace*, CUP, New York, 2012.

<sup>308</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>309</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 for an indefinite period of time” (p. 108).

<sup>310</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>311</sup> J. Moses, *Sovereignty and Responsibility – Power, Norms and Intervention in International Relations*, *op. cit.*, pp. 22-23, with reference to R. Jackson, *Quasi-States: Sovereignty, International relations and the Third World*, CUP.

<sup>312</sup> S/2009/189 dd. 8 April 2009, ‘Report of the Secretary-General on enhancing mediation and its support activities’, § 20.

a state<sup>313</sup> – of such nature that, notwithstanding the *nominal* ownership by transitional authorities, international actors perform “quasi-governmental functions in war-shattered states, or [...] ‘proxy governance’”<sup>314</sup>. The following examples illustrate this. The external impact on DIG was particularly strong in Burundi and the DRC:

“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 in each country”<sup>315</sup>.

In the DRC, especially, the CIAT exercised enormous leverage during the transition, we observed above<sup>316</sup>. Indicative of the CIAT’s influence is the fact that J.-P. Bemba had written to the CIAT “asking for [its] intervention to resolve the political impasse over allocation of the state companies’ senior positions”<sup>317</sup>. This is only one example indicating that, as evidenced in various diplomatic cables, the CIAT was involved in virtually all aspects of the DRC state reconstruction<sup>318</sup>.

BEYOND ‘ASSISTANCE’ TO DIG (CAR & SOUTH SUDAN) – In the case of CAR, too, the external impact on DIG was enormous, we saw above<sup>319</sup>. The potential influence of states and/or IOs and/or contact groups over DIG may materialize in South Sudan, too<sup>320</sup>. Following the independence of the latter country in 2011, and even more so after the start of the civil war following the split within the ruling Sudan People’s Liberation Movement (December 2013), a debate took place regarding the overall constitutional structure of this country. During the Summer of 2014, this structure was discussed on the basis of a ‘position paper’ proposing the creation of a (new) transitional government<sup>321</sup>. During a meeting of the UNSC on 13 August 2014, the US ambassador reportedly “reiterated the need for both leaders [of the civil war] to put together a transitional authority”<sup>322</sup>, which, again, is indicative of the keen interest the international community shows for DIG.

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<sup>313</sup> For a short but trenchant critique of the notion of ‘failed states’, see R. Wilde, ‘The skewed responsibility narrative of the ‘failed states’ concept’, *op. cit.*.

<sup>314</sup> R. Paris, ‘International Peacebuilding and the Mission Civilatrice’, *Review of International Studies* 28, n. 4, 2002, p. 645.

<sup>315</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.

<sup>316</sup> Chapter 1, Section A.2.3.1.

<sup>317</sup> [Cable signed by Amb. Roger Meece](#) dd. 30 November 2004, available on Wikileaks.

<sup>318</sup> [Cable signed by Amb. Roger Meece](#) dd. 5 November 2004.

<sup>319</sup> Chapter 1, Section B.1.2.

<sup>320</sup> ‘US security adviser Rice pledges help for Sri Lanka ‘transition’, Reuters, 7 February 2015, *op. cit.*, mentioning also other countries ‘in transition’ the US would like to assist.

<sup>321</sup> The ‘Position Paper’ dd. 17 July 2014 is available on [‘Commentary: The First Six Months of Transition in Post-Independent South Sudan’](#), The New Sudan Vision, 15 February 2012.

<sup>322</sup> [‘Security Council concludes South Sudan visit’](#), UNMISS press release, 13 August 2014.

BEYOND 'ASSISTANCE' TO DIG (ARAB SPRING) – The same trend was observed on 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. Perhaps inspired by the expectation of a revival of the 'democratic transition paradigm', public reports and press articles portrayed these 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 constitutionbuilding role in their respective countries.

### 2.3. Vacillating between multilateral state transformation and unilateral constitutional geopolitics

LACK OF INT'L COMMUNITY – Several strata of the 'international community' have an interest in promoting and offering assistance to DIG. The peace-through-transition paradigm and discourse has significantly reinforced the international relevance of DIG. It pretends to entrust DIG with a pacificatory function. Although it is unrelated to decolonization, secession or dissolution processes, DIG is a matter of international concern, and therefore has become extremely susceptible to external influences. The 'international community' continues to portray the installation and/or monitoring of transitional institutions as a panacea. Several actors rely on the peace-through-transition paradigm in order to justify their involvement with DIG, often presenting themselves as heralds of the 'international community'.

In spite of the appearances conveyed by said paradigm, peace through transition is not a shared goal pursued by a homogeneous 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>323</sup>. For lack of homogeneity, shared vision and shared responsibility, today's pluralist international society can hardly be called a community<sup>324</sup>. This reservation about the nature of the so-called international community is valid for the remainder of this study, and should be borne in mind whenever the terms

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<sup>323</sup> R.-J. Dupuy, Leçon inaugurale faite le Vendredi 22 Février 1980, *op. cit.*: “[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 majeur 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).

<sup>324</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.

international community will *–nolens volens–* be used. Perhaps “an international community of liberal states has formed *within* the wider, politically pluralist international society”, as Buchan argues<sup>325</sup>. Yet, the stated practices and preferences of a limited international community within a larger international society cannot (putting the issue of regional custom aside) constitute a reliable source for analyzing DIG under international law generally.

TELEOLOGY OF ASSISTANCE TO DIG? – In sum, one cannot assume that international actors are animated by the same reasons when they refer to the peace-through-transition paradigm. From an optimistic perspective, IOs such as the UN and the AU offer their assistance 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 a different perspective, the UN and regional organizations promote DIG to ‘get rid’ of their responsibilities by placing this burden on DIG; and contact groups and individual states would do so for strategic interests, i.e. would influence the constitutional structure of a country to bolster ties with countries or to counterbalance the geopolitical ambitions of peers. The circumstances of each case dictate a different perspective. The internationalization of DIG thus vacillates between *bona fide* multilateral state transformation and interest-based unilateral constitutional (proxy) politics. It is against this tension that this dissertation analyzes whether and how international law applies to DIG after observing, in the next chapter, that the current literature does not provide sufficient yardsticks to undertake this enterprise.

## Summary of Chapter 1

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State creation has passed its zenith, and ITA is too costly and has been criticized on normative grounds. As a result, the recourse to DIG is flourishing. Besides this historic-economic context, some might argue that DIG is also preferable on legal grounds for three reasons. First, given its domestic nature, DIG –even if it results from external influence– would naturally respect the exigencies posed by the principles of state sovereignty and self-determination. Second, given its detachment from belligerent occupation (if there is any), DIG would not be restricted by the order-preserving legal instruments traditionally applicable in times of occupation; consequently, domestic and external actors could instrumentalize DIG to push for their own agenda. Third, even when external actors leave their imprint on DIG, the responsibility for DIG would always be borne by domestic actors. This chapter explained that, if such were the rationales invoked to justify the proliferation of and recourse to DIG, they would be rather superficial and unconvincing. The piercing of this superficiality should incentivize a more nuanced analysis of DIG.

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<sup>325</sup> R. Buchan, *International Law and the Construction of the Liberal Peace*, Hart Publishing, 2013, p. 5.

State transformations are subject to internal and external influences in many fields. This thesis concentrates on a field going to the core of a state's business: its regime transformation and its reconstitutionalization through DIG. DIG has become the center of attention in geopolitics, which is not unrelated to its becoming the center piece of the international security system<sup>326</sup>. The UN and regional organizations as well as diplomatic coalitions and individual states are increasingly involved with DIG. In public discourse, this involvement is often associated with the peace-through-transition paradigm and with the assistance model. Such associations barely conceal the fact that other goals than international peace and security – namely constitutional geopolitics– may be pursued when actors assist DIG; and that the assistance model is often overstretched. The internationalization of DIG thus vacillates between multilateral state transformation and unilateral constitutional geopolitics. This leads us to the question how to take a nuanced approach to DIG under international law. In the following chapter, we shall explore the limits of the existing fields and concepts of international law in analyzing DIG.

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<sup>326</sup> E. De Groof, 'Domestic interim governance: the new center piece of the international collective security system', *op. cit.*



## CHAPTER 2. LIMITATIONS OF EXISTING LITERATURE

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This chapter examines the limitations of existing fields or concepts of international law to analyze modern DIG. Two fields of scholarship that seem particularly relevant for the study of DIG are transitional justice and *ius post bellum*, as these fields address the question how law and justice are applied in post-conflict –and often transitional– settings (Section A). Further, the concepts of ‘legitimacy’ and ‘democracy’ –both peculiar to the so-called transition paradigm– are often related to DIG, and therefore should be addressed, too (Section B).

An examination of these fields and concepts of international law is an indispensable step in the reasoning leading to the following conclusion of Part I: in light of the proliferation and internationalization of DIG, DIG deserves to be an object of study in its own right. A number of concepts or fields –like transitional justice, *ius post bellum*, legitimacy, and democracy– however relevant they may seem for the analysis of DIG, are of little avail for our enquiry. As a result, the analysis of DIG must be carried out anew under general international law.

### Section A. Limitations inherent to transitional justice and *ius post bellum* literature

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Neither the field of transitional justice (1) nor the doctrine of *ius post bellum* (2) can be used to detect how international law applies to DIG.

#### 1. Limitations to transitional justice literature

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**DEFINITION TJ** – Transitional justice (‘TJ’) is commonly understood as the “field of international law which is concerned with the question how to confront a situation of past large-scale human rights violations and humanitarian abuses in a period of transition to peace and democracy”<sup>327</sup>. The field of TJ studies how a post-conflict society can come to terms with its own past, through retributive and/or restorative justice mechanisms, and how it can achieve national reconciliation.

**CORRELATION TJ & DIG** – TJ is systematically applied or at least considered in the context of institutional/constitutional transformations within countries, we shall see under Chapter 6. One could argue that such transformations form the *conditio sine qua non* for TJ mechanisms to see the light, or at least that the effectiveness of TJ increases when such transformations take place<sup>328</sup>. This is why, at a UNSC roundtable on post-conflict national reconciliation, a delegation observed that “effective post-conflict reconciliation requires us to address [...]”

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<sup>327</sup> A. Seibert-Fohr, ‘Transitional Justice in Post-Conflict Situations’, MPEPIL.

<sup>328</sup> It is in this sense that it was observed during a UNSC roundtable on post-conflict national reconciliation, that “[e]ffective peace and reconciliation processes require effective social and administrative structures” and that “[e]ffective post-conflict reconciliation requires us to address [not only] institution-building”. See S/PV.4903 dd. 26 January 2004, pp. 9-10.

institution-building”<sup>329</sup>. There is undoubtedly a correlation between TJ and state transformation.

**TJ & DIG: DIFFERENT DOCTRINAL ORIGIN** – While, in certain respects, DIG and TJ are twin phenomena, this thesis opts for taking *general* public international law as the point of departure for analyzing DIG. The reason for this choice is that a number of weaknesses inherent to the TJ literature would contaminate, so to speak, the study of DIG if a TJ perspective were privileged. These weaknesses relate to the scope as well as to the normative underpinnings of TJ, and can be summarized by formulating a dilemma, in the following way. At least initially (1970-1990) the general emphasis in TJ literature was on questions relating to TJ *sensu stricto*. The focus was on the role of amnesty and truth and reconciliation commissions in post-conflict societies to ‘digest’ the past, that is to cope with situations of past large-scale human rights violations and humanitarian abuses, in short to ensure a form of *Vergangenheitsbewältigung*, to use an accurate German term. Considering this particular emphasis and the traditional focus of TJ on human rights violations (human rights law being considered the mother discipline of TJ), the tendency towards *droits-de-l’homme* (i.e. the “*état d’esprit des militants des droits de l’homme*”<sup>330</sup>) would underemphasize the importance of the overarching institutional context of TJ situations, a concern shared by Levitt<sup>331</sup> and Chesterman<sup>332</sup>.

**EXPANSION TJ BUT INITIAL FOCUS REMAINS** – This tendency or even bias, some may say, has not disappeared even if the field of TJ has been steadily growing and now includes the analysis of procedural and institutional questions going well beyond the initial focus on (individual and societal) accountability for large-scale human rights violations. As Sriram observes, “it must be acknowledged that transitional strategies are now closely linked to a range of reforms and processes that are not in the first instance about accountability for past abuses”; “transitional justice is [...] *spilling over* into what have traditionally been ‘peacebuilding’ activities”<sup>333</sup>. In the same vein, Iverson mentions the “risk of overstretch” of TJ literature<sup>334</sup>.

If, at its beginnings, the TJ literature underemphasized the fundamental role of procedures and institutions in transforming the state and in shaping the broader context in which TJ operates,

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<sup>329</sup> Ms. Mc Askie (then Deputy Emergency Relief coordinator for the UN Office for the Coordination of Humanitarian Affairs, and subsequently UNSG special Representative for Burundi) furthermore observed that “[e]ffective peace and reconciliation processes require effective social and administrative structures”. See S/PV.4903 dd. 26 January 2004, pp. 9-10.

<sup>330</sup> A. Pellet, ‘[Droits-de-l’homme et droit international](#)’, *op. cit.*

<sup>331</sup> J. I. Levitt, *Illegal Peace in Africa*, *op. cit.*

<sup>332</sup> Chesterman already observed that “[t]ransitional justice’ is frequently used to refer to both prosecution of war criminals and the establishment of a legal system, but it is typically the former that receives the most attention and resources”, S. Chesterman, ‘An International Rule of Law?’, *op. cit.*, p. 343.

<sup>333</sup> C. L. Sriram, ‘Transitional Justice and the liberal peace’ in E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, pp. 116-117. Own emphasis.

<sup>334</sup> J. Iverson, ‘Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics’, *The International Journal of Transitional Justice*, Vol. 7, 2013, p. 413. Cf. also the broad definition of TJ adopted by the ICTJ.

it now risks outgrowing itself by dealing with these procedural/institutional questions (TJ *sensu latissimo*<sup>335</sup>), yet without being cleansed, so to speak, of its predisposed focus on (individual and societal) accountability for human rights violations.

FALL BACK POSITION: GENERAL INT'L LAW (METHODOLOGY) – Against this dilemma, a choice was to be made. Where to 'box', from a legal perspective, transition procedures characterizing conflict-related interregna? Either such procedures, undeniably related to the field of TJ *sensu stricto*, could be analyzed under the framework of TJ *sensu latissimo*, at the risk of tainting the analysis with the same normative underpinnings characterizing this field, notably its penchant for *droit-de-l'homme-isme*. Or the same analysis could be made from a traditional international legal perspective. By opting for the latter choice, this thesis reclaims a role for general international law in examining DIG. It hopes to lay the groundwork for an approach allowing for a more distant, coherent, and arguably less value-driven analysis of practices and procedures that are intertwined with, albeit distinct from, TJ mechanisms<sup>336</sup>. The practical difficulty entailed by this choice is that a general international law analysis must be based on a considerable amount of materials and case references<sup>337</sup>.

## 2. Limitations to *ius post bellum* literature

As a toolbox for analyzing DIG, the *ius post bellum* literature has obvious shortcomings, which will lead us to dismiss this concept in the further analysis.

IUS POST BELLUM AS A NORMATIVE PROJECT – The shortcomings of *ius post bellum* can be summarized under three headings. First, *ius post bellum* rests on the assumption that it would be necessary to carve out a new category of law, and to “develop norms that will govern the formation of peace”<sup>338</sup>. *Ius post bellum* is thus described as a project, i.e. the “work of scholars who seek to leverage international law in the aftermath of war in the interests of a just and sustainable peace”<sup>339</sup>. For De Brabandere, *ius post bellum* “fails to convincingly explain [...] why the normative framework containing post-conflict obligations needs to be remodeled”<sup>340</sup>.

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<sup>335</sup> The superlative is used not only to emphasize the considerable expansion of TJ's field of enquiry but also because further below, under Chapter 6, Section D, a distinction will be drawn between transitional justice *sensu stricto* (truth and reconciliation; amnesty) and *sensu lato* (incl. domestic and international criminal justice, and international commissions of enquiry).

<sup>336</sup> Sriram also observes, about the above-cited report and “The rule of law and transitional justice in conflict and post-conflict societies” dd. 23 August 2004, that it is noticeable how the UNSG “treats the rebuilding of the rule of law and specific mechanisms of transitional justice both as intertwined with each other and as central to post-conflict peacebuilding”. C. L. Sriram, ‘Transitional Justice and the liberal peace’, *op. cit.*, p. 117.

<sup>337</sup> See, in this regard, the caveat expressed in the introduction of Part III.

<sup>338</sup> K. E. Boon, ‘Obligations of the New Occupier: The Contours of Jus Post Bellum’, *Loyola of Los Angeles International and Comparative Law Review* 31, 2009, p. 69.

<sup>339</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 4.

<sup>340</sup> E. De Brabandere, ‘The Responsibility for Post-Conflict Reforms: A Critical Assessment of *Jus Post Bellum* as a Legal Concept’, *Vanderbilt Journal of Transnational Law*, Vol 43:119.

Such a project would disregard the capacity of the law as it stands now, *de lege lata*, or even the potential of its current progressive development.

**DEPENDENCY ON QUALIFICATION OF ARMED CONFLICT** – Second, it is difficult to make the distinction between *before* and *after* the war, given the circumstance that “many societies emerging from [civil] war can be described as experiencing ‘no war, no peace’ situations”<sup>341</sup>. Jessup wrote in 1954 that “legal thinking [...] finds it difficult if not impossible to escape from the confining walls of the firmly established distinction between war and peace”<sup>342</sup>. This challenge is partly taken up by the development of a *ius in interregno*. Moreover, transition procedures may span periods with or without armed conflict. For these reasons, the *ius post bellum* project, with its strong emphasis on the role of the law *after* armed conflicts, is of little avail to our particular enquiry<sup>343</sup>.

**LIMITED SCOPE OF IUS POST BELLUM** – Third, *ius post bellum* would artificially exclude the analysis of transition cases presenting a threat to international peace and security without constituting an armed conflict. As we just observed, transitions can span periods of armed conflict and peace, but can also be realized in the context of a threat to international peace and security not acquiring the level and intensity of armed conflict. For instance, in Yemen, the UNSC determined that the situation constituted a threat to international peace and security in February 2014<sup>344</sup>; later, in March 2015, the situation evolved into an armed conflict. The transition based on the 2011 Gulf Cooperation Agreement thus spanned both moments.

**IRRELEVANCE OF LEX PACIFICATORIA** – *Lex pacificatoria* (the law of peacemakers) developed by Bell is regarded as a part of *ius post bellum*<sup>345</sup>, and is therefore briefly addressed here. Bell emphasizes the hybrid nature of peace agreements. These agreements “address both the external position of the state on the international realm, and the internal constitutional structure of the state”. *Lex pacificatoria* entirely hinges on the notion of peace agreement. DIG, however, can also be based on constitutional texts or unilateral declarations<sup>346</sup>. True, Bell accepts the notion of ‘peace agreement constitutions’<sup>347</sup>, and recognizes that peace agreements may fulfill both pacificatory and constitutional functions. Yet, *lex pacificatoria* does not account for DIG as a conceptually distinct phenomenon. Rather, Bell creates an account of how the legal form of peace agreements influences issues of compliance

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<sup>341</sup> R. M. Ginty, 'No War, No Peace: Why so Many Peace Processes Fail to Deliver Peace', *International Politics* 47, no. 2, March 2010, p. 145. Cf. also P. C. Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?', *The American Journal of International Law* 48, no. 1, 1954, 98–103. In the same sense, M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 5.

<sup>342</sup> P. C. Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?', *op. cit.*, pp. 98-103.

<sup>343</sup> Cf. also Chapter 4, Section A.2.6.

<sup>344</sup> S/RES/2140 dd. 26 February 2014.

<sup>345</sup> J. Iverson, 'Transitional Justice, *Jus Post Bellum* and International Criminal Law: Differentiating the Usages, History and Dynamics', *The International Journal of Transitional Justice*, Vol. 7, 2013, p. 427.

<sup>346</sup> Chapter 3.

<sup>347</sup> C. Bell, *On the Law of Peace*, *op. cit.*, p. 151.

considering that such agreements not easily fit the conventional legal categories<sup>348</sup>. In light of the different object and perspective of *lex pacificatoria*, DIG cannot be comprehensively examined under this doctrine.

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Before turning to the legal analysis (and practice-based observation) of DIG, under Part II and Part III of the thesis, we cannot escape the discussion of a number of concepts, other than TJ and *ius post bellum*, often heard *en lien* with it: the concepts of democracy and legitimacy, both inherent to the so-called transition paradigm.

## Section B. Irrelevance of transition paradigm

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The main focus of this thesis is on transitions, in spite of the “uneasiness about the term and the idea of ‘transitions’, which is not so much the difficulty or perhaps the recurrent emptiness of its many definitions, but rather its conceptual context”; “it presupposes the ‘end of history’ (transition to what?)”<sup>349</sup>. This led us to propose a more neutral or at least less value-driven understanding of ‘transition’<sup>350</sup>. In this dissertation, this concept refers to the procedures carried out during interregna while state and constitutional structures are held in abeyance. And, as explained above, it is based on a number of features: its association with the peace-through-transition paradigm, and its self-regulatory, temporal, nonconstitutional, and domestic nature<sup>351</sup>.

**NORMATIVE UNDERPINNINGS OF TRANSITOLOGY** – Despite the neutral approach to the concept of transition, it remains difficult to discharge it from its many connotations. Five assumptions solidly underpin, hence almost define, the ‘transition paradigm’. Carothers summarizes these assumptions as follows: (a) any country said to be in transition would be moving toward democracy, and democracy only; (b) democratic teleology would ensure that states in transition would naturally go through a number of stages until an end point is reached; (c) elections would generate democracy; (d) structural conditions –e.g. cultural and socio-economic features– would not influence the transition; and (e) transition processes would be able to rely on existing state structures.

**CONTINUING WEIGHT OF LEGITIMACY & DEMOCRACY CONCEPTS DESPITE END OF TRANSITION PARADIGM** – One by one, these presuppositions have been deconstructed in the literature. It is therefore safe, today, to say that the transition paradigm, as based on the above assumptions, has crashed altogether<sup>352</sup>. Anno 2002, the ‘end of the transition paradigm’ was declared<sup>353</sup>. Anno 2016, however, transition parlance remains omnipresent in political discourses, legal texts and

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<sup>348</sup> *Id.*, p. 160.

<sup>349</sup> R. Iveković. ‘Partition as a Form of Transition’ in S. Bianchini, *Partitions: Reshaping States and Minds*, Frank Cass Studies in Geopolitics, Abingdon, Frank Cass, 2005, p. 13.

<sup>350</sup> Introduction, Section A.

<sup>351</sup> Introduction, Section A.

<sup>352</sup> T. Carothers, ‘The End of the Transition Paradigm’, *op. cit.*, pp. 5–21.

<sup>353</sup> *Ibid.*

policy briefs, especially when regime transitions in conflict-riven states are concerned. More often than not, the concepts of legitimacy or democracy are, then, evoked. They seem to be inherent to the transition paradigm. Regularly heard in the context of post-conflict regime transitions, these concepts however remain controversial, especially from a legal perspective.

**NECESSARY DISASSOCIATION LEGITIMACY & DEMOCRACY CONCEPTS** – Because politically tainted concepts like legitimacy or democracy are controverted, this dissertation adopts an *agnostic* viewpoint on them. It does not share the approach that (so-called hybrid) regimes are “described as transitional on the assumption that they were an intermediate point on a trajectory from authoritarianism to liberal democracy”<sup>354</sup>. Avoiding the ‘democratizing bias’<sup>355</sup> allow us to disassociate legal analysis from disputed legitimacy or democracy considerations. Thus, apart from the two following subsections in which this double conceptual controversy is discussed, this study, to the extent possible, makes abstraction from general legitimacy (1) and democracy (2) considerations or transition *outcomes*, and focuses on deconstructing the transition procedures themselves.

### *1. The legitimacy controversy*

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**OBJECTS OF LEGITIMACY** – This section briefly explains why the concept of legitimacy cannot be used as a benchmark for tackling the transition paradigm from an international law perspective, and why it cannot be used to legally frame, let alone analyze, transitions. Even when one narrows the enquiry down to legitimacy of governmental authority (rather than of international law as such<sup>356</sup> or of state constitutions<sup>357</sup>, among other possible objects of ‘legitimacy’), the semantic ambiguity remains. In the following lines, legitimacy refers to the legitimacy of an established government or of a political body aspiring to such status.

**FREQUENT REFERENCE TO LEGITIMACY** – Departing from the traditional effective control test, states and organizations increasingly assess the ‘legitimacy’ of an oppositional or consensual political body considered to be a potential alternative and valid successor to a (governmental) regime deemed to be illegitimate (‘unwilling’) or simply ineffective (‘unable’). Rim notes that

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<sup>354</sup> M. Tuschnet, ‘Authoritarian Constitutionalism – Some Conceptual Issues’ in T. Ginsburg, A. Simpsen, *Constitutions in Authoritarian Regimes*, CUP, 2014, p. 37. With reference to IS. Levitsky and L. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, pp. 3-4.

<sup>355</sup> *Ibid.*

<sup>356</sup> V. Röben, ‘Legitimacy of UN member states’, *Coexistence, Cooperation and Solidarity. Liber amicorum Rüdiger Wolfrum*, 2 vols., The Hague: Martinus Nijhoff, 2011, p. 1509. Legitimacy as “the normative (moral) rationale providing international law with authority”.

<sup>357</sup> M. Kumm, ‘Constitutionalism and the Cosmopolitan State’, *Indiana Journal of Global Legal Studies*, Vol. 20, No. 2, 2013. Kumm finds that “national constitutional legitimacy depends, in part, on how the national constitution is integrated into and relates to the wider legal and political world”, and argues that domestic and international law entertain a relationship of mutual dependence. But Kumm does not refer to existing international legal standards to explain under which conditions *de lege lata* the claim to constitutional legitimacy would be valid, referring instead to ‘justice-sensitive externalities’.

"within the international legal discourse, it is a relatively recent phenomenon that 'the attribute 'legitimate' has been added to 'government' with frequency"<sup>358</sup>.

INTERACTIONS BETWEEN LEGITIMACY & EFFECTIVITY – The controversy surrounding the legitimacy *vel non* of governments in time of transition becomes sharper when one realizes that interactions between the tests of legitimacy and effective control vary. Different readings in scholarship reflect a variety of nuances about how both tests interrelate. They can broadly be subdivided into three categories: (i) the legitimacy of a government can be denied in spite of its effective control; (ii) the legitimacy of a government can only be questioned if it loses effective control; (iii) legitimacy can be accorded beforehand to a political body even if it lacks effective control.

(1) DENYING LEGITIMACY DESPITE EFFECTIVE CONTROL – According to one reading, a government's exercise of effective control over a state territory does not automatically endow it with legitimacy. In other words, legitimacy does not follow effective control<sup>359</sup>. The lack of correlation between effective control and legitimacy would result in a "broad-based movement towards reconsideration of the legal legitimacy that traditional doctrine has automatically conferred on governments in effective control"<sup>360</sup>. As regards the conditions for denying legitimacy, it has been argued, specifically relating to two countries analyzed in the latter part of this dissertation, that "while international law does not yet provide any clear rules for the assessment of governmental legitimacy, the Libyan and Syrian situations show an emerging consensus that governments which use excessive force against their own population to secure their position *lose their legitimacy* and must or should go"<sup>361</sup>.

(2) QUESTIONING LEGITIMACY WHEN EFFECTIVE CONTROL IS CHALLENGED – According to another reading, the legitimacy criterion only becomes relevant where the government's effective control is being challenged. In other words, legitimacy could only be invoked as a subsidiary criterion, not to be considered as long as effective control is secured<sup>362</sup>.

(3) CONFIRMING LEGITIMACY DESPITE LACK OF EFFECTIVE CONTROL – Yet another reading considers that, in a play of compensation, legitimacy can 'counterbalance' the lack of effective control.

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<sup>358</sup> Y. Rim, 'Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d'Ivoire', *Leiden Journal of International Law*, September 2012, Vol. 25, Issue 3, p. 693.

<sup>359</sup> J. Vidmar, 'Human Rights, Democracy and the legitimacy of governments in international law: practice of states and UN organs', in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2013, p. 53: "in contemporary international law [...] practice has emerged which may well deny legitimacy to a government despite its effective exercise of control over the state's territory".

<sup>360</sup> See B. R. Roth, *Governmental Illegitimacy in International Law*, OUP, 1999, p. 303; pp. 196-197.

<sup>361</sup> S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *Chinese JIL*, 2013, p. 20.

<sup>362</sup> See B. R. Roth, *Governmental Illegitimacy in International Law*, *op. cit.*, p. 303; pp. 196-197: "where effective control is closely contested or where the opposition has gained the upper hand, the presumption in favor of the established government is arbitrary from the standpoint of popular sovereignty. [...] *Where the test of effective control is indeterminate, some alternative criterion must be found*".

Legitimacy could, then, be invoked from an external perspective to endorse an opposition-generated government *in statu nascendi*, and to (purportedly) confer a status upon it<sup>363</sup>.

LEGITIMACY AS A CRITERION FOR GOVERNMENTAL RECOGNITION? – According to the latter reading, legitimacy is a defining factor for formally recognizing a government. In this sense, Nesi observes that “practice also shows that States’ decisions have been based not only on traditional elements such as the effective control of parts of the State territory; but that other elements, such as the *legitimacy* of the parties, have also been considered as parameters to be taken into account in relation to recognition or the absence thereof”<sup>364</sup>. For Wippman, the legitimacy of a political body, even when it lacks effective authority, may even be invoked to accept its invitation to forcibly intervene in a country<sup>365</sup>.

INDETERMINACY OF LEGITIMACY – The above observations indicate that the concepts of ‘legitimacy’ and ‘illegitimacy’ suffer from conceptual indeterminacy. Legitimacy is both a word and a concept, and can encompass several conceptions. One can distinguish between legal, moral and social legitimacy<sup>366</sup>. Can ‘legitimacy’ be gauged in isolation, or is it to be articulated against the opposite criteria of ‘illegitimacy’ or ‘loss of legitimacy’? Is it in this sense that the criterion of legitimacy has compensatory power, as Tomuschat, Wippman and Nesi hinted at in the above citations? Whether these concepts are employed to refer to an illegitimate but effective government, or to a legitimate but ineffective political body, in both cases the indeterminacy persists. The question thus remains whether ‘legitimacy’, with its strong value connotation, can be assessed in legal terms.

Should the legitimacy assessment concentrate on the legal and constitutional foundation of the exercise of political power – ‘legitimacy of origin’–, or on the manner in which this power is actually exercised – ‘legitimacy of exercise’–, or on both<sup>367</sup>? Does it matter, to mention another distinction developed by d’Aspremont, whether the origin or exercise of power is perceived to be legitimate by domestic actors (‘internal legitimacy’) or third actors (‘external legitimacy’)?

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<sup>363</sup> For Tomuschat, legitimacy thus ‘compensates’ for the lack of effective control: “[i]n July 2011, the NTC was at the most a government *in statu nascendi*. But its lack of factual power was *compensated* by its legitimacy which it possessed as the voice of the Libyan people, although not confirmed by formal elections”. C. Tomuschat, ‘The Arabellion – Legal Features’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 3/2012, p. 447.

<sup>364</sup> See G. Nesi, ‘Recognition of the Libyan National Transitional Council: When, How and Why’, Symposium: the Libyan Crisis and International Law, *The Italian Yearbook of International Law*, Vol. XXI, 2011, p. 59. Own emphasis. The author adds that “only future practice can clarify whether these new trends will persist in determining the attitude of States towards insurgents, including regarding recognition”.

<sup>365</sup> D. Wippman, ‘Military Intervention, Regional Organizations, and Host-State Consent’, *Duke Journal of Comparative & International Law* 7, 1996-1997, p. 238: “[i]ncreasingly [...] states are prepared to consider the democratic *legitimacy* of an inviting authority as a counterbalance to considerations of power and effective control”.

<sup>366</sup> C. A. Thomas, ‘[The Concept of Legitimacy and International Law](#)’, LSE Law, Society and Economy Working Papers 12/2013.

<sup>367</sup> d’Aspremont and De Brabandere write: “while the legitimacy of origin has constituted the classical measure to evaluate the legitimacy of governments, recent practice has shifted the paradigm toward the legitimacy of exercise”. J. D’Aspremont, E. De Brabandere, ‘The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise’, 34 *Fordham Int’l L.J.* 190, 2010-2011, p. 192. Other variants of legitimacy have been proposed in literature: ‘input legitimacy’; ‘output legitimacy’; ‘procedural legitimacy’. See V. Röben, ‘Legitimacy of UN member states’, *op. cit.*, p. 1508.

These are only few among many interrogations provoked by the idea of having legitimacy gain legal status or even letting it adventure into the realm of law.

**ILLEGITIMACY AS GRAVE ILLEGALITY** – To be clear, situations violating international law standards can be illegitimate. Law and morals belong to separate registers. But they both belong to the larger field of normativity and, as such, can intersect. Violating the principle of self-determination, running a racist government or illegally occupying a country can be illegitimate, and sometimes conspicuously so. Thus, the artificial creation of Bantustans, the politics of the Apartheid regime or the occupation of South West Africa were generally deemed to be illegitimate. In these cases, all relating to pre-transition South Africa, as well as in other cases (e.g. the alleged territorial illegitimacy of North Cyprus and Crimea), the word illegitimacy was used to label or re-name instances in which gross or systematic internationally wrongful acts occurred, i.e. to illegality. In other words, illegitimacy was the result of grave illegality. If illegitimacy is to mean something else than gross or systematic illegality, the question however remains: what, precisely, does the former concept cover *in law*?

**IRRELEVANCE OF LEGITIMACY FOR IUS IN INTERREGNO** – In sum, “it is widely known that the concept of ‘legitimacy’ in international law is a complex one and attempting to determine the criteria for the basis of legitimacy [...] could be very difficult”<sup>368</sup>. d’Aspremont summarizes: “there are no objective criteria to determine governments’ legitimacy”<sup>369</sup>. As a result, identifying the ‘right’ post-transition government, or the ‘right’ political body for governing the interregnum on the basis of legitimacy criteria is a doubtful enterprise. More generally, even if it were true that, since the beginning of the twenty-first century, the international community has been undergoing a structural and value-driven change by departing from traditional effectiveness criteria<sup>370</sup>, the concept of ‘legitimacy’ cannot be used to replace these criteria. *A fortiori*, it cannot become a backbone principle of international law. Its usage is too fresh, its contents too unstable, its legal nature too contested.

**IUS IN INTERREGNO TO BE PREDICATED ON DE LEGE LATA CONCEPTS (METHODOLOGY)** – Because legitimacy is an elusive notion, other concepts and criteria should be identified as benchmarks for legally framing and assessing DIG. The (projected) legitimate character or outcome of transition procedures is uninformative from a legal perspective. This dissertation therefore intends to legally frame the transition paradigm using concepts *other* than legitimacy by relying on the existing language of international law instead. The following section explains why ‘democracy’ cannot be part of that language.

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<sup>368</sup> G. Nesi, ‘Recognition of the Libyan National Transitional Council: When, How and Why’, *op. cit.*, p. 58.

<sup>369</sup> J. d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, *New York University Journal of International Law and Politics*, JILP, Vol. 38, 2006, p. 878.

<sup>370</sup> E. Šarčević, ‘Völkerrechtlicher Vertrag Als „Gestaltungsinstrument“ Der Verfassungsgebung: Das Daytoner Verfassungsexperiment Mit Präzedenzwirkung?’, *Archiv Des Völkerrechts* 39, no. 3, September 1, 2001, p. 324: “[a]n der Schwelle zum 21. Jahrhundert erlebt die Staatengemeinschaft den fundamentalen Strukturwandel des Völkerrechts: Die bisher eher auf dem Grundsatz der Effektivität und des status quo fußende völkerrechtliche Ordnung wandelte sich nach und nach zu einem stärker wertorientierten Völkerrecht”.

## 2. The democracy controversy

**FREQUENT REFERENCE TO DEMOCRACY** – This section argues that the concept of ‘democracy’ does not enlighten us any more than the concept of ‘legitimacy’ on how the transition paradigm should be analyzed from a general international legal perspective. Democracy cannot be used as a benchmark for legally framing, let alone analyzing, DIG. It cannot serve to identify either the post-transition government or, even less so, to appoint the ‘right’ political body for governing the interregnum – note that transitions are seldom triggered by elections<sup>371</sup>. Nevertheless, the concept of democracy invariably marches in when discussing regime transitions. This is not surprising since, as we have seen above, the transition paradigm is intrinsically linked to the idea of democracy<sup>372</sup>.

**DEMOCRACY: CONTESTED NORMATIVE BASIS & EFFECTIVENESS** – The transition paradigm and its various assumptions have been severely criticized from a political science perspective, it was mentioned above. This is linked to the fact that “the core assumptions of liberal peacebuilding have increasingly been challenged”<sup>373</sup>. In addition, democracy is often critiqued because it does not yield the desired results. According to the democratic peace theory, “consolidated democracies do not go to war with each other because democracies have institutional constraints upon leaders that make initiating conflict with other countries more difficult”, Newman, Paris and Richmond summarize<sup>374</sup>. But this theory must be distinguished from the question whether, as such, democratization is conducive to peace. Bastian and Luckham observe that there would be no (direct) causality between democracy and (even negatively defined) peace<sup>375</sup>. Especially in transitional contexts, democratization efforts might even form an incentive for violence<sup>376</sup>.

**DEMOCRACY: CONTESTED LEGAL VALUE** – From a legal perspective, too, there are at least three interrelated reasons why the international law analysis of nonconstitutional transitions does better without the concept of democracy. From this perspective, the question ‘what is democracy?’ can be deconstructed in three parts, which relate to the fluctuating conception of

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<sup>371</sup> This point will be revisited below, under Chapter 5, Summary; and under Chapter 6, Section C.1.

<sup>372</sup> N. Bhuta, ‘Democratisation, state-building and politics as technology’ in B. Bowden, H. Charlesworth and J. Farrall, *The Role of International Law in Rebuilding Societies After Conflict - Great Expectations*, CUP, 2009, p. 58: “After the cold war, the academic research programme of democratic transition held out the promise of a rationalised method of managing ‘transitions to democracy’. Not unlike modernisation theory before it, the newly consecrated discipline of ‘transitology’ filled a cognitive gap among policy intellectuals and donors facing a new period of uncertainty in the politics of the Third World. It became, in the words of one democracy-promoting insider, ‘a universal paradigm for understanding democratization’. [It was] ubiquitous in US policy circles as a way of talking about, thinking about, and designing interventions in processes of political change around the world”.

<sup>373</sup> E. Newman, ‘Liberal peacebuilding debates’, *op. cit.*, p. 39: “[t]he Political Instability Task Force, after conducting a large-scale analysis of conflict from 1955 to 2003, came to the conclusion that, in terms of statistical correlation, the risk of conflict is highest not among democracies or authoritarian states but in partial democracies or transitional states”.

<sup>374</sup> E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 11.

<sup>375</sup> S. Bastian and R. Luckham, *Can Democracy Be Designed?: The Politics of Institutional Choice in Conflict-Torn Societies*, Zed Books, 2003: “the relationship between democracy and conflict is far from simple, and there is little point in polemical disputes about whether democracy promotes conflict or resolves it”.

<sup>376</sup> E. Newman, ‘Liberal peacebuilding debates’, *op. cit.*, p. 11: “significant amount of research suggests that transitional societies [...] may be more likely to experience civil conflict, especially in poor and divided societies”.

democracy (2.1), the inconsistent practice of democracy (2.2), and the uncertain legal status of democracy (2.3).

## 2.1. Variety of definitions of democracy

A panoply of definitions and conceptions exist, and, *decrescendo*, may be subdivided in three categories.

(1) **SUBSTANTIVE APPROACH** – First, there is the expansive/substantive approach to democracy, which is based on a positive definition of democracy, and associates the exercise of democracy to the respect for human rights<sup>377</sup>. This vision of democracy can be found in the Human Rights Committee General Comment on art. 25 of the ICCPR, which considers that the freedom of expression, assembly and association are essential preconditions of the right to participate in public affairs. A deeper concept of democracy is promoted in the UNCHR’s 1999 resolution ‘Promotion of the Right to Democracy’, and in the 1990 Charter of Paris for a new Europe, which defines democracy as follows:

“democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person. Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially”<sup>378</sup>.

Generally, the expansive/substantive approach to democracy is based on the following elements: (a) the actual exercise of governmental power by the freely chosen representatives; (b) the participation of citizens in public affairs; (c) the institutionalized constraints on the exercise of power; (d) the guarantee of civil liberties; and (e) the (equal application of) the rule of law<sup>379</sup>.

(2) **FORMAL APPROACH** – Second, there is the formalist/procedural approach to democracy, described by Salmon as follows: “*dans les rapports de force actuels au sein des relations internationales, c’est la conception purement formaliste de la démocratie axée sur le droit à des élections libres et honnêtes qui domine. Cette conception occulte le fait que ce type de démocratie est souvent fictif*”<sup>380</sup>. The latter observation relates to the paradox of the ‘illiberal democracy’, i.e. the rule by autocratic regimes entrenched through regular elections. Fox also

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<sup>377</sup> G. Fox, ‘Democracy, Right to, International Protection’, MPEPIL: “political participation and government accountability [...] are seen as impossible to achieve without a robust protection of other rights”.

<sup>378</sup> 1990 ‘[Charter of Paris for a new Europe](#)’.

<sup>379</sup> M. Saul, ‘The Impact of the Legal Right to Self-Determination on the Law of Occupation as a Framework for Post-Conflict State Reconstruction’ in N. Quinivet, S. Shah-Davis, *International Law and Armed Conflict*, T.M.C. Asser Press, 2010, p. 407.

<sup>380</sup> J. Salmon, ‘Le droit international à l’épreuve au tournant du XXI siècle’, Cours Euro-Méditerranéens Bancaja, Vol. VI, 2002, p. 298-301

accentuates the formalist/procedural approach to democracy<sup>381</sup>, observing that most of the state practice centers on elections<sup>382</sup>.

(3) MINIMALIST APPROACH – Third, there is the minimalistic approach to democracy, which can be based on d’Aspremont’s negative definition of democracy: “states where the effective holder of the power is not chosen through free and fair elections and where basic civil rights are seriously and blatantly infringed are usually considered non-democratic in contemporary practice”<sup>383</sup>. According to this approach, consensus would only exist about a number of parameters which, if they are met, would define the *absence* of democracy.

## 2.2. Inconsistent practice

IMPLEMENTATION DIFFERS PER REGION & INSTITUTION – In light of these conceptual controversies, it is not surprising that the practice of states and IOs in adopting democratic standards is (deemed to be) inconsistent. With regard to state practice, Fox and Roth observed that there "remains an onus to demonstrate acceptance by the community of states of democratic norms that go beyond the boilerplate abstractions of old"<sup>384</sup>, while, with specific reference to the practice of UN Charter organs, Bhuta observed that democracy lacks both determinate legal content and consistent practice<sup>385</sup>. For Steinorth, the UN “has approached the promotion of democratic principles from a functional perspective, promoting a ‘thin’ concept of democracy”<sup>386</sup>. As a result of these indeterminacies, democracy practices strongly vary according to the regional context<sup>387</sup>.

## 2.3. Uncertain legal status

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<sup>381</sup> G. Fox, ‘The right to political participation in international law’ in G. Fox and B. Roth, *Democratic Governance and International Law*, CUP, 2000, p. 48-49: “international law clearly has not cohered [such] an all-encompassing notion of a democratic society. International law has, however, come to understand ‘democracy’ in narrower, more *process-oriented* terms”.

<sup>382</sup> G. Fox, ‘Democracy, Right to, International Protection’, MPEPIL.

<sup>383</sup> J. d’Aspremont, *L’Etat non démocratique en droit international – étude critique du droit international positif et de la pratique contemporaine*, Pedone, Paris, 2008.

<sup>384</sup> G. H. Fox, B. R. Roth, ‘Democracy and international Law’, *Review of International Studies* (2001), 27, p. 346.

<sup>385</sup> N. Bhuta, ‘Democratisation, state-building and politics as technology’, *op. cit.*, p. 46: “even if the shifting geopolitical context opened a space for a renewed effervescence of liberal internationalism, it has *not necessarily resulted in a conforming legal practice among international institutions*. [...] In the practice of UN Charter organs, resolutions increasingly refer to ‘democracy’ or ‘periodic and genuine elections’ as desiderata in the context of specific regional conflicts, but there is little evidence that ‘democracy’ has developed a determinate legal content in international law”. Emphasis added. Cf. also D. Amoroso, ‘Il ruolo del riconoscimento degli insorti nella promozione del principio di autodeterminazione interna: considerazioni alla luce della ‘Primavera Araba’’, 23 October 2013, *federalismi.it* n. 21/2013, pp. 27 – 31.

<sup>386</sup> C. Steinorth, ‘The United Nations, Post-Conflict Institution-Building and Thin Concepts of Democracy’, *Journal of Intervention and Statebuilding*, 2011, p. 305 – 321.

<sup>387</sup> For an overview of the formal importance accorded to democracy on regional levels, see T. Christakis, *Le droit à l’autodétermination en dehors des situations de décolonisation*, CERIC, 1999: “[s]i l’existence d’un principe de légitimité démocratique semble très probable aujourd’hui au niveau euro-américain, de sérieux doutes persistent sur l’existence d’un tel principe au niveau universel” (*id.*, p. 503). Cf. also V. Saranti, ‘Pro-democratic intervention, invitation, or ‘responsibility to protect’? Challenges to international law from the ‘Arab Spring’’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.*, pp. 171-172.

CONSENSUAL BASIS – Besides the uncertainty about how democracy should be defined – substantially, procedurally or negatively?– and besides the persistent doubts about whether it can be consistently applied under any of these approaches, the legal status of the concept –“*lex lata, de lege ferenda* or mere political aspirations”<sup>388</sup>?– also causes controversy. A convincing argument for denying that, *de lege lata*, states are obliged to be or to become democratic is that democratization efforts mostly *follow* state consent. Because democratization practices mostly occur on a voluntary basis, for Fox and Roth this indicates that international practice does not support the conviction that democracy is compulsory<sup>389</sup>.

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DEMOCRACY AS A MANIPULATIVE OR DESTABILIZING FACTOR? – The triple, inter-connected, interrogation about the definition, implementation and legal status of democracy leaves us empty-handed. Even if a consensus about the contents of democracy existed, the uncertainty about its implementation and legal status would persist. As a result, “‘democracy’ becomes identified with whichever choice engages our sympathies. All too often, democracy is equated with freedom and power for those members of foreign societies who most closely resemble ourselves”, Roth writes<sup>390</sup>. For other authors, accepting a ‘right to democracy’ could even have adverse effects, and serve as a justification for imposing politics abroad, in violation of the principles of state sovereignty and self-determination<sup>391</sup>; or democratic legitimacy would not even have the *potential* of governing state transformation processes which, in order to be effective, would need to be predicated on bold nondemocratic power<sup>392</sup>.

NECESSARY PERUSAL OF TRANSITION PRACTICES (METHODOLOGY) – Without having to engage with these more or less provocative statements, it is sufficient, from a legal perspective, to note that ‘democracy’ suffers from legal indeterminacy. It is thus better dispensed with in the analysis of DIG. This choice will be confirmed further below when we shall conclude that DIG is neither the fruit of formal/procedural democracy nor an exercise of substantive democracy<sup>393</sup>. At best, DIG can be seen as an undemocratic means of realizing democracy<sup>394</sup>, whereby the

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<sup>388</sup> G. H. Fox, ‘Democracy, Right to, International Protection’, Wayne State University Law School Research Paper No. 07-22, 2007: “more common statements by international bodies that strongly affirm democracy’s importance but lack clear indications of whether the statements are *lex lata, de lege ferenda* or mere political aspirations”.

<sup>389</sup> G. H. Fox, B. R. Roth, ‘Democracy and international Law’, *op. cit.*, p. 344: “although the international community has, through UN electoral assistance projects and General Assembly pronouncements, manifested support for liberal democratic electoral processes around the world, the assistance has been rendered only in cases where host states have *requested* it”.

<sup>390</sup> B. R. Roth, ‘Democratic intolerance: observations on Fox and Nolte’ in G. H. Fox and B. R. Roth, *Democratic Governance and International Law, op. cit.*, p. 442.

<sup>391</sup> S. McLaughlin Mitchell, P. F. Diehl, ‘Caution in What You Wish For – The Consequences of a Right to Democracy’, *Stanford Journal of International Law*, Vol. 48, Issue 2, 2012, p. 289.

<sup>392</sup> See the reference to and explanation of R. Hardin’s account of state transformation / formation in N. Bhuta, ‘New Modes and Orders: The Difficulties of a *Jus Post Bellum* of Constitutional Transformation’, *University of Toronto Law Journal* Volume 60, Number 3, Summer 2010, pp. 20-21.

<sup>393</sup> Chapter 5, Summary; and Chapter 6, Section C.1.

<sup>394</sup> R. Ponzio, *Democratic Peacebuilding, Aiding Afghanistan and other Fragile States*, OUP, 2011, p. 220: “[r]ather than decelerating or impeding democratization, [such] case specific and transformative governance innovation are necessary to build a viable and durable democratic state over the medium to long term”.

absence of democracy during the interregnum is not necessarily to be equated to a complete lack of normativity, this thesis argues. To grasp that normativity, the thesis concentrates on concrete practices and specific norms applicable during transitions.

**ABSTRACTION OF TRANSITION OUTCOME** – Unavoidably, then, the agnostic position taken with regard to ‘legitimacy’ or ‘democracy’ extends to the (positive or negative) *outcome* of transitions – this may be called ‘irrelevance of outcome’. Accordingly, the terms ‘legitimate transition’ or ‘democratic transition’ are avoided<sup>395</sup>. Even though the declared purpose of many transitions is undeniably to install a (more) legitimate regime and a democracy based on the respect of fundamental rights<sup>396</sup>, this goal –whether achieved or not in the post-transition stage– does not inform us about the norms and practices *of the transition*. The question thus becomes the following. How can the transition procedure itself –and the period during which state and constitutional structures are held in abeyance– be analyzed and evaluated from an international legal perspective *without* relying on the field of TJ and *ius post bellum* or on the concepts of legitimacy and democracy.

## CONCLUSION OF PART I

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State creation and direct ITA are now beyond their zenith. We are witnessing how, under the impact of various forms of external influence, ranging from international diplomacy to aid and development assistance, important structural changes affect institutional and constitutional structures *within* the state, i.e. without creating new states or without affecting the state’s territorial integrity or, at least in appearance, its sovereignty<sup>397</sup>. Through DIG, international involvement can be cost-efficient and discrete while maintaining the possibility of leaving its marks on virtually all statebuilding components.

There are historic-economic reasons why the UN, regional organizations, and/or states opt for assisting, directing or empowering domestic transitional authorities rather than being directly involved with a transition through ITA, belligerent occupation or other forms of direct

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<sup>395</sup> Contrary to N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*

<sup>396</sup> *Id.*, p. 45. True, arguably the circumstance that, over the last decades, no newly created state has *not* committed itself to democracy might be indicative of a putative international democratic principle. But such a principle in relation to state creation, if its existence is verified, is not directly transposable to the realm of DIG. Further, a pre-commitment to democracy should not be confused with the actual and immediate exercise of or abidance by democracy –even formally defined– during the interregnum, which seems rather utopian. If compliance with democracy is to be realized *gradually*, the question remains what international law expects –if anything at all– from the state in transformation during this interim period.

<sup>397</sup> In this sense, but with a focus on democratization processes: “UN intervention most often involved the supervision of elections after a ceasefire and a peace settlement agreement was signed. Thus, the international community is best able to play a democracy promoting role as a guarantor of a process in which disputing parties have already committed to democracy. Still, most cases of democratization (eighty-four percent) did not involve liberal military intervention, indicating that transforming states to democracies largely occurs by *processes internal to the states* involved. Key internal conditions associated with democratization success, most of which are not easily malleable by international action, include high levels of economic development, supportive elites, parliamentary (rather than presidential) systems, and support for inclusive conceptions of nationalism”, S. McLaughlin Mitchell, P. F. Diehl, ‘Caution in What You Wish For – The Consequences of a Right to Democracy’, *op. cit.*, p. 289.

administration. The trusteeship system has become obsolete, and ITA too ponderous. Assistance to DIG presents itself as an alternative. Also, when considerations of sovereignty, subsidiarity and proportionality prevent the international community from directly administering a country, assistance to DIG might be regarded as a lawful last-resort option for influencing transitions.

The proliferation and internationalization of DIG invite us to treat DIG as an object of study in its own right. Given the limitations of the existing literature, this study has to be carried out from a new angle. This is why we will ‘take a step back’ and analyze DIG from a general international legal perspective. We will thus ask the question how international law relates to DIG, and whether a set of legal norms specific to DIG may be developing (1). This question will be addressed in accordance with a specific methodology (2).

### 1. Is a coherent set of legal norms developing with regard to DIG?

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**DURATION OF CHOICE** – The fields of TJ and *ius post bellum* and the concepts of legitimacy and democracy are of little utility for analyzing DIG from a general international legal perspective. In light of the controversies and indeterminacies surrounding these concepts, the ‘Nicaragua principle’, elaborated in 1986 by the International Court of Justice (ICJ), according to which “a State's domestic policy falls within its exclusive jurisdiction”<sup>398</sup>, perhaps has not lost all its relevance today; “even the post-Cold War international law adheres to the Nicaragua case principle: the choice of the political system and electoral method is a domestic matter of states”, Vidmar writes<sup>399</sup>.

This study, however, is not so much concerned with the question whether or to what extent the Nicaragua principle is still relevant today, considering the ‘irrelevance of outcome’ approach it takes<sup>400</sup>. Rather than engaging with the question whether or to what extent the decision of a political system befalls on states, this study zeroes in on the period preceding that decision in the context of state transformations: the very operation of choosing a political system, to which the ICJ refers in the Nicaragua case, in many cases takes time. In various cases, it consists of a protracted (over-arching) *process*<sup>401</sup> with (concrete) *procedures*<sup>402</sup> designed for, and to be followed during, transitions. These procedures include “formal

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<sup>398</sup> This principle was pronounced by the International Court of Justice *in Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *ICJ Reports*, 1986, p. 14., § 258 (‘Nicaragua Case’). This position was already announced in the Western Sahara case: “no rule of international law [...] requires the structure of the State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today”, *Western Sahara*, Advisory Opinion, 1.C.J. Reports 1975, p. 12, § 94.

<sup>399</sup> J. Vidmar, ‘Democracy and Regime Change in the Post-Cold War International Law’, 11 *NZJPIIL*, 2013, p. 358.

<sup>400</sup> Chapter 2, Section B.2.3.

<sup>401</sup> The transition *process* comprises all stages of the transition *sensu lato* (see Chapter 4, Section A.2).

<sup>402</sup> The transition *procedure* specifically refers to the third stage of the transition, from the transitional authority’s foundation until the formal end of the transition procedure (the end being marked either by the adoption of the new constitution, the holding of general elections, or the dissolution of the transitional authority/resumption of power by the post-transition government). Cf. Chapter 4, Section A.2.3.

processes [...] mandated to develop constitutional frameworks as a basis for a new constitution to be adopted by their countries' parliaments"<sup>403</sup>, but are not limited to the issue of reconstitutionalization.

**RESEARCH HYPOTHESIS** – Having addressed the current relevance of this thesis –the proliferation and internationalization of DIG– and having concluded that the existing literature cannot comprehensively address this phenomenon, the research hypothesis of this thesis can be presented again but in more detail<sup>404</sup>. Transitions must follow a similar set of norms under international law. Although (arguably in light of the Nicaragua principle) international law does not prescribe the exact form of government to be pursued *after* DIG<sup>405</sup>, it does increasingly (a) regulate how transitional authorities must pursue DIG, and (b) define the conditions under which third states and organizations may impact or engage with DIG.

**IUS IN INTERREGNO: BEYOND IN STATU NASCENDI** – This hypothesis will only partly be verified. Although this dissertation will conclude that the law has an “essential role to play in informing and regulating [...] transitional political arrangements”<sup>406</sup>, it will also recognize that an international rule of law with regard to DIG is only germinating (rather than in existence at the time of writing). Beyond the stage of a project *in statu nascendi*, the seeds of what may be called, for ease of reference (and this is why the indefinite article will consistently be used), a *ius in interregno* –i.e. a “*droit de transition*”<sup>407</sup>, a coherent (yet not self-contained<sup>408</sup>) set of rules regulating DIG– are currently germinating, the dissertation argues<sup>409</sup>; other rules relevant for DIG rely on existing principles of international law<sup>410</sup>. In Part III, existing and evolving legal norms with regard to DIG will be examined in depth. These norms concern (a) the temporal and material limits to the powers of transitional authorities, (b) the progressive realization of self-determination during the interregnum, including through TJ, and (c) the application of international law during the interregnum.

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<sup>403</sup> H. Siebert, ‘National Dialogue and Legitimate Change’, in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, Accord Issue 25, April 2014.

<sup>404</sup> Introduction, Section B.1.

<sup>405</sup> This thesis argues that international law actually limits the possibilities for transitional authorities to predefine the future of their country. The law, it will be argued, thus confirms the position, defended in political science specifically with regard to peace agreements and processes, against the inclusion of long-term institutional arrangements. See Chapter 5, Section B.1.

<sup>406</sup> J. I. Levitt, *Illegal Peace in Africa*, *op. cit.*, p. 43.

<sup>407</sup> The terms *ius in interregno* are not used in the sense of a ‘droit de transition’ as defined by X. Philippe, which refers to *domestic* legal rules applicable to transitions: “[l]e droit de transition peut se définir comme l’ensemble des règles juridiques qui sont adoptées ou confirmées dans un ordre politique et juridique en mutation et qui sont destinées à permettre au nouveau régime de s’instaurer dans la durée et la stabilité”. X. Philippe, ‘La spécificité du droit de transition dans la construction des Etats démocratiques. L’exemple de l’Afrique du Sud’, *Droit et Démocratie en Afrique du Sud*, l’Harmattan, Paris, 2001, p. 36. A *ius in interregno* rather refers to the set of international legal rules applicable to DIG whereby these rules stem both from principles of international law and from custom based on a broad comparison of several ‘droits de transition’ (as defined by Philippe) combined with *opinio iuris*.

<sup>408</sup> At least in its narrow sense, i.e. defined as a “special set of secondary rules claims priority over the secondary rules in the general law of State responsibility”. [Report of the study group on the fragmentation of international law](#), finalized by Martti Koskeniemi, A/CN.4/L.682, 13 April 2006, p. 66. See p. 68 for the distinction between self-contained regime in a narrow and broader sense.

<sup>409</sup> See especially Chapter 5.

<sup>410</sup> See specially Chapters 6 and 9.

## 2. Methodology

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The object and methodology of this thesis flows from the conclusion of Chapter 1 that internationalized DIG is on the rise; and from the conclusion of Chapter 2 that the current literature or specific doctrinal concepts do not permit a comprehensive international legal analysis of DIG. The thesis thus tackles the question how DIG itself can be deconstructed; especially the question how transitions are legally and procedurally structured will be considered. Also from a legal perspective, “greater emphasis should be placed on the processes that shape how parties to the conflict relate to each other during the transition”<sup>411</sup>. This dissertation aims to legally analyze the transition procedures themselves, rather than to fetishize, so to speak, their –legitimate, illegitimate, democratic or undemocratic– outcomes.

This international legal analysis of DIG will complement the political science literature on DIG (2.1). In spite of the multitude of actors involved or interested in DIG, this study primarily examines the practice of states in transition and, to a lesser extent, of IOs in relation to DIG (2.2).

### 2.1. General international law approach

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INT’L LEGAL RELEVANCE OF DIG – The rise of DIG and the international influences it can undergo have not yet been the object of a (comprehensive) legal study on the topic. This is so in spite of the active entanglement of the international community with DIG. The current state of legal literature may partly be explained by the subtlety marking the topic: “as a domestic government administers the process, the assistance model of state reconstruction is *less striking* than belligerent occupation or international territorial administration”<sup>412</sup>. Saul continues to say that, in spite of it being projected as unremarkable, “when one views the international involvement as a continuum, the potential impact on the political independence of the state and its people is much more apparent”<sup>413</sup>. In other words, the nuances surrounding the assistance model and the internationalization of the interregnum do all but diminish the legal relevance of this topic.

COMMON PARADIGM, UNDERLYING DISPARITIES – As noted earlier, the international impact on DIG and its susceptibility to external influences define the internationalization of DIG. Its proliferation is expedited by 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

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<sup>411</sup> T. Lyons, ‘Post-conflict elections and the process of demilitarizing politics: the role of electoral administration’, *Democratization*, 11:3, p 57.

<sup>412</sup> M. Saul, ‘From Haiti to Somalia’, *op. cit.*, p. 133.

<sup>413</sup> *Ibid.*

given the diversity of goals pursued by a vast array of actors engaged with DIG. The international attention for DIG was, therefore, never undivided. 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, as was remarked above. Also when it relates to DIG, global governance is polycentric and heterarchical.

NECESSITY COMMON GRAMMAR GIVEN LACK OF INT'L COMMUNITY – A common reference frame – however robust – is indispensable for a pluralist international society. Political science has been addressing the topic of DIG from a comparative perspective for some time already<sup>414</sup>. This thesis prioritizes an international legal assessment of the same topic. By offering a common reference frame – a shared grammar – international law has the power to provide an argumentative framework that is formally self-referential, and can continuously be refined from within. Corten remarks that “international law is a social discourse and argumentation practice in constant evolution”<sup>415</sup>, and Francioni emphasizes the need for “making international law a common language for lawyers and judges throughout the world”<sup>416</sup>. This study regards both the conception and function of international law as a social discourse and argumentation practice<sup>417</sup>. In this vein, the study underscores that socialization lies at the origin of this discourse and practice<sup>418</sup>: “legal norms can only arise in the context of social norms based on shared understandings”<sup>419</sup>.

INT'L LAW: AN ANALYTICAL FRAMEWORK AMONG OTHERS – Adopting an international legal reference frame is not to deny the complexity and contingency of transformation processes. Using international legal references is only one approach among many others to address this issue. It is in this sense that this study has a limited yet significant ‘common grammar’ purpose: to unveil the international legal framework applicable to post-conflict nonconstitutional transitions by reference to existing legal references, anchored in the law *de lege lata*. The institutional transformation processes under scrutiny are internal to the state yet (i) raise questions under international law, and (ii) can be associated with a number of well-known international legal concepts.

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<sup>414</sup> Y. Shain, J. Linz, *Between States – Interim Governments and Democratic Transitions*, *op. cit.*; K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*; J. Strasheim, H. Fjelde, 'Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies', *op. cit.*; Y.-P. Mandjem, 'Les Gouvernements de transition comme sites d'institutionnalisation de la politique dans les ordres politiques en voie de sortie de crise en Afrique', *African Journal of International Affairs*, Volume 12, n° 1 & 2, 2009, pp. 81 – 182.

<sup>415</sup> O. Corten, *Méthodologie du droit international public*, Éd. de l'Université de Bruxelles, 2009. Own translation.

<sup>416</sup> F. Francioni, 'International Law as a Common Language for National Courts', 36 *Tex. Int'l L. J.*, 2001, p. 598. Cf. also B. Conforti, A. Labella, *An Introduction to International Law*, Martinus Nijhoff Publishers, 2012, p. 5 about international law as a support and background to diplomatic relations.

<sup>417</sup> This is not deny that other conceptions of international law can be valid. Cf. J. d'Aspremont, *Epistemic Forces in International Law*, Elgar International Law, 2015, p. vii: “there is not necessarily any inconsistency in simultaneously thinking of international law as a set of rules and institutions, a set of authoritative processes, a combination of rules and processes, a set of legal relations, a discourse, a tool to create authoritative claims, a political project, etc”.

<sup>418</sup> Part III, Introduction.

<sup>419</sup> J. Brunnée, S. Toope, *Legitimacy and Legality in International Law*, CUP, 2010.

The following questions can be mentioned. Can the political bodies mandated to observe DIG –‘transitional authorities’– be conceptualized; and how can the texts creating them be categorized (Part II)? What are the obligations of transitional authorities (Part III)? Does international law impose limits on external involvement with DIG (Part IV)? Throughout the thesis a number of international law concepts or topics are transversally referred to. Non-exhaustively, and in random order: the international legal status of domestic or internationalized agreements; the concepts belligerency and of *de facto* governments (from which the concept of ‘transitional authority’ will be differentiated); the role of custom and unilateral declarations in relation to self-imposed or externally imposed obligations incumbent on transitional authorities; the right to self-determination; and the principle of non-intervention in domestic affairs.

RATIONALIZATION OF THE MODE OF THE DEBATE – Attempting to replace controversial political concepts like legitimacy and democracy by concepts with more legal cachet is not unproblematic. While the very existence of specific legal concepts *as legal references* is not seriously questioned, their precise legal content often is no less controversial than the contents of said political concepts. The principles of non-intervention in domestic affairs and self-determination of peoples are paradigmatic in this regard. But the choice of adopting an international legal perspective for the study of DIG aims at altering the *mode* of the debate. The present author is convinced that creating the space for a debate within the parameters of the law about a topic as controversial as DIG is a welcome, even necessary, change.<sup>420</sup>

INT’L RESPONSIBILITY – This study is in part inspired by the need to unravel the sometimes ambiguous responsibility regime of DIG. The regular overstretch of the assistance model in combination with the artificial insistence on domestic responsibility on the occasion of DIG should provoke more critical thinking, especially when transitions end up in disasters; the PBC, too, noted that “all too frequently this model breaks down”<sup>421</sup>. The international impact on, and regular failures of, modern DIG raise the following question: who is responsible for illegalities potentially tainting internationally assisted DIG?

ABSTRACTION FROM COMPOSITE ACTION AT THE OCCASION OF DIG – DIG is characterized by a complex division of labor. Responsibility is a delicate issue whenever one has to decode aggregated relationships: principal-agent, trustor-trustee, direction and control, aid and assistance, etc. Implicitly, the tension between domestic responsibility and international engagement during interregna is central to this dissertation. Only part of the tension inherent to internationally assisted DIG will be addressed. Within the confines of this dissertation, it is impossible to analyze under which precise conditions *either* domestic *or* external actors are to be held internationally responsible for wrongful acts committed on the occasion of DIG.

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<sup>420</sup> See, Introduction, Section B.1 where I explain that this is a normative choice.

<sup>421</sup> 2015 Review of the UN Peacebuilding architecture, *op. cit.*, § 31.

ATTRIBUTION IS CASE-DEPENDENT – More humbly, this study uncovers a number of norms or practices that must be respected both by domestic and international actors engaged in DIG, without examining in depth the question of *attribution* under the law of international responsibility (which, in any event, depends on a case-by-case assessment). By unveiling a *ius in interregno*, this dissertation examines under which circumstances transitional authorities or external states and organizations interacting with these authorities violate the law, thus potentially engage their respective responsibility, without however enquiring how, if at all, the burden of responsibility must be shared.

ATTRIBUTION OF RESPONSIBILITY COMES AFTER DEFINITION LEGAL FRAMEWORK – Also in relation to aggregate operations like internationally assisted DIG, one must first detect what the law is before applying it. First, one has to define whether an international legal framework is developing with regard to DIG before analyzing who would be internationally responsible for mismanaged transitions. Similarly, before addressing the “appearance of a lack of accountability in post-conflict efforts”, it is “both necessary and timely to establish a clear normative framework”, Jubilut rightly remarks<sup>422</sup>. With this in mind, this thesis focuses on the question how international law applies to DIG, and indeed how DIG might influence the development of international law. This dissertation elucidates under which circumstances transitional authorities –or the states and organizations assisting them– would violate a *ius in interregno*. It hopes to lay the groundwork for clarifying the conditions under which domestic and international actors would engage their international responsibility in case of transition failures.

## *2.2. Perusal of state and IO practice*

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Several actors are involved in nonconstitutional transitions, and may be considered when conducting an international legal analysis of DIG. A variety of actors may wish to influence the interregnum and the ensuing political/constitutional reconfiguration of a state’s order. We have indeed seen that several actors are actively interested in DIG, both domestically, i.e. the provisional or interim (governmental) authorities leading these processes; and internationally, i.e. the states and organizations purporting to influence DIG.

The practice of (third) states with regard to DIG could provide useful insights for our analysis<sup>423</sup>. Consider, for instance, the role of Turkey and Egypt as hosts of the Syrian oppositional transitional authorities; or programs like USAID's Office of Transition Initiatives (or other national programs to monitoring transition processes). National foreign affairs services and chancelleries often view or even promote DIG as a conflict resolution mechanism. Governmental or government-funded agencies (e.g. the role of the *Max Planck*

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<sup>422</sup> L. L. Jubilut, 'Towards a New Jus Post Bellum: The United Nations Peacebuilding Commission and the Improvement of Post-Conflict Efforts and Accountability', *Minnesota Journal of International Law* 20, 2011, pp. 26 - 64.

<sup>423</sup> See, generally, the article by V. Mayer-Schönberger, 'Into the Heart of the State: Intervention through Constitution-Making', 8 *Temp. Int'l & Comp. L.J.* 315, 1994.

*Foundation for International Peace and the Rule of Law* in the Afghan and Sudan/South Sudan transitions) should also be mentioned here.

One furthermore thinks of regional IOs and of the UN. Regional organizations include the AU, whose “mandate, especially in transition contexts, appears to have gradually expanded over time to include brokering talks between stakeholders in constitution-building processes”<sup>424</sup>, and ECCAS and ECOWAS. At the UN, one can include the Constitutional Focal Point<sup>425</sup>, which was “established in 2013 in response to increased demand for UN assistance in constitution-making processes”<sup>426</sup>; the Peacebuilding Commission (2005); the UNDPA Mediation Support Unit (2006) with its Standby Team of Mediation Experts (2006); the ‘Rule of Law Coordination and Resource Group’; and the UN field missions whose mandates relate to the rule of law. Outside the UN, a number of nongovernmental or academic organizations work specifically on DIG, e.g. the NGO’s DRI, International IDEA, and IDLO, to name but a few<sup>427</sup>; or the Berkely University *Center for Constitutional Transitions*.

In spite of the plurality of actors interested in DIG, this dissertation draws primarily on practice by states in transition (or by transitional authorities the acts of which may be attributed to states), reactions by contact groups, UNSC practice and practitioners’ guidelines. The following parts of the thesis, especially Part II and Part III, draw on the observation of practice of more than twenty states, which are, or were said to be in transition<sup>428</sup>. Reference to views expressed by other states will complement this observation. This large sample is necessary. The analysis of a currently developing *ius in interregno* must be connected to a wide range of relevant sources and lawmakers: the depth, legal force and relevance of a *ius in interregno* depend on that.

The practice of contact groups will also be examined. We shall see that the conclusions of contact group meetings are taken on behalf of dozens of states and IOs. With the necessary nuances, these conclusions can form an indicator of state practice and/or *opinio iuris*. The practice of the UNSC will furthermore also be considered. The UNSC plays an important role in divulging the peace-through-transition paradigm, especially when it adopts binding resolutions with regard to DIG. In this way, it may prove to play a significant role in spreading or catalyzing *opinio iuris* in relation to DIG-specific practices. Lastly, reference is made to practitioners’ and deontological guidelines. These guidelines explain the socialized origin of DIG-specific practices. Their reading assists us in understanding why DIG is so easily replicated and why DIG-specific norms are germinating.

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<sup>424</sup> IDEA, *Rule of Law and Constitution Building, The Role of Regional Organizations*, 2014, p. 3.

<sup>425</sup> Interview with J. Gluck, Constitutional Focal Point, New York UNHQ, 8 May 2014 (transcription on file with author).

<sup>426</sup> See the [one-pager](#) presenting the CFP.

<sup>427</sup> Note that religious organizations have also played a role in state transformation processes. For example the mediation by the Catholic Church leading to the 1989 power-sharing agreement in Poland. Cf. Observations by L. Garlicki in IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 17.

<sup>428</sup> See Table 2 under Chapter 3, Section A.1.

The practice of several actors can be relevant to analyze how international law relates to DIG, and especially to verify whether a *ius in interregno* is now in its infancy. This study recognizes a plurality of actors generating DIG-relevant practice, which, in turn, could inform this analysis. Within the confines of this study, a selection had to be made; hence the focus on states in transition, contact groups, the UNSC and practitioners' guidelines. This selection needs to be expanded and rendered more coherent in future research.

## PART II – FOUNDATION & ACTORS OF DOMESTIC INTERIM GOVERNANCE

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This part analyzes the foundation of DIG (Chapter 3) and conceptualizes political bodies (purportedly) introducing a state transformation process in their respective states under the heading of ‘transitional authorities’ (Chapter 4). The position of ‘transitional authorities’ will be taken as a point of departure for the analysis under part III about the core obligations under *ius in interregno*. The examination of the international obligations of external actors vis-à-vis these authorities is reserved for part IV of the thesis.

### CHAPTER 3. THE FOUNDATION OF DOMESTIC INTERIM GOVERNANCE AND THE COMMON RELEVANCE OF TRANSITION INSTRUMENTS

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This chapter analyzes ‘transition instruments’, i.e. the legal or pre-legal documents triggering and regulating DIG. Transitional authorities are installed through nonconstitutional processes such as peace deals, power-sharing agreements but also unilateral declarations or interim constitutions. This is their origin (Section A). They have a supraconstitutional function and strive for a constitutional transformation within their domestic legal order. This is their function and purpose, respectively (Section B). Even if embodied in different forms, transition instruments can be analyzed together under international law, and as such can contribute to the analysis of DIG under international law under the heading of *ius in interregno*. This is the international legal relevance of transition instruments (Section C).

#### Section A. Origin: nonconstitutionality

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This section defines nonconstitutionality (1) and observes that nonconstitutionality is neutral under international law (2).

##### 1. Definition of nonconstitutionality

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DIG as analyzed in this thesis is generated in contexts of nonconstitutionality. Such contexts have their own distinct nuances. We shall see in this subsection that nonconstitutionality is not incompatible, in the domestic legal sphere, with forms of *provisional constitutionality*.

**DEFINITION OF NONCONSTITUTIONALITY** – Nonconstitutionality defines the origin and context of DIG. The return to (‘permanent’ or ‘stable’) constitutionality announces its end. As indicated in the introduction<sup>429</sup>, the words ‘nonconstitutionality’ or ‘nonconstitutional’ are used to refer to (a) the violation or modification of the constitution without following the established amendment or revision procedures, or to (b) the creation of (transitional) institutions not

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<sup>429</sup> Introduction, Section A.3.

foreseen by the constitution, either to alter the existing constitution (the transition instrument would then be both *praeter constitutionem* and unconstitutional) or to restore an older constitutional order (the transition instrument would then be *praeter constitutionem* without necessarily being unconstitutional).

CONTEXT OF NONCONSTITUTIONALITY: SUPRACONSTITUTIONALITY – The acts or instruments laying the foundation of transitional authorities are nonconstitutional, either because an oppositional transitional authority comes into being on the basis of a unilateral declaration overtly defying the constitutional order (the case of *replacement*, e.g. the Libyan transitional authorities); or because a consensual transitional authority is created on the basis of an agreement departing from and re-defining the existing constitutional order (the case of *transplacement*, e.g. the Burundi Arusha Agreement)<sup>430</sup>. Nonconstitutionality is naturally accompanied by supraconstitutionality, i.e. the claim that the transition instrument is superior to the constitution. Supraconstitutionality is instrumental to nonconstitutionality: it aims at ensuring that the old constitutional order is (progressively) replaced by instruments superseding it<sup>431</sup>.

NONCONSTITUTIONALITY: NUANCED UNDERSTANDING – Nonconstitutionality should not be conflated with large-scale constitutional / institutional modifications within a country carried out with due regard to the existing institutions of a state and in accordance with the applicable constitutional provisions. This study does not engage in a comparison of constitutional reforms (*‘Verfassungsänderungsprozessen’*<sup>432</sup>); or of illegitimate transitions through (formally) lawfully adopted amendments, i.e. the issue of so-called unconstitutional constitutional amendments<sup>433</sup>. Furthermore, nonconstitutionality is not incompatible with transition texts referring to previous constitutional systems (as in Afghanistan<sup>434</sup>, Somalia<sup>435</sup>), or even confirming the continued application of the previous constitutional system if, at the same time, such texts claim to have supraconstitutional value<sup>436</sup>, i.e. supersede the previous

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<sup>430</sup> The distinction between *replacement* and *transplacement* will be introduced below, in the introduction of Chapter 4.

<sup>431</sup> Chapter 3, Section B.

<sup>432</sup> M. Böckenförde, ‘Die Einbindung der Bevölkerung in Verfassungsänderungsprozessen – Ein Überblick’ in H. P. Hestermeyer, Nijhoff (et al) (eds.), *Coexistence, cooperation and solidarity*, Leiden, pp. 1107-1123.

<sup>433</sup> A. Barak, ‘Unconstitutional Constitutional Amendments’, *Israel Law Review*, Vol. 44, pp. 321 – 341. Barak defines an unconstitutional constitutional amendment as “an amendment to the constitution that has been made pursuant to the formal requirements of the constitution but [that] deviates from its basic structure” (p. 321). The main focus of Barak’s enquiry is whether such an amendment can be subject to judicial review. Roznai observes that a “global trend is moving towards accepting the idea of limitations –explicit or implicit– on constitutional amendment power” (and that certain principles are identified as unamendable – which may constitute a bridge to the idea or reality of ‘global constitutionalism’). Y. Roznai, *The American Journal of Comparative Law*, Vol. 61, 2013, p. 658. Cf. also L. Garlicki, ‘Constitutional Amendments and Departure from Democratic Rule’, NYU presentation, 6 November 2013, highlighting the concept of ‘unconstitutional constitutional amendments’.

<sup>434</sup> The Bonn Agreement, art. II.1.1, giving rise to the Afghan transitional authorities, explicitly refers to the continued application, in principle, of the Afghan Constitution of 1964.

<sup>435</sup> The Somali Transitional Charter refers to the 1960 Somali Constitution. Cf. the Transitional Federal Charter for the Somali Republic, February 2004, art. 71.2.

<sup>436</sup> Chapter 3, Section B. Cf. especially Table 3.

regime (as in Afghanistan<sup>437</sup>, Burkina Faso<sup>438</sup>, Burundi<sup>439</sup>, Côte d'Ivoire<sup>440</sup>, South Africa<sup>441</sup>, South Sudan<sup>442</sup>, and Yemen<sup>443</sup>). Sometimes one can find, within the same transition instrument, the affirmation that it has supraconstitutional value side by side with a reference to the previous constitutional and legal order, e.g. to ensure the continued application of existing laws inasmuch as these are not overridden by the transition instrument. The nonconstitutional basis of all the transitions just mentioned in passing is actually a moot point: there is no doubt that the constitutional orders of these countries were fundamentally altered as a result of DIG generated by a nonconstitutional rupture. This is so irrespective of whether the transition instruments contain references to the previous constitutional order.

**NONCONSTITUTIONALITY DOES NOT EXCLUDE INTERIM CONSTITUTIONALISM** – Domestic transitions are composite procedures. They go through a number of stages, and mostly build on a sequence of interim acts or documents. The nonconstitutionality that initially characterizes them can subsequently be remedied, in one or more steps (staged constitutionmaking<sup>444</sup>). In other words, nonconstitutionality in such contexts is not a linear or continuing state of affairs. Interim constitutional acts or documents can depart from the previous constitutional order, and at the same time provide a provisional legal foundation for the regime to come. For example, the 1993 South African Constitution repealed South Africa's first constitution, adopted in 1909, and at the same time laid the basis for the 1996 constitution and post-Apartheid South Africa. Transitional authorities established on the basis of such acts or documents are nonconstitutional but 'interim-constitution based', like South Africa's Government of National Unity (April 1994 - February 1997). They are, thus, constitutional in a sense, even if they were set up in the larger context of a nonconstitutional transition process.

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<sup>437</sup> Bonn Agreement, Section V.5: "[a]ll actions taken by the Interim Authority shall be consistent with Security Council resolution 1378 (14 November 2001) and other relevant Security Council resolutions relating to Afghanistan".

<sup>438</sup> The Burkinabé Charte de la Transition dd. 16 November 2014 provides: "[e]n cas de contrariété entre la Charte de la transition et la Constitution, les dispositions de la présente charte prévalent".

<sup>439</sup> In the case of Burundi, the Arusha Agreement, Protocol II, Ch. II, art. 15 provides that "[w]hen there is any conflict between [the Constitution of the Republic of Burundi of 13 March 1992] and the Agreement, the provisions of the Agreement shall prevail". Also, the Chair of the Specific Configuration on Burundi of the Peacebuilding Commission "appeal[ed] for an inclusive process and a revision that didn't undermine the basic principles of the Arusha Agreements" (Chair's Summary of the Informal meeting of the Burundi Specific Configuration of the PBC, New York, 12 March 2014).

<sup>440</sup> In Côte d'Ivoire, for example, the UNSC stated that "no Ivorian party should invoke *any* legal provision to impede the peace process" launched by the 2003 Linas-Marcoussis Agreement. Cf. S/RES/1721 dd. 1 November 2006, Preamble and § 4. Emphasis added.

<sup>441</sup> The South African Interim Constitution provides that the new constitutional text shall comply with 34 constitutional principles. Cf. Interim Constitution, art. 71.

<sup>442</sup> For South Sudan, the January 2005 Sudan, which ended the civil war in that country, could be seen as an 'Überconstitution': "the negotiation and conclusion of the CPA was considerably influenced by external factors. *And it was the CPA that determined the procedural and substantial framework for the constitution-making process*" (P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, pp. 443-448).

<sup>443</sup> The 'Agreement on the Implementation Mechanism for the Transition Process in Yemen' provides that "[t]he GCC Initiative and the Mechanism shall supersede any current constitutional or legal arrangements. They may not be challenged before the institutions of the State". ([Agreement on the Implementation Mechanism for the Transition Process in Yemen in Accordance with the Initiative of the Gulf Cooperation Council \(GCC\)](#) dd. 5 December 2011, § 4).

<sup>444</sup> Introduction, Section A.3.

OVERVIEW – In most cases under scrutiny, the nonconstitutional origins of the transition eventually evolve into the adoption of a new constitution (‘reconstitutionalization’) and the creation of a new regime. Between these two moments, i.e. during the interregnum, typically one or more transitional authorities administer the state, and ensure the return to (permanent) constitutionality on the basis of the election/appointment of a constituent body and the organization of a constitutional referendum. The following overview indicates (a) the nonconstitutional context and (b) the main transition instrument per transition procedure.

**TABLE 2: Context of nonconstitutionality leading to adoption transition instruments (short reference)**

<b>Country</b>	<b>A. Context Nonconstitutional Origin</b>	<b>B.1. Transition Instrument</b>	<b>B.2. Legal nature</b>
Afghanistan	Ousting of Taliban (1996 – 2001)	<a href="#">2001 Bonn Agreement</a>	Intrastate Agreement
Burkina Faso	Ousting of Pres. Blaise Compaoré (31 October 2014).	<a href="#">2014 Charte de la Transition</a>	Domestic law
Burundi	Peace process in context of Burundi civil war (1993 - 2005).	<a href="#">2000 Arusha Agreement</a>	Intrastate Agreement
Cambodia	Peace process in context of Cambodian-Vietnamese war (1977 - 1991).	<a href="#">1991 Paris Peace Accords</a>	Int. treaty
Central African Republic	Ousting Pres. Bozizé & Suspension constitution (March 2013) by Séléka coalition.	<a href="#">2013 Déclaration de N’Djamena</a> <a href="#">2013 Charte Constitutionnelle</a> <sup>445</sup>	Domestic law
Chad	Peace process in context of Chad-Libyan conflict (1978–1987).	1979 Lagos Accord	Intrastate Agreement
Comoros	Coup in April 1999 deposing Pres. Massoude.	<a href="#">1999 Accords d’Antananarivo</a>	Intrastate Agreement
Côte d’Ivoire	Peace process in context of Fist Ivorian Civil War (2002-2007).	<a href="#">2003 Linas-Marcoussis Accord</a> <a href="#">2007 Ouagadougou Political Agreement</a>	Intrastate Agreement
DRC	Peace process in context of Second Congo War (1998-2003).	<a href="#">2002 Pretoria Agreement</a> 2002 ‘Draft Constitution of the Transition’	Int. treaty / Domestic law
Guinea	Coup by CNDD on 23 December 2008 following death Pres. Conté.	<a href="#">2010 Ouagadougou Declaration</a>	Domestic law
Guinea-Bissau	Coup on 12 April 2012 deposing Pres. Pereira.	<a href="#">2012 ECOWAS Communiqué</a> <a href="#">Pacto de Transição Política</a>	Int. resolution Domestic law
Iraq	Ousting of Pres. Hussein in 2003 and dissolution of Ba’ath party.	<a href="#">2004 Transitional Administration Law</a>	Domestic law
Kyrgyzstan	Ousting of Pres. Bakiev and his government in April 2010.	2010 Provisional Government Decree No 19 & 20	Domestic law
Liberia	Peace process in context of Second Liberian Civil war (1999 – 2003).	<a href="#">2003 Accra Comprehensive Peace Agreement</a>	Intrastate Agreement
Libya	Unilateral transition procedure and ousting of Col. Gaddafi in context of Libyan Civil War (2011).	<a href="#">2011 Constitutional Declaration</a> <a href="#">2015 Libyan Political Agreement</a>	Domestic law
Mali	Coup on 22 March 2012 deposing Pres. Touré.	<a href="#">2012 Framework Agreement</a>	Intrastate Agreement
Nepal	Ousting of King Gyanendra (May 2006) in aftermath of Nepalese Civil War (1996 – 2006).	2006 ‘Comprehensive Peace Agreement’ <a href="#">2007 Interim Constitution</a>	Intrastate Agreement
Rwanda	Peace process in the aftermath of Rwandan Civil War (1990 – 1993).	<a href="#">1993 Arusha Agreement</a>	Intrastate Agreement / Domestic law
Sierra Leone	Peace process in the aftermath of	<a href="#">1999 Lomé Agreement</a>	Intrastate Agreement

<sup>445</sup> *Charte constitutionnelle du 18 juillet 2013*, Preamble.

	Sierra Leone Civil War (1991–2002).		
Somalia	Peace process in the context of Somali Civil War (1986 – present).	<a href="#">2004 Somali Transitional Charter</a>	Domestic law
South Africa	Abolition of Apartheid (1948 - 1994).	<a href="#">1994 Interim Constitution</a>	Domestic law
Syria	Attempt of unilateral transition procedure and ousting of Pres. Al-Assad in the context of Syrian Civil War (2011 – present).	<a href="#">Coalition Principles (undated)</a> / 2015 Basic Principles	/
Sudan	Peace process in the context of Second Sudanese Civil War (1983 – 2005).	<a href="#">2005 Sudan Comprehensive Peace Agreement</a>	Int. treaty / Intrastate Agreement
Ukraine	Peace process in the context of War in Donbass (2014 – present).	<a href="#">2015 Minsk Agreement</a> <a href="#">2014 Agreement on the Settlement of Crisis in Ukraine</a>	Int. treaty / Intrastate Agreement
Yemen	Departure of Pres. Saleh; Yemeni Civil War (2015)	<a href="#">2011 Gulf Cooperation Council Agreement</a> <a href="#">2015 Constitutional Declaration</a>	Intrastate Agreement

## 2. Neutrality of nonconstitutionality

In the international legal sphere, contexts of nonconstitutionality are regarded as *neutral* because there is no (regional or international) legal framework for regulating the (formally absent) dynamics between domestic nonconstitutionality and international legality. A *ius in interregno* does not tackle this issue, even though it indirectly addresses it since it is based on an international legal analysis of practices and procedures resulting from nonconstitutional moments.

**NONCONSTITUTIONALITY: A DOMESTIC MATTER** – If a durable constitution defines the ‘rules of the game’ defining how public power is limited, then (on yet another level) transition instruments purport to be ‘the rules of the game defining the rules of the game’. They are –or purport to become– secondary norms in the Hartean sense of the word. In spite of this, their domestic validity is not guaranteed from the start – precisely because they are nonconstitutional. In this subsection we shall see that when transition instruments are qualified as nonconstitutional/supraconstitutional, this is a domestic legal matter in the first place. Nonconstitutionality/supraconstitutionality refers to a possible conflict of norms within the domestic legal order, and as such does not concern the relationship between domestic and international law.

**THE PROGRESSIVE VALIDATION OF NONCONSTITUTIONALITY** – The nonconstitutionality of transition instruments may (progressively) be cured through the transition it generates and regulates. The (incremental) return to, or restoration of, constitutional legality precisely hinges on DIG. As secondary supraconstitutional norms, transition instruments may become domestically valid early on in the transition. This is often the case when they emanate from consensual and inclusive processes<sup>446</sup> and have not been externally imposed<sup>447</sup> (e.g. the 2002 Pretoria

<sup>446</sup> Chapter 6.

<sup>447</sup> Chapters 8 & 9.

Agreement for the DRC). Transition instruments may also (in whole or in part) acquire domestic legal validity *ex post*. This is the case when a transition instrument emanates from an opposition movement, and comes to effectively regulate the transition procedure (e.g. the 2011 Constitutional Declaration for Libya<sup>448</sup>). In such case, the supraconstitutional nature of a transition instrument will be confirmed with certainty only once the subsequent regime has been installed following the successful completion of a transition. The *ex post* validation of an initially invalid transition instrument may then be seen as a form of acquiescence<sup>449</sup>.

REGIONAL PROVISIONS ON NONCONSTITUTIONALITY – On the regional level a number of provisions directly apply to domestic nonconstitutionality. The most elaborate provisions with regard to domestic nonconstitutionality are part of the African regional legal framework as developed after the decolonization process<sup>450</sup> (before that, the OAU often supported nonconstitutional transitions as a means of realizing self-determination<sup>451</sup>). At least since its 2000 Constitutive Act, the AU has been confirming the principle according to which unconstitutional changes of governments shall be condemned and rejected. This act also provides that “governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union”<sup>452</sup>. In its decision 141 (XXXV), the AU Assembly of Heads of State decided that “member States whose Governments came to power through unconstitutional means after the Harare Summit, should restore constitutional legality [...]”. The 2000 ‘Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government’ (Lomé Declaration) defines unconstitutional changes of government as follows:

- i) military coup d’état against a democratically elected Government;
- ii) intervention by mercenaries to replace a democratically elected Government;

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<sup>448</sup> Since the adoption of the Political Agreement of 17 December 2015, the domestic validity of the 2011 Constitutional Declaration is under discussion: “constitution-makers should include transitional provisions that make clear how the constitution would relate to Libya’s wider governance framework, in particular the Political Agreement of December 2015 and the Constitutional Declaration of 2011”. DRI, ‘Ensuring a Smooth Transition to the new Constitutional Order: Transitional Provisions in the Libyan Draft Constitution and Political Agreement’, *op. cit.* Emphasis added.

<sup>449</sup> In this sense, cf. S. Wheatly, ‘The Security Council, Democratic Legitimacy and Regime Change in Iraq’, EJIL 17, 2006, p. 550. The issue of acquiescence is only dealt with in passing. Cf. Chapter 7, Section B.4; Chapter 8, Section B.1. If a situation calls for some reaction within a reasonable period on the part of state (transitional) authorities, and they do not do so, they are held to have acquiesced the situation. Cf. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, ICJ Reports, 1962, p. 23. For the link between acquiescence and estoppel, cf. I. Sinclair, ‘Estoppel and Acquiescence’ in V. Lowe, M. Fitzmaurice, *Fifty years of the International Court of Justice, Essays in honor of Sir Robert Jennings*, CUP, 1996, pp. 104 – 120.

<sup>450</sup> Cf. also 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*, *op. cit.*

<sup>451</sup> A historical example whereby a regional organization tried to trigger a nonconstitutional transition, in the specific context of a liberation struggle, is provided by the Harare Declaration dd. 21 August 1989, 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, Preamble, § 4). The same declaration provides that “the outcome [of such a process] should be a new constitutional order” (*id.*, nr. 16).

<sup>452</sup> AU Constitutive Act dd. 11 July 2000, artt. 4 & 30.

- iii) replacement of democratically elected Governments by armed dissident groups and rebel movements;
- iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections

On 21 December 2001, ECOWAS declared “zero tolerance for power obtained or maintained by unconstitutional means”<sup>453</sup>. In the 2007 Governance Charter, the adherence to the rule of law is “premised upon the respect for, and the supremacy of, the Constitution and constitutional order in the political arrangements of the State Parties”<sup>454</sup>. This charter furthermore makes the “condemnation and total rejection of unconstitutional changes of government” a fundamental principle<sup>455</sup>.

The 2001 Inter-American Democratic Charter and the 2011 South Asian Association for Regional Cooperation Charter of Democracy also contain provisions regarding unconstitutional changes of government. The relevant articles concern the rejection or condemnation by the respective regional organization of unconstitutional changes of government, as well as the suspension of membership that may result from it<sup>456</sup>.

Contrary to the previous legal instruments, EU treaties do not contain specific provisions relating to unconstitutional changes of government in member states (hence the fierce debates about which legal arsenal could be used for combatting the ‘unconstitutional constitutional amendments’ and the ‘authoritarian backsliding’ in Hungary<sup>457</sup> and Poland<sup>458</sup>). Generally, the Council of the EU can, under certain conditions, “determine that there is a clear risk of a serious breach”<sup>459</sup> by a member state of the values of democracy and the rule of law, among other fundamental values the EU is founded on<sup>460</sup>.

**INCONSISTENT APPLICATION AND LIMITED SCOPE OF REGIONAL PROVISIONS ON NONCONSTITUTIONALITY –**  
The above-cited provisions show that, on the regional level, the policy of non-interference with regard to unconstitutional changes of government is making place for a policy of non-indifference: “there are quite a number of international organizations that sanction the overthrow of a government, particularly when the latter benefits from some democratic legitimacy”<sup>461</sup>. The application of these provisions however has not been consistent, especially

<sup>453</sup> Protocol on Democracy and Good Governance (A/SP1/12/01) dd. 21 December 2001, art. 1.c.

<sup>454</sup> African Charter on Democracy, Elections and Governance (“Governance Charter”) dd. 30 January 2007, art. 2.2.

<sup>455</sup> *Id.*, art. 3.3.

<sup>456</sup> AU Constitutive Act, artt. 4 & 30; Inter-American Democratic Charter, art. 20; South Asian Association for Regional Cooperation Charter of Democracy, seventh commitment. With regard to the AU, cf. also 2007 Governance Charter & the Lomé Framework for an OAU Response to Unconstitutional Changes in Government (‘Lomé Declaration’).

<sup>457</sup> L. Garlicki, ‘Constitutional Amendments and Departure from Democratic Rule’, *op. cit.*

<sup>458</sup> See how the EU Commission used the new ‘EU Framework to Strengthen the Rule of Law’ with regard to Poland in January 2016.

<sup>459</sup> TEU, art. 7.

<sup>460</sup> *Id.*, art. 2.

<sup>461</sup> J. d’Aspremont, ‘Coups d’Etat in international law’, *Tulane J. of Int’l & Comp. Law*, Vol. 18, 2009-2010, pp. 463.

under the AU framework<sup>462</sup>; after the so-called Arab Spring erupted, “pundits argue that the revolutions brought to the fore the limitations of the union’s current conceptualization of unconstitutional changes in government”<sup>463</sup>. This observation can probably be extended to other regional frameworks.

The scope of the above-cited provisions is furthermore limited as they only reject and condemn unconstitutional changes of government, without foreseeing *how* the constitutional order must be restored, and how the period between the unconstitutional change of government and return to constitutionality (including, where relevant, the interim constitutionmaking process) must be bridged and managed. They furthermore remain silent about nonconstitutional changes of government that are *praeter constitutionem* without being unconstitutional. (e.g. the *Accord Cadre de mise en oeuvre de l’engagement solennel* dd. 1 April 2012 regarding Mali, or the *Pacto de Transição Política* dd. 16 May 2012 regarding Guinea-Bissau).

**ABSENCE INT’L LEGAL FRAMEWORK ON DOMESTIC NONCONSTITUTIONALITY** – There are no global international legal instruments directly applicable to domestic nonconstitutionality; propositions *de lege ferenda* in this regard are unrealistic today<sup>464</sup>. Apart from the regional organization instruments just mentioned, there is, to my knowledge, only one international-treaty-based reference to domestic nonconstitutionality. The 1969 VCLT provides that (under strict conditions) the violation of internal law of fundamental importance –read: constitutional law– relating to treaty-concluding powers may lead to the invalidation of the consent to be bound by a treaty<sup>465</sup>. The drafting history of art. 27 of the VCLT confirms that the autonomy of international law must however be upheld, even vis-à-vis constitutional law<sup>466</sup>. The ILC has also underlined the autonomy of international law vis-à-vis domestic law (albeit in another field, the law of international responsibility<sup>467</sup>). For the same reason the Tobar doctrine, according to which recognition of unconstitutional (insurgent) governments should be refused, has not gained acceptance in international legal doctrine.

**NEUTRALITY INT’L LAW VIS-A-VIS DOMESTIC NONCONSTITUTIONALITY** – Apart from the issues of international recognition and of accreditation of delegates in the UNGA on the basis of a

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<sup>462</sup> Z. Yihdego, ‘The African Union: Founding Principles, Frameworks and Prospects’, *European Law Journal*, Vol. 17, No. 5, September 2011, pp. 568–594. U. Engel, ‘Unconstitutional Changes of Government – New AU Policies in Defence of Democracy’, Working Paper Series, 2010, No. 9.

<sup>463</sup> G. M. Wachira, ‘The Role of the African Union in Strengthening the Rule of Law and Constitutional Order in Africa’ in IDEA, *Rule of Law and Constitution Building, The Role of Regional Organizations*, 2014, p. 22.

<sup>464</sup> The Tunisian President suggested that an International Constitutional Court be created (speech to the UNGA in September 2012). The (quite elaborate) proposal is on file. Consult the website of NYU [Center for Constitutional Transitions](#) for more information.

<sup>465</sup> VCLT, art. 46. The manifest violation of internal laws ‘of fundamental importance’ regarding a state’s competence to conclude a treaty potentially invalidates that state’s consent to be bound by that treaty under the VCLT.

<sup>466</sup> A. de Hoogh, ‘[The Relationship between National Law and International Law in the Report of the Georgia Fact-Finding Mission](#)’, *EJIL:Talk!*, 4 January 2010.

<sup>467</sup> See, for example, DASR, art. 3: “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”.

constitutionality criterion<sup>468</sup>, domestic nonconstitutionality or illegality is thus of no concern for international law. International law adopts a position of neutrality –“*un comportement ni permis ni interdit*”<sup>469</sup> – with regard to the context of nonconstitutionality in which transitions are triggered, even if such a context may occasionally be condemned by the UNSC<sup>470</sup>. In short, domestic nonconstitutionality is neither allowed nor prohibited under international law. At the maximum it is tolerated. For Vidmar, “it appears that an extra-constitutional regime change in international law is generally –at least– tolerated; except where the overthrown government enjoys democratic legitimacy”<sup>471</sup>. For d’Aspremont, “contemporary practice weathers an incremental de-emphasising of the democratic origin of governments”<sup>472</sup>. In a sense, the neutrality of international law vis-à-vis nonconstitutional transition instruments can be compared to international law’s neutrality vis-à-vis declarations of independence (potentially) leading to the birth of a new state<sup>473</sup>.

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In sum, there is no clear or consistently implemented international legal framework, either on the global or regional level, concerning the effects of domestic nonconstitutionality on the international legal plane. It is therefore not surprising that international reactions vis-à-vis nonconstitutional transitions are often contradictory.

**INCONSISTENT INT’L PRACTICE VIS-A-VIS DOMESTIC NONCONSTITUTIONALITY** – The UNSC, for instance, sometimes rejects nonconstitutional transitions, and may observe that they present a threat to

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<sup>468</sup> Cf. the accreditation of delegates of Kuwait (1990), Afghanistan (1996-2001), Haiti (1992), and Sierra Leone (1997). For a discussion, cf. J. d’Aspremont, ‘[Duality of government in Côte d’Ivoire](#)’, EJIL:Talk!, 4 January 2011. Cf. also J. d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, *op. cit.*, p. 905, and M. Griffin, ‘Accrediting democracies: does the credentials committee of the United Nations promote democracy through its accreditation process, and should it?’, 32 NYU J. Int’l & Pol., 1999-2000, pp. 725-785, arguing that, while the UNGA Credentials Committee starts to take account of democracy, there is no general rule in this regard (which, in any event, would be inadvisable for Griffin).

<sup>469</sup> J. Salmon, ‘Le droit international à l’épreuve au tournant du XXI siècle’, *op. cit.*, p. 93.

<sup>470</sup> The UNSC has only twice labeled the unseating of the constitutionally elected government as a threat to international peace and subsequently approved the use of military force to restore constitutionally elected leaders. UNSC/RES/940 dd. 31 July 1994. UNSC Statement by the Pres. of the UNSC dd. 26 February 1998. On the other hand, the UNSC “regularly invokes Chapter VII to condemn coups against democratically elected regimes”. Cf. G. H. Fox, ‘Regime Change’, MPEPIL. But the UNSC “has not responded to the vast majority of cases of regime change in the post-war era” (*ibid.*), and in any event nonconstitutional foundational moments do not directly impact on the legality of DIG practices.

<sup>471</sup> J. Vidmar, ‘Democracy and Regime Change in the Post-Cold War International Law’, *op. cit.*, p. 380. See also the concept of ‘democratic coup d’état’: O. O. Varol, ‘The Democratic Coup d’Etat’, Harvard International Law Journal, Vol. 53, No. 2, 2012.

<sup>472</sup> d’Aspremont, ‘1989-2010: the rise and fall of democratic governance in international law’, Select Proceedings of the European Society of International Law (J. Crawford, ed., Hart Publishing, 2011), p. 8.

<sup>473</sup> Declarations of independence, too, are legally neutral under international law; “[s]tate practice confirms that the adoption of a declaration of independence, or similar legal acts, frequently occurs during the creation of a new State. *As such, this very act – the act of declaring independence – is legally neutral*”: ICJ, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Public sitting held on Monday 7 December 2009, CR 2009/29, 52 [11] (argument of Andreja Metelko-Zgombic on behalf of Croatia). Emphasis added. See, however, J. Vidmar, ‘Conceptualizing Declarations of Independence in International Law’, Oxford Journal of Legal Studies, Vol. 32, No. 1 (2012).

international peace and security<sup>474</sup>. On other occasions it (indirectly) approves of a nonconstitutional transition by endorsing a transitional authority. Thus, while in 2002 the UNSC “expresse[d] its strong support to the decisions of the OAU Heads of State and Government at the Algiers Summit held in 1999 denying recognition to Governments that come to power through unconstitutional means”<sup>475</sup>, it has turned a blind eye on unconstitutional transitions (e.g. the Libyan transition triggered in 2011), especially where transitions incapacitate a government allegedly breaching international law. UNSC resolutions in relation to the (nonconstitutional) foundation of DIG are thus inconsistent.

In the case of Burkina Faso, the AU, ECOWAS and the UN seemed to agree about how to react vis-à-vis a nonconstitutional transition, as their joint declaration dd. 2 November 2014 indicates<sup>476</sup>. But in other cases international reactions were less consistent. The reactions to the creation of the transitional government in Guinea-Bissau evidence this inconclusiveness. This government was recognized by ECOWAS, which deployed a mission (ECOMIB) in the country. But it was not recognized by the Community of Portuguese-Language countries (CPLP), or by the EU. The AU and the *Organisation internationale de la Francophonie* suspended Guinea-Bissau. In its resolution of 18 May 2012, the UNSC had condemned the coup and had called for a restoration of the constitutional order. It had specifically requested the UNSG “to *harmonize* the respective positions of international bilateral and multilateral partners, particularly the AU, ECOWAS, the CPLP and the EU, and ensure maximum coordination and complementarity of international efforts”<sup>477</sup>, but to no avail.

**DYNAMIC PERSPECTIVE ON DIG RATHER THAN STATIC ANALYSIS OF NONCONSTITUTIONAL MOMENTS** – Literature has much focused on the question whether the international community’s stance has evolved over the years from a position of non-interference to non-indifference vis-à-vis nonconstitutional acts or instruments. Yet, if non-indifference there is, it is sporadic because based on a couple of poorly implemented regional frameworks. In light of this inconclusiveness another approach is proposed here. This approach consists in zeroing in on DIG procedures *resulting from or following* nonconstitutional acts or instruments rather than on the nonconstitutional moments that generate such procedures.

**IRRELEVANCE OF ORIGIN** – This ‘irrelevance of origin’ complements the ‘irrelevance of outcome’ already discussed above<sup>478</sup>. It is informed by the circumstance that international law is not highly informative about the nonconstitutionality which undeniably forms the breeding ground for DIG. For this reason, the particular contexts of nonconstitutionality are not examined in detail. Instead, the following section analyzes how transition instruments purport to remedy the (initial) nonconstitutionality by (partly) supplanting the previous constitutional order and by laying the foundations for the order to come, and why they do so.

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<sup>474</sup> Cf. for instance UNSC resolutions with regard to Haiti and Rhodesia.

<sup>475</sup> S/PRST/2002/2 dd. 31 January 2002, p. 2.

<sup>476</sup> [AU, ECOWAS, UN joint declaration](#) dd. 2 November 2014.

<sup>477</sup> S/RES/2048 dd. 18 May 2012, § 3.

<sup>478</sup> Chapter 2, Section B.2.3.

## Section B. Function & purpose: supraconstitutionality & transitional constitutionalism

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At the foundation of the transition agreements can be concluded, declarations issued, pre-constitutional texts adopted, acts promulgated. This section analyzes the common function and purpose of instruments laying the foundation of and regulating DIG. It observes that constituent transition instruments have a supraconstitutional function (1) and pursue a form of transitional constitutionalism (2).

### 1. The function of transition instruments: supraconstitutionality

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CLASSIFICATION TRANSITION INSTRUMENTS (AND DISTINCTION BETWEEN LEGAL NATURE & LEGAL RELEVANCE) – Transition instruments can be subdivided in three categories. They are either international agreements (1.1), intrastate agreements (1.2), or interim constitutions / unilateral proclamations (1.3). This sequence seems to indicate that the international legal *nature* of transition instruments decreases from one category to the other. This is not entirely false, yet we shall see that the function and even international legal *relevance* of transition instruments for the development of a *ius in interregno* does not entirely depend on their nature<sup>479</sup>.

The following overview of transition instruments not only reveals their variety but also shows that, independently of their legal nature, they fulfill a supraconstitutional function by (partly) overriding the existing constitutional order. The reader who is only interested in the summary can immediately turn to Table 3, further below.

#### 1.1. International agreements

INT'L AGREEMENTS & TRANSITIONS SENSU LATO & SENSU STRICTO – International agreements may regulate transition processes *sensu lato* and *sensu stricto*. International treaties regulating transition processes *sensu lato* include the 1959 ‘Zurich Agreement for the constitution of Cyprus’ (‘Zurich Agreement’)<sup>480</sup> and the ‘1995 General Framework Agreement for Peace in Bosnia and Herzegovina’ (the ‘Dayton Agreement’)<sup>481</sup>. The Zurich Agreement and Dayton Agreement however deal with a transition in the context of state creation (Cyprus) and UN

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<sup>479</sup> Chapter 3, Section C.

<sup>480</sup> The Zurich Agreement, signed by Turkey, Greece, the United Kingdom and Cypriot community leaders, is undoubtedly an “international agreement concluded between States in written form and governed by international law”, thus a treaty in the sense of the VCLT. This agreement was at the basis of Cyprus becoming independent from British administration in 1960.

<sup>481</sup> The Dayton Agreement, signed by Bosnia and Herzegovina, Croatia, and Yugoslavia constitutes a treaty in the sense of the VCLT, even though it contains a mixture of international and national-level obligations. Sheeran writes in this regard that “[d]espite this it was considered a valid treaty as between the three States of Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (now Serbia and Montenegro)”. Cf. S. P. Sheeran; ‘International Law, Peace Agreements and Self-Determination: The Case of The Sudan’, *op. cit.*, p. 446. The Dayton Agreement is considered, in the words of Šarčević, to be a ‘*Völkerrechtlicher Vertrag als ‘Gestaltungsinstrument’ der Verfassungsgebung*’. Cf. E. Šarčević, ‘Völkerrechtlicher Vertrag Als „Gestaltungsinstrument“ Der Verfassungsgebung: Das Daytoner Verfassungsexperiment Mit Präcedenzwirkung?’, *op. cit.*, pp. 297–339.

administrative authority<sup>482</sup>, respectively, thus are not directly relevant for this study. As agreements regulating transition procedures *sensu stricto*, the Paris Agreement (Cambodia), the Pretoria Agreement (DRC), arguably the Minsk Agreement (Ukraine)<sup>483</sup> and, perhaps, the Comprehensive Peace Agreement (Sudan) are more relevant for our enquiry.

**CAMBODIA** – The 1991 Paris Accords, signed by various sovereigns<sup>484</sup>, is clearly an international treaty in the sense of the VCLT. Further, it is explicitly supra-constitutional. Its article 23 provides that Cambodia “will incorporate [...] [b]asic principles, including those regarding human rights and fundamental freedoms as well as regarding Cambodia's status of neutrality”<sup>485</sup>. The provisions concerning the constitution-to-be-adopted require that said basic principles must be incorporated into the new Cambodian Constitution. The supraconstitutionality of the Paris Agreement not only concerns the future but also the past constitutional order, as this agreement (at least implicitly) departs from the 1976 (Khmer Rouge) Constitution of Democratic Kampuchea.

**DRC** – The Pretoria Agreement regarding the DRC transition is also an international treaty. It provides that “the transitional *constitution* shall be drafted *on the basis of this inclusive Agreement* on transition in the DRC and shall form an integral part thereof”<sup>486</sup>. Mangu observes that “both instruments were the only source of Power during the transition”<sup>487</sup>. Both the 2006 Constitution<sup>488</sup> and the 2002 ‘Draft Constitution of the Transition’ refer in their respective preambles to the Pretoria Agreement. The latter instrument explicitly recognizes, in its first article, that “the Constitution of the transition of the Democratic Republic of Congo was drawn up based on the Comprehensive and Inclusive Agreement on Transition in the Democratic Republic of the Congo”.

**UKRAINE** – A ceasefire agreement was brokered by France and Germany and concluded between Ukraine and Russia on 12 February 2015 (‘Second Minsk Agreement’). At the time of writing its implementation is on hold, yet this agreement provides for the “passing of a constitutional reform in Ukraine with the entry into force by the end of 2015 of a new constitution, which shall incorporate decentralization as a key element”<sup>489</sup>. This provision affirms the claim of supraconstitutionality. It was followed by a presidential decree whereby a constitutional

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<sup>482</sup> Other denominations: ‘UN control’ or ‘Between direct governance and supervision’. Cf. Chapter 4, Section A.1.3, especially Table 4 ‘Gradations and classifications of international involvement in the interim rule’.

<sup>483</sup> Cf. the broad definition of an international treaty, as discussed below (Section C.1).

<sup>484</sup> People's Republic of Kampuchea, FUNCINPEC, KNPLF and the Khmer Rouge (NADK) as well as the Governments of Australia, Brunei Darussalam, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, Philippines, Singapore, Thailand, USSR, United Kingdom, USA, Vietnam, and Yugoslavia.

<sup>485</sup> Paris Accords, art. 23. The rights and freedoms to be incorporated into the Cambodian legal order are further detailed in the fifth annex to this treaty.

<sup>486</sup> Pretoria Agreement, VII.a. Emphasis added.

<sup>487</sup> A. M. B. Mangu, ‘The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter’, AHRLJ Volume 3 No 2 2003, pp. 253. It is not clear to which instrument Mangu is referring here: the interim constitution (but which interim constitution?), the Pretoria agreement, or another legal instrument. Emphasis added.

<sup>488</sup> *Constitution de la République du Congo*, February 2006.

<sup>489</sup> Minsk Agreement dd. 12 February 2015, art. 11.

commission was established<sup>490</sup>, an initiative which “might be seen as a first step towards compliance with the state’s obligations under the Second Minsk agreements”<sup>491</sup>.

SUDAN – Finally, the 2005 ‘Comprehensive Peace Agreement Between the Government of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army’ arguably constitutes an international treaty: while “it ha[d] been held in arbitration that the CPA is not a treaty”, “it is difficult to see the CPA solely as an agreement to be implemented at the national level. It is clearly an agreement with both a constitutional and international legal character”. It will however be treated as an ‘internationalized intrastate agreement’ under the next subsection.

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DIG BASED ON SUPRACONSTITUTIONAL INT’L TREATIES – Had it not been for their supraconstitutionality, the above-mentioned agreements could not have catalyzed DIG. As primary sources of international law<sup>492</sup>, international conventions have the capacity to inform the international legal analysis of DIG. They may contribute to the formulation of a *ius in interregno*. Such a contribution might seem less evident with the following category of transition instruments.

## 1.2. Intrastate agreements

INTERNATIONALIZATION OF INTRASTATE AGREEMENTS – In most cases, DIG is regulated by domestic intrastate agreements. Often such agreements contain various references to international law, and are endorsed by international mediators, third states and/or regional or global organizations. In addition, their implementation is frequently internationally monitored<sup>493</sup>. These three elements indicate that such agreements are particularly permeable to international (legal) influences<sup>494</sup>, which is why they are sometimes called ‘internationalized intrastate agreements’. Like the treaties discussed above, intrastate agreements regulating transitions contain explicit supraconstitutional provisions. This is so in at least twelve cases: Afghanistan, Burundi, Comoros, Côte d’Ivoire, Liberia, Mali, Nepal, Ukraine, Rwanda, Sierra Leone, Sudan, and Yemen.

AFGHANISTAN – The Bonn Agreement<sup>495</sup> provides that “until the adoption of the new Constitution” the Constitution of 1964 shall be applicable<sup>496</sup> but only “to the extent that its

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<sup>490</sup> Presidential Decree number 119/2015 dd. 3 March 2015.

<sup>491</sup> M. Timofeev, ‘[Ukraine: Once Again at Constitutional Crossroads](#)’, Constitutionnet, 6 March 2015.

<sup>492</sup> ICJ Statute, art. 38.1.a.

<sup>493</sup> Chapter 1, Section B.1.3, Table 1.

<sup>494</sup> Chapter 7, Section A.

<sup>495</sup> For a discussion of the legal nature of the Bonn Agreement, cf. T. Maruhn, ‘Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus’, *op. cit.*, pp. 480 – 511. See also M. Schoiswohl, for whom his agreement “escapes traditional distinctions between domestic agreements and international treaties”, but rightly notes that, in any event, it was endorsed in a UNSC resolution (S/RES/1383 dd. 6 December 2011). Cf. M. Schoiswohl,

provisions are not inconsistent with those contained in this agreement”<sup>497</sup>. At the same time, this agreement provides how and according to which timetable the next constitution is to be adopted<sup>498</sup>. Its supraconstitutionality thus concerns both the past and the future. In spite of the Bonn Agreement being an intrastate agreement, the UNSC has “reiterat[ed] its endorsement of the [...] Bonn Agreement, in particular its annex 2 regarding the role of the United Nations during the interim period”<sup>499</sup>, confirming that this intrastate agreement was internationally endorsed and monitored, notably by the UNSC.

**BURUNDI** – The Arusha Agreement provides that constitutional provisions were to be adopted “pursuant to the provisions of Protocol II to the Agreement”<sup>500</sup>. This agreement, too, has supraconstitutional value. It furthermore provides:

“the constitutional provisions governing the powers, duties and functioning of the transitional Executive, the transitional Legislature and the Judiciary, as well as the rights and duties of citizens and of political parties and associations, shall be as set forth hereunder and, *where this text is silent*, in the Constitution of the Republic of Burundi of 13 March 1992. When there is any conflict between that Constitution and the Agreement, the *provisions of the Agreement shall prevail*”<sup>501</sup>.

Given its supraconstitutional nature “the Arusha Agreement clearly shaped the framework for the continued mediation of the conflict and in the end decisively shaped Burundi’s current Constitution of 18 March 2005”, Vandeginste remarks<sup>502</sup>. Even after completion of the transition this agreement continues to bear upon domestic politics<sup>503</sup>.

**COMOROS** – The *Accord-Cadre de Réconciliation Nationale* dd. 17 February 2001 regulates the procedure for organizing a constitutional referendum and for adopting the coming constitution in Comoros<sup>504</sup>. Its article 29 succinctly states: “*toutes dispositions contraires aux dispositions du présent Accord sont nulles et non avenues*”.

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'Linking the International Legal Framework to Building the Formal Foundations of a State at Risk: Constitution-Making and International Law in Post-Conflict Afghanistan', *op. cit.*, pp. 828 a.f.

<sup>496</sup> Bonn Agreement, Section V.5.

<sup>497</sup> Bonn Agreement, II.1.i.

<sup>498</sup> Bonn Agreement, I.6.

<sup>499</sup> S/RES/1401 (2002). Annex 2 is about the UN advising the Interim Authority during the interim period.

<sup>500</sup> Arusha Agreement, Protocol I, Ch. II, art. 5.5.

<sup>501</sup> *Id.*, Protocol II, Ch. II, art. 15.2. On a third occasion, the Arusha Agreement affirms its supraconstitutional nature by providing that “[t]he transitional National Assembly shall as a priority review all legislation in force with a view to amending or repealing legislation incompatible with the objectives of the transitional arrangements and the provisions of the present Protocol”. *Id.*, art. 16.2.

<sup>502</sup> S. Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error', *Africa Spectrum* 44, no. 3, January 1, 2009, p. 72.

<sup>503</sup> On 24 March 2014 the Chair of the Specific Configuration on Burundi of the Peacebuilding Commission “appeal[ed] for an inclusive process and a revision that *didn't undermine the basic principles of the Arusha Agreements*” in view of the 2015 elections and the “on-going insecurity over the constitutional review process”. Chair’s Summary of the Informal meeting of the Burundi Specific Configuration of the PBC, New York, 12 March 2014. Emphasis added.

<sup>504</sup> *Accord-Cadre de Réconciliation Nationale*, artt. 4, 9.i, 11.ii, 17, 18.

COTE D'IVOIRE – The 2003 Linas-Marcoussis Agreement<sup>505</sup> provides that 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 [which] will implement the appended Round Table program which includes, in particular, provisions in the *constitutional*, legislative and regulatory sphere”<sup>506</sup>. In the same agreement one can read that “the Government of National Reconciliation will ensure that the *constitutional*, legislative and regulatory reforms arising from the decisions it is required to make are introduced without delay”<sup>507</sup>, leaving no doubt as to the obligatory nature of this supraconstitutional provision. The UNSC confirms this when it decides that “no Ivorian party should invoke *any* legal provision to impede the peace process”<sup>508</sup>. This resolution indicates that the UNSC deems the Linas-Marcoussis agreement to be superior to all Ivorian laws, even of constitutional nature. In spite of the UNSC’s exhortations, the Linas-Marcoussis peace process failed, which resulted in a second (leg of the) transition process. Concluded on 4 March 2007, the ‘Ouagadougou Political Agreement’ (arguably also an internationalized<sup>509</sup> intrastate agreement<sup>510</sup>) referred back to the Linas-Marcoussis Agreement<sup>511</sup>.

LIBERIA – The 2003 Accra Agreement “prescribed extralegal rules and processes for sharing power that *abrogated constitutionally based superior rules*”<sup>512</sup>, Levitt summarizes. This agreement indeed provides that there is a “need for an *extra-Constitutional arrangement* that will facilitate its formation and take into account the establishment and proper functioning of the entire transitional arrangement”<sup>513</sup>. Again, the supraconstitutional function of this agreement also concerns the past:

“the provisions of the present Constitution of the Republic of Liberia, the Statutes and all other Liberian laws, which relate to the establishment, composition and powers of the Executive, the Legislative and Judicial branches of the Government, are hereby *suspended*. [c] For the avoidance of doubt, relevant provisions of the Constitution, statutes and other laws of Liberia which are inconsistent with the provisions of this Agreement are also hereby *suspended*. [d] All other provisions of the 1986 Constitution of the Republic of Liberia shall remain in force”<sup>514</sup>.

MALI – The restoration of the (existing) constitutional order was the aim of the ‘*Accord Cadre de mise en oeuvre de l’engagement solennel*’ dated 1 April 2012. At the same time, this

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<sup>505</sup> [Linas-Marcoussis Agreement dd. 23 January 2003](#).

<sup>506</sup> *Id.*, 3.a. Emphasis added.

<sup>507</sup> *Id.*, IX.

<sup>508</sup> S/RES/1721 dd. 1 November 2006, Preamble and § 4. Emphasis added.

<sup>509</sup> The Conference of Heads of State on Côte d’Ivoire dd. 25 and 26 January 2003, consisting of the EU member states, about eighteen other states, and representatives of the Organization de la Francophonie, UNDP, WB, IMF, ADB, UNHCR and ICRC, among other actors, explicitly ‘endorsed’ this agreement. Annex II to S/2003/99 dd. 27 January 2003, § 6.

<sup>510</sup> Linas-Marcoussis Agreement, art. 1. The ‘Round Table of the Ivorian political forces’ consisted of MFA, MJP, MPCI, MPIGO, PDCI-RDA, PIT, RDR, UDCY and UDPCI, all domestic actors.

<sup>511</sup> Ouagadougou Political Agreement, Preamble: “*les Parties [...] ont réaffirmé [...] leur attachement aux Accords de Linas-Marcoussis*”.

<sup>512</sup> J. I. Levitt, *Illegal Peace in Africa*, *op. cit.*, p. 86.

<sup>513</sup> Accra Agreement, Part 10 ‘Implementation of the Peace Agreement’, art. XXXV.1a.

<sup>514</sup> *Id.*, art. XXXV, b-d.

agreement indicates that, given the exceptional circumstances, it is impossible to follow the constitution (i.e. to organize elections within forty days), and necessary to establish transitional institutions<sup>515</sup>. It is in this sense that the Malian transition instrument, even if it intends to restore the constitutional order, has supraconstitutional value (without being unconstitutional).

NEPAL – The ‘Decisions of the Summit Meeting of the Seven-Party Alliance and the Communist Party of Nepal (Maoist)’ dd. 8 November 2006 briefly provides the procedure by which the interim constitution and new constitutional council are to be promulgated<sup>516</sup>. It also contains provisions about the future “structure of the state”<sup>517</sup> and its “socio-economic transformation”<sup>518</sup>. The ‘Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal’, an agreement between the Nepal Government and the Communist Party of Nepal concluded on 22 November 2006, contains several provisions on the interim constitution and transition institutions. It was integrated into the Interim Constitution of Nepal, 2063 (2007)<sup>519</sup>. This interim constitution provides that the final constitution –which at the time of writing has not seen the light<sup>520</sup>– shall be promulgated in accordance with the peace agreement just mentioned<sup>521</sup>.

UKRAINE – the draft intrastate compromise agreement brokered by the Weimar Triangle (composed of Poland, Germany & France), and calling for the establishment of a national unity government and “constitutional reform”<sup>522</sup>, failed. In February 2015, the international ‘Second Minsk Agreement’, already discussed above, was concluded to re-initiate the constitutional reform.

RWANDA – the ‘Protocol of Agreement on Power-sharing within the Framework of a Broad-based Transitional Government between the Government of the Republic of Rwanda and the Rwandese Patriotic Front’ dd. 9 January 1993 establishes a ‘Legal and Constitutional Commission’ that is to “prepare a preliminary draft of the Constitution which shall govern the country after the Transitional Period”<sup>523</sup>. The ‘Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front’ dd. 4 August 1993 provides that “the Constitution of 10th June, 1991 and the Arusha Peace Agreement shall constitute indissolubly the Fundamental Law that shall govern the Country during the Transition period”.

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<sup>515</sup> *Accord Cadre de mise en oeuvre de l’engagement solennel*, artt. 5 & 6.

<sup>516</sup> ‘Decisions of the Summit Meeting of the Seven-Party Alliance and the Communist Party of Nepal (Maoist)’, artt. III.1 and VI resp. III.6 and III.9.

<sup>517</sup> *Id.*, artt. III.10.

<sup>518</sup> *Id.*, artt. III.11.

<sup>519</sup> Interim Constitution of Nepal, 2063 (2007), Schedule 3.

<sup>520</sup> Note that the Seven Point Agreement dd. 1 November 2011 provides, under its last article, that the constitution drafting process must be accelerated.

<sup>521</sup> Interim Constitution of Nepal, 2063 (2007), Schedule 2.

<sup>522</sup> Agreement on the Settlement of Crisis in Ukraine, art. 2.

<sup>523</sup> Protocol of Agreement on Power-sharing within the Framework of a Broad-based Transitional Government between the Government of the Republic of Rwanda and the Rwandese Patriotic Front’ dd. 9 January 1993, art. 24.B.2.

At the same time, this peace agreement replaces forty-seven articles of this constitution<sup>524</sup>, and provides that “in case of conflict between the other provisions of the Constitution and those of the Peace Agreement, the provisions of the Peace Agreement shall prevail”<sup>525</sup>.

SIERRA LEONE – the Lomé Agreement (which served as a template for the Accra Agreement discussed above), did not suspend the constitution, but provided that “in order to *ensure* that the Constitution of Sierra Leone represents the needs and aspirations of the people of Sierra Leone and that *no constitutional or any other legal provision prevents the implementation of the present Agreement*, the Government of Sierra Leone shall take the necessary steps to establish a Constitutional Review Committee to review the provisions of the present Constitution”<sup>526</sup>. There is thus no doubt as to the supraconstitutional of the Lomé Agreement.

SUDAN – The 2005 Comprehensive Peace Agreement is to be seen, in the words of Dann, as an ‘*Überconstitution*’<sup>527</sup>: “the negotiation and conclusion of the CPA was considerably influenced by external factors. And it was the CPA that determined the procedural and substantial framework for the constitution-making process”<sup>528</sup>. Dann re-emphasizes the point by saying that “the process and substance of the constitution was almost entirely predetermined by the CPA. In fact, the domestic constitutional process only executed what had been agreed upon in the CPA [...]”<sup>529</sup>.

YEMEN – In the same vein, the ‘Agreement on the Implementation Mechanism for the Transition Process in Yemen’, finally, provides that “the GCC Initiative and the Mechanism shall supersede any current constitutional or legal arrangements. They may not be challenged before the institutions of the State”<sup>530</sup>. This agreement is probably also an ‘internationalized intrastate agreement’ since it clearly relies on the international community for its implementation<sup>531</sup>.

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DIG BASED ON SUPRACONSTITUTIONAL INTRASTATE AGREEMENTS – The supraconstitutionality characterizing the above intrastate agreements enable these agreements to function as

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<sup>524</sup> Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front dd. 4 August 1993, art. 3.1.

<sup>525</sup> *Id.*, art. 3.2.

<sup>526</sup> Lomé Agreement, art. X.

<sup>527</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 448.

<sup>528</sup> *Id.*, p. 443.

<sup>529</sup> *Id.*, p. 447.

<sup>530</sup> GCC Agreement, § 4.

<sup>531</sup> 2011 GCC Agreement, artt. 28 and 29: “[i]n order to ensure the effective implementation of this Mechanism, the two parties call on the States members of the GCC and the United Nations Security Council to support its implementation. They further call on the States members of the GCC, the permanent members of the Security Council, the European Union and its States members to support the implementation of the GCC Initiative and the Mechanism”; “[t]he Secretary-General of the United Nations is called upon to provide continuous assistance, in cooperation with other agencies, for the implementation of this Agreement. He is also requested to coordinate assistance from the international community for the implementation of the GCC Initiative and the Mechanism”.

transition instruments, i.e. to introduce DIG transforming the existing constitutional order. Further below their international legal relevance will be examined and confirmed: even if they are chiefly domestic legal documents, these intrastate agreements have the capacity to contribute to the unveiling of a *ius in interregno*<sup>532</sup>.

### 1.3. Domestic legislation or acts

**SELF-TERMINATING DOMESTIC TRANSITION INSTRUMENTS** – Besides international conventions and intrastate agreements, interim or transitional constitutions can regulate transition procedures. An interim, transitional or temporary constitution can be defined, to borrow Varol's definition, as a constitution that "limits its own term and lapses at its expiration date unless reenacted through regular constitutional amendment procedures"<sup>533</sup>. This allows us to differentiate them from other, permanent, constitutions, which also, in some respects, have a transitional component: "any constitution that 'lasts' must have a capacity to be 'transitional' in allowing for contest over changing understandings and new circumstances, whether through amendment or interpretation"<sup>534</sup>, Jackson observes. The distinguishing criterion, however, is that so-called permanent constitutions do not announce their own termination or otherwise compromise their own existence.

**DOMESTIC INTERIM ARRANGEMENTS: A BROAD CATEGORY** – During the last decades, the number of interim or transitional constitutions has increased exponentially, especially if one includes in this category all documents fulfilling a constitutional or state-power-modifying function in the context of DIG:

"It has been estimated that one third of all constitutional design processes from 1975 to 2003 involved interim documents. If the meaning of the word 'document' extends beyond constitutions, then the number of interim arrangements would be even larger, as some of them are based on understandings, treaties, or peace arrangements that affect the way state power is to be exercised, but are not constitutions. Several terms can be used to refer to what we call here 'interim arrangements': provisional, temporary, interim, and transitional constitutions"<sup>535</sup>.

In addition to interim constitutions, instruments like charters, (joint) declarations, communiqués or decrees may regulate transition procedures. In the following lines, the supraconstitutional components of such instruments regulating DIG in Burkina Faso, Central African Republic, DRC, Guinea, Guinea-Bissau, Iraq, Kyrgyzstan, Libya, Nepal, Somalia, South Africa, Syria and Yemen are briefly discussed.

**BURKINA FASO** – The *Charte de la Transition* dd. 13 November 2014 refers to the 1991 constitution in its preamble, on which it is based, but also provides that it 'completes'<sup>536</sup> this constitution, and is superior to it: «*en cas de contrariété entre la Charte de la transition et la*

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<sup>532</sup> Chapter 3, Section C.2.

<sup>533</sup> O. O. Varol, 'Temporary Constitutions', *op. cit.*, p. 409.

<sup>534</sup> V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1281.

<sup>535</sup> Interpeace, 'Constitution-Making for Peace', [Interim constitutional Arrangements](#).

<sup>536</sup> *Charte de la Transition* dd. 13 November 2014, Preamble.

*Constitution, les dispositions de la présente charte prévalent*<sup>537</sup>. Also, art. 2 of the *Charte de la Transition* provides that the President can exercise its powers according to the provisions of the 1991 constitution except for those that are incompatible with this charter<sup>538</sup>. The claim of supraconstitutionality, here too, is clearly formulated.

CENTRAL AFRICAN REPUBLIC – The *Déclaration de N’Djamena* provides that a constitutional referendum is to take place<sup>539</sup>, and that a ‘Conseil national de Transition’ is to prepare a draft constitution: “*l’urgente mission du Conseil National de Transition est d’élaborer et d’adopter une Charte constitutionnelle de la transition organisant l’ensemble des pouvoirs publics de la transition conformément à l’Accord de Libreville, à la Déclaration de N’Djamena [...]*”<sup>540</sup>. The Preamble of the *Charte constitutionnelle du 18 juillet 2013* explicitly refers to the *Déclaration de N’Djamena*<sup>541</sup>.

DRC – The 2002 ‘Draft Constitution of the Transition’, already referred to above, provides that “all previous constitutional provisions, in particular Statutory Order No. 03 of May 27<sup>th</sup> 1997 pertaining to the exercise of power as modified to date, are repealed and replaced by this Transitional Constitution of the Democratic Republic of Congo”<sup>542</sup>.

GUINEA – The *Déclaration conjointe de Ouagadougou* dd. 15 January 2010 enumerates a number of measures to be taken in order to ensure a return to constitutional order. Eventually, this declaration would pave the way for the promulgation of the constitution on 7 May 2010, which in its Preamble explicitly refers to it<sup>543</sup>.

GUINEA-BISSAU – The ‘Final communiqué’ dd. 3 May 2012 of the ‘Extraordinary summit of ECOWAS heads of state and government’ held in Dakar, ECOWAS “confirm[ed] its previous decision to establish a twelve-month transition, during which *the following measures shall be taken* with the assistance of ECOWAS: a review of legal texts (*constitution, electoral code, etc.*) to achieve greater efficiency”<sup>544</sup>.

IRAQ – The ‘Law of Administration for the State of Iraq for the Transitional Period’ includes several supra-constitutional provisions. It states that it is “the Supreme Law of the land”<sup>545</sup>, and that “any legal provision that conflicts with this Law is null and void”<sup>546</sup>. It regulates when and

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<sup>537</sup> *Id.*, art. 25. Emphasis added.

<sup>538</sup> This article reads as follows : “[l]e Président de la transition occupe les fonctions de Président du Faso et de Chef de l’Etat. Il veille au respect de la Constitution et de la Charte de la transition. Ses pouvoirs et prérogatives sont ceux définis par la présente Charte et au Titre III de la Constitution du 2 juin 1991 à l’exception de ceux incompatibles avec la conduite de la transition”. Cf. also art. 14.

<sup>539</sup> *Déclaration de N’Djamena*, art. 4.

<sup>540</sup> *Id.*, art. 8.

<sup>541</sup> *Charte constitutionnelle du 18 juillet 2013*.

<sup>542</sup> 2002 Draft Constitution of the Transition, art. 202. Emphasis added.

<sup>543</sup> Constitution of 7 May 2010.

<sup>544</sup> ‘Final communiqué’ of the Extraordinary summit of ECOWAS heads of state and government, Dakar, 3 May 2012, § 21.

<sup>545</sup> *Id.*, art. 3.A.

<sup>546</sup> *Id.*, art. 3.B.

how<sup>547</sup>, and in light of which standards<sup>548</sup>, the permanent constitution should be drafted.

KYRGYZSTAN – After the April 2010 popular uprisings, a draft constitution was adopted on 26 April 2010<sup>549</sup>. After the referendum dd. 27 June 2010, this draft (for 90% based on the Venice Commission’s proposals<sup>550</sup>) was adopted<sup>551</sup>. The transitional period was extremely short, and the texts regulating the transition procedure are not easily accessible. According to the OSCE: “the legal framework for the referendum derives from various decrees adopted by the provisional government, which, according to a decree, *supersede other constitutional laws*”; “Decrees No 19 and 20 stipulate that constitutional laws should guide the administration of the referendum unless they contradict the decrees; in such cases the *decrees supersede constitutional laws*”<sup>552</sup>.

LIBYA – The ‘Draft Constitutional Charter for the Transitional Stage’ provides that “the constitutional documents and laws which were applicable before applying this Declaration shall be repealed”<sup>553</sup>. This transition instruments also defines when and how, and in light of which standards, the permanent constitution should be drafted<sup>554</sup>.

NEPAL – The Interim Constitution 2063 provides in its first article that “all laws inconsistent with this constitution shall, to the extent of such inconsistency, be void”. Its art. 167 provides that “the Constitution of the Kingdom of Nepal, 2047 (1990) has hereby been terminated”. Part VII of this interim constitution provides how the constituent assembly is to be formed, when it is to meet, and how it must pass bills relating to the constitution<sup>555</sup>.

SOMALIA – The ‘Transitional Federal Charter for the Somali Republic’ of February 2004 also shows the features of double supra-constitutionality. Vis-à-vis the past, it provides that it “shall be the supreme law binding all authorities and persons and shall have the force of law throughout the Somali Republic. If any law is inconsistent with this Charter the Charter shall prevail”<sup>556</sup>, and that “the validity, legality or procedure of enactment or promulgation of this Charter shall not be subject to challenge by or before any court or other State organ”<sup>557</sup>. Art. 71.2 of the same instrument provides: “the 1960 Somalia Constitution and other national laws

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<sup>547</sup> TAL, art. 2.B, 59, 60, 61.

<sup>548</sup> *Id.*, art. 58b.

<sup>549</sup> Club de Madrid, [Political Leadership for Democratic Transition in the Kyrgyz Republic](#); ‘[New Kyrgyz Constitution Strong on Promises, Vague on Checks and Balances](#)’, Eurasianet, 4 May 2010.

<sup>550</sup> ‘[How Strong Is Kyrgyzstan's New Constitution?](#)’, Radio Free Europe, 2 July 2010.

<sup>551</sup> About the distinctions between the 2010 and the 2007 constitutions, see the Venice Commission’s Opinion on the draft constitution of the Kyrgyz Republic, adopted on 4 June 2010.

<sup>552</sup> OSCE Office for Democratic Institutions and Human Rights Referendum Observation Mission, Constitutional Referendum Kyrgyz Republic 2010, Interim Report, 21 May – 13 June 2010, 17 June 2010.

<sup>553</sup> Draft Constitutional Charter for the Transitional Stage, art. 34; see also art. 35: “[a]ll the provisions prescribed in the existing legislations shall continue to be effective in so far as they are not inconsistent with the provisions hereof until they are amended or repealed”.

<sup>554</sup> Draft Constitutional Charter For the Transitional Stage, art. 1-16; 31-33.

<sup>555</sup> Interim Constitution 2063, art. 63 a.f.

<sup>556</sup> Somali Transitional Charter, art. 3.2.

<sup>557</sup> *Id.*, art. 3.3.

shall apply in respect of all matters not covered and not inconsistent with this Charter”. Vis-à-vis the future, it provides that “it shall be the basis for the federal constitution whose draft shall be completed within two and half (2 1/2) years and be adopted by popular referendum during the final year of the transitional period”<sup>558</sup>.

**SOUTH AFRICA** – As a notable precursor of modern domestic governance, the South African Interim Constitution famously provides that the new constitutional text shall comply with a set of no less than thirty-four constitutional principles<sup>559</sup>.

**SYRIA** – Declarations by the National Coalition of Syrian and Opposition forces outline how a transition procedure should be carried out. “Overthrowing the Syrian regime” is the fourth out of six principles of this coalition<sup>560</sup>. This suggests that the principles claim to gain supra-constitutional value. If the transition procedure were to unfold according to the Coalition’s plan –*quod non*– one can imagine that said principles would be adopted in a new (interim) constitution; the same is true of the “13-item draft document of basic principles for a political settlement to the Syrian conflict” adopted by the Coalition’s General Assembly at the occasion of its Istanbul meetings from 13 to 15 February 2015<sup>561</sup>. This document provides that the purpose of the resumption of the political process is “to institute a radical comprehensive change within the current political system from the top down”<sup>562</sup>. Even if the Coalition’s principles do not have domestic or international standing, their claim to supraconstitutionality must be borne in mind when, in Chapter 9, the legality of the support to this coalition will be discussed.

**YEMEN** – The ‘Constitutional Declaration to organize the foundations of governance during the transitional period in Yemen’<sup>563</sup> adopted by the Houthi Revolutionary Committee on 6 February 2015 provides, in its first article, that “the provisions of the constitution in force shall continue to apply, *provided that they do not conflict with the provisions of the present Declaration*”. Its fourteenth article provides: “ordinary legislation shall remain in force unless it explicitly or implicitly contradicts texts of the present Declaration”.

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**PLURALITY OF SUPRACONSTITUTIONAL TRANSITION INSTRUMENTS** – A variety of documents serve as interim or transitional constitutions. The supraconstitutionality characterizing these documents is central to the function inherent to transition instruments: the initiation of an interregnum to transform the existing constitutional order. By virtue of their supraconstitutional provisions,

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<sup>558</sup> *Id.*, art. 71.9.

<sup>559</sup> Interim Constitution, art. 71.

<sup>560</sup> Cf. <http://www.etilaf.org/en/about-us/principles.html> consulted on 9 December 2013 (now only available *en cache*).

<sup>561</sup> ‘[Communiqué of the 19th General Assembly meeting](#)’, 17 February 2015.

<sup>562</sup> Draft Document of Basic Principles for a Political Settlement in Syria, Principle 3, on file with author (e-mail by B. Khatib dd. 8 March 2015).

<sup>563</sup> [Houthi Constitutional Declaration](#) dd. 6 February 2015.

all of the above declarations, pre- or constitutional texts directly relate to DIG. Further below we shall see that, even when they are domestic legal documents, these transition instruments can assist us in the analysis of how international law applies to DIG, thus contribute to the formulation of a *ius in interregno*<sup>564</sup>.

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**SURACONSTITUTIONALITY & RECONSTITUTIONALIZATION** – Whether materialized in treaties, intrastate agreements, transitional constitutions or declarations, the transition instruments studied above fulfill a supraconstitutional function, in a double sense. They (claim to) *supersede*, in whole or in part, the previous constitution, and (claim to) *pre-define*, at least to some degree, the coming constitution. As they claim to be superior not only to the previous constitution but also to the constitution ensuing from the transition, they can be considered, and have been called ‘*Überconstitutions*’<sup>565</sup>.

Just like every constitution has an extra-legal origin, every transition instrument has a supraconstitutional origin (notwithstanding possible references to former constitutions<sup>566</sup>). Self-evidently, it would be impossible to imagine the reconstitutionalization and transformation of a state order without supraconstitutionality. The following tableau provides an overview of the provisions in which the above-mentioned transition instruments claim supraconstitutionality.

**TABLE 3: Transition procedures and supra-constitutionality**

<b>Transition processes (<i>sensu lato</i> in italics)</b>	<b>Supraconstitutional provisions / decisions</b>
Afghanistan	Bonn Agreement, Section V.5.
<i>Bosnia and Herzegovina</i>	Dayton Agreement, Annex 4
Burkina Faso	Charte de la transition, artt. 2, 25.
Burundi	Arusha Agreement, art. 5.5. ; art. 15.2.
Cambodia	Paris Accords, art. 23.
Central African Republic	Déclaration de N’Djamena, art. 4, art. 8.
Comoros	Accord-Cadre de Réconciliation Nationale, artt. 4, 9.i, 11.ii, 17, 18, 29.
Côte d’Ivoire	Linas-Marcoussis Agreement, 3.a., IX.
DRC	Pretoria Agreement, VII.a.
Guinea	<i>Déclaration conjointe de Ouagadougou</i> dd. 15 January 2010, artt. 1-12.
Guinea-Bissau	<i>Pacto de Transição Política</i> dd. 16 May 2012, art. 5.1. ‘Final communiqué’ of the Extraordinary summit of ECOWAS heads of state and government, Dakar, 3 May 2012, par. 21
Iraq	Law of Administration for the State of Iraq for the Transitional Period, Artt. 2B, 3, 26, 58B, 59, 60, 61
Kyrgyzstan	Provisional Government Decree No 19, 20 (April 2010)
Liberia	2003 Accra Comprehensive Peace Agreement, art. 35
Libya	Draft Constitutional Charter For the Transitional Stage, artt. 34, 35.
Mali	Accord Cadre de mise en oeuvre de l’engagement solennel, art 5.
Nepal	Interim Constitution of Nepal, 2063 (2007), artt.1, 167, schedules 2, 3 (with

<sup>564</sup> Chapter 3, Section B.1.3.

<sup>565</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*

<sup>566</sup> Chapter 3, Section A.1, with reference to Afghan and Somali transition instruments.

	reference to Comprehensive Peace Agreement dd. 22 November 2006).
Rwanda	'Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front' dd. 4 August 1993, artt. 3.1 and 3.2.
Sierra Leone	Lomé Agreement, art. X.
Somalia	Somali Transitional Charter, Artt. 3.2, 3.3, 71.9.
South Africa	Art. 71 of the Interim Constitution.
Syria	Coalition's Principles nr. 4; basic principles for a political settlement to the Syrian conflict, February 2015. See call by the UNGA for a "review of the constitution on the basis of an inclusive national dialogue" <sup>567</sup> .
Sudan	2005 Sudan Comprehensive Peace Agreement
Ukraine	Minsk Agreement dd. 12 February 2015, art. 11
Yemen	2011 GCC agreement, par. 4 2015 Constitutional Declaration, art. 1.

## 2. The purpose of transition instruments: transitional constitutionalism

TRIPLE FUNCTION OF CONSTITUENT TRANSITION INSTRUMENTS – Whichever form they take, transition instruments generally fulfill three functions: (i) resolving conflicts and creating the conditions for peace (peace through transition); (ii) regulating the exercise of public powers *ad interim* (defining the interim rule); and (iii) projecting and preparing the coming constitutional order (constitutional reconfiguration). These three functions are interrelated: the constitutional reconfiguration of the state is only one –albeit crucial– aspect of the interim rule<sup>568</sup>, which itself is observed to cope with a situation of crisis or armed conflict.

(1) PACIFICATORY FUNCTION – The first function refers to the peace-through-transition paradigm, already discussed in the introduction. The conflict-resolution and peace-conducive function of transition instruments led EU member states, Norway, Iceland and Turkey to consider that 'constitutional reform' is a *principle* underpinning post-conflict national reconciliation<sup>569</sup>. It explains why interim constitutions, as one category of transition instruments, are increasingly being used as "instruments of peacekeeping and as efforts to reconstitute or transform their societies"<sup>570</sup> or, more broadly, as "crisis management tools"<sup>571</sup>. Constitutions thus become "part of the process of conflict transformation"<sup>572</sup>.

(2) SELF-LIMITATION – The second function of transition instruments directly relates to the idea of self-constraint or self-regulation central to DIG; "abandoning the old constitutional framework raises the question of how to define the rules and institutions that guide the process of making

<sup>567</sup> A/RES/67/262 dd. 4 June 2013 § 25.

<sup>568</sup> Other aspects of the interim rule include economic reconstruction, demilitarization, and TJ.

<sup>569</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 4: "[t]he fifth principle is constitutional reform. In many cases, a new beginning will require the fundamental rewriting of an existing constitution or the elaboration of a new constitution".

<sup>570</sup> V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1255.

<sup>571</sup> IDEA, 'Constitutionbuilding after Conflict: External Support to a Sovereign process', *op. cit.*

<sup>572</sup> V. Hart, 'Constitution-making and the Transformation of Conflict', *Peace & Change*, Vol. 26, Issue 2, p. 153. This is not entirely a new phenomenon. It seems that in Colombia, for example, constitutions from the 19<sup>th</sup> century served as peace pacts. Cf

Also A. Tadjdini, 'The Constitutional Dimension of Peace' in C. M. Bailliet and K. M. Larsen, *Promoting Peace Through International Law*, OUP, 2015, p. 395 a.f.

the new constitution”<sup>573</sup>, a question to be broadened to DIG generally. In the introduction this idea was already symbolized by reference to Ulysses’ foresight in having his hands tied in order to avoid temptation by mellifluous Sirens. The self-regulation of DIG will be further explored under Chapter 5, where the limitations *ratione temporis* and *ratione materiae* to DIG will be discussed.

(3) RECONSTITUTIONALIZATION – The third function of transition instruments is to constitutionally reconfigure states in transition, which is only possible if they are supraconstitutional. Only to the extent that the function of constitutional reconfiguration is actually implemented will transition instruments (retroactively) have had *constituent* or *constitutional* value.

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TRANSITIONAL CONSTITUTIONALISM – The three functions of transition instruments serve to realize a form of transformative or transitional constitutionalism. In Teitel’s words:

“transitional constitutionalism serves not only conventional constitutionalism’s constitutive purposes, but also its transformative purposes. While in ordinary times constitutions are conceived as fully forward-looking, in periods of radical change such constitutions are simultaneously backward- and forward-looking, varying along a range of constitutional entrenchment”<sup>574</sup>.

TRANSITIONAL CONSTITUTIONALISM & TRANSITIONS SENSU STRICTO / SENSU LATO – Transitional constitutionalism is inherent to modern DIG, but can be observed in transition processes *sensu lato* too. Teitel thus refers to the Southern European (post-Franco Constitution of 1978; Portuguese constitutions 1976) and Southern American transitions (1988 Brazilian Constitution, Chile’s 1991 Constitution, 1990 Colombian referendum). In these cases transitional constitutionalism was used to ‘broker out’ of authoritarian rule. Teitel also refers to West Germany’s Basic Law of 1949 and Japan’s post-war constitution of 1946 as instances of victor’s (transitional) constitutionmaking; as well as to constitutions in post-Communist countries resulting from the 1989 revolutions.

TRANSITIONAL CONSTITUTIONALISM: DISASSOCIATION & CONTINUITY – As instruments for constitutional reconfiguration, transition instruments are both backward- and forward-looking. They form a ‘historic bridge’, to use the words of the 1993 South African Interim Constitution’s postscript. In post-conflict settings, they fulfill both a palliative (peacebuilding) and preventive (conflict prevention) function. They contain the germs for the future and refer to the remnants of the past. Yet, in contrast to ‘preservative constitutions’, “the point is *disassociation* with rather than continuation of norms”<sup>575</sup>. Disassociation in the context of as

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<sup>573</sup> IDEA, *Constitutional Transitions and Territorial Cleavages*, 2015, p. 12.

<sup>574</sup> R. Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’, *op. cit.*, p. 2015.

<sup>575</sup> J. Mendez, ‘Constitutionalism and Transitional Justice’ in M. Rosenfeld and A. Sajó (ed.), *The Oxford Handbook of Comparative Constitutional Law*, OUP, 2012. p. 1282: “[t]ransformative constitutions are founded upon a need to break with the past, and form a thick line between what was, and what will be. This stands in contrast to constitutions

grand an enterprise as a wholesale state transformation, however, can only occur incrementally. In other words, state transformation can only be successful if there is some *attachment* with former laws and institutions:

“Reconstructions often involve a two-step process: disentanglement or rupture from the former regime followed by reconstitutionalism. The probability of successfully accomplishing both in one fell swoop is low. [...] it may often be necessary to temporarily *preserve* governance structures from the former regime as new institutions are formed during reconstitutionalism constitution-making process”<sup>576</sup>.

The emphasis on disassociation (rather than continuation) is stronger when transitional constitutionalism takes place in the context of oppositional DIG. This type of DIG usually results from unilateral constitutionmaking. Unilateral (transitional) constitutionmaking “reflects the somewhat paradoxical nature of the revolutionary concept of constitution-making. It is an act of politics, ultimately *unrestricted* by the old legal order, but it creates a new normative order, binding new actors”<sup>577</sup>, Dann and Al-Ali write. This proposition will be nuanced below<sup>578</sup>. That is because oppositional/unilateral transitions are also characterized by a degree of continuity. Inversely, disassociation also characterizes, if to a lesser degree, transitional DIG including constitutionmaking carried out by consensual transitional authorities. These authorities, too, detach themselves from the previous constitutional order by adopting supraconstitutional legal instruments, as we have seen above. Constitutional association and disassociation are thus inherent both to oppositional and consensual forms of DIG.

**TRANSITIONAL CONSTITUTIONALISM: A PLURALITY OF TRANSITION INSTRUMENTS WITH A COMMON PURPOSE** – In this study, *transitional constitutionalism* refers to Teitel’s description above under its general tenets. It is primarily used to describe instances of modern DIG, and covers not only constitutional documents *sensu stricto* but all sorts of transition instruments –such as peace agreements, unilateral declarations and laws– fulfilling a particular function: the reconstitutionalization of a country in transition.

**TRANSITIONAL CONSTITUTIONAL FUNCTION OF NONCONSTITUTIONAL DOCUMENTS** – Peace processes and agreements may fulfill the purposes of transitional constitutionalism, or be closely associated to it<sup>579</sup>. Depending on their object and purpose, declarations or bills, too, may fulfill

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that, as Sunstein emphasizes, are more preservative of tradition [‘preservative constitutions’]; for transformative constitutions, the point is disassociation with rather than continuation of norms”.

<sup>576</sup> O. O. Varol, ‘Temporary Constitutions’, *op. cit.*, p. 426. Emphasis added. Cf. also Chapter 5, Section B.2 about how transitional authorities must respect the past.

<sup>577</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 427.

<sup>578</sup> The assertion that oppositional transitional constitutionmaking is ‘unrestricted’ by the old legal order will be strongly nuanced below, under Chapter 5, Section B.2.

<sup>579</sup> L. Brahim, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 7: “the constitutional process is intimately linked to the peace process. A new constitution ultimately is needed to serve as the framework of principles and rules upon which the new state will be based. The other elements of the peace process, if properly sequenced and implemented, will help facilitate a successful constitutional process. Reciprocally, a well-conceived and implemented constitutional process will be a decisive contributor to the overall success of the peace process”.

constitutional functions. For instance, the Libyan Constitutional Declaration of August 2011 transformed the Libyan legal order. Also, the Law of Administration for the State of Iraq for the Transitional Period' dd. 8 March 2004 ('TAL') "functioned as something of an interim constitution", Jackson observes<sup>580</sup>.

This evolution has not gone unnoticed in literature, and has led Mambo to write that constitutions suffer from an "*extensibilité sémantique, surtout en temps de crise*"<sup>581</sup>, referring in particular to internationalized agreements taking precedence over constitutional arrangements<sup>582</sup>. Constitutions would become 'semantically extensible', Mambo writes. Transformative constitutionalism would thus extend the notion of constitution itself. This is not entirely accurate. The notion of constitution is not being artificially extended to refer to documents which, traditionally, would not be denominated as such. Instead, more and more documents, regardless of their legal nature, acquire *transformative constitutional functionality*. This point must be borne in mind when, under Part IV, the legal limits to external assistance to transitional constitutionmaking will be discussed<sup>583</sup>.

The following section explains why the legal nature of transition instruments does not affect the general argument of this study. Given the relative lack of formality as regards the *sources* of international law, transition instruments of different sorts and shapes are relevant for our international law analysis of DIG.

### Section C. International legal relevance: transition instruments as sources of *ius in interregno*

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The above-mentioned constituent transition instruments share the same function (supraconstitutionality) and purpose (transitional constitutionalism). The question however remains whether, independently of their legal nature, these instruments are informative for our enterprise: the analysis of DIG from an international legal perspective. This section confirms their utility, and argues that, irrespective of their legal nature and validity *vel non* on the domestic legal plane, transition instruments are relevant for this analysis and for the formulation of a *ius in interregno*. As this section and chapter concern the *foundation* of DIG on the basis of constituent transition instruments, the legal nature of practices aimed at implementing these instruments will be discussed under Part III of the thesis, which precisely focuses on such practices *during the interregnum*<sup>584</sup>.

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<sup>580</sup> V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1273.

<sup>581</sup> P. Mambo, 'Les Rapports entre la Constitution et les Accords Politiques dans les Etats africains: Réflexion sur la Légalité Constitutionnelle en Période de Crise', *op. cit.*, p. 925. With reference to D. F. Meledje, 'Le gouvernement dans la Constitution de Côte d'Ivoire', 41 *Revue ivoirienne de droit*, pp. 167-171, 2010.

<sup>582</sup> *Id.*, p. 931: "*le caractère prioritaire ou supraconstitutionnel des accords politiques signés par les parties en conflit*".

<sup>583</sup> Chapter 8, Section B.3.1 and Section B.5.

<sup>584</sup> Chapter 7, Section B.

PLURALITY OF SOURCES OF IUS IN INTERREGNO – Because the sources of international law are characterized by a relative lack of formality, a *ius in interregno* can be formulated by reference to a variety of instruments. International law is quite flexible when it comes to defining the forms various sources of international law can take: international conventions are not confined by the VCLT, which in any event adopts a broad definition; custom can be based on different types of state practice; the formulation of unilateral declarations is not dictated by strict requirements. Nearly all transition instruments mentioned above –conventions, domestic agreements, interim constitutions, decrees– can thus be taken into account for carrying out an international legal analysis pertaining to the foundation of the transition (stage 2) as well as to the transition procedure itself (stage 3)<sup>585</sup>.

WAYS IN WHICH TRANSITION INSTRUMENTS ACQUIRE INT'L LEGAL FORCE – Transition instruments can be encapsulated, so to speak, by various international law sources. They can be enshrined in international treaties, be indicative of custom, or may be regarded as binding declarations. In some cases they are directly invoked in UNSC resolutions, and acquire international legal force through that avenue. In the following lines we shall see how transition instruments, enshrined in treaties (1), intrastate agreements (2) or domestic legal acts (3), enjoy or acquire international legal force through one of these avenues.

### *1. The legal relevance of international agreements*

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A number of transition instruments are enshrined in international agreements, like for instance the Paris Agreement (Cambodia), the Pretoria Agreement (DRC), and arguably the Minsk Agreement (Ukraine). Such agreements are treaties in the sense of the VCLT's definition of a treaty, i.e. “an international agreement concluded between states in written form and governed by international law [...] *whatever its particular designation*”<sup>586</sup>. This definition, which does not require treaties to be registered with the UN Secretariat<sup>587</sup>, and accepts a variety of nomenclatures, is flexible enough so as to include even joint *communiqués* between states, the ICJ confirmed in the Aegean Sea Continental Shelf case<sup>588</sup>.

There is no doubt as to the international legal nature and relevance of transition instruments taking the form of treaties. This is sometimes emphasized by the UNSC, which, for instance, “underlin[ed] the necessity for the full cooperation of the Supreme National Council of

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<sup>585</sup> For these distinctions, see Chapter 4, Section A.2. For the analysis of the legal nature of practices during the interregnum, cf. Chapter 7, Section B.

<sup>586</sup> VCLT, art. 2.1.a. Emphasis added.

<sup>587</sup> UN Charter, art. 102 requires that “[e]very treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it”, a requirement echoed by VCLT, art. 80. This obligation has never been consistently respected and, in any event, the definition of a treaty does not depend on it.

<sup>588</sup> The ICJ considered, with regard to treaties: “[o]n the question of form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement”, Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978, p. 3, § 96 (‘Aegean Sea Continental Shelf case’).

Cambodia, and all Cambodians for their part, in the implementation of the agreements”<sup>589</sup>. The UNSC also referred to the Pretoria Agreement for the DRC<sup>590</sup>, and to other agreements<sup>591</sup>. In such instances, the UNSC simply confirms pre-existing international obligations.

When, as traditional sources of international law, international treaties serve as transition instruments, their contribution to the formulation of a *ius in interregno* is difficult to contest. Such treaties, thus, can contribute to the understanding of how international law applies to DIG, and inform us on the obligations of transitional authorities’ obligations as analyzed under Part III.

## *2. How intrastate agreements acquire international legal relevance*

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Transitions have also been regulated by domestic intrastate agreements containing supra-constitutional provisions. We discussed twelve such cases above<sup>592</sup>. It is submitted here that, even without being treaties in the sense of the above-mentioned VCLT definition, such agreements are also relevant for understanding how international law applies to DIG. The VCLT recalls:

“the fact that the present Convention does not apply to international agreements concluded between states and other subjects of international law *or between such other subjects of international law* [...] shall not affect [...] [t]he legal force of such agreements”<sup>593</sup>.

When transitional authorities (beyond being embryonic) effectively execute transition procedures and are addressees of international rights and obligations, they enjoy functional international legal personality; this argument will be developed below<sup>594</sup>. Yet, even before they observe DIG, transitional authorities may be created by transition instruments. In such cases, it must be examined case by case whether intrastate agreements are treaties under international law, depending on the international legal personality of the concluding parties.

**CHARACTERISTICS INTERNATIONALIZED INTRASTATE AGREEMENTS** – Another approach, briefly introduced here, is to verify whether intrastate agreements are ‘internationalized’. If an intrastate agreement exhibits the following features, it is deemed to be internationalized: (a) the signatories are subjects of international law (international personality); (b) the agreement has been endorsed by other subjects of international law (international endorsement by co-

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<sup>589</sup> UNSC/RES 718 dd. 31 October 1991, Preamble. In another resolution, it “call[ed] upon the Supreme National Council of Cambodia to fulfill its special responsibilities set out in the agreements”. UNSC/RES 745 dd. 28 February 1992, § 5.

<sup>590</sup> See e.g. S/RES/1565 dd. 1 October 2004.

<sup>591</sup> Part III.

<sup>592</sup> Afghanistan, Burundi, Comoros, Côte d’Ivoire, Liberia, Mali, Nepal, Ukraine, Rwanda, Sierra Leone, Sudan, and Yemen.

<sup>593</sup> VCLT, art. 3.a. Cf. also Aegean Sea Continental Shelf case, *op. cit.*, p. 3. Emphasis added.

<sup>594</sup> Chapter 4, Section A.2.6. The question whether transitional authorities are ‘lawmakers’ will also be dealt with below.

signature<sup>595</sup>); (c) the agreement contains various references to international law (international law referencing); (d) the agreement has consistently been invoked or referred to in binding UNSC resolutions (UNSC invocation); (e) its implementation is internationally monitored (international monitoring). On the basis of these features, the Arusha Agreement (Burundi), the Pretoria Agreement (DRC), the Bonn Agreement (Afghanistan), the Global Comprehensive Agreement (Sudan) and the GCC Agreement (Yemen) may be regarded as internationalized intrastate agreements.

LEGAL NATURE INTERNATIONALIZED INTRASTATE AGREEMENTS – Even if said internationalization features are verified, one may question whether this creates a presumption in favor of their having international legal force. Whether or under which circumstances intrastate agreements acquire international (or internationalized) legal status remains a contested point, Vierucci notes:

“nonostante gli indubbi elementi di suggestioni presenti nel filone dottrinale che qualifica gli accordi come ‘ibridi’ o ‘internazionalizzati’, preme osservare che *da questa dottrina non emerge con chiarezza quale sia l’ordinamento di riferimento di questo tipo di atti*. Non è chiaro, infatti se l’ordinamento di inquadramento degli accordi ‘ibridi’ o ‘internazionalizzati’ sia quello interno, e in tal caso il diritto internazionale avrebbe una funzione limitata, ad esempio, al diritto applicabile, oppure se l’ordinamento di base sia quello internazionale, e al diritto interno sia fatto un mero ‘rinvio’.”<sup>596</sup>

Vierucci asks what the residual legal system is –domestic or international law?– of so-called internationalized or hybrid agreements. This question may affect the international legal status of intrastate agreements. About the legal status of intrastate peace agreements, Bell remarks that the “dismissal of peace agreements as legal documents [...] seems to fly in the face of their language and structure, and the apparent intention of the parties”<sup>597</sup>. This point is probably right, but we should not insist on it. The precise legal nature of internationalized intrastate or peace agreements triggering and regulating DIG is not central to the argument of this thesis. The intrastate agreements *sub examine* can acquire international legal force regardless of their legal status as treaties *vel non*, on three alternative accounts:

(1) UNSC CONFIRMING BINDING FORCE INTRASTATE AGREEMENTS – Intrastate agreements are sometimes endorsed in binding UNSC resolutions. The UNSC for example explicitly referred to the Bonn Agreement for Afghanistan<sup>598</sup>, the Arusha Agreement for Burundi<sup>599</sup>, the Accra Comprehensive Peace Agreement for Liberia<sup>600</sup>, Yemen’s Transition Agreement<sup>601</sup>, the

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<sup>595</sup> See e.g. the Comores *Accord sur les dispositions transitoires aux Comores* dd. 20 December 2003.

<sup>596</sup> L. Vierucci, *Gli accordi fra governo e gruppi armati di opposizione nel diritto internazionale*, Editoriale Scientifica, Napoli, 2013, p. 100.

<sup>597</sup> C. Bell, *On the Law of Peace*, *op. cit.*, p. 153.

<sup>598</sup> For several references, refer to Chapter 6, Section B.1.1.

<sup>599</sup> Cf. for example UNSC/RES/1375 dd. 29 October 2001.

<sup>600</sup> UNSC/RES/1509 dd. 19 September 2003.

<sup>601</sup> UNSC/RES/2051 dd. 12 June 2012, Preamble. See also § 1.

Libreville Agreements regarding Central African Republic<sup>602</sup>, and the Ouagadougou Preliminary Agreement relating to Mali<sup>603</sup>.

(2) INTRASTATE AGREEMENTS CO-CONSTITUTIVE OF CUSTOM – Intrastate agreements may be regarded as a manifestation of state practice and/or *opinio iuris*. State practice can be evidenced by a wide range of actions and documents by “all branches of the (central) government of the State, be they executive, legislative, or judicial”<sup>604</sup>, a point which will be developed below<sup>605</sup>. To the extent that intrastate agreements have legislative power or constitute executive acts, they can be indicative of state practice, thus co-constitutive of custom.

(3) INTRASTATE AGREEMENTS AS UNILATERAL DECLARATIONS – If they are attributable to the state in transition, intrastate agreements may also constitute “formal declarations formulated by a State with the intent to produce obligations under international laws”<sup>606</sup>, especially if the second (international endorsement by co-signature), third (international law referencing) and fifth (international monitoring) of the internationalization features mentioned above are verified.

### *3. How domestic legislation acquires international legal relevance*

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In at least thirteen cases<sup>607</sup> transition procedures were regulated by interim constitutions, transitional declarations, *communiqués*, charters or laws, we saw above. Interim arrangements are then generally part of domestic law, except if they are part of, or annexed to, an international treaty (e.g. the 1991 Paris Agreement) or an internationalized intrastate agreement (e.g. the 2005 Sudan CPA).

DOMESTIC TRANSITION INSTRUMENTS RELATED TO INT'L LEGAL INSTRUMENTS (AFGHANISTAN, BURUNDI, DRC, CÔTE D'IVOIRE) – Domestic legal texts often come into existence as a direct consequence of, or in connection with, a parent transition instrument. For example, the 2004 Constitution of Afghanistan would not have seen the light without the 2001 Bonn Agreement. In Burundi, the 1998 Constitutional Act of Transition initiated the Arusha peace negotiations, affirmed the necessity of a transitional period, and eventually led to the 2000 Arusha Agreement. This agreement was followed by another agreement determining the structure of the transitional government<sup>608</sup>, a ceasefire agreement<sup>609</sup>, and a post-transition constitution<sup>610</sup>. In the DRC, the *Mémorandum sur le mécanisme pour la formation d'une armée nationale, restructurée et*

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<sup>602</sup> UNSC/RES/2149 dd. 10 April 2014 in which the UNSC “[r]eiterates its support for the Libreville Agreements of 11 January 2013”.

<sup>603</sup> S/2014/403 dd. 9 June 2014 with reference to the Agreement dd. 23 May 2014.

<sup>604</sup> M. Wood, O. Sender, ‘State Practice’, MPEPIL, § 9.

<sup>605</sup> Chapter 7, Section B.1.3.

<sup>606</sup> ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’, *Yearbook of the International Law Commission, 2006*, vol. II, Part Two.

<sup>607</sup> Burkina Faso, Central African Republic, DRC, Guinea, Guinea-Bissau, Iraq, Kyrgyzstan, Libya, Nepal, Somalia, South Africa, Syria and Yemen.

<sup>608</sup> Agreement on the legal framework and the structure of the transitional government, and the composition of the cabinet, the senate and the transitional national assembly dd. 11 October 2001.

<sup>609</sup> Global Ceasefire Agreement dd. 16 November 2003.

<sup>610</sup> Post-transition Interim Constitution of the Republic of Burundi dd. 18 March 2005.

*intégrée*’ dd. 6 March 2003 was adopted in line with the Pretoria Agreement, and should be seen as part of its context. Similarly, the domestic decrees of 29 March 2007 and 7 April 2007 regarding the creation and composition of the transitional government in Côte d’Ivoire are part of the context of the 2007 Ouagadougou Political Agreement.

In the absence of a direct incorporation into a treaty, interim or pre-constitutional texts may still *refer* to an international agreement. In such a case, transition instruments are to be read in conjunction with each other. In the words of the VCLT, where an act or declaration supplements existing treaties, such instrument is part of the ‘context’ of the treaty<sup>611</sup>, or can be seen as an “instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an *instrument related to the treaty*”<sup>612</sup>, or as “subsequent practice in the application of the treaty”<sup>613</sup>. This is also true when there is a clear contextual association but no explicit textual link between the relevant transition instruments.

**BINDING NATURE DOMESTIC TRANSITION INSTRUMENTS THROUGH CUSTOM, UNILATERAL DECLARATIONS OR UNSC RESOLUTIONS** – Finally, just as intrastate agreements, domestic transition instruments may, under the same conditions as those mentioned above, enter the international legal realm if they contribute to the development of customary rules. Both national courts, the ICJ and the ILC have considered domestic legislation as primary evidence of state practice<sup>614</sup>, a position recently confirmed by the Special Rapporteur on custom identification<sup>615</sup>.

Further, domestic transition instruments may enter the realm of international law if they can be considered as binding unilateral declarations<sup>616</sup>, or are endorsed by UNSC resolutions. Interim arrangements may acquire international legal relevance when UNSC resolutions refer to them explicitly, especially if these resolutions call for their implementation. The UNSC for instance referred to the *N’Djamena Declaration* of 18 April 2013 and to the *Constitutional Charter for the Transition* of 18 July 2013 which, in principle, are domestic legal documents. Yet, arguably they become part of international law –or at least become informative for an international law analysis– through the UNSC resolutions in which they come to be cited, if the relevant provisions of these resolutions are binding<sup>617</sup>.

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<sup>611</sup> VCLT, art. 31.1.

<sup>612</sup> VCLT, art. 31.2.b. Emphasis added.

<sup>613</sup> VCLT, art. 31.3.b.

<sup>614</sup> M. Akehurst, ‘Custom as a source of international law’ in M. Koskenniemi, *Sources of International Law*, Ashgate, 2000, p. 259. Akehurst notably refers to the ICJ *Nottebohm* and *North Sea Continental Shelf* cases to substantiate this claim.

<sup>615</sup> [Fourth report on identification of customary international law](#), A/CN.4/695, 8 March 2016, p. 21 (draft conclusion 6).

<sup>616</sup> Chapter 7, Section B.1.

<sup>617</sup> See e.g. S/RES/2149 dd. 10 April 2014, which, after referring to the Libreville Agreements of 11 January 2013, N’Djamena Declaration of 18 April 2013, and Constitutional Charter for the Transition of 18 July 2013, ‘urges’ the transitional authorities to continue with the transition.

COMMON BUT DIFFERENTIATED PRACTICE GROUNDED IN VARIOUS INSTRUMENTS – The lack of rigidity of international law warrants that a *ius in interregno* be practice-oriented and thus based on a variety of texts and policies. This variety, also observed by Youssef<sup>618</sup>, only reflects the creative power and casuistic approach of lawyers and politicians who, within their respective constituencies, happen to be involved in a similar enterprise becoming common currency nowadays: DIG. Casuistry concerns the form or sequence of specific instruments used for realizing the peace-through-transition paradigm, not the paradigm itself. Nor has this casuistry prevented us from noting that DIG is a distinct phenomenon<sup>619</sup>. Without being based on identical legal instruments, said paradigm is indeed based on common practices including supraconstitutionality and transitional constitutionalism, with more examples to follow under Part III. As noted, how DIG practices can be legally conceptualized after transition instruments are concluded or enacted will be discussed after a perusal of interregnum-relevant practices<sup>620</sup>.

PLURALITY OF SOURCES OF IUS IN INTERREGNO: AN OBSERVATION, NOT NORM ENTREPRENEURSHIP – A broadly-based formulation of a *ius in interregno* is not enticed by the desire to create normativity where there would be none, especially since the stage of maturity of this body of norms is surely open for debate. Instead, it allows us to critically engage with the proposition that a rudimentary but consistent body of norms for regulating instances of DIG is –at least–germinating. With reference to the transition instruments analyzed in this chapter, this proposition will be corroborated in Part III, after the following conceptualization of transitional authorities.

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<sup>618</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, pp. 112 a.f.

<sup>619</sup> Chapter 1. Chapter 4, Section A.

<sup>620</sup> Chapter 7, Section B.

Political bodies like ‘interim governments’, ‘transitional governments’, ‘transitional councils’, etc., created and/or regulated by transition instruments and operating in the context of DIG are referred to as *transitional authorities*, regardless of their (consensual or oppositional) origins. This term is already used in practice<sup>621</sup>. Transitional authorities mirror a diverse politico-legal reality. Yet, this chapter will show that, in spite of their diversity, they are amenable to a common conceptualization on the basis *inter alia* of their domestic and provisional nature, and of their common purpose. This conceptualization is necessary for delimiting the scope of application of a *ius in interregno*, which *a priori* is not applicable to any kind of transition<sup>622</sup>. As noted in the introduction, transitions come in many sorts. Among transitions from authoritarian regimes to democracy, Huntington<sup>623</sup> has distinguished between:

- ‘transformations’, by which “those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system”<sup>624</sup>;
- ‘replacements’, by which “democratization [...] results from the opposition gaining strength and the government losing strength until the government collapses or is overthrown”; and,
- ‘transplacements’, by which “democratization is produced by the combined actions of government and opposition”.

Huntington has developed this distinction when advancing the idea of a third wave of democratization or ‘worldwide democratic revolution’. Even when abstracting from this idea (‘irrelevance of outcome’<sup>625</sup>), the distinctions between transformation, replacement and transplacement generate insights that are useful for our analysis.

**TRANSFORMATIONS** – The first form of transition is a form of self-initiative. In such case, the transition is in fact a reform undertaken by the incumbent in line with the existing constitution. This transition scenario is chiefly a domestic matter, and therefore least relevant for the international law analysis of DIG. It concerns self-reform initiatives, such as the Moroccan transition, initiated by King Mohammed VI who organized the 2011 referendum and the subsequent constitutional reforms. Indonesia’s interim government after President Suharto’s resignation in 1998, also represents, Malley confirms, the “incumbent caretaker model of

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<sup>621</sup> Cf. e.g. the ‘Report of the Working Group on the issue of discrimination against women in law and in practice’, A/HRC/23/50 dd. 19 April 2013, § 97.

<sup>622</sup> Cf. also the delimitation of the scope of the thesis under Introduction, Section A.

<sup>623</sup> S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, Julian J. Rothbaum Distinguished Lecture Series v. 4, University of Oklahoma Press, Norman, 1991.

<sup>624</sup> *Id.*, p. 124.

<sup>625</sup> Chapter 2, Section B.2.3.

transition from authoritarian rule”<sup>626</sup>. Being constitutional, transitions by transformation are not further considered<sup>627</sup>.

**REPLACEMENTS & TRANSPLACEMENTS** – The second form of transition is unilateral or confrontational, and follows uprisings, coups, or revolutions. Transitional authorities installed by replacement will be referred to as ‘oppositional transitional authorities’, a concept that will be refined under Chapter 9<sup>628</sup>. This transition scenario raises important questions under international law, notably in light of the principles of self-determination and non-intervention, discussed in Chapter 6 and 9, respectively. The third form of transition is consensual. Domestic transitional authorities with a consensual origin are mostly set up as part of a peace process and based on power-sharing agreements or peace agreements. Such transitional authorities will be referred to as ‘consensual transitional authorities’.

**EXCLUSIVE FOCUS ON REPLACEMENTS & TRANSPLACEMENTS** – The thesis focuses on the two latter transition models, i.e. on oppositional and consensual transitional authorities. Most domestic transitional authorities under scrutiny have a consensual origin. Consensus-created domestic transitional authorities include those in Afghanistan (2001-2004); Burundi (1998-2005); Chad (1979-1982); Côte d’Ivoire (2007); the DRC (2002-2006); Liberia (2003-2006); Mali (2012-present); Rwanda (1993-2003); Somalia (2004-2012); Sudan (2005-2011); Tajikistan (1997); and Uganda (1979-1980).

Some domestic transitional authorities have a unilateral origin –a unilateral proclamation or declaration– like those in Kyrgyzstan (2010), Libya (2011-present); Eritrea (1992-present); Syria (2012-present) and Ukraine (2014). In these cases, transitional authorities were created by opposition forces. In spite of their oppositional origin and even if lacking effective control<sup>629</sup>, such transitional authorities generally, nearly systematically, take a vow to ensure ‘inclusivity’ and ‘representativity’ during the transition<sup>630</sup>, thus in a sense abandoning their oppositional origin, as shall be observed in Chapter 6 entitled *Self-determination through DIG*.

This study addresses both consensual and unilateral transitional authorities but Chapters 9 & 10 deal primarily with oppositional transitional authorities. External involvement with oppositional DIG represents a thorny issue, and therefore is reserved for the end of the thesis. This issue cannot simply be glossed over considering what may be at stake: the regulation of indirect regime change through external involvement with oppositional DIG.

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<sup>626</sup> M. S. Malley, ‘Inchoate Opposition, Divided Incumbents – Muddling toward Democracy in Indonesia, 1998-99’ in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, pp. 147-169.

<sup>627</sup> Chapter 3, Section A.

<sup>628</sup> Chapter 9, Section A.1.

<sup>629</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 78: “a post-conflict situation in which there is an absence of independent effective control of the territory is not incompatible with the existence *or creation* of an entity with governmental status”. Own emphasis.

<sup>630</sup> Chapter 6, Section B.

COMMON RAISON D'ÊTRE – In sum, transitional authorities refer either to revolutionary quasi-governmental<sup>631</sup> or pre-governmental<sup>632</sup> bodies, or to power-sharing / consensual interim governmental bodies<sup>633</sup>. The distinction between oppositional or consensual transitional authorities is an important yet not all-defining dividing line in the formulation of a *ius in interregno*. In both cases transitional authorities aim at bridging a transition from one politico-legal regime to another, often under international assistance, and sometimes pressure. Notwithstanding the differences between consensual and oppositional transitional authorities, their common *raison d'être* justifies that they be analyzed in the same dissertation. They are both children of the peace-through-transition paradigm, and pursue a common finality: a rupture with the past and the creation of a new constitutional order within the same state, without disrupting the state's territorial integrity<sup>634</sup>.

COMMON PRACTICES – Besides the similar aim they pursue, oppositional and consensual transitional authorities generally exhibit a similar set of features, and adopt analogous practices, including by committing to the same obligations (Part III). Transitions by replacement and transplacement can therefore be studied together. They are both relevant under international law, especially to the extent that their practices are indicative of specific state behavior, thus potentially co-constitutive of international custom; or to the extent that their practices contribute to the development of international law on other accounts.

DYNAMIC APPROACH – DIG is characterized by self-regulation: a set of secondary norms regulates the interregnum. Transition instruments usually specify these norms. These instruments and norms inform us on the (oppositional or consensual) origins and (sometimes dynamic) composition of transitional authorities. Together with the stage of maturity of transitional authorities (cf. the subdivision of the interregnum proposed below), these factors are not without consequence. They are part of the criteria that define, *inter alia*, (a) whether transitional authorities are representative, and whether their actions are attributable –either instantly or *ex post*– to the state, and (b) whether or how other states and organizations can engage with them.

GOVERNMENTS VEL NON – Transitional authorities may, or may not, be internationally recognized governments of the state during the interregnum. They are if they exercise effective control during the transition and are representative, i.e. possess the capacity to enter into relations with other states<sup>635</sup>. This is generally not contested when they are consensual (transition by transplacement), and their power to represent the state is not seriously, or only marginally, contested. If, on the other hand, transitional authorities originate from an oppositional

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<sup>631</sup> The adjective *quasi-governmental* is used to emphasize that transitional structures can be endowed with government-like features, e.g. representation powers in international fora.

<sup>632</sup> The adjective *pre-governmental* is used to emphasize that transitional structures often have the intention of governing the state ad interim, and therefore only engage in anticipative processes of constitution-making.

<sup>633</sup> Y. Shain, J. Linz, *Between States – Interim Governments and Democratic Transitions*, op. cit., p. 5.

<sup>634</sup> Chapter 3, Section B.2.

<sup>635</sup> Montevideo Convention, 26 December 1933, art. 1.

movement (transition by replacement), they may come to represent the state only after the (successful) completion of the transition, or at a certain point of the interregnum after acquiring effective control<sup>636</sup>. In such case, DIG acts can be retroactively attributed to the state. Importantly, the crux of the thesis argument does not hinge upon the governmental or non-governmental status of transitional authorities. We shall see that a (limited) number of obligations are applicable to such authorities as long as they enjoy (a limited form of) international legal personality<sup>637</sup>, regardless of their governmental status *vel non*.

A number of distinctive features of DIG will now be discussed. These features were already addressed in the introduction<sup>638</sup>. In section A, the domestic and provisional nature of DIG will be elaborated on. In section B, transitional authorities will be distinguished from related but distinct realities or concepts.

## Section A. Domestic and provisional nature of transitional authorities

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The two following subsections address the domestic (1) and provisional nature (2) of transitional authorities.

### 1. Domestic nature

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Domestic forms of interim governance can be conceptually contrasted against foreign and international forms of interim governance. The primacy of the domestic nature of the actors is based on the non-international character or identity of the (main) stakeholders and beneficiaries formally appointed in the transition. Domestic institutions formally hold the reigns over DIG. In the absence of direct ITA, transitional authorities bear the final responsibility over the transition, even if the interregnum is substantially internationalized<sup>639</sup>.

The following lines briefly elaborate on the non-foreign (1.1) and non-international (1.2) character of domestic transitional authorities. As foreign and international involvement in the interregnum can be a matter of degree, the subsequent paragraph succinctly discusses the various classifications developed by scholarship in this regard (1.3).

#### 1.1. Exclusion of foreign administrations

The transitional authorities examined in this dissertation are formally domestic, and mostly enjoy international legal personality<sup>640</sup>, which distinguishes them from foreign or occupying

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<sup>636</sup> Exceptionally they would do so already at an earlier stage. See the acceptance of credentials at the UNGA of the Libyan TNC during September 2011 already.

<sup>637</sup> Chapter 4, Section A.2.6.

<sup>638</sup> Introduction, Section A.

<sup>639</sup> As discussed in Chapter 1, Section A.2.3, the UNSC and UNGA affirmed the responsibility of transitional authorities. This is confirmed by relevant practice discussed under Chapter 5, Section B.3.

<sup>640</sup> Chapter 4, Section A.2.6.

powers: a “key distinction from belligerent occupation and international territorial administration is that a domestic government administers the reconstruction process”<sup>641</sup>.

**SUCCESSION TRANSITIONAL AUTHORITIES WITHIN SAME COUNTRY** – A foreign transitional authority may be succeeded by a domestic transitional authority. For instance, while the USA-led Coalition Provisional Authority and its Iraqi Governing Council (13 July 2003 – 1 June 2004) lacked formal domestic ownership, the Iraqi Interim Government (28 June 2004 – 3 May 2005) and the Iraqi Transitional Government (3 May 2005 – 20 May 2006), which were set up and functioned after the formal transfer of sovereignty, were domestic transitional authorities.

**COEXISTENCE FOREIGN OCCUPATION & DOMESTIC TRANSITION** – The military occupation of a country does not exclude the presence of a domestic transitional authority, and *vice versa*. The Afghan transitional authorities (Afghan Interim Administration, 22 December 2001 – 13 July 2002; the Afghan Transitional Administration, 13 July 2002 – 3 January 2004) were at least formally in Afghan hands while the country was under foreign occupation. In Mali, the transitional authority requested military assistance from ECOWAS<sup>642</sup>, and later from France<sup>643</sup>, which resulted in the partial occupation of the country. In such a case, the interregnum is simultaneously characterized by (domestic) interim rule and (foreign) occupation, whereby the two modes of governance are (at least) formally dissociated one from another.

## 1.2. Exclusion of international administration

**TENSION INHERENT TO ASSISTANCE MODEL** – The international legal personality of the transitional authorities under scrutiny does not derive from ITA<sup>644</sup>. Domestic transitional authorities are (formally) independent from the UN or other IOs. They may however receive assistance from the UN or other external actors under the assistance model<sup>645</sup>. Within this model, the degree of assistance can vary. Even if external actors, notably the UN, are to “guide, not direct”<sup>646</sup> DIG, at times assistance amounts to a form of (implicit) indirect rule<sup>647</sup>. The distinction between the assistance model and ITA should nevertheless be made. Saul compares both forms of governance, and underlines the tension inherent to the former model as follows:

“in the assistance model, the external actors do not exercise direct political authority. Political authority is reserved for the favored domestic actors. These domestic actors are *subject to the influence of the external actors*, but not to the extent that there is a complete absence of autonomy. As a result, the assistance model has the potential to create different and in some respects more *complex challenges for international law* than situations of direct international administration”<sup>648</sup>.

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<sup>641</sup> M. Saul, 'From Haiti to Somalia', *op. cit.*

<sup>642</sup> Letter of the Transitional authorities of Mali of 1 September 2012 to ECOWAS requesting military assistance.

<sup>643</sup> Opération Serval.

<sup>644</sup> Chapter 4, Section A.2.6.

<sup>645</sup> Chapter 1, Section B.1.3, Table 1.

<sup>646</sup> S/PV.4903 dd. 26 January 2004 p. 16.

<sup>647</sup> See the examples in Chapter 1, Section B.1.

<sup>648</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 6-7.

**DISTINCTION BETWEEN ASSISTANCE MODEL & ITA** – The assistance model, inherent to (the discourse surrounding) DIG, distinguishes DIG from ITA. According to Caplan’s definition, ITA is “a formally constituted international body that has been entrusted temporarily with *responsibility* for the *principal governance functions* of a state or territory”<sup>649</sup>. Wilde observes that ITA “has been used as a device to *replace* local actors in the activity of administration”<sup>650</sup>, and uses the criterion of supervision and control to distinguish it from the assistance model<sup>651</sup>. According to another definition, (direct) ITA refers to the :

*“substitution d’une autorité étrangère d’origine internationale à un Etat [...] dans l’exercice directs de pouvoirs gouvernementaux formellement identiques à ceux résultant habituellement pour un Etat de son titre territorial”<sup>652</sup>.*

**DIG: ABSENCE OF (FORMAL) SUPERVISION & CONTROL** – Occasionally it may be difficult, yet it remains crucial, to distinguish between ITA (supervision and control) and the assistance model, Wilde remarks<sup>653</sup>. On the basis of the supervision and control criterion, Wilde includes the following scenario under the category of ITA: “situations where particular administrative activities are performed by local actors, but under the overall authority of the international organization”<sup>654</sup>. The international transitional administration in Kosovo (UNMIK) and East Timor (UNTAET)<sup>655</sup>, and their historical precedents<sup>656</sup>, thus constitute instances of ITA, hence need not be further considered. Wilde uses the supervision and control criterion to conceptually

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<sup>649</sup> R. Caplan, ‘Transitional Administration’, in V. Chetail (ed.), *Post-Conflict Peacebuilding*, *op. cit.*, p. 359. Emphasis added. See also the Peacemaker definition: “[a] transitional authority often arising from a negotiated peace process and is established by the United Nations Security Council to assist a country during a government regime change or passage to independence. It typically consists of three segments: (i) public administration including rule of law (ii) humanitarian assistance, and (iii) a security and stabilization force. Transitional administrations have been authorised in Cambodia, Kosovo and East Timor”.

<sup>650</sup> *Id.*, p. 587.

<sup>651</sup> R. Wilde, ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’, *The American Journal of International Law* 95, no. 3, July 1, 2001, p. 585: “the international organization asserts the right either to supervise and control the operation of this structure by local actors, or to operate the structure directly. The right is exercised from within the territory, and can pertain to the structure as a whole, or certain parts of it (e.g. the legislature). This activity should be contrasted with merely monitoring and/or assisting local actors in operating such a structure, although the *distinction is sometimes difficult to make* in practice, particularly in the case of conduct and assistance”.

<sup>652</sup> I. Prezas, *L’administration de collectivités territoriales par les Nations Unies – Etude de la substitution de l’organisation internationale à l’état dans l’exercice des pouvoirs de gouvernement*, L.G.D.J., 2012, p. 26. Emphasis added.

<sup>653</sup> R. Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away*, *op. cit.*, p. 33: “[a]lthough *the distinction between assistance, on the one hand, and supervision or control, on the other, is contested and can be difficult to make in practice, as an idea it is key to understanding how the activity of territorial administration is compared with other activities performed by international organizations*, and treated as distinctive as a result. Because of these considerations relating to distinctiveness and originality, the difference between supervision/control/conduct, on the one hand, and mere assistance/advice, on the other, is adopted as a key component in defining the nature of the involvement in territorial administration by international actors”. He adds: “the activity of ITA [international territorial administration] should be contrasted with merely monitoring and/or assisting local actors in operating the structure of territorial administration as defined in this study” (*id.*, p. 35).

<sup>654</sup> *Id.*, fn. 95.

<sup>655</sup> L. Aucoin and M. Brandt, ‘East Timor’s Constitutional Passage to Independence’ in L. E. Miller, *Framing the State in Times of Transition: Case Studies in Constitution Making*, United States Institute of Peace Press, Washington, D.C., 2010.

<sup>656</sup> R. Wilde, ‘From Danzig to East Timor and Beyond: The Role of International Territorial Administration’, *op. cit.*, pp. 583-606.

isolate ITA. Here, the distinction between this criterion and the assistance model is emphasized for the opposite reason, i.e. to point at the conceptual relevance of DIG, which raises a different set of legal issues.

### 1.3. Gradations and classifications of international involvement

Some transitions are not clear-cut and defy the distinction between international/foreign administration and assisted DIG. Aside from this basic distinction, what other distinctions are made in scholarship? There are various, more or less complex, conceptualizations and classifications of models of international involvement in transitional situations.

SCHOLARLY DISTINCTIONS – While Caplan only differentiates between direct UN governance<sup>657</sup> and UN supervision, Chopra makes a distinction between (a) governorship, i.e. the UN assuming full responsibility for the transition; (b) control, i.e. the UN exercising powers of direct control over the transition; (c) partnership, i.e. that the UN has a veto and final say over the transition; and (d) assistance, i.e. the UN only supporting the transition without any binding powers. Doyle differentiates between four models of international administration, depending on the legal authority and effective capacity exercised by the UN. *Decrescendo*, models of international administration range from supervisory authority to executive authority to administrative authority and mere monitoring<sup>658</sup>. Commenting on this classification, Croissant observes that, in contrast with other models, only the monitoring model (similar to Saul’s assistance model) allows interim governance to be truly domestic. Other models would fall under the broader category of UN-managed ITA<sup>659</sup>.

The following table represents an overview of the categories of international involvement in transitional situations, as developed in literature. It reflects the diversity and degrees of external involvement in transitional situations, allowing us to better situate DIG. Categories developed in scholarship not commented on above are also included.

**TABLE 4: Categories and degrees of international involvement in interregnum**

[1] Ottaway & Lacina	[a] International transitional administrations [int. admin. by High Representative in Bosnia; UNMIK; UNTAET] [b] Installation of local transitional government [Afghanistan, DRC, Liberia, Rwanda, Somalia] [c] Reliance on existing structures
[2] Caplan	[a] Direct UN governance [UNTAES; UNMIK; UNTAET] <sup>660</sup>

<sup>657</sup> R. Caplan, *International Governance of War-torn Territories*, OUP, 2005, pp. 17-21.

<sup>658</sup> M. W. Doyle, ‘War Making and Peace making – The United Nations’ Post-Cold War Record’ in C. A. Crocker, F. O. Hampson, P. Aall, *Turbulent Peace, The Challenges of Managing International Conflict*, United States Institute of Peace Press, Washington D.C., 2001, p. 551, table 2. This article does not provide an exhaustive explanation of these types of international administration.

<sup>659</sup> A. Croissant, ‘International Interim Governments, Democratization, and Post-conflict Peace Building: Lessons from Cambodia and East Timor’, *op. cit.*, p. 227.

<sup>660</sup> Similar to 3.a.

	<b>[b]</b> ‘Between direct governance and supervision’ [int. admin. by High Representative in Bosnia] <b>[c]</b> Supervision [no direct role for UN, relatively little authority, e.g. UNTAC] <sup>661</sup>
<b>[3]</b> Chopra	<b>[a]</b> Governorship [UNMIK] <sup>662</sup> <b>[b]</b> Control [int. admin. by High Representative in Bosnia] <b>[c]</b> Partnership <b>[d]</b> Assistance <sup>663</sup>
<b>[4]</b> Doyle	<b>[a]</b> Supervisory authority [UNTAET; UNMIK] <b>[b]</b> Executive authority [UNTAES; UNOMIL; int. admin. by High Representative in Bosnia] <b>[c]</b> Administrative authority [ONUMOZ; UNTAC; MINURSO; int. admin. by High Representative in Bosnia] <b>[d]</b> Monitoring [ONUAL; UNTAG; UNMOT; UNMIH; MINUGUA; UNAVEM; UNOMIG; UNFICYP; UNAMIR; UNOSOM I; MONUC; UNPROFOR; UNOMSIL]
<b>[5]</b> Wilde	<b>[a]</b> Supervision/control/conduct [incl. UNMIK; UNTAET] <b>[b]</b> Assistance/advice
<b>[6]</b> Chesterman	<i>Depending on the purpose and trajectory of the transition:</i>  <b>[a]</b> Decolonization and independence [Namibia, East Timor] <b>[b]</b> Temporary admin. of territory pending peaceful transfer of control to existing government [West New Guinea, Western Sahara, Eastern Slavonia] <b>[c]</b> Temporary admin. of territory pending holding of elections [Cambodia] <b>[d]</b> Interim admin. as part of peace process without an end state [Bosnia and Herzegovina, Kosovo] <b>[e]</b> <i>De facto</i> administration or responsibility for basic law and order in the absence of governing authority [Congo 1960-1964, Somalia 1993-1995, Sierra Leone 1999]
<b>[7]</b> Shain & Linz <sup>664</sup>	<b>[a]</b> Revolutionary provisional governments <sup>665</sup> <b>[b]</b> Power-sharing interim governments <sup>666</sup> <b>[c]</b> Incumbent caretaker governments <sup>667</sup> <b>[d]</b> International interim governments
<b>[8]</b> Huntington	<b>[a]</b> ‘Transformation’ <sup>668</sup> <b>[b]</b> ‘Replacement’ <sup>669</sup> <b>[c]</b> ‘Transplacement’ <sup>670</sup>
<b>[9]</b> Excl. in thesis	1.a; 2.a; 2.b; 3.a; 3.b; 4.a, 4.b, 4.c; 5.a; 7.c; 7.d; 8.a.
<b>[10]</b> References made in thesis	1.b; 3.d; 4.d; 5.b; but also regime trajectories which receive no formal UN assistance/advice, yet which are much influenced by the ‘international community’ (Syria 2011; Ukraine 2014)  - Afghanistan (2001-2004); - Burkina Faso (2014); - Burundi (1998-2005); - Cambodia (1991); - Central African Republic (April 2013-present); - Comoros (2001); - Côte d’Ivoire (2007-2010); - DRC (2002-2006); - Guinea (2010); - Guinea-Bissau (2012); - Iraq (2004); - Kyrgyzstan (2010); - Liberia (2003); - Libya (2011-present); - Mali (2012-present); - Nepal (2006-present)

<sup>661</sup> Similar to 3.d.

<sup>662</sup> Similar to 2.a.

<sup>663</sup> Similar to 2.c.

<sup>664</sup> Y. Shain, J. Linz, *Between States – Interim Governments and Democratic Transitions*, *op. cit.*, p. 5.

<sup>665</sup> Similar to 8.b.

<sup>666</sup> Similar to 8.c.

<sup>667</sup> Similar to 8.a.

<sup>668</sup> Similar to 7.c.

<sup>669</sup> Similar to 7.a.

<sup>670</sup> Similar to 7.b.

	<ul style="list-style-type: none"> <li>- Rwanda (1994-2003);</li> <li>- Somalia (2004-2012);</li> <li>- South Africa (1993);</li> <li>- Syria (2012);</li> <li>- Sudan (2005-2011);</li> <li>- Ukraine (2014);</li> <li>- Yemen (2012).</li> </ul>
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Clearly, the distinction between international/foreign administration and assisted DIG does not represent a perfect dichotomy. Grey zones exist. The experiences in Bosnia and Herzegovina and Cambodia, for instance, may be difficult to classify either under ITA or DIG. In the former case the division of labor and prerogatives was explicitly foreseen in the Dayton Agreement<sup>671</sup>. It lies somewhere ‘between direct governance and supervision’<sup>672</sup> for Caplan.

**DEFYING THE ITA-DIG DISTINCTION: CAMBODIA** – In the case of Cambodia, sovereignty during the transitional period was vested in the country’s representatives, but all powers necessary to ensure the implementation of the transitional arrangements of the 1991 Paris Accords were delegated to the UN<sup>673</sup>. Interim governance in Cambodia was formally domestic although some powers were delegated to UNTAC. On the one hand, the domestic “supreme National Council [was] the unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined”<sup>674</sup>. On the other hand, this domestic body agreed to “delegate[s] to the United Nations all powers necessary to ensure the implementation of this Agreement”<sup>675</sup>.

**POWER OF UNTAC & OF SNC** – In spite of a wide delegation of powers to UNTAC<sup>676</sup>, it seems that UNTAC did not use all of its powers, and regularly met and consulted with the SNC, using it as a sounding board<sup>677</sup>. For Dobbins, “the UN’s control over Cambodia’s civil administration

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<sup>671</sup> See J. C. O’Brien, ‘The Dayton Constitution of Bosnia and Herzegovina’ in L. Miller, *Framing the state in times of transition*, *op. cit.*, p. 332.

<sup>672</sup> Similar to 3.d.

<sup>673</sup> ‘The process of Creating a New Constitution in Cambodia’ in L., *Framing the State in Times of Transition*, *op. cit.*. Cf. also G. Curtis, ‘Transition to what? Cambodia, UNTAC and the peace process’, UN Research Institute for Social Development, 1993.

<sup>674</sup> Paris Agreement, art. 3.

<sup>675</sup> *Id.*, art. 6.

<sup>676</sup> C. Bull, *No Entry Without Strategy – Building the Rule of Law under UN Transitional Administration*, *op. cit.*, p. 29: UNTAC “was delegated only those powers necessary for it to fulfill its mandate. Although the SNC continued to conduct many government functions, UNTAC had direct authority over the organisation and conduct of free elections, including the establishment of laws and administrative procedures; over all administrative agencies that could influence the outcome of the elections (foreign affairs, defense, finance, public security and information); over the police force, over relevant law enforcement and judicial processes in consultation with the SNC; and over military operations”.

<sup>677</sup> S. P. Marks, ‘The Process of Creating a New Constitution in Cambodia’ in L. E. Miller, *Framing the State in Times of Transition*, *op. cit.*, p. 212.

was largely nominal<sup>678</sup>. The SNC exercised full legislative power, and UNTAC could only act when this council was deadlocked, Croissant notes<sup>679</sup>.

CO-GOVERNANCE – In conclusion, even if some considered SNC to be a “semisovereign mechanism”<sup>680</sup>, Cambodia was not under ITA. The situation can best be qualified as a “mixed national-international governance structure”<sup>681</sup> or *formal co-governance*<sup>682</sup>; the “scope of UN engagement did not yet quite reach the depth of the UN mandates in Kosovo and East Timor”<sup>683</sup>. Trusteeship and/or exclusive international governance were thus avoided<sup>684</sup>.

## 2. Provisional nature

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Transitional authorities (purport to) “rule for a limited amount of time until a permanent government can come to power”<sup>685</sup>. As explained in the introduction, they observe the interim rule during the interregnum, as regulated by a set of (secondary) transition norms. The constitutionmaking process is a central part of the public powers *ad interim*.

STAGED CONSTITUTIONMAKING – During the interregnum, transitional authorities endeavor to pre-define the coming constitutional order. They operate in the context of (envisaged) two-staged / multi-staged constitutionmaking processes. These processes are (supposed to be) carried out in accordance with the relevant provisions of transition instruments. Arato has qualified staged constitutionmaking processes as ‘post-sovereign constitutionmaking’<sup>686</sup>. This refers to the circumstance that the constitutionmaking process itself is pre-defined or at least constrained by

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<sup>678</sup> J. Dobbins, ‘A History of UN Peacekeeping’ in I. Shapiro, J. Lambert, *Charter of the United Nations*, Yale University Press, New Haven & London, 2014, p. 199.

<sup>679</sup> A. Croissant, ‘International Interim Governments, Democratization, and Post-conflict Peace Building: Lessons from Cambodia and East Timor’, in K. Gutteri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 227: “[u]nlike in East Timor, UN transitional authority in Cambodia was restricted to administrative authority, while the Supreme National Council –the local power-sharing government of all four warring parties with Prince Norodom as its head– had full legislative authority. UNTAC and its special representative, Yasushi Akashi, were given the authority to decide matters only when the factions within the council were deadlocked and Prince Sihanouk did not act. UNTAC’s primary responsibility was to control the administration in five areas of sovereign activity –defense, finance, foreign affairs, information, and public security. UNTAC thus exercised executive power only indirectly”.

<sup>680</sup> M. W. Doyle, ‘War Making and Peace making – The United Nations’ Post-Cold War Record’, in C. A. Crocker, F. O. Hampson, P. Aall, *Turbulent Peace, The Challenges of Managing International Conflict*, United States Institute of Peace Press, Washington D.C., 2001, p. 543. Doyle and Sambanis also consider the *Commission on the Peace in El Salvador* and the *National Consultative Council in East Timor* as ‘semisovereign mechanisms’. See M. W. Doyle, N. Sambanis, *Making War and Building Peace: United Nations Peace Operations*, Princeton University Press, 2011.

<sup>681</sup> *Id.*, pp. 270-271.

<sup>682</sup> C. Stahn, *The Law and Practice of International Territorial Administration*, *op. cit.*, p. 269: “the UN engagement in Cambodia marked the first systematic governance undertaking of the UN in the 1990s. It presented a midway point between the accidental UN governance experiences of the Cold War period and the comprehensive UN statebuilding missions of the mid- to late 1990s”.

<sup>683</sup> *Ibid.*

<sup>684</sup> *Id.*, p. 270.

<sup>685</sup> Definition provided by the [African Elections Database](#).

<sup>686</sup> A. Arato, *Constitution Making Under Occupation*, *op. cit.*

a number of limitations specified beforehand. Teitel describes the distinctive nature of transitional constitutionmaking as follows:

“Constitutionmaking often begins with a provisional constitution, predicated upon the understanding of subsequent, more permanent constitutions. Despite our ordinary notions of constitutional law as the most forward-looking and enduring of legal forms, transitional constitutionmaking is frequently impermanent, and involves *gradual change*. Many constitutions that emerge in periods of political transformations are explicitly intended as interim measures.”<sup>687</sup>

STAGED TRANSITIONS – Staged constitutionmaking processes take place against the background of transition processes, which, themselves, can roughly be subdivided into four stages. While Youssef’s subdivision centers on the level of protection of human rights before, during and after the transition<sup>688</sup>, the subdivision proposed here revolves around material events and/or juridical texts. It is based on the distinction between the pre-transition stage (before the transition) (2.1); the foundation of the transition (2.2); the transition itself (2.3); and the post-transition stage (2.4). After a brief discussion of each stage, we will turn to an overview (2.5), and, finally, explain the rationale behind the temporal subdivision of DIG (2.6).

**TABLE 5: Four stages of a transition: conceptual understanding**

1. Pre-transition	2. Foundation of transition	3. Transition procedure	4. Post-transition
Political event (e.g. ceasefire, formal opening negotiations) until foundation of transition.	Consensual or unilateral (textual) foundation of the transition.	Setting up and functioning of transitional institutions; the transition procedure as such.	From the approval of the constitution / holding general elections / creation new government onwards

## 2.1. Pre-transition

PRE-TRANSITION: AN APPROXIMATION – The period ‘before the transition’ starts with a political event –e.g. a ceasefire, the formal start of negotiations, civil unrest– eventually leading to the creation of a transitional authority. The choice in picking the event triggering the pre-transition stage is indicative and context-related. Where the interregnum is based on a peace agreement, the preliminary stage may partly correspond to what Bell, under a ‘stage-function classification’, described as the ‘stage producing pre-negotiation agreements’<sup>689</sup>. The pre-transition stage ends on the date on which transitional authorities are founded.

<sup>687</sup> R. Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’, *op. cit.*, p. 2057. Emphasis added.

<sup>688</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 43.

<sup>689</sup> C. Bell, *On the Law of Peace*, *op. cit.*, p. 53.

ASPIRATIONAL/EMBRYONIC TRANSITIONAL AUTHORITIES – During the pre-transition period, (candidate) transitional authorities are either non-existent or only embryonic, and sometimes remain stuck at this stage, as for instance in Uganda and China. Manifestly inspired by the recognition of the Libyan Transitional National Council, which gained momentum during 2011, a number of Ugandan citizens decided late August 2011 to ‘assemble’ [sic] a Uganda interim government, i.e. to set up an Uganda National Transition Council<sup>690</sup>. This initiative had poor outreach (it received little attention in the media), and met with little success. The same is true of the little-known publication of the ‘Charter of the Transitional Authority of China’ late February 2008, which, in somewhat more detail than the Uganda National Transition Council Manifest, provides how this authority would be composed. It also details which missions it would pursue, including its own dissolution once its purpose is reached, i.e. “once the task of rejecting the totalitarian rule of the CCP’s [Chinese Communist Party] bureaucratic group is completed and following the establishment of democracy based on a national referendum”<sup>691</sup>.

RELATIVE RELEVANCE OF ASPIRATIONAL TRANSITIONAL AUTHORITIES – Both the Uganda National Transition Council and the Transitional Authority of China are aspirational transitional authorities. At no stage of their existence or inception is their gravitas and level of organization sufficiently high so as to plausibly trigger a transition and organize DIG. Lacking (sufficient) international support, aspirational transitional authorities may remain blocked in the pre-transition stage without ever activating a transition.

Aspirational transitional authorities are however not irrelevant for our enquiry to the extent that their political purpose –the reconfiguration of the state order– must be taken into account when examining the leeway external states have in supporting them. External support to inchoative oppositional transitional authorities potentially results in a regime change. This issue will be discussed under Chapters 9 & 10. It suffices here to make a couple of cursory and general remarks about their position under domestic and international law. The right to create a transitional authority depends both on (i) domestic and (ii) international law.

(1) POTENTIAL IMPACT OF DOMESTIC LAW ON ASPIRATIONAL TRANSITIONAL AUTHORITIES – Agreements, acts or proclamations that trigger DIG do not come out of the blue. Transition instruments are generally prepared beforehand, either in the framework of dialogues, negotiations, conferences, etc., or in the context of opposition gatherings. Domestic legislation may allow, condition or forbid –for instance in the name of ‘national security’, ‘public safety’, or the

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<sup>690</sup> Cf. <http://www.musevenimustgo.com/index.php?id=NEWS&newsid=183>, last consulted on 17 February 2015 (not available anymore). E-mail sent on the same date to ask for information about the Uganda National Transition Council has remained unanswered to this date.

<sup>691</sup> Cf. the *Charter of the Transitional Authority of China*, available on <http://www.dossiertibet.it/news/charter-transitional-authority-china> (last retrieved on 16 October 2015, not available anymore), A.2.c. The title of the URL indicates that the initiative is linked to the ongoing debate about Tibet’s status and quest for sovereignty. E-mail sent on 17 February 2015 to ask for information about the Transitional Authority of China has remained unanswered to this date.

‘prevention of disorder’, to borrow the words of the European Convention on Human Rights<sup>692</sup> – the creation of movements intending to introduce a new constitutional order.

(2) POTENTIAL IMPACT OF INT’L LAW ON ASPIRATIONAL TRANSITIONAL AUTHORITIES – The freedom of assembly and speech may be invoked by, but also held against, aspirational transitional authorities. Freedom of assembly is guaranteed by the 1948 UDHR and the 1966 ICCPR on the universal level, and by the 1950 ECHR, the 1969 American Convention on Human Rights and the 1986 African Charter on Human and Peoples’ Rights on the regional level. This right is however not absolute. It does not apply to non-peaceful assemblies<sup>693</sup>, and can be limited by law, e.g. for the purpose of national security or public safety. Freedom of speech, including the right to hold an opinion, is protected by the same legal instruments. This right, too, can be restricted under three conditions: the restriction must be prescribed by law; it must pursue a legitimate aim; it must be necessary for attaining that aim<sup>694</sup>.

In short, international legal rights may be invoked during the pre-transition period to expedite the creation of transitional authorities. But prohibitions under domestic law or restrictions under the relevant human rights treaties may also limit this possibility. The right to create a transitional authority and to trigger DIG will be further discussed in Chapter 7, where this issue will be addressed from the perspective of the right to internal self-determination<sup>695</sup>.

## 2.2. Foundation

VARIOUS INSTRUMENTS MAY BE CONSTITUTIVE OF DIG – The foundation of a transitional authority relates to its creation on the basis either of a unilateral text (proclamation, declaration) or of a consensual text (agreement, treaty). The legal nature of transition instruments was discussed under Chapter 3, where an overview of the transition instruments *sub examine* was provided<sup>696</sup>. The penholders of transition instruments dispose of enormous powers. The limits of actors established by these instruments will be discussed under Part III. Sometimes external actors, too, dispose of significant power in defining transition instruments. External assistance to the elaboration of transition instruments will be discussed under Chapter 8, where the legal limits to the powers of external actors in relation to transition instruments will be examined.

INITIATION OF DIG MAY BE EXPLICITLY FORESEEN – Transition instruments can explicitly provide when a transitional authority is to be established. In Rwanda, for example, a peace agreement foresaw that “the Transitional Institutions shall be set up within thirty-seven days following

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<sup>692</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, artt. 10 and 11.

<sup>693</sup> N. Weiß, ‘Assembly, Freedom of, International Protection’, MPEPIL.

<sup>694</sup> N. Wenzel, ‘Opinion and Expression, Freedom of, International Protection’, MPEPIL.

<sup>695</sup> Chapter 7, Section C. The freedom of assembly and freedom of speech will be mentioned again, as the respect of these rights is instrumental to the realization of an inclusive transition procedure, ‘inclusivity’ becoming arguably a legal requirement under *ius in interregno* (Chapter 6). For a study placing the role of fundamental rights at the center of analysis of *democratic* transitions, see N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*

<sup>696</sup> Chapter 3, Section A.1, Table 2; Chapter 3, Section B.1.3, Table 3.

the signing of the Peace Agreement”<sup>697</sup>. By the time of its foundation, the transitional authority’s organizational structure and portfolio have generally been defined in the relevant transition instruments. These instruments define how DIG is to be pursued. But the initiation of DIG and the foundation of a transitional authority need not coincide. Also, in some cases, several texts, entering into effect on different moments, are to be read together (e.g. intrastate agreement in combination with a preconstitutional act<sup>698</sup>) in order to understand the design of a transition procedure.

**ABORTED TRANSITIONAL AUTHORITY / NON-INAUGURATED TRANSITION** – It is possible that a transitional authority is founded, receives recognition and becomes (relatively) influential without the transition roadmap eventually being executed. In Syria, for instance, an agreement was reached on 11 September 2012 during a meeting of Syrian opposition groups gathered in Doha. This agreement formalized the founding of the National Coalition for Syrian Revolutionary and Opposition Forces (the ‘Coalition’). Towards the end of 2012, the first countries to ‘recognize’<sup>699</sup> this Coalition were France, Turkey, Qatar, and then Britain<sup>700</sup>. This Coalition also enjoyed the support of at least two regional IOs: the Council of the EU<sup>701</sup> and the Gulf Cooperation Council<sup>702</sup>. Even prior to the foundation of this Coalition, the involvement by states and organizations in the process leading to the formation of this Coalition conferred considerable political weight on it; this was reinforced after its foundation<sup>703</sup>. The aim of these states and organizations was clear from the beginning: creating new structures of governance and triggering a regime change through DIG<sup>704</sup>. To this date, this attempt has not materialized. In other words, the foundation of this transitional authority did not result in the initiation of DIG. On 17 May 2016, DIG as a solution for the Syrian crisis was again envisaged<sup>705</sup>.

The following table emphasizes the gradual nature of transition processes, with concrete examples of (a) embryonic, (b) inchoative, (c) halfway or (d) completed transition procedures.

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<sup>697</sup> Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front dd. 4 August 1993, art. 7.

<sup>698</sup> For examples, see Chapter 3, Section C.3.

<sup>699</sup> A discussion on the ‘recognition’ of oppositional transitional authorities will follow under Chapter 9, Section A.1.

<sup>700</sup> ‘Syria criticizes 3 countries for recognizing opposition’, IHT, 19 November 2012.

<sup>701</sup> Conclusions on Syria at the 3199th Foreign Affairs Council meeting of 19 November 2012.

<sup>702</sup> ‘Opposition in Syria war is urged to pick leaders; U.S. and others want to see a political structure that could replace regime’, IHT, 7 December 2012.

<sup>703</sup> This shall be explained in detail in Chapter 9, Section A.2 where this practice will be labeled ‘transformative empowerment’.

<sup>704</sup> ‘Obama threatens Syria over chemical weapons; Warning to Assad suggests use could be met with military force’, IHT, 5 December 2012.

<sup>705</sup> Cf. the [Statement of the International Syria Support Group dd. 17 May 2016](#), especially the last part on ‘advancing a political transition’

**TABLE 6: Embryonic, inchoate, midway or completed transition procedures (without reference to transition instruments)**

<i>Transition Process</i>				
	<b>Pre-transition</b>	<b>Public foundation TA</b>	<b>Transition procedure / Interregnum</b>	<b>Completion of transition</b>
<b>(a) Tentative foundation of TA / aspirational TA</b>	- Uganda ( <i>Uganda National Transition Council</i> ) - China ( <i>Transitional Authority of China</i> )	/	/	/
<b>(b) Tentative interregnum</b>	- South Sudan () - Syria ( <i>Arab Spring</i> )	- South Sudan (agreement formation unity government)  - Syria ( <i>National Council 08/'11; National Coalition 11/'12</i> )	/	/
<b>(c) Tentative completion of interregnum</b>	- Burkina Faso - CAR - Libya ( <i>Arab Spring</i> ) - Nepal - Ukraine ( <i>Maidan protests</i> )	- Burkina Faso - CAR - Libyan TNC/GNC - Nepal - Ukraine	- Burkina Faso (interruption transition by coup in 09/'15) - CAR - Libyan TNC/GNC - Nepal - Ukraine	/
<b>(d) Completion of transition</b>	- Afghanistan - Burundi - Côte d'Ivoire - DRC - Guinea - Guinea-Bissau - Iraq - Kyrgyzstan - Liberia - Mali - Somalia - Sudan - Yemen	- Afghanistan - Burundi - Côte d'Ivoire - DRC - Guinea - Guinea-Bissau - Iraq - Kyrgyzstan - Liberia - Mali - Somalia - Sudan - Yemen	- Afghanistan - Burundi - Côte d'Ivoire - DRC - Guinea - Guinea-Bissau - Iraq - Kyrgyzstan - Liberia - Mali - Somalia - Sudan - Yemen	- Afghanistan - Burundi - Côte d'Ivoire - DRC - Guinea - Guinea-Bissau - Iraq - Kyrgyzstan - Liberia - Mali - Somalia - Sudan - Yemen <sup>706</sup>

### 2.3. The interregnum

The transition procedure as such lasts from the explicitly foreseen DIG commencement date (or, in the absence thereof, the actual foundation of the transitional authority) to the end of the transition. The end of the transition, we shall discuss below, can be marked by various events (such as general elections, the dissolution of transitional authority/resumption of powers, and/or the adoption of a new constitution). The actors who are in a position to steer or modify the interregnum enjoy enormous power. The limits to the powers of domestic transitional authorities will be discussed under Part III, while the limits to the powers of external actors in assisting transitional authorities (also) *during* the interregnum will be discussed under Part IV.

**DURATION OF DIG MAY BE EXPLICITLY FORESEEN** – Transition instruments regularly provide the length of the interregnum, e.g. in Cambodia<sup>707</sup>, Côte d'Ivoire<sup>708</sup>, and the DRC<sup>709</sup>. The period

<sup>706</sup> After transition: tentative by Houthi Revolutionary Committee to trigger new transition.

<sup>707</sup> Paris Agreement, art. 1: “the transitional period shall commence with the entry into force of this Agreement and terminate when the constituent assembly elected through free and fair elections, organized and certified by the

spanning from the beginning until the end of the transition procedure is defined as the transitional period, interim period or interregnum. The transition can last from a couple of months (Kyrgyzstan, April – October 2010) to almost a decade (Nepal, 2007 – present<sup>710</sup>) and even longer, as in Somalia<sup>711</sup> or in Palestine, where the five-year transition foreseen by the 1993 Oslo Accords evolved into ‘Palestine’s permanent transition’<sup>712</sup>. Transitions can also be consecutive, as was the case in Côte d’Ivoire (2003 – 2006; 2006 – 2010) and is now the case in Somalia (2004 – 2012; 2012 – present); the 2012 Provisional Constitution was thus described as essentially “handing over from one interim authority to another, from one transition to another”<sup>713</sup>. At the time of writing, a second consecutive transition is being implemented, for better or worse, in Libya<sup>714</sup>.

During the interregnum/interregna, transitional authorities administer the country (the ‘interim rule’), and execute the transition procedure. Transition processes generally follow a similar roadmap:

- Setting up of transitional authorities;
- Election or appointment of a constituent assembly;
- National dialogue / Roundtable;
- Organization of a constitutional referendum;
- Adoption of the constitution<sup>715</sup>;
- General elections;
- Organization of post-conflict justice / TJ.

## 2.4. End of the transition

END INTERREGNUM EXPLICITLY FORESEEN – Transition instruments sometimes explicitly indicate when the transition procedure is to end. This is the case with instruments relating to DIG in

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United Nations, has approved the constitution and transformed itself into a legislative assembly, and thereafter a new government has been created”.

<sup>708</sup> Accord de Ouagadougou, Annexe ‘Chronogramme de mise en oeuvre de l’Accord de Ouagadougou’, nr. 4: “*formation du gouvernement [s]e fait cinq semaines après la signature de l’Accord*”.

<sup>709</sup> Pretoria Agreement, IV.

<sup>710</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 20, observation by P. M. Shakya: at the time of writing, the 2007 interim constitution is still in force and “the drafting process has been ongoing since the election of a 601-member Constituent Assembly in April 2008, tasked with drafting the permanent constitution”.

<sup>711</sup> *Id.*, p. 22, observation by A.-S. Jama: “in 2012, the international community declared that the 12-year transition had ended and recognized the Somali government, despite the absence of legitimate institutions, and indeed ongoing conflict”.

<sup>712</sup> Z. Miller, ‘Perils of Parity: Palestine’s Permanent Transition’, *Cornell International Law Journal*, Vol. 47, 2014, p. 331 – 412.

<sup>713</sup> A. Ainte, ‘Somalia – Legitimacy of the Provisional Constitution’, *Accords*, Issue 25, p. 60 (quoting A. Hashi of ICG).

<sup>714</sup> The difficult implementation of the Libyan Political Agreement of 17 December 2015. M. Toaldo, ‘[Libya’s Political Stalemate](#)’, *The Cairo Review of Global Affairs*, 6 February 2016.

<sup>715</sup> For the sequencing of the constitutionmaking process itself, cf. ‘[Guidance note of the Secretary-General on UN assistance to constitution-making processes](#)’, April 2009, p. 8.

Burkina Faso (installation new institutions)<sup>716</sup>, Burundi<sup>717</sup>, Cambodia (approval constitution and creation new government)<sup>718</sup>, DRC (election new President)<sup>719</sup>, Guinea Bissau (new President assumes office)<sup>720</sup>, Iraq (formation elected government)<sup>721</sup>, Libya (ratification permanent constitution)<sup>722</sup>, Nepal (new constitution “framed” by constituent assembly)<sup>723</sup>, and Rwanda (general elections<sup>724</sup>/fixed period of 22 months<sup>725</sup>).

**DISTINCTION TRANSITION PROCEDURE (INTERREGNUM) & TRANSITION PROCESS** – The distinction between a transition procedure and a transition process was already made<sup>726</sup>. In this dissertation, the words transition or transition *procedure* (as opposed to the longer transition *process*) refer to the formal interregnum itself. The use of the word transition must be disassociated from the long-term and ever-to-be-renewed process of installing a well-functioning democracy based on the respect of human rights. Conversely,

*“la transition démocratique se détache de la période transitoire pour s’étendre bien au-delà la fin de cette période et jusqu’au temps nécessaire pour renforcer et consolider le régime de l’Etat de droit fondé sur la démocratie et la protection des droits fondamentaux”<sup>727</sup>.*

If not by the arrival of a well-functioning democracy, how should the end of a transition procedure be marked? Three points of reference may serve this end:

- National elections<sup>728</sup>;

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<sup>716</sup> *Charte de la Transition* dd. 13 November 2014, art. 21: “[l]es institutions de la période de la transition fonctionnent jusqu’à l’installation effective des nouvelles institutions”.

<sup>717</sup> Arusha Agreement, Protocol II, chapter II, art. 13: “[t]he transition period shall culminate upon the election of the new President”.

<sup>718</sup> Paris Agreement, art. 1: “the transitional period shall commence with the entry into force of this Agreement and terminate when the constituent assembly elected through free and fair elections, organized and certified by the United Nations, has approved the constitution and transformed itself into a legislative assembly, and thereafter a new government has been created”.

<sup>719</sup> Pretoria Agreement, IV.

<sup>720</sup> *Pacto de Transição Política* dd. 16 May 2012, art. 2.1.

<sup>721</sup> TAL, art. 2: “[t]he term ‘transitional period’ shall refer to the period beginning on 30 June 2004 and lasting until the formation of an elected Iraqi government pursuant to a permanent constitution as set forth in this Law [...]”.

<sup>722</sup> The ‘Draft Constitutional Charter For the Transitional Stage’, Preamble: “[t]he interim Transitional National Council has decided to promulgate this Constitutional Declaration in order to be the basis of rule in the transitional stage until a permanent Constitution is ratified in a plebiscite”.

<sup>723</sup> Interim Constitution of Nepal, 2063 (2007), Preamble, *op. cit.*

<sup>724</sup> Protocol of Agreement on Power-sharing within the Framework of a Broad-based Transitional Government between the Government of the Republic of Rwanda and the Rwandese Patriotic Front dd. 9 January 1993, art. 23.a.2: “[t]he Broad-based Transitional Government shall implement the programme comprising the following: [...] [p]repare and organise general elections to be held at the end of the Transition Period”.

<sup>725</sup> ‘Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions’ dd. 3 August 1993, art. 22 on the ‘transitional period’: “[t]he duration of the Transition period shall be *twenty two (22) months*, effective from the date of establishment of the Broad-Based Transitional Government, with the possibility of one (1) extension if warranted by exceptional circumstances impeding the normal implementation of the programme of the Broad-Based Transitional Government”.

<sup>726</sup> Cf. footnotes 401 & 402. See also Table 6.

<sup>727</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 28.

<sup>728</sup> J. Strasheim, H. Fjelde, ‘Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies’, *op. cit.*, p. 342: “a case is considered to be experiencing interim rule if

- The resumption of power by a permanent domestic government<sup>729</sup>;
- The adoption of the new constitution (e.g. Cambodia<sup>730</sup>, Libya<sup>731</sup>, and Nepal<sup>732</sup>).

## 2.5. Overview

The following table provides an overview of the various stages of some of the cases referred to in this thesis.

**TABLE 7: Four stages of a transition: examples**

	Pre-transition	Foundation of the transitional authority	The transition procedure as such	After the transition
Afghanistan (2001-2004)	11/09/2001 – 5/12/2001	5/12/2001 (Bonn Agreement)	5/12/2001 – 3/01/2004	3/01/2004 until today
Burundi (1998-2005)	23/10/1993 – 6/06/1998	6/06/1998 (Constitutional Act of Transition)	6/06/1998 – 18/03/2005	18/03/2005 until today
Chad (1979-1982)	1978 – 18/08/1979	18/08/1979 (Accord de Lagos sur la réconciliation nationale au Tchad)	29/04/1979 – 12/02/1982	12/02/1982 (GUNT loses int. support) – 10/12/1989 (Habré const. referendum)
DRC (2002-2006)	15/10/2001 (opening Inter-Congolese Dialogue) – 16/12/2002	16/12/2002 (Pretoria Agreement)	16/12/2002 – 19/12/2005 (Const. referendum)	19/12/2005 – today
Iraq	19/03/2003 (USA invasion) – 28 June 2004 (transfer of sovereignty)	8/03/2004 Law of admin. Signed	28/06/2004 – May 2006 (formation government National Unity)	May 2006 – now
Liberia (2003-2006)	May 2003 (Taylor consents to peace talks) – 18/08/2003	18/08/2003 (Accra Comprehensive Peace Agreement)	18/08/2003 – 8/11/2005 (presidential elections)	8/11/2005 – now
Libya (2011 – present)	15/02/2011 (protests Benghazi) – 5/03/2011	5/03/2011 (Establishment Libyan Transitional National Council)	5/03/2011 – today	/

the peace agreement or UNSCR calls for a transition and sets its final endpoint. This endpoint can be a *national election* [...], where most executive and legislative power transfers to a permanent government”.

<sup>729</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 24: “a transitional period has ended when a *new or reconstituted, permanent, domestic government* is able to wield effective internal sovereignty. By effective internal sovereignty we mean the *dissolution of the interim structures* and the resumption of law and order functions by the domestic regime”.

<sup>730</sup> Paris Agreement, art. 1: “the transitional period shall commence with the entry into force of this Agreement and terminate when the constituent assembly elected through free and fair elections, organized and certified by the United Nations, has approved the constitution and transformed itself into a legislative assembly, and thereafter a new government has been created”.

<sup>731</sup> The ‘Draft Constitutional Charter For the Transitional Stage’, Preamble: “[t]he interim Transitional National Council has decided to promulgate this Constitutional Declaration in order to be the basis of rule in the transitional stage until a permanent Constitution is ratified in a plebiscite”.

<sup>732</sup> Interim Constitution of Nepal, 2063 (2007), Preamble: “hereby promulgate this Interim Constitution of Nepal, 2063 (2007), prepared through a political consensus *enforceable until a new Constitution is framed by the Constituent Assembly*”.

Mali (2012 – present)	2/03/2012 (coup) – 6/04/2012	6/04/2012 (Framework Agreement)	6/04/2012 – July 2012	/
Syria (2011 – present)	foundation of the 'National Coalition for Syrian Revolutionary and Opposition Forces'	/	/	/

## 2.6. Reasons for temporal division of transitions

The division of transition processes in four stages offers an analytical grid that is useful for three reasons: (i) it does not depend on the qualification of armed conflict, (ii) it informs the distinction between transitional authorities and *de facto* states/governments, (iii) it allows to define the scope of a *ius in interregno*, both *ratione temporis*, i.e. depending on when the interregnum takes place, and *ratione personae*, i.e. depending on when in the transition process transitional authorities acquire international legal personality.

(1) SELF-REFERENTIAL SUBDIVISION – The quadruple subdivision of transition processes follows an internal, self-referential, structure. This structure is not dependent on external circumstances, such as the presence, absence or degree of intensity of the crisis or conflict occurring during the transition or preceding it. In some cases, transitional authorities are created during armed conflict. For instance, both the establishment of the Libyan National Transitional Council by self-proclamation and the subsequent promulgation of its core tasks occurred during a (non-international, then both non-international and international<sup>733</sup>) armed conflict. In other cases, transitions start in the aftermath of an armed conflict, e.g. the DRC transition following the Second Congo War. These examples illustrate why the analysis of (sometimes lengthy) transition processes must be decoupled from the distinction between ‘before’ and ‘after’ the war. This distinction is central to *ius post bellum*, which is why this doctrine constitutes too fragile or artificial a framework for studying conflict-related transitions<sup>734</sup>.

(2) A STAGED TRANSITION EXCLUDES SELF-PERPETUATION – The subdivision of transition processes allows us to conceptually distinguish transitional authorities from *de facto* governments. The latter, it is generally understood, not only exercise effective control but also intend to exercise *lasting* control. Transitional authorities, on the other hand, do not always exercise (full)

<sup>733</sup> P. Thielbörger, ‘The Status and Future of International Law after the Libya intervention’, *Göttingen Journal of International Law* 4 (2012) 1, 11-48: “by attacking regime troops while fighting rebel forces on the ground, the NATO governments were intervening in a civil war”.

<sup>734</sup> Cf. Chapter 2, Section A.2. See, for example, the critique by C. Bell, ‘The *Jus Post Bellum* Project: *Jus – Post – Bellum*: Mapping the Normative Foundations’, conference report, p. 4. Another weakness of *ius post bellum* is that is entrenched in the law of occupation and focused on the role and leeway of international or foreign actors, whereas transitional situations do not necessarily follow or coincide with situations during which international humanitarian law applies, and are often ‘managed’ by domestic actors (K. E. Boon, ‘Obligations of the New Occupier: The Contours of *Jus Post Bellum*’, *op. cit.*, p. 76: “*Jus post bellum* should apply to the exercise of governmental and public powers by external entities such as IOs and foreign states”).

effective control, and are not supposed to perpetuate themselves. This point will be elaborated on when the distinction between transitional authorities and *de facto* governments/states will be further discussed<sup>735</sup>, and when the limits *ratione temporis* to DIG will be analyzed<sup>736</sup>.

(3.1) APPLICATION RATIONE TEMPORIS OF THE CORE OF IUS IN INTERREGNO / EXTERNAL ACTORS UNDER HIGHER SCRUTINY – The subdivision of transition processes refines the temporal scope of application of *ius in interregno*. It is based on formal criteria marking the beginning and the end of the interregnum, thus indicating the time frame during which the core of a *ius in interregno* –as detailed in Part III– is certainly applicable. During this period, transitional authorities must respect and fulfill the minimum core of mandatory rules in relation to DIG, resulting in what Youssef calls the minimum of the *Etat légal intérimaire*<sup>737</sup>. Furthermore, during the interregnum, compliance with the principles of self-determination and non-intervention calls for a heightened scrutiny, as we shall see in Chapters 9 and 10. This is because, during that period, the institutional and constitutional structures of the state are held in abeyance, thus rendering the state fragile, and making the threshold for outside states to violate said principles easier to reach. External involvement during the interregnum occurs, therefore, if not *in tempore suspecto* then at least *in tempore fragili*.

(3.2) APPLICATION RATIONE PERSONAE IUS IN INTERREGNO – Importantly, the subdivision of transition processes can be of assistance in defining when transitional authorities acquire functional international legal personality<sup>738</sup>. This, in turn, is important for delimiting the scope *ratione personae* of a *ius in interregno*. Two interrelated variables may be indicative of when transitional authorities acquire international legal personality (which must be strictly separated from the issues of international recognition and international responsibility<sup>739</sup> but also from the question whether transitional authorities endowed with international legal personality are ‘lawmakers’ under the doctrine of sources<sup>740</sup>).

First, when, after their public foundation, transitional authorities (purportedly) act on behalf of the state or nation, and exercise substantial public and pre-constitutional functions, they can be

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<sup>735</sup> Chapter 4, Section B.2.2.

<sup>736</sup> Chapter 5, Section A.

<sup>737</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 73.

<sup>738</sup> Distinctions between *Völkerrechtspersönlichkeit*, *Völkerrechtssubjektivität*, *Völkerrechtsfähigkeit* are not further analyzed here. Adopting a functional approach, this thesis equates international legal personality to international legal capacity. For a similar approach, see C. Walter, ‘Subjects of International Law’, MPEPIL.

<sup>739</sup> International responsibility and international legal personality are separate issues. The ECHR affirmed that “each State Party to the Convention nonetheless remains *responsible* for events occurring anywhere within its national territory” including for events occurring on the territory of what the Court calls ‘self-proclaimed authorities’ (ECHR, *Assanidze v. Georgia*, Judgment dd. 8 April 2004, 39 EHRR 32, § 146). This finding is not incompatible with the reasoning that such authorities –and, *mutatis mutandis*, transitional authorities– may enjoy international legal personality. Considering the principle of state unity, reminded by the ICJ in the *LaGrand* case (*LaGrand, Germany v. United States of America*, judgment, ICJ, Reports 2001, p. 466), it cannot be said that the international responsibility of a state for one of its parts or sub-entities would exclude such entities from enjoying (partial) international legal personality. This is evidenced, for example, by the treaty-concluding powers Belgian federal entities have in their respective field of competences.

<sup>740</sup> I thank J. d’Aspremont for insisting on making the latter distinction clearer.

said to enjoy international legal personality. To the extent that, as publicly instituted bodies, transitional authorities actually exercise public functions, they arguably possess (a degree of) international legal personality.

Second, when transitional authorities are considered to be addressees of certain obligations, their international legal personality is acknowledged in practice. Outside states and IOs –not least the UNSC– regularly ‘urge’ or ‘require’ transitional authorities to execute specific legal obligations, thus consider them to be addressees of international law<sup>741</sup>. The UNSC has for example “[c]all[ed] on the Transitional institutions”<sup>742</sup> or has “[u]rge[d]”<sup>743</sup> transitional authorities to adopt specific behavior, in the context of the DRC and CAR transitions, respectively. It has addressed itself to the Governing Council of Iraq, ‘determining’ that this council and its ministers are “the principal bodies of the Iraqi interim administration”<sup>744</sup>; and has determined responsibilities of the Transitional National Assembly<sup>745</sup> and of the Interim Government of Iraq<sup>746</sup>. It has also addressed itself to the Mali transitional authorities<sup>747</sup>. Part III is entirely devoted to analyzing the obligations incumbent on transitional authorities, and contains several references indicating that the UNSC as well as states and IOs regard transitional authorities as addressees of certain obligations.

INT’L LEGAL PERSONALITY OF TA: DYNAMIC/FUNCTIONAL APPROACH – A functional approach to international legal personality, based on the criterion of effectiveness, is favored in this study. This approach has been applied to *de facto* regimes like the Taliban, a group that has regularly been directly addressed by the UNSC<sup>748</sup>. It is defended by authors like Wolfrum & Philipp<sup>749</sup>, but also Heintze and Krönert. Heintze argued with regard to *de facto* states or regimes:

“if international law grants even insurgents the status of partial subjects of international law, this must *a fortiori* apply to quasi-State entities that have consolidated their positions [...]. The principle of effectiveness means that they can gradually be granted international legal personality while remaining unrecognized”<sup>750</sup>.

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<sup>742</sup> S/RES/1635 dd. 28 October 2005.

<sup>743</sup> S/RES/2149 dd. 10 April 2014.

<sup>744</sup> S/RES/1511 dd. 16 October 2003, § 4.

<sup>745</sup> S/RES/1546 dd. 8 June 2004 § 4.c.

<sup>746</sup> *Id.*, § 26

<sup>747</sup> UNSC/RES/2056 dd. 5 July 2012; UNSC/RES/2071 dd. 12 October 2012.

<sup>748</sup> The UNSC stated that the Taliban was obliged to comply with international law. See SC/RES/1267 dd. 15 October 1999, S/RES/1333 dd. 19 December 2000, S/RES/1363 dd. 30 July 2001, S/RES/1378.

<sup>749</sup> R. Wolfrum, C. Philipp, ‘The Status of the Taliban : Their Obligations and Rights under International Law’ in J. Frowein, R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, Volume 6, 2002, p. 601: “[d]ue to their non-recognition the Taliban were a non recognized *de facto* regime and as such in spite of their non recognition enjoyed certain rights under international law, as well as being under the obligation to respect it”.

<sup>750</sup> H.-J. Heintze, ‘[Are De Facto Regimes Bound by Human Rights?](#)’. In the same vein, J. Frowein writes: “[a]uch ein Regime, das nicht als Staat oder Regierung anerkannt ist, kann aber möglicherweise als Völkerrechtssubjekt in gewissem Umfang anerkannt sein”, J. Frowein, *Das de facto-Regime im Völkerrecht, Eine Untersuchung zur Rechtsstellung ‘nichtanerkannter Staaten’ und ähnlicher Gebilde*, Carl Heymanns Verlag Kg, Köln Berlin, 1968, p. 14. Cf. Also M. Schoiswohl, ‘De facto Regimes and Human Rights Obligations – The Twilight Zone of Public International Law?’, 6 *Austrian Rev. Int’l & Eur. L.* 45 2001. In the words of the Darfur Commission of Inquiry: “all insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound

For Krönert, functional international legal personality stems from the circumstance that certain entities have international rights and obligations under international law<sup>751</sup>. Walter adopts the same approach: “subjects of international law may be defined as entities which are capable of possessing international rights and duties”<sup>752</sup>. In other words, international legal personality follows the existence of such rights and obligations; not the other way around. This implies that the international legal personality of transitional authorities is essentially *relative* because *correlative* to the public functions they exercise, and to the legal position (*Rechtsstellung*) assigned to them by other subjects of international law.

INT'L LEGAL PERSONALITY OF TA: APPLICATION IN PRACTICE – When oppositional transitional authorities are merely embryonic or inchoate, the principle of effectiveness is not satisfied. By contrast, this principle leaves no doubt as to the international legal personality of consensual transitional authorities effectively observing DIG, i.e. effectively reconfiguring their state order, under the monitoring of the international community. Further, when publicly instituted oppositional transitional authorities effectively exercise important public functions with a view of triggering and observing DIG, they may enjoy (relative) international legal personality (e.g. the opposition-based Libyan Transitional National Council when it exercised public powers *ad interim*<sup>753</sup>). Finally, there is no doubt that oppositional transitional authorities acquire (relative) international legal personality when DIG is gradually becoming consensual (e.g. in Burkina Faso) or comes to a completion (e.g. in Kyrgyzstan); in such cases transitional authorities act as organs of the state and their acts become attributable to the state, which, per definition, enjoys international legal personality<sup>754</sup>. Just like with NLM, the issue of legal personality of transitional authorities is relevant only during a limited period, i.e. the time needed to pursue DIG until the post-transition government is in place<sup>755</sup>.

## Section B. Distinction between transitional authorities and related realities or concepts

This section is divided in two parts. It examines how oppositional transitional authorities must be conceptually distinguished from armed opposition groups as well as belligerents (1). Next, it examines how transitional authorities generally must be distinguished from national

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by the relevant rules of customary international law on internal armed conflicts”. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, § 172.

<sup>751</sup> O. Krönert, *Die Stellung nationaler Befreiungsbewegungen im Völkerrecht*, Europäische Hochschulschriften, Reihe 2, Rechtswissenschaft. Bd. 404, Frankfurt/M., Bern, Nancy, New York, 1984, p. 83: “*in diesem Zusammenhang bedeutet der Ausdruck ‘funktionelle’ Völkerrechtssubjektivität nicht anderes, als dass die Wirkungseinheit nicht –wie die Staaten- die volle Rechtsfähigkeit hat, sondern nur Adressat der Rechte und Pflichten ist, die für ihre spezielle Rechtsstellung und Funktion im Völkerrecht notwendig sind*”.

<sup>752</sup> C. Walter, ‘Subjects of International Law’, MPEPIL.

<sup>753</sup> According to the Constitutional Declaration, the TNC was “the supreme power in the State of Libya” that had to “undertake the works of the supreme sovereignty” (Constitutional Declaration dd. 3 August 2011, art. 17). When it actually undertook this task, the international community generally treated it as the sovereign ruler.

<sup>754</sup> DASR, art. 4. See also Chapter 7, Section B.1.1.

<sup>755</sup> J. Verhoeven, *Droit international public*, Larcier, Bruxelles, 2000, p. 291.

liberation movements ('NLM') and *de facto* states or governments (2). From the outset, it should be recalled that this study concerns itself with the non-forcible aspects of DIG<sup>756</sup>. Yet, intersections or analogies exist between these concepts and categories. The conceptual isolation of transitional authorities is necessary for clarifying the scope of a *ius in interregno*, and will accompany the analysis throughout the thesis.

### *1. Distinction from armed opposition groups and belligerency*

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The difficulty in grasping the nature of oppositional transitional authorities has not gone unnoticed, e.g. with regard to the Syrian National Coalition:

"The Syrian National Coalition (SNC) is a peculiar creature. It can be classed neither as a revolutionary organization—it is no Palestine Liberation Organization or African National Congress—nor as a true opposition umbrella group, like the Alliance for Change that toppled Milošević. Its purpose is similarly perplexing. It claims to represent the aims and aspirations of the Syrian people, yet it has no presence on the ground and little say over what people do there. It promises international intervention—or at the very least the arming of the Free Syrian Army—yet NATO has explicitly ruled out becoming involved. And while the SNC makes a big fuss about its humanitarian work, what little money that reaches the deserving is often marked by corruption. If the SNC is not an effective leadership body, a relief organization, or a particularly good lobby group, *what exactly is it?*"<sup>757</sup>

Because this thesis focuses on the legal-regulatory aspects of DIG, civilian oppositional transitional authorities (such as the Burundi Transitional Government, the Libyan Transitional National Council, the Syrian National Coalition, etc.) must be distinguished from armed opposition groups (1.1) and 'belligerency' (1.2).

#### *1.1. Distinction from (portfolio of) military and armed (opposition) groups*

**A NECESSARY DISTINCTION** – The civilian, non-armed associations, groups or factions observing DIG must be distinguished from their armed wings or military counterparts, if there are any. Although transitional authorities may, and often do, have ties with the military or armed groups, they can mostly be separated from each other (separate structure & hierarchy criterion (1.1.1)). Where there is a significant entanglement or overlap between both groups, it is necessary, for the purposes of this study, to conceptually isolate the acts and persons concerned with the civilian/political/institutional aspects of DIG (functionality criterion (1.1.2)). Where DIG is observed by armed groups or the military, the international community generally demands a return to civilian (interim) rule (1.1.3). It is thus generally possible, and indeed necessary, to sever the civilian from the military/forcible aspects of DIG (1.1.4).

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<sup>756</sup> Cf. Chapter 2, Section C.2. Cf. also below, Chapter 4, Section B.1.1.4 about the severability between civilian/political and forcible/military aspects of DIG.

<sup>757</sup> M. Al-Abdeh, 'Glorified Middlemen', The Majalla, 11 June 2013.

### 1.1.1. Separate structure & hierarchy

**DEFINITION OF CIVILIAN GROUPS** – The distinction between a transitional authority and an affiliated (parallel or parent) organized armed groups is often quite straightforward. In order to verify their civilian nature, the definition of civilians developed by the ICRC can be of further assistance. In the absence of any treaty definition, the ICRC has provided the following (negative) definitions of ‘civilians’ in international and non-international armed conflict:

“for the purposes of the principle of distinction in *international armed conflict*, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities”<sup>758</sup>

“for the purposes of the principle of distinction in *non-international armed conflict*, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’)”<sup>759</sup>.

If these definitions are accepted<sup>760</sup>, it follows that a person who (a) is not member of the state armed forces<sup>761</sup> or of an organized armed group<sup>762</sup>, (b) nor participant in a *levée en masse*<sup>763</sup>,

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<sup>758</sup> N. Melzer, ICRC, [‘Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’](#), May 2009, p. 20. Emphasis added.

<sup>759</sup> *Ibid.*

<sup>760</sup> For a discussion, see C. Garraway, ‘Direct participation and the principle of distinction: squaring the circle’ in C. Harvey, J. Summers, N. D. White, *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, CUP, 2014. Cf. also G. Aivo, *Le statut de combattant dans les conflits armés non internationaux*, Primento, 2013. See especially the second chapter under title 1 of part 2 on ‘la nécessité de mieux préciser la notion de ‘participation directe aux hostilités’.

<sup>761</sup> The notion of state armed forces is relatively broad, and includes “both the regular armed forces and other armed groups or units organized under a command responsible to the state” (N. Melzer, ICRC, ‘Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, *op. cit.*, p. 31). Yet, even in a country at war, persons exercising political powers within a group that has the intent of constitutionally and institutionally reconfiguring the state are not necessarily members of that state’s armed forces, or of its national guard, customs or police forces. The execution of DIG is mostly not a state’s army’s business, even though this is not excluded, as the role by the military (the interim cabinet of the Supreme Council of the Armed Forces installed in February 2011) in the transition process *sensu lato* in Egypt illustrates.

<sup>762</sup> The category of ‘organized armed group’ does not directly relate to DIG either. This category includes both dissident armed forces and other organized armed groups: “members of dissident armed forces [...] do not become civilians merely because they have turned against their government. At least to the extent, and for as long as, they remain organized under the structures of the state armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well” (N. Melzer, *op. cit.*, p. 32). If defectors quit the structures of the State armed forces, one can assume that they become civilians unless they fall under one of the other categories. Concerning the membership in organized armed groups other than dissident armed forces, one should follow a functional criterion: “the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities ([...] ‘continuous combat function’)” (Id., p. 33. Emphasis added). If an individual does not exercise continuous combat function, s/he (again) acquires civilian status.

<sup>763</sup> Art. 2 H IV R; Art. 4 [6] GC III; Art. 50 [1] AP I; N. Melzer, ICRC, ‘Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, *op. cit.*, p. 25. DIG is not an improvised exercise. Transition instruments pre-define the transition roadmap sometimes in quite some detail. This is why DIG

(c) nor directly takes part in hostilities<sup>764</sup>, is undoubtedly a civilian. Persons not falling under either of the above categories are civilians regardless of whether the armed conflict is international or non-international. When a group is mainly composed of such persons it is a civilian group as opposed to an armed group<sup>765</sup>. A civilian group functioning as a transitional authority is a civilian transitional authority. In this thesis, the adjective ‘civilian’ is however generally omitted.

Civilian transitional authorities can either be parallel to (e.g. the Libyan council and Syrian coalition) or originate from (e.g. the Eritrean provisional government) an armed group. The criteria of separate structure and hierarchy imply that civilian transitional authorities are organized following their own organogram and chain of command, in plain, are directed by someone other than the superior of the parallel military wing, if there is one.

ILLUSTRATION – On the basis of the criterion of separate structure and hierarchy there is a clear distinction, for instance, between the ‘National Coalition for Syrian Revolutionary and Opposition Forces’ (the ‘Coalition’), on one hand, and the ‘Free Syrian Army’ and ‘Supreme Military Council Command’, on the other. This not only stems from the fact that these organizations are based in different cities –Istanbul and Reyhanli respectively– and from the fact that the Coalition only has “*tenuous* links with fighters on the ground”<sup>766</sup>, but also from official statements. The conclusions of the November 2012 Doha meeting, where the Coalition was created, provided that it would “creat[e] a Supreme Military Council that oversees all military councils and entities. The Coalition will also aid in the composition of the Supreme Military Council, including all organizational and structural specifications”<sup>767</sup>. On 7 December 2012, a unified command structure was agreed on<sup>768</sup>. The Coalition and Supreme Military Council are clearly separate entities. When on 15 December 2012 the Military Council issued a statement clarifying its legal status, the Coalition was not even mentioned<sup>769</sup>. Notwithstanding the ties between the Coalition and the Free Syrian Army, they thus function under a distinct organization and hierarchy.

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cannot easily rely on “inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units”, which is the definition of a *levée en masse* (N. Melzer, *op. cit.*, p. 32).

<sup>764</sup> For lack of ‘belligerent nexus’ –which is defined in relation to the (purported) causation of military harm (N. Melzer, *op. cit.*, pp. 47 and 58)–, “the concept of direct participation in hostilities [*excludes*] the lawful exercise of *administrative, judicial or disciplinary authority* on behalf of a party to the conflict”<sup>764</sup>. This is why the exercise of political authority on behalf of a political –even warring– party to a conflict cannot be compounded with direct participation in hostilities.

<sup>765</sup> Z. Dabone, *Le Droit International Public Relatif Aux Groupes Armés Non Étatiques*, L.G.D.J., Schulthess Éditions Romandes, Université de Genève, Faculté de Droit, 2012, p. 85. Dabone focuses on the use of arms for belligerent purposes in order to define an armed group. This definition can be used *a contrario* to describe a ‘civilian group’.

<sup>766</sup> ‘Western-backed Syrian opposition body elects new leadership’, Reuters, 5 January 2015: “[d]espite having *tenuous links* with fighters on the ground [...], the National Coalition remains one of the main parties in international discussions to find solutions to the almost four-year civil war”. Emphasis added.

<sup>767</sup> Draft of the ‘Syrian Coalition Doha Agreement’, fourth conclusion, [http://www.etilaf.org/en/index.php?option=com\\_k2&view=item&id=153:draft-of-the-syrian-coalition-doha-agreement&Itemid=683](http://www.etilaf.org/en/index.php?option=com_k2&view=item&id=153:draft-of-the-syrian-coalition-doha-agreement&Itemid=683), consulted on 5 April 2013 (not available anymore).

<sup>768</sup> ‘Rebel Groups in Syria Make Framework for Military’, NYT, 7 December 2012.

<sup>769</sup> ‘Statement on the Formation of the Supreme Military Council Command of Syria’ dd. 15 December 2012.

### 1.1.2. *Civilian/political portfolio*

Where there is a significant entanglement or overlap between armed/military groups and political factions, one should conceptually isolate the acts and persons concerned with the civilian and political aspects of DIG. This is necessary both for unveiling the practices that are relevant for the law of DIG and for clarifying the scope of a *ius in interregno*. When the criteria of separate structure and hierarchy cannot be applied, the criterion of functionality takes precedence. The label of civilian transitional authority could then also be used when a group exercises political and administrative authority on behalf of a party to the conflict, or otherwise entertains ties with a military/armed wing, irrespective of the degree of (mutual) control<sup>770</sup>. Reflecting the goals and features of modern DIG<sup>771</sup>, transitional authorities purport to reconstitutionalize their respective countries, which is eminently a civilian/political activity, even if it is carried out against the background of armed conflict.

The Guinean transitional authority, for example, was “composed of civilians *and* the military”<sup>772</sup>, yet its portfolio was civilian as it held “legislative powers, with a view to achieving the objectives of the transition”<sup>773</sup>. It is furthermore possible that the military or political function of a group aspiring to pursue DIG shifts over time; this possible shift was already observed with regard to NLM. Thus, for example, the military status of the ANC and PAC “had been suspended with the beginning of negotiations for transition”<sup>774</sup>. A close survey of the function (purportedly) exercised at one given time –DIG or armed struggle?– will be central to identifying the civilian portfolio of a transitional authority.

### 1.1.3. *Requirement that DIG be civilian*

When armed (opposition) groups or the military play a role in triggering and/or observing the transition, the international community generally requires DIG to be handed over to civilians<sup>775</sup>, and may threaten to apply sanctions if this requirement is not followed, as ECOWAS did with Burkina Faso during November 2014<sup>776</sup>.

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<sup>770</sup> It can also occur that civilian parties involved in DIG lose control over their military/armed counterparts, as in the DRC during the 2002-2005 transition. Thus, for ICG, “[n]one of the signatories of the Sun City Agreement, which ushered in the transition in 2003, has strong control of either its military or political wing”. ‘The Congo’s Transition is Failing: Crisis in the Kivus’, ICG, Africa Report n. 91, 30 March 2005, p. i.

<sup>771</sup> Introduction, Section A.

<sup>772</sup> Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.1. Emphasis added.

<sup>773</sup> *Id.*

<sup>774</sup> K. Ginther, ‘Liberation Movements’ in R. Bernhardt, P. Macalister-Smith, and *Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht* (eds.), *Encyclopedia of Public International Law*, Amsterdam; New York: North-Holland, 1992, pp. 213–215.

<sup>775</sup> See, for example, ‘ECOWAS names contact group on Burkina Faso’, 7 November 2014, calling for the “urgent designation of a suitable eminent *civilian* person to lead the transition”. Emphasis added. See, in the same vein, ‘The African Union appoints a special envoy for Burkina Faso’, AU press release dd. 3 November 2014.

<sup>776</sup> ‘Burkina Faso crisis: African leaders in army handover talks’, BBC News Africa, 5 November 2014. On 5 November 2014, it was reported that ECOWAS will “hold a series of meetings to press for the quick handover,

The Egyptian Supreme Council of the Armed Forces had turned itself against the Mubarak regime early 2011, and jeopardized any civilian oversight during the interregnum. After adopting a constitutional declaration in March 2011, and subsequently a number of ‘basic principles for the new constitution’, it amended the constitutional declaration and conferred enormous political powers upon itself. In doing so, the Supreme Council of the Armed Forces seemed to avert the possibility of civilian oversight. This move was however contrary to an earlier pledge to transition to civilian rule<sup>777</sup>, and other states have continued to insist that the transition be civilian<sup>778</sup>.

#### 1.1.4. Severability civilian/political vs. forcible/military aspects of DIG

UTILITY DISTINCTION CIVILIAN T.A. – A civilian transitional authority is thus distinguishable from the state military / an armed (opposition) group. Although not always uncontested<sup>779</sup>, this is an important distinction to make, for two reasons. First, assistance to civilian oppositional transitional authorities and assistance to armed opposition groups should be evaluated differently under international law. This distinction offers much-needed nuances when assessing the engagement by external states or organizations with civilian oppositional transitional authorities under the principle of non-intervention in domestic affairs<sup>780</sup>. Second, and more generally, it justifies the formulation of a *ius in interregno* that stands independently from questions related to the use of force or to international humanitarian law.

The relevance of studying the political/civilian aspects (rather than military/security) of DIG finds confirmation in the fact that the UNSC can apply sanctions both to political and military stakeholders trying to derail a transition. This is precisely what it threatened to do in Guinea-Bissau by “urge[ing] stakeholders in Guinea-Bissau, including political and military leaders to refrain from any action that could hamper”<sup>781</sup> the transition. With this statement it is assumed that the issue at stake is not exclusively a military/security concern, and, more generally, it confirms the evident assumption that DIG also concerns civilian aspects.

#### 1.2. Distinction from belligerency

The concept of belligerency is not informative for the analysis of (oppositional) DIG under international law. In what follows the intellectual history of belligerency will be sketched. The

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following a threat by the AU to *impose sanctions if the military did not act within two weeks*”. Cf. also ‘Thousands gather in Burkina Faso to denounce ‘military coup’’, *The Guardian*, 2 November 2014, reporting about a UN official calling for a return to civilian rule, “adding that *sanctions were a possibility* if there was no progress”.

<sup>777</sup> ‘Egypt military pledges transition to civilian rule’, BBC, 13 February 2011.

<sup>778</sup> Cf., for instance, ‘US urges Egypt’s army commander on peaceful civilian transition’, Reuters, 6 July 2013.

<sup>779</sup> Specifically in relation to the Libyan transitional authorities. See the severe criticism by M. A. E. Youssef, ‘Security Council Resolution 1973: a new interpretation of the notion of protection of civilians?’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.*, pp. 160-161.

<sup>780</sup> Chapter 9.

<sup>781</sup> S/PRST/2013/19, p. 2.

reader who is already familiar with the historical reception of this concept can skip this part (1.2.1). The reason why it is included here is to contrast it with the concept of transitional authorities. Developing the latter concept would not be necessary if the former concept could account for the phenomenon studied in this thesis, *quod non*. Indeed, the subsequent subsection discusses the (lack of) relevance of belligerency for the analysis of DIG as observed by transitional authorities (1.2.2).

### 1.2.1. Historical reception of belligerency

The relatively short-lived doctrine of belligerency was developed to deal with specific, further advanced, forms of rebellion and insurgency<sup>782</sup>. It originates from a factual assessment practiced during the early 19<sup>th</sup> century. This assessment mainly served as the antechamber for recognition of government/independence.

ORIGINS OF BELLIGERENCY – Belligerency is a subject “which only obtained a place for itself in text-books on international law as the result of the controversy between the United States of America and [England] as to the recognition of the Confederate States in 1861”<sup>783</sup>. In May 1861, Great Britain had recognized the belligerency of the Confederates. The American Civil War (1861 – 1865) is “arguably the last time that the rules on belligerency were seriously applied”<sup>784</sup> (some authors mention the War of the Boers at the turn of the century). During this war, the US Supreme Court formulated the conditions of belligerency as follows:

“when the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war”<sup>785</sup>.

TOWARDS GOVERNMENTAL CAPACITY AS A PRECONDITION FOR RECOGNIZING BELLIGERENCY – Harcourt mentions belligerency in 1863 only to disassociate himself from the –then novel– idea of *recognition* of belligerency. Only six years later, however, President Grant specified the conditions of recognition of belligerency: “a *de facto* political organization of the insurgents sufficient in character and resources to constitute, if left to itself, a State among nations capable of discharging the duties of a State”<sup>786</sup>. This declaration is primarily concerned with

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<sup>782</sup> Rebellion and insurgency broadly deal with a situation in which groups “take up arms against the rule of the society”, to use Vattel’s words. E. de Vattel, *Le Droit Des Gens, Ou, Principes de La Loi Naturelle*, *op. cit.* In the absence of a modern international law definition, “joint doctrine defines an insurgency as an organized movement aimed at the overthrow of a constituted government *through the use of subversion and armed conflict*” (Definition of the ‘United States Department of Defence Counterinsurgency Field Manual’, cited in E. Crawford, ‘Insurgency’, MPEPIL).

<sup>783</sup> W. L. Walker, ‘Recognition of Belligerency and Grant of Belligerent Rights’, *Transactions of the Grotius Society*, Vol. 23, Problems of Peace and War, Papers Read before the Society in the Year 1937, p. 177. Cf. also N. Henry, *Les gouvernements de fait devant le juge*, Guillon, Paris, 1927, § 40.

<sup>784</sup> V. Azarov, ‘Belligerency’, *op. cit.*, § 11.

<sup>785</sup> Supreme Court of the United States, 67 US 635 (1862). Emphasis added.

<sup>786</sup> Cited in W. L. Walker, ‘Recognition of Belligerency and Grant of Belligerent Rights’, *op. cit.*, p. 188.

*state capacity and continuity* rather than with international (humanitarian) law compliance. For Neumann,

“it had been assumed in the 19<sup>th</sup> century that a new government would take over the treaty obligations and debts [...]. After the turn of the century, however, this assumption became a specific prerequisite and recognition was often refused on this basis”<sup>787</sup>.

**CLASSICAL DOCTRINE OF BELLIGERENCY** – The classical doctrine of belligerency crystallized between the American Civil War and the adoption of the IDI resolution in 1900<sup>788</sup>. This resolution finds that states may only recognize belligerency if the insurgents (a) exercise control over a distinct territory and exhibit features of a regular government, and (b) conform themselves to the laws of war<sup>789</sup>. First, belligerency depends on a degree of effective control<sup>790</sup>. This entails that insurgents “must act under the direction of [an] *organized civil authority*”<sup>791</sup>, requiring “a measure of orderly administration”<sup>792</sup>, in order to qualify as belligerents. Second, insurgents have to observe the laws of war<sup>793</sup>. Characterized as the “engagement in a war on the part of [...] [an] entity possessed of the *jus belli*”<sup>794</sup>, belligerency thus presupposes the presence of civil war.

**DEBATE ON THE OCCASION OF THE SPANISH CIVIL WAR** – During the Spanish Civil War (1936-39), it was discussed whether recognition of belligerency should be granted to the Francoist troops. The doctrine of belligerency was not applied anymore, only debated. This debate took place in public letters<sup>795</sup>, and led to fierce doctrinal discussions during the early years of the war. Walker participated in this debate only to conclude that “both literature and practice on the topic of recognition of belligerency and belligerent rights remain rather scant”<sup>796</sup>. He even

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<sup>787</sup> W. L. Neumann jr., *Recognition of Governments in the Americas*, Foundation for Foreign Affairs, 1947.

<sup>788</sup> IDI, Session de Neuchâtel, 1900, ‘Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l’insurrection’.

<sup>789</sup> The 1900 IDI resolution, art. 8 provides: “[l]es tierces Puissances ne peuvent reconnaître au parti révolté la qualité de belligérant : (1) S’il n’a pas conquis une *existence territoriale distincte* par la possession d’une partie déterminée du territoire national. (2) S’il n’a pas réuni les *éléments d’un gouvernement régulier* exerçant en fait sur cette partie du territoire les droits apparents de la souveraineté. (3) Si la lutte n’est pas conduite en son nom par des troupes organisées, soumises à la discipline militaire et se conformant aux lois et coutumes de la guerre”.

<sup>790</sup> C. Le Mon, ‘Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested’, *New York University Journal of International Law and Politics* (JILP) 35 (2003), p. 742: “in the event that the insurgent continued to acquire territory, so that its degree of control matched or exceeded that of the previously-recognized government, the civil war was characterized as a ‘belligerency’”.

<sup>791</sup> *Id.* Cf. also B. R. Roth, *Governmental Illegitimacy in International Law*, *op. cit.*, p. 178.

<sup>792</sup> *Id.*

<sup>793</sup> V. Azarov, ‘Belligerency’, MPEPIL, § 2.

<sup>794</sup> Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, OUP, 2013, p. 55.

<sup>795</sup> Participated in the discussion in *The Times*: Noel-Baker, Fischer Williams, Zulueta, Fachiri, Smith, Landon, Lindley. The exchange of visions in *The Times* is nicely summarized in J. W. Garner, ‘Recognition of Belligerency’, *The American Journal of International Law* 32, no. 1, 1938.

<sup>796</sup> W. L. Walker, ‘Recognition of Belligerency and Grant of Belligerent Rights’, *op. cit.*, p. 180. In the same vein, Halabi writes that “It should be clear through these episodes that the customary international law norm articulated by Lauterpacht did not enjoy particularly strong historical support”. S. Halabi, ‘Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context’, *American University International Law Review*, 27 no. 2, 2012, p. 352.

goes further by treating recognition of belligerency as a doctrinal construct<sup>797</sup>, and criticizes the position according to which the right to wage war is dependent on an act of recognition by third states<sup>798</sup>. He considers that the criterion of sufficient *de facto* political organization is ‘now’ relevant for the recognition of belligerency<sup>799</sup>; this criterion allows for distinguishing “organized belligerent community” from insurgency<sup>800</sup>.

**DEBATE ABOUT CONDITIONS FOR RECOGNITION OF BELLIGERENCY** – Teaching towards the end of the Spanish Civil War, Wehberg explains that recognition of belligerency results in the insurgents acquiring international legal personality, thus becoming responsible for their acts under international law<sup>801</sup>. Wehberg insists on this act of recognition being constitutive of the (provisional) international legal personality of the belligerents. This act of recognition is relevant at the intermediary stage between uprisings and civil war, and depends on the conditions as formulated by the IDI in 1900 (control over distinct territory; features of a regular government; conformity to laws of war) being met<sup>802</sup>.

**POST-SECOND-WORLD WAR: DIMINUTION RELEVANCE BELLIGERENCY** – After the Second World War<sup>803</sup>, scholarship engages itself increasingly with the position of *de facto* governments under international law<sup>804</sup>. Belligerency was not addressed in the 1949 Geneva Conventions or the supplementary 1977 Protocols. However, common Article 3 of said conventions states that the application of its provisions “shall not affect the legal status of the Parties to the conflict”. For the Colombian Constitutional Court, “from the legal standpoint this short phrase was of revolutionary import at the time, because it meant that, in internal conflicts, application of the humanitarian rules ceased to be dependent on the recognition of insurgents as belligerents”<sup>805</sup>. For some authors, the belligerency doctrine would now lose all its relevance in light of the regime of minimal protection established by said common Article 3.

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<sup>797</sup> W. L. Walker, 'Recognition of Belligerency and Grant of Belligerent Rights', *op. cit.*, p. 191: “W. E. Hall [1835 – 1894] planted it, Amos S. Hershey [1867 – 1933] watered it, and Henry Lewis Stimson [1867 – 1950] gave it increase”.

<sup>798</sup> *Id.*, 199. Walker speaks of the invention of the “perfectly astonishing doctrine that neither side in a civil war can exercise belligerent rights until they have been granted to them by the recognition of third States”.

<sup>799</sup> *Id.*, 187. See also p. 189.

<sup>800</sup> *Id.*, 184.

<sup>801</sup> H. Wehberg, ‘La guerre civile et le droit international’, Collected Courses of the Hague Academy of International Law, Brill Online, 2015, Chapter III.

<sup>802</sup> *Id.*, p. 88.

<sup>803</sup> No evidence of recognition of belligerency being applied during the Second World War. On the other hand, declarations of neutrality have been issued at the beginning of the war, by Spain and Italy.

<sup>804</sup> See for example Jochen Abr Frowein, *Das de facto-Regime im Völkerrecht; eine Untersuchung zur Rechtsstellung “nichtankerkannter Staaten” und ähnlicher Gebilde*, C. Heymanns, Köln, 1968). This is not irrelevant for the study of belligerency. An avenue for further research could be to examine analogies between *de facto* governments/regimes and belligerency.

<sup>805</sup> RULING No. C-225/95, Re: File No. L.A.T.-040; original in Spanish, unofficial translation available [online](#). Emphasis added.

CURRENT (LACK OF) RELEVANCE BELLIGERENCY – More recent handbooks of international (humanitarian) law do not treat the subject of belligerency anymore<sup>806</sup>. A few scholars have pleaded for a revival of some sort of the doctrine of belligerency. Gomulkiewicz has argued that “although the doctrine has fallen into disuse, the belligerency standards are a good test of the legitimacy of an armed opposition group”<sup>807</sup> while, for Lootsteen, “a rather tentative argument can be made for the continued existence of belligerency as a salient international legal doctrine”<sup>808</sup>. He argues that in a limited set of circumstances the doctrine could still be relevant, considering that “strictly speaking it [the doctrine of belligerency] still exists in international law”<sup>809</sup>, but is to be applied only in limited circumstances.

BELLIGERENCY: DOCTRINAL DEBATES – The doctrine of belligerency was developed partly to cope with the indeterminacy inherent to the concept of insurgency<sup>810</sup>, and, awaiting the moment of governmental recognition, to deal with well-organized insurgents holding a portion of state territory and having the potential to do well-intentioned commerce and to exercise governmental power. The development of the doctrine of belligerency however did not eliminate doctrinal uncertainties. On the contrary, it provoked an additional range of questions and debates.

Since before the American Civil War, these questions –other than the discussion about belligerency’s current relevance or desuetude– include whether (a) belligerency is a state of facts that arises independently from any act of recognition<sup>811</sup>, or a legal status acquired after an act of recognition; (b) belligerents have a right to be accorded the status of belligerency<sup>812</sup>; (c) third states have an obligation to recognize belligerency<sup>813</sup>. Other –related– questions concern (d) under which conditions belligerency arises as a factual state of affairs, (e) under which

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<sup>806</sup> R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts*, Oxford u.a.: Hart Publishing, 2008. This handbook only notes that “[t]o the extent that the rebels are recognized as belligerents by any state, either the local government or a third state, the relations between the rebels and the recognizing state will be in any case governed by the LOAC applicable to IAC. In practice, such recognition of belligerency is no longer proclaimed today. This category therefore almost completely belongs to legal history” (p. 81). J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar Pub, 2015). D. Fleck, ed., *The Handbook of International Humanitarian Law*, *op. cit.*

<sup>807</sup> R. W. Gomulkiewicz, 'International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency', *Washington Law Review* 63 (1988): 44.

<sup>808</sup> Lootsteen, 'The Concept of Belligerency in International Law', *op. cit.*, p. 112.

<sup>809</sup> *Id.*, p. 133.

<sup>810</sup> Insurgency is a rather indeterminate concept: “insurgency is a status of a conspicuous degree of elasticity”. H. Lauterpacht, *Recognition in International Law*, CUP, 2012, p. 295. It is “descriptive of some sort of rising or rebellion within a State and the rebellious party thereto, ha[s] no precise meaning in the sense that any distinction can be drawn between a mere revolt or rising and an insurrection”. C. Parry, *Parry and Grant Encyclopaedic Dictionary of International Law*, 2nd ed., Dobbs Ferry, N.Y: Oceana Publications, 2004, p. 236.

<sup>811</sup> Position defended by Canning and Walker. Garner writes that “belligerency is nothing more than recognition of the fact of the existence of war. It does not involve recognition of any government or political regime, nor does it involve any expression of approbation or disapprobation”. Garner, 'Recognition of Belligerency', *op. cit.*, pp.111–112.

<sup>812</sup> Position opposed by Garner. Under certain conditions insurgents only have a “moral right to be treated as belligerents by foreign state”. *Ibid.*, p. 112.

<sup>813</sup> Position opposed by Garner: “recognition is a matter entirely within the discretion of foreign states”; “For the refusal to accord recognition, however, non-recognizing states cannot be held responsible by the insurgent organization should it come into power”. *Ibid.*

conditions third states may or must recognize belligerency; (f) the legal effects of belligerency either as a fact or as a legal status<sup>814</sup>.

LEGAL EFFECTS OF BELLIGERENCY – As to the latter point, debates evolve around the questions whether (recognition of) belligerency (i) results in the acquisition of (partial) international legal personality on behalf of the belligerent entity<sup>815</sup>, (ii) affords the insurgents certain rights and obligations<sup>816</sup>, (iii) results in third states assuming the obligation of neutrality<sup>817</sup>, (iv) allows third states to offer their assistance to the belligerents, or allows them to intervene upon their invitation<sup>818</sup>, (v) results in the application of the laws of war to hostilities<sup>819</sup>, (vi) dissolves the parent state of its responsibility for the belligerent group's acts<sup>820</sup>. In light of these questions and debates, the doctrine of belligerency is far from being established.

### 1.2.2. Lack of direct relevance for the analysis of DIG

In spite of some affinities between DIG and the doctrine of belligerency, this doctrine cannot be used to characterize or define transitional authorities.

BELLIGERENCY: AFFINITIES WITH DIG – Admittedly, a couple of ‘classical’ conditions for belligerency broadly correspond to self-imposed obligations of transitional authorities, which will be developed under Part III<sup>821</sup>. First, the criteria of effective control and orderly administration are reminiscent of the self-imposed obligation of transitional authorities to administer the country during the interregnum, often in war or post-war zones. Second, the observance of international law as a condition for belligerency is reminiscent of the self-imposed obligation to respect international law during the interregnum.

BELLIGERENCY: INDETERMINACY – Transposing the belligerency standards to DIG is however problematic in light of the doctrinal uncertainties sketched above, and given the desuetude of the doctrine of belligerency, which, latest since the Second Boer War (1899-1902), has not been applied anymore. The doctrine of belligerency was a contested and short-lived doctrinal construct, and even if it were accepted, it would be difficult to apply to DIG.

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<sup>814</sup> See below.

<sup>815</sup> A position defended by Wehberg.

<sup>816</sup> Lootsteen, 'The Concept of Belligerency in International Law', *op. cit.*, p. 110. With reference to Kotsch (id., p. 114). Lootsteen writes that without an act of recognition “the existence of the belligerency criteria will not suffice to grant the insurgents any rights whatsoever”.

<sup>817</sup> *Id.*, 109. See also brief discussion of neutrality, above. See also H. Wehberg, 'La guerre civile et le droit international', *op. cit.*, p. 100.

<sup>818</sup> V. Azarov, 'Belligerency', *op. cit.*: “Once a state of belligerency was recognized, an invitation to intervene or offer assistance was legally valid, regardless of whether the inviting party was the previously-recognized government or the anti-government forces”.

<sup>819</sup> Lootsteen, 'The Concept of Belligerency in International Law', *op. cit.*, p. 110.

<sup>820</sup> W. L. Walker, 'Recognition of Belligerency and Grant of Belligerent Rights', *op. cit.*, p. 194. See also H. Wehberg, 'La guerre civile et le droit international', *op. cit.*, p. 99.

<sup>821</sup> See Chapter 5, Section B.3. and Chapter 7, respectively.

**BELLIGERENCY & DIG: DIFFERENT STANDARDS** – Traditionally, the qualification of belligerency depends on an act of *recognition* (also in the absence of a central body that can evaluate when a state of belligerency exists<sup>822</sup>). The *recognition* of belligerency precisely depends on the effective control, orderly administration, and legal compliance of insurgents claiming this status. These conditions were supposed to be fulfilled *at the time* of recognition of belligerency. In the context of DIG, however, compliance with international law, effective control and orderly administration of the interregnum are often *commitments* made beforehand, we shall see under Part III. In addition, the standards transitional authorities have to abide by are different and sometimes more nuanced, as it will be argued under Part III.

**BELLIGERENCY: INTRINSIC LINK WITH RECOURSE TO ARMED STRUGGLE BY OPPOSITION IN CIVIL WAR** – Traditionally, the concept of belligerency presupposes a struggle against a state in the context of non-international armed conflict. This fact alone makes the concept inadequate for examining DIG taking place against the background of *international* armed conflicts (e.g. in Libya, the DRC and Mali). Further, the belligerency standards are not relevant for consensual forms of DIG ('transplacement'), because a struggle within and against the state is presupposed. Lastly, whereas belligerency, as an ennobled form of insurgency, so to speak, is intrinsically linked with the use of force, civilian transitional authorities intend to transform their country through non-forcible means, notably by reconstitutionalizing their state. DIG does not require a belligerent nexus.

**DOCTRINE OF RECOGNITION: NOT RELEVANT FOR DIG** – The doctrine of belligerency is not even informative as to the legality *vel non* of recognition of or external assistance to oppositional transitional authorities. The most detailed study of how belligerency might be relevant for analyzing the recognition of a transitional authority (namely the Libyan transitional authority) was conducted by Halabi. This study associates belligerency with the commercial, constitutional and institutionalist traditions of belligerency, and explains how these traditions were also pertinent in the context of the Libyan transition<sup>823</sup>. Beyond this general comparison between the traditions behind recognition of belligerency and the reasons potentially informing the recognition of a transitional authority, the doctrine of belligerency contributes little to our analysis. What is more, the doctrine of international recognition, generally (be it of belligerency or of governmental status), does not impact on the formulation of a *ius in interregno*, it will be argued under Chapter 9.

In conclusion, the doctrine of belligerency is only distantly relevant for the study of DIG and of (civilian) transitional authorities, in spite of some commonalities. The fact that a couple of 'classical' conditions for belligerency broadly correspond to self-imposed obligations of

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<sup>822</sup> R. W. Gomulkiewicz, 'International Law Governing Aid to Opposition Groups in Civil War – Resurrecting the Standards of Belligerency', *op. cit.*, § 19.

<sup>823</sup> S. Halabi, 'Traditions of Belligerent Recognition', *op. cit.* Halabi concludes that these traditions rightly informed those states who recognized the Libyan opposition during 2011 because, in so doing, these states (a) ensured the continued supply of affordable energy (commercial aspect), (b) triggered a pluralistic Libyan republic (constitutional aspect), and (c) conformed to UNSC resolutions 1970 and 1973 (institutional aspect) (cf. pp. 379, 382, and 385, respectively).

transitional authorities is of little relevance. The concept of belligerency cannot be used to analyze civilian DIG, even that observed in conflictual settings.

## *2. Distinction from national liberation movements & de facto governments or states*

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This subsection distinguishes transitional authorities from NLM (2.1) and *de facto* states or governments (2.2).

### *2.1. Distinction from NLM*

After a brief discussion of the historical criteria for recognizing NLM (2.1.1), we shall observe that the study of NLM is of limited relevance for the conceptualization of transitional authorities (2.1.2). This discussion is necessary for the remainder of the thesis, as comparisons between NLM and DIG will assist us in the analysis under Chapter 6 (discussion of the principle of self-determination)<sup>824</sup> and Chapters 9 & 10 (discussion of legal limits to support to oppositional transitional authorities).

#### *2.1.1. Historical criteria for recognizing NLM*

**RECOGNITION NLM: ABSENCE OF PRE-DEFINED CRITERIA** – Within the OAU, a Liberation Committee was established to “provide for collective recognition and support of liberation movements on the African continent”<sup>825</sup>. Yet, it is unclear which criteria were used for recognizing NLM<sup>826</sup>. It may be superfluous to say that the pursuance of self-determination –the *raison d’être* of NLM– is an evident criterion for identifying NLM<sup>827</sup>; UNGA resolutions with regard to NLM always mention the struggle for self-determination. But while the UNGA made several calls to discontinue any support to self-determination-violating states and to lend support to NLM instead<sup>828</sup>, it did not define NLM or describe their recognition criteria. In its resolution 2105 the UNGA “invite[d] all States to provide material and moral assistance to the national liberation movements in colonial Territories”, without defining NLM<sup>829</sup>. Subsequent resolutions relating to the decolonization process did not clarify this point<sup>830</sup>. The ‘General

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<sup>824</sup> Chapter 6, Section C.1.2.

<sup>825</sup> K. Ginther, 'Liberation Movements', *op. cit.*, § 17.

<sup>826</sup> A consultation of the reports by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples may shed light on this matter.

<sup>827</sup> In the same sense, O. Krönert, *Die Stellung nationaler Befreiungsbewegungen im Völkerrecht*, *op. cit.*, p. 24: „*doch darf das Ziel der Arbeit, nämlich die völkerrechtliche Erfassung der Bewegungen, nicht völlig übersehen werden*“.

<sup>828</sup> Note that, to my knowledge, the UNGA did not make any calls to recognize or engage with the Libyan and Syrian transitional authorities; it did not consider that it is a legal obligation to discontinue support to the incumbents, and to assist the transitional authorities. In September 2011, however, the Credentials Committee accepted that the TNC represent Libya at the UNGA.

<sup>829</sup> UNGA/RES/2105 dd. 20 December 1965 § 10. This call was repeated in UNGA/RES/2787 dd. 6 December 1971 § 3.

<sup>830</sup> UNGA/RES/2787 dd. 6 December 1971; UNGA/RES/2625 dd. 24 October 1970; UNGA/RES/2787 dd. 6 December 1971. UNGA/RES/2878 dd. 20 December 1971. In resolution UNGA/RES/2908 dd. 2 November 1972 the UNGA refers to the “arrangements relating to the participation in the work of the Special Committee of

Report of the Goodwill Mission of the Coordinating Committee for the Liberation of Africa to the Angolan Nationalists' ('Goodwill Mission Report')<sup>831</sup> is sometimes cited as an authoritative text in this regard. Talmon, for instance, refers to it when writing that:

“in the 1960s, the Organization of African Unity’s Coordinating Committee for the Liberation of Africa developed *certain standards, albeit vague*, for the recognition of national liberation movements fighting the incumbent government as the sole legitimate representative of a people which, it is suggested, *may equally be applied to the recognition of the [Libyan] NTC*”<sup>832</sup>.

CRITERIA RECOGNITION NLM (DOCTRINAL VIEWS) – The Goodwill Mission Report was cited by another author as providing two alternative criteria for the recognition of a NLM: “either it must be a United Action Front that is acting against the incumbent regime, or it ‘must be broadly based, have effective following and popular support’”<sup>833</sup>. Scholarship generally agrees that effective territorial control was *not* a criterion to recognize NLM<sup>834</sup>. Neither regional organizations nor the UN used effective control over state territory as a criterion for recognizing NLM. In contrast, (i) political control and domestic allegiance, and (ii) international support were considered to be criteria for recognizing NLM.

(1) POLITICAL CONTROL & DOMESTIC ALLEGIANCE – Political control over, and organized allegiance of, the people represented by NLM conferred the effectiveness to NLM<sup>835</sup>. Krönert, for instance, saw a direct link between representation, effectiveness, and the right to pursue self-determination<sup>836</sup>. Abi-Saab also notes:

"until self-determination can be freely and openly exercised, one has to be content with certain indices of the representative character of liberation movements. Prominent among them is the fact that a *liberation movement can hold on and continue the struggle even at a low level of intensity*, in spite of the difficult conditions in which, and the uneven position from which, it has to operate; something it could not have done if it did not enjoy wide popular support. In other words, a *certain degree of continued effectiveness creates a presumption of representativeness*”<sup>837</sup>.

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representatives of the national liberation movements” without further detail. UNGA/RES/3280 dd. 10 December 1974.

<sup>831</sup> General Report of the Goodwill Mission of the Coordinating Committee for the Liberation of Africa to the Angolan Nationalists, Léopoldville, July 13-18, 1963, repr. in Marcum, *The Angolan Revolution*, vol. II, Appendix 2, pp. 304-307. Cited in Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 77 and in S. Talmon, '[Recognition of the Libyan National Transitional Council](#)', *ASIL Insights* 15, no. 16 (n.d.). Also cited in C. Panara and G. Wilson, *The Arab Spring: New Patterns for Democracy and International Law*, *op. cit.*

<sup>832</sup> S. Talmon, 'Recognition of the Libyan National Transitional Council', *op. cit.*

<sup>833</sup> A. E. Youssef, 'Security Council Resolution 1973: a new interpretation of the notion of protection of civilians?', *op. cit.*

<sup>834</sup> K. Ginther, 'Liberation Movements', *op. cit.*, pp. 211–212: “unlike insurgency in a civil war or a de facto regime, the recognition of liberation movements does *not require proof of any effective territorial control*”. Emphasis added.

<sup>835</sup> *Id.*: “according to OAU and LAS practice, and according to the overwhelming majority of UN member States, liberation movements may gain recognition if evidence exists of *political control* over, and *organized allegiance* of, the people they claim to represent”. Emphasis added.

<sup>836</sup> *Id.*, p. 250, p. 253: “*notwendigen Verknüpfung von Effektivität und Repräsentativität*”.

<sup>837</sup> G. Abi-Saab, *Wars of National Liberation in the Geneva Conventions and Protocols* (165 Recueil Des Cours, 363-436 (1979-IV), p. 46.

The requirement of effectiveness was however relative<sup>838</sup>. Yet, national liberation had to be pursued by a ‘movement’ supposed to be organized<sup>839</sup>.

(2) INTERNATIONAL SUPPORT – Boczek adds that “the status of the movements rested not on the control of the territory but on the international support of the anti-colonial forces for the principle of self-determination of peoples”<sup>840</sup>. Frowein vaguely writes that recognition of NLM “mainly confirms that some sort of official relations will be or have been established with the movement concerned”<sup>841</sup>.

RECOGNITION NLM IN PRACTICE: FLEXIBILITY OF CRITERIA – In practice, the criteria of domestic allegiance and international support were not consistently applied. A wide variety of NLM existed in South-East Asia, Africa and the Americas. Their power and popular support was not constant. In some cases, NLM acquired popular support only progressively. Also, history shows that NLM were not always prepared to govern once they transformed into ruling political parties<sup>842</sup>. The UNGA actually declared that “inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence”<sup>843</sup>. As already noted, the UNGA was not clear however about which criteria could be used to recognize NLM. These criteria are open to debate, and Faundez observes that:

“over the years, the United Nations has developed certain practices and procedures for identifying liberation movements which are fighting against colonialism and racist regimes. Inevitably, there is room for argument concerning the criteria the General Assembly uses to include, or exclude, liberation movements from its resolutions”<sup>844</sup>.

RECOGNITION NLM: POWER OF REGIONAL IOs – The flexibility of said criteria conferred enormous powers on regional organizations like the OAU and LAS since the UN only granted observer status to NLM previously recognized by these regional organizations. The UN, thus, “relied

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<sup>838</sup> O. Krönert, *Die Stellung nationaler Befreiungsbewegungen im Völkerrecht*, op. cit., p. 246, 248: “an die Effektivität der Bewegungen [sind] geringere Anforderungen zu stellen als an die Effektivität von Regierungen eines Staates. [...] Es ist vielmehr allgemein festzustellen, dass die Staatenpraxis an die Effektivität der Herrschaftsgewalt der aus der Dekolonisierung hervorgegangenen Staaten geringere Anforderungen stellt”.

<sup>839</sup> Id., p. 23: “[i]m Sprachgebrauch der internationalen Politik werden grundsätzlich nur organisierte Bewegungen unter den Befreiungsbegriff gefasst. Das lässt sich damit erklären, dass spontan sich bildende und agierende Gruppen nicht das Maß an Stabilität und Dauerhaftigkeit aufweisen, das nun einmal erforderlich ist, um zu einem relevanten Faktor zu werden”.

<sup>840</sup> B. A. Boczek, *International Law: A Dictionary*, Scarecrow Press, 2005.

<sup>841</sup> J. A. Frowein, ‘Recognition’, MPEPIL.

<sup>842</sup> M. N. Younis, *Liberation and Democratization: The South African and Palestinian National Movements*, 1 edition, Univ of Minnesota Press, 2000, Minneapolis, London: in South Africa, for instance, “[a]s the ANC prepared to govern, the organization faced a dearth of experienced and skilled personnel. The shortage of personal made the ANC’s ability to assume control over the various apparatuses of the state, which were retained rather than dismantled, let alone the economic enterprises of the country, virtually impossible”.

<sup>843</sup> UNGA/RES/1514 dd. 14 December 1960, § 3.

<sup>844</sup> J. Faundez, *International Law and Wars of National Liberation: Use of Force and Intervention*, 1 Afr. J. Int’l & Comp. L. 85 1989, p. 97. This author adds that “the General Assembly has been conspicuously silent in cases involving liberation movements struggling against third-world states, as in East Timor and in the Western Sahara. The General Assembly’s failure to follow a consistent policy does not of course affect the rights of those liberation movements to receive assistance to further their lawful struggles”.

heavily upon the judgment of regional organizations which for their part began to play a role as powerful intermediaries between liberation movements and the international community”<sup>845</sup>. In resolution UNGA/RES/3280, the UNGA refers to the OAU’s recognition of NLM, and

“decides to invite as observers [...] representatives of the national liberation movements *recognized by the Organization of African Unity* to participate in the relevant work of the Main Committees of the General Assembly and its subsidiary organs concerned, as well as in conferences, seminars, and other meetings held under the auspices of the United Nations which relate to their countries”<sup>846</sup>.

This became established practice<sup>847</sup>, even if it is contested whether the recognition by regional organizations would be *constitutive* of NLM<sup>848</sup>. The UNGA’s recognition of NLM thus resulted from the UN’s cooperation with the OAU. This *modus operandi* was notably observed in the Fourth Committee, i.e. the Special Committee on Decolonization and the Economic Commission for Africa<sup>849</sup>.

### 2.1.2. Lack of direct relevance for the analysis of DIG

Analogies between transitional authorities and NLM have been made in literature<sup>850</sup>, and some will be made below<sup>851</sup>. But comparisons fall short because (i) NLM operated in a different context and (ii) transitional authorities do not represent a specific legal category.

(1) EXTERNAL VS. INTERNAL SELF-DETERMINATION – First, transitional authorities pursue the explicit aim of reconfiguring the constitutional order *within* their respective states. This was observed under Chapter 3 about the common nature of transition instruments. This clearly differentiates them from NLM which –save for exceptions<sup>852</sup>– in the specific context of decolonization<sup>853</sup>,

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<sup>845</sup> *Ibid.*, p. 863. Emphasis added.

<sup>846</sup> UNGA/RES/3280 dd. 10 December 1974, §6. See also Preamble in which the UNGA mentions “the positive results achieved in the work of the United Nations bodies concerned as a direct consequence of the participation of representatives of the national liberation movements recognized by the Organization of African Unity”. Cf. also UNGA/RES/3247 dd. 29 November 1974, and A/RES/43/160 dd. 9 December 1988 § 2 in which the UNGA “[c]alls once more upon the States concerned to accord to the delegations of the national liberation movements *recognized by the Organization of African Unity and/or by the League of Arab States* and accorded observer status by international organizations, the facilities, privileges and immunities necessary for the performance of their functions”.

<sup>847</sup> O. Krönert, *Die Stellung nationaler Befreiungsbewegungen im Völkerrecht*, *op. cit.*, p. 208: „[b]ei der Betrachtung der Aktivitäten der Vereinten Nationen mit dem Ziel der Einräumung eines Beobachterstatus für Befreiungsbewegungen fällt auf, dass immer wieder die Standardformulierung ‚national liberation movement, recognized by the OAU (or LAS or other regional organizations)‘ Verwendung findet. Daraus ergibt sich, dass nur solche Bewegungen Anerkennung in den Vereinten Nationen finden können, die auch von der jeweiligen Regionalorganisation anerkannt wurden“.

<sup>848</sup> E. U Olalia, ‘The Status in International Law of National Liberation Movements and Their Use of Armed Force’, International Association of People’s Lawyers, Utrecht, 2002, p. 17.

<sup>849</sup> Wolfrum and Philipp, *United Nations: Law, Policies, and Practice*, *op. cit.*, Martinus Nijhoff, 1995, p. 859.

<sup>850</sup> P. Thielbörger, ‘Die Anerkennung oppositioneller Gruppen in den Fällen Libyen (2011) und Syrien (2012)’, *Journal of International Law of Peace and Armed Conflict*, 26. Jahrgang, 1/2013.

<sup>851</sup> Chapter 6, Section C.1.2.

<sup>852</sup> See the position of PLO.

generally struggled to gain independence *from* the ‘metropolitan’ states (*‘Fremdherrschaft’*). In short, the aim of NLM is to realize external self-determination<sup>854</sup> while the aim of domestic transitional authorities is generally to realize internal self-determination<sup>855</sup>. To pursue this goal, transitional authorities seek to reverse the existing state order. On this ground, transitional authorities can also be differentiated from resistance movements whose actions “are rather directed towards securing a position *within* the institutional framework of the *existing* social and political order”<sup>856</sup>. In contrast, transitional authorities purport to *transform* the institutional and constitutional framework of their respective countries<sup>857</sup>, using non-forcible means to this end<sup>858</sup>.

(2) LEGAL CERTAINTY VS. LEGAL UNCERTAINTY – Second, DIG or transitional authorities do not correspond to a specific *legal* category or concept, but simply reflect a specific, recurring, politico-legal phenomenon. In contrast, “from being a political concept, the national liberation movement became a *specific legal category* with its own conditions for recognition and a legal system of rights and duties”<sup>859</sup>. This absence of legal status of transitional authorities, and the lack of readily available legal guidance for analyzing DIG, is precisely the reason why this dissertation decodes, on the basis of international practice, which obligations are incumbent on transitional authorities (Part III), and under which circumstances they may be endorsed or supported by third states (Part IV).

The latter point leads us to another distinction between national liberation and DIG: whereas the “legality of the peoples’ struggle for self-determination and liberation from colonial and foreign domination and alien subjugation”<sup>860</sup> under international law cannot be doubted, international law remains mostly neutral vis-à-vis –neither permitted nor prohibited– domestic calls to transform the political and constitutional order of a country, and generally prohibits external intervention to encourage such transformations<sup>861</sup>. In spite of this, we shall see that a thematic continuity exists between the application of self-determination to the decolonization process and its role for DIG<sup>862</sup>.

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<sup>853</sup> UNGA/RES/1514 (XV), known as the ‘Charter of decolonization’. Cf. also UNGA/RES/3280 (XXIX).

<sup>854</sup> Chapter 6, Section C.1.2. Cf., in the same sense, D. Amoroso, ‘Il ruolo del riconoscimento degli insorti nella promozione del principio di autodeterminazione interna: considerazioni alla luce della ‘Primavera Araba’’, *op. cit.*, p. 4, p. 23.

<sup>855</sup> Chapter 6.

<sup>856</sup> S. von. Schorlemer, ‘Liberation Movements’ in Wolfrum and Philipp, *United Nations*, *op. cit.*, p. 857.

<sup>857</sup> Chapter 3, Section B, where the commonality of function and purpose is discussed.

<sup>858</sup> Chapter 4, Section B.1.1.

<sup>859</sup> R. Ranjeva, ‘Peoples and National Liberation Movements’ in M. Bedjaoui, *International Law: Achievements and Prospects*, UNESCO and Martinus Nijhoff, Paris and Dordrecht, 1991, p. 107. Emphasis added. See also C. Lazarus, ‘Le statut des mouvements de libération nationale à l’Organisation des Nations Unies’, *Annuaire français de droit international*, volume 20, 1974. pp. 173-200.

<sup>860</sup> UNGA/RES/2787 dd. 6 December 1971. Cf. also UNGA/RES/3103 dd. 12 December 1973.

<sup>861</sup> Chapter 9.

<sup>862</sup> Chapter 6, Section C.1.2.

## 2.2. Distinction from de facto state/government

*De facto* states are “territories which have gained *de facto* independence –often following warfare and/or state collapse– but have failed to gain international recognition or are, at best, recognised by only a few states”<sup>863</sup> (e.g. Abkhazia, South Ossetia<sup>864</sup>). *De facto* governments refer either to the putative governments of these states or to nonconstitutional governments even of recognized states<sup>865</sup> (as opposed to *de iure* governments, i.e. governments that emerged in accordance with the existing constitutional order).

Transitional authorities potentially are *de facto* governments, but can be conceptually differentiated from them. It is generally understood that *de facto* states/governments (i) exercise effective control, (ii) intend to transform their control or new juridical order into a permanent state of affairs, (iii) are established after an instantaneous constitutional rupture, and do not aspire at guiding an interregnum.

(1) DIG NOT PREMISED ON EFFECTIVE CONTROL – Transitional authorities do not always exercise effective control. The concept of *de facto* state/government presupposes the factual, i.e. effective, control over state territory. DIG is not dependent on this. This thesis’ dynamic approach to DIG is not premised on DIG being exercised in conjunction with effective control over state territory, or on transitional authorities exhibiting governmental features. The subdivision of the transition process into various stages precisely integrates the changing dynamics of DIG, also when effectiveness is concerned. The distinctions between embryonic, inchoate, halfway or completed transition procedures need not be recalled here<sup>866</sup>.

(2) PROVISIONAL NATURE OF DIG – The provisional nature of transitional authorities also allows us to conceptually distinguish them from *de facto* states and governments<sup>867</sup>. While *de facto* states like Northern Cyprus, Somaliland or South Ossetia aspire to perpetuity, transitional authorities, by definition *but also by law*, set temporary limits on their own existence. This restriction is frequently recalled by the UNSC. Transitional authorities must not intend to perpetuate themselves in light of the limits *ratione temporis* to the interim rule<sup>868</sup>. In addition, contrary to the *de facto* states just mentioned, transitional authorities are not the fruit of (incomplete<sup>869</sup>) secessionist activities, as they aspire to realizing state transformation while respecting its territorial integrity.

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<sup>863</sup> N. Caspersen, ‘Playing the Recognition Game: External Actors and De Facto States’, *The International Spectator*, Vol. 44, No. 4, December 2009, p. 47. See p. 48 about goal of permanence.

<sup>864</sup> For more examples cf. J. A. Frowein, ‘De Facto Regime’, MPEPIL.

<sup>865</sup> S. Gemma, ‘Les gouvernements de fait’, *Collected Courses of the Hague Academy of International Law*, Vol. 4, 1924, p. 307 : « un gouvernement qui n’est pas conforme, qui est même contraire à l’ordre juridique existant ».

<sup>866</sup> Chapter 4, Section A.2.2, Table 6.

<sup>867</sup> Chapter 4, Section A.2.

<sup>868</sup> Chapter 5, Section A. Cf. also Chapter 8, Section B.2.

<sup>869</sup> A. Cullen, S. Wheatley, ‘The Human Rights of Individuals in *De Facto* Regimes under the European Convention on Human Rights’, *Human Rights Law Review* 13, n. 4, 2013, p. 698.

(3) ABSENCE OF INTERIM CONSTITUTIONALISM – Lastly, in the context of DIG, the nonconstitutional nature of transitional authorities is qualitatively different from the nonconstitutionality characterizing *de facto* governments. The former form of nonconstitutionality is usually paired with (pretensions of) supraconstitutionality, allowing the pursuit of DIG<sup>870</sup>. The latter form of nonconstitutionality is reduced to its unlawful nature: “*le gouvernement de fait est celui dont le pouvoir est entaché d’irrégularité*”<sup>871</sup>. The concept of *de facto* governments/states is premised on this idea of illegality, and, in this sense, is rather one-dimensional.

This subtlety allows us to further differentiate transitional authorities from *de facto* governments: the former can be, or become incrementally, constitutional (in spite of their nonconstitutional origins), while the latter are commonly seen as unequivocally nonconstitutional. This feature of *de facto* governments was longtime accepted by Spiropoulos<sup>872</sup> and Gemma<sup>873</sup>. Linear nonconstitutionality characterizes *de facto* governments while interim or incremental constitutionality characterizes transitional authorities.

Thus, the division between *de facto* and *de iure* governments is premised on the idea that the replacement of the one by the other is done almost instantaneously. Further, even though it is recognized that the precise moment of replacement is not always easy to pinpoint<sup>874</sup>, it does not envisage the scenario of institutions set up to regulate the substitution; in the context of DIG, however, substitution is not an instantaneous or quasi-instantaneous act, as Part III of the thesis will demonstrate.

## Summary of Chapter 4

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DIG, as a distinct politico-legal phenomenon, touches upon transversal issues that are rarely treated together. In spite of the diverse contexts of DIG and the polymorphous nature of actors observing DIG or purporting to do so, transitional authorities can be conceptually isolated. Independently of foreign administrations, and in the absence of direct ITA, transitional authorities purport to redefine the state order and reconstitutionalize their country. This goal is common to oppositional and consensual transitional authorities, and this is why they are treated together in this dissertation.

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<sup>870</sup> Chapter 3, Section B.

<sup>871</sup> N. Henry, *Les gouvernements de fait devant le juge*, Guillon, Paris, 1927, § 2.

<sup>872</sup> J. Spiropoulos, *Die de facto-Regierung im Völkerrecht*, Verlag des Instituts für internationales recht an der Universität Kiel, 1926, p. 1: “[u]nter einer de facto-Regierung versteht man die im Widerspruch zu einer bestehenden Verfassung, oder bei Nicht-Existenz einer Staatsordnung ipso facto ins Leben getretenem ohne verfassungsmäßige Grundlage die Regierungsgewalt ausübende Behörde”. Own emphasis.

<sup>873</sup> S. Gemma, ‘Les gouvernements de fait’, *op. cit.*, p. 308: “[n]ous considérons comme étant de droit tout gouvernement qui est fondé sur des lois positives et reconnu par une constitution fondamentale [...] Nous considérons, par opposition, comme gouvernement de fait tout gouvernement qui ne se trouve point dans cette situation”.

<sup>874</sup> S. Gemma, ‘Les gouvernements de fait’, *op. cit.*, p. 318: “il n’est pas toujours facile d’établir le moment juridique où l’ancien gouvernement a cessé d’exister, où le nouveau l’a remplacé. L’ancien ordre juridique, en effet, ne peut pas prévoir son anéantissement, ni même sa transformation radicale, et le nouveau ne peut pas trouver dans un droit préexistant (parce qu’alors il ne serait plus nouveau) le titre de sa suprématie. Les deux moments : l’initial, celui de la sortie de la légalité et le terminal, celui de la rentrée, ne peuvent souvent se déterminer qu’approximativement”.

Both oppositional and consensual transitional authorities (intend to) pursue DIG on a provisional basis. The legal instruments founding them generally explicitly foresee when they must cease to exist. During the interregnum, the redefinition of the state order is an exercise of public power, and eminently so. This thesis argues that transitional authorities, even when they do not (yet) have governmental status, enjoy international legal personality, but only to the extent that they effectively exercise this power, and/or are seen as addressees of international obligations.

Reconstitutionalizing a state is not exactly a military activity. The forcible/military and non-forcible/non-military aspects of transitions are severable, and (also) on this ground it is possible to conceptually isolate transitional authorities from other concepts or realities. Even if they entertain links with armed groups, the finality of DIG is not armed struggle but the exercise of political power during the interregnum in view of a state renaissance; if military and political rule are confounded, the UNSC and states ask for a return to civilian rule during transitions.

In the past, belligerents and NLM also observed a form of political/civilian rule. Are these concepts not sufficient to analyze DIG? If insurgents wished to be recognized as belligerents, a level of orderly administration and the respect for international law were required. With regard to NLM, political control and domestic allegiance –effectiveness through representativity– were consistently listed as the criteria for recognition. A number of self-imposed obligations of transitional authorities –the commitment to administering the country during the interregnum, to be inclusive, and to respect international law– are reminiscent of the criteria for recognizing either NLM or belligerents.

In spite of these affinities, NLM and belligerency cannot be used to study DIG. Belligerency was a short-lived and contested doctrinal concept; NLM were confined to a specific historic context: the exercise of *external* self-determination during decolonization. In contrast, DIG does not depend on any act of recognition, and concerns the pursuit of *internal* self-determination in a different epoch, the post-Cold War era<sup>875</sup>.

## CONCLUSION OF PART II

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This part of the thesis has developed a deeper understanding of the foundation of DIG and of the concept of transitional authorities.

The transition instruments under analysis come in all sorts of shapes and sizes. Such instruments are enshrined in texts like international treaties, intrastate agreements or domestic

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<sup>875</sup> Chapter 6.

legal acts and laws; in many cases DIG is regulated by a combination, sometimes even juxtaposition, of such instruments. Yet, the transition instruments examined here (i) share a common ‘breeding ground’, (ii) pursue a similar purpose, and (iii) are relevant under international law.

First, nonconstitutionality is a central feature of modern DIG. The nonconstitutionality characterizing transition instruments calls for a nuanced analysis: DIG progresses in stages and may, in part or in whole, be interim-constitution-based. Whether transition instruments are valid on the domestic plane or only become ‘legalized’ *ex post* is not relevant for our study. International law adopts a position of *neutrality* vis-à-vis the domestic legality of transition instruments; and compliance with international law is expected regardless of how the transition is triggered, i.e., to paraphrase d’Aspremont, regardless of the transition’s ‘(il)legitimacy of origin’. In other words, whether or not DIG is initiated in a domestically lawful fashion does not diminish the relevance of the following question: does the exercise of public powers *during the interregnum* comply with international law? This question is central to the international legal analysis of the ‘legitimacy of exercise’ of DIG.

Second, transition instruments are embodied in various forms but have in common the fact that they strive for an institutional transformation and reconstitutionalization within their domestic legal order (transitional constitutionalism). This purpose can only be reached if transition instruments (partly) supersede the constitutional order by fulfilling a supraconstitutional function. The transition instruments *sub examine* fulfill this function.

Third, the argument of this study does not hinge upon the (domestic or international) legal *nature* of transition instruments. For our analysis it is however important that these instruments have international legal *status* or *relevance*, i.e. can be ranged under one of the sources of international law or acquire legal force on other grounds. Transition instruments may be enshrined in, or connected to, international conventions in three ways. They may simply be consecrated in such conventions, may constitute internationalized intrastate agreements, or may be part of the context of international conventions. Also, they may be co-constitutive of custom, or be binding as unilateral declarations. Finally, they may (indirectly) acquire international legal force if UNSC resolutions regard them as mandatory.

Transition instruments share some commonalities: their origins (nonconstitutionality), function (supraconstitutionality) and teleology (transitional constitutionalism). The lack of formality which characterizes the sources of international law in conjunction with the distinguishability of transitional authorities and the commonality of context, origin, function and purpose of transition instruments allow us to treat a wealth of cases together.

As to the concept of transitional authorities, from the outset a distinction was made between consensual (‘transplacement’) and oppositional (‘replacement’) transitional authorities, leaving the analysis of how international law relates to transitions triggered and executed by

the incumbent ('transformations') for another day. The distinction between transitions by transplacement and by replacement is central. They are analyzed in the same study because consensual and oppositional transitional authorities are the children of the same peace-through-transition paradigm, and, more generally, respond to the features of DIG.

DIG should be contrasted with other forms of interim governance, notably foreign and international administration, admitting however that these distinctions are not always self-evident. Like few other forms of governance, DIG is both provisional and civilian. Transition processes can be divided into four stages, with the two middle stages (foundation and interregnum) being most relevant for our analysis. This subdivision assists us in analyzing when, and to what extent, transitional authorities enjoy (functional) international legal personality. The provisional nature of transitional authorities also distinguishes them from *de facto* governments or states. Finally, emphasizing their civilian nature or portfolio, transitional authorities are to be contrasted with related concepts or realities like armed opposition groups, belligerents and NLM.

The conceptualization of transition instruments and transitional authorities allows us to tackle the next step. How does international law apply to DIG? Can one formulate a rudimentary but consistent *ius in interregno* without disavowing the richness of the rapidly expanding practice of DIG? The following part addresses this question, and deals with the obligations and responsibilities of transitional authorities as revealed by their founding instruments and shared practices.



### PART III – THE CORE OF A IUS IN INTERREGNO

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This part concerns the conduct of transitional authorities *during* the interregnum (stage 3); the conduct of embryonic or aspirational transitional authorities will not be discussed here<sup>876</sup>. It will be argued that, during the interregnum, a common set of obligations is generally incumbent on transitional authorities. Given the ‘irrelevance of outcome’<sup>877</sup> (and, some may say, in line with the Nicaragua principle<sup>878</sup>), this part does not promote a specific vision of a political or constitutional order to be pursued after the interregnum (‘irrelevance of outcome’, but argues that international law is not indifferent to the *mode* of observing public authority during the interregnum.

FOCUS ON CORE OBLIGATIONS OF IUS IN INTERREGNO (SENSU STRICTO) – DIG obligations analyzed in this part form the core of a *ius in interregno*. The word ‘core’ is used for two reasons. First, this part unveils the minimum legal requirements that transitional authorities must respect, and it is certainly possible for these authorities to go beyond the minimum expected from them. In the words of Youssef, transitional authorities must at least respect the requirements of an *Etat légal intérimaire* but can go beyond that, and sometimes effectively do so when, as of the beginning of the transition (stage 2), they would build an *Etat de droit intérimaire* already announcing and reflecting the transformation into a substantive democracy respectful of fundamental rights<sup>879</sup>. Second, the core of a *ius in interregno* unveiled in this chapter will be complemented in Part IV by an analysis of the rights and obligations of external actors influencing the interregnum, which, together with the core of a *ius in interregno*, form *ius in interregno sensu lato*.

AMBIT OF IUS IN INTERREGNO SENSU STRICTO – The core of a *ius in interregno* applies both to oppositional and consensual transitional authorities exercising effective power. It contains the minimal obligations incumbent on them. In a nutshell, the core of a *ius in interregno* imposes a time-constrained renaissance of the state order whereby this *renouveau* must be seen as a means of realizing internal self-redetermination. A *ius in interregno* requires clearly more than just elections, but demands less than (substantive) democracy. Chapters 5 and 6 center on an observation of recurring DIG practices while the closing chapter of this part, Chapter 7, examines the legal relevance of these practices.

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<sup>876</sup> Chapter 4, Section A.2.1 for a brief discussion on the rights of embryonic or aspirational transitional authorities under international human rights law.

<sup>877</sup> Chapter 2, Section B.2.3.

<sup>878</sup> Part I, Conclusion, 1.

<sup>879</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, pp. 72 a. f. Cf. also pp. 78 - 78: “[l]a transition démocratique peut se faire par la construction dès le début de la transition d’un Etat de droit intérimaire sans avoir le besoin et la nécessité de passer d’abord par l’étape indépendante de l’Etat légal”.

**OBSERVATION OF COMMON PRACTICES** – We shall see that the transitions under examination exhibit a number of common features and procedures. Chapters 5 and 6 draw on the observation of practice of more than twenty states, which are, or were said to be in transition. Reference to views expressed by other states will complement this observation. This vast perusal of state practice and *opinio iuris* is meant to show the richness and geographical breadth of specific practices repeated in the context of DIG. Eliminating this perusal from the dissertation would hinder the verification of the practices observed, and indeed make the thesis argument as a whole vulnerable to critique on that ground. At the risk of being dismissed as a natural law enterprise, a *ius in interregno* is to be ascertained from observation of practice by states in transition and by transitional authorities whose acts can be attributed to such states ; this is to avoid that the idea precedes the facts.

Inevitably, the observation that specific practices are being *repeated* in the context of DIG – even if summaries of relevant facts are provided and several cases have been omitted– at times may feel encyclopedic. It burdens the reading. As shall be indicated, the enumeration of recurrent practices can be skimmed or even skipped by the reader who is only interested in the recapitulative parts, provided after each overview. From these overviews, it will become apparent that states in transition follow two strands of practices:

- Transitional authorities must manage the country during the interregnum, and then relinquish power (limits *ratione temporis*). Their powers do not go much beyond the management of the transition procedure and the administration of their country, which includes the provision of security during the interregnum (limits *ratione materiae*). This will be discussed under Chapter 5.
- DIG must be conducive to the (progressive) realization of internal self-determination. To this end, requirements of ‘inclusion’ and ‘representativity’ must be respected during the interregnum. Also, post-conflict transitional authorities must ensure one form or another of TJ (*sensu lato*). This will be discussed under Chapter 6.

The first category mainly concerns limitations, or negative obligations, directly deriving from the temporary nature of the interim rule. The second category mostly concerns (positive) obligations informing transitional authorities as to how they must pursue DIG.

**PRACTICES COMMON TO CONSENSUAL & OPPOSITIONAL DIG** – Chapter 7 places the observations of the two preceding chapters in legal context, in three regards. First, it observes that in light of the increasing internationalization of DIG, the exercise of public authority during the interregnum must be guided by the respect of international legal norms. Second, it observes that both oppositional and consensual transitional authorities commit to the aforementioned practices and procedures. Thus, at least the *commitment* to guide DIG in such a way is shared by oppositional and consensual transitional authorities, irrespective of their origin and often irrespective of the transition’s progression. This triggers the question of whether shared

practices and procedures are indicative of an emerging international custom, or may acquire legal status on other grounds. Third, it asks how, and at which level, the principle of self-determination can be rendered operational in relation to DIG.

This part of the thesis shows that DIG is increasingly subject to regulation. This is undoubtedly so on the domestic legal level. Domestic laws provide much detail as to how DIG must be executed. The objective of domestic laws and post-sovereign (staged) constitutionmaking<sup>880</sup> is thus to “avoid the legal and institutional state of nature”<sup>881</sup> during the interregnum. Here, it is submitted that international law complements and guides domestic laws in this endeavor.

The portrayal of the interregnum as a legal and institutional vacuum is becoming more and more a *misrepresentation*. The vision famously expressed almost a century ago by the International Committee of Jurists at the occasion of the *Aaland Islands Report*, namely that the role of international law would remain relative and obscure in times of state transformation<sup>882</sup>, must be nuanced anno 2016. This nuance is unavoidable in light of the legal reception of practices evidencing the duties of conduct transitional authorities are expected to fulfill in the exercise of public authority during the interregnum. Before turning to the perusal of these practices, a number of caveats must be expressed.

### Introductory caveats: DIG practices are rudimentary, socialized, and contested

The practices common to transitional authorities are rudimentary (1), are the product of socialization (2), and are contested (3). As a result, a *ius in interregno* is itself rudimentary (thus leaving room for variability of path-dependent transitions) and (like any other normative framework) generated by socialized practices which are not uncontested.

### 1. Rudimentary nature of DIG practices

MARGINAL SCRUTINY – The recurrent practices *sub examine* are rudimentary, sometimes even underdetermined. This is, in itself, not problematic. There is no need to engage in norm entrepreneurship or to aspire to overregulation if certain practices, *ex hypothesi* transforming into custom or otherwise gaining legal force<sup>883</sup>, simply do not operate on a high level of detail. There is no need for overstandardization, especially not for as rich and casuistic a practice as DIG. Considering that (international) law applies to a vast array of situations, overregulation would hinder contextual sensitivity<sup>884</sup>, or more fundamentally, would hinge on a naive vision

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<sup>880</sup> A. Arato, *Constitution Making Under Occupation*, *op. cit.*; A. Arato, 'Post-Sovereign Constitution-Making and It's Pathology in Iraq', *New York Law School Law Review* 51, 2007 2006, pp. 536 - 555.

<sup>881</sup> A. Arato, 'Post-Sovereign Constitution-Making and It's Pathology in Iraq', *op. cit.*, p. 541.

<sup>882</sup> Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, October, 1920.

<sup>883</sup> Chapter 7.

<sup>884</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 48.

of DIG as ‘techno-politics’<sup>885</sup>. It would deny that “any effort to generate a *rigid* template for reconstructing the institutions of law and order in a post-conflict environment is [...] likely to fail”<sup>886</sup>, a situation Chesterman rightly cautions against.

This caveat is essential. This chapter, and indeed the thesis as a whole, does not intend to artificially contribute to a ‘legal globalization’<sup>887</sup> by creating blueprints ‘out of the blue’. Rather, it observes the expansion of specific practices and designs relating to DIG pursued by transitional authorities (progressively) binding the state in which they operate<sup>888</sup>. If these practices and designs are sanctioned in law (through custom, treaties, unilateral declarations, or binding resolutions), then the interregnum becomes subject to regulation. A *ius in interregno* thus disclosed would allow for some flexibility. At the same time, it would be indicative of a number of ‘red lines’ that must not be crossed.

## 2. Socialized origin of DIG practices

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**DOMINATION PEACE-THROUGH-TRANSITION PARADIGM** – Why do transitions seem to follow similar patterns? Why do transitional authorities follow similar state transformation roadmaps? The answer is twofold. To begin with, the installation and monitoring of DIG by the international community is viewed –sometimes wrongly– as a panacea for all kinds of problems. The peace-through-transition paradigm is strongly anchored in practice. The creation of transitional authorities in Burkina Faso during Autumn 2014, and proposals made in this sense for South Sudan during Summer 2014<sup>889</sup> and Syria during 2015<sup>890</sup> and 2016<sup>891</sup> confirm this trend.

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<sup>885</sup> N. Bhuta, ‘Against State-Building’, *op. cit.*, pp. 517 – 542. See especially p. 518 (“successful political action thus resides in a certain kind of self-limitation in terms of the presumed malleability of the real”), and p. 520.

<sup>886</sup> S. Chesterman, ‘Ownership in theory and in Practice: Transfer of Authority in UN Statebuilding Operations’, *Journal of Intervention and Statebuilding*, Vol. 1, Nr. 1, 2007, p. 3.

<sup>887</sup> J. H. Peterson, ‘Rule of Law’ Initiatives and the Liberal Peace: The Impact of Politicised Reform in Post-Conflict States’, *Disasters* 34, 2010, S20.

<sup>888</sup> Transitional authorities either are already governmental bodies enjoying international legal personality, or may, akin to insurrectional movements (art. 10 DASR), retroactively gain thus status when, after completion of the transition procedure, they are succeeded by the (effective) representatives of the states. See also Chapter 4, Section A.2.6.

<sup>889</sup> During Summer 2014, the constitutional structure of South Sudan was being discussed on the basis of a ‘position paper’ proposing the creation of a (new) transitional government (The ‘Position Paper’ dd. 17 July 2014 is available on [‘Commentary: The First Six Months of Transition in Post-Independent South Sudan’](#), The New Sudan Vision, 15 February 2012. During a UNSC meeting, the US ambassador reportedly “reiterated the need for both leaders [of the civil war] to put together a transitional authority” ([‘Security Council concludes South Sudan visit’](#), UNMISS press release, 13 August 2014).

<sup>890</sup> During September and October 2015, Germany, Iran, Russia and Saudi Arabia, the UK, the UK, have at least pondered about the creation of a transitional government. ‘Germany calls for Syria transitional government’, Yahoo news, 27 September 2015. ‘Forming Transitional Government: Iran Solution for Syria Crisis’, Alalam, 25 October 2015. ‘U.S., Russia, Saudi Arabia, Turkey meet on possible transitional government for Syria’, Triblive, 23 October 2015. Position of UK, cf. ‘Deal to end civil war in Syria could allow president Bashar al-Assad to stay’, The Observer, 26 September 2015.

<sup>891</sup> [Statement of the International Syria Support Group dd. 17 May 2016.](#)

The result often is that domestic constituencies yield to international pressure presenting DIG as the adequate means of promoting peace, a template copied by non-Western political actors, too<sup>892</sup>. In addition to this functional explanation, other –legal and non-legal– reasons potentially explaining the rise of DIG were advanced under Chapter 1. Whichever reason is predominant, the discourse usually adopted is that, in line with the peace-through-transition paradigm, DIG can help manage conflict in divided societies.

**ACCULTURATION & SMALL EPISTEMIC COMMUNITY** – Next, the re-occurrence of DIG and the reiteration of specific features associated with it can be attributed to particular social phenomena. These phenomena include the ‘migration of constitutional ideas’<sup>893</sup>, ‘constitutional borrowing’<sup>894</sup>, ‘transnational information networks’, the acculturation of certain practices<sup>895</sup>, the (recommended *vel non*<sup>896</sup>) presence of international mediators and experts, and the use of “template-based or one-size-fits-all peacebuilding initiatives”<sup>897</sup>. One proposal voiced at a UNSC meeting was thus to “prepare a compendium of model practices for use by the United Nations in each post-conflict situation”<sup>898</sup>. The community of practitioners engaged in post-war countries and especially constitutionbuilding is relatively small, and has been characterized as the ‘eternal caravan of mourners’<sup>899</sup>. As a result, the epistemic community dealing with these issues is also small, thus creating a habitat favorable to the reproduction of professional practices by emulation.

**DIG PRESENTED AS A TECHNOCRATIC EXERCISE** – This mimesis explains why specific DIG practices gain currency. This is even more so since professionals, such as members of the UN mediation Support Unity, “rel[y] on a conception of mediation emphasizing generic and depoliticized expertise”<sup>900</sup>, thus “emphasiz[ing] knowledge that can be transferred from one conflict to

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<sup>892</sup> R. M. Ginty, 'No War, No Peace: Why so Many Peace Processes Fail to Deliver Peace', *International Politics* 47, no. 2, March 2010, pp. 154. Thus, the 'African solutions to African problems' approach "resemble[s], in many respects, western approaches".

<sup>893</sup> S. Choudry, *The Migration of Constitutional Ideas*, CUP, New York, 2011.

<sup>894</sup> D. M. Dennis, 'Constitutional Borrowing: The South Africa Experience', *International Journal of Constitutional Law* 1 (2), pp. 181-95.

<sup>895</sup> For example, participants of the contact group “encouraged countries that have undergone similar processes to share their experiences with the CAR”. See Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, § 9.

<sup>896</sup> J. Benomar, 'Constitution-Making After Conflict: Lessons for Iraq', *Journal of Democracy*, Volume 15, Number 2, April 2004, p. 90: “[i]t is particularly important to try to mobilize as much national expertise as possible during the constitution-making process. Foreign advisors may be helpful as well, but should not effectively replace the local participants in the process. Such advisors can usefully offer counsel or lay out options, but under no circumstances should they act on behalf of any local political party or group”. For Jackson, “[g]iven the importance of political preconditions for the likely success of constitution-making in any of these forms, the expertise of constitutional lawyers in other ongoing systems will be of only limited relevance in post-regime change settings”. V. C. Jackson, 'What's in a name?', *op. cit.*, pp. 1270-1271.

<sup>897</sup> D. N. Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique', *Chicago Journal of International Law*, Vol. 14 No. 1, 2013-2014, p. 169, fn. 16.

<sup>898</sup> UNSC discussion on the role of the UN in post-conflict national reconciliation. S/PV.4903 dd. 26 January 2004, p. 16.

<sup>899</sup> Conversation with Prof. E. Afsah (Winter 2014).

<sup>900</sup> E. Convergne, 'Learning to Mediate? The Mediation Support Unit and the Production of Expertise by the UN', *Journal of Intervention and Statebuilding*, 2015, p. 3.

another and from one mediator to the next”<sup>901</sup>. The tendency to characterize external mediation and assistance to DIG as a technocratic and depoliticized action reinforces its ‘transposability’ to other situations. Custom creation and the germination of *ius in interregno* are partly predicated on these professional practices and convictions. True, “participant and actor-based understandings of international law-making reflect the observer’s interest in norm-generating processes”<sup>902</sup>. It is for this reason that, as noted earlier<sup>903</sup>, reference will also be made to policy guidelines and deontological obligations which are relevant for DIG<sup>904</sup>.

**CARROT & STICK** – Furthermore, transitional authorities adopt analogous practices with the hopes of increasing their (perceived) legitimacy, and of gaining political and financial support by international community actors (often acting through contact groups). Such strategic calculations increase the odds of receiving budgetary support. The Comoros transition instrument, for instance, emphasizes “*la nécessité de parachever rapidement la mise en place des institutions de l’Union des Comores, afin [...] d’encourager la communauté internationale à débloquent l’assistance technique et financière*”<sup>905</sup>. With regard to Guinea-Bissau, it was similarly observed that respecting the temporal limits to the interregnum would “enabl[e] the full re-engagement of international partners with Guinea-Bissau”<sup>906</sup>.

**FINANCIAL ASPECTS (ASSISTANCE TO) DIG** – Strasheim and Fjelde write that “the international community continues to allocate vast resources to support interim regimes within peace-building programmes”<sup>907</sup>. While the assistance model may be less costly than ITA, it does not come without costs. The international involvement with DIG requires financial commitments on the basis of aid agreements, conditionality programs or donations. The UNSC underscores that peacebuilding in transition states requires sustained financial support<sup>908</sup>. This translates in considerable sums, also committed bilaterally, e.g. the \$875 million provided by the US to Yemen since the transition began in November 2011<sup>909</sup>. In short, as one delegation put it at a

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<sup>901</sup> *Id.*, p. 8.

<sup>902</sup> J. d’Aspremont, *Epistemic Forces in International Law*, Elgar International Law, 2015, p. 138.

<sup>903</sup> Part I, Conclusion, 2.2.

<sup>904</sup> Chapter 6, Section B.2; Section D.2. The issue of self-regulation / accountability of mediators is not addressed in this thesis. In other words, references to deontology guidelines are used to corroborate the argument that a *ius in interregno* is developing, but, *vice versa*, the issue of how this *ius in interregno* would impose legal limits upon practitioners is not analyzed.

<sup>905</sup> *Accord sur les dispositions transitoires aux Comores* dd. 20 December 2003, Part I (Principles). Emphasis added.

<sup>906</sup> S/PV/6963 dd. 9 May 2013, ‘The situation in Guinea-Bissau’.

<sup>907</sup> J. Strasheim, H. Fjelde, ‘Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies’, *op. cit.*, p. 336.

<sup>908</sup> S/PRST/2015/2 dd. 14 January 2015: “[t]he 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”.

<sup>909</sup> Remarks at the Friends of Yemen Ministerial, 24 September 2014: “[a]s 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.

UNSC debate, “the international community has an important role to play in providing financial and technical support to transitional Governments”<sup>910</sup>.

The load of providing financial assistance to DIG is increasingly carried by the international community. The financial commitments to the Afghan transition process, and, beyond that, to the so-called transformation decade (2015-2024), have been widely reported in official statements<sup>911</sup> and literature<sup>912</sup>. The same applies to the Burundi, Central-African<sup>913</sup>, Congolese<sup>914</sup>, Guinean<sup>915</sup>, South Sudanese, and other transitions. The UNGA went as far as considering that “today, in an era when dozens of States are under stress or recovering from conflict, there is a clear *international obligation to assist States* in developing their capacity to

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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”.

<sup>910</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.

<sup>911</sup>Conference Conclusions ‘Afghanistan and the international community: from transition to the transformation decade’, *op. cit.*: “[t]he intensive international effort in Afghanistan over the last decade represents a unique engagement. The International Community’s commitment both to Afghanistan and to its role in international security, lasts beyond Transition. Transition will reduce the international presence and the financial requirements associated with it. We recognize that the Government of Afghanistan will have special, significant and continuing fiscal requirements that cannot be met by domestic revenues in the years following Transition. Therefore, during the Transformation Decade, the International Community commits to directing financial support, consistent with the Kabul Process, towards Afghanistan’s economic development and security-related costs, helping Afghanistan address its continuing budget shortfall to secure the gains of the last decade, make Transition irreversible, and become self-sustaining”, Cf. also the Afghanistan Compact of 2006, “a pledge document which set out a series of reconstruction objectives to be pursued by the government of Afghanistan as a basis for funding and other international assistance, is reported to have involved rounds of line-by-line negotiations with key international policy-makers” (M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 36).

<sup>912</sup>A. Suhrke, *When More is Less: the international project in Afghanistan*, *op. cit.* C. McCool observes that the constitutional process alone cost US \$12 million. Cf. C. McCool, ‘The role of constitution-building processes in democratization’, IDEEA, 2004, p. 13.

<sup>913</sup>Cf. Declaration of the third meeting of the ICG-CAR dd. 8 November 2013: “Participants pledged to facilitate and speed up, at the bilateral and multilateral levels, the procedures for financial assistance, taking into account the urgency and the magnitude of needs of the CAR. They agreed to reactivate the ongoing assistance programmes which had been interrupted as a result of the crisis. They urged the authorities of the Transition to work closely with the World Bank, the IMF, the African Development Bank (AfDB) and the EU, in order to establish quickly a transparent management system of the financial resources in conformity with the above-mentioned paragraph 18 (b)”.

<sup>914</sup>Third UNSG Special Report on DRC Mission, *op. cit.*, § 17: “[a]s soon as the Sun City Agreement was signed, the DRC government and the World Bank signed a loan agreement of US \$120 million to rebuild the economy, followed by US \$120 million to rebuild the economy, followed by US \$214 million in emergency support a few months later”; “The donors reiterated their commitment to support a well-designed plan endorsed by all the components of the Transitional Government”.

<sup>915</sup>*Déclaration conjointe de Ouagadougou*, janvier 2010, § 11 : “les signataires de la présente déclaration appellent instamment la communauté internationale à apporter son concours politique, financier et technique pour la mise en œuvre des mesures ci-dessus arrêtées”.

perform their sovereign functions effectively and responsibly”<sup>916</sup>, and the UNSC often calls on states to financially support transitional institutions<sup>917</sup>.

But support to DIG is seldom unconditional. Saul calls this ‘implicit coercion’, and, with reference to human rights law specifically, highlights that “there can be a strong, implicit signal that the level of international support will be attached to the government’s commitment to consistency with international human rights law”<sup>918</sup>. In the same vein, Chandler notes:

“the relationship between Western institutions and non-Western states is a highly coercive one which forces these states to cede their sovereign powers to external institutions; the fiction of partnership then relies heavily on an exaggeration of the importance of international legal sovereignty”<sup>919</sup>.

In sum, social, political and financial incentives explain why transitional authorities (pledge to) follow common behavioral patterns. The same reasons explain why they often effectively comply with these practices, or at least commit considerable efforts to do so. This common legal culture accounts both for the (socialized) origins of, and (legal) compliance with these behavioral patterns, and forms a breeding ground for *opinio iuris*.

### 3. DIG practices are contested

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CONTESTED NORMATIVITY; DEFECTIVE COMPLIANCE – The normative underpinnings of DIG are often questioned under the ‘critical approach’ to statebuilding<sup>920</sup>. The assistance-to-DIG model is often considered to be biased. This was already discussed in the introduction<sup>921</sup>. In a nutshell, the normative underpinnings of this model would be generated by the liberal/democratic peace(building) paradigm, i.e. “the idea that certain kinds of (liberally constituted) societies will tend to be more peaceful, both in their domestic affairs and in their international relations than illiberal states are”<sup>922</sup>. The idea of liberal peace, itself severely criticized, would be spreading its tentacles, so to speak, to the realm of DIG. Sriram for instance considers that the

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<sup>916</sup> ‘A More Secure World: Our Shared Responsibility’, Report of the High-level Panel on Threats, Challenges and Change, A/59/565 dd. 2 December 2004, § 261.

<sup>917</sup> For example, the UNSC has “call[ed] on Member States, international and regional organizations to provide rapid and tangible support to the Transitional Authorities of the CAR including contributions for the payment of salaries and other needs of the Transitional Authorities of the CAR”. S/RES/2149 dd. 10 April 2014. Cf. also M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 28: “international actors can [also] be expected to provide substantial funding for post-conflict reconstruction”. Cf. also sections on aid agreements (pp. 208-223).

<sup>918</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 106. With regard to Afghanistan, Saul writes: “[t]he clarity of the message that international actors expected a concern for human rights also had implications for the domestic actors that assumed governing responsibilities on the basis of the Bonn Agreement. It strengthened the signal that continued and extended international support was likely to have some connection to the approach taken to compliance with international law. In so doing, it increased the likelihood that the actors with general political authority in Afghanistan would attempt to comply with international law even if they did not see intrinsic value on its contents or view the potential outcomes as best suited to the circumstances” (*id.*, pp. 164-165).

<sup>919</sup> D. Chandler, *Empire in Denial – The Politics of State-building*, *op. cit.*, p. 39.

<sup>920</sup> This approach calls into question the very assumptions of liberalism and state-building. *Id.*, p. 32.

<sup>921</sup> Chapter 2, Section B, ‘Irrelevance of the transition paradigm’.

<sup>922</sup> E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 11. Cf. also R. M. Ginty, ‘No War, No Peace: Why so Many Peace Processes Fail to Deliver Peace’, *op. cit.*, pp. 145–62.

systematic integration of TJ mechanisms into statebuilding initiatives is part of this narrative<sup>923</sup>. Another criticism in relation to modern DIG practices relates to its defective compliance<sup>924</sup> and/or undesired results<sup>925</sup>.

Although DIG practices are criticized on normative (but extra-legal) grounds, such a critique does not necessarily lead to a *legal* contestation of these practices. That is because, as we shall see under Chapter 7, these practices, however politically contested, seem to be increasingly validated in international law. Before coming to this conclusion, we shall now turn to a perusal of practice concerning the limits *ratione temporis* and *ratione materiae* of DIG.

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<sup>923</sup> C. L. Sriram, 'Transitional Justice and the liberal peace' in E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 112.

<sup>924</sup> Chapter 7, Section B.3.

<sup>925</sup> Chapter 6, Section B.2.1.2.



## CHAPTER 5. LIMITS *RATIONE TEMPORIS* & *MATERIAE* TO DOMESTIC INTERIM GOVERNANCE

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DIG is not unrestricted. The observation and analysis of practice indicates that transitional authorities are restrained by a number of limits *ratione temporis* (Section A) and *ratione materiae* (Section B).

### Section A. Limits *ratione temporis*

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The interregnum is limited *ratione temporis*, and DIG, even if it may have been predefined to last for a long period, cannot be *prolonged* artificially. This may seem to be a tautology, and in a certain way it is, but we shall see that it is not devoid of legal significance. Explicit temporal limitations to DIG are observed in Afghanistan, Burkina Faso, Burundi, Cambodia, CAR, Comoros, Côte d'Ivoire, DRC, Guinea, Guinea-Bissau, Iraq, Libya, and Yemen, among other cases. This observation only suffers few exceptions<sup>926</sup>.

**TEMPORAL SELF-LIMITATION** – From the various cases under analysis, it stems that transitional authorities must manage DIG without frequent or long interruptions, and subsequently transfer power. This requirement is mostly self-imposed<sup>927</sup>. In addition, the UNSC or organizations like ECOWAS often underline that transitional authorities' powers are temporal, and that the transition must be implemented in a timely fashion after which power must be relinquished. For Shain and Linz, “that a government has declared itself provisional, interim, transitional (or uses other similar appellations) bespeaks a choice (or at least the appearance of a choice) not to translate its *de facto* control to a *de jure* power”<sup>928</sup>. When the provisional government in Eritrea, for example, was reluctant to end its provisional reign, for Weldehaimanot this “demonstrate[d] a typical case of *illegal perpetuation of transitional government* beyond the reasonable transitional period”<sup>929</sup>. When transitional authorities do not hand over power, or perpetuate their reign, this is viewed as unlawful.

**POLICY RATIONALE** – From a policy perspective, a prolonged interregnum, like in Eritrea, Libya and Côte d'Ivoire, “could arguably itself be a sign of continued instability, if elections are

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<sup>926</sup> N. Youssef considers that the 1989 Taif Agreement is such an exception, i.e. that limits *ratione temporis* of the reforms in Lebanese society should have been provided in this agreement, and that this omission has contributed to the failure of the transition in Lebanon: “*les parties de cet accord n'ont pas voulu, expressément, fixer un délai pour entamer les réformes, par crainte de ne pouvoir respecter la période déterminée [...]. Cette abstention à délimiter la période de la transition constitue, à notre avis, une erreur qui a aidé entre autre à empêcher et à retarder la conduite d'une vraie transition démocratique du pays*”. N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 28. Cf. also pp. 99 a.f., where Youssef recognizes that the Taif Agreement was not a transition instrument.

<sup>927</sup> For example, “the Transitional Government held during this volatile period [July 2003] and Buyoya –true to form– agreed to step down at the appointed hour of his relinquishing the presidency of the transitional government in April 2003”, T. Sisk, *International Mediation in Civil Wars*, Routledge, London, New York, 2009, p. 142.

<sup>928</sup> Y. Shain, J. Linz, *Between States – Interim Governments and Democratic Transitions*, *op. cit.*, p. 8.

<sup>929</sup> S. M. Weldehaimanot, ‘The status and fate of the Eritrean Constitution’, AHRLJ Vol. 8 No, 1 2008, p. 133. Emphasis added.

pushed back repeatedly because the situation is not deemed ‘ripe’<sup>930</sup>. For Youssef, defining the limits *ratione temporis* to the interregnum is a necessity, “*sinon, la transition va se prolonger ce qui peut la rendre obsolète et peut contribuer à son échec*”<sup>931</sup>. Temporal limitations would contribute to an incremental and solid transition<sup>932</sup>. The assertion that the immediate security of a country in transition and its long-term institutional development would be “served by extended transitional periods”<sup>933</sup> is not, in itself, incompatible with the proposition that clear time limits must be set to DIG.

LIMITS RATIONE TEMPORIS TO DIG & INELIGIBILITY AFTER TRANSITION – Besides these policy considerations, there is also a legal issue at stake here. The following cases evidence that the competent organizations, as well as the transitional authorities themselves, take a clear stance on the temporal scope of their powers. This mostly impacts transition leaders’ eligibility, which is generally repealed after the transition. In several cases, the interregnum is limited in time, and the ineligibility of office-holders after the transition (‘ineligibility-after-transition practice’) confirmed. This is true of transitions in Afghanistan, Burkina Faso, Burundi, Cambodia, Central African Republic, Comoros, Côte d’Ivoire, DRC, Guinea, Guinea Bissau, Iraq, Kyrgyzstan, Liberia, Libya, Yemen and Ukraine.

Transition instruments, and, as the case may be, the UNSC or regional organizations, impose temporal limits on DIG. The following observations, in a (roughly) chronological order, are only cursory, but may be skimmed or skipped by the reader who is only interested in the recapitulative overview of the limitations *ratione temporis* to the interregnum (see Table 8, below).

**1. In Cambodia, the Paris Agreement explicitly limits the transitional period<sup>934</sup>, and various UNSC resolutions repeat the limits *ratione temporis* to the interim rule<sup>935</sup>. No ineligibility**

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<sup>930</sup> J. Strasheim, H. Fjelde, 'Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies', *op. cit.*, p. 350.

<sup>931</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 28. This author adds: “[é]tablir un calendrier de la transition déterminant les étapes et les démarches à suivre durant un délai déterminé favorise les chances d’atteindre les buts souhaités, et de mener à bien le processus transitoire” (id., p. 61). Youssef mentions Lebanon (and the Taif Agreement) as a counter-example. See *id.* p. 101.

<sup>932</sup> *Id.*, p. 31.

<sup>933</sup> K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, p. 50. In the same sense, see J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 87. While Jackson writes that “a fair amount of time for deliberation, compromise, education, participation, and renewed discussion prior to efforts to solidify agreements in a comprehensive and final constitution is conducive to successful constitution-making in situations of serious post-conflict regime change”, she also warns that “comparison and generalization here are remarkably difficult, and turn out to be something of a quagmire. There are many confounding factors that may affect analysis and predictions in particular cases”. V. C. Jackson, ‘What’s in a name?’, *op. cit.*, pp. 1270-1271. In the same vein, Samuels argues that “supporting longer time-frames between the negotiation of peace agreements and constitutions” would “minimize the inherent tensions in a postwar constitution building”. K. Samuels, ‘Postwar constitution building’ in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 175.

<sup>934</sup> Paris Agreement, art. 1.

<sup>935</sup> S/RES/745 dd. 28 February 1992, § 3; S/RES/783 dd. 13 October 1992, § 2; S/RES/792 dd. 30 November 1992, Preamble § 3. Cf. also § 2.

requirements seem to have been inserted in the 1991 Paris Accords, yet it seems that the Supreme National Council was dissolved after the transition.

**2.** As regards the transition in Comoros, three different transition instruments explicitly limit the duration of the respective transitional periods<sup>936</sup>. Furthermore, the 1999 ‘Accords D’Antananarivo’ and 2001 *Accord-cadre de réconciliation nationale* both imply that the head of state or any member of government deciding to serve in the ‘transition government of national union’ (*Gouvernement d’union nationale de transition*) cannot present themselves at the following elections<sup>937</sup>.

**3.** In Burundi, the Arusha Agreement details when the interregnum is to start and to finish<sup>938</sup>. During this transition period, the Burundian authorities had the temporary responsibility for managing a step-by-step transition procedure<sup>939</sup>, in line with the ‘objectives of the transitional arrangements’. These objectives included “the holding during the transition period of elections”. On at least three occasions, the UNSC insisted on this. The relevant UNSC resolutions were at first only exhortatory in tone, but subsequently used wordings that were clearly binding<sup>940</sup>. On 31 May 2005, the UNSC, in unmistakable terms, “call[ed] on the Transitional authorities *strictly to adhere to this timetable*”<sup>941</sup>. The temporal limitations to the interregnum stem both from domestic legal texts (the Arusha Agreement, an intrastate agreement) and from international resolutions (UNSC resolutions). Like in the previous case, these limitations also apply to transition office-holders<sup>942</sup>.

**4.** In Afghanistan, public authority was exercised by two subsequent transitional authorities, the Interim Authority and Transitional Authority. In its preamble, the Bonn Agreement states that “these interim arrangements [...] are not intended to remain in place beyond the specified period of time”<sup>943</sup>. In the same vein, this agreement provides that “the Interim Authority *shall cease to exist* once the Transitional Authority has been established by the Emergency Loya Jirga”<sup>944</sup>, which, in turn, shall “lead Afghanistan until such time as a fully representative government can be elected through free and fair elections”<sup>945</sup>. In 2002, the UNSG accentuated these temporal limits<sup>946</sup>. The Afghan transitional authorities –the Interim Authority and

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<sup>936</sup> *Accords D’Antananarivo*, art. 3.b; *Accord-cadre de réconciliation nationale* dd. 17 February 2001, titre II, Cf. also artt. 15 and 17; *Accord sur les dispositions transitoires aux Comores* dd. 20 December 2003, titre III.

<sup>937</sup> *Accords D’Antananarivo*, art. 3.a. *Accord-cadre de réconciliation nationale* dd. 17 February 2001, III, art. 18.

<sup>938</sup> Arusha Agreement, art. 13.1.

<sup>939</sup> *Id.*, protocol II, Ch. II, ‘Transitional Arrangements’ (artt. 1 – 11).

<sup>940</sup> S/RES/1545 dd. 21 May 2004, Preamble, § 4; S/RES/1577 dd. 1 December 2004, Preamble, § 7; S/RES/1602 dd. 31 May 2005, Preamble, § 8.

<sup>941</sup> *Id.* In the post-transition period, too, the UNSC keeps a close eye on the electoral process. See for example S/RES/1858 dd. 22 December 2008, Preamble, § 6, and S/RES/1902 dd. 17 December 2009, Preamble, § 6.

<sup>942</sup> Arusha Agreement, Protocol II, Ch. II, art. 13. *Id.*, Ch. 1, art. 20, § 11.

<sup>943</sup> Bonn Agreement, Preamble, § 7.

<sup>944</sup> *Id.*, art. I.5.

<sup>945</sup> *Id.*, art. I.4.

<sup>946</sup> See ‘The situation in Afghanistan and its implications for international peace and security’, *Report of the Secretary-General* dd. 18 March 2002, S/2002/278: “[t]he participants in the loya jirga are to be drawn from all segments of society, and the representation of women and all ethnic and religious communities is to be ensured. The

Transitional Authority— were thus to follow a strict schedule in managing DIG and transferring the power to a full-fledged government. This did not translate in the ineligibility of the office-holders of the transition. While, to my knowledge, the office-holders of the transition had the possibility to be re-elected after the adoption of the constitution, this case constitutes an exception, as most of the following cases confirm the ineligibility-after-transition practice.

5. In the DRC, the duration of the transition was also legally restrained<sup>947</sup>. The Pretoria agreement however allowed for an extension of the interregnum:

“because of problems specifically linked to the organization of the elections, this period may be extended by six months, renewable once for a period of six months, if circumstances so require, on the recommendation of the Independent Electoral Commission and by a well-founded joint decision of the National Assembly and the Senate”<sup>948</sup>.

This excerpt, reiterated in similar wordings in the 2002 ‘Draft Constitution of the Transition’<sup>949</sup>, indicates that any extension of the interregnum must be justified in a bi-cameral decision, following the recommendation of an electoral commission. Any suspension of DIG would thus be the exception. On 24 January 2003, about a month after the signing of the Pretoria agreement, the UNSC insisted on a quick establishment of transitional authorities as a means to avoid the illicit exploitation of the country<sup>950</sup>. On 20 March 2003, the UNSC again insisted on a speedy establishment of the transitional authorities, and “stresse[d] that any effort to undermine or delay its establishment would be unacceptable”<sup>951</sup>.

When the transitional government called for a suspension of the transition, “those efforts encountered *strong opposition*, in particular from the Mouvement de libération du Congo (MLC) and the RCD-Goma representatives, as well as from the international community, and were subsequently *abandoned*”<sup>952</sup>. In the same sense, CIAT “exert[ed] political pressure for progress in areas of the transition where delays have been encountered”<sup>953</sup>. The UNSC consistently supported the transitional authorities<sup>954</sup>, while urging them to implement the transition according to the agreed timetable<sup>955</sup>. The above-cited Pretoria Agreement and UNSC resolutions unmistakably indicate that DIG must not be unduly prolonged.

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Transitional Authority is to lead Afghanistan until a fully representative government can be elected through free and fair elections, which are to be held no later than two years after the date of the convening of the emergency loya jirga. A constitutional loya jirga to ratify a new constitution is to convene within 18 months of the establishment of the Transitional Authority”.

<sup>947</sup> Pretoria Agreement, IV. Emphasis added.

<sup>948</sup> *Id.* Emphasis added.

<sup>949</sup> Draft Agreement of the Transition, art. 196.

<sup>950</sup> S/RES/1457 dd. 24 January 2003.

<sup>951</sup> S/RES/1468 dd. 20 March 2003.

<sup>952</sup> Third UNSG Special Report on DRC Mission, *op. cit.*, § 38.

<sup>953</sup> *Id.*, § 56.

<sup>954</sup> See, for example, S/RES/1555 dd. 29 July 2004.

<sup>955</sup> S/RES/1565 dd. 1 October 2004. S/RES/1592 dd. 30 March 2005. Cf. S/RES/1635 dd. 28 October 2005. See also S/RES/1621 dd. 6 September 2005 and UNSC S/RES/1592 dd. 30 March 2005.

The temporal limitations to the interregnum were translated into the ineligibility-after-transition practice, yet this limitation did not concern presidential power<sup>956</sup>. This exception was the subject of lengthy negotiations, and disconfirms the ineligibility-after-transition rule only with regard to the transition leader. This is the exception to the rule, and it should be emphasized that the DRC transition is the last case in which such an exception was made. Otherwise stated, following the completion of the DRC transition in 2005, said rule was effectively adopted in most subsequent transition procedures.

6. In Iraq, the ‘Agreement on Political Process’ of 15 November 2003 (‘APP’) determined beforehand that a ‘fundamental law’ was to announce its own expiration. The APP also foresaw a timetable for drafting Iraq’s constitution and for holding elections<sup>957</sup>. A detailed timetable was included in the TAL, which stated that “*no amendment* may be made that could [...] *extend the transitional period* beyond the timeframe cited in this Law; delay the holding of elections to a new assembly”<sup>958</sup>, clearly affirming the illegality of any extension of the interregnum. Furthermore, the APP provided that “the GC [Iraqi Governing Council] will have no formal role in selecting members of the assembly, and *will dissolve* upon the establishment and recognition of the transitional administration”<sup>959</sup>. The TAL provided that the CPA was also to be dissolved. The dissolution of the GC and then CPA seems to indicate that transition office-holders were not to take office or present for elections after completion of their assignment<sup>960</sup>.

7. In Côte d’Ivoire, the *Troisième accord complémentaire à l’accord politique de Ouagadougou* dd. 28 November 2007 schedules with precision according to which timetable specific tasks are to be carried out. The Ivoirian transition was in fact a double protracted transition followed by post-electoral unrest. A Government of National Reconciliation was installed following the 2003 Linas-Marcoussis Accord. In October 2005, presidential elections should have concluded this transition. Instead, it was prolonged, until the 2007 Ouagadougou Political Agreement was signed, which gave rise to a second transition headed by a transitional government. This power-sharing transitional government completed its mandate in December 2010. Controversial presidential elections then followed. Because of these protracted transitions, the UNSC protested and “express[ed] its deep concern at the *continuing delays* in the electoral process and the absence of a time frame for the holding of open, free, fair and transparent elections in Côte d’Ivoire”<sup>961</sup>. As to the ineligibility-after-transition rule, at

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<sup>956</sup> The 2002 ‘Draft Constitution of the Transition’, art. 200 provides that “with the exception of the President of the Republic currently in office, the political institutions stemming from statutory order No. 003 of May 27<sup>th</sup> 1997, cease to function once corresponding institutions envisaged in the present Constitution are actually installed”.

<sup>957</sup> Agreement on Political Process dd. 15 November 2003.

<sup>958</sup> TAL, art. 3.

<sup>959</sup> *Id.*, § 3.

<sup>960</sup> It is not clear whether members of the Iraqi Interim Government / Transitional Government were allowed to assume office or to be re-elected after the transitional period (if they were, this would constitute an exception to the otherwise confirmed practice that transition leaders are not re-eligible after the transition).

<sup>961</sup> S/RES/1933 dd. 30 June 2010.

least two instruments indicate that transition leaders were not to re-present themselves at the elections following the transition procedure<sup>962</sup>.

**8.** In Guinea, ECOWAS called “for the *speedy establishment of the NTC*”<sup>963</sup>. The ECOWAS summit furthermore took note of “the *commitment to conclude the transition in 2009* by organizing credible, free, fair and transparent elections”<sup>964</sup>. On 12 March 2009, several states and organizations convening under the umbrella of the International Contact Group on Guinea expressed their hope “that a clear timetable might be established with a view to holding elections by the end of 2009”<sup>965</sup>. On 16/17 July 2009, this contact group “urge[d] [it] to make immediate, concrete proposals towards the elimination of obstacles impeding the implementation of the timetable”<sup>966</sup>. Importantly, this contact group considered the non-compliance with the transition agenda as a potential violation of the AU Constitutive Act/Lomé Declaration on Unconstitutional Changes of Government<sup>967</sup>. The ineligibility-after-transition rule was repeatedly confirmed both by the transitional authorities themselves<sup>968</sup>, ECOWAS<sup>969</sup>, the various states and organizations of the International Contact Group on Guinea, the AU<sup>970</sup>, and the UNSC<sup>971</sup>.

**9.** In Libya, the Constitutional Declaration regulated the transition, including the adoption of the constitutional draft by referendum and the approbation of a permanent government<sup>972</sup>, in

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<sup>962</sup> Linas-Marcoussis Accord dd. 13 January 2003, art. 3.c. *Premier accord complémentaire à l'accord politique de Ouagadougou* dd. 27 March 2007, unnumbered.

<sup>963</sup> Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.1. Emphasis added.

<sup>964</sup> *Id.*, § 13.3. Emphasis added.

<sup>965</sup> S/2009/140 dd. 12 March 2009, § 9.

<sup>966</sup> S/2009/422 dd. 17 August 2009, § 4. Cf. also § 6.

<sup>967</sup> “The Group recalls the measures taken to date by the international organizations represented in the International Contact Group on Guinea. It underscores the determination of the Peace and Security Council of the African Union to apply the provisions of the Constitutive Act of the African Union and the Lomé Declaration on Unconstitutional Changes of Government if the Guinean authorities fail to take promptly, in line with the timetable, any necessary steps to restore constitutional order”, *Id.*, § 8. In the same sense, cf. ‘ECOWAS Leaders Call for Suspension of Legislative Elections in Niger, Want New Transition Authority in Guinea’, Press release No. 111/2009, 17 October 2009.

<sup>968</sup> ICC Report on Preliminary Examination Activities 2012: Camara “promised that the CNDD would transfer power after holding presidential and parliamentary elections. However, subsequent statements suggesting that Dadis Camara might run for president led to protests by opposition and civil society groups”. *Déclaration conjointe de Ouagadougou* dd. 15 January 2010, art. 8.

<sup>969</sup> Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.5.

<sup>970</sup> S/2009/422 dd. 17 August 2009, § 7. As to the members of this contact group: “In addition to the African Union and the Economic Community of West African States (ECOWAS), the following organizations attended the meeting: the United Nations, the International Organization of la Francophonie, the European Union, the Mano River Union, the Organization of the Islamic Conference, the Community of Sahelo-Saharan States (CEN-SAD) and the World Bank. Other participants included Angola, as President of the African Union Peace and Security Council and Nigeria, as Chairman of ECOWAS; African members (Burkina Faso and the Libyan Arab Jamahiriya) and permanent members of the United Nations Security Council (the United Kingdom, France, the Russian Federation, and the United States of America); and Spain”. S/2009/140 dd. 12 March 2009.

<sup>971</sup> See S/PRST/2009/27 dd. 28 October 2009 (statement by the UNSC president about Guinea).

<sup>972</sup> Indeed, “[t]he ‘Declaration of Liberation’ set in motion the transitional process outlined in the NTC’s Constitutional Declaration”. According to the International Commission of Inquiry on Libya, “on 12 February 2012

much detail<sup>973</sup>. On 11 March 2014, the Libyan parliament amended the constitutional declaration in order to prolong the transitional period<sup>974</sup>. On 6 November 2014, the Libyan Supreme Court held that this amendment was unconstitutional. In other words, the prolongation of the transitional period was held to be unconstitutional<sup>975</sup>. This judgment corroborates the finding that, as a matter of law, transitional periods may not lightly be suspended or prolonged. Furthermore, the ineligibility-after-transition was also confirmed in this case<sup>976</sup>.

**10.** The Yemen GCC Transition Agreement of 23 November 2011 ('GCC Agreement') defined the beginning and end of the interregnum. It provided in some detail which schedule had to be followed<sup>977</sup>, and divided the interregnum in two phases<sup>978</sup>. DIG in Yemen, however, failed. A constituent assembly proposed a draft constitution early in January 2015, which was rejected by the Houthi forces. On 6 February 2015 the 'Houthi revolutionary Committee' adopted its own 'Constitutional Declaration to organize the foundations of governance during the transitional period in Yemen'. This declaration foresaw a transition of (maximum) two years, including a reconstitutionalization process<sup>979</sup>. The 2011 GCC Agreement is not explicit about the ineligibility-after-transition practice<sup>980</sup>. As a matter of fact, Saleh did quit his position after the elections of 21 February 2012. After his removal from power, the second phase of the Gulf Cooperation Council's Initiative was initiated. Hadi, the former vice-president, was president since 27 February 2012, until the takeover by the Houthis in September 2014 and February 2015.

**11.** In Guinea Bissau, the *Pacto de Transição Política* of 16 May 2012 provides that the transition period lasts twelve months counting from its signature<sup>981</sup>. On 27 and 28 February 2013, ECOWAS however took the 'decision supporting the extension of the tenure of the

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the NTC adopted a Libyan Electoral Law; and elections for the National Congress are scheduled for June 2012". See the Report dd. 2 March 2012 of the International Commission of Inquiry on Libya, *op. cit.*, p. 49, §§ 97 a.f.

<sup>973</sup> *Id.*, art. 30.

<sup>974</sup> *General National Congress – Libya 7<sup>th</sup> Amendment to the Constitutional Declaration General National Congress (GNC)*.

<sup>975</sup> O. Hammady, M. Meyer-Resende, 'Saving Libya's Constitution-Making Body', Carnegie Endowment for international peace, 18 December 2014.

<sup>976</sup> 2011 Constitutional Declaration, art. 21 provides that "it shall be impermissible for any member of the Interim Transitional National Council to assume any executive public office".

<sup>977</sup> *Id.*, art. 6.

<sup>978</sup> 2011 Yemen Transition Agreement, artt. 7, 10.

<sup>979</sup> Houthi Constitutional Declaration: "[w]ithin a maximum period of two years, the State's transitional authorities shall work to reach the milestones of the transitional period in accordance with the outcome of the comprehensive National Dialogue Conference and the Peace and National Partnership Agreement. This includes reviewing the new draft constitution, enacting the laws required by the constituent assembly phase, holding a referendum on the constitution in preparation for the country's transition to a permanent status, and conducting parliamentary and presidential elections in accordance with the provisions of said constitution"

<sup>980</sup> Neither the 2015 Constitutional Declaration for that matter. Art. 12 of this declaration provides that "[t]he powers of the National Transitional Council and the Presidency Council shall be determined by a decree supplementing the Constitutional Declaration issued by the Revolutionary Committee", and its art. 9 provides that "[t]he bylaws of the National Transitional Council shall specify its system of work and the rights and duties of its members". For what it is worth, Decrees or bylaws may specify what are the limits to the powers of the office-holders of the Houthi National Transitional Council.

<sup>981</sup> *Pacto de Transição Política* dd. 16 May 2012, art. 1.3.

transitional organs in Guinea-Bissau'. ECOWAS' explicit endorsement of the extension of the interregnum marks the point that such extension is seen as an exceptional measure. Yet, about two months after this decision, the Brazilian delegation at a UNSC meeting opined:

“the international community needs to maintain pressure on the transitional authorities and on political and military leaders to achieve the swift adoption and implementation of a more inclusive transitional arrangement. [...] A prolonged period of transition is in nobody's interest and raises questions about the political will of the transitional authorities to find a sustainable solution to the current crisis”<sup>982</sup>.

When the transition was again suspended, the UNSC “urge[d] the Authorities in charge of the transitional period to ensure there is no further delay or postponement”<sup>983</sup>. In sum, the *Pacto de Transição Política*, ECOWAS' exceptional and explicit support for an extension of the transition, and the severe reaction by the UNSC point to the fact that, in principle, DIG procedures and schedules must be strictly followed. As to the ineligibility-after-transition practice, both ECOWAS<sup>984</sup> and the *Pacto de Transição Política*<sup>985</sup> confirm that the president and prime minister of the transition are not re-eligible.

**12.** In CAR, the *Déclaration de N'Djamena* of 18 April 2013 limits the duration of the interregnum. In April 2014, the UNSC pressured the transitional authorities to timely implement the transition roadmap<sup>986</sup>. Furthermore, on 3 April 2013, ECCAS had agreed that “none of the members of the Government or the NTC bureau would be eligible to run for the presidential elections at the end of the transition”<sup>987</sup>. The *Déclaration de N'Djamena* confirmed the post-transition-ineligibility rule, and extended it to all members of the transitional government and to the judges of the transitional constitutional court<sup>988</sup>. The (non-amendable) requirement of ineligibility was finally enshrined in the *Charte Constitutionnelle du 18 juillet 2013*<sup>989</sup>, and was also confirmed by the UNSC<sup>990</sup>.

**13.** In Burkina Faso, the *Charte de la Transition* confirms the temporal limitations to the interregnum. In February 2015, three months into the transition, the UN called on Burkina Faso's transitional institutions to follow the timeline set out in the Transition Charter, adding

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<sup>982</sup> S/PV/6963 dd. 9 May 2013, ‘The situation in Guinea-Bissau’.

<sup>983</sup> S/PRST/2013/19 dd. 9 December 2013.

<sup>984</sup> The ‘Final communiqué’ dd. 3 May 2012 of the ‘Extraordinary summit of ECOWAS heads of state and government’ held in Dakar, § 25.

<sup>985</sup> The *Pacto de Transição Política* dd. 16 May 2012, art. 5.3.

<sup>986</sup> S/RES/2149 dd. 10 April 2014, § 8. Cf. also S/RES/2127 dd. 5 December 2013, §§ 5 and 6. Emphasis added.

<sup>987</sup> Informal meeting of the Central African Republic configuration of the PBC Commission, Chairman's Summary, 16 May 2013, § 2.

<sup>988</sup> *Déclaration de N'Djamena* dd. 18 April 2013, Titre XI, art. 101: «[s]ont expressément exclus de la révision: [...] l'inéligibilité du Chef de l'État de la transition, du Premier ministre de transition, des membres du Gouvernement de transition et des membres du bureau du Conseil national de transition aux élections présidentielles et législatives organisées durant la transition ; l'inéligibilité des juges constitutionnels de transition et des membres du Haut Conseil de l'information et de la Communication de transition aux élections présidentielle et législatives [...]».

<sup>989</sup> *Charte Constitutionnelle*, 18 July 2013, art. 106.

<sup>990</sup> S/RES/2127 dd. 5 December 2013, § 3. Emphasis added.

that obstacles to the transition would not be tolerated<sup>991</sup>. The *Charte de la Transition* confirmed the ineligibility rules already enshrined in the *Avant-Projet de la charte de la transition*<sup>992</sup>. The ineligibility-after-transition is confirmed in the *Charte de la Transition* both for the president of the transition and the members of the transitional government<sup>993</sup>.

14. Temporal limitations to the interregnum also concern Kyrgyzstan<sup>994</sup>, Liberia<sup>995</sup> and Ukraine<sup>996</sup>, for instance. Towards the end of this part of the thesis, the legal value of this practice will be discussed. It suffices here to confirm that this practice seems to be relatively established, as the following recapitulative overview shows.

**TABLE 8: Overview limitations *ratione temporis* to interregnum**

Transition processes	Limitations transitional period	Ineligibility	Exhortation by UNSC to respect temporal limits
<b>Afghanistan</b>	Bonn Agreement, Preamble, § 7; art. I.4; art. I.5.	/	S/2002/278
<b>Burkina Faso</b>	Charte de la Transition dd. 16 November 2014, artt. 20, 21.	Charte de la Transition dd. 16 November 2014, artt. 4, 13, 16.	No UNSC resolutions in 2014 or 2015 (as of 1 June 2015).
<b>Burundi</b>	Arusha Agreement, protocol II, Chapter II, 'Transitional Arrangements' (artt. 1 – 11).	Arusha Agreement, Ch. 1, Art. 20, par. 11	S/RES/1545; S/RES/1577; S/RES/1602.
<b>Cambodia</b>	Paris Accords, art. 23.	Dissolution SNC.	S/RES/745, § 3; S/RES/783, § 2; S/RES/792, Preamble §3; §2.
<b>Central African Republic</b>	Déclaration de N'Djamena, § 4	Charte Constitutionnelle du 18 juillet 2013, art. 106.  S/RES/2127, § 3.	S/RES/2149, § 8 S/RES/2127, §§ 5 & 6.
<b>Comoros</b>	Accords d'Antananarivo', art. 3.b ;	Accords d'Antananarivo, art.	Double transition procedure. Pressure by AU (check).

<sup>991</sup> UN News Centre, 'International community 'will not tolerate' obstacles to Burkina Faso transition, says UN political chief', 4 February 2015.

<sup>992</sup> *Avant-Projet de la charte de la transition* dd. 9 November 2014, art. 2 provided in its second article : « [L]e Président de la transition occupe les fonctions de Président du Faso et de Chef de l'Etat. Il veille au respect de la constitution et de la charte de la transition. [...] *Son mandat prend fin avec la transition* ». Art. 4 of the same instrument provides: « [L]e Président de la transition n'est pas éligible aux élections présidentielles et législatives qui seront organisées à la fin de la transition ». Art. 12 provides: « [L]es membres du gouvernement de transition ne sont pas éligibles aux élections présidentielles et législatives qui seront organisées à la fin de la transition ». 'Burkina Faso Draft Transition Charter Drawn', AllAfrica 10 November 2014. Cf. also 'Charte de la transition : voici les propositions des partis politiques et de la société civile', Le Faso, 10 November 2014.

<sup>993</sup> Artt. 4, 13, 16.

<sup>994</sup> The transition in Kyrgyzstan was exceptionally short, only a few months. The ineligibility-after-transition practice was also confirmed in this case. Indeed, "[o]n May 19, the interim government proclaimed that Otunbayev would serve as interim president until a presidential election in December 2011, and that she will be ineligible to run in this election". J. Nichol, 'The April 2010 Coup in Kyrgyzstan and its Aftermath: Context and Implications for U.S. Interests', Congressional Research Service, 2010, p. 5.

<sup>995</sup> In Liberia, too, it seems that the "terms in office of the NTGL members were limited until the national elections in November 2005". N. Roehner, *UN Peacebuilding - Light Footprint or Friendly Takeover?*, *op. cit.*, p. 184.

<sup>996</sup> The Second Minsk Agreement dd. 12 February 2015 foresees a "constitutional reform by the end of 2015", i.e. the "[p]assing of a constitutional reform in Ukraine with the entry into force by the end of 2015 of a new constitution, which shall incorporate decentralization as a key element" (art. 9, art. 11).

	Accord-cadre de réconciliation nationale' dd. 17 February 2001, titre II;  Accord sur les dispositions transitoires aux Comores, I. Principes.	3.a.  Accord-cadre de réconciliation nationale' dd. 17 February 2001, III, art. 18.	
<b>Côte d'Ivoire</b>	Linás-Marcoussis Agreement, 3.a., IX.	Linás-Marcoussis Accord, art. 3.c.  Premier accord complémentaire à l'accord politique de Ouagadougou (unnumbered).	S/RES/1933.
<b>DRC</b>	Pretoria Agreement, IV.	Draft Constitution of the Transition, art. 200 (exception for President of the transition).	S/RES/1457; S/RES/1468; S/RES/1565; S/RES/1592; S/RES/1635.
<b>Guinea</b>	<i>Déclaration conjointe de Ouagadougou</i> , artt. 1-12.  ECOWAS Final communiqué 10/11 January 2009, artt. 13.1, 13.3.	<i>Déclaration conjointe de Ouagadougou</i> , art. 8.  ECOWAS Final communiqué 10/11 January 2009, par. 13.  S/2009/422, § 7. S/PRST/2009/27.	
<b>Guinea-Bissau</b>	ECOWAS Final communiqué 3 May 2012, § 21.  S/PRST/2013/19.	<i>Pacto de Transição Política</i> , art. 5.3.  ECOWAS Final communiqué 3 May 2012, § 25.	S/PRST/2013/19.
<b>Iraq</b>	Transitional Administration Law, artt. 2B, 58B, 59, 60, 61.  Agreement on Political Process.	Dissolution GC.	
<b>Kyrgyzstan</b>	Provisional Government Decree No. 19, 20 (April 2010).	Above-cited article by J. Nichol (text primary source not available).	
<b>Liberia</b>	Accra Comprehensive Peace Agreement, art. 35	Above-cited article by Roehner (text primary source not available).	
<b>Libya</b>	Constitutional Declaration art. 30. Libyan Supreme Court ruling dd. 6 November 2014.	Art. 21 of the 2011 Constitutional Declaration	
<b>Mali</b>	<i>Accord Cadre de mise en oeuvre de l'engagement solennel</i> , art 5.	TBC	
<b>Nepal</b>	Interim Constitution of Nepal, 2063 (2007), artt.1, 167, schedules 2, 3 (with reference to Comprehensive Peace Agreement dd. 22 November 2006).	TBC (transition not completed)	
<b>Rwanda</b>	Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front dd. 4 August 1993, artt. 3.1, 3.2.	TBC	
<b>Sierra Leone</b>	Lomé Agreement, art. X.	TBC	
<b>Somalia</b>	Somali Transitional Charter, Artt. 3.2, 3.3, 71.9.	TBC	
<b>South Africa</b>	Interim Constitution, art. 71.	TBC	
<b>Syria</b>	Coalition's Principles nr. 4;	TBC (transition not	

	Basic principles for a political settlement to the Syrian conflict, February 2015.	initiated)	
<b>Sudan</b>	Sudan Comprehensive Peace Agreement.		
<b>Ukraine</b>	Second Minsk Agreement, art. 11.	TBC (transition not aborted)	
<b>Yemen</b>	GCC agreement, artt. 6, 7, 10.	TBC (transition not aborted)	

The limitations *ratione temporis* to DIG have a (i) general and specific (ii) component. In all the cases above, transitional authorities' powers are limited in time. In most cases, transition leaders or even all transition office-holders are ineligible to hold office after the transition.

(1) PROHIBITION OF SUSPENSION OF INTERREGNUM; LINK WITH LIMITATIONS RATIONE MATERIAE TO DIG – As a general rule, transitional authorities must exercise their duties on a temporary basis, i.e. without suspending or delaying the interregnum and with the aim of being replaced. This rule should be seen in connection with the limited powers *ratione materiae* of transitional authorities, which will be studied in the following section. Limitations *ratione temporis* considerably diminish the course of action transitional authorities may wish to take. This can be illustrated, *a contrario*, by the following events that occurred in Ghana in the 1990s:

“unlike previous military regimes, the PNDC [Provisional National Defence Council] refused to declare its political neutrality. Instead, it openly sought to control the entire transition period and to give itself maximum advantage. While it accepted the report of the National Commission on Democracy (NCD) to return the country to constitutional rule, it did not commit itself to any timetable”<sup>997</sup>.

Similarly, in the DRC, elites “tried to prolong the transition for as long as possible, and to postpone the elections” only to continue war exploitations during the transition period<sup>998</sup>. These examples show how temporal and substantive limitations to the interregnum are connected.

INELIGIBILITY AFTER TRANSITION – A specific application of the temporal limits of the interregnum is that the leaders and office-holders of the transition are ineligible for office after its completion. This practice is relatively consistent, and has suffered only few, nuanced, exceptions in the past<sup>999</sup>. The ineligibility-after-transition practice is not a TJ measure, e.g. in the context of vetting procedures, and should not be invoked to justify long-term exclusions in

<sup>997</sup> E. Gyimah-Boadi, ‘Ghana – The Political Economy of ‘Successful’ Ethno-regional Conflict Management’ *in* S. Bastian and R. Luckham, *Can Democracy Be Designed?: The Politics of Institutional Choice in Conflict-Torn Societies*, Zed Books, 2003, p. 130. Emphasis added.

<sup>998</sup> M. de Goede and C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *op. cit.*, p. 120.

<sup>999</sup> In Afghanistan, Karzai was appointed during the transition procedure. In the DRC, the ineligibility rule was generally applicable, with the exception of the President. In Iraq, the GC was dissolved before the reigns were taken over by the interim council and transitional government. The more recent exception seems to concern Yemen where the ineligibility-after-transition was not explicitly enshrined in the 2011 GCC Agreement. Yet, Saleh *de facto* quit office (even if he continues to exert significant powers ‘behind the scene’).

the post-transition era<sup>1000</sup>. It does not target members from the pre-transition regime (contrary to, for instance, the De-Baathification process in Iraq; or to the vetting procedures in post-1989 Central and Eastern Europe). Instead, it bars DIG office-holders from taking office after completion of the transition.

**RATIONALE BEHIND INELIGIBILITY-AFTER-TRANSITION PRACTICE** – The rationale behind the ineligibility-after-transition practice is double. First, it ensures that transition office-holders do not have an incentive to trigger DIG only to monopolize power after the interregnum. Second, the transition procedure (purportedly) becomes de-politicized. The (appearance of) technocratic functionality characterizing the transition (as it characterized ITA before DIG became topical) is corroborated by the ineligibility-after-transition practice. For the same reason, in some cases the constituent assembly may not, during the interregnum, include sitting members of parliament<sup>1001</sup>.

In the same context, transition instruments may provide that transition office-holders are not allowed to buy or rent state property, or to conclude contracts with the state as suppliers or contractors<sup>1002</sup>. Such limitations on the legal capacity corroborate the fact that transition office-holders should not expect to gain personal advantages when holding power during the interregnum<sup>1003</sup>. The ineligibility-after-transition and correlative reduction of legal capacity discourage political actors from initiating DIG for personal or political advantages. In this sense, this practice is connected to, but distinct from, the prohibition contained in the African Charter on Democracy, Elections and Governance according to which “the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to

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<sup>1000</sup> In Egypt, the Supreme Constitutional Court declared a political exclusion law unconstitutional in 2012.

<sup>1001</sup> For Egypt, cf. Ruling Higher Administrative Court, April 2012.

<sup>1002</sup> See, for example, the Constitutional Declaration dd. 3 August 2011 regarding Libya, art. 21: “during the term of his membership, the member [of the Interim Transitional National Council], his wife or his sons may not buy or rent any State property or lease or sell to or barter with the State any of his own property, or conclude a contract with the State in his capacity as obligator, supplier or contractor”. This examples could be complemented with texts relating to the transition in Burundi.

<sup>1003</sup> Admittedly, in at least one case, i.e. Liberia, this has had the contrary effect. Roehner writes, with regard to the transition in Liberia, that “[a]s terms in office of the NTGL members were limited until the national elections in November 2005, they did not have a great interest in sustainable reforms but rather aimed at securing economic benefits for themselves”. N. Roehner, *UN Peacebuilding - Light Footprint or Friendly Takeover?*, *op. cit.*, p. 184. Mehler and Strasheim write: “[d]agegen gibt es Hinweise, dass wichtige Reformen gezielt verhindert wurden: Ehemalige Bürgerkriegsparteien in der Übergangsregierung Liberias [...] nutzten die Machtbeteiligten, um sich persönlich zu bereichern und eine grundlegende Justizreform zu blockieren”. N. Ansorg, F. Haass, A. Mehler, J. Strasheim, ‘Institutionelle Reformen zur Friedenskonsolidierung’, GIGA Focus, Nr. 6, 2012, p. 5. Papagianni seems to suggest that this could have been remedied by a wider participation in the NTGL: “[t]here is a very important role for third parties in the effort to expand political participation. Third parties need to advocate for wider participation because the members of power-sharing governments often have no interest in such efforts. The National Transitional Government of Liberia (NTGL) inaugurated in October 2003 demonstrates the attitudes of power-sharing elites. One rebel politician summarized the character of the NTGL as follows: ‘this is an administration for warring factions. They control the government. People need to accept this reality. Civilians have no role in the cabinet, they are virtually voiceless’ (ICG, January 2004, 13). Due to the lack of accountability mechanisms during the transitional period, the members of the NTGL devoted more attention to the division of the spoils of the state than to making and implementing public policies”, K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 50.

restore the democratic order or hold any position of responsibility in political institutions of their State”<sup>1004</sup>.

As already suggested, there is an interconnection between the temporal and substantial limitations to the interregnum. A transitional authority tempted to act *ultra vires* might only be able to do so by disregarding the limits *ratione temporis* to DIG. In other words, at times noncompliance with a pre-defined timetable may be the only way for a transitional authority to overstep its limited mandate. The following section addresses the limits *ratione materiae* on DIG.

## Section B. Limits *ratione materiae*

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THREE APPLICATIONS SUBSTANTIVE LIMITATIONS TO DIG – DIG is limited not only in time but also substantively. Practice indicates that transitional authorities do not have unbridled freedom in affecting acquired rights, adopting decisions for the present, or foreshadowing the future. In other words, transitional authorities cannot (utterly) defy the past, overstep their (limited) managerial mandate for the present, or take (full) grip on the future. The limitations *ratione materiae* influence their *marge de manoeuvre* in these three ways. These limitations will be addressed in reverse order, thus starting with those that concern the future.

Observation of practice indicates that transitional authorities must prepare for the future without exhaustively predefining it (1), respect the body of past laws and treaties even if reforms may be initiated (2), and execute the transition roadmap and administer the country on a provisional basis, including by restoring security (3).

### 1. Prepare for the future without entrenching it

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FOCUS ON PROCEDURES – Transitional authorities prepare for the future, generally by following a comparable roadmap<sup>1005</sup>: arranging an inclusive or participatory interregnum<sup>1006</sup>, setting up a constituent assembly for drafting a new constitution, organizing a referendum to adopt or reject the draft constitution, and preparing general elections after the constitution is adopted. These are among the core *procedural duties* of transitional authorities. In addition, just as pre-transition governments are sometimes barred from taking actions that would hinder the transition (e.g. in Rwanda<sup>1007</sup> and Burundi<sup>1008</sup>), transitional authorities must not negatively affect, or (firmly) entrench, their country’s future.

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<sup>1004</sup> African Charter on Democracy, Elections and Governance dd. 30 January 2007, art. 25.4. The distinction is emphasized because the transition procedures under scrutiny are not necessarily ‘unconstitutional’, but can also be nonconstitutional, as we have seen Chapter 3, Section A.

<sup>1005</sup> Chapter 4, Section A.2.3.

<sup>1006</sup> Chapter 6.

<sup>1007</sup> Peace Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front dd. 4 August 1993, art. 8: “[t]he current Government shall, in no case, take decisions which may be detrimental to the implementation of the Broad-Based Transition programme”.

AVOIDANCE OF OVERREGULATION IN TRANSITION INSTRUMENTS (POLICY CONSIDERATIONS) – The limited power in pre-defining the future concerns DIG in general, and constitutionmaking in particular. In short, there is a “need to separate discussions on [transitional] frameworks from debates on new constitutional arrangements”<sup>1009</sup>. With regard to constitutional arrangements enshrined in peace agreements, for instance, Papagianni argues:

“against the inclusion of fixed, long-term institutional arrangements in peace agreements. [...] [P]eace agreements should define the *processes through which* political leaders will reach decisions on constitutional arrangements, *but should not define the long-term constitutions themselves*”<sup>1010</sup>.

One way for avoiding the possibility that transition instruments entrench long-term institutional arrangements is simply by avoiding detail (an approach which, however, may also result in a protracted interregnum; the transition in Nepal being a case in point<sup>1011</sup>). If too detailed, transition instruments risk becoming ‘ossified’<sup>1012</sup>, which could come at the expense of other *ius in interregno* requirements, most notably that during the interregnum self-determination must be progressively realized<sup>1013</sup>.

PRECEDENT – The idea that unelected transitional authorities should not pre-empt or foreshadow the future is not new. In the early 1950s, in the context of the planned decolonization of Libya under UN assistance, UN Commissioner A. Pelt feared “the extent to which the Provisional Libyan Government, as yet unable to account for its actions to an Elected Parliament, could bind the future duly constituted Government”. Pelt thus proposed to limit the mandate of the provisional government:

“the Provisional Government, while assuming full responsibilities for all measures necessary during its period in office to build up federal governmental machinery, should *limit its other obligations to the strictest minimum*, so as to leave as much liberty of action as possible to the Government that would take office on the declaration of independence”<sup>1014</sup>

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<sup>1008</sup> 2000 Arusha Agreement regarding the transition procedure in Burundi, Protocol II, Ch. II, art. 22.8: “[t]he Government shall be responsible for the day-to-day government of Burundi during the interim period. If during that period the Government should, without the approval of the Implementation Monitoring Committee, take any of the actions indicated in subparagraphs (a)–(d) below, *such action may subsequently be reviewed by the transitional Government and, if found not to have been in the interests of good governance, summarily cancelled or reversed*”, emphasis added.

<sup>1009</sup> K. Papagianni, ‘Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation’, *Development in Practice*, vol. 15, no. 6, 2005, p. 747.

<sup>1010</sup> K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *Journal of Intervention and Statebuilding* vol. 3, nr 1, March 2009, p. 52. Own emphasis.

<sup>1011</sup> The 2007 interim constitution is very detailed, and, at the time of writing, the interregnum is still lingering.

<sup>1012</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 6, p. 10 (under ‘stickiness and scope’).

<sup>1013</sup> Chapter 6.

<sup>1014</sup> A. Pelt, *Libyan Independence and the United Nations: a Case of Planned Decolonization*, Carnegie Endowment for International Peace, 1970, p. 827. Emphasis added.

FOCUS ON ‘BIG PRINCIPLES’ – Subsequent practice confirms that transitional authorities, in light of their *fiduciary* or *commissarial* role for the present<sup>1015</sup>, have limited powers in pre-defining – other than procedurally – the future of their country. At maximum they may pronounce a set of general principles to which the coming constitutional order must conform. Jackson observed that “some transitional constitutions seek not only to entrench themselves as law for a short period of time, but also to advance entrenched principles or rules from which future constitution makers cannot depart”<sup>1016</sup>. The analysis of DIG in practice reveals that the pre-definition of broad supraconstitutional principles is the maximum allowed. The question *how* these principles are pre-defined is reserved for further below (to the extent that they are defined through inclusive or participatory practices, this should not pose a problem under international law)<sup>1017</sup>.

TRANSITION INSTRUMENTS OMITTING ANY REFERENCE TO ‘BIG PRINCIPLES’ – Many transition instruments however only determine which procedural steps must be taken during the interregnum *without* listing which supraconstitutional principles should predetermine the post-transition constitutional order (which would be the maximum allowed). Any transition instrument that does not list such principles would confirm the finding that transitional authorities must prepare for the future without being mandated to predefine the substance of the coming constitutional order. The following observation of practice however focuses on cases in which general principles concerning the post-transition were indeed consecrated in transition instruments. The list is therefore limited.

OBSERVATION OF PRACTICE – The practice of imposing limits *ratione materiae* to DIG was initiated throughout the 1990s in countries like Cambodia and South Africa. After the turn of the millennium, it was observed in countries including Burundi, Afghanistan, DRC, Iraq, Somalia, and Libya.

1. The 1991 Paris Agreement, which governed the transition in Cambodia, provided that the constitution must abide by a set of pre-defined rights and principles<sup>1018</sup>. It furthermore provided that “Cambodia will follow a system of liberal democracy”<sup>1019</sup>, but at the same time acknowledged that the “Cambodian people shall have the right to determine their own political future through the free and fair election of a constituent assembly, which will draft and

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<sup>1015</sup> Chapter 5, Section B.3.

<sup>1016</sup> V. C. Jackson, ‘What’s in a name?’, *op. cit.*, p. 1282.

<sup>1017</sup> Chapter 6.

<sup>1018</sup> Paris Agreement, Annex 5, especially § 2. “the constitution *will contain* a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments”

<sup>1019</sup> *Id.*, Annex 5, art. 4.

approve a new Cambodian Constitution”<sup>1020</sup>. In collaboration with UNTAC, the Supreme National Council was thus to facilitate the transition without however (fully) predetermining Cambodia’s political future.

2. Similarly, the 1994 South African interim constitution famously enshrined thirty-four general principles by which the definitive constitution had to abide<sup>1021</sup>. Jackson commented on this, observing that “the non-elected members of the South African Multi-party Negotiating Process decided on the thirty-four basic principles to which the later constitution must conform”<sup>1022</sup>. In the *Certification judgment*<sup>1023</sup>, the Constitutional Court controlled whether the draft constitution conformed to these principles, found that there was partly noncompliance, and referred the draft constitution back to the Constitutional Assembly.

3. In Burundi, the 2000 Arusha Agreement enumerated the principles according to which the post-transition Constitution was to shape this country. One of the ‘objectives of the transitional arrangements’ was precisely “to ensure the adoption of a post-transition Constitution that is in conformity with the constitutional principles”<sup>1024</sup>. Eleven such principles were listed under the chapter ‘Constitutional Principles of the Post-Transition Constitution’<sup>1025</sup>. Furthermore, the Arusha Agreement provided that long-term decisions taken by the interim government (until 1 November 2001) “found not to have been in the interests of good governance” could be reversed by the transitional government (from 1 November 2001 onwards), in particular when such decisions “have the effect of incurring financial obligations”<sup>1026</sup>. The aim of this provision was to preserve and protect Burundi’s future from ill-considered decisions taken during the first phase of the transition.

4. The same logic explains why, in 2001, “Afghanistan benefited from a clear transitional framework [...] which did not attempt to determine long-term constitutional principles”<sup>1027</sup>. Afsah and Guhr confirm that “the Bonn negotiations resulted in *very few substantive issues* being settled, but rather concentrated on laying down the time-table and the overall framework in which to proceed”<sup>1028</sup>.

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<sup>1020</sup> *Id.*, art. 12.

<sup>1021</sup> SA Interim Constitution, Schedule 4.

<sup>1022</sup> V. C. Jackson, ‘What’s in a name?’, *op. cit.*, p. 1282.

<sup>1023</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996).

<sup>1024</sup> Arusha Agreement, *op. cit.*, Protocol II, Ch. II, ‘Transitional Arrangements’ (artt. 1 – 11).

<sup>1025</sup> *Id.*, Protocol II, Ch. I, ‘Constitutional Principles of the Post-transition Constitution’ (artt. 12 – 22). These concern fundamental values (art. 1), general principles of law (art. 2), fundamental rights (art. 3), political parties (art. 4), elections (art. 5), the legislature (art. 6), the executive (art. 7), local government (art. 8), the judiciary (art. 9), the administration (art. 10), and defense and security (art. 11).

<sup>1026</sup> Arusha Agreement, Protocol II, Ch. II, art. 22.8.d.

<sup>1027</sup> K. Papagianni, ‘Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation’, *op. cit.*, p. 751.

<sup>1028</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, pp. 384-385.

5. In the same vein, the 2002 Pretoria Agreement regarding the transition in DRC only contains basic principles for a peaceful transition in the DRC<sup>1029</sup>.

6. In Iraq, the TAL contained key constitutional principles, but also went beyond that. It was “a full-fledged constitution that commits Iraqis to many important decisions that should have been left to the debate on the permanent constitution in a legitimate elected assembly”, Benomar notes<sup>1030</sup>. On 1 June 2004 an annex to the TAL was however issued, which provided that the “Iraqi Governing Council [IGC], as an interim government, will *refrain from taking any actions affecting Iraq’s destiny beyond the limited interim period*. Such actions should be reserved to future governments democratically elected by the Iraqi people”<sup>1031</sup>.

On 8 June 2004 the UNSC confirmed in similar wording that this limitation must be respected by the IGC<sup>1032</sup>, and reaffirmed the right of the Iraqi people “freely to determine their own political future”<sup>1033</sup>. For Wolfrum there is no doubt that this UNSC resolution referred to the constitutionmaking process, which was not supposed to be carried out by an unelected transitional authority<sup>1034</sup>. By stating that the IGC must refrain from predetermining Iraq’s future and that this power must be reserved to an elected Transitional Government, the UNSC unequivocally confirmed that the mandate of (unelected) transitional authorities is circumscribed.

7. In Somalia, two interim transition instruments came into force after the turn of the millennium. The 2004 Transitional Federal Charter “does not precisely define the respective competences of the federal government and federal units; nor does it name the territories that are to gain these various degrees of autonomy. These decisions were deferred to future negotiations”<sup>1035</sup>. This Charter did not result in the adoption of a constitution that could be endorsed by all of Somalia, yet, in 2012, the transition regulated by this Charter was declared ended. The 2012 Provisional Constitution provides that the “specific allocation of powers and responsibilities are subject to further negotiations”<sup>1036</sup>.

8. Regarding the transition in Libya, the Constitutional Declaration of 3 August 2011 regulated in detail how a constituent assembly, chosen by the National Public Conference, was to prepare a draft constitution, and how this draft was to be approved<sup>1037</sup>. This declaration did

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<sup>1029</sup> 2002 Pretoria Agreement, Part III.

<sup>1030</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, pp. 92-93.

<sup>1031</sup> TAL, Annex dd. 1 June 2004. Emphasis added.

<sup>1032</sup> S/RES/1546 dd. 8 June 2004, § 1.

<sup>1033</sup> S/RES/1546 dd. 8 June 2004, Preamble, § 3. See also S/RES/1511 dd. 16 October 2003.

<sup>1034</sup> R. Wolfrum, ‘Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’, Max Planck UNYB 9 (2005), p. 40: “[t]his refers to the constitution-making process which has to be under the responsibility of an institution which derives its legitimacy from general elections in Iraq”.

<sup>1035</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 21, observation by A.-S. Jama.

<sup>1036</sup> A. Ainte, ‘Somalia – Legitimacy of the Provisional Constitution’, *op. cit.*, p. 60. Refer to this article for more details about the precise issues which are subject to further negotiations.

<sup>1037</sup> Constitutional Declaration dd. 3 August 2011, art. 30.

not pre-define the long-term constitution itself. It broadly provided that “the State shall seek to establish a political democratic regime to be based upon the political multitude and multiparty system in a view of achieving peaceful and democratic circulation of power”<sup>1038</sup>, and enumerates a number of ‘rights and public freedoms’ to which the coming constitutional order was to conform<sup>1039</sup>.

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The above discussion and considerations unveil a relatively consistent practice: transitional authorities ‘midwife’<sup>1040</sup> the process of state transformation without pre-defining the coming constitutional order. At a maximum a set of general supraconstitutional (often international legal) principles can be pre-determined. These principles often reflect international legal principles, or refer to fundamental goals of the transition:

*“toute norme juridique ou toute règle de droit adoptant les valeurs de la démocratie et consacrant les droits fondamentaux est une norme ‘permanente’ qui reflète le but de la transition démocratique et qui ne peut être que ‘permanente’ dans le sens où elle est destinée à être ‘permanente’ et non temporaire”*<sup>1041</sup>.

While these goals are thus ‘permanent’ they cannot preempt the power of the people to reconstitutionalize their country<sup>1042</sup>. Being chiefly secondary norms, transition instruments define the method to be followed for reconstitutionalizing a state without pre-determining the contents of the new constitutional order. The above-cited policy proposal by Papagianni<sup>1043</sup> that such instruments should determine *how* the reconstitutionalization process takes place without fixing the (contents of) ensuing long-term constitutions is thus often verified in practice. As a relatively consistent practice –self-imposed and/or enjoined by the UNSC– the reserving of fundamental legal changes for elected bodies and/or for the post-transition stage is not only a policy question. It is potentially also a legal matter. This finding will be confirmed under Chapter 7.

**DIG AS FIDUCIA** – While preparing for major institutional changes, the leeway for substantively defining the post-transition constitutional order is limited. As mentioned above, DIG is best qualified as a *fiduciary* or *commissarial* type of administration. This finding triggers the question whether transitional authority may grant long-term concessions to foreign investors

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<sup>1038</sup> *Id.*, art. 4.

<sup>1039</sup> *Id.*, part II.

<sup>1040</sup> A word also used in K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 338.

<sup>1041</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 124. See also p. 125: “[i]l convient de mentionner que certaines règles de droit, malgré leur intégration dans des instruments provisoires ou intérimaires, sont porteuses d’un caractère permanent qui dépasse le cadre transitoire de l’instrument intérimaire où elles ont été adoptées. C’est le cas des règles constituant les fondements juridiques du nouvel ordre juridique et constitutionnel”.

<sup>1042</sup> Chapter 6.

<sup>1043</sup> See also, in about the same wordings, K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 51: “need to define the processes through which political leaders will reach decisions on constitutional arrangements without actually defining the long-term constitutions themselves”.

for the exploitation of natural resources. This question is reserved for a separate study on the socio-economy of DIG<sup>1044</sup>.

**CONSERVATION PRINCIPLE & BELLIGERENT OCCUPATION** – The fiduciary nature of DIG is reminiscent of –without being identical to– the prohibition of fundamental legislative and institutional change in situations of belligerent occupation<sup>1045</sup>. The same observation was made by Wolfrum with regard to the Iraqi transitional authorities<sup>1046</sup>. The fiduciary nature of DIG can be associated to the conservation principle, which authors have described as follows. Writing about the limited powers of occupiers' administration, Saul notes that “there is a clear emphasis on the indication of areas where administration must be conducted rather than on change and development. The expectation is that *change will be deferred* until the end of occupation. *Any attempts to make permanent changes would therefore be of doubtful legality*”<sup>1047</sup>. Boon confirms the principle of conservation: “occupiers are [...] obliged to protect the civilian population, by acting as trustees *and reserving fundamental political and legal changes to future governments* representing the occupied population”<sup>1048</sup>. For Cohen, the

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<sup>1044</sup> The available literature on transitions does not sufficiently take into account how socio-economic circumstances can determine DIG, Djaziri contends, or what the political economy is of DIG. M. Djaziri, 'Les défis économiques d'une société éclatée', *Moyen-orient, Libye, De la révolution au chaos*, nr. 25, Janvier-Mars 2015, p. 48. This is not to say that scholarship has disregarded the topic. See, for example, A. Wennmann, 'Sharing natural resource wealth during war-to-peace transitions' in P. Lujala and S. A. Rustad (eds.), *High-Value Natural Resources and Peacebuilding*, Routledge, 2011. It is not self-evident, however to find legal analyses on the topic. In the same vein, Enterline and Greig observe that “the survival of democracy is strongly conditioned by the process by which the regime is imposed and the social and economic conditions present in the state hosting the imposed polity”. A. J. Enterline and J. M. Greig, 'Against All Odds? The History of Imposed Democracy and the Future of Iraq and Afghanistan', *Foreign Policy Analysis*, 2008, 4, 321–347. Transition instruments have explicitly addressed socio-economic matters like the return of property to refugees (e.g. in the context of the Burundi transition) or to disadvantaged swaths of the population. In the South African context, the transition resulted in the incorporation of a good number of progressive socio-economic rights into the 1996 Constitution, but left land reform issues largely unaddressed. In transition settings, the question often arises whether TJ should also pursue a redistributive aim, i.e. the reordering of material resources to correct past injustices resulting from socio-economic disparities. Experts like Haysom and Kane recommend that the division or sharing of natural resources should be explicitly addressed in transition instruments (as was done, for instance, in the context of the Sudanese, and in less detail the South African transition): “particularly in situations where natural resources are or may have been a driver of conflict, the handling of natural resources should be a central component of subsequent peace or constitutional negotiations”. N. Haysom, S. Kane, 'Negotiating natural resources for peace: ownership, control and wealth-sharing', *Center for Humanitarian Dialogue*, 2009. Cf. also IDEA, *Oil and Natural Gas: Constitutional Frameworks for the Middle East and North Africa*, 2015.

<sup>1045</sup> *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, art. 64, which enshrines a 'prohibition of fundamental legislative and institutional change'. See also *Hague Convention (IV) respecting the Laws and Customs of War on Land*, 18 October 1907, artt. 43 and 55. The fiduciary nature of DIG could also be approximated to the fact that ITA also has a conservation function, and is limited by that. See I. Prezas, *L'administration de collectivités territoriales par les Nations Unies – Etude de la substitution de l'organisation internationale à l'état dans l'exercice des pouvoirs de gouvernement*, *op. cit.*

<sup>1046</sup> R. Wolfrum, 'Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference', *op. cit.*, p. 40.

<sup>1047</sup> M. Saul, 'The Impact of the Legal Right to Self-Determination on the Law of Occupation as a Framework for Post-Conflict State Reconstruction' in N. Quinivet, S. Shah-Davis, *International Law and Armed Conflict*, *op. cit.*, p. 298 a.f. Emphasis added.

<sup>1048</sup> K. E. Boon, 'Obligations of the New Occupier: The Contours of Jus Post Bellum', *op. cit.*, p. 60.

principle of self-determination, to which we shall come back, underpins the limited legislative and institutional powers of occupying forces<sup>1049</sup>.

CONSERVATION PRINCIPLE & DIG – To a lesser degree and under a more nuanced form, the conservation principle also applies to DIG. Transitional authorities have to exercise self-constraint. They may prepare for the future without holding it hostage. This is what relatively consistent practice shows, what the UNSC occasionally confirms, and what scholarship –with Papagianni being vocal– generally commends. Apart from the prohibition on leaving a detailed imprimatur on the successor constitutional order, the conservation principle *cum* fiduciary nature of DIG entails two other consequences. First, transitional authorities must focus on their primary task –completing the transition procedure– while remaining attentive to running the state on a daily basis. This will be discussed further below<sup>1050</sup>. Second, except where it relates to the transition procedure as such, DIG should not, in principle, negatively affect the legal position of third states or of private persons. This point will be developed now.

## 2. Respect the past vis-à-vis third states and private persons

STATE CONTINUITY DESPITE TRANSITIONAL CONSTITUTIONALISM – State continuity<sup>1051</sup> and the respect of acquired (private) rights demand that transitional authorities, even if they introduce a break with history, respect the past in certain regards. Transitional authorities must strike this balance. This section argues that it would be inaccurate to say that (even oppositional) transitional constitutionmaking is “ultimately unrestricted by the old legal order”<sup>1052</sup>, and it is no coincidence that many transition instruments contain explicit references to preceding constitutional systems<sup>1053</sup>. Post-sovereign constitutionmaking purports to avoid the “legal and institutional state of nature”<sup>1054</sup>, and a reference to existing law may contribute to this goal.

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<sup>1049</sup> J. L. Cohen, ‘Sovereignty and human rights in ‘post-conflict’ constitution-making: toward a *jus post bellum* for ‘interim occupation’, *op. cit.*, p. 223: “if post-conflict constitution-making is to be an exercise in self-determination instead of foreign imposition, if the sovereignty of the occupied state and people is to remain intact while that state and the constitution is being reconstructed, then occupying forces *must not themselves engage in expansive legislative and institutional changes that pre-empt autonomous political decision-making by the occupied regarding the nature of their political, social, and economic regime*”.

<sup>1050</sup> Chapter 5, Section B.3.

<sup>1051</sup> See, generally, A. Zimmermann, ‘Continuity of States’, MPEPIL. State continuity does not pose a particular problem when profound regime changes are not accompanied by territorial changes, which had been the case with the Italian reunification, the post Second World War Germanies, the Baltic states, etc. As state continuity is assured in all cases under scrutiny, there are no issues of state succession coming up – these are mutually exclusive legal institutions. Wimmermann has observed that “[s]tate practice has over time always confirmed that any such internal changes are irrelevant for purposes of international law” (*id.*). Referring to transitions from Tsarist to communist Russia (1917), from the Ottoman Empire to the Turkish Republic (1921), from republican Spain to Francoist Spain (1937), and from federal to unitary Indonesia (1950), and from the Japanese empire to post-War Japan, Verzijl notes that in spite of important constitutional changes these states remained the same persons, and their “international rights and obligations subsist in principle unaltered”. J. H. W. Verzijl, *International law in historical perspective*, *op. cit.*, pp. 118–119. Cf. also, about state continuity and interim governments, S. Gemma, ‘Les gouvernements de fait’, *op. cit.*, p. 342. And, about state continuity and *de facto* governments, N. Henry, *Les gouvernements de fait devant le juge*, *op. cit.*, § 185.

<sup>1052</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 427.

<sup>1053</sup> Chapter 3, Section A.1 with reference to Afghan and Somali transition instruments.

<sup>1054</sup> A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 541.

NO TABULA RASA – The nonconstitutional origin and supraconstitutional function<sup>1055</sup> of DIG is not at odds with the principle of state continuity. Transitional authorities are to introduce a state transformation, not engage in state creation. The supraconstitutional function of transition instruments leaves ordinary legislation and previously concluded treaties generally untouched (this is also why post-conflict “constitution-drafting processes [...] should be carefully *aligned* with existing legal provisions”<sup>1056</sup>). Transitional authorities are not in the position to repeal or terminate these instruments *en bloc*. There is no *tabula rasa*. Just as post-transition governments inherit from (successful) transitional authorities, as the transition in Liberia illustrates<sup>1057</sup>, transitional authorities, too, need to ensure a level of continuity with the previous legal order. This continuity concerns both the international and domestic legal plane, and is upheld in deference both to third states and private interests.

TREATIES REMAIN IN FORCE – As a general principle, the principle of state continuity remains applicable in times of transition, regardless whether care was taken to enshrine this principle in the relevant transition instruments. Various transition instruments do reiterate that international treaties, for instance, must be upheld. In the DRC, the 2002 Draft Constitution of the transition specified that the delegates of the Inter-Congolese Dialogue would respect international and regional legal instruments already ratified by the DRC<sup>1058</sup>. Similarly, the 2004 Somali Transitional Charter provides that “the Transitional Federal Government of the Somali Republic shall uphold all bilateral agreements concluded by the Somali Republic”<sup>1059</sup>. State continuity also explains why during September 2011 the UNSC, in the context of the Libyan transition, unequivocally “call[ed] upon the Libyan authorities to honor extant contracts and obligations”<sup>1060</sup>. The *Pacto de Transição Política* dd. 16 May 2012 regarding the transition in Guinea-Bissau also provided that the transitional authorities were to respect international treaties previously concluded<sup>1061</sup>. When the Venice Commission issues opinions on draft constitutions, it consistently advises that the principle of legal continuity and respect for existing treaties be part of the final constitutions<sup>1062</sup>. Further, post-transition constitutional texts generated by DIG often refer to the continuing validity of treaties and, more generally, confirm the preeminence of international law<sup>1063</sup>. Unless, under the strict conditions imposed by the VCLT, the initiation of DIG is successfully presented as a ‘supervening impossibility of performance’<sup>1064</sup> or a ‘fundamental change of circumstances’<sup>1065</sup>, treaties concluded prior to the interregnum remain in force.

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<sup>1055</sup> Chapter 3, Section A and Section B, respectively.

<sup>1056</sup> L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.* Emphasis added.

<sup>1057</sup> The Accra Agreement, regarding the transition in Liberia, provides that “[a]ll legal obligations of the transitional government shall be inherited by the elected government”. Cf. Accra Agreement, art. 35.e.

<sup>1058</sup> These delegates reaffirm their “attachment to [...] all international and regional legal instruments adopted within the framework of the United Nations Organisation and of the African Union duly ratified by the Democratic Republic of Congo” Cf. 2002 Draft Constitution of the Transition, Preamble.

<sup>1059</sup> 2004 Somali Transitional Charter, art. 69.

<sup>1060</sup> S/RES/2009 dd. 16 September 2011.

<sup>1061</sup> *Pacto de Transição Política* dd. 16 May 2012, art. 1.2.

<sup>1062</sup> See e.g. Opinion 733/2013 on the final draft constitution of the Republic of Tunisia (2013), §§ 38 – 40.

<sup>1063</sup> Chapter 7, Section A.

<sup>1064</sup> VCLT, art. 61.

**BULK OF DOMESTIC LEGISLATION REMAINS VALID** – Several transition instruments confirm that the major part of domestic law enacted by the previous regime remains in place. In 1992, before the South African transition (1994 to 1997) even started, “the Government and the ANC agreed that during the interim/transitional period there shall be *constitutional continuity* and no constitutional hiatus”<sup>1066</sup>. In Burundi, the 2000 Arusha Agreement provided that “for purposes of continuity, all laws in force prior to the commencement of the transition shall *remain in force* until amended or repealed”, but provided for the possibility of reviewing legislation contrary to the transitional arrangements<sup>1067</sup>. In the DRC, the 2002 Draft Constitution of the Transition provided that “legislation currently in force, where it is not contrary to the Transitional Constitution, remains applicable for as long as it is not amended or repealed”<sup>1068</sup>. In Liberia, the 2003 Accra Agreement provided that “all suspended provisions of the Constitution, Statutes and other laws of Liberia, affected as a result of this Agreement, shall be *deemed to be restored* with the inauguration of the elected Government by January 2006”<sup>1069</sup>. In Côte d’Ivoire, previous laws, including controversial ones like the ‘Law 98-750 of 23 December 1998 on Rural Land Tenure’<sup>1070</sup>, were in principle upheld<sup>1071</sup>. In Iraq, the 2004 TAL provided that “except as otherwise provided in this Law, the laws in force in Iraq on 30 June 2004 *shall remain in effect* unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law”<sup>1072</sup>. To the extent that there is no incompatibility with supraconstitutional transition instruments, continuity is the rule while rescission or amendment is the exception.

**PROTECTION ‘DROITS ACQUIS’** – State continuity protects the legal position of third states as well as the private interests of the state’s citizens, and the acquired rights of foreign investors. This need not be explicitly recognized, even if at times transition instruments have done so. In the context of the Rwandan transition process, for example, the right of refugees to repossess their properties was confirmed explicitly<sup>1073</sup>. The protection of private property, generally, was also confirmed on the occasion of transitions in Burkina Faso<sup>1074</sup> and CAR<sup>1075</sup>.

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<sup>1065</sup> VCLT, art. 62.

<sup>1066</sup> Record of Understanding between ANC and Government dd. 26 September 1992.

<sup>1067</sup> Arusha Agreement, Protocol II, Ch. II, art. 16: “[t]he transitional National Assembly shall as a priority review all legislation in force with a view to amending or repealing legislation incompatible with the objectives of the transitional arrangements and the provisions of the present Protocol”.

<sup>1068</sup> Draft Constitution of the Transition, art. 203.

<sup>1069</sup> Accra Agreement, Part 10 ‘Implementation of the Peace Agreement’, art. XXXV, e. For a discussion, cf. E. P. Morgan, ‘Interim Government in Liberia - Peace Building toward the Status Quo’, in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 195.

<sup>1070</sup> Linas-Marcoussis Accord dd. 13 January 2003, art. IV.1.

<sup>1071</sup> The continuity of domestic legislation of course does not amount to an interdiction of any reform. It was for instance decided that: “[t]he Government of National Reconciliation will within one year *overhaul* the general regime governing the press so as to strengthen the role of the regulatory authorities, guarantee neutrality and impartiality of the State broadcasters and foster the financial independence of the media”. Linas-Marcoussis Accord dd. 13 January 2003, art. V.2. Emphasis added.

<sup>1072</sup> TAL, art. 26. Emphasis added.

<sup>1073</sup> Protocol of Agreement between the Government of Rwanda and the Rwandese Patriotic Front on the Repatriation of Rwandese Refugees and the Resettlement of Displaced Persons dd. 9 June 1993, art. 4: “All refugees

**NAMIBIA PRINCIPLE** – In the same vein, citizens’ rights and their legitimate expectations require that acts such as the registration of births, deaths and marriages concluded under the previous order not be invalidated by the transitional authorities. The perspective of the citizen as point of reference during temporary administration is not unknown in international law. It was central to the ICJ’s ruling that South Africa’s administration of the Namibian territory could not affect the validity of acts “the effects of which can be ignored only to the detriment of the inhabitants of the Territory”<sup>1076</sup>.

**NAMIBIA PRINCIPLE APPLICABLE TO DIG** – Even against the background of a state renaissance, transitional authorities generally do not question the validity of private acts like those just mentioned. The ‘Namibia principle’ can be applied *mutatis mutandis*, it is suggested, to DIG. If interpreted extensively, this principle may also explain why contracts or concessions granted by transitional authorities may be rescinded if they manifestly conflict with the citizens’ interests. Thus, when government officials of the Liberian National Transitional Government (allegedly) committed fraud and misappropriated \$1.3 million –manifestly overstepping their mandate to the detriment of the citizenry– a good number of contracts and concessions were reviewed and sometimes cancelled by states and organizations<sup>1077</sup>.

**PROTECTION COMMERCIAL & FINANCIAL INVESTMENT** – Furthermore, foreign investors enjoy protection against governmental changes of revolutions, including in a transition setting, Fink observes<sup>1078</sup>. This is in line with the 1923 Tinoco arbitration case<sup>1079</sup>. If investors’ rights are

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shall therefore have the right to repossess their property on return. [...] refugees who left the country more than 10 years ago should not reclaim their properties, which might have been occupied by other people. The Government shall compensate them by putting land at their disposal and shall help them to resettle”. The fact that this issue is related to the transition procedure as such is evidenced in artt. 34-35 of this protocol, which links the repatriation program to the establishment of the Broad-Based Transitional Government.

<sup>1074</sup> [‘ECOWAS names contact group on Burkina Faso’](#), ECOWAS press release, 7 November 2014.

<sup>1075</sup> *Déclaration de N’Djamena*, art. 7.

<sup>1076</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, § 125.

<sup>1077</sup> C. Bruch et al., ‘International Law, Natural Resources and Post-Conflict Peacebuilding: From Rio to Rio+20 and Beyond’, *Review of European Community & International Environmental Law* 21, no. 1, April 1, 2012, p. 50: “the World Bank and other donors insisted on –and the transitional Liberian government ultimately accepted– putting in place the Governance and Economic Management Assistance Program (GEMAP) to *review all contracts and concessions granted by the transitional government* as well as the first few years of the new government. GEMAP applied to international accounting, financial management and transparency standards to all concessions and contracts, not just those relating to timber or other natural resources. *The reviews led to the cancellation or renegotiation of fifty contracts* and the approval of fifty-two contracts, yielding a substantial improvement in the proportion of concessions and contracts meeting minimum legal standards. While this may have yielded improved outcomes, it also was intrusive – all contracts required two signatures: one from the relevant Liberian official and one from the World Bank”. Emphasis added. Saul writes: “Charles Gyude Bryant, former Chairman of the National Transitional Government of Liberia, stands charged with economic sabotage for misappropriating \$1.3 million during his tenure is a further illustration of the inherent risk that the international involvement will put a self-interested government in control of the state in question”. M. Saul, ‘From Haiti to Somalia’, *op. cit.*, p. 139. Note that Bryant was acquitted in April 2009, and further charges were dropped during September 2010.

<sup>1078</sup> M. Fink, ‘Grenzen des arabischen Wandels aufgrund von Investitionsschutzrecht?’, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, HJIL, vol. 72, N° 3, 2012, pp. 483-519.

<sup>1079</sup> *Great Britain v Costa Rica*, 1 U.N. Rep. Int’l Arb. Awards 369, 1923.

not respected during the interregnum, the international responsibility of the transitional authority or the successor government may be engaged on the basis of general international law and/or of specific investment-protection regimes. The Libyan transitional authorities, for instance, were to exercise due diligence in protecting the rights of investors. Dozens of states and organizations represented in the ‘International Contact Group for Libya’<sup>1080</sup> thus “welcomed the commitment of the NTC to [...] honor any existing legal contracts signed under the Qaddafi regime”<sup>1081</sup>. On the basis of the due diligence principle, and of a joint Italian-Libyan declaration dated 21 January 2012<sup>1082</sup>, foreign investors could vindicate their rights, Francioni argued, concluding that:

*“nonostante le incertezze sul piano politico e la fluidità sul campo in Libia, l’Italia ha buoni argomenti per tutelare i diritti degli investitori in Libia sulla base dei trattati in vigore e avrebbe sia l’interesse, sia buoni argomenti giuridici per sostenere la perdurante operatività dei trattati in vigore”*<sup>1083</sup>.

ODIOUS DEBTS – The protection of investment can also be invoked by financial institutions. This would even apply to so-called ‘odious debts’ contracted by previous regimes, Howse argues. For this author, the theory of the odious debt generally confirms that, outside the context of state succession, “relationships with financial institutions that had odious dealings with the previous regime [*should be continued*] when the economic and financial stability of the transition suggests such a course of action”<sup>1084</sup>. This rule is however not absolute for Howse as its application also depends on the question whether the contracting of the debt was beneficial for the population concerned. Howse adds that a ‘special transitional tribunal’ should be created to consider claims in relation to odious debts in contexts of transition<sup>1085</sup>.

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The above indicates that the principle of state continuity is not fundamentally challenged by transition procedures, even if such procedures purport to realize a state transformation. This principle imposes restraint and prudence when managing state affairs. It protects the legal position not only of any state entertaining a *Rechtsverhältnis* with the transition country, but

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<sup>1080</sup> Including the Arab League, the EU, the GCC, the NATO, and the UN.

<sup>1081</sup> U.S. Dep’t of State Press Release, Fourth Meeting of the Libya Contact Group - Chair’s Statement dd. 15 July 2011, § 12.

<sup>1082</sup> F. Francioni, ‘Lo status del transitional national council della Libia e gli effetti del cambiamento di regime sui diritti degli investitori esteri’, *Giornate di Studio sulla Libia*, La Comunità internazionale, p. 32.

<sup>1083</sup> *Id.*, p. 36. Emphasis added.

<sup>1084</sup> R. Howse, ‘The concept of odious debt in public international law’, UN Conference on Trade and Development, Discussion Papers, July 2007, No. 185. J. Crawford, on the other hand, has briefly argued that a possibility “might be to develop a system under which third parties dealing with a grossly unrepresentative regime would be required to take the risk of doing so. This would apply both to States and to private parties, including corporations. It would put them on a notice that if they wish to deal with a regime lacking any legitimacy or popular support, they would take the risk of the review of the transaction by a subsequent representative government”, J. Crawford, ‘Democracy and the body of international law’ in G. H. Fox, B. R. Roth, *Democratic Governance and International Law*, *op. cit.*, p. 109.

<sup>1085</sup> R. Howse, ‘The concept of odious debt in public international law’, *op. cit.*, p. 4, p. 25.

also of state citizens legitimately expecting that their rights not be fundamentally altered during or after the interregnum; and of third investors, for similar reasons.

Not unlike belligerent occupiers<sup>1086</sup> or ITAs<sup>1087</sup>, transitional authorities act, in a sense, as *trustees* also of third-state and private interests. This reflects the fiduciary nature of DIG. It echoes the idea of ‘stewardship’ which Boon deems central to *ius post bellum*, and which “require[s] that administrators respect the rights and safeguard the interests of inhabitants under their purview. This obligation entails acting in the best interests of the populations concerned”<sup>1088</sup>. In the context of DIG the “weakness of constitutional authority”<sup>1089</sup> or issues with regard to applicable law<sup>1090</sup> cannot be invoked by transitional authorities to deny third-state or private interests. Notwithstanding the transformative nature of DIG, their legal position remains in principle unaltered. Even if transitional authorities rupture with history, they have to respect the past in this sense.

### 3. Administer the country during the transition, and ensure security

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**DOUBLE TASK OF TRANSITIONAL AUTHORITIES** – The legal instruments founding and regulating transitions mostly foresee that transitional authorities have to fulfill two tasks, and bear domestic responsibility for them. First, stick to their main assignment, i.e. bringing the transition –including the constitutionmaking process– to completion. Second, ensure the day-

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<sup>1086</sup> The principle of ‘conservationism’ in international humanitarian law and ‘stewardship’ during transitional periods, which Boon deems central to *ius post bellum*: Conservationism: “Occupiers are [therefore] obliged to protect the civilian population, by acting as trustees and reserving fundamental political and legal changes to future governments representing the occupied population”. (K. E. Boon, ‘Obligations of the New Occupier: The Contours of Jus Post Bellum’, *op. cit.*, p. 60); Stewardship “require that administrators respect the rights and safeguard the interests of inhabitants under their purview. This obligation entails acting in the best interests of the populations concerned, because local populations are vulnerable to the risk of misconduct” (*id.*, p. 81). While introducing major constitutional changes, interim rule is thus based on a fiduciary or commissarial type of administration. This is reminiscent of situations of belligerent occupation (cf. *Hague Convention (IV) respecting the Laws and Customs of War on Land* dd. 18 October 1907, artt. 43 and 55; *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, art. 64, enshrining a ‘prohibition of fundamental legislative and institutional change’). For Saul, “[t]here is a clear emphasis on the indication of areas where administration must be conducted rather than on change and development. The expectation is that *change will be deferred* until the end of occupation. *Any attempts to make permanent changes would therefore be of doubtful legality*” (M. Saul, ‘The Impact of the Legal Right to Self-Determination on the Law of Occupation as a Framework for Post-Conflict State Reconstruction’, in N. Quinivet, S. Shah-Davis, *International Law and Armed Conflict*, *op. cit.*, p. 298 a.f. Emphasis added).

<sup>1087</sup> For Diamond, “[a]ll international post-conflict interventions to reconstruct a failed state on democratic foundations confront a fundamental contradiction. Their goal is, in large measure, democracy –popular, representative, and accountable government in which “the people” are sovereign. Yet their means are undemocratic – in essence, some form of imperial domination, however temporary and transitional. How can the circle be squared? Chesterman advises that when the United Nations and other international actors come “to exercise state-like functions, they must not lose sight of their *limited mandate* to hold that sovereign power in trust for the population that will ultimately claim it”. This requires a balancing of international *trusteeship* or imperial functions with a distinctly non-imperial attitude and a clear and early specification of an acceptable timetable for the restoration of full sovereignty”, L. Diamond, ‘Building Democracy After Conflict. Lessons from Iraq’, *Journal of Democracy*, 16(1), 2005, pp. 9–23.

<sup>1088</sup> *Id.*

<sup>1089</sup> R. Sannerholm, *Rule of Law after War and Crisis*, Series of Transitional Justice, Intersentia, Cambridge, Antwerp, Portland, 2012.

<sup>1090</sup> *Id.*

to-day conduct of state affairs, i.e. essential government services, which includes the core business of the Weberian state: demilitarizing politics, monopolizing legitimate force, providing security, and restoring effective control over the state territory. The limitation of DIG on the basis of this double assignment has a notable precedent: the powers of the 1814 French provisional government<sup>1091</sup>. The portfolio of transitional authorities is thus limited: do not lose sight of daily business and priorities and in the meantime pursue state transformation.

(1) SEEING TO COMPLETION OF THE TRANSITION ROADMAP – First and foremost, transitional authorities have the ultimate responsibility for completing the transition procedure. This is not limited to constitutionmaking –a task to be delegated to a constituent assembly– but also involves organizing surrounding activities, such as national dialogues, referenda, and elections. Moreover, these activities should be ‘inclusive’ and aim at progressively realizing the principle of internal self-determination, as we shall see further below<sup>1092</sup>. In this subsection we shall see that transitional authorities in principle bear sole responsibility for carrying out these activities. As the UNSC and UNGA have confirmed, this remains so even if DIG is subject to international influence (cf. the ‘assistance model’ introduced under Chapter 1)<sup>1093</sup>.

(2) SEEING TO DAILY RUNNING & SECURITY OF THE STATE – The second task –daily business and provision of security– is reminiscent of the function of caretaker governments<sup>1094</sup> in running day-to-day affairs and, as part of their daily concerns, maintaining public order and safety. As they often cope with considerable security issues, transitional authorities purport to restore (full) effective control over state territory (which sometimes includes safeguarding cultural heritage<sup>1095</sup>) during the interregnum. Transitional authorities bear the primary responsibility for ‘going through Hobbes’. Considering the volatile environments they work in, their efforts do not always succeed. The quasi-symbolic securization of the capital city in some states,<sup>1096</sup> or the need to rely on an international presence so as to dissipate physical threats to the transition<sup>1097</sup>, are cases in point.

In order to restore control and security over state territory, transitional authorities execute disarmament, demobilization and reintegration programs (‘DDR’). These programs are now

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<sup>1091</sup> In the context of the ‘Restauration’, ‘[Acte du Sénat qui nomme un gouvernement provisoire chargé de pourvoir aux besoins de l'administration, et de présenter au sénat un projet de constitution](#)’, dd. 1-2 avril 1814. This provisional government had a double function: “*chargé de pourvoir aux besoins de l'administration, et de présenter au sénat un projet de constitution*”.

<sup>1092</sup> Chapter 6, Section C.

<sup>1093</sup> Chapter 1, Section A.2.3.

<sup>1094</sup> In French: *gouvernements de gestion* or *gouvernements en affaires courantes*. The Australian [2013 Guidance on Caretaker Conventions](#), for example, ensures that during the caretaker period major policy decisions, significant appointments and the entering into major contracts or undertakings are avoided.

<sup>1095</sup> Cf. the Supreme National Council of Cambodia Decision dd. 10 February 1993 on the National Heritage Protection Authority of Cambodia.

<sup>1096</sup> K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 13: “states like Somalia seem to be stuck with a series of virtually permanent ‘transitional governments’ that cannot even govern the capital city. Other countries like Afghanistan have gone beyond the ‘transitional government’ phase, yet the resultant central government can barely project force beyond the capital city”.

<sup>1097</sup> E. Newman, ‘Liberal peacebuilding debates’, *op. cit.*, pp. 33-34.

commonplace in transition settings<sup>1098</sup>, and their importance has been recognized by dozens of non-transitioning states<sup>1099</sup>. In spite of the “diversity in the character of armed groups that have, with very uneven levels of success, been subject to DDR treatment”<sup>1100</sup>, the treatment itself has been relatively consistently applied. Generally, transitional authorities must see to it that politics are demilitarized during the interregnum:

“interim institutions that manage the implementation phase have the potential to foster the demilitarization of politics. Such transitional arrangements will be critical arenas in which ex-combatants and civilians make assessments regarding whether the post-conflict environment will protect their interests and whether to support the peace building and electoral processes”<sup>1101</sup>.

LINK BETWEEN TWO TASKS OF DIG – The two core tasks of transitional authorities are directly related to each other, and fundamentally so, given the “inextricable –perhaps even mutually constitutive– connection between effective power and successful legitimation during [...] founding periods and processes”<sup>1102</sup>. Benomar also writes the obvious, i.e. that security issues inhibiting meaningful debate, consensus-building and transparency must be first addressed<sup>1103</sup>. A secure environment is conducive to a successful transition<sup>1104</sup>, as evidenced by the contrast between the relatively successful South African transition and the difficult Afghan transition.

Monitoring transitions and ensuring security are tasks that have been increasingly ‘delegated’ to domestic constituencies, even where international peace and security were concerned. The

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<sup>1098</sup> N. Ansorg, F. Haass, A. Mehler, J. Strasheim, ‘Institutionelle Reformen zur Friedenskonsolidierung’, *op. cit.*: „Weder führt die militärische Integration von Rebellen in die nationalen Streitkräfte noch die einfache Demobilisierung solcher Rebellengruppen – zwei sehr unterschiedliche Reformlogiken – zwangsläufig zu einer Reduzierung der Gewalt. [...] Die häufigsten Maßnahmen in diesem Bereich waren Programme zur Entwaffnung, Demobilisierung und Reintegration ehemaliger Rebellengruppen (nach der englischen Bezeichnung „Disarmament, Demobilization, and Reintegration“, abgekürzt DDR). Die Beispiele Côte d’Ivoire, Liberia und Burundi zeigen, dass sich DDR und weitere Reformen im Sicherheitssektor nur dann erfolgreich auf eine Konfliktbearbeitung auswirken, wenn sie effizient implementiert werden und mit weiteren politischen Reformen einbergehen“.

<sup>1099</sup> EU states, China, Iceland, Morocco, Nigeria, Norway, Pakistan, Turkey, US. The EU states, Iceland, Norway and Turkey accentuate that DDR must go hand in hand with social and economic integration (S/PV.4903 dd. 26 January 2004, p. 27). China states: “[t]he first priority, at the outset of the post-conflict national reconciliation period, is that former combatants lay down their arms so as to create a secure environment. In this phase, the focus should be the disarmament, demobilization and reintegration of former combatants into society. The advantage that the United Nations has in this field must be brought fully into play” (S/PV.4903 dd. 26 January 2004, p. 28). Morocco considers that the reintegration of former combatants is a “pivotal element[s] in the lasting settlement of conflicts” (S/PV.4903 dd. 26 January 2004 (resumption 1) p. 22). Nigeria (S/PV.4903 dd. 26 January 2004 (resumption 1) p. 35). Pakistan insists on full-fledged peacekeeping operations whereby disarmament, demobilization and reintegration programmes should be implemented (*Id.*, p. 20). The US insists on disarmament, demobilization and reintegration as an instrument for post-conflict national reconciliation.

<sup>1100</sup> M. Berdal, D. H. Ucko (eds.), *Reintegrating Armed Groups After Conflict*, Routledge Studies in Intervention and Statebuilding, London, New York, 2009, p. 3.

<sup>1101</sup> T. Lyons, ‘Post-conflict elections and the process of demilitarizing politics: the role of electoral administration’, *op. cit.*, pp. 36-62.

<sup>1102</sup> Cf. Bhuta’s review of Weber’s, Schmitt’s, and Arendt’s theories of state formation / transformation. N. Bhuta, ‘New Modes and Orders’, *op. cit.*, p. 19.

<sup>1103</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 83. See also the remarks by Papagianni: “[p]rogress in the demilitarization and demobilization efforts and improvements in public security are essential before political participation is expanded significantly. Improved public security allows debate to take place and opinions to be expressed without the danger of destabilization”. K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, p. 55.

<sup>1104</sup> Introduction, Section A.

former UNSG noted about the Afghan transition that, while in 2001 the transition procedure was lagging behind after Operation Enduring Freedom had started, soon “the security reality began lagging behind the formal political transition. The inability to close this gap became the greatest threat to the transition itself”<sup>1105</sup>. Actually, security is the central pedestal supporting DIG in its various components, including the process of self-redetermination<sup>1106</sup>.

OBSERVATION OF PRACTICE – Even a rough sketch of state practice illustrates how transitional authorities bear the responsibility for (a) completing a transition procedure and (b) ensuring the daily business of state affairs in a secured environment. In South Africa, thus, the ‘Record of Understanding between ANC and Government’ of 26 September 1992 precisely addresses these two issues. It committed the participants of the ANC and the South African government to a transition procedure<sup>1107</sup> as well as to a more secure environment following the 1991 National Peace Accord<sup>1108</sup>.

After the turn of the millennium, transitional authorities worldwide remained concerned with, and responsible for the execution of the transition roadmap and the provision of security. This trend was evident in Burundi, Afghanistan, DRC, Haiti, Iraq, Côte d’Ivoire and Nepal. Since 2010, it was confirmed in Yemen, Guinea Bissau, Central African Republic, Burkina Faso, Ukraine, and Libya. The following overview is only cursory.

1. The 2000 Arusha Agreement regulates in detail which transitional institutions were to be created and how the transition was to be governed<sup>1109</sup>. The Burundian transitional authorities had the general responsibility for administering the country during the transitional period. The UN peacekeeping operation (‘ONUB’) was there only to assist the transitional authorities<sup>1110</sup>. When, from 2007 onwards, the UN Integrated Office in Burundi (‘BINUB’) was established to support Burundi’s post-transition period<sup>1111</sup> it was again “emphasize[d] that *the Government of Burundi bears the primary responsibility* for peacebuilding, security and long-term

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<sup>1105</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 342.

<sup>1106</sup> Cf. Chapter 6. This is also valid for TJ. Cf. E. Stover, H. Megally, H. Mufti, ‘Bremer’s Gordian Knot: Transitional Justice and the US Occupation of Iraq’, *Human Rights Quarterly* 27.3, 2005, p. 834: “in a post-conflict situation like Iraq in which the state has collapsed, security trumps everything: It is the central pedestal that supports all else. Without some level of security, transitional justice processes are doomed to fail”.

<sup>1107</sup> Record of Understanding between ANC and Government dd. 26 September 1992, 2.e, § 2.a and especially § 2.b.

<sup>1108</sup> [National Peace Accord of 14 September 1991](#). See especially Ch. 4 (regarding the mission and Code of Conduct of the South African Police) and Ch. 6 (regarding the establishment of a Commission of Inquiry regarding the prevention of public violence and intimidation).

<sup>1109</sup> Arusha Agreement, Protocol II, Ch. II, ‘Transitional Arrangements’ (artt. 1 – 11).

<sup>1110</sup> S/RES/1545 dd. 21 May 2004, § 2. Emphasis added. The mandate of ONUB was extended several times until 31 December 2006 (S/RES/1693 dd. 30 June 2006, § 1). S/RES/1545 dd. 21 May 2004, § 6.

<sup>1111</sup> S/RES/1719 (2006), §§ 1 a.f. regarding “peace consolidation and democratic governance”, “disarmament, demobilization and reintegration and reform of the security sector”, “promotion and protection of human rights and measures to end impunity”, “[d]onor and United Nations agency coordination”. BINUB was succeeded by BNUB: on 16 December 2010, the UNSC “[r]equested the Secretary-General to establish the United Nations Office in Burundi (BNUB) [...], as a significantly scaled-down United Nations presence”, S/RES/1959 dd. 16 December 2010, § 1.

development in the country”<sup>1112</sup>. The assistance from ONUB and then BINUB notwithstanding, the Burundi transitional institutions bore primary responsibility for the transition process.

Furthermore, before the installation of the Transitional Government, i.e. during the ‘interim period’, the government was “responsible for the day-to-day government of Burundi”<sup>1113</sup>. The Transitional Government, then, had the obligation to consolidate security, also through a DDR program<sup>1114</sup>. The Arusha Agreement provided that power had to be monopolized<sup>1115</sup>, and, in its protocol III, provided that the “institutions have the primary duty to guarantee the security of all citizens”<sup>1116</sup>.

2. The Bonn Agreement regulated *grosso modo* how the transition in Afghanistan was to be executed. It provided that the UN was only to “monitor and assist in the implementation of all aspects of [the Bonn Agreement]”<sup>1117</sup>, and formally had only an advisory role<sup>1118</sup>. To this end, the UNSC endorsed a UN Assistance Mission (UNAMA), and declared its willingness to support the transitional authorities and the implementation of the Bonn Agreement<sup>1119</sup>. Thus, the “objective of UNAMA should be to provide support for the implementation of the Bonn Agreement processes, including the stabilization of the emerging structures of the Afghan Interim Authority, while recognizing that the responsibility for the Agreement’s implementation ultimately rests with the Afghans themselves”<sup>1120</sup>. Afsah and Guhr remark that “the mandate does not furnish UNAMA with any operational responsibility for administering any part of Afghanistan, but is rather a recognition of the Afghan authorities’ ultimate responsibility for the Agreement’s implementation”<sup>1121</sup>. On this occasion, the concept of ‘light footprint’, discussed above in the introduction<sup>1122</sup>, was coined<sup>1123</sup>.

From the outset, the Afghan transitional authorities were to bear the responsibility for the country’s administration on a daily basis<sup>1124</sup>. This responsibility also concerned the

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<sup>1112</sup> S/RES/1719 (2006), § 7.

<sup>1113</sup> Arusha Agreement, Protocol II, Ch. II, art. 22.8. Cf. also Protocol II, Ch. I, art. 12.

<sup>1114</sup> Ceasefire Agreement dd. 2 December 2002.

<sup>1115</sup> Arusha Agreement, Ch. I, art. 22.9.

<sup>1116</sup> *Id.*, Protocol III, art. 1.3.a.

<sup>1117</sup> Bonn Agreement, Annex II.2.

<sup>1118</sup> *Id.*, Annex II.3. S/RES/1401 dd. 28 March 2002, § 1.

<sup>1119</sup> S/RES/1401 dd. 28 March 2002, § 1. See also A/56/875-S/2002/278 dd. 18 March 2002 § 98, basic principle b: “[t]he overall objective of UNAMA should be to provide support for the implementation of the Bonn Agreement processes, including the stabilization of the emerging structures of the Afghan Interim Authority, while recognizing that the responsibility for the Agreement’s implementation ultimately rests with the Afghans themselves”.

<sup>1120</sup> A/56/875-S/2002/278 dd. 18 March 2002 § 98, basic principle b. Emphasis added.

<sup>1121</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 417.

<sup>1122</sup> Chapter 1, Section A.1.

<sup>1123</sup> Afsah and Guhr describe it as follows: “UNAMA is to co-ordinate and consult closely with the Afghan actors to ensure that Afghan priorities lead the mission’s assistance efforts. The aim should be to increase Afghan capacity, while 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’”, E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 417.

<sup>1124</sup> Bonn Agreement, art. III.C.1. Emphasis added.

safeguarding of security<sup>1125</sup>. In similar wording to the Bonn Agreement, the UNSC repeated that the responsibility for providing security and order resides with the Afghans<sup>1126</sup>. This held true even following the creation of an ‘International Assistance Security Force’<sup>1127</sup> whose mandate was expanded during the transition to allow it to support the Afghan Transitional Authority and its successors in the maintenance of security<sup>1128</sup>. As a component of the restoration of security, the Bonn Agreement provides for the integration of all armed forces<sup>1129</sup>. In 2004, Afghanistan was pressured to implement the DDR program and continue the formation of the Afghan National Army<sup>1130</sup>, yet had scant resources at its disposal for doing so<sup>1131</sup>. Giustozzi nonetheless observes that the “wider disarmament and demobilization effort was largely owned by Afghan players”<sup>1132</sup>.

In short, notwithstanding the assistance it received from UNAMA, the Afghan interim administration held, at least formally, the authority to govern the transition. It bore the responsibility for executing the transition procedure, part of which concerned the consolidation of security.

**3.** The Pretoria Agreement of 16 December 2002 foresaw a detailed transition procedure to be implemented by the Congolese domestic authorities. Before this procedure even started, i.e. from the outset of the inter-Congolese dialogue starting mid-October 2001, the UNSC supported the transition<sup>1133</sup>. From the outset, the transition was (formally) led by the DRC. It was however closely monitored by the UNSC<sup>1134</sup>. The transition was furthermore followed by MONUC<sup>1135</sup>, and by the CIAT, which, for Reyntjens, “was instrumental in avoiding breakdown through flexible interventions each time the transition was in jeopardy”<sup>1136</sup>. In light of the many actors being involved in various (including political, economic<sup>1137</sup>, legal, and

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<sup>1125</sup> *Id.*, annex 1.1.

<sup>1126</sup> S/RES/1510 dd. 13 October 2003, Preamble. See also S/RES/1563 dd. 17 September 2004.

<sup>1127</sup> S/RES/1413 dd. 23 May 2002; S/RES/1386 dd. 20 December 2001.

<sup>1128</sup> S/RES/1510 dd. 13 October 2003, § 1.

<sup>1129</sup> *Id.*; Bonn Agreement, *op. cit.*, V.1.

<sup>1130</sup> On 1 April 2004, the participants in the 2004 Berlin Conference on Afghanistan confirmed: “it is necessary to implement vigorously the first phase of the Disarmament, Demobilization and Reintegration program to be completed by the end of June 2004 as decided by the President of Afghanistan, thereafter to intensify the program ahead of the 2004 elections, and to continue the formation of the Afghan National Army and the National Police”, Berlin Declaration dd. 1 April 2004, § 3.

<sup>1131</sup> T. H. Johnson, ‘Afghanistan’s Post-Taliban Transition – State Building After War’, in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, p. 290: “[t]he Bonn Agreement recognized the problem of the multiple armed forces operating in Afghanistan, even if scant resources were applied to address it. The text called for a single national army”.

<sup>1132</sup> A. Giustozzi, ‘Bureaucratic façade and political realities of disarmament and demobilisation in Afghanistan’ in M. Berdal, D. H. Ucko (eds.), *Reintegrating Armed Groups After Conflict*, *op. cit.*, p. 67 and p. 83.

<sup>1133</sup> S/RES/1376 dd. 9 November 2001; S/RES/1355 dd. 15 June 2001; S/RES/1341 dd. 22 February 2001; S/RES/1417 dd. 14 June 2002; S/RES/1399 dd. 19 March 2002.

<sup>1134</sup> S/RES/1445 dd. 4 December 2002, § 9. S/RES/1493 dd. 28 July 2003.

<sup>1135</sup> S/RES/1279 dd. 30 November 1999. S/RES/1565 dd. 1 October 2004.

<sup>1136</sup> F. Reyntjens, ‘Briefing: Democratic Republic of Congo: Political Transition and Beyond’, *African Affairs* 106, no. 423 (27 November 2006), pp. 307-317.

<sup>1137</sup> See e.g. the advising role of a UN panel to the transitional authorities with regard to the exploitation of natural resources. Cf. S/RES/1457 dd. 24 January 2003, § 9.

developmental) aspects of the transition, “the DRC was put under a *de facto* international trusteeship”, Reyntjens considers<sup>1138</sup>. In spite of the massive international involvement, the UNSG noted that “MONUC cannot implement the transitional process on behalf of the Transitional Government, *it can only assist*”<sup>1139</sup>.

The Congolese transitional authorities were repeatedly reminded that they bear the primary responsibility for maintaining order and security<sup>1140</sup>. The UNSG noted that restoring security is one of the “core tasks of the transition”<sup>1141</sup>, and to this end urged the transitional government to establish the Supreme Defence Council in accordance with the Pretoria Agreement<sup>1142</sup>. The UNSC asked the transitional authorities to reform the security sector and to implement a DDR program<sup>1143</sup>, which was largely dysfunctional<sup>1144</sup>, also because of the many difficulties encountered by the DRC “where parallel administrations established by armed groups, including of the former belligerent components of the Transitional Government, maintain control”<sup>1145</sup>.

4. After Aristide’s departure from Haiti during February 2004, a transitional authority was installed, and assisted by the UNSC<sup>1146</sup>. To that end, MINUSTAH was set up. Its mandate concentrated on assisting the transitional authority with a DDR program and security reform<sup>1147</sup>.

5. In addition to the countries mentioned above, transitional authorities were set up during the same decennium (2000 – 2010) in Liberia<sup>1148</sup>, Côte d’Ivoire<sup>1149</sup>, Iraq<sup>1150</sup> and Nepal<sup>1151</sup> so as to observe the transition procedures, attend to the daily affairs of the state, and ensure security.

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<sup>1138</sup> F. Reyntjens, ‘Briefing: Democratic Republic of Congo: Political Transition and Beyond’, *op. cit.*, pp. 307-317.

<sup>1139</sup> Third UNSG Special Report on DRC Mission, *op. cit.*, § 119.

<sup>1140</sup> *Id.* Emphasis added.

<sup>1141</sup> *Id.*

<sup>1142</sup> *Id.*, § 15.

<sup>1143</sup> S/RES/1635 dd. 28 October 2005 and S/RES/1649 dd. 21 December 2005. See also S/RES/1522 dd. 15 January 2004 in which the UNSC “urged the Government of National Unity and Transition to take the appropriate measures, for the restructuring and integration of the armed forces of the Democratic Republic of the Congo”.

<sup>1144</sup> Z. Marriage, ‘Flip-flop rebel, dollar soldier – Demobilisation in the Democratic Republic of Congo’ in M. Berdal, D. H. Ucko (eds.), *Reintegrating Armed Groups After Conflict*, *op. cit.*, pp. 119-143.

<sup>1145</sup> Third UNSG Special Report on DRC Mission, *op. cit.*, § 12; cf. also § 14. Cf. also ‘The Congo’s Transition is Failing: Crisis in the Kivus’, ICG, Africa Report n. 91, 30 March 2005, p. 16.

<sup>1146</sup> S/RES/1542 dd. 30 April 2004, 7.I.a.

<sup>1147</sup> S/RES/1542 dd. 30 April 2004, § 7.I.b-d: It was set up both to “assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti through the provision inter alia of operational support to the Haitian National Police and the Haitian Coast Guard”, to “assist the Transitional Government, particularly the Haitian National Police, with comprehensive and sustainable Disarmament, Demobilization and Reintegration (DDR) programmes for all armed groups”, and to “assist the Transitional Government in monitoring, restructuring and reforming the Haitian National Police”.

<sup>1148</sup> The National Transitional Government of Liberia was to ‘scrupulously implement’ the 2003 Accra Peace Agreement (cf. art. XXII.1).

<sup>1149</sup> The *Troisième accord complémentaire à l’accord politique de Ouagadougou* dd. 28 November 2007, art. 4, affirms the “*redeployment de l’Administration et des services publics sur l’ensemble du territoire nationaux*”. This agreement also enumerates specific tasks of the transition, like the organization of a fiscal and customs administration and DDR program. Immediately after assuming office, the Government of National Reconciliation was to undertake a DDR program,

6. During the 2010s, transitional authorities continued to be created and were accorded the responsibility of governing the transition and ensuring safety and security. The patterns described above are thus generally confirmed. Domestic transitional authorities are required to execute a more or less detailed transition procedure and are asked to restore security while attending to daily business. In case of international assistance or mediation, the domestic responsibility for carrying out this task is asserted repeatedly. This description corresponds to instances of (attempted) DIG in Yemen<sup>1152</sup>, Guinea Bissau<sup>1153</sup>, Central African Republic<sup>1154</sup>, Burkina Faso<sup>1155</sup> and Ukraine<sup>1156</sup>. The same is true of Libya, where DIG was generated by oppositional forces.

7. In Libya the Transitional National Council's ('TNC') primary mission was to administer the transition procedure. It was to monitor the transition procedure until permanent institutions

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according to the 2003 Linas-Marcoussis Accord, Part VII. A DDR program was again foreseen in the 2007 Ouagadougou Political Agreement dd. 13 March 2007, art. 3.2, as well as in the *Troisième Accord Complémentaire à l'accord Politique de Ouagadougou* dd. 28 November 2007.

<sup>1150</sup> In Iraq, the 2004 Transitional Administration Law foresaw a detailed transition procedure to be followed by domestic transitional authorities after 'transfer of sovereignty' (by 30 June 2004) from the CPA to the Iraqi Interim Government. Also, the CPA "tried over many months to implement in essence a 'DDR' plan. [...] it was ultimately derailed by the twin insurgencies of the Falluja-based Sunni resistance and the Shiite fighters under Muqtada al-Sadr that erupted in April 2004". L. Diamond, 'Iraq and Democracy: The Lessons Learned', *Current History*, 2006, p. 36.

<sup>1151</sup> The 2007 Interim Constitution details the responsibilities of the transitional authority. The Seven Point Agreement dd. 1 November 2011 includes a DDR program in its first part entitled 'Integration and rehabilitation of the Maoist combatants'.

<sup>1152</sup> The UNSC "reaffirm[ed] the need for the full and timely implementation of the GCC Initiative and Implementation Mechanism in accordance with resolution 2014 (2011)", and has stated, in quite some detail, how the transition should progress: "the second phase of the transition process should focus on: (a) convening an all-inclusive National Dialogue Conference, (b) restructuring of the security and armed forces under a unified professional national leadership structure and the ending of all armed conflicts, (c) steps to address transitional justice and to support national reconciliation, (d) constitutional and electoral reform and the holding of general elections by February 2014". S/RES/2051 dd. 12 June 2012.

<sup>1153</sup> The *Pacto de Transição Política* provides in some detail how the transition procedure must be carried out by the domestic authorities, while the relevant UNSC resolutions all indicate that UNIOGBIS only has the power to assist or support the authorities. Cf. S/RES/2186 dd. 25 November 2014; S/RES/2157 dd. 29 May 2014; S/RES/2203 dd. 18 February 2015. Also, the UNSC "urge[d] Authorities in charge of the transitional period to provide the security and create the conditions conducive to the safe full and equal participation of all political actors and all sectors of the society" (S/PRST/2013/19 dd. 9 December 2013).

<sup>1154</sup> The *Charte constitutionnelle* dd. 18 juillet 2013 provides, with reference to a 'Feuille de route de la transition' and a 'chronogramme électoral', how the transitional authorities must execute the transition procedure. *Charte constitutionnelle* dd. 18 juillet 2013, art. 44 resp. art. 45. Furthermore, the *Gouvernement de transition* of the Central African Republic, too, had the duty, according to the 'Déclaration de N'Djamena', to provide security – "[r]estaurer la paix et la sécurité des personnes et des biens" –, including by a DDR procedure.

<sup>1155</sup> ECOWAS and the Contact Group for Burkina Faso called for the "urgent designation of a suitable eminent civilian person to lead the transition [and] composition of the transitional government; and to secure all Burkinabe, including political party leaders, members of Parliament and National Assembly, and protect [...] property" ('ECOWAS names contact group on Burkina Faso', 7 November 2014).

<sup>1156</sup> The second Minsk Agreement dd. 12 February 2015 provides for a set of measures to enhance security and control over the territory during the transition. It provides for the "[r]estoration of full control by the government of Ukraine over the state border throughout the conflict zone", and the "[w]ithdrawal of all foreign armed units, military equipment, as well as mercenaries from the territory of Ukraine under the supervision of the OSCE. The disarmament of all illegal groups". Second Minsk Agreement, artt. 9-10.

were in place. The UNSC decided to assist the TNC in this endeavor<sup>1157</sup>, and, to this end, established a UN support mission (UNSMIL)<sup>1158</sup>. UNSMIL’s mission was to “*assist and support* Libyan national efforts to [...] undertake inclusive political dialogue, promote national reconciliation, and embark upon the constitution-making and electoral process”<sup>1159</sup>. Yet, the transition was to be genuinely Libyan<sup>1160</sup>. The TNC furthermore bore the general responsibility for administering the country in the interim. According to the Constitutional Declaration, it was “*liable for managing the State* until the National Public Conference is elected”. In particular, it had the obligation of consolidating security<sup>1161</sup>. In sum, the Libyan transitional authority was to execute the transition and attend to the state’s safety and daily affairs. The International Contact Group for Libya (representing several states and organizations<sup>1162</sup>) confirmed this double role<sup>1163</sup>.

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The above discussion and examples confirm the fiduciary nature of DIG. Transitional authorities have a double core mission. They must execute the transition procedure, see to day-to-day state affairs, including by doing everything within their power to restore public security and effective control over the state territory. These two main tasks of DIG are intimately intertwined. If successful, the restoration of security and control –*inter alia* through DDR initiatives– will normally positively impact on other components of the transition. These components include public participation in the state order reconfiguration<sup>1164</sup> as well as the realization of TJ<sup>1165</sup>, topics which will be addressed below<sup>1166</sup>.

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<sup>1157</sup> S/RES/2009 dd. 16 September 2011, Preamble, § 11. Emphasis added.

<sup>1158</sup> *Id.*, § 12.

<sup>1159</sup> *Id.*, § 12.b.

<sup>1160</sup> At a EUJ conference in March 2013, the UN Special Representative to Libya, Ian Martin, insisted on the ‘local ownership’ of the post-conflict organization in Libya, and stressed that the Libyan Transitional National Council (“TNC”) was a Libyan creation. The UN, or the UNSMIL, had no formal hand in the creation of the TNC. Broadly speaking, after Gaddafi’s forces were overthrown in the East of the country, the notables of local councils created the TNC. There were no expatriates taking part in the TNC until the creation of its executive committee. UNSMIL’s role in the constitutional process, dixit Martin, was merely technical. The international expertise and experience of the UN –which was very well received in Libya– had no direction role whatsoever. Cf. report of a public discussion held at the EUJ, ‘Libya in Transition, reflections by Ian Martin’, 8 March 2013. On file with author.

<sup>1161</sup> *Id.* For the same purpose, the Constitutional Declaration provides that “[t]he establishment of clandestine or armed societies, or societies in violation of public system or of public morals and others which may be detrimental to the State or the unity of the State shall be prohibited” (*Id.*, art. 15). Also, on 27 November 2011, during the second meeting of the transitional cabinet, priority was accorded to achieving security (See NTC Executive Bureau, ‘Summary of the second meeting of the transitional Cabinet’, 27 November 2011, cited *in* the Report dd. 2 March 2012 of the International Commission of Inquiry on Libya, *op. cit.*, p. 50, § 99).

<sup>1162</sup> Including the Arab League, the EU, the GCC, the NATO, and the UN.

<sup>1163</sup> U.S. Dep’t of State Press Release, Forth Meeting of the Libya Contact Group - Chair’s Statement dd. 15 July 2011.

<sup>1164</sup> K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, p. 47: “[p]rogress in the demilitarization and demobilization efforts and improvements in public security are essential before political participation is expanded significantly. Improved public security allows debate to take place and opinions to be expressed without the danger of destabilization. Also, a degree of public security allows citizens to participate freely in public discussions about the future of the country, to express their opinions without fear, and to not be forced to represent pre-determined social categories, usually ethnic or religious, which were created or enhanced during the conflict”. See also p. 55. Saul suggests that, conversely, inclusivity can also

The review of transition instruments, state practice and UNSC practice confirms that DIG must be limited both in time and in substance. The discretionary powers of transitional authorities during the interregnum are limited by a number of temporal and substantive restrictions. Transitional authorities are in principle prevented from taking measures that go beyond these limitations.

LINK BETWEEN LIMITATIONS RATIONE TEMPORIS & RATIONE MATERIAE – Transitional authorities must exercise their duties on a temporary basis, i.e. without suspending or delaying the interregnum, and with the aim of being replaced. They commit to a pre-defined timeframe. This mostly entails that the members and leaders of the transitional authority are not re-eligible for office after the transition (‘ineligibility-after-transition practice’). These temporal limitations reinforce the substantive limitations of DIG. Transitional authorities must not pre-shadow the future. While preparing for major institutional changes, the leeway for substantively defining the post-transition constitutional order is limited. At a maximum, they may define beforehand the ‘big principles’ that will guide the transition and/or ensure the constitutional structure of the state. Furthermore, they must respect the pre-transition legal position of other states as well as the acquired rights of private persons. Lastly, in discharging their obligations, transitional authorities must concentrate on successfully completing DIG while ensuring the daily running of the state. They bear the primary responsibility for doing so, even if they receive extensive international assistance.

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enhance security: “the development of security in Afghanistan has remained an exclusive process that has been criticised for lacking transparency. A more inclusive process involving workshops with the general population [...] could have aided transparency and helped to build a sense of ownership”, M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 177. In some cases, the gender aspects of inclusive security are emphasized. With regard to the CAR transition, for example, dozens of states and organizations “stressed the importance of [...] ensuring their [women’s] involvement in the processes relating to disarmament, demobilization and reintegration (DDR), as well as to security sector reform (SSR)”. Cf. Declaration of the third meeting of the International Contact Group on the Central African Republic’, Bangui, 8 November 2013.

<sup>1165</sup> This is why a UNDP official states that “unless citizens feel that their personal security is being met by effective policing of their streets and communities, a lot of the rest of reconciliation and peace-building is hard to achieve”. Cf. S/PV.4903 dd. 26 January 2004, p. 7. In the same sense, the Russian delegation observed: “[b]ut the quest for justice should not be an impediment to peace. In this complex and painful process, a special role should be played by the international community, and primarily by the United Nations, whose key task is to promote the creation of the conditions necessary for national reconciliation processes. Here, we refer primarily to establishing a secure climate that can rule out attempts to use armed force to settle political problems”, S/PV.4903 dd. 26 January 2004, p. 21. The link between security through DDR and reconciliation was also made with respect to Sierra Leone, as the UN regarded “the process of reintegration as an essential component of national reconciliation, with special focus on ex-combatants” (S/PV.4903(Resumption 1) dd. 26 January 2004, p. 8). Similarly, the representative of France noted: “[s]uccess will also depend on the process being inclusive. It is crucial that the positive effects of national reconciliation spread to all segments of the population. That is why, in this context, special importance must be accorded to disarmament and reintegration programmes for former combatants, to the situation of children, to the situation of women —whose important role has been acknowledged in resolution 1325 (2000)— and to the full integration of communities, minority groups, refugees and foreign or displaced populations”, S/PV.4903 dd. 26 January 2004 p. 17. Saul, finally, suggests that, conversely, post-conflict justice can be a means of restoring a sense of (personal and collective) security in the transitioning country. M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 18.

<sup>1166</sup> Chapter 6, Section D and Section C, respectively.

BALANCING THE POWER OF MODIFICATION & THE DUTY OF CONSERVATION – In sum, the scope of DIG is clearly confined, not only *ratione temporis*, but also *ratione materiae*. In the limited time allotted to them, transitional authorities prepare for the future without predefining it, initiate reforms while respecting the continuity of the state, prepare a state renaissance while attending to daily business. They come into being in a nonconstitutional fashion with the aim of reconfiguring their state’s constitutional order. At the same time, they commit to stability, and accept that their role during the interim rule is constrained. In other words, they must strike a balance between the *power of modification* (within the limits imposed by the mandate) and the *duty of conservation* (regarding all matters not covered by the mandate). They commit both to *change* (manage the transition procedure) and *stability* (state continuity; respect of private rights). Enormous procedural powers (the transition as a state-transformation enterprise) are combined with little substantive powers (limitations to the interregnum). This tension, also inherent to transitional constitutionalism, manifests itself with more intensity and for a longer period during DIG. It is addressed by *ius in interregno* in the following way: because mostly unelected, DIG is a fiduciary type of administration that must facilitate the realization of internal self-determination.

UNDEMOCRATIC NATURE DIG – Because transitional authorities are generally unelected, their mandate is (to be) circumscribed. Pelt recognized the necessity of this limitation back in 1951. Temporal and substantive limitations to DIG are important because transitional authorities, being unelected, are undemocratic, in the formalist/procedural sense and possibly beyond that level<sup>1167</sup>. In the words of the UNSG:

“many post-conflict countries are governed by transitional political arrangements until the first post-conflict elections are held. National authorities are often *appointed rather than elected*, put in place through a brokered agreement between parties to the conflict who may not be fully representative or recognized by the population”<sup>1168</sup>.

ADDRESSING THE PARADOX OF DIG: SELF-LIMITATION – Undemocratic transitional authorities carry out a reconstitutionalization process in the name of democracy. This kind of paradox also tainted ITA, which is not based on elections either<sup>1169</sup>. The only way that ITA can avoid being embroiled in this contradiction is for temporary unelected state-like administration to function under a limited mandate. For Chesterman, “to exercise state-like functions, [the UN and other international actors] must not lose sight of their *limited mandate* to hold that sovereign power

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<sup>1167</sup> For the definitions of democracy, cf. Chapter 2, Section B.2.

<sup>1168</sup> Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict’ dd. 11 June 2009, A/63/881-S/2009/304, §§ 11 & 12.

<sup>1169</sup> L. Diamond, ‘Building Democracy After Conflict. Lessons from Iraq’, *op. cit.*, pp. 9–23: “All international post-conflict interventions to reconstruct a failed state on democratic foundations confront a fundamental contradiction. Their goal is, in large measure, democracy –popular, representative, and accountable government in which ‘the people’ are sovereign. Yet their *means are undemocratic* – in essence, some form of imperial domination, *however temporary and transitional*”. Emphasis added.

in trust for the population that will ultimately claim it”<sup>1170</sup>. For Diamond, this requires “balancing of international trusteeship or imperial functions with a distinctly *non-imperial attitude* and a clear and early specification of an *acceptable timetable* for the restoration of full sovereignty”<sup>1171</sup>, in short, limits *ratione materiae* and *ratione temporis*. The same reasoning applies, *mutatis mutandis*, to the kind of governance that is increasingly supplanting ITA, that is, DIG.

Consequently, substantive decisionmaking including constitutionmaking should be deferred to elected bodies or validated by elections towards the end of (or after) the interregnum. In addition, the power to conclude specific (political or alliance) treaties is arguably limited during the interregnum<sup>1172</sup>. This furthermore explains why the previous legal order cannot be completely overhauled, and why transitional authorities’ main responsibility is limited to completing the transition procedure.

FIDUCIARY NATURE DIG & PRINCIPLE OF SELF-DETERMINATION – The fiduciary nature of DIG, in turn, is justified by the principle of self-determination. It ensures that fundamental state-transformation choices are left open for decision by the national constituencies after or towards the end of the transition. It also prevents third states and organizations from defying the interregnum’s confined mandate e.g. by influencing the transition beyond what transitional authorities themselves are allowed to do. The latter point will be developed under Part IV. The former point will be dealt with in the following chapter, which argues that DIG must favor broad and inclusive political participation during the interregnum so as to (progressively) implement the principle of internal self-determination<sup>1173</sup>.

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<sup>1170</sup> S. Chesterman, *You, The People, The United Nations, Transitional Administration, and State-Building*, *op. cit.*, p. 257. Emphasis added. See also I. Prezas, *L’administration de collectivités territoriales par les Nations Unies – Etude de la substitution de l’organisation internationale à l’état dans l’exercice des pouvoirs de gouvernement*, *op. cit.* Prezas details the limits *ratione materiae* (‘principe de conservation’) and *ratione temporis* of ITA: “*il est extrêmement douteux que l’ONU puisse être investie de pouvoirs de gestion permanents à l’égard d’une collectivité territoriale donnée*” (p. 213).

<sup>1171</sup> L. Diamond, ‘Building Democracy After Conflict. Lessons from Iraq’, *op. cit.*, pp. 9–23.

<sup>1172</sup> As with *de facto* governments, it can be argued that transitional authorities “would have the legal capacity to bind the state to treaties of a technical, apolitical nature (e.g. postal and aeronautical conventions), though not to *partisan* alliances [...]”. B. R. Roth, *Governmental Illegitimacy in International Law*, *op. cit.*, p. 158, where the author refers to the *Texas v. White* case and the *Madzimbamuto vs. Lardner-Burke* case.

<sup>1173</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 51: “[e]xperience suggests that decisions on long-term constitutional design should not be rushed and should not be dominated by power-sharing transitional governments. If power sharing is to be enshrined in the long-term constitution of a country, it should result from inclusive and lengthy discussions during the transitional period. Long-term institutional arrangements should not be included in peace agreements. By deciding long-term constitutions, peace agreements miss the opportunity to lengthen the dialogue on constitutional options and to expand political participation beyond those at the peace-negotiating table”.

“The international community [...] has to clarify the applicability of self-determination in non-colonial situations and in light of the particularities of the contemporary political context. A clarification of the scope and applicability of self-determination will help to prevent groups from asserting unfounded claims, curb self-determination conflicts, and allow other states to lend appropriate support to lawful claims of self-determination”<sup>1174</sup>

### Section A. Introduction

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**PRESENTATION CHAPTER ARGUMENT** – This chapter argues that the principle of self-determination informs how DIG must be pursued, and, *vice versa*, that DIG is instructive about the contents and scope of this principle. Building on the previous chapter, it argues that the limits *ratione temporis* and *ratione materiae* to the interregnum as well as another recurrent DIG practice – inclusivity – can only be understood and specified in light of the principle of self-determination. The chapter is premised on the idea that there is, and indeed must be, a threefold dialectical relationship between the principle of self-determination, the recurrent commitment to ‘inclusivity’ during the interregnum, and DIG:

- DIG is one of the *means of implementation* of the principle of self-determination. Self-determination can indeed be implemented by the “emergence into any other political status freely determined by a people”<sup>1175</sup>. In our day and age, the dynamics of such emergence are mostly regulated through DIG, which thus becomes a specific mode for implementing the principle of self-determination, and is to be differentiated from state creation or the free association or integration with another state.
- The principle of self-determination becomes an *interpretive guideline* for DIG. It informs how DIG must be observed, and what the undisputed minimum requirement is for inclusivity, as a DIG practice, to conform with the principle of self-determination. Specifically, in order to be internationally lawful, DIG must ensure that the transitional constitutionmaking process be participatory, and must see to it that fundamental human rights commonly associated with self-determination be respected.
- In turn, DIG *further extends and specifies* the principle of self-determination, thus reducing its indeterminacy. The contents of this principle gain in precision, and its contemporary relevance and validity come to be confirmed through DIG. Because the scope of internal self-determination is specified through DIG, controversies around the content and limitations of this principle are further reduced. In light of the rise of DIG,

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<sup>1174</sup> K. Roepstorff, *The Politics of Self-determination: Beyond the Decolonisation Process*, Routledge Advances in International Relations and Global Politics v. 95, Abingdon, Oxon, New York, 2013, p. 153.

<sup>1175</sup> *Friendly Relations Declaration*, principle e.

internal self-determination is thus partly losing its indeterminacy, at least to the extent that the requirement of ‘inclusivity’, now a mantra in situations of DIG, is instructive to this end:

- In order to be internationally lawful, the interregnum as a whole, and not only the transitional constitutionmaking process, must be carried out in conformity with, or at least aim at progressively realizing, the principle of internal self-determination.
- Self-determination can be exercised through a limited set of procedures.
- The voice of various groups and factions of society must be taken seriously throughout the interregnum.
- Even in cases where DIG is initiated in an exclusionary fashion, it must gradually open up to the participation and representation of several groups of society.

Thus, the principle of internal self-determination as applicable to DIG requires more than just the (thin, procedural) holding of a constitutional referendum and elections towards the end of the interregnum, but less than what a substantive democracy would require. The relevance and continuing validity of the principle of self-determination is confirmed through DIG and, at the same time, the principle acquires an ‘extra layer’ through DIG. In light of these dialectics, the principle of self-determination becomes a bedrock principle of *ius in interregno*<sup>1176</sup>.

**INTERNAL SELF-DETERMINATION: LEGAL BASIS** – In the post-Second World War era, the 1960 UNGA resolution on the ‘Granting of Independence to Colonial Countries and Peoples’<sup>1177</sup> (known as the Charter of decolonization) forms the basis for the implementation of self-determination in the context of decolonization. Its second paragraph provides that “all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. Importantly, the first article of the 1966 ICCPR and ICESCR sanction this principle in exactly the same wordings without limiting their scope to the context of decolonization. By virtue of this article, peoples have the right to *freely* determine their political status, thus also, Cassese observes, “free from any manipulation or undue influence from the *domestic* authorities themselves”<sup>1178</sup>.

**INTERNAL SELF-DETERMINATION: CONFIRMATION BY LITERATURE & JURISPRUDENCE** – Today, a narrow interpretation of the right of self-determination cannot be defended anymore. Self-determination is not reduced to the decolonization process<sup>1179</sup>. The 1970 Friendly Relations

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<sup>1176</sup> Saxer also considers that the principle of self-determination has become an umbrella principle for *Staatenwandel*. Cf. U. Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung*, Springer-Verlag, Berlin Heidelberg, 2010. In the words of Röben, self-determination “provides a rationale for standard-setting on legitimate institutions of UN member states”. V. Röben, ‘Legitimacy of UN member states’, *op. cit.*, p. 1519.

<sup>1177</sup> UNGA/RES/1514 (XV) dd. 14 December 1960, *Declaration on the Granting of Independence to Colonial Countries and Peoples*.

<sup>1178</sup> A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*, Hersch Lauterpacht Memorial Lecture Series, CUP, p. 53.

<sup>1179</sup> J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’ in P. Alston (ed.), *Peoples’ Rights*, OUP, 2001, pp. 37-38. In the same sense: C. Tomuschat, ‘Self-Determination in a Post-

Declarations precisely states that, in addition to the establishment of an independent state or the free association or integration with another state, “the emergence into any other political status freely determined by a people” constitutes a mode of implementing the right of self-determination<sup>1180</sup>. In his 2002 study based on treaty law, resolutions and declarations of IOs, as well as state practice, jurisprudence and literature, Raič concludes that self-determination has a “*continuing* character [...] beyond the traditional colonial context”<sup>1181</sup>. In 2004 the ICJ confirmed the continuing validity of the principle of self-determination, stating that “it is one of the essential principles of contemporary international law”<sup>1182</sup>. International jurisprudence amply confirms that internal self-determination is less controversial today than it used to be<sup>1183</sup>.

**TOWARDS THE MONOPOLY OF INTERNAL SELF-DETERMINATION** – The continuing character of self-determination “in particular refers to an *internal* dimension or aspect of the right of self-determination, that is to say, to an implementation of self-determination *within* States”, Raič rightly observes<sup>1184</sup>. Among other scholars, Yusuf sees a fundamental role for internal self-determination today and in the future:

“it might be realistic to assume that resort to external self-determination, in the sense of separation from an existing state, will gradually disappear in the future, except in its consensual form, giving way to the *increasing prevalence of internal self-determination* of peoples, both in the political and socio-economic fields, as a cornerstone of international law and relations”<sup>1185</sup>.

**PEOPLE AS NATION** – Internal self-determination is least controversial when disassociated from the right to secession. Controversies especially arise when self-determination is invoked for justifying the secession from a state<sup>1186</sup>. Thornberry limpidly observes that “international law

Colonial World’ in C. Tomuschat, *Modern Law of Self-Determination*, *op. cit.*, pp. 2-4; M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 67. See also G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, Recueil Des Cours, Collected Courses, 1972, Volume 137, pp. 565-565: “self-determination is not just another word for decolonization in a narrow sense”.

<sup>1180</sup> *Friendly Relations Declaration*, principle e. See also G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, *op. cit.*, p. 567.

<sup>1181</sup> D. Raič, *Statehood and the Law of Self-determination*, Kluwer Law International, The Hague, 2002, p. 228. Emphasis added.

<sup>1182</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, § 154.

<sup>1183</sup> The *Gambian coup* case (Joined Communications 147/95 and 149/96, *Jawara v. The Gambia*, (2000) A.H.R.L.R. 107 (ACHPR 2000) (Thirteenth Annual Activity Report), § 73); African Commission on Human and Peoples’ Rights, Communication 75/92, *Katangese Peoples’ Congress v. Zaire* (2000) A.H.R.L.R. 72 (ACHPR 1995) (Eighth Annual Activity Report); Supreme Court of Canada, reference re Secession of Quebec [1998] 2 SCR 217; Committee on the Elimination of Racial Discrimination, General Recommendation No. 21, Right to Self-Determination (adopted at the forty-eighth session, on 23 August 1996), § 4.

<sup>1184</sup> *Ibid.*, p. 234.

<sup>1185</sup> A. Yusuf, ‘The Role That Equal Rights and Self-Determination of Peoples can Play in the Current World Community’ in A. Cassese (ed.), *Realizing Utopia*, *op. cit.*, p. 383.

<sup>1186</sup> “we have the continued and repeated assertion of the right of self-determination by hundreds of groups, and at the same time the repeated denial of that right, *at least if it takes the form of a claim to secession*”, Crawford writes, before adding that “outside the colonial context there remains a strong presumption in favour of territorial integrity and *against secession*”. J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, p. 39; p. 64. Emphasis added.

is not a suicide club for States”<sup>1187</sup>. The skepticism about self-determination as embodying a right to secede was confirmed in jurisprudence, notably by the African Commission on Human and Peoples’ Rights and the Supreme Court of Canada<sup>1188</sup>. In relation to DIG, internal self-determination is not referred to as a right to secede. Transitional authorities do not (directly<sup>1189</sup>) challenge the existence or continuity of the state. For the purposes of this dissertation, the ‘peoples’ beneficiaries of the right to self-determination are ‘peoples of states’<sup>1190</sup>. By generating a state renaissance on the basis of inclusivity, transitional authorities thus pursue the *least controversial form of internal self-determination*.

SELF-DETERMINATION AS IUS COGENS – It is generally accepted that self-determination constitutes an *erga omnes* norm under international law. Writing in 1995, the ICJ found that the “assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irrefragable”<sup>1191</sup>. The same year, Cassese went a step further by confirming that “self-determination constitutes a *peremptory norm* of international law”<sup>1192</sup>. This observation must be borne in mind when oppositional interim governance as a response to *ius cogens* violations will be discussed, under Chapter 10.

If one accepts the continuing character of the principle of internal self-determination, and the premise that DIG constitutes a means for implementing it, then the observation of practice with regard to DIG may well enlighten us on how this principle –notable for its indeterminacy– might gain precision. The following overview indicates that ‘inclusivity’ has virtually become a mantra in DIG practice, which also results from policy considerations and socialized practices that have gained currency over the last decade or so (Section B). Since the

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<sup>1187</sup> P. Thornberry, ‘The Democratic or Internal Aspect of Self-Determination’ in C. Tomuschat, *Modern Law of Self-Determination*, *op. cit.*, p. 118. In the same sense, G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, *op. cit.*, p. 567.

<sup>1188</sup> African Commission on Human and Peoples’ Rights, Communication 75/92, *Katangese Peoples’ Congress v. Zaïre* (2000) A.H.R.L.R. 72 (ACHPR 1995) (Eighth Annual Activity Report); Supreme Court of Canada, reference re Secession of Quebec [1998] 2 SCR 217: “[t]he recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination” (§ 126).

<sup>1189</sup> The 2005 CPA for Sudan is a special case as it left the decision to separate open (question referred to referendum).

<sup>1190</sup> J. Summers, *Peoples and International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2007, p. 329.

<sup>1191</sup> Case concerning East Timor, judgment of 30 June 1995, ICJ Reports 1995, 90, § 29 (*Case concerning East Timor*). With references to the UN Charter and to ICJ jurisprudence (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16; Western Sahara, Advisory Opinion, ICJ Reports 1975, pp. 31-33, §§ 54-59. Confirmation in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, § 88.

<sup>1192</sup> A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*, *op. cit.*, p. 140: “the conclusion is justified that self-determination constitutes a peremptory norm of international law”. Summers writes that self-determination is not a *ius cogens* norm, and that its *erga omnes* character is also questionable (self-determination could simply be explained as a customary norm). See J. Summers, *Peoples and International Law*, *op. cit.*, pp. 387-392. Summers writes that “many aspects of self-determination, such as its supposed transformation from a principle into a right, and assertions of its *ius cogens* and *erga omnes* status appear to be best explained in terms of legitimacy”. See J. Summers, ‘The internal and external aspects of self-determination reconsidered’ in D. French (ed.), *Statehood and Self-Determination*, CUP, 2013, p. 397.

requirement of ‘inclusivity’, also seems rather indeterminate, it will be deconstructed and then analyzed from a legal point of view (Section C).

## Section B. The practice of inclusivity

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In this section, we shall first observe how, both in transition instruments and UNSC resolutions, inclusivity has become a mantra in the context of DIG (1) and then turn to policy and sociology of law considerations that may explain this evolution (2).

### 1. Observation of DIG practice

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Over the two last decades or so, the requirement of inclusivity has been promoted in different contexts, in relation to ITA<sup>1193</sup> but especially to DIG. In 1996, a UN official thus observed: “a system of institutional transition cannot be unilaterally defined by the new *de facto* authorities in power; rather, a genuine broad dialogue within the political parties and civil society must be initiated”<sup>1194</sup>. Since 1994, the need for inclusivity was emphasized in countries like South Africa, Comoros, Burundi, Afghanistan, DRC, Liberia, Côte d’Ivoire, and Iraq (1.1). Since 2010, inclusivity was again promoted for (purported) transitions in countries like Kyrgyzstan, Guinea, Libya, Somalia, Yemen, Syria, Guinea-Bissau, the CAR, Burkina Faso, and Ukraine (1.2). The following overview will only be cursory, and can be skimmed by the reader who is only interested in the recapitulative parts (provided below under paragraphs 19 & 20).

#### 1.1. 1994 – 2010

1. As a well-known precursor, the South African transition was based on direct negotiations between the ANC and the then South African government<sup>1195</sup>, and was inclusive: “the delicate transformation of the apartheid state into the new, non-racial, democratic Republic of South Africa was achieved through a deliberate, patient, careful, inclusive process [...] An inclusive national debate was organised by the ‘peace structures’, and nobody was excluded from this process”<sup>1196</sup>. There is no doubt that the inclusivity of the South African national dialogue and constitutionmaking process was essential to the success of the South African transition.

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<sup>1193</sup> The insistence on inclusivity seems to lie at the basis of the creation of the East Timor Transitional Administration, as “in August 2000, after political elites protested against the lack of influence they had over East Timor’s transition to independence, did the UN create the East Timor Transitional Administration (ETTA) –a body that represented the structure of East Timor’s government following the cessation of the interim government”. J. Strasheim, ‘Interim Governments: Short-Lived Institutions for Long-Lasting Peace’, *op. cit.*, p. 4.

<sup>1194</sup> ‘Situation of human rights in Burundi’ (A/51/459), report dd. 7 October 1996, § 37.

<sup>1195</sup> See, for example, A. Sachs, ‘South Africa’s Unconstitutional Constitution: the Transition from Power to Lawful Power’, *op. cit.*, p. 1253.

<sup>1196</sup> L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 6. He added: “[e]ven the most extremist groups and individuals who did their damndest to derail the process knew that they were welcome to join in if they so desired and, along the years, many of them did” (*id.*).

2. In 1999, the importance of inclusivity was emphasized in the context of the transition in Comoros. One of the principles guiding DIG in Comoros was precisely that the signatory parties to the transition instrument committed to inclusive DIG *before* elections take place<sup>1197</sup>.

3. Legal texts relating to the Burundi transition starting in 2000 repeatedly confirm the inclusivity requirement in relation to the composition of the transitional authority, the composition of political parties, and the constitutiondrafting process. First, the 2000 Arusha Agreement required inclusivity throughout the two-step transition<sup>1198</sup>. It provided that “during the transition period, there shall be a broad-based transitional Government of national unity. The Government shall include representatives of different parties in a proportion”<sup>1199</sup>, and that the transitional Executive was to function in the spirit of national unity<sup>1200</sup>. It also provided that the post-transition government was to be representative<sup>1201</sup>. Second, no political party participating in the transition process could be registered if it was established on the basis of ethnic or regional exclusivity<sup>1202</sup>. Third, the Arusha Agreement required that a constitutional text be drafted during the transition period “founded on the values of unity without exclusion”<sup>1203</sup>

The UNSC reiterated the need for inclusive DIG in Burundi on several occasions<sup>1204</sup>. Thus, the UNSC urged the armed movement ‘Palipehutu-FNL’ to integrate itself into the transitional institutions<sup>1205</sup>. The UNSC also commended the adoption of the interim Constitution because it “provide[d] guarantees for all communities to be represented in the post-Transition institutions”<sup>1206</sup>. The requirement of inclusion was progressively implemented. Only in 2003, three years into the transition, did the National Council for the Defence of Democracy (CNDD) join the transitional government<sup>1207</sup>. Yet, as the Arusha Agreement and UNSC resolutions show, inclusivity was surely seen as a condition for and basis of the

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<sup>1197</sup> *Accord sur les dispositions transitoires aux Comores*, I. Principes.

<sup>1198</sup> Arusha Agreement, art. 7.

<sup>1199</sup> *Id.*, Protocol II, art. 15.13.

<sup>1200</sup> *Id.*, art. 15.16.

<sup>1201</sup> *Id.*, Protocol II, art. 1.4. Other examples with regard to the promotion of inclusiveness concern the general functioning of the administration (which shall “be broadly representative and reflect the diversity of the components of the Burundian nation. The practices with respect to employment shall be based [...] on the need to correct the imbalances and achieve broad representation”, Arusha Agreement, Protocol II, art. 10.4), the structure of the judiciary (which “shall be so structured as to promote the ideal that its composition should reflect that of the population as a whole”, Arusha Agreement, Protocol II, art. 9.3) and the establishment of a ‘Judicial Service Commission’ (which shall have “an ethnically balanced composition”, Arusha Agreement, Protocol II, art. 9.12). With regard to the reform in this sense of the Burundian judicial sector, also see Arusha Agreement, Protocol II, art. 17.3.a and 17.3.b. Also see art. 17.11 of this agreement.

<sup>1202</sup> Arusha Agreement, Protocol II, art. 14.5.

<sup>1203</sup> *Id.*, Protocol II, Preamble, § 2.

<sup>1204</sup> S/PRST/2001/26 dd. 26 September 2001.

<sup>1205</sup> S/RES/1545 dd. 21 May 2004, Preamble, § 7.

<sup>1206</sup> S/RES/1577 dd. 1 December 2004, Preamble, § 5.

<sup>1207</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 44: “the largest non-signatory, the National Council for the Defence of Democracy (CNDD), joined the transitional government. Talks continued, and finally in September 2006 the last rebel group signed a ceasefire agreement”.

transition. When a constitutional review was tabled during 2014, the UNSC referred back to the spirit of inclusivity which animated the Arusha Agreement<sup>1208</sup>.

4. The same is true of the Afghan transition starting in 2001. This transition introduced a conceptual shift –the light footprint approach– which in part accounts for the rise of DIG<sup>1209</sup>. Inclusivity in the context of the Afghan transition will therefore be addressed in some detail. The Afghan transitional authorities were to progressively implement the inclusivity requirement. The Bonn agreement was “intended as a first step toward the establishment of a broad-based, gender-sensitive, multi-ethnic and fully representative government”<sup>1210</sup>. This agreement provided that a ‘Emergency Loya Jirga’ (a grand assembly) shall decide on a broad-based transitional administration<sup>1211</sup>. The UNSC was also vocal about the Afghan transition being “broad-based, multi-ethnic and fully representative”<sup>1212</sup>. There is no doubt that the UNSC “recognized the importance of having a representative government lead the reconstruction”<sup>1213</sup>.

In spite of this, the inclusion requirement was only progressively, and not fully, implemented. Initial difficulties are attributable to the Bonn Agreement being a victor’s agreement<sup>1214</sup>. By promoting inclusivity, it contradicted itself as it “did not try to reconcile differences between the warring parties or attempt to draw members of the defeated group – the Taliban– into the process of government reestablishment or state creation”<sup>1215</sup>. The moderate Taliban elements were never drawn in the negotiations. For one commentator, the moderate Taliban could not be assumed not to have legitimate grievances, and the 2011 NATO decision to support dialogue with the Taliban illustrated “the ripening work of war”<sup>1216</sup>. Peace talks with Taliban, through their delegation based in Qatar<sup>1217</sup>, began only in June 2013.

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<sup>1208</sup> S/RES/2137 dd. 13 February 2014.

<sup>1209</sup> Chapter 1, Section A.1.

<sup>1210</sup> Bonn Agreement, Preamble, § 7. This provision was repeated word for word by the UNSC. S/RES/1383 dd. 6 December 2001, § 6.

<sup>1211</sup> Bonn Agreement, art. I.4.

<sup>1212</sup> S/RES/1378 dd. 14 November 2001, § 1.

<sup>1213</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 196.

<sup>1214</sup> T. H. Johnson, ‘Afghanistan’s Post-Taliban Transition – State Building After War’, in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, pp. 289-290, “[t]he Bonn Agreement was also not a peace agreement to end the decade-long Afghan civil war or the conflict between the Taliban and the US-led Northern Alliance, as Bonn brought together only the winners of the US-led Operating Enduring Freedom (OEF), not the warring parties”. This is confirmed by Brahimi: “[a] national reconciliation programme would benefit greatly from a genuinely inclusive peace agreement. That is what we did not have with the Bonn Agreement for Afghanistan: the hastily assembled delegates were not representative of the Afghan ethnic and political diversity. The Taliban who controlled 90 percent of the country a mere few weeks before the Bonn Conference were kept out and the Pashto population, the largest ethnic group, was poorly represented”, L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 13.

<sup>1215</sup> *Id.* For Johnson, “[i]n retrospect, Bonn should have attempted to draw in moderate Taliban elements and include them in the government” (*Id.*, p. 314). In the same sense, IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 20, observation by B. Rubin.

<sup>1216</sup> J. Arnault, ‘Legitimacy and Peace Processes – International Norms and Local Realities’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*

These contradictions were thus not immediately or fully redressed during the transition. The Interim Authority (22 December 2001 – 13 July 2002), Emergency Loya Jirga (11-19 July 2002) and Afghan Transitional Administration (13 July 2002 – 3 January 2004) failed to include sufficient Pashtun representation<sup>1218</sup>.

As a result, several commentators found that the Afghan transition was neither representative nor participatory. While Johnson<sup>1219</sup>, Afsah and Guhr<sup>1220</sup> criticize the lack of representativity (and legitimacy) of the Bonn peace process and its results, Saul considers that the lack of popular participation characterized the whole transition: its foundation, the interregnum itself<sup>1221</sup>, but also the constitutionmaking process<sup>1222</sup>. The latter point is not settled since authors like Afsah, Guhr and McCool consider that the constitutionmaking process was fairly inclusive<sup>1223</sup>.

**TABLE 9: Afghan transition: inclusivity (or lack thereof)**

Moment of transition	Degree of inclusion
Bonn process & Agreement (5 December 2001)	Victors' agreement (winners of the US-led Operation Enduring Freedom; exclusion Taliban; underrepresentation Pashtuns).
Interim Authority or Interim Administration (22 December 2001 – 13 July 2002)	Selection by Bonn Conference participants; participation based on distribution armed power <sup>1224</sup> .
Emergency Loya Jirga (11-19 July 2002)	The participants in the <i>loya jirga</i> were to be drawn from all segments of society, and the representation of women and all ethnic and religious communities was to be ensured. While there was an important women's delegation, criticism about fair representation (criticism from Pashtuns as seven southern provinces un-represented) <sup>1225</sup> .

<sup>1217</sup> 'Taliban Political Office in Qatar – Hopes and Fears', Huffington Post, 23 July 2013. 'How Qatar came to host the Taliban', BBC News, 21 June 2013.

<sup>1218</sup> It seems this was also recognized by the UNSG.

<sup>1219</sup> T. H. Johnson, 'Afghanistan's Post-Taliban Transition – State Building After War', in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.* p. 295: "[t]he composition of [the Afghan interim administration] undermined both the interim and transitional regimes. Critics contended that neither Bonn nor the chosen government was very representative of the traditional power centers in Afghanistan".

<sup>1220</sup> E. Afsah, A. Guhr, 'Afghanistan: Building a State to Keep the Peace', *Max Planck Yearbook of United Nations Law*, 9, 2005, p. 421.

<sup>1221</sup> Chapter 6, Section B.3. Table 11.2, 1b. Saul writes: "the Bonn Agreement did little to motivate a proactive approach to broader popular involvement in decision-making [...] Neither the Bonn Agreement nor the domestic legal framework that the Bonn Agreement endorsed [...] obligate the government to directly involve the population in decision-making", M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 175-176.

<sup>1222</sup> Chapter 6, Section B.3. Table 11.2, 1c. Saul writes: "the nation-wide consultations on the constitution that preceded the Constitutional Loya Jirga are reported to have proceeded at the insistence of the United Nations rather than the government, and to have been undermined by the absence of a draft constitution as a basis for the consultation" (M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 176-177). This led Saul to the conclusion that "governmental conduct [...] has been highlighted as having breached the requirements of international law in a manner and to an extent that has been deeply problematic for the transitional period" (*id.*, p. 186).

<sup>1223</sup> C. McCool, 'The role of constitution-building processes in democratization', *op. cit.*, p. 26.

<sup>1224</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 158.

<sup>1225</sup> C. McCool, 'The role of constitution-building processes in democratization', *op. cit.*, p. 10.

Afghan Transitional Administration (13 July 2002 – 3 January 2004)	Bonn vision of expanding membership of TA not fulfilled <sup>1226</sup> . Failure to include important Pashtuns (apart from Karzai) in the TA. Domination TA by groups like the ethnic Panjshiri Tajik Shura-yi Nazar (impacting on selection of commission) <sup>1227</sup> .
Constitutional Loya Jirga (December 2003 – January 2004)	Consensus about CLJ being representative of Afghan society. Mandate Constitutional Commission also related to public participation <sup>1228</sup> .

In spite of these trenchant critiques, three points should be emphasized. First, the Bonn process explicitly committed to inclusivity. It “recognized the need to expand representation in the government and the political process beyond the Bonn group”<sup>1229</sup>. Serious efforts were undertaken to progressively broaden the transition, and the lack of representativity was at least partly remediated during the transitional period, efforts which were recognized by the UNSC<sup>1230</sup>. Second, the constitutionmaking exercise was relatively representative. After the first constitutional commission established on 5 October 2002, a second constitutional commission was established on 26 April 2003, which “represented a broader political and ethnic spectrum than the first commission”<sup>1231</sup>. Third, the situation of women was significantly advanced during the transition in Afghanistan<sup>1232</sup>, an improvement also recognized by the UNSC<sup>1233</sup> and commended by several states<sup>1234</sup>.

Even beyond the transition, the inclusivity requirement continues to leave a mark. Years after the transition, an Afghan representative recognized that inclusivity had been central to the Afghan transition<sup>1235</sup>. During 2012, more than forty states and twenty organizations insisted on more inclusivity in Afghanistan<sup>1236</sup>, including for women<sup>1237</sup>. Afghan authorities continue to

<sup>1226</sup> *Ibid.*

<sup>1227</sup> ICG Asia Report no. 56, ‘Afghanistan’s Flawed Constitutional Process’, 12 June 2003.

<sup>1228</sup> M. Brandt, ‘Constitutional Assistance in Post-Conflict Countries, The UN Experience: Cambodia, East Timor & Afghanistan’, June 2005, p. 19: “one of the key aspects of [its] mandate was related to public participation”.

<sup>1229</sup> K. Papagianni, ‘Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation’, *op. cit.*, p. 749.

<sup>1230</sup> S/RES/1419 dd. 26 June 2002, § 1.

<sup>1231</sup> J. A. Thier, ‘The Making of a Constitution in Afghanistan’, *New York law school Review*, Volume 51, 2006 2007, p. 567.

<sup>1232</sup> C. McCool, ‘The role of constitution-building processes in democratization’, *op. cit.*, p. 9.

<sup>1233</sup> S/RES/1419 dd. 26 June 2002, § 1.

<sup>1234</sup> See, for instance, S/PV.4579 dd. 19 July 2002, p. 14 regarding Canada’s position: “[w]e were heartened by the participation of thousands of Afghans throughout the country. We were particularly encouraged by the effective participation of some 200 women delegates in the Loya Jirga itself. We welcome the appointment of three women to positions of authority in the transitional Administration and the appointment of a fourth to head the Human Rights Commission of Afghanistan. This is a very good start. We look to President Karzai and his Administration to ensure that women are included going forward at every level of decision-making and that women benefit fully and equitably from the country’s reconstruction”.

<sup>1235</sup> The Afghan representative stated that “[o]ne of the main characteristics of Afghanistan’s peacemaking process was the participation of all Afghan political groups representing the major political parties of Afghanistan”. S/PV.4903 (Resumption 1), p. 39.

<sup>1236</sup> The Tokyo Declaration: Partnership for Self-Reliance in Afghanistan From Transition to Transformation’, A/66/867-S/2012/532, 12 July 2012, § 9: “[t]he process that will lead to reconciliation and peace must be inclusive, represent the legitimate interests of all Afghans and be Afghan-led and Afghan-owned”.

commit to this requirement<sup>1238</sup>. This requirement was not only part of the dominant discourse, but also yielded some effects on the ground. The reliance on inclusivity as a guiding principle of the Afghan transition, one of the early instances of DIG, seems to have influenced the approach to other transitions which followed during the 2000s and the 2010s.

5. In the DRC, the Pretoria Agreement was itself the result of inclusive negotiations. The contention that the supraconstitutional provision integrated in this agreement is “problematic, since it made the Agreement the supreme law during the transition and not the Constitution”<sup>1239</sup> should be nuanced to the extent that this agreement was the result of inclusive negotiations, indeed. Further, this agreement proclaims inclusivity as one of the ‘transition principles’: “the transitional institutions shall be run on the basis of consensus, inclusiveness and the avoidance of conflict”<sup>1240</sup>. This is repeated in the ‘Draft Constitution of the Transition’, which links the success of a peaceful transition to “consensus, inclusiveness and non-conflict”, and to appropriate representation of local powers and “effective participation of women on all levels of responsibility”. The latter confirms women’s participation as one of the ‘basic principles for a peaceful transition’<sup>1241</sup>. The UNSC welcomed the commitment to inclusivity<sup>1242</sup>. The CIAT was instrumental in keeping the transition inclusive<sup>1243</sup>, and systematically insisted on this point<sup>1244</sup>.

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<sup>1237</sup> The participants of the Tokyo Conference on Afghanistan of 8 July 2012 held that women’s rights are a ‘reconciliation principle’ to be respected in the framework of an inclusive peace and reconciliation process: “[t]he Participants also stressed the importance of the participation of civil society organizations and women’s groups in support of the peace process and the culture of peace and human rights in Afghan society in particular in the light of the UN Security Council Resolution 1325”. Cf. ‘The Tokyo Declaration: Partnership for Self-Reliance in Afghanistan From Transition to Transformation’, A/66/867-S/2012/532, 12 July 2012, § 9. Cf. also the conclusions of the Tokyo conference on Afghanistan dd. 8 July 2012, § 9: “[t]he Participants reaffirmed the importance of the peace and reconciliation process with a view to ending the ongoing violence in the country and restoring lasting peace and security as per the UN Security Council Resolutions and as stated in the London and Kabul Communiqués, and reconfirmed in the Bonn Conclusions. The process that will lead to reconciliation and peace must be inclusive, represent the legitimate interests of all Afghans and be Afghan-led and Afghan-owned”.

<sup>1238</sup> This commitment to public participation continued after the transition period. Thus, the Afghanistan’s interim National Development Strategy includes a “comprehensive consultation process at the provincial, district and village levels”. ‘Islamic Republic of Afghanistan: Interim Poverty Reduction Strategy Paper–Summary Report’, IMF Country Report No. 06/195, May 2006, p. 65.

<sup>1239</sup> A. M. B. Mangu, ‘The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter’, *op. cit.*, p. 252.

<sup>1240</sup> Pretoria Agreement, III.5.

<sup>1241</sup> *Id.*, Part III. A. M. B. Mangu, ‘The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter’, *op. cit.*, p. 251.

<sup>1242</sup> S/RES/1445 dd. 4 December 2002, § 9: “the commitment of the Government of the Democratic Republic of the Congo and other Congolese parties to achieve an *inclusive* agreement on political transition, stresses the importance of such an agreement to the *wider peace process*, calls on all Congolese parties to cooperate actively with a view to a speedy conclusion of such an agreement”.

<sup>1243</sup> M. de Goede and C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *op. cit.*, pp. 123-125. Cf. also the Communiqué of the International Committee to support the Transition dd. 24 August 2004.

<sup>1244</sup> “Following RCD-G’s withdrawal, a CIAT delegation traveled to Goma to negotiate with Ruberwa and bring him back to Kinshasa. The main argument used by CIAT to convince potential spoilers like RCD-G to come back to the transition was one of the departing train and naming and shaming. [...] CIAT did manage to convince the parties to stay within the transition [...] [When] opposition party UDPS (Union for Democracy and Social Process) refused to participate in the elections [...] CIAT tried to change UDPS’s position”, *Ibid.*, *op. cit.* Cf. also the Communiqué of the International Committee to support the Transition dd. 24 August 2004: “[t]he CIAT has learned of the declaration made by the Congolese Rally for Democracy - RCD and notes with regret that some of those responsible for this

6. During 2003, transitional authorities in Liberia also committed to inclusivity. The Liberian ‘all-inclusive Transitional Government’ included the parties previously at war. The Liberian transition also introduced a reform of the electoral system “in order to ensure that the rights and interests of Liberians are guaranteed”<sup>1245</sup>.

7. In neighboring Côte d’Ivoire, laws had to be amended during the transition so as to achieve a better representation of the parties taking part in it<sup>1246</sup>.

8. In Somalia, between 2004 and 2012 two consecutive transitional authorities emerged, the ‘Transitional National Government’ and the ‘Transitional Federal Government’. In September 2011, dozens of states and organizations<sup>1247</sup> participating in the High Level Meeting on Somalia stated that “ownership and inclusiveness [and] political outreach to all major Somali stakeholders, including the regional entities [and] civil society” were guiding principles of the transition roadmap<sup>1248</sup>.

9. In Iraq, the inclusivity requirement formed the basis of the decision to replace the US-led CPA by domestic transitional authorities<sup>1249</sup>, i.e. the Interim Governing Council (IGC) and the Interim Iraqi Government (IIG). The UNSC tried to create as wide a political consensus as possible to create “the first genuinely Iraqi expression of a post-Saddam government”<sup>1250</sup>. The UNSC endorsed the formation of the IIG<sup>1251</sup>, and insisted on the “convening of a national

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entity have decided to temporally suspend their participation in the Transitional Institutions. [3] *The CIAT immediately invites RCD members who have announced suspension of their participation in the Transitional Institutions to retake their respective positions in Kinshasa which is the headquarters of the country's institutions* [4] The CIAT calls on all transition officials and political leaders to encourage dialogue and national reconciliation through their actions and statements. It calls on everyone to abstain from speech or acts which may raise tensions or foment ethnic hatred. [5] The CIAT reiterates that there is no viable alternative to the transition process as laid down in the All Global and Inclusive Accord and the Constitution. The difficulties encountered must find their solutions within the transitional institutions and within the framework of mechanisms set to this effect”.

<sup>1245</sup> 2003 Accra Agreement, art. XVIII.2.a.

<sup>1246</sup> Linas-Marcoussis Accord dd. 13 January 2003, art. II.2.b., provides that the Government of National Reconciliation “will submit several amendments to Law 2001-634 aimed at achieving better representation of the parties taking part in the Round Table within the central committee of the Independent Electoral Commission, including its Officers”.

<sup>1247</sup> Burundi, China, Denmark, Djibouti, Ethiopia, France, Germany, Italy, Japan, Kenya, Norway, the Russian Federation, Saudi Arabia, Somalia, Spain, Sudan, Sweden, Turkey, the United Kingdom, the United States, Uganda, the African Union, the European Union, the League of Arab States, and the Organisation of the Islamic Conference.

<sup>1248</sup> Cf. Chairman’s Summary of High Level Meeting on Somalia dd. 23 September 2011.

<sup>1249</sup> K. Papagianni, ‘Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation’, *op. cit.*, p. 750: “[o]riginally, the US administration envisaged that the CPA would stay in place until a permanent constitution was drafted and a government elected. However, this plan underestimated the importance of Iraqi leadership in steering the country’s transition as well as of negotiation and consensus building among Iraqis. A few months into Iraq’s occupation it became obvious that a transitional process led by an IIG was necessary in order for the legitimacy of the new political order and constitution”.

<sup>1250</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 356.

<sup>1251</sup> S/RES/1546 dd. 8 June 2004, § 1.

conference reflecting the diversity of Iraqi society”<sup>1252</sup>. The 2004 TAL insisted that the National Assembly include all Iraqi communities, and also have women participating<sup>1253</sup>.

The inclusivity requirement was however not implemented because “at each stage of the transitional process, the US and its Iraqi allies decided against wider inclusion in the political process”<sup>1254</sup>. According to Jackson, by the time the Sunnis were included in the discussions their participation was rejected by other groups<sup>1255</sup>. The de-Baathification process –targeting neo-Baathist as well as Arab Nationalist parties– also ran counter to the requirements of broad inclusion and representativity. Arato observes that the US “resolutely decided to include only previous outsiders, and to neglect and reject all important, intermediate strata that were previously not in explicit opposition to the regime”. This created a ‘legitimacy problem’<sup>1256</sup>, Brahimī<sup>1257</sup>, Papagianni<sup>1258</sup> and Welikala<sup>1259</sup> confirm. Neither the transitional process nor the adoption of the TAL were the fruit of public debate or consultations, as the below table indicates.

**TABLE 10: Inclusivity in the Iraqi transition procedure**

Moment of transition	Degree of representativity, ownership and transparency
CPA (21 April 2003 – 28 June 2004)	US-led (this is not a domestic transitional authority)
Iraqi Governing Council (13 July 2003 – 1 June 2004)	US-appointed (composed of allies or supporters of US occupation). Advisory role (possible veto by head of CPA).

<sup>1252</sup> *Id.*, § 4.b.

<sup>1253</sup> TAL, art 30.c: “[t]he National Assembly shall be elected in accordance with an electoral law and a political parties law. The electoral law shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly and of having fair representation for all communities in Iraq, including the Turcomans, ChaldoAssyrians, and others”.

<sup>1254</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 45.

<sup>1255</sup> V. C. Jackson, ‘What’s in a name?’, *op. cit.*, p. 1275.

<sup>1256</sup> A. Arato, ‘Post-Sovereign Constitution-Making and It’s Pathology in Iraq’, *op. cit.*, p. 548. He adds: “from the outset, the forums in charge of the first phase of the transition, and in particular constructing the interim constitution and forming the interim government, had a severe legitimacy problem”.

<sup>1257</sup> L. Brahimī, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 7: “[i]n Iraq, the institutions created by the invaders and the Iraqis drafted to serve under occupation never acquired any legitimacy or credibility in the eyes of the people of Iraq. The return to the Security Council may have given occupation a semblance of legality; but neither the Security Council resolutions nor the participation of the United Nations in the attempts to rebuild the state helped in any significant way to make the new institutions acceptable to the vast majority of the people of Iraq”. See also p. 14 of the same article.

<sup>1258</sup> For Papagianni, “[i]n Iraq, the US-led authority attempted to short-circuit an Iraq-led transitional process by imposing a constitution and leading the country to swift elections. When that plan was abandoned, the negotiation of a transitional framework was criticized because of the secrecy of the drafting discussions, and because it also contained key constitutional principles”. K. Papagianni, ‘Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation’, *op. cit.*, p. 751.

<sup>1259</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 19.

Law of Administration for transitional period dd. 8 March 2004 ('TAL')	- Drafted behind closed doors. - Imposition of some rules <sup>1260</sup> , also against Shi'ite groups <sup>1261</sup> .
Iraqi Interim Government (28 June 2004 – 3 May 2005)	- Same political balance as IGC. - Did not initiate process broad consultation/negotiation. - Transition and constitutiondrafting still largely in hands of US <sup>1262</sup> .
Iraqi National Conference (mid-August 2004)	- Missed opportunity to expand participation; - No participation of opponents US occupation; - Domination by political parties of interim government; - Refusal by opposition groups to participate <sup>1263</sup> .
Elections (30 January 2005)	Boycott by a number of political groups <sup>1264</sup> .
Iraqi Transitional Government (3 May 2005 – 20 May 2006)	
Constitutional Commission	- Reflection composition members TNA <sup>1265</sup> . - 2005 Constitution rejected by Sunni population <sup>1266</sup> .

In short, the Iraqi transition was far from inclusive since “the TAL did not represent a wide political agreement on the country’s transitional framework and failed to draw all the key political leaders into the process”<sup>1267</sup>. This inevitably affected the acceptance of the post-transition<sup>1268</sup>. Yet, there was a formal commitment to inclusivity, and it cannot be denied that

<sup>1260</sup> It seems that some rules that concern the interim rule, including amendment procedures, were “pushed through in a coup-like fashion”. A. Arato, 'Post-Sovereign Constitution-Making and It's Pathology in Iraq', *op. cit.*, p. 549.

<sup>1261</sup> *Id.*, p. 549: “the Shi’ite groups were not only forced to agree to the deal [i.e. the Transitional Administrative Law], but also to the procedural rules in the interim constitution that almost completely enshrined it against later alteration”.

<sup>1262</sup> K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *op. cit.*, p. 753: “The appointment in June 2004 of the IIG, with the blessing of the UN, gave some managerial responsibilities to the Iraqis, but did not change the central premise of the political process, namely that the transition to elections and constitutional drafting was to be managed by the USA and a select political grouping. The IGC then more or less reproduced itself in the IIG, a risk Pollack (2004) had identified before its appointment. Significantly, the CPA did not initiate or encourage a process of broad consultation and negotiation aimed at reaching agreement on the interim government and then on the transitional framework”.

<sup>1263</sup> *Id.*, p. 755.

<sup>1264</sup> *Id.*, p. 753: “The legitimacy of the January 2005 elections was challenged by the decision to boycott them made by a number of political groups and parties, such as the Muslim Scholars’ Association, the Iraqi Islamist Party, and several Arab nationalist groups [...] As a result of the boycott, the TNA barely represents the country’s Arab Sunni population or anti-occupation groups”.

<sup>1265</sup> *Id.*, p. 754: “the recently appointed Constitutional Commission is composed only of members of the TNA and thus includes very few Sunni Arabs”

<sup>1266</sup> K. Papagianni, 'Power sharing, transitional governments and the role of mediation', *op. cit.*, p. 45: “[a]s a result of a narrowly led transitional process, the constitution adopted in 2005 was largely rejected by the Sunni population”.

<sup>1267</sup> K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *op. cit.*, p. 751.

<sup>1268</sup> K. Papagianni, 'Power sharing, transitional governments and the role of mediation', *op. cit.*, p. 45: “[a]s a result of a narrowly led transitional process, the constitution adopted in 2005 was largely rejected by the Sunni population”.

domestic transitional authorities were created to realize a more inclusive transition. Further, the UNSC certainly insisted on DIG being inclusive.

## 1.2. 2010 onwards

After 2010, political constituencies guiding (attempted) transitions in Kyrgyzstan, Guinea, Libya, Somalia, Yemen, Syria, Guinea-Bissau, Central African Republic, Burkina Faso, and Ukraine all considered inclusivity to be central, if not to the transition as a whole than at least to the constitutionmaking process.

**10. KYRGYZSTAN** – After demonstrations during April 2010, Kyrgyz President Bakiyev and his government were ousted, and interethnic violence between the Kyrgyz and Uzbeks ensued. Next, an oppositional transitional authority was created and Bakiyev fled<sup>1269</sup>. Although the transition was opposition-led, the opposition leader claimed that “the opposition was looking for Bakiyev to discuss power transition but has failed to establish contact with the president”<sup>1270</sup>, and that all political parties and a wide array of civil society leaders participated in the constitutionmaking process<sup>1271</sup>.

**11. LIBYA** – The Libyan Transitional National Council (‘TNC’) claimed to be “the sole representative of all Libya with its different social and political strata and all its geographical sections”<sup>1272</sup>. It purportedly affirmed its legitimacy by highlighting its connection with local representative bodies<sup>1273</sup>. The Constitutional Declaration confirmed this<sup>1274</sup>. According to one observer, DIG in Libya was “designed and implemented by dominant elites or institutions without reflecting any national consensus. The unrealistic timeline for reforms left little room for public participation”<sup>1275</sup>. Moreover, while claiming representativity, the TNC refused to engage in an inclusive transitional process. It rejected a roadmap developed by the AU which, from the outset, emphasized the importance of full inclusivity. On 10 April 2011, Gadhafi confirmed his acceptance of the AU Roadmap, including the “dialogue between the Libyan

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<sup>1269</sup> OSCE Office for Democratic Institutions and Human Rights Referendum Observation Mission, Constitutional Referendum Kyrgyz Republic 2010, Interim Report, 21 May – 13 June 2010, 17 June 2010.

<sup>1270</sup> ‘Kyrgyz opposition forms interim gov’t’, Xinhua, 8 April 2010. This mere statement is of course quite vague and in any case has no evidentiary value.

<sup>1271</sup> OSCE Office for Democratic Institutions and Human Rights Referendum Observation Mission, Constitutional Referendum Kyrgyz Republic 2010, Interim Report, 21 May – 13 June 2010, 17 June 2010: “[k]ey parties in the provisional government and their allies support the draft constitution. Opponents criticize the legitimacy of the provisional government”.

<sup>1272</sup> Founding Statement of the Interim Transitional National Council, *op. cit.*, § 2.

<sup>1273</sup> Cf. ‘Introducing the Council’, <http://www.ntclibya.org/english/about/> (last retrieved on 4 May 2012; now only available *en cache*): “[t]he council derives its legitimacy from the decisions of local councils set up by the revolutionary people of Libya on the 17th of February. These local councils facilitated a mechanism to manage daily life in the liberated cities and villages. The council consists of thirty one members representing the various cities of Libya from the east to the west and from the north to the south”.

<sup>1274</sup> Constitutional Declaration dd. 3 August 2011, art. 17: “[t]he Transitional National Council shall be deemed as the sole legitimate representative of the Libyan people”. Cf. also *id.*, art. 18.

<sup>1275</sup> O. Hammady, ‘International support to legal and constitutional reforms in the MENA transitional processes’, presentation during International Expert Seminar of 21 and 22 September 2015.

parties and the establishment of an inclusive transition period”<sup>1276</sup>. The NTC refused to consider this roadmap, and did not show up at meetings where this was discussed<sup>1277</sup>. For Koko and Bakwesegha-Osula, “by posing the departure of Gaddafi and members of his family as a prerequisite to the peace process, [the NTC] was simply rejecting the very rationale underpinning the AU’s initiative, namely inclusiveness”<sup>1278</sup>.

The AU Peace and Security Council (‘PSC’) made its recognition of the NTC conditional upon the establishment of an all-inclusive transitional government<sup>1279</sup>. On 26 April 2011, the PSC decided to establish an AU Ad-Hoc High-Level Committee on Libya (comprising five Heads of State and Government, as well as the Chairperson of the Commission) with the mandate to “facilitate an inclusive dialogue among Libyan parties on the appropriate reforms”<sup>1280</sup>. On 26 August 2011, the PSC again called for the formation of an inclusive transitional Government<sup>1281</sup>.

On several occasions, the UNSC confirmed its position that the Libyan transition was to be inclusive<sup>1282</sup>. After the TNC’s declaration of liberation, the UNSC again highlighted the importance of an inclusive, representative transitional government<sup>1283</sup>. The inclusivity requirement also concerned women’s participation<sup>1284</sup>; UNSMIL, too, systematically called for women’s participation in the constitutionmaking process<sup>1285</sup>.

In spite of these exhortations, inclusive negotiations were undermined both by NATO and, indirectly, by the UNSC, as we shall see in Chapter 9. Furthermore, minority groups like the Berbers and the Toubous were not fairly represented in the transitional institutions<sup>1286</sup>. Lastly,

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<sup>1276</sup> ‘The leader of the 1<sup>st</sup> of September revolution conforms the acceptance of the AU Roadmap for the resolution of the crisis in his country’, press release dd. 10 April 2011.

<sup>1277</sup> During a meeting held on 19 March 2011 in Adis Abeba, members of the NTC were not present. ‘The African Union ad hoc High- Level Committee on Libya convenes its second meeting in Addis Ababa – The Committee interacted with a delegation of the Libyan government’, AU press release, 25 March 2011.

<sup>1278</sup> S. Koko, M. Bakwesegha-Osula, ‘Assessing the African Union’s Response to the Libyan Crisis’, African Centre for the Constructive Resolution of Disputes (ACCORD), 2012, pp. 8-9.

<sup>1279</sup> *Id.*, p. 10. Emphasis added. Also: “[m]eeting under the leadership of South African President, Jacob Zuma, the High Level Ad Hoc Committee emphasised the PSC’s initial position of linking the admission of the NTC into the AU to the formation of an all-inclusive Libyan government”.

<sup>1280</sup> ‘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, § 5.

<sup>1281</sup> AU Peace and Security Council Communiqué dd. 26 August 2011, PSC/AHG/COMM.(CCXCI), § 3.

<sup>1282</sup> S/RES/2009 dd. 16 September 2011, § 2, § 4.c.; S/RES/2016 dd. 27 October 2011, Preamble, § 5. S/RES/2174 dd. 27 August 2014.

<sup>1283</sup> *Id.*, § 2.

<sup>1284</sup> S/RES/2016 dd. 27 October 2011, Preamble, § 5. Cf. also O. Jurasz, ‘Women of the revolution: the future of women’s rights in post-Gaddafi Libya’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.*, p. 118.

<sup>1285</sup> H. Youssef, ‘The Arab League and the Rule of Law’ in IDEA, *Rule of Law and Constitution Building, The Role of Regional Organizations*, 2014, p. 43.

<sup>1286</sup> Moyen-orient, Libye, de la révolution au chaos, nr. 25, Janvier-Mars 2015, p. 17: «[é]mergeant de territoires marginalisés, les Berbères –environ 10% de la population totale- et les Toubous Oquelque 800000 individus- ont joué un rôle central dans la chute du colonel, avant d’être renvoyés à leur ostracisme. Ces minorités de retrouvent victimes de discrimination, du refus de connaître leur langue et leur culture, d’une faible représentation dans les organes de transition et surtout du manque de reconnaissance de leur

the widely condemned ‘law of political exclusion’, approved in May 2013 (and subsequently revoked by the Tobruk-based legislature<sup>1287</sup>) was also contrary to the spirit of inclusivity. It arguably contributed to the duality of government (with one government in Tripoli and the other in Tobruk<sup>1288</sup>) and the further disintegration of the country in 2015/2016. Yet, there is no doubt that inclusivity was seen –domestically, regionally and globally– as a guiding principle for the interregnum, albeit one of varying degree or intensity. The TNC claimed (local) representativity from the outset, the PSC insisted on an all-inclusive transition, and the UNSC on consultative, inclusive political process in anticipation of the constitutionmaking phase.

**12. YEMEN** – In Yemen, the Implementation Mechanism of the GCC Initiative provided for the establishment of a national unity government<sup>1289</sup> and for a national dialogue conference<sup>1290</sup> for “all forces and political actors, including youth, the Southern Movement, the Houthis, other political parties, civil society representatives and women”<sup>1291</sup>. The 2011 GCC Agreement provided for appropriate women’s participation<sup>1292</sup>, a requirement which resulted in concrete reform initiatives<sup>1293</sup>. The National Dialogue Conference, representing both the South and the North of the country and including civil society, youth’s and women’ representatives, completed its work early 2014 and produced a draft post-transition constitution.

The UNSC repeatedly called for inclusive DIG<sup>1294</sup>. In October 2011, the UNSC put pressure on Saleh to accept the 2011 GCC agreement, stating that “the best solution to the current crisis in Yemen is through an inclusive and Yemeni-led political process of transition”<sup>1295</sup>. On 12 June 2012, the UNSC called for an expansion of the transition beyond the participants to the GCC Agreement<sup>1296</sup>, and demanded that the national dialogue conference be “fully-inclusive, participatory, transparent and meaningful”<sup>1297</sup>. On 26 February 2014, the UNSC again emphasized the need for an inclusive and Yemeni-led transition<sup>1298</sup>.

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*territorialités spécifiques et de leurs structures politiques* ». Emphasis added. See also p. 18: “*le Conseil national de transition (CNT) formé dans la précipitation [...] a ou être une interface efficace à l'international, mais il n'a réussi à établir ni autorité ni relations étroites avec et entre les divers acteurs d'une insurrection qui s'est réalisée au travers de mobilisations locales autonomes* ».

<sup>1287</sup> ‘Libya revokes bill which banned Gaddafi-era officials from office’, BBC, 2 February 2015.

<sup>1288</sup> *Id.*

<sup>1289</sup> Implementation Mechanism, Part III.

<sup>1290</sup> *Id.*, Part IV.

<sup>1291</sup> *Id.*, § 20.

<sup>1292</sup> [The 2011 GCC Agreement](#), art. 26.

<sup>1293</sup> Reforms in this sense would have been undertaken by the Yemeni minister of culture. S. Baric, ‘Women's rights in Yemen: democratic transition post-Arab Spring?’, The Jerusalem Post, 18 February 2015: “[i]n 2013, Othman [Yemen’s culture minister] headed a committee on ‘rights and freedoms’ as part of the process for constitutional reform. Committees were responsible for drafting recommendations for changes in the constitution. Many of the recommendations supported women’s rights such as enhancing women’s political participation”.

<sup>1294</sup> S/RES/2014 dd. 21 October 2011. See also S/RES/2051 dd. 12 June 2012; S/RES/2051 dd. 12 June 2012; S/RES/2140 dd. 26 February 2014.

<sup>1295</sup> S/RES/2014 dd. 21 October 2011. Emphasis added. See also S/RES/2051 dd. 12 June 2012.

<sup>1296</sup> S/RES/2051 dd. 12 June 2012.

<sup>1297</sup> S/RES/2051 dd. 12 June 2012.

<sup>1298</sup> S/RES/2140 dd. 26 February 2014.

Opinions vary as to how the inclusivity requirement was implemented before the Houthi take-over. Some consider they were not (sufficiently) included in the transition<sup>1299</sup>, but Holzapfel nuances: “the Houthi were not represented in the negotiations on the implementation of the GCC initiative, but have taken an active role in successive parts of the transition process, most importantly in the National Dialogue Conference (NDC)”. For Holzapfel, the transition came to gradually include not only the Houthi’s but also other previously excluded groups<sup>1300</sup>. After the Houthi take-over, the Arab League, representing twenty-two states, called for a resumption of the transition based on the participation of all parties<sup>1301</sup>. The UNSC also called for a “consensus solution”<sup>1302</sup> and for a “peaceful, inclusive, orderly and Yemeni-led political transition process”<sup>1303</sup>, and urged that the Houthi refrain from undermining the transition<sup>1304</sup>, a demand reiterated during April 2015<sup>1305</sup>.

**13. SYRIA** – A transition in Syria was never initiated. Yet, significant portions of the international community purported to direct this country towards inclusive DIG. At the end of January 2012, the League of Arab States called for the formation of a government of national unity (including the opposition) under the leadership of the Vice-President<sup>1306</sup>, and called “on the international community to support [this] government”<sup>1307</sup>. Beginning February 2012, a draft UNSC resolution calling for an inclusive transition was not adopted<sup>1308</sup>; and the Arab League project to create a unity government not implemented.

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<sup>1299</sup> F. Al-Muslimi, ‘Violence in Yemen overshadows National Dialogue’, Al-Monitor, January 2014.

<sup>1300</sup> Holzapfel describes in the following terms how the transition gradually came to include not only the Houthi’s but also other previously excluded groups: “the transition process also reached out to the opposition that had formed outside the political establishment—most significantly, the movements in the North (the Houthis) and South (al-Hiraak), and the independent protest movement, including civil society organizations, youth, and women. *These groups were not represented in the negotiations on the implementation of the GCC initiative, but have taken an active role in successive parts of the transition process, most importantly in the National Dialogue Conference (NDC).* The inclusion of these other actors in the NDC is all the more important because these groups represent other competing centers of gravity within Yemen’s complex political picture”. P. B. Holzapfel, ‘Yemen’s Transition Process: Between Fragmentation and Transformation’, *op. cit.*, p. 6. Cf. also A. S. Hassan, ‘Yemen - National Dialogue Conference: managing peaceful change?’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*, p. 50.

<sup>1301</sup> Summit XXVI of the League of Arab States, referred to in S/RES/2216 dd. 14 April 2015: “resumption of Yemen’s political transition process with the participation of all Yemeni parties in accordance with the Gulf Cooperation Council Initiative and its Implementation Mechanism and the outcomes of the comprehensive National Dialogue conference”.

<sup>1302</sup> *Id.*, § 5. Cf. also S/RES/2201 dd. 15 February 2015, § 5.

<sup>1303</sup> S/RES/2201 dd. 15 February 2015, Preamble.

<sup>1304</sup> S/RES/2216 dd. 14 April 2015, § 1.

<sup>1305</sup> S/RES/2216 dd. 14 April 2015, § 6: the UNSC “[d]emand[ed] that all Yemeni parties adhere to resolving their differences through dialogue and consultation, reject acts of violence to achieve political goals, and refrain from provocation and all unilateral actions to undermine the political transition and stresses that all parties should take concrete steps to agree and implement a consensus-based political solution to Yemen’s crisis in accordance with the Gulf Cooperation Council Initiative and its Implementation Mechanism and the outcomes of the comprehensive National Dialogue conference”. See also § 13 in which the UNSC again called for the “resumption of a peaceful, inclusive, orderly and Yemeni-led political transition process”.

<sup>1306</sup> Arab League Council Resolution 7444 dd. 22 January 2012 (S/2012/71), ‘Elements of the Arab plan to resolve the Syrian crisis’, § 4.a.

<sup>1307</sup> *Id.*, § 6.

<sup>1308</sup> S/2012/77 dd. 4 February 2012.

In spite of their support for the Syrian National Coalition (‘SNC’), the ‘Group of Friends of the Syrian People’, representing more than sixty countries and several IOs<sup>1309</sup> (the ‘contact group’), repeatedly insisted that a transition was to be inclusive. On 24 February 2012, this contact group set out the parameters for an inclusive and Syrian-led transition<sup>1310</sup>. It was also a vocal supporter of the SNC, “a loosely-aligned umbrella organization comprised of seven different blocs”<sup>1311</sup>; for some “a coalition of mostly exiled dissidents”<sup>1312</sup>. Contrary to, for instance, the Damascus-based National Coordination Committee, which “favors a negotiated political settlement and dialogue with the Regime”<sup>1313</sup>, the SNC has consistently rejected any negotiations with the incumbent.

In March 2012 K. Annan proposed a six-point plan for Syria, the first point of which confirmed the need for an inclusive transition<sup>1314</sup>. In April 2012, the UNSC called for a “comprehensive political dialogue between the Syrian government and the whole spectrum of the Syrian opposition”<sup>1315</sup>. In June 2012, the ‘Action Group for Syria’ (a smaller UN-backed group, all members of which also take part in the contact group) convened and issued the Geneva final communiqué. The section on ‘Principles and Guidelines for a Syrian-led transition’ provided for “the establishment of a transitional governing body [with full executive powers] which can establish a neutral environment in which the transition can take place”<sup>1316</sup>. This transitional authority would “include members of the present government and the opposition and other groups and shall be formed on the basis of mutual consent”<sup>1317</sup>. This communiqué was endorsed by the contact group during July 2012<sup>1318</sup>.

In spite of these exhortations, inclusive DIG has not yet been pursued at the time of writing. This approach was, however, again discussed during a meeting in Vienna on 30 October

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<sup>1309</sup> The Chairman's Conclusions of the International Conference of the Group of Friends of the Syrian People, 24 February 2012, § 1: “more than 60 countries and representatives from the United Nations, the League of Arab States, the European Union, the Organisation of Islamic Cooperation, the Arab Maghreb Union and the Cooperation Council for the Arab Gulf States”

<sup>1310</sup> *Id.*, § 5.

<sup>1311</sup> O’Bagy, p. 6: the Muslim brotherhood, the Damascus Declaration, The national Bloc, the local coordination committee (as representatives of the grassroots movement), the Kurdish Bloc, the Assyrian Bloc, and independents.

<sup>1312</sup> *Id.*, p. 9.

<sup>1313</sup> O’Bagy, p. 6. Cf. the *communiqué de presse* dd. 28 May 2014: “[l]a solution politique négociée entre la délégation des forces de l’opposition, sérieuses et acceptées, où participent ses différentes composantes d’un côté et la délégation gouvernementale annoncée dans la déclaration de Genève 1 et qui est compatible avec l’essence même du processus de négociation, qui a débuté à Genève 2, soutenue par les autorités nationales et les garanties régionales et internationales, cela actuellement est la clef de route pour une sortie de crise saine et crédible”.

<sup>1314</sup> Cf. ‘Six-Point Proposal of the Joint Special Envoy of the United Nations and the League of Arab States’, annexed to S/RES/2042 dd. 14 April 2012: “commit to work with the Envoy in an inclusive Syrian-led political process to address the legitimate aspirations and concerns of the Syrian people”.

<sup>1315</sup> S/RES/2043 dd. 21 April 2012.

<sup>1316</sup> See ‘Action Group for Syria Final Communiqué’ dd. 30 June 2012. See second part. Annexed to UNSC draft resolution S/2012/538.

<sup>1317</sup> *Id.*

<sup>1318</sup> See ‘Group of Friends of the Syrian People: 3<sup>rd</sup> Conference’, 6 July 2012. The chairman’s conclusions of the Paris meeting indicated that the group “reiterated their commitment to support the political and economic transition in Syria”, and “welcomed that the Action Group Geneva communiqué called for the establishment of a transitional governing body with full executive powers”.

2015<sup>1319</sup>. Anno 2015, several actors of the international community continued to insist that an inclusive transition would be the only way to end the Syrian armed conflict. Some states reconsidered their initial reluctance to negotiate with the incumbent<sup>1320</sup>. The grand majority of states and organizations agreed that a DIG would need to include members of the regime and the opposition, even though the issue of whether inclusivity would extend to the incumbent head of state remained controversial.

A major shift on negotiations about an inclusive transition occurred a day after the Paris attacks of 13 November 2015. World leaders then agreed that inclusive negotiations should lead to a credible, inclusive, non-sectarian government within six months<sup>1321</sup>. At the time of writing, international collaboration seems to be widening as several states seem to be willing to directly negotiate with the Syrian head of state, and not only about the eradication of the so-called *Islamic State* but also about an inclusive transition. The conviction that an inclusive transition is the *only* way forward is thus widely shared, confirming the peace-through-transition paradigm.

**14. GUINEA-BISSAU** – In Guinea-Bissau, after a coup deposed President Pereira on 12 April 2012, a transitional authority was set up. It was supposed to lead an inclusive transition over two years. During May 2012, ECOWAS confirmed the need for a ‘broad based’ transition<sup>1322</sup>. One year later, the UNSC “stress[ed] that the consolidation of peace and stability in Guinea-Bissau can only result from a consensual, inclusive and nationally owned transition process”<sup>1323</sup>. By the end of 2013, it repeated this approach<sup>1324</sup>. On 18 February 2015, the UNSC again called for an inclusive dialogue, and “stress[ed] the importance of including all Bissau-Guineans in this process at national and local levels”<sup>1325</sup>. Other UNSC resolutions consistently called for an inclusive transition procedure<sup>1326</sup>, also based on women’s participation<sup>1327</sup>.

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<sup>1319</sup> ‘Syria Conflict: Powers backing rivals meet in Vienna’, BBC, 30 October 2015. During September and October 2015, Germany, Iran, Russia and Saudi Arabia, the UK, the UK, have at least pondered about the creation of a transitional government. ‘Germany calls for Syria transitional government’, Yahoo news, 27 September 2015. ‘Forming Transitional Government: Iran Solution for Syria Crisis’, Alalam, 25 October 2015. ‘U.S., Russia, Saudi Arabia, Turkey meet on possible transitional government for Syria’, Triblive, 23 October 2015. Position of UK, cf. ‘Deal to end civil war in Syria could allow president Bashar al-Assad to stay’, The Observer, 26 September 2015.

<sup>1320</sup> ‘Kerry Suggests There Is a Place for Assad in Syria Talks’, New York Times, 15 March 2015.

<sup>1321</sup> ‘Vienna talks: Syrian regime and opposition to meet, collaborate before the new year’, Albawaba news, 16 November 2015.

<sup>1322</sup> ‘Final communiqué’ dd. 3 May 2012, § 21, by which ECOWAS “confirm[ed] its previous decision to establish a twelve-month transition” and decided that a “consensual Prime Minister with full powers shall be designated to lead a broad-based government that shall lead the transition to its conclusion”.

<sup>1323</sup> S/RES/2103 dd. 22 May 2013.

<sup>1324</sup> S/PRST/2013/19 dd. 9 December 2013.

<sup>1325</sup> S/RES/2203 dd. 18 February 2015, Preamble. The UNSC furthermore stressed that “the consolidation of peace and stability in Guinea-Bissau can only result from a consensual, inclusive and nationally owned process”, and that “all stakeholders in Guinea-Bissau should work to ensure short, medium and long-term stability through clear commitment and genuine inclusive political dialogue”. It listed as one of the priorities its support to “an inclusive political dialogue and national reconciliation process to strengthen democratic governance” (Id., § 2a).

<sup>1326</sup> Cf. also S/RES/2186 dd. 25 November 2014, § 1.a. The UNSC “decided to extend the mandate of UNIOGBIS for a period of 3 months beginning on 1 December 2014 until 28 February 2015 to [...] Support[ing] an

**15. CAR** – In the CAR, the inclusivity requirement led to a revision of the composition of the transitional authorities: "*compte-tenu de la nécessité de faire du CNT le creuset d'une gestion inclusive de la transition [...] il convient de revoir la composition du CNT*"<sup>1328</sup>. This followed a decision by ECCAS "to establish an inclusive National Transitional Council (NTC) – to replace less inclusive National Assembly"<sup>1329</sup>. Not only the UNSC<sup>1330</sup> but also the participants of the contact group<sup>1331</sup>, the EU Council<sup>1332</sup> and Parliament<sup>1333</sup> have echoed the inclusion requirement. In addition, dozens of states and organizations emphasized that women were to be involved in the transition<sup>1334</sup>.

**16. SOUTH SUDAN** – With regard to South Sudan, the UNSC has "urged all parties to engage in an open and fully inclusive national dialogue seeking to establish lasting peace, reconciliation and good governance"<sup>1335</sup>, even before the transition started<sup>1336</sup>.

**17. BURKINA FASO** – The 2014 *Charte de la Transition* for Burkina Faso considers inclusivity as a necessity<sup>1337</sup> and as a guiding principle for the whole transition<sup>1338</sup> also applicable to women's participation<sup>1339</sup>. A commitment to the inclusivity requirement was echoed by ECOWAS and the Contact Group for Burkina Faso when they urged the transition leader to "initiate an all-inclusive consultation among political party leaders, representatives of civil society organizations, religious and traditional leaders as well as the military, to work out the

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inclusive political dialogue and national reconciliation process to facilitate democratic governance". See also S/PV/6963 dd. 9 May 2013, 'The situation in Guinea-Bissau'.

<sup>1327</sup> On 18 February 2015, the UNSC "[e]mphasiz[ed] the important role of women in prevention and resolution of conflicts and in peacebuilding", and "welcome[d] the cooperation between UNIOGBIS, National authorities and civil society organizations to increase women's participation in Guinea-Bissau and underlining that a gender perspective must continue to inform the implementation of all relevant aspects of the mandate of UNIOGBIS" (S/RES/2203 dd. 18 February 2015, Preamble. Cf. also *id.*, § 3.e.). On 9 December 2013, the UNSC "urge[d] Authorities in charge of the transitional period to provide the security and create the conditions conducive to the safe full and equal participation of all political actors and all sectors of the society, in particular women in the political process and calls upon all stakeholders to contribute to that effect" (S/PRST/2013/19 dd. 9 December 2013).

<sup>1328</sup> *Déclaration de N'Djamena*, § 3.

<sup>1329</sup> Informal meeting of the Central African Republic configuration of the PBC, Chairman's Summary, 16 May 2013, § 2. Emphasis added.

<sup>1330</sup> Cf. annexes for list of relevant resolutions.

<sup>1331</sup> Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, § 9.

<sup>1332</sup> Chairman's Summary, 16 May 2013, § 6.

<sup>1333</sup> European Parliament resolution of 17 January 2013 on the situation in the Central African Republic (2013/2514(RSP)).

<sup>1334</sup> 'Declaration of the third meeting of the International Contact Group on the Central African Republic', Bangui, 8 November 2013: "[p]articipants agreed that addressing effectively the challenges facing the CAR requires commitments from both the CAR authorities and the international community. They stressed the *importance of integrating women in the transitional process*". Cf. also S/PV.7217, Report of the Peacebuilding Commission on its seventh session (S/2014/67).

<sup>1335</sup> S/RES/2187 dd. 25 November 2014.

<sup>1336</sup> During Summer 2014, the constitutional structure of South Sudan was being discussed on the basis of a 'position paper' proposing the creation of a (new) transitional government, an avenue also recommended by the US Amb. to the UN. Cf. also the caveat about socialized practices expressed at the beginning of Part III.

<sup>1337</sup> 2014 *Charte de la Transition*, Preamble.

<sup>1338</sup> *Id.*, art. 1: « *la présente Charte consacre les valeurs suivantes pour guider la transition : [...] l'inclusion* ».

<sup>1339</sup> *Id.*, art. 12: « *le Conseil national de la transition [...] prend en compte les jeunes et les femmes* ».

composition of the transitional government”<sup>1340</sup>. In February 2015, the UN, too, called on Burkina Faso’s transitional institutions “to do everything possible to implement the Transition Charter in an inclusive manner and in a spirit of national cohesion”<sup>1341</sup>.

**18. UKRAINE** – In Ukraine, the ‘Agreement on the Settlement of Crisis in Ukraine’ of 21 February 2014 called for the creation of a coalition and formation of a unity government within ten days after its signature<sup>1342</sup>. Even though this agreement failed, it reveals the position of all EU member states. It was on their behalf that Poland, Germany, and France (the ‘Weimar Triangle’) had brokered this agreement. In addition, Russia sought to expand the participation in the proposed constitutional reform to all Ukrainian regions and political forces<sup>1343</sup>. Several states thus expressed that the transition was to be inclusive (a position however not shared by the interim government)<sup>1344</sup>. The Venice Commission “re-emphasize[d] the need for a broad-based drafting process and for deliberation on major constitutional reform, as well as the approval of such a reform”<sup>1345</sup>. It also stressed “that it is essential in order for a constitutional reform to succeed that it should be prepared in an inclusive manner, notably through broad public consultations”<sup>1346</sup>.

**19. OTHER STATES** – The above overview is not exhaustive, and could be complemented with multiple references to legal instruments, state practice, and relevant resolutions confirming the conviction that DIG must be inclusive<sup>1347</sup>. For example, the notion of participatory constitutionmaking was explicitly endorsed by Fiji, Nepal, Tunisia and Zimbabwe<sup>1348</sup>. All EU member states, Turkey, Iceland and Norway underline the importance of ‘inclusiveness’ in transition settings<sup>1349</sup>. This conviction is shared by states like India<sup>1350</sup>, the Philippines<sup>1351</sup>, and

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<sup>1340</sup> ‘ECOWAS names contact group on Burkina Faso’, 7 November 2014.

<sup>1341</sup> UN News Centre, ‘International community ‘will not tolerate’ obstacles to Burkina Faso transition, says UN political chief’, 4 February 2015.

<sup>1342</sup> Agreement on the Settlement of Crisis in Ukraine’ dd. 21 February 2014, art. 1.

<sup>1343</sup> G. Vaypan, ‘(Un)Invited Guests: The Validity of Russia’s Argument on Intervention by Invitation’, Cambridge Journal of International and Comparative Law, 5 March 2014.

<sup>1344</sup> Note that it has been suggested that the outbreak of violence in Ukraine –perhaps also the secession of Crimea– would have been avoided by an inclusive transition. J. Strassheim, ‘Interim Governments: Short-Lived Institutions for Long-Lasting Peace’, *op. cit.*, p. 6.

<sup>1345</sup> 722/2013, ‘Opinion on the Draft Law on the amendments to the Constitution, strengthening the independence of Judges and on changes proposed by the Constitutional Assembly to the Constitution of Ukraine’, § 64.

<sup>1346</sup> Opinion no. 766/2014, § 73.

<sup>1347</sup> Cf. also the ‘Strategic Framework for Peace-building in Burundi’ and the ‘Peacebuilding Cooperation Framework in Sierra Leone’; DRC country assistance framework; national peacebuilding agenda’s.

<sup>1348</sup> IDEA, *Constitution Building: A Global Review (2013)*, 2014, p. 5.

<sup>1349</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004, p. 4. The focus is on inclusion of groups and sections of the population in the nation-building process (national reconciliation *sensu lato*). With individual position by France. S/PV.4903 dd. 26 January 2004 p. 17. France mentions inclusive processes both at the population (national reconciliation in all segments of the population; disarmament and reintegration programs, integration of children & women, minorities, refugees, foreign and displaced people) and elite (power-sharing, fair distribution of economic resources) levels.

<sup>1350</sup> *Id.*, p. 18: “[a]n important contribution the United Nations can make, in our view, is to ensure the centrality of the local actors in the political process. Models forced upon societies from the outside often fail. Full ownership by

the US<sup>1352</sup>. These countries have also highlighted that in order to achieve social and economic integration it is necessary to ensure an “equitable sharing of resources between communities”<sup>1353</sup>, an issue of high relevance for DIG but mentioned only in passing in this study<sup>1354</sup>. Finally, the overview above indicates that several transition states emphasize the importance of women’s participation during the interregnum, a vision shared by other states including Cameroon<sup>1355</sup>, Fiji<sup>1356</sup>, Morocco<sup>1357</sup>, and the Philippines<sup>1358</sup>.

**20. OTHER STATES & ORGANIZATIONS (CTD.)** – The general inclusivity approach is collectively affirmed, not only through the UNSC but also through regional organizations (like ECOWAS, GCC or EU), or through contact groups. Contact groups assemble dozens of states and organizations. Their joint actions are therefore an important indicator of how state practice and/or *opinio iuris* may evolve. The contact groups mentioned above (for Afghanistan, Burkina Faso, Central African Republic, DRC, Somalia and Syria, to which the one for Guinea may be added<sup>1359</sup>) have all insisted on DIG being inclusive.

## *2. Policy & sociology of law considerations*

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In the literature, inclusivity as a requirement for DIG is both commended and criticized (2.1). Yet, practitioners are invariably asked to promote inclusive DIG (2.2).

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the political elements of society in an inclusive, rather than exclusive, process would ensure that the solutions devised do not contain the seeds of resurgence of conflict”.

<sup>1351</sup> For a description of how inclusivity was put into practice in the transition procedure of the Philippines, see Y. Busran-Lao, ‘Philippines: women and inclusivity in the Mindanao peace process’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*, p. 29. Mao argues that the transitional institutions in the Philippines “could serve as strong platforms for greater inclusivity among the stakeholders in the Bangsamoro peace process. For example, the TC is a very good venue for intra-Bangsamoro dialogue where all the splinter groups of the MILF, MNLF and their communities can participate and converge their agendas. The TC also provides a useful platform for broader Tripeople dialogue. The 15 members of the TC represent the various stakeholders: the MILF; recognised allies of the MNLF; indigenous people; settlers; and nominees of provincial governors of ARMM”.

<sup>1352</sup> US National Security Strategy, February 2015, p. 10: “we are working with our partners to train and equip a moderate Syrian opposition to provide a counterweight to the terrorists and the brutality of the Assad regime. Yet, the only lasting solution to Syria’s civil war remains political—an inclusive political transition that responds to the legitimate aspirations of all Syrian citizens”.

<sup>1353</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004, p. 4.

<sup>1354</sup> See Chapter 5, Section B.1, *in fine*.

<sup>1355</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 40.

<sup>1356</sup> V. Buadromo, ‘Fiji, The constitutional process: a view from the Fiji Women’s Rights Movement’.

<sup>1357</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 22: “[a] comprehensive approach must also take into account all of the actors in the field — civil society, non-governmental organizations, but also, and above all, women. We cannot overemphasize the decisive role of women in post-conflict reconstruction processes. To be sure, the Beijing Platform for Action highlighted that particular dimension and the valuable contribution made by women, but we must now go farther and promote the participation of women in the field and in peacekeeping operations”.

<sup>1358</sup> For a description, see Y. Busran-Lao, ‘Philippines: women and inclusivity in the Mindanao peace process’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*

<sup>1359</sup> On 12 March 2009, the International Contact Group on Guinea (ICG-G), gathering dozens of states and organisations, “noted with satisfaction the beginning of a comprehensive political dialogue involving all stakeholders and CNDD”. S/2009/140 dd. 12 March 2009, § 12.

## 2.1. Policy considerations

Inclusivity as a requirement for DIG is both commended (2.1.1) and criticized (2.1.2).

### 2.1.1. Positive critique

**FINALITY OF INCLUSION: STABILITY** – Political science literature generally considers that inclusivity leads to a (more) stable post-transition period. In post-conflict countries, the insistence on requirements of ‘inclusion’, ‘representation’, and ‘participation’ can be explained as a reaction to prior domination by specific groups<sup>1360</sup>. Inclusive DIG can break this cycle, and pave the way for stability as “consultative and inclusive mechanisms, which facilitate bargaining and negotiation among elites and participation by the public, contribute to the acceptance of the transitional political process and its outcomes”<sup>1361</sup>. Sisk writes that transition processes “that are broadly inclusive [...] have the best chance of creating the legitimacy needed for effective post-war governance”<sup>1362</sup>. For Ponzio,

“while discouraging the international community from rushing into electoral contests that inevitably result in winners and losers, transitional governance arrangements send the signal that political change is under way in a manner that is both inclusive of the general population and least threatening to traditional elites”<sup>1363</sup>.

**INEFFECTIVENESS EXCLUSIVE DIG** – Benomar discusses a number of cases in which representation and shared decisionmaking-processes in transition processes *sensu lato* have yielded positive results (Namibia, Spain), and also mentions counter-examples, i.e. cases in which exclusive transitions produced adverse consequences (Colombia, Ethiopia, Venezuela)<sup>1364</sup>. Transitions in Cambodia (no inclusive constitutionmaking process<sup>1365</sup>) and Thailand (restriction of

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<sup>1360</sup> S/PV.4903 dd. 26 January 2004, p. 14: “recurrent presence of certain symptoms, namely one social or ethnic group’s excessive domination over other groups or components of society. This is reflected, generally speaking, in the monopolizing of national resources and positions of power, causing, more often than not, the use of State repression to maintain this domination”.

<sup>1361</sup> *Id.*, p. 58. Papagianni summarizes the policy reasons behind the requirements of inclusion or expansion of participation during the transition process as follows: “improving perceived legitimacy of a power-sharing government, representing newly formed opposition groups, enabling the emergence of new leaders, and laying foundations for long-term institutional development”, K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 47.

<sup>1362</sup> T. D. Sisk, ‘Elections and Statebuilding after Civil War, Lurching toward legitimacy’ in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, *op. cit.*, p. 259.

<sup>1363</sup> R. Ponzio, *Democratic Peacebuilding, Aiding Afghanistan and other Fragile States*, *op. cit.*, p. 220.

<sup>1364</sup> See J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 85. The lack of representation during the Ethiopian transition would have led to secessionist claims. The lack of representation in the constitutional process in Venezuela in 1999 has led to a deadlock between pro- and contra-Chavez forces. The exclusion of two large rebel groups in Colombia has not brought peace.

<sup>1365</sup> S. P. Marks, ‘The Process of Creating a New Constitution in Cambodia’ in L. E. Miller, *Framing the State in Times of Transition: Case Studies in Constitution Making*, *op. cit.*, p. 213: “[h]ad the Paris Agreements provided for the appointment of an inclusive and independent constitutional commission to direct a constitution-making process that included a comprehensive program of public participation, the process itself may have been more transparent and democratic. In turn, perhaps a more democratic and transparent process would have contributed to more transparent and democratic political processes than those that exist in Cambodia today”.

communication rights<sup>1366</sup>) have also been mentioned as counter-examples, whereas for some the outbreak of violence in Ukraine during 2014 could have been avoided, had there been inclusive DIG<sup>1367</sup>.

**INCLUSIVITY ALLOWS FOR MEANINGFUL DELIBERATION** – For inclusivity to be meaningful and to pave the way for long-term institutional development, DIG would be “served by extended transitional periods”, Papagianni argues, an assertion with which Benomar and Samuels seem to concur<sup>1368</sup>. For Jackson,

“a fair amount of time for deliberation, compromise, education, participation, and renewed discussion *prior to* efforts to solidify agreements in a comprehensive and final constitution is conducive to successful constitution-making in situations of serious post-conflict regime change”<sup>1369</sup>.

**METHODS TO ENSURE INCLUSIVITY** – There are several, sometimes interconnected methods or components of inclusivity, which may be commended or criticized on their own merits. These methods include (i) power-sharing; (ii) political representation and popular participation with regard to constitutionmaking and elections; and (iii) women’s inclusion.

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<sup>1366</sup> J. Strasheim, ‘Interim Governments: Short-Lived Institutions for Long-Lasting Peace’, *op. cit.*, p. 7: “[i]n Thailand the interim National Council for Peace and Order (NCPO) of Prime Minister Prayuth Chan-ocha, and then head of the army, was criticized in September 2014 in an Amnesty International report that accused it of systematic human rights violations. The allegations include arbitrary arrests and the restriction of freedom of expression and assembly. Amnesty International claims that *such restrictions are unfavorable to an inclusive institutional reform process* as well as national reconciliation. The situation in Thailand is that without consulting civil society in the institutional reform process, Thailand’s interim leaders are risking a hard landing: not only will reforms not supported by civil society be unsustainable, but an *exclusive interim period might promote further unrest in the country*”.

<sup>1367</sup> *Id.*, p. 6: “[i]n Ukraine the outbreak of violence may have been prevented if the interim government had not been presented as a political ‘clean break’ with the former regime. An original plan for the transition of Ukraine proposed by German foreign minister Frank-Walter Steinmeier and his counterparts from Poland and France included a powersharing interim government of national unity that would have been composed of both the opposition and members of Viktor Yanukovich’s regime. Instead, the regime was toppled, and the opposition’s interim government (attempting to reform the civil administration) swiftly dismissed a number of long-seated bureaucrats and tried to impose a bill that aimed to make Ukrainian the sole state language – threatening Russian-speaking Ukrainians in the country’s eastern oblasts, which were Yanukovich strongholds. *A more inclusive transition process that had better taken into consideration voices from eastern Ukraine would have added to national reconciliation*”.

<sup>1368</sup> *Id.* p. 50. In the same sense, see J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 87. In the same vein, Samuels argues that “supporting longer time-frames between the negotiation of peace agreements and constitutions” would “minimize the inherent tensions in a postwar constitution building”. K. Samuels, ‘Postwar constitution building’ in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 175. Ould-Abdallah even goes as far as to suggest that “in many African countries the introduction of democracy should be allied with a ten- to twenty-year transitional period of constitutional power sharing”. A. Ould-Abdallah, *Burundi on the Brink 1993-1995. A UN Special Envoy Reflects on Preventive Diplomacy*, United States of Peace Press, Washington DC, 2000, p. 71 cited in E. Newman, ‘Liberal peacebuilding debates’, *op. cit.*, p. 41.

<sup>1369</sup> Jackson also warns that “comparison and generalization here are remarkably difficult, and turn out to be something of a quagmire. There are many confounding factors that may affect analysis and predictions in particular cases”. V. C. Jackson, ‘What’s in a name?’, *op. cit.*, pp. 1270-1271.

(1) **POWER-SHARING** – Inclusivity can be observed by establishing power-sharing transitional authorities<sup>1370</sup>. In the words of the representative of Benin: “a Government of national unity or other power-sharing arrangements may prove to be necessary – indeed, they may be preferable”<sup>1371</sup>. For some, power-sharing arrangements benefit security during the interregnum<sup>1372</sup>. As a *provisional* measure, power-sharing fulfills a particular function which may mitigate the critique generally addressed to it:

“incompatibilities between political leaders are more easily overcome if *power sharing is seen as a transitional and time-finite step* towards more competitive elections. On the other hand, such transitional agreements still allow voters and constituents to familiarise themselves with democratic procedures, or for tensions between groups and individuals to subside and, ideally, for the integration of former disputants into common institutions before a non-power-sharing system is adopted”<sup>1373</sup>.

(2) **REPRESENTATION & PARTICIPATION** – While some authors emphasize the importance of *representation*<sup>1374</sup>, others stress the importance of *participation*<sup>1375</sup> and popular governance, and still others both<sup>1376</sup>. Representation and participation may concern DIG generally and/or constitutionmaking and elections<sup>1377</sup> in particular. The insistence on inclusive transition and constitutionmaking procedures is shared by commentators like Benomar and Samuels<sup>1378</sup>. For Samuels, “in all cases where the constitutional process was inclusive, representative or participatory, the constitution-building process has led to incremental democratization of the state”<sup>1379</sup>. This author writes that “an exclusionary, provocative or inflammatory process [...]

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<sup>1370</sup> Cf. Chapter 6, Section B.3, Tables 11.1 & 11.2.

<sup>1371</sup> S/PV.4903, p. 30. Emphasis added.

<sup>1372</sup> *Id.*, p. 51: “power-sharing transitional governments and expanded representation in transitional political processes can contribute to the reduction of security concerns among former belligerents”. For A. Ould-Abdallah, “in many African countries the introduction of democracy should be allied with a ten- to twenty-year transitional period of constitutional power sharing”. A. Ould-Abdallah, *Burundi on the Brink 1993-1995. A UN Special Envoy Reflects on Preventive Diplomacy*, United States of Peace Press, Washington DC, 2000, p. 71 cited in E. Newman, ‘Liberal peacebuilding debates’, *op. cit.*, p. 41.

<sup>1373</sup> I. S. Spears, ‘Africa: The Limits of Power-Sharing’, *op. cit.*, p. 114.

<sup>1374</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 84: “[f]or purposes of war termination, it will usually help to have an initial or interim agreement guaranteeing all parties representation and a share in decision making. Such an agreement should be short-term, and should lead to a flexible process of democratic dispute resolution rather than the rigid marking out of group guarantees”.

<sup>1375</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 30: “general political authority should be vested in domestic authors and exercised in a manner that involves considerable input from the broader population, as it is the population that will be most directly affected by the reconstruction”.

<sup>1376</sup> Papagianni commends that both forms of inclusion be respected in transition contexts. K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, p. 58: “[e]xperiences in a number of countries demonstrate that consultative and inclusive mechanisms, which facilitate *bargaining and negotiation among elites and participation by the public*, contribute to the acceptance of the transitional political process and its outcomes”.

<sup>1377</sup> The inclusive nature of the transition process also concerns the inclusivity of the electoral process: “When electoral processes fail to be sufficiently inclusive, or when they are managed and controlled by wily governments seeking to predetermine their outcome, elections can lend a facade of legitimacy to otherwise undemocratic ruling elites”, T. D. Sisk, ‘Elections in the wake of war – Turning points for peace?’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*, p. 33.

<sup>1378</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 84; K. Samuels, ‘Constitution-Building Processes and Democracy: A Discussion of Twelve Case Studies’, IDEA.

<sup>1379</sup> *Ibid.*

constitution building can undermine the creation of sustainable peace and a legitimate state”<sup>1380</sup>. Papagianni, too emphasizes the link between inclusivity and sustainability by making the point that “lasting institutions tend to result from lengthy and inclusive constitution-making processes”<sup>1381</sup>.

(3) **WOMEN’S PARTICIPATION** – Lastly, inclusivity often concerns the involvement of women in decisionmaking processes. The UNSG deems the full participation of women in DIG essential<sup>1382</sup>. In the same vein, the UNSC President noted that women can play an important role for the “design and implementation of reconciliation strategies”<sup>1383</sup>, an opinion shared by the EU<sup>1384</sup>. The UN Guidance Note for Effective Mediation finds that women may play an effective role in high-level mediation processes, and converts this finding into a deontological guideline for mediators<sup>1385</sup>. It has also been suggested that women’s inclusion in the transition has beneficial socioeconomic effects<sup>1386</sup>.

### 2.1.2. Negative critique

The diverse components of inclusivity have been subject to criticism. Some commentators remark that “the claim that participatory design processes generate constitutions with higher levels of legitimacy and popular support has been subject to only limited study”<sup>1387</sup>. Besides this epistemological question, and as seen in the introduction of Part III, the practices generally observed at the occasion of DIG –or the paradigms underlying them– are controverted.

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<sup>1380</sup> K. Samuels, ‘Postwar constitution building’ in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 174.

<sup>1381</sup> K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, p. 47. See also p. 50: “the peacebuilding agenda is served by extended transitional periods, which provide avenues for political representation beyond the signatories of peace agreements before elections are held. It argues that national-level, inclusive political processes do not need to be preceded by the establishment of solid state institutions and the fulfillment of demanding rule of law criteria. Peace agreements should therefore provide for the sharing of power in transitional governments and for continued negotiations aiming to expand participation to elites who are not members of these governments, including armed opposition to the agreements as well as civilian leaders who were not included in peace talks”.

<sup>1382</sup> Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict’ dd. 11 June 2009, A/63/881-S/2009/304, §§ 11 & 12.

<sup>1383</sup> S/PV.4903 (resumption 1) dd. 26 January 2004, p. 2.

<sup>1384</sup> *Id.*, p. 4: “[n]ational reconciliation will not take root if some groups or sections of the population are excluded from the process of nation-building. In this regard, greater attention should continue to be paid to the role of women”<sup>1384</sup>. The EU considers ‘inclusiveness’ to be a principle underpinning national reconciliation.

<sup>1385</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 11: “[w]omen leaders and women’s groups are often effective in peacemaking at community levels and should therefore be more strongly linked to the high-level mediation process”; see also pp. 9 and 13. This guidance note also mentions that the gender dimension of the mediation process should be explicitly addressed in resulting peace agreement (p. 21).

<sup>1386</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 41-42: “[t]he argument that it is important for the specific needs of women, which include matters related to sexual violence, internal displacement, and responsibility for the household, to be addressed during post-conflict reconstruction as a means of harnessing the transitional period to improve the circumstances of women is compelling in its own right. However, *ensuring that the specific needs of women are addressed can also contribute to a general improvement in the socioeconomic circumstances of the population and thereby facilitate sustainable peace more generally*”. Emphasis added.

<sup>1387</sup> *Ibid.*

Also, requirements of ‘ownership’ and popular involvement during the interregnum may slow down the transition or otherwise hinder its effectiveness, as “more actors will, *ceteris paribus*, increase the difficulty of reaching agreement”<sup>1388</sup>. A risk linked to participatory constitutionmaking processes is “that it may lead to dissonance between those who influence the outcome of the drafting process and those who will be called upon to operate the constitution”<sup>1389</sup>. In addition, direct participatory processes cannot serve to *institutionalize* a country<sup>1390</sup>. Such processes may raise expectations that cannot be fulfilled, and “the pressures to accept the views of the people lead to complex and ambitious constitutions which the government may not (or often does not) have any intention of fulfilling; this not only discredits the constitution but also leads to disillusionment with the political process”<sup>1391</sup>. In addition, the risk of over- or underrepresentation of DIG in the context of territorial cleavages should be mentioned<sup>1392</sup>.

As one particular interim institutional design, powersharing is sometimes considered ineffective<sup>1393</sup>. Several commentators have criticized this model<sup>1394</sup>, also on legal grounds. Levitt, for instance, argued that this model, as applied in Liberia and Sierra Leone, was –at least domestically– illegal<sup>1395</sup>. Note, however, that power-sharing as a temporary governance device should be discerned from power-sharing as a permanent, post-transition, mode of governance<sup>1396</sup>.

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<sup>1388</sup> J. Blount, Z. Elkins, T. Ginsburg, ‘Does the Process of Constitution-Making Matter?’, CUP, 2012, p. 51.

<sup>1389</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, IDEA, 2006, p. 10.

<sup>1390</sup> *Id.*, p. 16.

<sup>1391</sup> *Id.*, p. 15.

<sup>1392</sup> S. Bisarya, IDEA, ‘Constitutional Transitions and Territorial Cleavages’, 2015.

<sup>1393</sup> I. S. Spears, ‘Understanding inclusive peace agreements in Africa: the problems of sharing power’, *Third World Quarterly*, Vol. 21, No. 1, pp. 105 – 118, 2000. Note that this article focuses on power-sharing as a form of government generally, not as a way to conduct DIG.

<sup>1394</sup> For critique on power-sharing generally, cf. I. S. Spears, ‘Africa: The Limits of Power-Sharing’, *Journal of Democracy*, Vol. 13, Number 3, July 2002, pp. 123-136; S. Vandeginste, C. L. Sriram, ‘Power Sharing and Transitional Justice: A Clash of Paradigms?’, *Global Governance*, Vol. 17, No. 4, 2011, pp. 489-505; C. L. Sriram, M.-J. Zahar, ‘The Perils of Power-Sharing: Africa and Beyond’, *op. cit.* D. Rothchild, ‘Executive Power-sharing Systems – Conflict Management or Conflict Escalation?’ in K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, *op. cit.*, pp. 73-93; J. Strasheim, H. Fjelde, ‘Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies’, *op. cit.*, p. 347. For a well nuanced position, see K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 45: “[i]t is true that simply sharing power among former enemies may promote moderate behaviour and encourage a positive-sum perception of politics. Especially when combined with third-party security guarantees, power sharing reduces the parties’ security concerns. Their inclusion in the transition allows parties to test their opponents’ commitment to respect interests other than their own. Through power sharing, the signatories of agreements continue talking, to build trust, and to offer assurances and guarantees to each other. However, making power-sharing governments work is not a straightforward endeavour. Routine interaction and relationships among the parties are not yet established. The government partners share few, if any, common interests, have low expectations about their partners’ reliability and are plagued by security fears. Power sharing is designed to make decision making slow and consensus-based in order to reassure parties that they will be consulted on matters of importance. Given divergent interests and effective veto powers by each party, transitional power-sharing governments usually fail to embark on reconstruction and reconciliation. They tend to stagnate and are often unable to take decisions”.

<sup>1395</sup> J. I. Levitt, *Illegal Peace in Africa*, *op. cit.*

<sup>1396</sup> Chapter 6, Section B.2.1.1.

Whether criticized or commended or understudied, the requirements of ‘inclusion’, ‘representation’ and ‘participation’ are now solidly embedded in international discourse and practice. The overview above indicates that DIG systematically requires transitional authorities to (at least) attempt to progressively realize an inclusive transition. This observation should be separated from the discussion of the opportunity *vel non* of these requirements. The legal analysis in relation to this observation will follow after the next subsection, which confirms that the inclusivity requirement is a product of (legal) socialization.

## 2.2. Sociology of Law considerations

If states and organizations frequently confirm that transitions must be inclusive, this is also echoed in the frequent reference to this requirement in practitioners’ and organizations’ guidelines, manuals and policy briefs. Such documents systematically refer to inclusivity as a pivotal concern for DIG generally, and constitutionmaking processes specifically.

**EMPHASIS AT UN & OTHER IOs ON OWNERSHIP/INCLUSION** – First, the condition that internationally assisted transitions must be inclusive is now well established in UN language,<sup>1397</sup>. As a general rule, the UN’s approach is “centered on national ownership and support for inclusive, participatory and transparent processes”<sup>1398</sup>. For Sharp, “the importance of local or national ownership has now become a virtual *UN mantra* in official policy documents”<sup>1399</sup>. Indeed, in a 2001 report of the UNSG, creating the conditions for “participatory governance” and assisting parties “to develop legitimate and broad-based institutions” are seen as effective peacekeeping operations exit strategies<sup>1400</sup>. Also, a 2004 UNSG report considers participation in decisionmaking to be a requirement under the rule of law<sup>1401</sup> while a 2009 UNSG report notes the importance of “effective communication and an inclusive dialogue between national authorities and the population”<sup>1402</sup>. More recently, the 2015 Review of the UN Peacebuilding architecture emphasized the importance of ‘inclusive national ownership’<sup>1403</sup>.

As main organs of the UN, the UNGA and UNSC, too, emphasize the importance of inclusivity. In the resolution establishing the PBC, the UNGA “emphasiz[ed] that the Commission shall work in cooperation with national or transitional authorities [...] with a view

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<sup>1397</sup> Chapter 1, Section A.1.

<sup>1398</sup> See UN Rule of Law pages: <http://www.unrol.org/article.aspx?n=Constitution-making>.

<sup>1399</sup> D. N. Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique', *op. cit.*, p. 183. Emphasis added.

<sup>1400</sup> 'No exit without strategy: Security Council decision-making and the closure or transition of United Nations peacekeeping operations', S/2001/394, Report of the Secretary-General dd. 20 April 2001.

<sup>1401</sup> 'The rule of law and transitional justice in conflict and post-conflict societies', S/2004/616 dd. 23 August 2004.

<sup>1402</sup> Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict' dd. 11 June 2009, A/63/881-S/2009/304, § 9.

<sup>1403</sup> 2015 Review of the UN Peacebuilding architecture, *op. cit.*, pp. 8-9.

to ensuring national ownership of the peacebuilding process”<sup>1404</sup>. In the 2015 Review of the UN Peacebuilding architecture, including of the PBC, it was noted that “the principle of national ownership is widely invoked and accepted”<sup>1405</sup>. On 14 January 2015, the UNSC “emphasize[d] the importance of inclusivity”<sup>1406</sup>.

OWNERSHIP/INCLUSION & CONSTITUTIONMAKING – Second, inclusivity sharply resonates with constitutionmaking. Influential constitutionmakers with extensive field experience enumerate ‘public participation’, ‘inclusiveness’, and ‘national ownership’ as “emerging guiding principles”<sup>1407</sup>. A UNDP report on constitutional assistance in post-conflict countries underscores that “the UN’s constitutional assistance should seek to support a nationally owned and led process that is inclusive, transparent and participatory”<sup>1408</sup>. In the same vein, “inclusivity, participation and transparency” are listed as core principles guiding UN assistance to constitution-making processes<sup>1409</sup>. While Preuss generally remarks that “the authority of constitutions rests largely upon the legitimacy of the processes through which they are generated”<sup>1410</sup>, Samuels, in somewhat more detail, observes that “the trend is towards recognition of the importance of inclusive and participatory processes in constitution-making”<sup>1411</sup>. International IDEA, for example, considers that inclusive and participatory constitutional processes is essential for strengthening the rule of law<sup>1412</sup>.

Under section C, it will be argued that, in international law, the requirements of ‘inclusion’, ‘representation’ and ‘participation’ are to be read in light of the principle of self-determination. We shall see that, within the limits of this principle, the margin of appreciation for transitional authorities to do justice to these requirements remains relatively broad but is not unlimited.

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<sup>1404</sup> A/RES/60/180 dd. 30 December 2005, Preamble and § 10. Emphasis added.

<sup>1405</sup> A/64/868 - S/2010/393 dd. 21 July 2010 (‘review of the United Nations peacebuilding architecture’), § 18. See also A/67/312-S/2012/645 dd. 15 August 2012 (‘civil capacity in the aftermath of conflict’).

<sup>1406</sup> S/PRST/2015/2 dd. 14 January 2015

<sup>1407</sup> M. Brandt, J. Cottrell, Y. Ghai, and A. Regan, ‘Constitution-making and Reform - Options for the Process’, *op. cit.*, pp. 9-10. Cf. also K. Samuels, ‘Post-Conflict Peace-Building and Constitution-Making’, *Chicago Journal of International Law*, 2006, 663, 2.

<sup>1408</sup> M. Brandt, ‘Constitutional Assistance in Post-Conflict Countries, The UN Experience: Cambodia, East Timor & Afghanistan’, *op. cit.*, p. 27.

<sup>1409</sup> ‘Guidance note of the Secretary-General on UN assistance to constitution-making processes’, *op. cit.*, p. 4: “[t]he UN should make every effort to support and promote *inclusive, participatory and transparent constitution-making processes* given the comparative experiences and the impact of inclusivity and meaningful participation on the legitimacy of new constitutions. A genuinely inclusive and participatory constitution-making process can be a transformational exercise”.

<sup>1410</sup> U. K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization’, *New York Law School Law Review* 51, 2007 2006, p. 493.

<sup>1411</sup> *Id.*, p. 175. Emphasis added.

<sup>1412</sup> IDEA, *Rule of Law and Constitution Building, The Role of Regional Organizations*, 2014, p. 1.

### 3. Deconstruction of inclusivity

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**SUBJECTS OF INCLUSIVITY** – As the more general term, ‘inclusion’ or ‘inclusivity’ refers to the involvement of various groups in DIG capable of contributing to the redefinition of the social contract, or having a direct interest in this matter. The 2015 Review of the UN Peacebuilding architecture describes ‘inclusive national ownership’ as the national responsibility for peacebuilding

“shared by the national government across all key social strata and divides, across a spectrum of political opinions and domestic actors, including minorities. This implies participation by minority groups, women’s platforms and representatives, youth, labour organizations, political parties, the private sector and domestic civil society, including under-represented groups”<sup>1413</sup>.

The perusal of practice above indicates that inclusivity is related to the *entitlement to be taken seriously* of the following groups or subjects: the political factions or armed groups previously in conflict with each other; the military; segments within political parties; civil society; ethnic groups; minorities; regional entities or provinces; traditional and religious leaders; and women<sup>1414</sup>. A question left unaddressed in the literature is whether exiles and/or members of diaspora are deemed to represent domestic and local constituencies (cf. for example how DIG was observed in Iraq and Libya<sup>1415</sup>), and have an entitlement to be included in DIG.

**MODES OF INCLUSIVITY** – These groups and individuals can, in one way or another be included in roundtable negotiations; power-sharing governments; referenda and general elections. Inclusivity can relate to the drafting or adopting of a transition instrument; national dialogues / national conferences; the exercise of public authority during the interregnum; constitutionmaking; and the adoption of the constitution. This can be done either by representation of (direct) participation.

- ‘Representation’ refers to the inclusion of *delegates* of the various groups that wish to be included in the interregnum. Representativeness “is based on the idea that a certain person is representative of a group and its interests”<sup>1416</sup>. Representation thus refers to the inclusion

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<sup>1413</sup> The 2015 Review of the UN Peacebuilding architecture, *op. cit.*, § 44. Specifically about the inclusion of women during transitions, cf. the Report of the Working Group on the issue of discrimination against women in law and in practice, A/HRC/23/50 dd. 19 April 2013. This working group recommend that states “[s]upport and ensure women’s equal participation in and benefit from all areas of political decision-making during times of political transition”. This includes women’s participation in “all transitional authorities and mechanisms” and in transitional justice initiatives (*id.*, § 97. d).

<sup>1414</sup> Since the UNSC resolution 1325 on women, peace and security a “remarkable trend in power-sharing agreements is the presence of references to gender and women’s rights”. S. Aroussi, S. Vandeginste, ‘When interests meet norms: the relevance of human rights for peace and power-sharing’, *The International Journal of Human Rights*, Vol. 17, No. 2, 2013, p. 188. The observation of practice further below indicates that this is true of other forms of transition instruments, too.

<sup>1415</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, resp. on p. 19 & p. 22.

<sup>1416</sup> N. Töpperwien, ‘Participation and representativeness in constitution-making processes’ in IDEA, *Constitution Building: A Global Review (2013)*, 2014, p. 8.

of key political players or peoples’ delegates during the transitional period (‘elite involvement’).

- ‘Participation’ refers to the involvement of the *population* during the interregnum by means of general consultations, national dialogues, public referenda, or other modes of popular governance. Participation thus refers to the inclusion of the population at large through general consultations or referenda (‘popular involvement’).

**TABLE 11.1: Inclusivity deconstructed (a preliminary overview)**

<b>Subject of inclusivity (<i>who is to be included?</i>):</b>	<b>Mode of inclusivity (<i>how is inclusivity implemented?</i>):</b>	<b>Object of inclusivity (<i>inclusivity in relation to what?</i>):</b>
<ul style="list-style-type: none"> <li>▪ Political parties; former ruling party and other political parties (e.g. SA, Burundi, DRC, Kyrgyzstan, Yemen, Burkina Faso)</li> <li>▪ Composition of political parties (e.g. SA, Burundi, Libya<sup>1417</sup>)</li> <li>▪ Civil society (e.g. SA, Somalia, Kyrgyzstan, Yemen)</li> <li>▪ Armed movements (e.g. Burundi, DRC, Liberia, Burkina Faso)</li> <li>▪ Military (e.g. Burundi, Burkina Faso)</li> <li>▪ Ethnic Groups / indigenous peoples (e.g. SA, Afghanistan, Yemen)</li> <li>▪ Regional or local entities / Provinces (e.g. DRC, Somalia, Libya, Yemen)</li> <li>▪ Women<sup>1418</sup> (e.g. Afghanistan, DRC, Iraq, Libya, Yemen, Guinea-Bissau, CAR, Burkina Faso)</li> <li>▪ Youth (e.g. Yemen)</li> <li>▪ Traditional / Religious Leaders (e.g. Burkina Faso)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Negotiations</li> <li>▪ Government of national unity / power-sharing government</li> <li>▪ Representation</li> <li>▪ Participation</li> <li>▪ Referendum</li> <li>▪ Elections</li> </ul>	<ul style="list-style-type: none"> <li>▪ Drafting or adopting of transition instrument</li> <li>▪ National Dialogue (e.g. Yemen)<sup>1419</sup> / National Conference (e.g. SA, )</li> <li>▪ Public authority during interregnum</li> <li>▪ Constitutionmaking (e.g. SA, Burundi, Afghanistan, Kyrgyzstan, Libya)</li> <li>▪ Adoption of the constitution</li> <li>▪ Natural resource management</li> </ul>

<sup>1417</sup> For example, parties based on religion, tribe or ethnicity were banned from Libyan elections in July 2012. Cf; ‘Libya bans religious, tribal or ethnic parties’, Reuters, 25 April 2012. About the ‘centripetal approach’, cf. D. L. Horowitz, ‘Conciliatory Institutions and Constitutional Processes in Post-Conflict States’, *William and Mary Law Review*, Vol. 49, 2008, p. 1217.

<sup>1418</sup> IDEA, *Constitution Building: A Global Review (2013)*, 2014, p. 6: “women are almost always among the groups considered relevant today”.

<sup>1419</sup> “A degree of inclusiveness seems necessary before any process can be dubbed a ‘national dialogue’. The term ‘dialogue’ is usually also intended to signal a desire to move from oppositional politics that reinforce differences and division to a process in which thought is given to understanding different positions and considering the possibility of agreement”. C. Murray in IDEA, *Constitution Building: A Global Review, op. cit.*, p. 11.

**OBJECTS REPRESENTATIVE/PARTICIPATORY DIG** – The following overview relates to the requirements of representation and participation as applicable to the various stages of the transition process, notably at the time of the foundation of the transition, during the interregnum, and, towards the end of the interregnum, when constitutional referenda or general elections take place. The overview relates to the following objects: (a) the transition instrument, (b) the interregnum (division of powers during the interregnum), and (c) the (transitional) constitutionmaking process. The latter category includes three components: transitional constitutionmaking (the preparation and adoption of transition instruments), the constitutionmaking process for the post-transition stage, and the approval and adoption of the post-transition constitution. The following table summarizes how representation and participation relate to all of these categories.

**TABLE 11.2: Inclusivity deconstructed (based on the object)**

INCLUSIVITY	[a] Foundation of the transition	[b] Interregnum or Interim governance	[c] Constitutionmaking
<b>[1] Popular involvement (participation)</b>	Foundation nonconstitutional transition/adoption transition instrument after popular consultation by referendum or election. ( <i>rare</i> )	Interim rule observed in conformity with popular will on the basis of $\alpha$ election and referendum ( <i>rare</i> <sup>1420</sup> ) or $\beta$ national dialogue. ( <i>occasional</i> )	<p>PRE-TRANSITION (upstream constraint<sup>1421</sup>)</p> <p><math>\alpha</math> Constituent supraconstitutional transition instrument prepared and adopted after popular approval. (<i>rare, see also 1.a.</i>)</p> <p>INTERREGNUM (upstream constraint)</p> <p><math>\beta</math>.i Constitutionmaking process carried out on basis of national dialogue and/or public consultations. (<i>common</i><sup>1422</sup>)</p> <p><math>\beta</math>.ii Election of constituent assembly. (<i>occasional</i>)</p> <p>POST-TRANSITION (downstream constraint)</p> <p><math>\gamma</math> Post-transition constitutional framework approved and adopted by popular referendum. (<i>frequent</i><sup>1423</sup>)</p>
<b>[2] Elite involvement (representation)</b>	Foundation nonconstitutional transition/adoption transition instrument by fairly representative body (delegates of various political and/or ethnic groups). ( <i>frequent with consensual transitions, rare with oppositional transitions</i> ).	Interim rule observed by: $\alpha$ interim power-sharing/unity government ( <i>frequent with consensual transitions</i> ), or $\beta$ by opposition-based body progressively including other political factions in interim decisionmaking processes. ( <i>common with oppositional transitions</i> ).	<p><math>\alpha</math> Constituent supraconstitutional transition instrument prepared and adopted by representative body. (<i>frequent with consensual transitions, rare with oppositional transitions, see also 1.2</i>)</p> <p><math>\beta</math>.i Constitutionmaking by representative body but carried out in confidential negotiations / closed roundtables. (<i>common</i>)</p> <p><math>\beta</math>.ii Constituent assembly appointed by representative body. (<i>common</i>)</p> <p><math>\gamma</math> Post-transition constitutional framework approved and adopted by representative body but without popular approval. (<i>rare</i><sup>1424</sup>)</p>

<sup>1420</sup> Cases in which DIG is directly exercised by the people, or exercised after elections or referenda expressing the will of the people, are rare. That is because DIG, as defined in this dissertation, is exercised on a nonconstitutional basis, and is accompanied by a pledge to return to constitutional order after the holding of a referendum and elections.

<sup>1421</sup> For the distinction between upstream and downstream constraints, cf. J. Elster ‘Forces and Mechanisms in the Constitution-Making Process’, *Duke Law Journal*, Vol. 45, 1995, p. 373: “upstream constraints are imposed on the assembly before it starts to deliberate. Downstream constraints are created by the need for ratification of the document the assembly produces”. Cf. also J. Elster, *Ulysses Unbound*, CUP, 2000

<sup>1422</sup> The South African transition constitutes a famous precedent in this regard.

<sup>1423</sup> Constitutionmaking processes that take account of popular input on the basis of direct (call to the public) or indirect (via civil society representatives) public consultations or national dialogues are more frequent. In contrast, the Autumn of Nations transitions, for instance, were guided by roundtable discussions (Introduction, Section A.5). The national conferences in Francophone Africa since 1989, on the other hand, “allowed a broad and inclusive participation involving representatives from key political and civic groups” according to Samuels. Cf. K. Samuels, ‘Postwar constitution building’ in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 177.

<sup>1424</sup> Elite players device the permanent constitution during the transitional period.

These distinctions can be informative for a legal assessment of the various aspects of DIG. For instance, elite interim constitution-making processes (2.c.α) or elite permanent constitution-making processes (2.c.γ) raise different issues under international law. Also, combinations between these ten scenarios are possible, and popular or elite involvement can vary in degree or over time<sup>1425</sup>. For instance, the foundation of DIG by certain elites (2.a) is not incompatible with the constitutionmaking process for the post-transition stage being carried out on the basis of a national dialogue and/or public consultations (1.c.β). It will be argued further below that the lack of participation or representation in the event of some of the ten scenario's or their combinations as depicted above would (increasingly) be prohibited under international law<sup>1426</sup>.

### Section C. Inclusive interim governance under the principle of self-determination

The need to ensure inclusive DIG may rest on sound policy considerations, and, within specialized circles, is required as a socialized practice. The discussion and illustrations above evidence that this requirement can be applied in various ways, and is repeated in several relevant legal texts. This section explains how inclusive DIG should be understood from a legal perspective. First, we shall briefly recall that neither democracy nor the concept of national liberation (movement) serve to legally contextualize inclusive DIG. Second, we shall analyze the dialectical relationship between the principle of self-determination and inclusive DIG.

#### 1. Disassociation from democracy and national liberation

Inclusive DIG should not be associated with democracy (1.1) or with national liberations (1.2).

##### 1.1. Inclusivity's incompatibility with democracy

Transitional authorities are installed through nonconstitutional, often undemocratic means, sometimes in clear defiance of, and always rupturing with, the established legal order. This strongly suggests that DIG should be disassociated from democracy. This intuition is confirmed by the fact that DIG is neither the fruit of formal/procedural democracy nor the exercise of substantive democracy<sup>1427</sup>.

**THE UNDEMOCRATIC ORIGIN & EXERCISE OF DIG** – First, transitional authorities are mostly appointed or self-selected, as was already observed<sup>1428</sup>. Seldom, if ever<sup>1429</sup>, do transitions as defined in this dissertation result from democratic selection procedures. Second, if DIG complies with

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<sup>1425</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 39.

<sup>1426</sup> Chapter 6, Section C.2.1.2, Table 12.

<sup>1427</sup> The formalist/procedural vs. substantive understandings of democracy were already discussed above, Chapter 2, Section B.2.1.

<sup>1428</sup> Chapter 5, Summary.

<sup>1429</sup> Note the exception of double transition procedures, i.e. when one elected transitional authority follows up on a selected/appointed one. Also, the transitional constituent assembly can be voted, and function both as a parliament/house of representatives and constitutional body, e.g. in Nepal.

the inclusivity requirement, this is not (necessarily) out of deference to democratic ideals. Even if inclusive, DIG is not or only seldom an exercise of democracy. Like other transition practices discussed in this part of the thesis, inclusivity is a rudimentary practice. It can be honored in various ways<sup>1430</sup>. The systematic insistence and general reliance on ‘representation’, ‘participation’ and ‘ownership’ as obligations of the transition does not miraculously transform DIG into a textbook example of democracy.

Inclusivity is less high a standard than democracy, certainly if democracy is seen as a substantive right or obligation. Benomar observed, with regard to the 2004 national conference in Iraq, that “while such a national dialogue would not be fully democratic, it could be made relatively inclusive, transparent, and participatory, and would offer a chance to set forth principles to guide the transition”<sup>1431</sup>. Between inclusivity and democracy, the latter is thus seen as the greater good, the former as the lesser evil.

Because DIG is neither the fruit of formal/procedural democracy nor the exercise of substantive democracy, d’Aspremont is correct in advising: “*on se gardera de confondre la représentativité d’un gouvernement et son caractère démocratique*”<sup>1432</sup>. Youssef also observes that, even if the declared goal of transitions is mostly to achieve democracy, the transition itself is often undemocratic<sup>1433</sup>. Strasheim and Fjelde add to this that inclusive transitions do not necessarily lead to democratic outcomes<sup>1434</sup>.

In particular instances, inclusive DIG has been regarded as a concrete application of the principle of self-determination, yet this was never formulated as a general rule<sup>1435</sup>. Scholars have, however, interpreted a good number of transitions against the principle of self-determination, preferring this principle over democracy for analyzing and explaining DIG, notably in Cambodia and South Africa before the turn of the millennium, and Afghanistan, Iraq, Sudan and Libya after the year two-thousand.

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<sup>1430</sup> Chapter 6, Section C.2.2.2.

<sup>1431</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 94.

<sup>1432</sup> J. d’Aspremont, *Les administrations internationales de territoire et la création internationale d’Etats démocratiques*, *op. cit.*, pp. 7-8.

<sup>1433</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 81.

<sup>1434</sup> J. Strasheim and H. Fjelde, ‘Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies’, *op. cit.*, p. 347. This is perhaps especially true when inclusive transitions lead to premature elections.

<sup>1435</sup> Some indications going in this direction can be found in literature. Saul observed that “[i]n the practice of post-conflict reconstruction, in spite of circumstances of political flux, the right to self-determination has not been abandoned. In some instances, the commitment of the lead actors to the right to self-determination has been expressed in key documents and resolutions setting out the basis for international involvement and plans for how to enhance the transitional period”. M. Saul, ‘Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement’, *Journal of Conflict and Security Law*, January 21, 2011, p. 190-191. Stathopoulou, after a perusal of the language generally used in peace agreements, points at the intrinsic link between peacemaking and self-determination, without making the link to transitions generally. K. Stathopoulou, ‘Self-determination, peacemaking and peace-building: recent trends in African intrastate peace agreements’, *op. cit.*

ILLUSTRATIONS (BEFORE THE TURN OF THE MILLENIUM) – With regard to the transition in Cambodia, Marks writes that “it is most accurate to describe the *essence* of the Cambodian process as an exercise in political *self-determination* through a UN-managed transition to a democratic form of government”<sup>1436</sup>. After reaffirming its support for the 1991 Paris Accords, the UNSC indeed affirmed it intended to contribute to “the assurance of the right to self-determination”<sup>1437</sup>. The South African transition starting in 1994 was also considered “a problem of self-determination” in the first place<sup>1438</sup>.

ILLUSTRATIONS (AFTER THE TURN OF THE MILLENIUM) – With respect to the Afghan transition starting in 2001, Vidmar explains that the UNSC was not calling for a ‘democratic’ transition. The UNSC expressed its support for the establishment of a transitional administration in Afghanistan, which had to be ‘broad based’ and ‘fully representative’<sup>1439</sup>, but it did not call for the establishment of a particular political system<sup>1440</sup>. For Vidmar, “references to a ‘broad based government’ clearly cannot be seen as a call for democracy as a political system; it should rather be understood as a *requirement for representativeness* of various ethnic groups and peoples *in the context of the right to self-determination*, which is not to be conflated with democracy as a political system”<sup>1441</sup>, a position confirmed by Marauhn<sup>1442</sup>.

ILLUSTRATIONS (CTD.) – Regarding the 2004 Iraqi transition, Wolfrum concludes that “the *principle governing the transition* of Iraq from the former governmental regime via the power exercised by the occupying states to a government under a new national regime is the principle of *self-determination*”<sup>1443</sup>. The 2005 CPA regarding the transition in Sudan is also associated to an exercise of internal self-determination<sup>1444</sup>. In the context of the Arab Spring, finally, calls

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<sup>1436</sup> S. P. Marks, ‘The Process of Creating a New Constitution in Cambodia’ in L. E. Miller, *Framing the State in Times of Transition: Case Studies in Constitution Making*, *op. cit.*, p. 208.

<sup>1437</sup> S/RES/745 dd. 28 February 1992, Preamble.

<sup>1438</sup> A. Sachs, ‘South Africa’s Unconstitutional Constitution: the Transition from Power to Lawful Power’, *op. cit.*, p. 1255.

<sup>1439</sup> S/RES/1378 dd. 14 November 2001.

<sup>1440</sup> J. Vidmar, ‘Human Rights, Democracy and the legitimacy of governments in international law: practice of states and UN organs’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.*, p. 64: “one cannot argue that Security Council Resolution 1378 expressed support for a particular political system –that of Western style liberal-democracy. The use of the term ‘democracy’ itself was avoided. The resolutions also failed to call for an enactment of a particular political system or electoral method”.

<sup>1441</sup> *Ibid.*

<sup>1442</sup> Marauhn finds that both the Bonn Agreement and the ensuing transition procedure must be understood in light of the principle of self-determination. T. Marauhn, ‘Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus’, *op. cit.*, p. 492: “[d]er somit vorhandene faktische Zusammenhang zwischen den Unterzeichnern des Abkommens und dem afghanischen Volk lässt sich nur auf der Grundlage des Selbstbestimmungsrechts in einen rechtlichen Zusammenhang transformieren”. He thus considers that the signatories of the Bonn Agreement were (temporarily) entrusted with honoring and realizing the right to self-determination. *Id.*: “die Teilnehmer der Afghanistan-Gespräche (und damit die Unterzeichner des Bonner Abkommens) [erhalten] jedenfalls temporär die Qualität von Organwaltern des afghanischen Selbstbestimmungsrechts”.

<sup>1443</sup> R. Wolfrum, ‘Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’, *op. cit.*, p. 43. Emphasis added.

<sup>1444</sup> S. P. Sheeran; ‘International Law, Peace Agreements and Self-Determination: The Case of The Sudan’, *op. cit.*, p. 444.

for inclusivity in the context of (attempted) transitions are, again, analyzed in light of the principle of self-determination<sup>1445</sup>.

**THE DOUBLE FUNCTION OF INCLUSIVITY IN THE ABSENCE OF DEMOCRACY** – In the absence of democracy during the interregnum, inclusivity fulfills a double function. First, it fulfills a compensatory function. The provisional absence of democratic legitimacy (or any other ‘legitimate’ form of government’) is, in a way, remedied “by substituting principles like pluralistic inclusion of the main political forces, publicity, and adherence to the rule of law *for the missing principle of democratic legitimacy*”<sup>1446</sup>, Arato writes, and Schoiswohl confirms<sup>1447</sup>. In order to cope with the (provisional) lack of democracy (or lack of legitimacy) –almost unavoidably characterizing nonconstitutional interim governance– inclusivity is put forward as the guiding principle.

Second, inclusivity during the interregnum is sometimes seen as a precursor of democracy. Even if it is contested whether a correlation exists between inclusivity and democratization<sup>1448</sup>, in dominant discourse inclusivity –through representation and participation– is considered to help pave the way for democracy. While awaiting democracy, inclusivity is seen as a requirement to be respected during the interregnum. d’Aspremont thus intuitively feels that it is *as if* the representation requirement *anticipated* the democratic character of the state, before adding:

*“cela n’est finalement guère surprenant. Il est en effet difficile de concevoir qu’un gouvernement intérimaire –c’est-à-dire une autorité qui a vocation à mettre en place les principes de l’exercice futur du pouvoir– puisse prétendre à quelque autre légitimité que celle procédant de sa représentativité”*<sup>1449</sup>.

## 1.2. Inclusive DIG and the imperfect analogy with national liberation

**NLM & DIG: IMPORTANCE OF POPULAR ALLEGIANCE RATHER THAN EFFECTIVE CONTROL TO REALIZE SELF-DETERMINATION** – There is some thematic continuity between the application of self-determination to the decolonization process and its application to DIG, in spite of these contexts being radically different. The legal basis and criteria for recognizing NLM were already discussed<sup>1450</sup>. The principle of self-determination provided the legal basis for NLM’s

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<sup>1445</sup> J. Vidmar, ‘Human Rights, Democracy and the legitimacy of governments in international law: practice of states and UN organs’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.*, p. 64. Vidmar acknowledges that the inclusion requirement is to be associated to an exercise of internal self-determination.

<sup>1446</sup> A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 540. Emphasis added.

<sup>1447</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’, *op. cit.*, p. 825: “the democratic deficit inherent in the self-appointment of a transitional authority mandated to re-institute permanent state structures after civil war can only be overcome by designing a process that sufficiently allows for the emergence of a democratic dialogue and participation”.

<sup>1448</sup> J. Strasheim, H. Fjelde, ‘Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies’, *op. cit.*, p. 347.

<sup>1449</sup> J. d’Aspremont, ‘Les administrations internationales de territoire et la création internationale d’Etats démocratiques’, *op. cit.*, pp. 7-8.

<sup>1450</sup> Chapter 4, Section B.2.1.1.

struggle in the context of decolonization. While no proof of territorial control (or any stringent effectiveness criterion) had to be verified, the organized allegiance of the people (claimed to be represented) was required for a NLM to be recognized as such.

In the context of DIG, the progressive implementation of the inclusivity requirement during the interregnum also aims at garnering the allegiance of the people so as to allow for a participatory and/or representative reformulation of the social contract, even if the transitional authority does not exercise effective control. Popular allegiance (through participation/representation in public affairs) constitutes the tool both for NLM and transitional authorities to implement the principle of self-determination.

**IMPERFECT ANALOGY** – This thematic continuity corroborates that self-determination lends itself (better than democracy) to encapsulating inclusivity in the context of DIG. The analogy between NLM, operating in the context of decolonization, and transitional authorities, operating in the context of DIG, is however imperfect. While NLM (generally) pursue external self-determination, transitional authorities pursue internal self-determination.

## *2. The dialectics between self-determination and inclusive interim governance*

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In the following paragraphs the dialectical relationship between inclusive DIG and the principle of self-determination is examined. On the one hand, the principle of self-determination – a *continuing* principle also relevant in its *internal* dimension– serves as an *interpretive guideline* for DIG. In the context of DIG, transitional authorities are to be seen as the repositories or trustees of this principle (2.1). On the other hand, DIG *further extends and specifies* the contours of the principle of self-determination, thus reducing its indeterminacy (2.2).

### *2.1. Self-determination as an interpretive guideline for inclusive interim governance*

The strong relevance of self-determination as a directive principle for DIG should not be underestimated<sup>1451</sup>. It informs how DIG must be observed, and what is at minimum required for inclusivity, as a DIG practice, to conform with this principle. It defines the limits of transitional authorities' margin of appreciation. We shall see that, in order to be internationally lawful, DIG must be pursued in conformity with the fundamental human rights which undergird the principle of self-determination. In addition, throughout the interregnum DIG must be representative or participatory, and certainly participatory when it concerns transitional constitutionmaking.

**SELF-DETERMINATION REQUIRES REPRESENTATION/PARTICIPATION** – Internal self-determination is sometimes defined quite broadly: “as a legal principle internal self-determination is

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<sup>1451</sup> Paraphrasing J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, p. 65.

indeterminate with the exception of the stricture that a government must *represent* the population of the territory without systematic exclusion or discrimination against groups on the basis of race, creed, or color”<sup>1452</sup>. Furthermore, the right to self-determination serves as a basis for a people to “*participate* (a right to have a say) in the decision-making processes of the State”<sup>1453</sup>, i.e. a general right to participation. These definitions refer to the requirements of *representation* and *participation*, respectively, which, as we have seen above, are two main components of inclusivity.

**RELEVANCE TRIPLE OBJECT SELF-DETERMINATION FOR DIG** – With more precision, three layers of internal self-determination can be distinguished, depending on the object of this principle as seen from the right-holder perspective:

- the "right of the people to constitute its own political system (*pouvoir constituant*)", this is, so to speak, the right of the people to define the rules of the game;
- "the right of the people to have a say in amending the constitution, including the right of resistance against tyranny and oppression", this is the right for the people to amend the rules of the game;
- "the right of the people to govern and to take part in the conduct of public affairs, including participation in elections, referenda, and so on"<sup>1454</sup>; this is the right for the people to participate in the game once the rules are set.

Throughout the transition each of the three components of self-determination may be relevant, i.e. for defining the transition instrument, participating in transitional constitutionmaking, and taking part in the exercise of public powers during the interregnum, respectively (see also Table 11.2, above). In light of this layered definition of internal self-determination, one wonders what the *undisputed, minimum legal conditions* are in relation to DIG. If these core conditions can be identified, they would impose specific limits to the margin of appreciation of transitional authorities pursuing DIG. In the following lines, we shall see that these conditions relate to human rights law (2.1.1) and to transitional constitutionmaking (2.1.2).

### *2.1.1. Inclusivity and the respect for human rights law*

Internal self-determination must be associated with the protection of a number of human rights<sup>1455</sup>. Transitional authorities generally confirm the continued relevance of human rights instruments during the interregnum, as we shall see under Chapter 7.

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<sup>1452</sup> See J. L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, *op. cit.*, p. 253.

<sup>1453</sup> D. Raič, *Statehood and the Law of Self-determination*, *op. cit.*, p. 237.

<sup>1454</sup> *Id.*, p. 249.

<sup>1455</sup> CCPR General Comment No. 12: Article 1 (Right to Self-determination). In this comment, the Human Rights Committee recognizes that “this right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law” (§ 2).

The link between self-determination and human rights, especially the protection of minorities (as guaranteed by art. 27 of the ICCPR), goes further back in history than the association between decolonization and self-determination<sup>1456</sup>. Furthermore, “if self-determination is a continuing right [...] then its normal manifestation will be through the exercise of civil, political and social rights [...] within the framework of the relevant state”<sup>1457</sup>. In all its aspects, the inclusivity of the transition –its foundation, the interregnum, constitutionmaking– hinges on the state protecting, respecting and fulfilling the rights to freedom of expression, assembly and association (as guaranteed by artt. 19, 21 and 22 of the ICCPR, respectively)<sup>1458</sup>. This is why, for Saul, the *prospect* of compliance with these rights should be used as a benchmark for evaluating the ‘legitimacy’ of interim governments<sup>1459</sup>.

As the above citation indicates, internal self-determination is a continuing right. Even and especially during state transformation processes, transitional authorities must consequently do what can be reasonably expected from them to carry out DIG in conformity with the human rights associated to the exercise of internal self-determination. The perusal of cases under section B above indicates that inclusivity also requires involving minority groups in DIG. Further, the protection of minority groups is historically associated with the principle of self-determination. In light of the connection between the principle of self-determination and the protection of ethnic, religious or linguistic minorities under human rights law, the inclusion of these minorities during DIG can be regarded as a concrete application of this principle.

Whether the principle of self-determination also protects and guarantees the inclusion of youth and women’s representatives when it comes to re-determining the political status of a country is more controverted. This dissertation argues that the systematic inclusion of women, as observed in the perusal of practice above, helps to add specificity to the principle of self-determination; this issue will therefore be considered further below<sup>1460</sup>.

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<sup>1456</sup> B. Simma (ed.), *The Charter of the United Nations, A Commentary*, OUP, 1995, p. 64. Cf. also UN Charter, art. 55 §c. For the link between human rights & self-determination, see also G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, Recueil Des Cours, Collected Courses, 1972, Volume 137, p. 565. See also the declaration by Italy submitted in this regard (*id.*, p. 571).

<sup>1457</sup> J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, p. 40.

<sup>1458</sup> Cf. A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*, Hersch Lauterpacht Memorial Lecture Series, CUP, p. 53 who links self-determination to freedom of expression, association, etc.

<sup>1459</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 178.

<sup>1460</sup> Chapter 6, Section C.2.2.

### 2.1.2. Inclusive transitional constitutionmaking and final referenda / elections

“the understanding of interim constitutions as political agreements aimed at achieving peace has shaped a view that *public participation might not be required in the transitional period*, only in the drafting of the final constitution. Yet *an interim constitution’s legitimacy is likely to depend on a certain degree of inclusivity*, even if this falls short of full public participation. Unless the real power brokers are present at the negotiating table, the process (and resulting settlement) will struggle to gain traction”<sup>1461</sup>

Self-determination imposes limits on *how* a new constitution is adopted and on *how* constitutionmaking is conducted. This must be done in a participatory manner and inclusively, respectively.

First, constitutional texts must be submitted to a vote, whereby a number of electoral requirements must be followed. The essential nucleus of the principle of self-determination indeed requires transitional authorities, when coming to represent the state, “to ascertain the wishes of the population concerned by means of a referendum or plebiscite, or by any other appropriate means capable of ensuring a free and genuine expression of will”<sup>1462</sup>.

Second, under the principle of self-determination, transitional constitutionmaking must be inclusive. The reason why this requirement is particularly relevant today is that, especially in the past two decades, modern constitutions or transition instruments fulfill a different function, that of redefining and renegotiating the social contract and of

“developing a collective agenda for social and political change—negotiated rather than imposed. [...] If these are the contemporary functions of constitutions, then the process for making them is crucial to developing a national consensus”<sup>1463</sup>.

The right to political participation under the procedural conception of democracy, i.e. as an entitlement to fair and regular elections, has been abundantly analyzed in literature<sup>1464</sup>. This section therefore focuses exclusively on the issue of inclusive transitional constitutionmaking. For several commentators, people’s participation in transitional constitutionmaking confers *legitimacy* to the ensuing constitutional order. Beyond the issue of legitimacy, the people’s participation in transitional constitutionmaking is arguably increasingly becoming a legal requirement under the principle of self-determination.

Importantly, “there may be various procedures acceptable for the expression of popular will (referendums, popular consultations, etc.), provided that they enable the population to

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<sup>1461</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 6.

<sup>1462</sup> A. Cassese, ‘The International Court of Justice and the right of peoples to self-determination’ in V. Lowe, M. Fitzmaurice, *Fifty years of the International Court of Justice, Essays in honor of Sir Robert Jennings*, *op. cit.*, p. 359.

<sup>1463</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, *op. cit.*, p. 13.

<sup>1464</sup> Cf. for example G. H. Fox, ‘International Law and the Entitlement to Democracy After War’, *Global Governance* 9 (2003), esp. p. 183.

manifest its choice in a ‘free and genuine’ way”<sup>1465</sup>. Transition leaders worldwide recognized that, *whatever the process chosen for designing a new constitution*, a wide range of participants must be involved, and the core demands of key contending groups should be accommodated<sup>1466</sup>.

RIGHT TO PARTICIPATE IN CONSTITUTIONMAKING – Transitional constitutionmaking must be inclusive. It should be seen as an uncontested act of internal self-determination. From the right-holder perspective, self-determination, seen as a right to participate in the conduct of public affairs (art. 1 *cum* art. 25 ICCPR), applies to constitutionmaking. This was recognized by the UNCHR<sup>1467</sup>, and confirmed in literature, as the following lines indicate.

LITERATURE (PARTICIPATION) – After observing that the right to self-determination serves as a basis for a people to “participate (a right to have a say) in the decision-making processes of the State”<sup>1468</sup>, i.e. a general right to participation, Raič writes that “the right of participation *would, in any case, relate to the determination or constitution* of the political system of the State (*pouvoir constituant*)”<sup>1469</sup>. Preuss, too, observes that “constitution-making demands the constituent power of a collective that defines itself as a political entity and disposes of the institutional means to develop and express its own political will. In other words, constitution-making is an act of political self-determination”<sup>1470</sup>. For Dann, this concerns the most fundamental act of self-determination<sup>1471</sup>.

LITERATURE (CTD.) – Franck and Thiruvengadam, even while arguing that there is “no persuasive evidence that customary law requires any particular modalities to be followed in the process of writing a state’s constitution”<sup>1472</sup>, write that the methods for drafting constitutions are not unlimited. On the basis of observations regarding UN-supervised practice of decolonization and of textual requirements of the ICCPR, they confirm that the requirement of participation is applicable to constitutionmaking. Focusing on the object and purpose of the ICCPR or the equivalent customary rules<sup>1473</sup>, these authors find that there is a “general requirement of public participation in governance”<sup>1474</sup>. There would be a “growing convergence around universal

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<sup>1465</sup> *Id.*, p. 360.

<sup>1466</sup> A. F. Lowenthal, S. Bitar, *From Authoritarian Rule Towards Democratic Governance: Learning from Political Leaders*, IDEA 2015, p. 30. Emphasis added.

<sup>1467</sup> UNCHR, *Marschall v. Canada* § 5.2 & 5.3: “at issue in the present case is whether the constitutional conferences constituted a ‘conduct of public affairs’... [and] the Committee cannot but conclude that they do indeed constitute a conduct of public affairs”.

<sup>1468</sup> D. Raič, *Statehood and the Law of Self-determination*, *op. cit.*, p. 237.

<sup>1469</sup> *Ibid.* Emphasis added.

<sup>1470</sup> U. K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization’, *op. cit.*, p. 478. Emphasis added.

<sup>1471</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 426.

<sup>1472</sup> T. Franck, A. Thiruvengadam, ‘Norms of International Law Relating to the Constitution-Making Process’ in L. E. Miller, *Framing the State in Times of Transition*, *op. cit.*

<sup>1473</sup> *Ibid.*: “the treaty provisions applying more generally to governance *may apply to constitution drafting* in specific states, either by a broad construction of the object of a treaty on governance to which they are parties or by operation of customary law if they are not parties to the relevant universal instrument”.

<sup>1474</sup> *Id.*, p. 14. Emphasis added.

principles of legitimate governance [which] are tending to be applicable also to the process of constitution drafting”<sup>1475</sup>. Hart confirms that participation is a “requirement of a constitution-making process”; “The public has a right to take part in the *foundational affair of constitution making*, and the powerful interests that will always be involved in the process must recognize and respect that right”<sup>1476</sup>. For Jackson, finally, there is an “emerging international consensus that ‘legitimate’ constitution-making requires public participation or ratification”<sup>1477</sup>.

**PROHIBITION INTERNALLY IMPOSED CONSTITUTIONMAKING** – Transitional constitutionmaking, no less than ‘traditional’ constitutionmaking, must be carried out in line with internal self-determination, thus based on public participation. In line with the human rights requirement mentioned above, this prevents transitional authorities from excluding groups from constitutionmaking on the basis of race, creed, political allegiance but also gender<sup>1478</sup>. There are no grounds for denying that the conclusion reached by the UNCHR, and confirmed by authors like Raič, Preuss, Franck, Thiruvengadam, Hart and Jackson, applies to transitional constitutionmaking. The inclusion of the people in redefining the social contract is paramount. The circumstance that transitional constitutionmaking is done through various sorts of instruments does not alter this conclusion<sup>1479</sup>. As suggested before and summarized in the following table, this finding confirms that inclusivity excludes any form of internally imposed constitutionalism. The necessary association between self-determination and transitional constitutionmaking indicates that the rise of DIG is anchored in what Tulley calls a ‘postimperial paradigm shift in constitutionalism’<sup>1480</sup>.

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<sup>1475</sup> *Id.*, p. 15.

<sup>1476</sup> V. Hart, ‘Constitution Making and the Right to Take Part in a Public Affair’ *in ibid.* Emphasis added.

<sup>1477</sup> V. C. Jackson, ‘What’s in a name?’, *op. cit.*, p. 1293.

<sup>1478</sup> This thesis argues that there is more space for women’s participation in transition procedures than ordinarily thought. Gana seems to be skeptical about self-determination being applicable to women’s participation, while Saul writes that this issue should be explicitly regulated. R. L. Gana, ‘Which ‘Self? Race And Gender In The Right To Self-Determination As A Prerequisite To The Right To Development’, 14 *Wisconsin International Law Journal*, 133-153 (1995): “How does the principle of self-determination apply to our hypothetical woman who is part of this collective, whose relationship to the collective is important to her sense of identity, but whose participation within it is circumscribed by the norms upon which the claim to self-determination is made? Is it possible to be a part of this collective and yet ‘protected’ from it? This Article contends that the answer under the current framework of legal thought is no”. M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 170: “it could have been useful for international law to make specific requirements on the steps to be taken to achieve gender balance in the election of the legislature in the aftermath of conflict”. See also C. Chinkin, H. Charlesworth, ‘Building Women into Peace: the international legal framework’, Routledge, 2008, pp. 233-253. See also S/RES/1325 (2000) dd. 31 October 2000 on Women, Peace and Security.

<sup>1479</sup> Chapter 3, Section B.2 about transitional constitutionalism.

<sup>1480</sup> J. Tully, ‘Strange Multiplicity: Constitutionalism in an Age of Diversity’, *op. cit.*

**TABLE 12: Inclusivity – Obligation of progressive inclusion in DIG incl. constitutionmaking & prohibition of internally imposed constitutionalism**

Inclusivity: legal aspects	[a] Foundation of the transition	[b] Interregnum or Interim governance	[c] Constitutionmaking
<p><b>[1] Absence of popular involvement (lack of participation)</b></p>	<p>Foundation of the transition and adoption of the transition instrument without popular consultation by referendum or election (<i>common</i>).</p> <p><u>Neutral under int'l law</u></p> <p>Imposition of transitional authorities ('transition de fait')<sup>1481</sup>.</p>	<p>Interim rule not observed in conformity with popular will as expressed through <b>α</b> referendum or election (<i>common</i>) or <b>β</b> national dialogue (<i>occasional</i>).</p> <p><u>Neutral under int'l law</u></p>	<p><b>α</b> Supraconstitutional transition not prepared or adopted after popular approval (<i>common</i>, see also 1.a).</p> <p><u>Neutral under int'l law</u></p> <p><b>β.i</b> Constitutionmaking not carried out on basis of national dialogue and/or public consultation (<i>rare</i>).</p> <p><u>Neutral under int'l law; unlawful if in combination with I.c. γ.</u></p> <p><b>β.ii</b> Constituent assembly not elected (<i>occasional</i>).</p> <p><u>Neutral under int'l law; unlawful if in combination with I.c. γ.</u></p> <p><b>γ</b> Post-transition constitutional framework not approved or adopted after general referendum (<i>rare</i>).</p> <p><u>Unlawful under int'l law.</u></p>
<p><b>[2] Absence of elite involvement (lack of representation)</b></p>	<p>Foundation of transition / adoption transition instrument not on basis of fair representation (delegates of various political and/or ethnic groups) (<i>rare with consensual transitions, frequent with oppositional transitions</i>).</p> <p><u>Neutral under int'l law</u></p>	<p>Interim rule not observed by <b>α</b> interim power-sharing/unity government (<i>rare with consensual transitions</i>), or <b>β</b> by opposition-based body progressively including other political factions in interim decisionmaking processes (<i>uncommon with oppositional transitions</i>).</p> <p><u>Unlawful under int'l law.</u></p>	<p><b>α</b> Supraconstitutional transition instrument not prepared and adopted by representative body (<i>rare with consensual transitions, frequent with oppositional transitions, see also 1.2</i>).</p> <p><u>Neutral under int'l law</u></p> <p><b>β</b> Constitutionmaking is unrepresentative and carried out in confidential negotiations / closed roundtables (<i>rare</i>).</p> <p><u>Unlawful under int'l law</u></p> <p><b>γ</b> Post-transition constitutional framework approved and adopted by unrepresentative body and without popular approval.</p> <p><u>Unlawful under int'l law.</u></p>

If, in line with the peace-through-transition function of transition instruments, (transitional) constitutionmaking is a “site of contest, [...] a process, a continuing conversation, or a forum

<sup>1481</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 89 a.f.

for negotiation amid conflict and division”<sup>1482</sup>, then there is no doubt that, under the principle of self-determination, it must be inclusive. *A fortiori*, it must be transparent. In Cambodia, for example, the constitutionmaking process suffered from a lack of transparency. According to Benomar, “although the elections were free and fair and enjoyed massive participation, the continued flaring of political violence became an excuse for a *brief and secretive constitution-making process*”<sup>1483</sup>. In the same sense, Warren writes that the constitutiondrafting process was “opaque and non-transparent”<sup>1484</sup>. Inclusive transitional constitutionmaking was hindered.

The question however remains how the inclusivity requirement must be implemented: “broad-based popular participation is fast becoming a norm in constitution building, but questions remain regarding how to structure *effective* participation and how to balance mass participation with pact making by the political elite”<sup>1485</sup>. From the above observation of DIG practice, it can be distilled what kind of groups must be included. This will inform us as to how the concept of *population* must be understood. In line with Klabber’s thinking on this, the concept of ‘population’ is not to be associated with territorial groups. We shall come back to this point in the following section, which argues that various segments of the national population must at least be taken seriously during the interregnum.

## 2.2. Inclusivity further specifies the principle of self-determination: the right to be taken seriously during the interregnum

As a requirement for DIG, inclusivity, in its various expressions and components, has become wide-spread. With d’Aspremont, we can observe this “*trait nouveau de la pratique contemporaine: pour voir son existence ou, à tous le moins, ses pouvoirs internationalement reconnus, le gouvernement intérimaire doit être ‘représentatif’ de la population qu’il assujettit*”. The inclusivity requirement has become so recurrent that it is possibly indicative of an emerging custom. The circumstance that its implementation often leaves to be desired (as the transitions in Afghanistan and Iraq testify to), does not affect its (increasingly) mandatory nature, it shall be argued below<sup>1486</sup>.

The requirement of inclusivity is admittedly somewhat underdetermined. This multi-faceted requirement nevertheless contributes to reducing the relative indeterminacy characterizing the principle of self-determination. In other words, the contents of the principle of self-determination gain in precision, and its contemporary relevance and validity come to be confirmed *through* individual customary rules concerning DIG:

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<sup>1482</sup> V. Hart, ‘Constitution-Making and the Transformation of Conflict’, *Peace & Change*, vol. 26, no. 2, 2001, pp. 154.

<sup>1483</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 83. Emphasis added.

<sup>1484</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 14.

<sup>1485</sup> IDEA, *Constitution Building: A Global Review (2013)*, 2014, p. 2. The question of effectiveness was mentioned in the introductory caveats to Part III and is treated again under Chapter 7, Section B.4.

<sup>1486</sup> Chapter 6, Section C, 2.3. Chapter 7, Section B.

”Clearly, self-determination is one of the typical legal principles of the present world community. With the other fundamental principles it shares a high degree of generality and abstraction. [...] The task of *specifying* the issues that the principle does not address is fulfilled by *individual customary rules*”<sup>1487</sup>.

Internal self-determination is –at least partly– losing its indeterminacy in the following four ways. First, the interregnum as a whole must be respectful of the principle of internal self-determination (2.2.1). Second, self-determination can be exercised in various ways, but the options are limited (2.2.2). Third, various segments of society must be taken seriously throughout the interregnum (2.2.3). Fourth, DIG must gradually open up to the participation and representation of various segments of society (2.2.4).

### *2.2.1. Application self-determination throughout the interregnum*

In order to be internationally lawful, the interregnum as a whole, and not only the transitional constitutionmaking process, must be carried out in conformity with, or at least aim at progressively realizing, the principle of internal self-determination. The perusal of practice above unveils an obligation to ensure ‘inclusion’, ‘representation’, and ‘participation’ during the interregnum. The temporary nature of DIG cannot be invoked as an excuse to hinder the progressive implementation of these requirements. As already mentioned, these requirements account for the requalification of the peace-through-transition paradigm into the peace-through-*inclusive*-transition paradigm.

If current trends are continued in the future and individual customary rules in relation to DIG further germinate<sup>1488</sup>, then these requirements will need to be complied with during the *entire* interregnum under international law. The progressive development of custom hereby not only confirms existing obligations concerning participation in constitution-making processes<sup>1489</sup> and elections<sup>1490</sup>, but also sensibly *extends* the inclusivity requirement, and the principle of internal self-determination, to the whole interregnum.

### *2.2.2. Diversified but limited choice for implementing inclusive DIG*

**VARIOUS WAYS TO RESPECT INCLUSIVITY** – If a custom requiring DIG to be inclusive (participatory and/or representative) crystallizes in the future, it would not operate at a high level of detail. This entails that “the legal framework is not overly prescriptive and includes considerable scope for a discretionary approach to matters of popular governance”<sup>1491</sup>. Inclusivity can be honored in various ways, which depends on the context and contingencies of each case: “there is no escaping the fact that process choices, like the choice of institutions to be incorporated in

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<sup>1487</sup> A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*, Hersch Lauterpacht Memorial Lecture Series, CUP, p. 129. Emphasis added.

<sup>1488</sup> Chapter 6, Section C.2.2. Chapter 7, Section B.

<sup>1489</sup> Chapter 6, Section C.2.1.2.

<sup>1490</sup> ICCPR, art. 25.

<sup>1491</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 107.

a constitution, are heavily colored by constraint”<sup>1492</sup>. Ways for realizing participatory/representative processes thus vary. Yet, as we shall see below, there are ways in which DIG is clearly incompatible with the inclusivity requirement<sup>1493</sup>.

**NO OBLIGATION OF POWER-SHARING** – Inclusivity does not require the transition to be based on the power-sharing model. Above it was noted that power-sharing as a *time-finite measure* is more easily accepted than outside the context of DIG<sup>1494</sup>. DIG on the basis of power-sharing is not a prefiguration of the post-transition stage, but may expedite the familiarization with democratic procedures, and may advance reconciliation in a post-conflict setting<sup>1495</sup>. But installing a power-sharing arrangement is not the only method for realizing inclusive DIG<sup>1496</sup>. Inclusive DIG should not be conflated with provisional power-sharing, and even less with *definitive power-sharing*. Methods other than the power-sharing model may well comply with the inclusivity requirement.

**CONSULTATIONS, DIALOGUES, ROUNDTABLES, PROGRESSIVE INCLUSION** – While self-determination can be exercised through several procedures, the options are not unrestrained, and can be listed as follows: nation-wide consultations, national dialogues and inclusive roundtables (comparable to the roundtables preceding the 1989 pacted transitions in Central and Eastern Europe) (Tables 11.2 & 12, 1.b.β), opposition-based interim governments gradually opening up to other political factions (Tables 11.2 & 12, 2.b.β), and inclusive constitutionmaking processes (Tables 11.2 & 12, 1.c).

### 2.2.3. Plurality of groups to be involved in DIG

“There is no such thing as ‘the people’; there are religious groups, ethnic groups, the disabled, women, youth, forest people, pastoralists, sometimes ‘indigenous peoples’, farmers, peasants, capitalists and workers, lawyers, doctors, auctioneers, and practising, failed or aspiring politicians, all pursuing their own agenda”<sup>1497</sup>.

The voice of various groups and factions of society must be taken seriously throughout the interregnum. The inclusivity requirement aims at fostering the cohesion of ‘the people’ in a post-conflict situation. It addresses the problem: “of a people’s forming themselves into a nation [...] To agree in their collective name to a political covenant, individuals must have

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<sup>1492</sup> D. L. Horowitz, ‘Conciliatory Institutions and Constitutional Processes in Post-Conflict States’, *op. cit.*, p. 1247.

<sup>1493</sup> Chapter 6, Section C.2.1.2., Table 12.

<sup>1494</sup> Chapter 6, Section B.2.1.1.

<sup>1495</sup> I. S. Spears, ‘Africa: The Limits of Power-Sharing’, *op. cit.*, p. 114.

<sup>1496</sup> On a more general note, Saul observes that, in the instance of Sierra Leone at least, “international law does not make demands in terms of the composition of the governing authority when an electoral process is delayed”, M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 136. The composition of governments is however not only of domestic legal relevance. It is not unknown or irrelevant in international law. It is for example discussed in the commentaries to the 2001 Draft Articles on State Responsibility.

<sup>1497</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, *op. cit.*, p. 15.

already had some meaningful corporate identity as a people”<sup>1498</sup>. Involving a plurality of groups during DIG contributes to the creation of this ‘meaningful corporate identity’. ‘New constitutionalism’ accepts this challenge; it “must be responsive to an inherent uncertainty about the identity and inclusiveness of a nation or a people which embarks on constitution-making, and to a demand for participatory constitutionalism conducted by active citizens”<sup>1499</sup>. Transitional constitutionmaking therefore requires a broad ‘constitutional conversation’<sup>1500</sup>. It deals with various claims for recognition coming from the people, and seeks to “build trust and consent *through* its process” in order to arrive at a ‘mediated peace’<sup>1501</sup>.

DIG practices are instructive on the notion of ‘people’ in post-conflict settings. They thus specify the principle of self-determination *of peoples*. A people includes not only the former belligerents or opponent political parties but also representatives of ‘civil society’, women’s groups, ethnic group, regional entities and traditional leaders:

“if the constitution is to be a social contract between different communities, understood as ethnic, linguistic, cultural and/or religious communities [...] then these communities must also be included in the constitution-making process”<sup>1502</sup>.

Table 11.1 further above ‘Inclusivity deconstructed (a preliminary overview)’ refers to the variety of groups to be included, not only in the transitional constitutionmaking process, but during DIG generally. If it is correct that the requirement of inclusivity specifies the principle of internal self-determination in this way, then it will be crucial to develop strategies for marginalized groups to successfully engage in DIG<sup>1503</sup>.

Whether the principle of self-determination also protects and guarantees the inclusion of youth and women’s representatives during DIG is more controverted. Gana, for instance, seems to be skeptical about this principle guaranteeing women’s participation<sup>1504</sup>. Saul advocates for a new *lex specialis* on gender balance in relation to post-conflict building, thus implicitly recognizes that the law as it stands now, including the principle of self-determination, does not

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<sup>1498</sup> W. F. Murphy, ‘Constitutions, Constitutionalism, and Democracy’ in Greenberg (ed.), *Constitutionalism and Democracy*, OUP, 1993.

<sup>1499</sup> V. Hart, ‘Constitution-Making and the Transformation of Conflict’, *Peace & Change*, vol. 26, no. 2, 2001, p. 156.

<sup>1500</sup> S. Chambers, ‘Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis’, *Politics and Society* 26, 1998, pp. 143-172.

<sup>1501</sup> V. Hart, ‘Constitution-Making and the Transformation of Conflict’, *op. cit.*, p. 167.

<sup>1502</sup> IDEA, *Constitution Building: A Global Review (2013)*, *op. cit.*, p. 4.

<sup>1503</sup> J. Hedström, J. Smith, *Overcoming Political Exclusion - Strategies for marginalized groups to successfully engage in political decision-making*, IDEA, 2013. For a concrete example, cf. N. Guinée, *Inclusive constitution building, Identifying Common Ground through Political Dialogues on Contentious Constitutional Issues & Indigenous Peoples’ Concerns in Nepal*, IDEA, 2015. Cf. also I. S. Spears, ‘Africa: The Limits of Power-Sharing’, *op. cit.*, with concrete proposals about how to render (interim) power-sharing effective.

<sup>1504</sup> R. L. Gana, ‘Which ‘Self’? Race And Gender In The Right To Self-Determination As A Prerequisite To The Right To Development’, *op. cit.* See also C. Chinkin, H. Charlesworth, ‘Building Women into Peace: the international legal framework’, *op. cit.*, pp. 233-253.

exhaustively address this issue<sup>1505</sup>. True, the UNSC landmark resolution 1325 encourages the development of a strategic plan “calling for an increase in the participation of women at decision-making levels in conflict resolution and peace processes”<sup>1506</sup>. But this mere encouragement is not formulated en lien with the principle of self-determination.

Yet, the perusal of practice above indicates that the participation of women in DIG is systematically seen as a requirement for the interregnum. In this particular sense, the indeterminacy of the principle of self-determination –at least in the context of DIG– is further reduced. Women’s inclusion in DIG is given more importance –including in transition countries with a bad record in this field– than ordinarily thought. On the basis of this particular observation which impacts the very definition of a ‘people’, the principle of self-determination thus gains precision.

#### *2.2.4. Gradual increase of the people’s involvement during interregnum*

In the context of DIG, the principle of internal self-determination goes further than the right to have a representative government, and further than the thin procedural right to a constitutional referendum and general elections towards the end of the interregnum. Transitions are often initially steered by elite negotiations and subsequently become more inclusive. When the notion of inclusivity was deconstructed, above<sup>1507</sup>, we saw that inclusivity can play a role at various stages of the transition. It can relate to (i) the foundation of the transition, (ii) the interregnum itself (i.e. division of powers during the interregnum), and (iii) the transitional constitutionmaking process (which can be carried out at various moments of the transition)<sup>1508</sup>.

(1) POPULAR INITIATION OF TRANSITION – Generally, the specifics of transition instruments are not even *grosso modo* defined by the people (Tables 11.2 & 12, 1.a). Transition instruments are mostly drafted by political elites (Tables 11.2 & 12, 2.a). Large-scale popular protests against tyranny and oppression, mismanagement or perpetuation of one-man rule or armed conflict however constitute the social context in which transitions often arise. Calls for reform and reconstitutionalization are, then, the political factors triggering DIG. Social protests and political demands often rely on the vindication of self-determination. Writing about the Arab Spring, Saranti observes:

“the claims of the heterogeneous group of demonstrators and insurgents, even though diversified, could be summed up as follows: freedom, democracy, human rights protection, establishment of functioning institutions and the rule of law, free and fair election and regime change; namely,

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<sup>1505</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 170.

<sup>1506</sup> S/RES/1325 dd. 31 October 2000, § 2.

<sup>1507</sup> Chapter 6, Section B.3.

<sup>1508</sup> Chapter 6, Section B.3. See Tables 11.1 & 11.2.

*especially regarding the latter, the people vindicated the right to self-determination, in its internal dimension*<sup>1509</sup>.

(2) REPRESENTATION OF INTERIM RULE – During the interregnum, the people may (progressively) be involved in the administration of the country, either by taking directly part in the conduct of public affairs (Tables 11.2 & 12, 1.b) or, more commonly, through representatives (Tables 11.2 & 12, 2.a). DIG is observed either by an interim power-sharing/unity government<sup>1510</sup>, or by a government committing itself to progressively involve other political factions in interim decisionmaking processes.

(3) INCLUSIVITY OF TRANSITIONAL CONSTITUTIONMAKING – Inclusivity can relate to various aspects of transitional constitutionmaking. During the interregnum, national dialogues and/or public consultations may influence the constitutionmaking process; the people’s voice is then non-binding, but may impact on the method by which the constituent assembly must discharge its duties (Tables 11.2 & 12, 1.c. β.i). In some cases, the constituent assembly, sometimes also functioning as a general assembly, is voted into power (Tables 11.2 & 12, 1.c. β.ii). As a general rule, towards the end of the transition, post-transition constitutional texts are approved and adopted by referendum (Tables 11.2 & 12, 1.c. γ). In sum, inclusivity will mostly be verified on the occasion of the ‘re-foundational moment’, i.e. by public consultations during the constitutiondrafting process, election of the constituent assembly, or popular approval of the draft constitution.

OBJECT OF SELF-DETERMINATION IN THE CONTEXT OF DIG – The principle of internal self-determination protects the right of the people to be closely and gradually involved, through representation and participation, in the steps of the interregnum. This gradual involvement allows the people to contribute to the self-redetermination of the country. Even in cases where DIG is initiated in an exclusionary fashion, it must *open up* to the participation and representation of several groups of society. Power-sharing agreements in Liberia and Sierra Leone were concluded in violation of the principle of self-determination, Levitt contends<sup>1511</sup>. This argument is based on the circumstances of the *foundation* of transitions in both countries. It does not consider whether or not the gradual involvement of the people might have served as a corrective for this initial violation. Yet, inclusivity or ‘ownership’ must *in any event* be gradually ensured during the interregnum. For the ‘2015 Review of the UN Peacebuilding architecture’, thus, ownership implies that peace “must be *genuinely and gradually built* by a process of accommodation on the part of domestic stakeholders, public and private”<sup>1512</sup>.

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<sup>1509</sup> See V. Saranti, ‘Pro-democratic intervention, invitation, or ‘responsibility to protect’? Challenges to international law from the ‘Arab Spring’’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2013, pp. 169-201. Emphasis added.

<sup>1510</sup> Power-sharing as a temporary governance device should be discerned from power-sharing as a permanent, post-transition, mode of governance.

<sup>1511</sup> J. I. Levitt, *Illegal Peace in Africa*, *op. cit.*, p. 46.

<sup>1512</sup> *Id.*, § 41. Emphasis added.

The procedural design of the interregnum especially relates to so-called ‘upstream constraints’, i.e. the application of participatory/representative procedures preceding the constitutionmaking process and the adoption of the constitution<sup>1513</sup>. Transition instruments generally confirm this design. Rather than posing substantive requirements as to the *outcome* of DIG, these instruments specify how internal self-determination must be pursued *during* the interregnum: by following procedures ensuring the (progressive) inclusion of the people during the interregnum.

Inclusivity is generally seen as an obligation to be implemented *progressively* over the course of the transition. It does not guarantee (a) that representation or participation of all segments of society is ensured from the beginning of the transition, or (b) that these segments are to be included in the post-transition phase. Yet, it ensures that secondary norms coming to existence during the transition are based on inclusive consultations. Inclusive decisionmaking in relation to constitutional and institutional arrangements *of the transition itself* is to be distinguished from inclusive decisionmaking in relation to *durable such arrangements in the post-transition stage*. Inclusivity focuses on the former aspect, not the latter. It thus has a limited scope. It concerns a *procedural requirement* during the *transition*<sup>1514</sup>.

GRADUAL INCLUSION DURING INTERREGNUM – Through representative and/or participatory processes, and to varying degrees of intensity, peoples are involved in the redefinition of their social contract. There is not one method for a people to freely determine its political status. Even if popular involvement can be expressed in various ways and degrees, as a general rule it gradually increases during the interregnum. If the transition first depends on negotiations between elite players, it subsequently becomes more inclusive. The progressive inclusion of the people during the interregnum can remediate poor popular involvement at the beginning of the interregnum. Towards the end of the interregnum, the people must always be involved with the transitional constitutionmaking process.

### 2.3. Conclusion. Inclusivity as an obligation of means and an obligation of results

Aside from being a political or social norm, commended or criticized as the case may be, inclusivity increasingly penetrates the legal sphere, as an emerging custom or on other (legal) accounts<sup>1515</sup>. The policy or legal sociology considerations that may explain this evolution do not alter this observation. Irrespective of the precise legal basis, the perusal of DIG practice indicates that inclusivity is seen as a legal requirement of the transition. This is corroborated

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<sup>1513</sup> J. Elster, ‘Forces and Mechanisms in the Constitution-Making Process’, *op. cit.*, p. 373. Cf. also J. Elster, *Ulysses Unbound*, CUP, 2000.

<sup>1514</sup> See, in this sense, K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, p. 52. In the same sense, and specifically with regard to power-sharing, cf. A. K. Jarstad, ‘Sharing power to build states’ in D. Chandler and T. D. Sisk (red.), *Routledge Handbook of International Statebuilding*, *op. cit.*, p. 254: “power-sharing should be a temporary provision”.

<sup>1515</sup> Chapter 7, Section B.

by the fact that the UNSC may apply sanctions when so-called spoilers obstruct an inclusive transition, as we shall see in Chapter 7<sup>1516</sup>.

**INCLUSIVITY: AN OBLIGATION OF MEANS AND OF RESULT AT VARIOUS POINTS OF THE TRANSITION** – Except when it concerns transitional constitutionmaking, inclusivity is best qualified as an obligation of means: during the interregnum, transitional authorities must apply this requirement throughout the interregnum, must pick one of the approaches for realizing it, and, if it originated from an elite movement, must gradually open up DIG to various segments of society. An obligation of result however imposes itself (a) for the transitional constitutionmaking process and (b) the approval of the draft constitution towards the end of the interregnum.

**FURTHER DEVELOPMENTS** – Further developments will confirm or disconfirm how inclusive DIG helps to add precision to self-determination. As explained in the caveat in the introduction of Part III, practices of DIG are rudimentary, which reflects on the rudimentary nature of a *ius in interregno*. This does not imply that internal self-determination with regard to DIG is completely underspecified. In the future, a detailed and more coherent perusal of DIG practices may expose the ‘flesh’ on the bone of internal self-determination. The nature of this principle favors this approach. A static view of self-determination, to be invoked at one specific moment or to carry its effects within a limited time frame (e.g. the question whether the unilateral declaration of independence by Kosovo is in compliance with this principle), is not relevant for DIG. Self-determination is, as Crawford remarked<sup>1517</sup>, a continuing principle, in a double sense: not only is it applicable outside the context of decolonization, it is also continuously applicable, i.e. cannot be instantly exhausted. And DIG, as a dynamic process, can last from a couple of months to several years<sup>1518</sup>.

**SELF-DETERMINATION AS A PRINCIPLE OF PROCESS** – Where the principle of self-determination remains contested as a basis for secession (and perhaps as an entitlement for the people as a nation outside the context of DIG), in relation to DIG it has sensibly gained ground over the past two decades. If the people is involved throughout the transition in all its aspects –ranging from the formulation of the transition instruments to the observation of the interim rule to transitional constitutionmaking– self-determination is honored as a substantive right. If their involvement is limited to the approval of the constitution and the participation in the subsequent elections, self-determination is applied as a procedural right. The general and systematic focus on ‘inclusion’, ‘representation’, ‘participation’ and ‘ownership’ during transitions constitutes a concrete application of the “proceduralized concept of self-determination”<sup>1519</sup>, at the minimum. These requirements must be considered as a concrete

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<sup>1516</sup> Chapter 7, Section B.2.

<sup>1517</sup> J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, p. 40.

<sup>1518</sup> Chapter 4, Section A.2.5, Table 7.

<sup>1519</sup> J. L. Cohen, ‘The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for ‘Interim Occupations’’, *op. cit.*, p. 527.

application of the principle of internal self-determination<sup>1520</sup>, seen at best as a substantive principle, and at minimum as a procedural principle.

In short, as an obligation of means, the requirement of inclusivity is to be implemented progressively through the transition. As an obligation of result, it must certainly be honored during the constitutionmaking process; public participation in transitional constitutionmaking constitutes a ‘red line’ that cannot be crossed given the prohibition of *internally* imposed constitutionalism discussed above.

#### Section D. Domestic ownership of transitional justice

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The last section of this chapter on self-determination and DIG briefly addresses TJ. The aim of TJ goes *beyond* redressing large-scale human rights violations of the past. In the context of DIG, TJ contributes to the transformation of the country, and to DIG as such. In this context, TJ must thus be “understood as a moment in the creation of a new political and legal order”<sup>1521</sup>. This section analyzes how TJ contributes to a *ius in interregno*.

As TJ is instrumental to the state order transformation, it is almost systematically part of DIG. When transitions come to an end, foreseeing TJ *sensu lato*, under one of its many available forms, has become generalized practice. While acknowledging that it is “an important task of the [transitional] process [...] to promote reconciliation among the previously conflicting communities”<sup>1522</sup>, this section does not analyze what would constitute the most efficient way for achieving effective reconciliation. Instead, it observes that TJ is almost systematically part of DIG, and notes that the systematic reliance on TJ is the result of a socialized practice. Further, we shall see that there is wide discretion as to how the categories of TJ can be implemented. But it is generally agreed:

- That TJ must be nationally owned and inclusive: “to the extent possible, all sectors of a war-ravaged society –the individual, community, society, and state– should become engaged participants in –and not merely auxiliaries to– the processes of transitional justice and social reconstruction”<sup>1523</sup>;
- That amnesty cannot be accorded for war crimes, genocide and crimes against humanity (‘serious crimes’).

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<sup>1520</sup> See, in the same sense, M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 33-34. See also S. Chesterman, ‘Ownership in theory and in Practice: Transfer of Authority in UN Statebuilding Operations’, *op. cit.*, p. 20, observing that the “broadest use of the term [ownership] is sometimes akin to self-determination”. *Contra*: J. d’Aspremont, ‘Les administrations internationales de territoire et la création internationale d’Etats démocratiques’, *op. cit.*, p. 14, who submits that, *to the extent that* the political regime of a state is determined by those who contribute to the reconstruction of the state, the *right* to self-determination would not be relevant: « [i]l n’y a plus rien d’un droit à disposer de soi-même si le régime politique d’une entité est déterminé par des puissances administrantes ou ceux qui collaborent à la reconstruction de l’Etat ».

<sup>1521</sup> D. Dyzenhaus, ‘Justifying the Truth and Reconciliation Commission’, *The Journal of Political Philosophy*, Vol. 8, Nr. 4, 2000, p. 494, defending the idea of *transformative justice*.

<sup>1522</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, *op. cit.*, p. 13.

<sup>1523</sup> E. Stover, H. Megally, H. Mufti, *id.*, p. 835.

PLURALITY TJ AVENUES – TJ *sensu lato* can be realized in various ways. It can be defined as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”<sup>1524</sup>. The UNSG further specified that these processes and mechanisms “may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof”<sup>1525</sup>. As a chapeau concept<sup>1526</sup>, TJ *sensu lato* (or, simply, ‘TJ’) comprises three categories:

- TJ *sensu stricto* (truth and reconciliation commissions);
- Post-conflict justice, i.e. domestic or international criminal justice (‘transitional criminal justice’<sup>1527</sup>);
- International fact-finding missions or inquiries.

For the purposes of this thesis, TJ should be understood in a broad sense. It includes not only so-called alternative tools for dealing with the past but also what Fijalkowski and Grosescu have called ‘transitional criminal justice’<sup>1528</sup>. In the following lines we shall observe that issues of justice figure prominently in DIG (1), examine the policy and sociology of law considerations which undergird this observation (2), and observe what the limits are to the discretionary powers of transitional authorities in designing and implementing TJ (3).

### 1. *Observation of practice*

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Post-conflict DIG is generally accompanied by TJ. The conviction that TJ is part and parcel of DIG is confirmed by state practice<sup>1529</sup>. In the following lines we shall see that in most cases transitional authorities commit themselves to organizing TJ. If not, the UNSC underscores the relevance, and even compulsory nature, of TJ and the fight against impunity for post-conflict transitions. Before the turn of the millennium, transitional authorities in Cambodia, Rwanda and South Africa committed to TJ. After the turn of the millennium, transitional authorities in Burundi, Afghanistan, DRC, Liberia, Somalia, Haiti, Iraq, Côte d’Ivoire, Guinea, Libya, Yemen, Guinea Bissau, Central African Republic, Burkina Faso and Ukraine also pledged to

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<sup>1524</sup> The rule of law and transitional justice in conflict and post-conflict societies’, S/2004/616 dd. 23 August 2004. Emphasis added.

<sup>1525</sup> *Ibid.*

<sup>1526</sup> Soares writes: “[t]ransitional justice is a chapeau concept that refers to a range of approaches, mechanisms and comprehensive strategies that are used in post-dictatorial and post-conflict societies, in order to address gross human rights violations”. P. P. Soares, ‘Positive Complementarity: Fine-Tuning the Transitional Justice Discourse’ in A. Fijalkowski and R. Grosescu, *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies*, *op. cit.* p. 187.

<sup>1527</sup> A. Fijalkowski and R. Grosescu, *Transitional Criminal Justice in Post-Dictatorial and Post-Conflict Societies*, *op. cit.*, p. 1: “mechanisms of judicial accountability carried out in post-dictatorial or post-conflict states”.

<sup>1528</sup> *Ibid.*

<sup>1529</sup> S/PV.4903 dd. 26 January 2004.

organize TJ. The observations in this subsection, in a chronological order, are only cursory, and may be skimmed by the reader who is only interested in the recapitulative part, under subsection 2 ('*opinio iuris* and sociology of law considerations').

1. The Paris Agreement regulating the transition in Cambodia committed to bringing to trial senior leaders and those who were most responsible for the crimes under Cambodian law, international humanitarian law, and international conventions<sup>1530</sup>. The jurisdiction of these Extraordinary Chambers (the 'Khmer Rouge Tribunal') was limited to genocide, crimes against humanity and grave breaches of international humanitarian law<sup>1531</sup>. Although this limitation has been criticized in scholarship<sup>1532</sup>, it confirms that such crimes cannot escape the purview of transitional criminal justice (and may not be submitted to a form of TJ *sensu stricto*).

2. In Rwanda, the International Criminal Tribunal for Rwanda was set up "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law"<sup>1533</sup>. These crimes could not be amnestied, and could not be submitted to the jurisdiction of the traditional *gacaca* courts<sup>1534</sup>.

3. During the South African transition, the first modern truth and reconciliation commission was established. This was a milestone for the development and expansion of TJ worldwide. While Apartheid constitutes a crime against humanity<sup>1535</sup>, its perpetrators were also granted amnesty by the truth and reconciliation commission. Since then, however, amnesty for serious crimes has been generally denied.

4. The Burundian Transitional Government committed to reforming the post-transition judiciary<sup>1536</sup>, and to the organizing TJ. The three categories of TJ mentioned above were covered. With regard to "serious acts of violence" other than genocide, war crimes or crimes against humanity, the Arusha agreement established a truth and reconciliation commission<sup>1537</sup>. For the organization of international criminal justice<sup>1538</sup> and the establishment of a

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<sup>1530</sup> 'Agreement concerning the prosecution under Cambodian law of crimes committed during the period of democratic Kampuchea' dd. 6 June 20 (the 'ECCC Agreement') concluded between the UN and Cambodia, art. 1.

<sup>1531</sup> *Id.*, art. 9.

<sup>1532</sup> K. Ainley, 'Transitional justice in Cambodia: the coincidence of power and principle', in R. Jeffery (ed.), *Transitional justice in the Asia-Pacific*, CUP, pp. 125-156.

<sup>1533</sup> S/RES/955 dd. 8 November 1994, § 1.

<sup>1534</sup> J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', *Journal of International Criminal Justice*, 3, 2005, p. 902.

<sup>1535</sup> R. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission*, 20, *MICH. J. INT'L L.* 267, 1999.

<sup>1536</sup> With regard to the permanent judicial institutions, the Arusha Agreement mentions the "[p]romotion of impartial and independent justice" and the "[r]eform of the judicial machinery at all levels". See *Id.*, Protocol I, artt. 7.18.a & 7.18.b.

<sup>1537</sup> *Id.*, art. 8. Also see, in the same agreement, Protocol II, art. 18.2.

<sup>1538</sup> The "[r]equest by the Government of Burundi for the establishment by the United Nations Security Council of an international criminal tribunal to try and punish those responsible should the findings of the report point to the existence of acts of genocide, war crimes and other crimes against humanity", *Id.*, art. 6.11.

commission of inquiry<sup>1539</sup>, the transitional government requested UN assistance. Finally, in the field of socio-economic TJ, the Arusha Agreement set out a policy of resettlement for the so-called *sinistrés*<sup>1540</sup>.

The Burundi transitional authorities considered TJ to be a mandatory component of the transition. The UNSC (echoed by the UN country office<sup>1541</sup>) adopted a similar approach. From the outset, the UNSC called on the transitional authorities to bring the perpetrators of human rights and international humanitarian law violations to justice<sup>1542</sup>. Between 2008 and 2010, it often referred to the TJ process<sup>1543</sup>. When national consultations about TJ were completed and published<sup>1544</sup>, the UNSC commended this<sup>1545</sup>, and encouraged the government to establish the proposed mechanisms<sup>1546</sup>. A draft TJ law was prepared in December 2012. In 2014 the UNSC, however, observed that no significant progress had been made in the field of TJ, and recalled the earlier commitment to TJ<sup>1547</sup>. After this reminder, the Burundi government admitted that TJ constitutes the “last component of the implementation of the Arusha Agreement”<sup>1548</sup>.

**5.** Steps taken to realize a form of TJ in Afghanistan were initially quite shy. Actually, the Bonn Agreement did not address TJ, and “no mechanism was established to deal with the abuses of the past”<sup>1549</sup>. Nadery deplors this lacuna, and attributes it to the circumstance that “all parties to the peace agreement were involved in serious human rights abuses during the course of the conflict”<sup>1550</sup>. An Afghan Independent Human Rights Commission was however

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<sup>1539</sup> The Arusha Agreement provides for the “[r]equest by the transitional Government for the establishment by the UNSC of an International Judicial Commission of Inquiry on genocide, war crimes and other crimes against humanity responsible for (a) Investigating and establishing the facts relating to the period from independence to the date of signature of the Agreement; (b) Classifying them; (c) Determining those responsible; (d) Submitting its report to the United Nations Security Council”. *Id.*, protocol I, art. 6.10. Also see, in the same agreement, Protocol II, art. 18.1.

<sup>1540</sup> Arusha Agreement, Protocol IV, Ch. I, ‘Rehabilitation and Resettlement of Refugees and Sinistrés’; Arusha Agreement, Ch. I, art. 1: “all displaced, regrouped and dispersed persons and returnees”.

<sup>1541</sup> ONUB, then BINUB, now BNUB. BINUB, for its part, supported the “efforts to combat impunity, particularly through the establishment of transitional justice mechanisms, including a truth and reconciliation commission and a special tribunal”. S/RES/1719 (2006), § 2.j.

<sup>1542</sup> S/RES/1545 dd. 21 May 2004, Preamble, § 9.

<sup>1543</sup> S/RES/1959 dd. 16 December 2010, Preamble, § 10. Also see S/RES/1858 dd. 22 December 2008, Preamble, § 8. Cf. also S/RES/1902 dd. 17 December 2009, § 17.

<sup>1544</sup> The OHCHR ‘Rapport des consultations nationales sur la mise en place des mécanismes de justice de transition au Burundi’ dd. 20 April 2010.

<sup>1545</sup> It “not[ed] with appreciation the completion of the national consultations on the establishment of the transitional justice mechanisms, in accordance with its resolution 1606 (2005) as well as the Arusha agreements 2000”, S/RES/1959 dd. 16 December 2010, Preamble, § 10. Also see S/RES/1858 dd. 22 December 2008, Preamble, § 8.

<sup>1546</sup> S/RES/1959 dd. 16 December 2010, § 13.

<sup>1547</sup> S/RES/2137 dd. 13 February 2014. Cf. also § 15.

<sup>1548</sup> UN Peacebuilding Commission Chair’s visit to Burundi and to other stakeholders (21-31 May 2014), report dd. 3 June 2014, p. 3.

<sup>1549</sup> A. N. Nadery, ‘Peace or Justice? Transitional Justice in Afghanistan’, *International Journal of Transitional Justice* 1, no. 1, March 1, 2007.

<sup>1550</sup> *Id.*, pp. 173–79. This author adds: “[t]he peace talks did not take place between a winner and loser of a war; the talks were between different ‘loser’ groups who regained control of some parts of Afghanistan after the US led coalition attacks on Afghanistan against the Taliban”; “[t]here is a strong desire for justice among the Afghans, but since the fall of the Taliban, the transitional government with its base of international support has intentionally *ignored*

established, and proposed a national strategy for TJ. Eventually, a general amnesty bill was adopted<sup>1551</sup>, excluding crimes against humanity from its scope<sup>1552</sup>.

6. After the transition in the DRC, various TJ mechanisms were applied, more or less successfully. The UNSC strongly encouraged the transitional authorities to establish a truth and reconciliation commission<sup>1553</sup>. Notwithstanding serious criticism<sup>1554</sup>, such a commission functioned from July 2003 to February 2007. The Pretoria Agreement also provided for an amnesty law, not to be applied to serious crimes<sup>1555</sup>. The UNSC monitored TJ initiatives, and encouraged the transitional authority to put an end to impunity<sup>1556</sup>. In 2004 the UNSG stated that the members of the transitional authority may also be responsible for human rights abuses. It then asked the transitional authority to take up all instances of human rights abuses, “in particular those perpetrated by members of the Transitional Government”<sup>1557</sup>. The UNSC later reiterated this demand<sup>1558</sup>.

7. In 2003, in spite of strong opposition by the Liberian transitional government against TJ measures (or even a justice sector reform)<sup>1559</sup>, the UNSC continued insisting on this, and actively monitored progresses made by a truth and reconciliation commission<sup>1560</sup>.

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*the calls to deal with these past injustices*”. Emphasis added. See also E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, pp. 385 – 387, and p. 411, for a discussion.

<sup>1551</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 177. Karzai then had an ‘action plan’ developed. ‘Action Plan of the Islamic Republic of Afghanistan for peace, justice and reconciliation’, 6-7 June 2005. With this action plan, a national strategy for peace, reconciliation and justice was to be implemented.

<sup>1552</sup> L. Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide*, Oxford and Portland, Oregon, 2008, p. 133.

<sup>1553</sup> S/RES/1468 dd. 20 March 2003 § 5. With reference to the resolutions adopted in the framework of the Inter-Congolese Dialogue in Sun City in April 2002.

<sup>1554</sup> ‘Ongoing Carnage’, ICTJ, country profile DRC. For the ICTJ, it was flawed as it “failed to investigate atrocities or hold public hearings to establish the truth about the conflict and the mass killings”.

<sup>1555</sup> Pretoria Agreement, III.8: “[t]o achieve national reconciliation, amnesty shall be granted for acts of war, political and opinion breaches of the law, with the exception of war crimes, genocide and crimes against humanity. To this effect, the transitional national assembly shall adopt an amnesty law in accordance with universal principles and international law. On a temporary basis, and until the amnesty law is adopted and promulgated, amnesty shall be promulgated by presidential decree-law. The principle of amnesty shall be established in the transitional constitution”.

<sup>1556</sup> S/RES/1493 dd. 28 July 2003.

<sup>1557</sup> Third UNSG Special Report on DRC Mission, *op. cit.*, § 111.

<sup>1558</sup> S/RES/1592 dd. 30 March 2005.

<sup>1559</sup> N. Ansorg, F. Haass, A. Mehler, J. Strasheim, ‘Institutionelle Reformen zur Friedenskonsolidierung’, *op. cit.*, pp. 5-6: “[d]agegen gibt es Hinweise, dass wichtige Reformen gezielt verhindert wurden: Ehemalige Bürgerkriegsparteien in der Übergangsregierung Liberias wehrten die Einrichtung eines außerordentlichen Gerichts zur Verfolgung von Kriegsverbrechen ab und nutzten die Machtbeteiligten, um sich persönlich zu bereichern und eine grundlegende Justizreform zu blockieren”. [...] Die Besetzung staatlicher Machtpositionen mit Vertretern ehemaliger Kriegsparteien beispielsweise kann den Aufbau eines unabhängigen Justizsystems erschweren. Ist ein Machtteilungsarrangement zeitlich befristet, ergibt sich die Chance zur Justizreform möglicherweise zu einem späteren Zeitpunkt. In Bürgerkriegen begeben sowohl Rebellen als auch die Regierung Kriegsverbrechen. Dabei haben Politiker beider Seiten im Nachkriegsprozess zumeist wenig Interesse daran, eine unabhängige Justiz aufzubauen, die die eigenen Kriegsverbrechen verfolgt. Im Jahr 2004 lehnten in Liberia Justizminister Janneh von der Rebellengruppe Liberians United for Reconciliation and Democracy (LURD) sowie Mitglieder des Übergangsparlaments, die ebenfalls am Krieg beteiligt waren, die Errichtung eines unabhängigen Kriegsverbrechertribunals ab“.

<sup>1560</sup> S/2008/183 dd. 19 March 2008, §§ 48-49.

**8.** The CPA order of 10 December 2003<sup>1561</sup> established the *Iraqi Special Tribunal for Crimes Against Humanity* for the purpose of trying Iraqi's accused of serious crimes. This tribunal was criticized because it was set up by the US CPA (rather than being domestically 'owned'<sup>1562</sup>), disregarded fair trial guarantees, and used the death penalty<sup>1563</sup>. Since then, there have been expressions of support for the establishment of a truth and reconciliation process in Iraq<sup>1564</sup>. In the field of socio-economic TJ, finally, the 2004 TAL for Iraq provided that the "Iraqi Transitional Government [...] shall act expeditiously to take measures to remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions"<sup>1565</sup>.

**9.** In Nepal, after several delays, a truth and reconciliation commission was set up in February 2015. The chairman of the commission publicly stated that "for gross violations, we will recommend punishment based on the witnesses' account and case details"

**10.** In Haiti, a truth and reconciliation commission was set up. It was mandated to identify the perpetrators of serious crimes committed between 1991 and 1994. But it largely failed in doing so<sup>1566</sup>. In 2004, the UNSC urged the Transitional Government of Haiti to put an end to impunity.

**11.** The three categories of TJ identified above were considered in Côte d'Ivoire. First, following UN recommendations, Côte d'Ivoire established a truth and reconciliation commission. Its activities were closely monitored by the UNSC<sup>1567</sup>, which "underlin[ed] the importance of including all Ivoirians in the reconciliation process at the national and local levels"<sup>1568</sup>. Second, on the level of transitional criminal justice, both national and international efforts were undertaken to combat impunity. In 2014, the UNSC welcomed the "national and international efforts to bring to justice alleged perpetrators of violations and abuses of human rights and of violations of international humanitarian law"<sup>1569</sup>. It furthermore urged Côte d'Ivoire to strengthen its combat against impunity<sup>1570</sup>, and threatened to sanction "those who are determined to be a threat to the peace and national reconciliation process"<sup>1571</sup>. In 2007, both parties to the transition had agreed to renew the amnesty law, excluding serious crimes

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<sup>1561</sup> Coalition Provisional Authority Order No. 48.

<sup>1562</sup> Cf. Chapter 8 about this issue.

<sup>1563</sup> For a discussion, cf. E. Stover, H. Megally, H. Mufti, 'Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq', *op. cit.*

<sup>1564</sup> For example, the *Islab Reparations Project*.

<sup>1565</sup> TAL, art. 58.

<sup>1566</sup> J. R. Quinn, 'Haiti's Failed Truth Commission: Lessons in Transitional Justice', *Journal of Human Rights*, 8:3, 2009, 265-281.

<sup>1567</sup> S/RES/2101 dd. 25 April 2013. See also S/RES/2062 dd. 26 July 2012, §§ 10 and 12; and S/RES/2045 dd. 26 April 2012.

<sup>1568</sup> S/RES/2162 dd. 25 June 2014.

<sup>1569</sup> *Id.*

<sup>1570</sup> *Id.*

<sup>1571</sup> S/RES/2153 dd. 29 April 2014, § 25.

from its scope<sup>1572</sup>. The situation in Côte d'Ivoire was auto-referred to the ICC, an initiative welcomed by the UNSC<sup>1573</sup>. Third, an international commission of inquiry was set up after each of the two transitions<sup>1574</sup>.

**12.** The Guinean transitional authorities, too, committed to the organization of TJ. In a promise addressed to dozens of states and organizations from the ICG-G, the Head of State announced the establishment of a truth and reconciliation commission. The ECOWAS heads of state and government also took note of “*the commitment of the transitional authorities [...] to fight against impunity*”<sup>1575</sup>.

**13.** From the outset, the Libyan Transitional Council committed itself to organizing TJ. The achievement of TJ was considered a “key goal” of the transition<sup>1576</sup>. The Libyan TNC thus adopted a TJ law which created a fact-finding and reconciliation commission “charged with investigating incidents of human rights violations committed over the past 42 years”<sup>1577</sup>. The AU PSC supported this initiative<sup>1578</sup>. Furthermore, at least initially, the Libyan TNC committed itself to collaborating with the ICC following resolution 1970 by which the UNSC referred the situation in Libya (since 15 February 2011) to the Prosecutor of the ICC<sup>1579</sup>. Although the TNC “reiterated their support for the ICC and their interest to work cooperatively together to ensure justice for Libya’s victims”<sup>1580</sup>, it later filed an admissibility challenge, which we shall revisit in Chapter 8. Finally, both a national fact-finding commission and an international commission of inquiry were set up.

**14.** In spite of the immunity accorded to Saleh and members of its government, the UNSC ‘urged’ the Yemeni government “to pass legislation on transitional justice to support

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<sup>1572</sup> Ouagadougou Political Agreement dd. 13 March 2007, art. 6.3: « [a]fin de faciliter le pardon et la réconciliation nationale et de restaurer la cohésion sociale et la solidarité entre les Ivoiriens, les deux Parties au Dialogue direct conviennent d’étendre la portée de la loi d’amnistie adoptée en 2003. A cet effet, elles ont décidé d’adopter, par voie d’ordonnance, une *nouvelle loi d’amnistie* couvrant les crimes et délits relatifs aux atteintes à la sûreté de l’État liés aux troubles qui ont secoué la Côte d’Ivoire et commis entre le 17 septembre 2000 et la date d’entrée en vigueur du présent Accord, à l’exclusion des crimes économiques, des crimes de guerre et des crimes contre l’humanité ». Cf. also Linas-Marcoussis Accord dd. 13 January 2003, art. 3.i: “[t]he Government of National Reconciliation will take the necessary steps to ensure release and amnesty for all military personnel being held on charges of threatening State security and will extend this measure to soldiers living in exile”.

<sup>1573</sup> Cf. for example S/RES/2162 dd. 25 June 2014.

<sup>1574</sup> Linas-Marcoussis Accord dd. 13 January 2003, art. VI.2: “the Government of National Reconciliation will call for the establishment of an international board of enquiry to investigate and establish the facts throughout the national territory in order to identify cases of serious violations of human rights and international humanitarian law since 19 September 2002”. Cf. also art. VI.3. About the National Commission of Inquiry after the second transition, cf. ICTJ, ‘Justice in Côte d’Ivoire: Examining its Challenges’, 28 October 2014.

<sup>1575</sup> Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.6.

<sup>1576</sup> NTC Executive Bureau, *Summary of the second meeting of the transitional Cabinet*, 27 November 2011, cited in the *Report dd. 2 March 2012* of the International Commission of Inquiry on Libya, *op. cit.*, p. 50, § 99.

<sup>1577</sup> See the *Report dd. 2 March 2012* of the International Commission of Inquiry on Libya, §§ 108 – 109.

<sup>1578</sup> AU Peace and Security Council Communiqué dd. 26 August 2011, PSC/AHG/COMM.(CCXCI), § 3.

<sup>1579</sup> S/RES/1970 dd. 26 February 2011, §§ 4-8. See the *Meeting Outcomes of the Interim National Council* held on 19 March 2011, *op. cit.*, decision 1.3.

<sup>1580</sup> Second Report of the Prosecutor of the International Criminal Court to the UNSC pursuant to UNSCR 1970 dd. 2 November 2011.

reconciliation without further delay”<sup>1581</sup>. The UNSC reaffirmed the need to implement the GCC Agreement, including “steps to address transitional justice and to support national reconciliation”<sup>1582</sup>. It furthermore “stresse[d] that all those responsible for human rights violations and abuses must be held accountable”<sup>1583</sup>. During the transition, a Yemeni TJ law was adopted. More recently, in February 2015, the UNSC “reiterat[ed] the need for comprehensive, independent and impartial investigations consistent with international standards into alleged human rights violations and abuses”<sup>1584</sup>.

**15.** The UNSC has firmly insisted that the CAR commit itself to TJ. It prompted the transitional authorities to elaborate national accountability mechanisms; it furthermore supported the work of an international commission of inquiry<sup>1585</sup>, an initiative welcomed by the participants of the contact group<sup>1586</sup>. The UNSC finally emphasized that the ICC may exercise its jurisdiction with regard to serious crimes<sup>1587</sup>.

**16.** In Burkina Faso, the *Charte de la Transition* foresees the creation of a national reconciliation commission, including a truth and reconciliation commission<sup>1588</sup>. It was created by presidential decree on 4 December 2014, and is chaired by Archbishop Ouedraogo.

**17.** With respect to Ukraine, the Second Minsk Agreement foresees, as one of its implementation measures, the provision of “pardons and amnesties by means of enacting a law prohibiting the prosecution and punishment of persons in connection with the events that took place in certain areas of the Donetsk and the Lugansk regions of Ukraine”<sup>1589</sup>. At the same time, the ICC is seized of the situation in Ukraine, excluding any amnesty for serious crimes.

**18.** In Guinea Bissau, on 18 February 2015, the UNSC stressed the importance of “national reconciliation [and] justice and combating impunity”<sup>1590</sup>.

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<sup>1581</sup> S/RES/2051 dd. 12 June 2012, par. 10.

<sup>1582</sup> *Id.*, par. 3.c.

<sup>1583</sup> S/RES/2051 dd. 12 June 2012, par. 7.

<sup>1584</sup> S/RES/2201 dd. 15 February 2015, Preamble.

<sup>1585</sup> S/RES/2149 dd. 10 April 2014: “[s]tressing the urgent and imperative need to end impunity in the CAR and to bring to justice perpetrators of violations of international humanitarian law and of abuses and violations of human rights, underlining in this regard the need to bolster national accountability mechanisms and underlining its support for the work of the Independent Expert on human rights in the CAR and of the International Commission of Inquiry”.

<sup>1586</sup> Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, § 19.

<sup>1587</sup> “[r]eiterating that all perpetrators of such acts must be held accountable and that some of those acts may amount to crimes under the Rome Statute of the International Criminal Court (ICC), to which the CAR is a State party, and further recalling the statement made by the Prosecutor of the ICC on 7 August 2013 and 9 December 2013 and noting the decision made by the Prosecutor of the ICC on 7 February 2014 to open a preliminary examination on the situation in the CAR since September 2012”, S/RES/2149 dd. 10 April 2014; see also §§ 12 and 13 of the same resolution.

<sup>1588</sup> See ‘Avant-Projet de la charte de la transition’ dd. 9 November 2014, artt. 17 & 18.

<sup>1589</sup> Minsk Agreement dd. 12 February 2015, art. 5.

<sup>1590</sup> S/RES/2203 dd. 18 February 2015, Preamble.

## 2. *Opinio iuris & sociology of law considerations*

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“the growth of transitional justice practices may be creating a ‘justice cascade’, a new *global norm of accountability* that helps give rise to new trials and truth commissions year after year”<sup>1591</sup>.

In the vast majority of cases, transitional authorities (are required to) address the past of their respective countries in one way or another: “increasingly, the question is not whether some kind of justice will be delivered during periods of transition but what the sequencing and modalities might be”<sup>1592</sup>, Sharp observes. Considering the worldwide expansion of the TJ paradigm, most transitional authorities implement mechanisms to this effect, or are asked to do so by the UNSC. Exclusive TJ is harshly criticized<sup>1593</sup>. Illustrations above, e.g. concerning DRC and Liberia, show the UNSC’s insistence that commitments by transitional authorities to organize TJ and to combat impunity be carried out. The UNSC expects that TJ measures also concern the members of transitional authorities, even if these members show reluctance<sup>1594</sup>. As a result, TJ is systematically considered even if there is “*no evidence that [TJ] [makes] a difference in terms of the durability or sustainability of those peace processes*. What past experience does bear out is the complexity of the choices each one of these issues involves”<sup>1595</sup>. In spite of these complexities, adopting TJ in post-conflict societies is becoming mainstream.

**TJ PART OF DIG: OPINIO IURIS** – There is a general agreement that, at the latest towards the end of the interregnum, TJ mechanisms must be installed, planned or at least conceptualized. This view is widely shared, not only by transition states but also by other states. It is shared by the participants of a UNSC meeting on ‘the role of the UN in post-conflict national reconciliation’<sup>1596</sup>. At this meeting, the EU member states, Norway, Iceland and Turkey found

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<sup>1591</sup> D. N. Sharp, ‘Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique’, *op. cit.*, p. 166. Emphasis added. Citing K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, Norton, 2011 (arguing that a global *crescendo* of human rights prosecutions demonstrates the emergence of a new international norm of accountability); and P. B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, Routledge 2d. ed., 2011 (discussing the phenomenon of truth commissions and their spread throughout the world).

<sup>1592</sup> D. N. Sharp, ‘Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique’, *op. cit.*, p. 176.

<sup>1593</sup> See however the criticism about the Rwandan *Gacaca* courts’ limited jurisdiction (exclusion crimes committed by soldiers of the ruling party RPF). Or the criticism about the exclusive conceptualizing of TJ in Iraq. Cf. E. Stover, H. Megally, H. Muftic, ‘Bremer’s Gordian Knot: Transitional Justice and the US Occupation of Iraq’, *op. cit.*

<sup>1594</sup> Cf. for instance Third UNSG Special Report on DRC Mission, *op. cit.*, § 111, and S/RES/1592 dd. 30 March 2005.

<sup>1595</sup> J. Arnault, ‘Legitimacy and Peace Processes – International Norms and Local Realities’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, Accord Issue 25, April 2014, p. 25. Emphasis added. In the same volume, D. Nilsson argues that there is a correlation between the inclusion of civil society in peace agreements and an increase in their durability. See D. Nilsson, ‘Civil society in peace accords and the durability of peace’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.* Also, H. Siebert argues that “strong and inclusive national dialogues based on national ownership and political inclusion hold immense potential to facilitate fundamental, sustained and just change”. H. Siebert, ‘National Dialogue and Legitimate Change’ *in ibid.*

<sup>1596</sup> S/PV.4903 dd. 26 January 2004.

that TJ constitutes a ‘principle’ underlying national reconciliation *sensu lato*<sup>1597</sup>; Sierra Leone considered that “post-conflict national reconciliation should be compulsory”<sup>1598</sup> and immediately addressed after the cessation of conflict, adding that “a mechanism for post-conflict reconciliation should be included in all peace agreements”<sup>1599</sup>.

DOMESTIC CHOICE TJ AVENUE (OPINIO IURIS) – No matter which approach to realizing TJ is chosen, there is general agreement that it must be ‘owned’ by the population of the state in transition. The modality of TJ cannot be externally imposed. This position is shared not only by the transition states discussed above but also by Angola<sup>1600</sup>, Brazil, China<sup>1601</sup>, Costa Rica<sup>1602</sup>, Japan<sup>1603</sup>, Korea<sup>1604</sup>, Liechtenstein<sup>1605</sup>, Serbia and Montenegro<sup>1606</sup>, the Philippines<sup>1607</sup>, and all the EU states (with individual but concurring positions by Germany<sup>1608</sup> and the UK<sup>1609</sup>); the EU considers that inclusivity is a *principle* underpinning national

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<sup>1597</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 4.

<sup>1598</sup> *Id.*, p. 8.

<sup>1599</sup> *Ibid.*

<sup>1600</sup> S/PV.4903 dd. 26 January 2004 p. 26: “[e]very process of national reconciliation must, however, be participative, must enjoy popular adherence”.

<sup>1601</sup> *Id.*, p. 29: “with regard to the relationship between international support and ownership by the parties concerned, post-conflict national reconciliation is not possible without the support and assistance of the international community and the United Nations. At the same time, national reconciliation within a country will depend, in the final analysis, on the efforts of all the parties concerned in the country. The support and assistance of the international community must therefore be based on an understanding of and respect for local conditions, traditions, history and culture, and its focus must be on their local interests and needs. Nothing should be imposed upon them”.

<sup>1602</sup> S/PV.4903 dd. 26 January 2004 (resumption 1) p. 20: “[r]econciliation is an arduous process for which the local population bears the primary responsibility. The international community must actively support local efforts at reconciliation, but it should not try to act as a substitute. In this context, the United Nations has an important part to play as a facilitator, assisting in crafting the mechanisms and agreements that are required to initiate the process of reconciliation”.

<sup>1603</sup> *Id.*, p. 23: “[i]t is vital for a post-conflict society to choose the policy measures which it considers best suited to its unstable transitional situation”.

<sup>1604</sup> *Id.*, p. 28: “reconciliation cannot be imposed upon a society from the outside”.

<sup>1605</sup> *Id.*, p. 34: “[o]wnership is also a key concept when it comes to striking a balance between the ideals of justice on the one hand and reconciliation on the other”.

<sup>1606</sup> *Id.*, pp. 29-30: “[r]eady-made solutions cannot merely be imposed from the outside. A *genuine internal process* is necessary and local actors must take responsibility for pushing it forward”.

<sup>1607</sup> S/PV.4903 dd. 26 January 2004 p. 24: “national reconciliation is essentially an internal process and cannot be imposed externally on communities in conflict. [...] *No external body or organ can decree reconciliation from the outside.* [...] Stakeholders in postconflict societies must have the sense of having ownership of the process if it is to bring about the emergence of institutions and practices capable of creatively resolving the kind of social and political tensions that led to past violent conflict. This is not to say, however, that the expertise and the guidance that could be provided by outside groups such as the United Nations have no place in national reconciliation processes. In many instances, the traumas of violent conflicts are so deep that conflicting groups require the even-handedness of objective outsiders to overcome emotional, cultural, political and other hurdles to mount a successful reconciliation process. But such an intervention, while desirable in certain instances, must be pursued carefully to maintain the *integrity of the reconciliation process*. One danger that could undermine such integrity would be for the interveners to yield, wittingly or unwittingly, to the temptation of supplanting the goals and values of the stakeholders with their own”.

<sup>1608</sup> *Id.*, p. 13. Germany “recall[s] that judicial and non-judicial mechanisms need local acceptance and legitimacy”, and mentions that transitional justice mechanisms must “meet with broad popular support”, i.e. that “judicial and non-judicial mechanisms need local acceptance and legitimacy”.

<sup>1609</sup> *Id.*, p. 23: “reconciliation process has the best chance of success if it is built from the ground level. Durability is best guaranteed by local ownership”.

reconciliation<sup>1610</sup>, and emphasizes that, in order to expedite TJ, priority should be given to restoring the domestic legal system<sup>1611</sup>.

TJ PART OF DIG: DOMINANT DISCOURSE & PRACTICE – If TJ is becoming part of the dominant legal discourse, this is also the result of acculturation<sup>1612</sup>. The integration of TJ mechanisms in transition instruments is recommended by experts<sup>1613</sup>. As a result, tools of TJ are “increasingly embedded in peacebuilding and democratization or rule of law strategies”<sup>1614</sup>. The mainstreaming of TJ is also results from the proactive work by the Office of the UN High Commissioner for Human Rights, and of the special rapporteurs this office relies on. Their work “has led to the establishment of truth commissions and other transitional justice and accountability mechanisms around the world”<sup>1615</sup>. Transition leaders worldwide have felt strong pressure to organize a form of TJ<sup>1616</sup>.

On various levels, thus, dominant discourse requires that TJ be part and parcel of DIG. As a result of these socialized practices, “in the quarter century that has followed the emergence of transitional justice discourse and practice, it has evolved from a discourse of exception and deviation [...] to something that has in many ways been *institutionalized, regularized, and mainstreamed*”<sup>1617</sup>. This development is further expedited by the fact that TJ is detaching itself from the liberal-peace-based transition paradigm it was first anchored in<sup>1618</sup>. As a generalized practice, TJ is outgrowing this paradigm. As noted earlier<sup>1619</sup>, it “has begun to move *beyond* its roots and association with the political transitions of the late 1980s and 1990s to Western liberal democracy, and it has become associated with postconflict peacebuilding situations *more generally*, even including those that do not involve a liberal transition”<sup>1620</sup>. This normative disassociation is favorable to the generalization of TJ.

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<sup>1610</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 5. It furthermore considered that “[n]ational reconciliation will not take root if some groups or sections of the population are excluded from the process of nation-building. In this regard, greater attention should continue to be paid to the role of women” (Id., p. 23).

<sup>1611</sup> *Id.*, pp. 4-5: “[l]asting national reconciliation will always prove elusive without sustained national commitment at the governmental and institutional levels [...] [t]he main burden, however, for prosecuting those responsible for atrocities will have to be carried by domestic legal systems. The restoration of domestic legal systems and support for domestic legal prosecutions is therefore a crucial task for the international community in post-conflict situations and in countries at risk”.

<sup>1612</sup> *Id.*, p. 192: “[i]t has been argued that as transitional justice practices have spread around the world, they have done so not necessarily by adapting themselves de novo to each new context, but through a process of ‘acculturation’ whereby a dominant script or practice is replicated again and again as a result of repeated information exchanges and consultations”.

<sup>1613</sup> D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation After Violent Conflict, A Handbook*, 2003, pp. 43-44.

<sup>1614</sup> C. L. Sriram, ‘Transitional Justice and the liberal peace’ in E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 113.

<sup>1615</sup> ‘Implementing the responsibility to protect – Report of the Secretary-General’, A/63/677 dd. 12 January 2009, § 33.

<sup>1616</sup> A. F. Lowenthal, S. Bitar, *From Authoritarian Rule Towards Democratic Governance: Learning from Political Leaders*, *op. cit.*, p. 36.

<sup>1617</sup> *Id.*, p. 176. Emphasis added.

<sup>1618</sup> This was discussed in the introduction. See introduction ‘Irrelevance of the transition paradigm’.

<sup>1619</sup> Chapter 2, Section A.1.

<sup>1620</sup> D. N. Sharp, ‘Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice Through the Lens of Critique’, *op. cit.*, p. 177. Emphasis added.

### 3. Scope and limits of transitional justice

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Transitional authorities have wide discretionary powers for organizing TJ without however enjoying an unbridled freedom.

COMBINATION OF TJ MECHANISMS – Institutional capacity, policy choice or the power balance may all impact the mode of TJ. The mode and implementation of TJ can be influenced by whether or not DIG is unilateral or consensual, or what the balance of power is during the initial stages of the transition<sup>1621</sup>. This study is not concerned with this issue, or for instance with the question of how retributive and restorative justice mechanisms may be combined during DIG. Restorative justice may take precedence when it seems that “the attainment of retributive justice is not feasible at the onset of the reconciliation process because of the inability of transitional institutions to provide justice through conventional means”<sup>1622</sup>. For some states, a combination between retributive and restorative justice should be explicitly pre-defined<sup>1623</sup>.

EXCLUSION INT'L CRIMES FROM AMNESTY – Regardless of questions related to institutional capacity, policy choice or the power balance, serious crimes (as defined above) can only be submitted to transitional criminal justice. Although it is not uncontested in literature<sup>1624</sup>, there is “a strong trend in international law contending that the duty of states to prosecute is binding only in respect of those most responsible for international crimes”<sup>1625</sup>. This (i) is confirmed by nearly all states and the UN, (ii) is corroborated by international conventions and jurisprudence, and also (iii) has deontological relevance.

(1) EXCLUSION INT'L CRIMES FROM AMNESTY: OPINIO IURIS – Most states do not accept that amnesty be applied to serious crimes. A distinction must thus be drawn between serious violations of human rights law and humanitarian law that must not escape punishment, on the one hand, and violations of the law that may be subject to amnesty. This position was defended by Brazil<sup>1626</sup>, Burundi<sup>1627</sup>, Costa Rica<sup>1628</sup>, Iceland<sup>1629</sup>, Japan<sup>1630</sup>, Liechtenstein<sup>1631</sup>, Norway<sup>1632</sup>, Pakistan<sup>1633</sup>,

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<sup>1621</sup> *Id.*, pp. 42 a.f.: “one of the most determining factors of post-conflict reconciliation is the balance of power between the previous regime and its successor at the point of the transition”.

<sup>1622</sup> S/PV.4903 dd. 26 January 2004 p. 4, p. 25. Intervention of Philippine delegation.

<sup>1623</sup> *Id.*, pp. 12-13. See, for instance, the intervention of German delegation: “both mechanisms, taken together, cover the whole spectrum of injustices committed during a conflict, without leaving an impunity gap”.

<sup>1624</sup> L. Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide*, *op. cit.* p. 135: “state practice [...] shows that although states are increasingly willing to exclude crimes under international law from amnesty laws, they tend to do so when the exclusion complements their domestic or international policy objectives. In contrast, where their political objectives, such as securing a peace treaty following an internal conflict, may be better served by amnestying crimes under international law, states continue to do so, regardless of the development of international law. Therefore, it is not yet possible to assert that state practice established an absolute prohibition on amnesties for crimes under international law”.

<sup>1625</sup> P. P. Soares, ‘Positive Complementarity: Fine-Tuning the Transitional Justice Discourse’, *op. cit.*, p. 191. This author further nuances that “prosecution needs to be at least an available avenue at the end of a non-criminal investigation” (*id.*, p. 191).

<sup>1626</sup> S/PV.4903 dd. 26 January 2004 p. 19.

<sup>1627</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 27.

<sup>1628</sup> *Id.*, p. 21.

Rwanda<sup>1634</sup>, Sierra Leone<sup>1635</sup>, Turkey<sup>1636</sup>, and all the EU states<sup>1637</sup>. It is generally accepted that “justice must always be rendered for the most serious crimes under international law, as defined in the Rome Statute of the International Criminal Court”<sup>1638</sup>. The UN adopts the same approach<sup>1639</sup>. This position also informs the R2P framework, which was adopted by all states at the 2005 World Summit<sup>1640</sup>.

(2.1) EXCLUSION INT’L CRIMES FROM AMNESTY: INTERNATIONAL CONVENTIONS & JURISPRUDENCE – The prohibition of a blanket amnesty for serious crimes is predicated on a dense international legal framework, based on instruments such as the Rome Statute, the ICCPR, the International Convention Against Torture, the Genocide Convention, the ECHR, the Inter-American Convention on Human Rights, and the African Charter of Human Rights. This prohibition has also been confirmed in jurisprudence. Jurisprudence has evolved from a rather permissive stance to a stringent approach on this matter. The UN Human Rights Committee, the Inter-American Court on Human Rights<sup>1641</sup>, and the European Court of Human Rights<sup>1642</sup> all agree that there should be no tolerance for amnesty for serious crimes. With regard to such crimes,

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<sup>1629</sup> *Id.*, p. 5.

<sup>1630</sup> *Id.*, p. 23.

<sup>1631</sup> *Id.*, p. 35.

<sup>1632</sup> *Id.*, p. 5.

<sup>1633</sup> S/PV.4903 dd. 26 January 2004, p. 20.

<sup>1634</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004, p. 31.

<sup>1635</sup> *Id.*, p. 8.

<sup>1636</sup> *Id.*, p. 5.

<sup>1637</sup> *Id.*, p. 5: “[w]hile a balance must be struck, the European Union also agrees with the Secretary-General that there should be no granting of amnesties for war crimes, genocide, crimes against humanity or other serious violations of international human rights and humanitarian law”. See also the separate statements by Germany (S/PV.4903 dd. 26 January 2004 p. 4, p. 13) and France (*Id.*, p. 17).

<sup>1638</sup> S/PV.4903 (Resumption 1) dd. 26 January 2004, p. 34. Position of Liechtenstein.

<sup>1639</sup> S/PV.4903 dd. 26 January 2004, p. 3. See also S/2000/915 dd. 4 October 2000, ‘Report of the Secretary-General on the establishment of a Special Court for Sierra Leone’, §§ 22 – 24: “while amnesties may sometimes be seen as the price to be paid for peace agreements to succeed or for stability to be maintained, the United Nations cannot condone agreements arrived at through negotiations that violate Charter principles. Amnesty clauses in peace agreements must exclude amnesties for war crimes, genocide, crimes against humanity and other serious violations of international human rights and humanitarian law. Blanket amnesty clauses are inconsistent with the twin goals of justice and reconciliation”.

<sup>1640</sup> ‘Implementing the responsibility to protect – Report of the Secretary-General’, A/63/677 dd. 12 January 2009, § 54.

<sup>1641</sup> *Barrios Altos v. Peru, Judgment of 14 March 2001, Inter-Am.Ct.H.R.* Cf. §§ 41 – 43: “This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law” (§ 41). See also other paragraphs (until § 43). See also finding 51; *Gelman v. Uruguay, Judgment of 24 February 2011, Inter-Am.Ct.H.R.* See §§ 225, 229, observing the “incompatibility of the amnesty laws with the American Convention in cases of serious violations of human rights”.

<sup>1642</sup> *Bazorkina v. Russia, 69481/01, Council of Europe: European Court of Human Rights, 27 July 2006. Sabir v. Turkey, Application no. 44774/98, Council of Europe: European Court of Human Rights, 10 November 2005, §§ 69-70.*

international law has become more protective of the victims, even though the issue of an individual right to effective remedy remains on the table<sup>1643</sup>.

(2.2) EXCLUSION INT'L CRIMES FROM AMNESTY: INT'L CRIMINAL LAW – In light of the considerable development of international criminal law on the eve of the twenty-first century<sup>1644</sup>, it would be difficult to sustain that TJ may be used to pardon serious crimes. The Rome Statute explicitly states “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”<sup>1645</sup>. There is thus little room for challenging the conclusion that serious crimes cannot be amnestied, especially since this treaty (which under certain circumstances also applies to non-signatories<sup>1646</sup>) has the specific ambition of putting an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole<sup>1647</sup>.

(3) EXCLUSION INT'L CRIMES FROM AMNESTY: DEONTOLOGICAL CONSEQUENCE – The limitation to states' discretion in choosing how to implement TJ has resulted in deontological guidelines for mediation. These guidelines reinforce the pre-existing limits to states' discretionary powers in dealing with or judging the past. Mediators have to draw the same distinction as the one commented on above, and “cannot endorse peace agreements that provide for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights, including sexual and gender-based violence”<sup>1648</sup>. The limitation to states' discretion with regard to TJ also affects the position of third states, we shall see under Chapter 8<sup>1649</sup>.

## Summary of Chapter 6

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“self-determination is there to stay”<sup>1650</sup>.

This chapter further built on the previous chapter which analyzed the limits *ratione temporis* and *ratione materiae* to DIG. These limits concern the prohibition on transitional authorities and their members artificially or forcefully suspending or prolonging the interregnum, with the aim of entrenching personal or political power. They also concern the prohibition of unelected transitional authorities exceeding their fiduciary mandate; this prevents them from fully pre-

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<sup>1643</sup> In *Velasquez Rodriguez Case, Judgment of 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)*, the Inter-American Court of Human Rights found that states must at least “attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation” (§ 166). For an in-depth study, cf. V. Spiga, *The Right to Justice for Victims of Human Rights Crimes*, EUI Thesis, 2013 (on file).

<sup>1644</sup> S/PV.4903 dd. 26 January 2004 p. 4, p. 15. Position of Algeria.

<sup>1645</sup> *Id.*, § 7.

<sup>1646</sup> Referral by UNSC or jurisdiction *proprio motu*.

<sup>1647</sup> Rome Statute, Preamble, § 6.

<sup>1648</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 11; see also p. 17.

<sup>1649</sup> Chapter 8, Section B.6.

<sup>1650</sup> G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, *op. cit.*, p. 566.

defining the future, a task to be left to representative institutions or to the electorate. These limits further specify the principle of self-determination.

DIG cannot function as a stepping stone for realizing self-determination unless the limits *ratione temporis* and *ratione materiae* are respected, and additionally, the obligation of inclusivity, based on participation and representation, is complied with. The failure to respect these key features would be incompatible with the core business of transitional authorities, which is precisely to facilitate the inclusive reconfiguration of the state order. Self-determination confirms and sanctions this prohibition and obligation, and guarantees the people's freedom to redefine their social contract with the state.

CONTINUED RELEVANCE OF SELF-DETERMINATION – The principle of internal self-determination contributes to the formulation of a *ius in interregno*, but DIG practices also contribute to the development of the principle itself. This dialectical relationship is central to this chapter, and indeed to the thesis as a whole. Internal self-determination offers little guidance about the result to be pursued *after* DIG ('irrelevance of outcome'<sup>1651</sup>). But this principle is fundamental for defining the rights and obligations of DIG itself. Even if internal self-determination, then, may not serve as a “standard of legitimation for constitutional forms and structures”<sup>1652</sup>, at least it functions as a standard for assessing the *process* of regime formation during the interregnum, which can last a couple of months or carry on for several years. Self-determination-based practices during DIG are neither underspecified –it certainly goes beyond a yes-or-no-plebiscitary choice– nor extremely detailed. The principle of self-determination thus provides a basis for conducting ‘marginal control’ assessments.

One imperative practice concerns the obligation of identifying means to progressively ensure an inclusive transition. Both consensual and oppositional transitional authorities respect this obligation, which thus remains pertinent even if DIG was initially imposed, i.e. results from a ‘*transition de fait*’<sup>1653</sup>. Both consensual and oppositional procedures call for (progressive) inclusivity and culminate in exercises of constitutionmaking needing popular approval. In the context of DIG, self-determination requires less than substantive democracy but more than the organization of elections.

Traditionally, a high burden rests on post-conflict elections. As a prime expression of politics, elections are often expected to continue war by other means (inverting Clausewitz's famous line that war is a mere continuation of politics by other means), thus to stop armed conflict. The perusal of practices in this chapter privilege an approach other than the traditional focus on elections by focusing on practices *of the* interregnum, prior to elections. These practices, too, can be legally assessed.

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<sup>1651</sup> Chapter 2, Section B.2.3.

<sup>1652</sup> N. Bhuta, ‘New Modes and Orders’, *op. cit.*, p. 10.

<sup>1653</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 90. Youssef gives the examples of Mauritania (2005 – 2006), Romania and Iraq.

The principle of self-determination emphasizes the importance of *deliberation* rather than bargaining during the interregnum. Deliberation allows the people to redefine the social contract, to create a “political space in which a population can begin a conversation about what kind of country they want to be theirs”<sup>1654</sup> (thus, ultimately, to allow the population to develop not only a constitution but also the spirit of constitutionalism<sup>1655</sup>). During the interregnum, habits of dialogue and compromise must be cultivated<sup>1656</sup>. In a post-conflict setting, the principle of self-determination as applied to DIG fulfills a pacificatory function. As a result, even when DIG was initially generated by a replacement, the interregnum must evolve into a transplacement<sup>1657</sup>.

Inclusivity imposes a process of deliberation among various segments of society: factions previously at war, political parties, civil society representatives, armed movements, regional entities, women’s groups, etc. They all have the right to be taken seriously during the interregnum. The allegiance of ‘the people’ in its various components is instrumental to the participatory and/or representative reformulation of the social contract. This aim is resolutely incompatible with the idea of ‘suspension of sovereignty’<sup>1658</sup> or with the distinction made in scholarship between ‘empirical’ and ‘juridical’ sovereignty<sup>1659</sup>. Deliberative DIG hinges on procedural safeguards ensuring that the exercise of public powers be inclusive, i.e. participatory or at least representative, especially when constitutionmaking is concerned. Constitutionmaking represents the “crucial link between dialogue and governance”; it is

“no longer a single event but a permanent meeting place where adversaries must try to construct the guarantees they need to sustain the common ground of mutual respect for their multiplicities within a shared system of governance”<sup>1660</sup>.

It would be naive to contend that this red line –and the normative concepts such as ‘inclusion’ or ‘ownership’ it is based on– would never be subject to manipulation or justificatory rhetoric. Also, commitments to inclusivity may fail. But this rhetoric and these failures do not diminish the potential legal relevance of this practice<sup>1661</sup>. Should it appear that there is a systematic gap between the *commitment* to inclusivity and the *actual practice* –i.e. that using self-determination as a legal benchmark for DIG is merely utopian–, then such observation can only result in an open invitation to actors with authority in such contexts either to readjust

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<sup>1654</sup> For a comparison with constitutionalism, cf. S. Chesterman, ‘An International Rule of Law?’, *op. cit.*, p. 954.

<sup>1655</sup> S. Chesterman, ‘Imposed Constitutions, Imposed Constitutionalism, and Ownership’, 37 *Conn. L. Rev.* 947, 2004-2005.

<sup>1656</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, IDEA, 2006, p. 13.

<sup>1657</sup> Refer to the terminology introduced at the beginning of Chapter 4.

<sup>1658</sup> E. Newman, ‘Liberal peacebuilding debates’, *op. cit.*, p. 36: “a suspension of sovereignty conflicts with the internationally recognized human right of self-determination and the legal norm of sovereignty”.

<sup>1659</sup> This would provide ‘quasi-states’ “with a legal promise of self-determination and non-intervention [...] decidedly inferior in relation to the positive sovereignty of the Great Powers”. Distinction critiqued by J. Moses, *Sovereignty and Responsibility – Power, Norms and Intervention in International Relations*, Palgrave Macmillan, 2014, pp. 22-23, with reference to R. Jackson, *Quasi-States: Sovereignty, International relations and the Third World*, CUP.

<sup>1660</sup> V. Hart, ‘Constitution-Making and the Transformation of Conflict’, *Peace & Change*, vol. 26, no. 2, 2001, pp. 169-170.

<sup>1661</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, pp. 459-460.

their practice or to reconsider the normative concepts underpinning them. Pending this, inclusivity *cum* self-determination increasingly becomes a compelling benchmark against which DIG must be legally assessed.

**LATITUDE OF INCLUSIVITY** – The synergy between inclusivity and the principle of internal self-determination under DIG confirms this principle’s continuing vitality and potential for expansion. Its scope arguably extends to DIG, and thus it gains in precision. At the same time, it cannot be denied that the analytical value of inclusivity *cum* self-determination is limited. Inclusivity as an instrument of internal self-determination only offers a rudimentary benchmark for assessing the validity of transition procedures. Provided that, towards the end of the interregnum, constitutionmaking process is carried out in conformity with the principle of self-determination, transitional authorities enjoy a considerable *marge de manoeuvre*. Inclusivity can indeed be applied in various ways and at various stages of the transition. Even if the principle of self-determination were individually justiciable –*quod non*<sup>1662</sup>– it will often be debatable whether or when this principle was respected during the interregnum. The red lines depicted above (and summarized in the table ‘prohibition of internally imposed constitutionalism’) offer at least some guidance in this regard.

**RISKS INHERENT TO LATITUDE OF INCLUSIVITY** – In light of the rudimentary nature of inclusivity, it may, or may not, be desirable to develop “practical and flexible management tools or guidelines to operationalize the various forms of ‘ownership’”, as Chesterman suggested<sup>1663</sup>. As a matter of policy, it may be useful indeed to render this requirement more concrete<sup>1664</sup>. Waving the flag of ‘inclusivity’ or ‘ownership’ sometimes amounts to little more than window dressing given the latitude these concepts allow for. The financial incentives for conforming to this discourse would be so strong that “non-Western states have ownership of policies which are externally imposed”<sup>1665</sup>. According to this critique, these requirements, as ‘carrots on a stick’, would only be nominally upheld, i.e. with the sole aim of attracting international support and financing<sup>1666</sup>. Against the backdrop of elite-driven transitions, participation and representation would only be minimal.

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<sup>1662</sup> The principle of self-determination, which does not protect an individual right, is not ‘justiciable’ as far as art. 1 of the two UN Covenants are concerned. Cf. also Human Rights Committee, *Ivan Kitok v. Sweden*, Communication No. 197/1985 (CCPR/C/33/D/197/1985), final views of 27 July 1988; Human Rights Committee, *Diergaardt et al. v. Namibia*, Communication No. 760/1997 (CCPR/C/69/D/760/1997), final views of 25 July 2000.

<sup>1663</sup> S. Chesterman, ‘Ownership in theory and in Practice: Transfer of Authority in UN Statebuilding Operations’, *op. cit.*, p. 21. Cf. for example 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 15, giving practical indications on how mediators can promote national ownership.

<sup>1664</sup> It would be naive to underestimate the importance of this issue, but it cannot be addressed within the confines of the present study.

<sup>1665</sup> *Id.*, p. 77. Chandler adds that “[a]gency and responsibility are located increasingly in the Other –non-Western states and societies– while the power of Western states and international institutions is increasingly understated”. D. Chandler, *Empire in Denial – The Politics of State-building*, *op. cit.*, p. 73.

<sup>1666</sup> For Chandler, “non-Western state institutions are increasingly colonized by external policy actors as international institutions seek to informalise their role in policy-making. This creates artificial state institutions which have a much more attenuated relationship with their own societies but also little influence with regard to policy negotiations with external actors”. *Id.*, pp. 89-90.

SELF-DETERMINATION AS A MARGINAL CONTROL TEST FOR DIG – Whether justified or not, this critique need not be engaged with here. This study tackles a politicized phenomenon from a legal perspective and therefore maintains the separation between the legal and political registers. Yet, it is not blind to the socialized discourses and political controversies surrounding DIG. Inclusivity is nevertheless increasingly considered mandatory for DIG. This requirement bears a clear connection with a legal principle. The standard to be lived up to, self-determination, is rudimentary, but the limit is clear: DIG is time-limited and power-constrained, must be progressively inclusive, and leaves no room for internally imposed constitutionmaking, under any form whatsoever.

TJ contributes to the reformulation of the social contract. In transitional moments, the role of TJ goes beyond addressing human rights violations from the past. In order to have any prospect of success, TJ must also be inclusive; in conflict-riven states, its success thus also hinges on the transition being inclusive. The respect for political rights, the inclusivity of the transition, and the success of national reconciliation seem to mutually reinforce each other<sup>1667</sup>. Without elaborating on this evident synergy, this chapter observed that TJ must be nationally owned. This observation was based on the following reasoning:

- By virtue of the principle of self-determination, all peoples have the right to freely determine their political status.
- TJ initiatives contribute to the re-determination of a country's political status.
- TJ must be carried out in accordance with the peoples' right to freely determine their political status. It must be domestically owned, and its design must be the result of inclusive consultations.

Further, while domestic constituencies have considerable leeway in designing *their* TJ, a number of limits under international criminal law must be respected.

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<sup>1667</sup> The transitions both in Thailand and Kosovo suffered from this unavoidable interaction. First, “the interim National Council for Peace and Order (NCPO) of Prime Minister Prayuth Chan-ocha, and then head of the army, was criticized in September 2014 in an Amnesty International report that accused it of systematic human rights violations. The allegations include arbitrary arrests and the *restriction of freedom of expression and assembly*. Amnesty International claims that *such restrictions are unfavorable to an inclusive institutional reform process as well as national reconciliation*. The situation in Thailand is that without consulting civil society in the institutional reform process, Thailand's interim leaders are risking a hard landing: not only will reforms not supported by civil society be unsustainable, but an exclusive interim period might promote further unrest in the country”, J. Strasheim, ‘Interim Governments: Short-Lived Institutions for Long-Lasting Peace’, *op. cit.*, p. 7. Second, “[t]he underlying problem is that the United Nations Interim Administration Mission in Kosovo (UNMIK) has not yet succeeded in creating even basic conditions conducive to the opening of a political debate among the communities about the modalities for their coexistence in Kosovo and Metohija. Again, as in the previous example, there are many reasons for this failure, and they are very complex indeed. What appears to be clear is that much greater resolve and consistency are necessary on the part of UNMIK in order to begin, first, to create a safe environment for non-Albanians and fully to ensure their human rights, and then to include them meaningfully in political life. Half measures, leaning towards one side and neglecting the other, will just perpetuate the conflict between communities. When a degree of normalcy is introduced, a very long period of sustained, primarily *domestically-generated effort* will be needed if any reconciliation is to take place in Kosovo and Metohija”, S/PV.4903 dd. 26 January 2004 (resumption 1) p. 29-30.

Thus, to summarize, the principle of self-determination co-defines how DIG must be observed. This principle constitutes the overarching norm underpinning practices systematically observed in the context of DIG. It is key to bear this in mind when observing whether or how a *ius in interregno* further develops as DIG practices may contribute to (further) specifying the contents of this principle. The strong relevance of self-determination for DIG confirms the “continuing vitality and potential for expansion of the principle of self-determination”<sup>1668</sup>. Since about two decades, the struggle or quest for self-determination has taken place *within* the frontiers of transition states, and *through* DIG.

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<sup>1668</sup> J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, p. 65.



This chapter confirms the relevance of international law for DIG (Section A), and explains how DIG contributes to international law (Section B). It also briefly addresses the question of how, and at which level, the principle of self-determination can be rendered operational in relation to DIG (Section C).

### Section A. The legal internationalization of the interim legal order

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Transitional authorities consistently pledge to respect human rights, and international law generally, thus confirming the significance of international law for DIG. In this section, we shall put the legal internationalization of DIG in context (1) before turning to an observation of practice in this regard (2).

#### 1. International law as residual DIG law

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International law serves as the residual law in times of transition. DIG is increasingly becoming an international project. International assistance to DIG has a broad impact on various –legal and non-legal– components of statebuilding and constitutionmaking. The factual internationalization of the interregnum was already discussed<sup>1669</sup>. In the legal sphere, the internationalization of the interregnum is apparent from the increased reliance on international law, especially human rights instruments.

INT'L LAW AS THE RESIDUAL LAW OF DIG – Transitional authorities must guide the transition, and increasingly rely on international law to do so. The reliance on international law during the interregnum ensures that, even when the constitutional structure of the state is held in abeyance, there is no descent into a legal and institutional state of nature during the interregnum. International law becomes the *residual* law of DIG. As the domestic legal sphere is in limbo during the interregnum, international law steps in to fill the vacuum. Possible compliance issues do not fundamentally alter this observation<sup>1670</sup>. Transitional authorities generally pledge to let DIG and its outcome be guided by international law, which comes to exercise a direct effect in the interim legal order.

Nearly all post-Cold War transition instruments contain multiple references to international law, including humanitarian law<sup>1671</sup> and especially human rights law<sup>1672</sup>. This stands in

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<sup>1669</sup> Introduction, Section A.4. Chapter 1, Section B.

<sup>1670</sup> S. Chesterman, 'Imposed Constitutions, Imposed Constitutionalism, and Ownership', *op. cit.*, p. 950, explaining the relevance of legal rhetoric in times of state transformation. Cf. also Nicaragua judgment: the fact that an international legal norm is not being respected does not alter the legal relevance of that norm. Cf. the ICJ Nicaragua Case, *op. cit.*, § 186.

<sup>1671</sup> This is also true for transitions that fall outside the scope of this study, e.g. the one in Cambodia. On the role of international law in the constitution-making process in Cambodia, see S. P. Marks, 'The Process of Creating a New Constitution in Cambodia', in L. E. Miller, *Framing the State in Times of Transition: Case Studies in Constitution Making*, *op.*

contrast with constitutional texts adopted before 1989 where especially “the constitutions of Socialist countries and Third World States [...] did not even pay lip service to international law”<sup>1673</sup>.

**DISTINCTION FROM COMMITMENT TO INT’L LAW IN PRE-TRANSITION PHASE** – The legal internationalization of the interregnum should be distinguished from the commitment, often made beforehand, that the post-transition legal order will be based on international law or will conform to a set of general principles. Compliance with international law *during* or *after* the interregnum are distinct issues. Generally, transitional authorities pledge to let the transition *and* its outcome be guided by international law. Earlier in this part of the thesis, it was argued that transitional authorities do not have the power to pre-determine their future constitutional order in detail<sup>1674</sup>. It was, however, observed that they, at a maximum, define the general legal principles (often with reference to international law) to which the coming constitutional order must conform. This section addresses a related but different issue, namely it concentrates on the commitment by transitional authorities to respect international law *during* the interregnum.

**DISTINCTION FROM COMMITMENT TO INT’L LAW IN PRE-TRANSITION PHASE (ILLUSTRATIONS)** – The Libyan transitional authority, for instance, affirmed its “strict compliance”<sup>1675</sup> with international humanitarian law during the interregnum, and, on a different note, pledged that “Libya will be a State that fully respects the international law and international declarations on human rights and one which will participate in international relations responsibly, constructively and with good faith”<sup>1676</sup>. The Constitutional Declaration confirms this<sup>1677</sup>. Further, the constitutional declaration adopted by the Houthi revolutionary Committee, also pledged to respect a number of international legal principles<sup>1678</sup>. The growing tendency to integrate international law

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*cit.*, p. 208 & p. 228: “[i]nternational law provided a foundation for the constitution's provisions on democratic governance and human rights, and could have done the same -but did not- for the issue of accountability for the Khmer Rouge's past crimes”.

<sup>1672</sup> Youssef thus observes that the “*protection théorique et juridictionnelle des droits fondamentaux a été prise en considération par les Etats menant la transition démocratique. La plupart d’entre eux ont adopté des Constitutions consacrant les droits fondamentaux*”. More generally, “if there is one substantive area where most states have shown great willingness to be open to principles of international law, it has been in the area of human rights”. T. M. Franck, A. K. Thiruvengadam, ‘International Law and Constitution-making’, 2 Chinese JIL, 2003, p. 518. The prospective abidance by human rights law is not unrelated to the “growing acceptance of the idea that conformity to human-rights norms is a necessary condition of the legitimacy of governments and even of states”. Cf. A. Buchanan, ‘Human Rights and the Legitimacy of the International Legal Order’, *Legal Theory*, 14, 2008, pp. 39-70.

<sup>1673</sup> G. Bartolini, ‘A Universal Approach to International Law in Contemporary Constitutions: Does it Exist?’, *Cambridge Journal of International Law* (3)3, 2014, p. 6.

<sup>1674</sup> Chapter 5, Section B.1.

<sup>1675</sup> Declaration regarding ‘The Treatment of Detainees and Prisoners’ dd. 25 March 2011, available on <http://www.ntclibya.org/english/prisoners/> (last retrieved on 5 May 2012, available *en cache*).

<sup>1676</sup> The Interim Transitional National Council Statement dd. 22 March 2011, available on <http://www.ntclibya.org/english/the-statement/> (last retrieved on 5 May 2012, available *en cache*). Emphasis added.

<sup>1677</sup> Constitutional Declaration dd. 3 August 2011, *op. cit.*, art. 7: “human rights and his basic freedoms shall be respected by the State. The State shall commit itself to join the international and regional declarations and charters which protect such rights and freedoms”.

<sup>1678</sup> Constitutional Declaration to organize the foundations of governance during the transitional period in Yemen dd. 6 February 2015, art. 4: “the foreign policy of the State shall be based on adherence to the good neighbor

references into transition instruments results from the enormous impact of several actors on states in transition<sup>1679</sup>. International legal obligations are increasingly directly transplanted into the realm of DIG. This is true both of the (i) consensual and (ii) unilateral instruments founding transitional authorities.

(1) RECEPTION OF HR & INT'L LAW IN CONSENSUAL TRANSITION INSTRUMENTS (PEACE AGREEMENTS) – Consensual transition instruments are often peace agreements. Extensive research on the relationship between peace agreements and human rights indicates that human rights references are increasingly integrated into such agreements: “because [...] peacemaking is often, to some extent, constitution making, and peace agreements are often distinctively ‘transitional’ constitutions, human rights are essential in such processes”<sup>1680</sup>. As a result, “a typical feature of contemporary peace accords and power-sharing agreements are references to human rights”<sup>1681</sup>. Such references abound both in the preambles and substantive parts of such instruments. This is especially the case when peace agreements fulfill functions beyond ending armed conflict or installing a ceasefire, i.e. when, as transition instruments, they also constitute secondary normative frameworks for regulating DIG<sup>1682</sup>.

(2) RECEPTION OF HR & INT'L LAW IN (INTERIM) CONSTITUTIONS – The reception of international law into transitional constitutionmaking is not an isolated phenomenon<sup>1683</sup>. It is part of the increased internationalization of constitutional law: “acknowledging the importance of national ownership does not imply that constitutions are entirely domestic instruments, given that states are subject to international law and processes”<sup>1684</sup>. Bartolini observed in 2014 that “contemporary constitution-making processes are increasingly open to international law”, and notes the “significant trend of contemporary constitution-making processes to facilitate the openness of domestic legal systems towards international law”<sup>1685</sup>. In 2000, Tourard came to a similar conclusion when writing about « *l'emprise concrète des relations internationales et des normes internationales sur les normes constitutionnelles* »<sup>1686</sup>. The internationalization of

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principle, non-interference in the internal affairs of other countries, adoption of sound and peaceful means to resolve disputes”. Note that this initiative was rejected by the ‘international community’.

<sup>1679</sup> Chapter 1, Section B.1.

<sup>1680</sup> *Id.*

<sup>1681</sup> S. Aroussi, S. Vandeginste, ‘When interests meet norms: the relevance of human rights for peace and power-sharing’, *op. cit.*, pp. 183 – 203.

<sup>1682</sup> *Id.*, p. 190. See also Chapter 3, Section B.2.

<sup>1683</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 428. H. Tourard, *L’Internationalisation des constitutions nationales*, L.G.D.J, 2000.

<sup>1684</sup> IDEA, ‘Constitutionbuilding after Conflict: External Support to a Sovereign process’, *op. cit.*, p. 15.

<sup>1685</sup> G. Bartolini, ‘A Universal Approach to International Law in Contemporary Constitutions: Does it Exist?’, *op. cit.*, pp. 1-34. See p. 9. Cf. also A. Cassese, *Modern Constitutions and International Law*, 192 Recueil des cours 331-476, 1985, and T. M. Franck, A. K. Thiruvengadam, ‘International Law and Constitution-making’, Chinese JIL, 2003.

<sup>1686</sup> H. Tourard, *L’Internationalisation des constitutions nationales*, L.G.D.J, 2000, p. 8. *Id.*, p. 10: « *toutes les constitutions modernes contiennent des dispositions relatives au droit international* ». Tourard furthermore observed : « *l’internationalisation est un processus à double sens : d’une part, il existe un développement de la prise en considération par les constitutions nationales du rapport de l’Etat avec le droit international ; d’autre part, on constate une pénétration croissante des normes internationales en droit constitutionnel et donc un soumission au droit international de l’ensemble des dispositions constitutionnelles* » (*Id.*, p. 12). Cf. also T. M. Franck, A. K. Thiruvengadam, ‘International Law and Constitution-making’, *op. cit.*, pp. 516-518.

constitutional law is extended to interim constitutions<sup>1687</sup>, especially since both the contents and form of such constitutions are influenced by a relatively small transnational epistemic community which regards transition instruments as conflict resolution tools (cf. the peace-through-transition function of transition instruments<sup>1688</sup>). The internationalization of the interregnum also impacts –often opposition-based– interim or transitional constitutions. In other words, oppositional transitional authorities, too, pledge to respect international law<sup>1689</sup>. This shall be confirmed further below<sup>1690</sup>.

**INTEGRATION OF INT'L LAW INTO DIG AS EXPERT PRACTICE** – The internationalization of constitutional law applies not only to traditional constitutions but also to transition instruments enshrined in peace agreements or interim constitutions. This is not surprising since the systematic incorporation of international law, and especially human rights principles into post-conflict (interim or transitional) constitutions is recommended expert practice<sup>1691</sup>. The UN, too, actively promotes compliance with international law during the constitutionmaking stage; it “encourages constitutional approaches that directly incorporate and make supreme international human rights standards”<sup>1692</sup>.

**INTEGRATION OF INT'L LAW INTO DIG AS DEONTOLOGICAL OBLIGATION** – Ensuring conformity with international law is seen as a deontological obligation. International mediators have a deontological obligation to ensure that peace agreements respect international law<sup>1693</sup>. With regard to constitutionmaking, the widely cited UNSG Guidance Note on assistance to constitutionmaking provides:

“the UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues”<sup>1694</sup>.

The prevalence of international law for DIG implies that, in post-conflict situations, “legal professionals and other public officials *have to interpret national law through the lens of international law and standards*”<sup>1695</sup>.

**CASCADE EFFECT OF PRACTICE & DEONTOLOGY ON INTEGRATION OF INT'L LAW ON DIG** – The insistence on incorporating international legal and human right standards into transition instruments gives

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<sup>1687</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 6.

<sup>1688</sup> Introduction, Section A.1 *cum* Chapter 3, Section B.2.

<sup>1689</sup> See above-cited declarations by Libyan, Syrian, Yemeni (Houthi) and Ukrainian transitional authorities.

<sup>1690</sup> Chapter 7, Section B.3.

<sup>1691</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 90.

<sup>1692</sup> UN Rule of Law Unit: <http://www.unrol.org/article.aspx?n=Constitution-making>.

<sup>1693</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 20.

<sup>1694</sup> ‘Guidance note of the Secretary-General on UN assistance to constitution-making processes’, *op. cit.*, p. 4. See also R. Sannerholm, *Rule of Law after War and Crisis*, *op. cit.*, p. 237.

<sup>1695</sup> R. Sannerholm, *Rule of Law after War and Crisis*, *op. cit.* Emphasis added.

rise to a ‘rapid internationalization’<sup>1696</sup> of the transitional legal order, an evolution confirmed by the overview below. The fact that experts should ‘speak out’ when international norms and standards are not sufficiently integrated in constitutional texts indicates or confirms that the internationalization of transitional legal orders results from socialization..

## 2. *Observation of practice*

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The following overview indicates that states in transition express or reaffirm their commitment to international law. Notable precursors in this regard are Cambodia, Rwanda and South Africa. After the turn of the century, transitional authorities in Burundi, Afghanistan, DRC, Liberia, Somalia, Haiti, Iraq, and Côte d’Ivoire also expressed their deference to international law during the interregnum. The enumeration of these practices can be skimmed by the reader who is only interested in the recapitulative part, after paragraph 15 of this subsection.

1. In Cambodia, the internationalization of transitional legal order is apparent from the Paris agreement, which contains a reference to the UDHR<sup>1697</sup>, and undertakes “to ensure respect for and observance of human rights and fundamental freedoms in Cambodia”<sup>1698</sup>.

2. In Rwanda, the 1993 ‘Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions’ provided that international law was to take precedence over the constitution<sup>1699</sup>.

3. In South Africa, international law played a fundamental role in the transition. As far back as 1991, the transition process participants committed to respecting human rights, especially freedom of conscience and belief, freedom of speech and expression, freedom of association with others, peaceful assembly, freedom of movement, and the right to participate freely in peaceful political activity<sup>1700</sup>. International law strongly influenced the transitional constitutionmaking process<sup>1701</sup>.

4. In 2000, the Burundian Transitional Government committed itself to abiding by

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<sup>1696</sup> *Id.*, p. 237. This author observes that “[t]hrough post-war treaty ratification, the incorporation of international law in constitutions, the establishment of institutions based upon international models, or the employment of standards directly in law-making, *war-torn societies are subject to rapid internationalisation*. This is also evident from the use of international personnel in national institutions”.

<sup>1697</sup> Paris agreement, Part III. Cf. also annex 5 (‘Principles for a New Constitution for Cambodia’).

<sup>1698</sup> *Id.*, art. 15.2.a.

<sup>1699</sup> ‘Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions’ dd. 3 August 1993, art. 17: “[w]ith regard to public freedoms and fundamental rights, the principles enshrined in the Universal Declaration of Human Rights of 10th December, 1948 *shall take precedence* over corresponding principles enshrined in the Constitution of the Republic of Rwanda, especially when the latter are contrary to the former”

<sup>1700</sup> National Peace Accord dd. 14 September 1991, art 1.2. Cf. also art. 2.3.

<sup>1701</sup> V. C. Jackson, ‘What’s in a name?’, *op. cit.*, p. 1296: “all of the principal negotiators by the early 1990s had accepted that *a new constitution for South Africa would need to meet criteria set forth in international instruments* condemning the apartheid”. Emphasis added.

international law. The 2000 Arusha Agreement provided that the constitutional text to be drafted during the transition period was to incorporate a number of human rights instruments. It referred to the UDHR, the ICCPR and the ICESCR, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, which all were to "form an integral part of the constitution"<sup>1702</sup>.

5. The Afghan interregnum was also characterized by the internationalization of the transitional legal order<sup>1703</sup>. From 2001, the transitional authorities committed to the respect of international law. The Bonn Agreement stated that these authorities were to act in accordance with international law<sup>1704</sup> and with UNSC resolutions<sup>1705</sup>. The UNSC, too, stated that "the transitional administration [...] should respect Afghanistan's international obligations"<sup>1706</sup>. The deference to international law also impacted the constitutionmaking process. McCool observes that the constitution's adherence to international law was a 'red line' for the international community<sup>1707</sup>, and as a result the post-transition constitution effectively includes a solid reference to international law<sup>1708</sup>.

6. The 2002 Pretoria Agreement regarding the Congolese transition, provided that the compliance with international legal instruments<sup>1709</sup> constituted a 'transition principle'<sup>1710</sup>. The delegates of the Inter-Congolese Dialogue reaffirmed their attachment to several international

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<sup>1702</sup> Arusha Agreement, Protocol II, art. 3. This article also provides: "these fundamental rights shall not be limited or derogated from, except in justifiable circumstances acceptable in international law and set forth in the Constitution".

<sup>1703</sup> Bonn Agreement, artt. V.2, V.3, V.5; Conference Conclusions 'Afghanistan and the international community: from transition to the transformation decade', *op. cit.*

<sup>1704</sup> Bonn Agreement, art. V.2: "[t]he Interim Authority and the Emergency Loya Jirga shall act in accordance with basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party". Cf. also V.3: "[t]he Interim Authority shall [...] commit itself to respect international law".

<sup>1705</sup> *Id.*, art. V.5: "[a]ll actions taken by the Interim Authority shall be consistent with Security Council resolution 1378 (14 November 2001) and other relevant Security Council resolutions relating to Afghanistan".

<sup>1706</sup> S/RES/1378 dd. 14 November 2001.

<sup>1707</sup> C. McCool, 'The role of constitution-building processes in democratization', *op. cit.*: "it may be said that the process and its outcome, the Constitution of 2004, were and are substantially Afghan. The process in Afghanistan has not been in any way akin to that of foreigners writing and nationals rubber-stamping a new constitution. This is not to suggest that the foreigners in this case did not argue strenuously, and in some cases successfully, for the inclusion of certain language and the adoption of certain sections. Most significantly, there were two *red or bottom lines* for the international community: that the constitution include *adherence to international law*, and that it be workable". Cf., furthermore, Schoiswohl, 'Linking the International Legal Framework to Building the Formal Foundations of a State at Risk', *op. cit.*

<sup>1708</sup> See 2004 constitution, art. 7: "[t]he state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights". This reference was confirmed in 2011, when Afghanistan "recommit[ted] to upholding all of its international human rights obligations". 'Conference Conclusions of the International Afghanistan Conference entitled 'Afghanistan and the international community: from transition to the transformation decade', *op. cit.*

<sup>1709</sup> Among which the UDHR, the 1966 ICCPR, the 1966 ICESCR, and the 1981 African Charter on Human Rights and the Rights of Peoples.

<sup>1710</sup> Pretoria Agreement, III.3.

and regional legal instruments<sup>1711</sup>. The UNSC confirmed that the transitional authority was to implement international human rights<sup>1712</sup>.

**7.** The 2003 ‘Agreement on Political Process’ for Iraq provided that the fundamental law of the transition was to contain a bill of rights<sup>1713</sup>. The 2004 TAL affirmed the respect of the people for international law<sup>1714</sup>, and referred to various UNSC resolutions<sup>1715</sup>.

**8.** In Nepal, the internationalization of the interim legal order stems from the fact that the CPA contains a detailed enumeration of international rights and principles to be adhered to by the parties to the conflict.

**9.** In the preamble of the Ouagadougou Political Agreement of 13 March 2007, “the Parties reaffirmed [...] [t]heir commitment to all United Nations resolutions on Côte d’Ivoire, particularly resolutions 1633 (2005) and 1721 (2006) of the Security Council”.

**10.** The Guinean transitional authorities committed to the respect of human rights. On 10/11 January 2009, the ECOWAS heads of state and government took note of the establishment of a National Transitional Council, as well as of their “commitment [...] to respect human rights and the rule of law”<sup>1716</sup>. This was echoed by the dozens of states and organizations composing the International Contact Group on Guinea (ICG-G)<sup>1717</sup>. This contact group “*urged CNDD and the Government to contribute to the establishment of the rule of law and respect for human rights*”<sup>1718</sup>. The 2010 Ouagadougou Declaration confirms the respect for “*individual and collective liberties*”<sup>1719</sup>, and “*public liberties, including freedom of the press and opinion*”<sup>1720</sup>.

**11.** From the outset, the Libyan TNC committed itself to abiding by international law, including international human rights law and humanitarian law. In several instruments, it asserted this. On 22 March 2011, the TNC promised its “respect for human rights and the

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<sup>1711</sup> 2002 ‘Draft Constitution of the Transition’, Preamble.

<sup>1712</sup> S/RES/1493 dd. 28 July 2003, § 6. It “emphasi[z]ed] that the transitional government in the Democratic Republic of the Congo will have to restore law and order and respect for human rights [...] across the entire country”.

<sup>1713</sup> Agreement on Political Process dd. 15 November 2003: “Bill of rights, to include freedom of speech, legislature, religion; statement of equal rights of all Iraqis, regardless of gender, sect, and ethnicity; and guarantees of due process”.

<sup>1714</sup> TAL, Preamble. Cf. also art. 23: “[t]hey [the people] enjoy all the rights that befit a free people possessed of their human dignity, including the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding upon it, and in the law of nations”.

<sup>1715</sup> Art. 59.C.

<sup>1716</sup> Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.6.

<sup>1717</sup> S/2009/140 dd. 12 March 2009. For an enumeration of the states and organizations attending this meeting, refer to the conclusions of this contact group (annexes).

<sup>1718</sup> S/2009/140 dd. 12 March 2009, § 12.

<sup>1719</sup> Preamble.

<sup>1720</sup> Art. 1.

guarantee of equal rights and opportunities for all its citizens”<sup>1721</sup>. Also, on 25 March 2011, this council affirmed its “strict compliance”<sup>1722</sup> with international humanitarian law; “the TNC would like to reiterate that its policies strictly adhere to the ‘Geneva Convention relative to the treatment of Prisoners of War’”<sup>1723</sup>. On 27 November 2011, during the second meeting of the transitional cabinet, “the interim Government publicly set out its key goals including ensuring the respect of human rights and the rule of law”<sup>1724</sup>. The UNSC, too, emphasized that the NTC was bound by international law<sup>1725</sup>.

**12.** On 21 October 2011, when the transition in Yemen had already started, the UNSC “demand[ed] that the Yemeni authorities immediately ensure their actions *comply with obligations under applicable international humanitarian and human rights law*, allow the people of Yemen to exercise their human rights and fundamental freedoms, including their rights of peaceful assembly to demand redress of their grievances and freedom of expression”<sup>1726</sup>. After the Houthi take-over, the UNSC urged all Yemeni parties to resume the transition, and “call[ed] on all parties to comply with their obligations under international law, including applicable international humanitarian law and human rights law”<sup>1727</sup>.

**13.** In Guinea Bissau, the *Pacto de Transição Política* provides that the signing parties reaffirm their total respect for the treaties signed by Guinea Bissau, in conformity with the general principles of international law<sup>1728</sup>.

**14.** Various actors have recalled that the CAR transitional authorities are to respect international law. The UN Human Rights Council has called on the CAR transitional authorities to respect international human rights<sup>1729</sup>. In the same vein, participants of the international contact group on the CAR have “noted the affirmation by the authorities of the Transition of their responsibility to ensure the observance of human rights, International Humanitarian Law and the protection of the civilian population”<sup>1730</sup>.

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<sup>1721</sup> *Id.*

<sup>1722</sup> Declaration regarding ‘The Treatment of Detainees and Prisoners’ dd. 25 March 2011, available on <http://www.ntclibya.org/english/prisoners/> (last retrieved on 5 May 2012, available *en cache*).

<sup>1723</sup> *Id.* Also see the declaration ‘A vision of a democratic Libya’ dd. 29 March 2011, available on <http://www.ntclibya.org/english/libya/> (last retrieved on 5 May 2012; not available anymore).

<sup>1724</sup> NTC Executive Bureau, *Summary of the second meeting of the transitional Cabinet*, 27 November 2011, cited in the *Report dd. 2 March 2012* of the International Commission of Inquiry on Libya, *op. cit.*, p. 50, § 99.

<sup>1725</sup> S/RES/2016 dd. 27 October 2011, Preamble, § 10: it “reiterat[ed] its call to the Libyan authorities to promote and protect human rights and fundamental freedoms, including those of people belonging to vulnerable groups, to comply with their obligations under international law, including international humanitarian law and human rights law, and urg[ed] respect for the human rights of all people in Libya, including former officials and detainees, during and after the transitional period”. Emphasis added. In the same sense: S/RES/2009 dd. 16 September 2011, § 11.

<sup>1726</sup> S/RES/2014 dd. 21 October 2011, § 5. See also S/RES/2051 dd. 12 June 2012, § 11.

<sup>1727</sup> *Id.*, § 8.

<sup>1728</sup> *Pacto de Transição Política* dd. 16 May 2012, art. 1.2.

<sup>1729</sup> A/HRC/23/L.3 dd. 7 June 2013.

<sup>1730</sup> ‘Declaration of the third meeting of the International Contact Group on the Central African Republic’, Bangui, 8 November 2013, § 14.

15. Without directly referring to international law as a relevant source of law in the domestic order, the *Charte de la Transition* builds on regional instruments<sup>1731</sup> –the African Charter on Democracy and a CEDEAO Protocol– which contain references to international law, especially international human rights instruments<sup>1732</sup>. ECOWAS and the Contact Group for Burkina Faso urged the Burkinabé transitional authorities to “protect human rights”<sup>1733</sup>. In February 2015, the UN called on Burkina Faso’s transitional institutions to “continue to respect the aspirations of the Burkinabe people and ensure full respect for human rights”<sup>1734</sup>.

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In light of the internationalization of DIG<sup>1735</sup>, it is not surprising that DIG is 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 porous to the influence of external actors. When there is a power vacuum, such actors tend to rely on international legal references. For domestic transitional authorities, too, international law is seen as the residual legal system whenever a domestic legal system is being transformed. The above perusal of post-Cold War transition instruments confirms that international law directly influences both their general *ratio legis* and individual provisions<sup>1736</sup>.

INCREASED ROLE OF INT’L LAW DURING INTERREGNUM – The legal internationalization of the interregnum can be seen as part of a larger movement, i.e. the internationalization of constitutional law. But the role and significance of international law for DIG is more significant than that. International law serves as an authoritative interpretive framework for domestic legal systems that are in limbo. Transitional authorities must abide by international law during the interregnum. Even when the constitutional structure of a state is in limbo, the international legal obligations incumbent on a state cannot be dispensed with. This was already observed with regard to the post-transition order (when the substantive limits to DIG in light of the principle of state continuity were discussed<sup>1737</sup>). The same conclusion is valid

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<sup>1731</sup> ‘Charte de la transition : voici les propositions des partis politiques et de la société civile’, Le Faso, 10 November 2014. The Preamble refers to the *Charte africaine de la démocratie, des élections et de la gouvernance du 30 janvier 2007 de l’Union Africaine* and to the *Protocole A/SP1/12/01 du 21 décembre 2001 de la CEDEAO sur la démocratie et la bonne gouvernance*.

<sup>1732</sup> African Charter on Democracy, Chapter 2, art. 2, art. 3.1. CEDEAO Protocol, Preamble, art. 1.a.

<sup>1733</sup> ‘ECOWAS names contact group on Burkina Faso’, 7 November 2014.

<sup>1734</sup> UN News Centre, ‘International community ‘will not tolerate’ obstacles to Burkina Faso transition, says UN political chief’, 4 February 2015.

<sup>1735</sup> Chapter 1, Section B.

<sup>1736</sup> International assistance to interim governance can only 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>1737</sup> Chapter 5, Section B.2.

for the interregnum. As a result, DIG helps consolidate the role of international law in the domestic sphere both during and after the interregnum.

CONTRIBUTION OF A IUS IN INTERREGNO TO GLOBAL CONSTITUTIONALISM? – While there is no doubt that a *ius in interregno* (and notably the legal internationalization of the interregnum) would be influenced by the internationalization of constitutional law, it can be questioned whether a *ius in interregno* can, in turn, inform or enrich the concept or movement of ‘global constitutionalism’. Global constitutionalism seeks to find or identify a constitutional narrative beyond the state. Debates around global constitutionalism come in many variants, and are to be separated from discussions on constitutionalism (without the preceding adjective ‘global’) as a legal theory<sup>1738</sup>. They usually address the question whether constitutionalisation is occurring in international law, i.e. whether aspects of constitutionalism “have or will become attributes of public international law”<sup>1739</sup>, or whether international law has “evolved from coexistence via cooperation to constitutionalization”<sup>1740</sup>. Peters has described global constitutionalism as an academic and political agenda, even as an ‘academic artefact’. She suggests that “a compensatory constitutionalization on the international plane should be asked for” in light of the “deconstitutionalization in the domestic level”<sup>1741</sup>. Can this compensation partly be provided by the formulation of a *ius in interregno*, which, unless its current germination is discontinued, provides insights not only on how international law applies to conflict-related nonconstitutional transitions but also, inversely, on how recurrent DIG practices may influence the structure of international law itself? This question will be addressed in future research.

## Section B. The legal nature of recurring DIG practices

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The perusal of practice and UNSC resolutions in this and the preceding chapters sheds light on how international law may be evolving with regard to DIG, and allows us to formulate the core of a *ius in interregno*. After a nonconstitutional rupture, transitional authorities generally follow a similar set of practices during the interregnum, regardless of their oppositional or consensual origin. The realization of internal self-determination during the transition is premised on transitional authorities accepting that their powers are limited *ratione materiae* and *ratione temporis*, and on their commitment to inclusive DIG and TJ. Furthermore, transitional authorities pledge to let the transition and its outcome be guided by international

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<sup>1738</sup> Of course, global constitutionalisation theories depend on a theory. Cf. A. O’Donoghue, *Constitutionalism in Global Constitutionalisation*, CUP, 2014.

<sup>1739</sup> *Id.*, p. 3.

<sup>1740</sup> A. Peters, ‘Global Constitutionalism Revisited’, *International Legal Theory*, Vol. 11, p. 39.

<sup>1741</sup> A. Peters, ‘Global Constitutionalism Revisited’, *International Legal Theory*, Vol. 11, pp. 40 - 41. Other authors have also described global constitutionalism as a normative project. S. Solomon, ‘*The Dynamic Law of Occupation: Inaugurating International Thematic Constitutionalism*’, 54 *Harv. Int’l L.J. Online* 59, 2012: “[i]nternational constitutionalism is the doctrinal attempt to explain international law developments in domestic constitutional terms with the incentive of creating a new normative, internationalist framework. This stems from the firm belief that there should be an international community with shared universal goals and principles and with the adequate organs to achieve them. Thus, international constitutionalism argues that the international community should be structured on a vertical rather than horizontal model”.

law, which comes to be directly applicable in the interim legal order. To the extent that these practices surpass mere expectations and can be attributed legal force, they form the core of a *ius in interregno*. This section addresses the question whether these practices are in the process of acquiring legal force.

IN'L LEGAL RELEVANCE OF COMMON PRACTICES – Recurrent DIG practices are either self-imposed, e.g. in domestic interim constitutional texts or intrastate agreements, or imposed 'from above', e.g. in resolutions taken by the UNSC or by regional organizations having competence over the transition states. Self-imposed and/or externally imposed practices are endowed with legal force, or at least increasingly acquire it, it will be argued. Their legal force can be derived from either of three sources, or a combination of them. First, if transitional authorities consistently repeat specific practices with the conviction that they are legally required to do so, these practices are indicative of an emerging international custom. Second, these practices may be enshrined in binding treaties or unilateral declarations, which *per se* have international legal force. Third, binding resolutions may foresee when and how transitions are to be followed. Deriving its obligatory nature from a combination of these sources, a set of procedural and substantive obligations becomes increasingly compulsory during DIG.

The legal relevance of transition instruments has been explored in Chapter 3, and will not be revisited here. We saw that the relative lack of formality as to the sources of international law allows us to conduct an international legal analysis of DIG by reference to various constituent transition instruments. The plurality and variety of these instruments reflects a rich and creative practice based on a common paradigm. We concluded that the analysis of transition instruments enshrined in international treaties, intrastate agreements or even domestic legislation assist us in understanding how international law applies to DIG. This conclusion will now be extended to the (partially overlapping) DIG practices discussed in this part of the thesis. Analyzing the international legal relevance of transition instruments and DIG practices had to be done separately as Chapter 3 under Part II dealt with the foundation of the interregnum whereas this part zeroes in on practices of the interregnum itself. The following lines analyze how unilateral declarations and germinating custom (1) as well as UNSC practice (2) contribute to the formulation of a *ius in interregno*. Finally, we will interrogate whether issues of noncompliance or ineffectiveness may affect this enterprise (3).

### *1. Unilateral declarations & custom*

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The question of attribution (1.1) precedes the examination of DIG practices expressed through unilateral declarations (1.2) and custom (1.3).

#### *1.1. The question of attribution*

ATTRIBUTABILITY – When are unilateral acts and declarations or other conduct by transitional authorities attributable to a state? When transitional authorities are consensual –e.g. unity or

power-sharing governments– their conduct is naturally attributable to the state. As regards oppositional transitional authorities, two scenarios must be distinguished.

**ATTRIBUTION CONDUCT OPPOSITIONAL T.A.: DISTINGUISHING FUNCTIONAL INT'L LEGAL PERSONALITY FROM LAWMAKING POWERS** – During the interregnum oppositional transitional authorities may acquire (a degree of) international legal personality. When publicly instituted oppositional transitional authorities effectively exercise important public functions with a view of completing a transition, and bear international obligations, they enjoy international legal personality to the degree of the public functions they exercise during the interregnum. This was observed under Chapter 4<sup>1742</sup>. Yet, it must be emphasized that the relative international legal personality of transitional authorities does not confer international lawmaking power on them. In other words, it is not because transitional authorities may enjoy international legal personality that they generate relevant practice under international law<sup>1743</sup>. The conclusion that these authorities may enjoy international legal personality is relevant on other accounts, including, arguably, the issue of operationalizing the principle of self-determination<sup>1744</sup>.

The central question here is whether the conduct of oppositional transitional authorities can be attributed to a state in transition. If conduct by transitional authorities is not (either immediately or *ex post*) attributable to the state, it cannot constitute a direct source for unveiling how international law evolves with regard to DIG. Thus, even if the Houthi rebellion had effectively exercised civilian interim rule (as it announced it would do in January 2015), the acts and declarations it adopted could not have been used as a direct source for gauging how international law currently develops with regard to DIG. Its conduct may however be relevant when assessing the practice of states<sup>1745</sup>. The reactions by states to these acts and declarations, thus, may be informative in this regard<sup>1746</sup>.

**EX POST ATTRIBUTION CONDUCT OPPOSITIONAL T.A. BECOMING NEW GVT. / ACKNOWLEDGED CONDUCT** – If oppositional transitional authorities are effective and successful in reconstitutionalizing the state, their conduct can be (retroactively) attributed to the state. The ILC considered that if an insurrectional movement becomes the new government of the state, its conduct “shall be considered an act of that state under international law”<sup>1747</sup>. This conclusion, it is suggested, should be applied *mutatis mutandis* to oppositional transitional authorities. In other words, the conduct of oppositional transitional authorities may be attributed *ex post* to the state if DIG has proven to be successful. By this avenue, the conduct of such authorities can be informative

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<sup>1742</sup> Chapter 4, Section A.2.6.

<sup>1743</sup> [Fourth report on identification of customary international law](#), *op. cit.*, p. 21 (draft conclusion 4, § 3). I thank J. d’Aspremont for insisting on making this point clearer.

<sup>1744</sup> Chapter 7, Section C.

<sup>1745</sup> *Ibid.*

<sup>1746</sup> Apart from the UNSC resolutions directly addressing the Houthi’s (S/RES/2201 dd. 15 February 2015; S/RES/2216 dd. 14 April 2015), the analysis of other international reactions, notably by states, could provide more insight in this regard.

<sup>1747</sup> DASR, art. 19. Cf. also the commentaries. Yearbook of the International Law Commission, 2001, vol. II (Part Two).

for the formulation of a *ius in interregno*. This is also the case when such conduct is acknowledged and adopted by a transition state as its own<sup>1748</sup>. For instance, in the period immediately following the 2011 Constitutional Declaration, the Libyan TNC exercised important functions, yet it was certainly not unanimously accepted that it then represented the Libyan state. This declaration was however accepted and acknowledged as foundational by subsequent transitional authorities, and therefore remains informative for an international law analysis of DIG.

## 1.2. Unilateral Declarations

**LEGAL RELEVANCE SELF-IMPOSED OBLIGATIONS: LITERATURE** – The practices observed in this part often stem from self-imposed obligations. Transitional authorities commit to them beforehand (i.e. before or at early stages of the interregnum), in domestic legislation or acts and/or in intrastate agreements. Almost a century ago, Gemma accepted the importance and legal relevance of obligations imposed by provisional governments upon themselves<sup>1749</sup>. More recently, Samuels considered that transitional authorities should conform to their self-imposed constitutional framework<sup>1750</sup>.

**UNILATERAL DECLARATIONS: INTENT TO BE BOUND (ICJ)** – The ICJ specified the conditions under which unilateral acts and declarations may have the effect of creating legal obligations. Unilateral declarations “if given publicly, and with an intent to be bound”, are binding<sup>1751</sup>. In the same vein, the ILC defined unilateral declarations as “formal declarations formulated by a State with the intent to produce obligations under international laws”<sup>1752</sup>, which, as to their form, are not dictated by special or strict requirements<sup>1753</sup>.

**UNILATERAL DECLARATIONS: NO NEED FOR ACCEPTANCE (ICJ)** – In short, when under any of the two circumstances explained above transitional authorities express their intention to be bound under international law, then such intention confers a legal character on the position taken<sup>1754</sup>. An international reaction in the form of an acknowledgement is not necessary. For evidentiary

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<sup>1748</sup> DASR, art. 11: “Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own”.

<sup>1749</sup> S. Gemma, 'Les Gouvernements de fait', *op. cit.*, pp. 383-384.

<sup>1750</sup> K. Samuels, 'Postwar constitution building' in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 175: “one of the benchmarks in the international community’s relationship with a postwar transitional government could be the expectation that the government will abide by the constitution negotiated as part of the transition”.

<sup>1751</sup> *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, § 46.

<sup>1752</sup> ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two.

<sup>1753</sup> *Id.*, art. 5. Cf. *The Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, PCIJ, Series A, No. 2, p. 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgment of 11 July 1996, ICJ. Reports 1996, p. 612, § 24 and p. 613, § 26; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, ICJ Reports 1961, p. 31; *Nuclear Tests (Australia v. France; New Zealand v. France)*, ICJ Reports 1974, pp. 267-268, § 45, and p. 473, § 48.

<sup>1754</sup> J. Salmon, *Dictionnaire de droit international public*, Bruylant, Bruxelles, 2001, p. 305.

purposes, the reactions of the international community, e.g. when conveyed through contact groups, may of course be taken into account<sup>1755</sup>. The ICJ thus observed:

“nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made”<sup>1756</sup>.

UNILATERAL DECLARATIONS: POTENTIAL ENTITLEMENT THIRD STATES (ICJ) – Transitional authorities generally accept that their mandate is limited, promise that the interim rule will be inclusive, ensure a form of TJ while pledging to combat impunity for serious crimes, and declare that international law plays a prominent role during the interregnum. These commitments are mostly echoed by other states and confirmed by the UNSC. In such circumstances, states may “take cognizance of [such] unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected”<sup>1757</sup>, if they have a legal interest in doing so and if the declarations were stated in clear and specific terms<sup>1758</sup>.

### 1.3. Custom

“experience reveals a continuous scale of transitions from *norms of conduct guaranteed by mere convention* to those which are regarded as *binding* and guaranteed by law ... It should be clear that, from the point of view of sociology, the transitions from mere usage to convention and from it to law are fluid”<sup>1759</sup>.

Certain practices are increasingly repeated in the context of DIG, and transitional authorities seem to be more and more convinced that these practices correspond to the law. This suggests that a series of customary rules with regard to DIG are emerging, as based on general practice (*usus*) and the conviction that such practice reflects or amounts to law (*opinio iuris*) or is required by social, economic, or political exigencies (*opinio necessitatis*)<sup>1760</sup>.

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<sup>1755</sup> The monitoring by the so-called international community of transition situations, and declarations made by various contact groups, can account for the *reactions* to which the unilateral declarations by transitional authorities give rise, which may be taken into account in order to determine the legal consequences of these declarations. *Id.*, art. 3. *Nuclear Tests (Australia v. France; New Zealand v. France)*, ICJ Reports 1974, pp. 269-70, § 51, and pp. 474-5, § 53; *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, ICJ Reports 1986, pp. 573-4, §§ 39-40; *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction of the Court and Admissibility of the Application*, § 49; *Nicaragua Case, op. cit.*, § 261; and *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, ICJ Reports 1986, p. 573, § 39.

<sup>1756</sup> *Nuclear Tests (New Zealand v. France)*, *Judgment*, ICJ Reports 1974, p. 457, § 46.

<sup>1757</sup> *Id.* An analysis of this case is contained in the Eighth Report §§ 70–83.

<sup>1758</sup> The ILC notes that “[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms”. ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, art. 7.

<sup>1759</sup> M. Weber, *On Law in Economy and Society*, Harvard University Press, 1954, pp. 30-53

<sup>1760</sup> A. Cassese, *International Law*, OUP, 2001, Oxford, New York, p. 119. B. Conforti also emphasizes that custom creation results from a social need: “at least in the early formative stages of the custom, the conduct may be

Transitional authorities generally accept that their mandate is limited, commit to inclusive DIG, and ensure a form of TJ while pledging to combat impunity for serious crimes. Are these practices accepted as law<sup>1761</sup>; do they constitute custom?

**BROAD BASIS FOR STATE PRACTICE** – State practice can be evidenced by a wide range of actions and documents. This observation was already made under Chapter 3, when the international legal relevance of domestic acts/laws and intrastate agreements embodying transition instruments was analyzed<sup>1762</sup>. Conforti and Labella write that “treaties, participation in the resolutions of international organisations, diplomatic correspondence, statutes, the decisions of domestic courts, and administrative acts” may evidence state practice<sup>1763</sup>. Brownlie, too, adopts a broad definition of state practice, as follows:

“diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions (eg manuals of military law), executive decisions and practices, orders to military forces (eg rules of engagement), comments by governments on ILC drafts and corresponding commentaries, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in ‘all States’ form), an extensive pattern of treaties in the same terms, the practice of international organs, and resolutions relating to legal questions in UN organs, notably the General Assembly”<sup>1764</sup>

More recently, the Special Rapporteur on the identification of custom has also adopted a relatively broad definition of state practice<sup>1765</sup>.

**RELEVANCE CONDUCT BY CONSENSUAL AND OPPOSITIONAL TRANSITIONAL AUTHORITIES** – Most of the transitions *sub examine* are or were led by consensual transitional authorities. Under specific conditions, conduct by oppositional transitional authorities may also be considered for the analysis of DIG under international law. As noted, this is the case when their conduct can eventually be attributed to, or is acknowledged by, a state in transition<sup>1766</sup>. If oppositional transitional authorities, as addressees of international obligations and after having exercised public powers during the interregnum, evolve into the government of the state, their policy statements, opinions, manuals or other relevant texts may thus become relevant for the assessment of custom germination.

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perceived as more of a social necessity than a legal obligation”. B. Conforti, A. Labella, *An Introduction to International Law*, *op. cit.*, p. 33.

<sup>1761</sup> ICJ Statute, art. 38.1.b.

<sup>1762</sup> Chapter 3, Section C.2 and C.3.

<sup>1763</sup> B. Conforti, A. Labella, *An Introduction to International Law*, *op. cit.*, p. 32, with reference to domestic jurisprudence.

<sup>1764</sup> J. Crawford, *Brownlie’s Principles of Public International Law*, OUP, 2008, p. 24. In the same sense, cf. V. Đ. Degan, *Sources of International Law*, Martinus Nijhoff Publishers, 1997, p. 174 a.f.

<sup>1765</sup> [Fourth report on identification of customary international law](#), *op. cit.*, p. 21, draft conclusion 6, § 3: “Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; legislative and administrative acts; and decisions of national courts”.

<sup>1766</sup> See above, Section B.1.1, and the reference to DASR, art. 10.

SHORT PERIOD OF CUSTOM FORMATION – Treaties, intrastate agreements, domestic acts or legislation, and resolutions by IOs may be indicative of state practice. To the extent that these instruments unveil consistent and recurrent DIG practices, an *early-stage, currently germinating international custom* can arguably be derived from this. In the North Sea Continental Shelf Case, the ICJ observed that “the passage of only a short period of time [is] not necessarily a bar to the formation of a new rule of customary international law”<sup>1767</sup>. The perusal of practice in this part is based on a relatively short period, i.e. from 1991 to 2016. This does not in itself prevent custom from developing, even less from germinating<sup>1768</sup>. Depending on the confirmation of current trends and practices, the future will tell us whether a *ius in interregno* results from “a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance”<sup>1769</sup>.

Consistent practice, both extensive and virtually uniform<sup>1770</sup>, combined with *opinio iuris/opinio necessitatis*, may amount to custom, or at least move in that direction. In order to distinguish *opinio iuris* from state practice, it is not always necessary to infer it from *separate acts*<sup>1771</sup>. In other words, *opinio iuris* can also be derived from the transition instruments and other documents discussed in this thesis. Arguably, both *opinio iuris* and *opinio necessitatis* accompany the categories of practices (circumscribed mandate; inclusivity; legal internationalization of the interregnum) described above.

OPINIO IURIS – First, the conviction that DIG practices conform to the law is generally shared by the transitional authorities, the UNSC, and relevant contact groups. The presence and multitude of contact groups indicate that the ‘international community’ is involved with most of the transitions discussed above. Contact groups gather a panoply of states and IOs for monitoring DIG. The documents they issue are valuable as they allow us to take stock of broadly shared practices and opinions. Their members often reiterate which DIG practices must be followed by transitional authorities. In addition to contact group meetings, this part of the thesis referred to a number of UN meetings. On these occasions, too, various states have expressed their opinion about how DIG must be carried out, largely in line with the practices observed above.

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<sup>1767</sup> North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3, § 74. For a discussion, cf. V. Đ. Degan, *Sources of International Law*, Martinus Nijhoff Publishers, 1997, p. 152 a.f. An example in this regard concerns the freedom of movement into outer space, discussed by Judge Lachs in the same case.

<sup>1768</sup> For a discussion on ‘the problem of time’ in relation to custom formation, cf. M. Akehurst, ‘Custom as a source of international law’ in M. Koskenniemi, *op. cit.*, p. 265.

<sup>1769</sup> M. P. Scharf, *Customary International Law in Times of Fundamental Change - Recognizing Grotian Moments*, CUP, 2013, p. 5.

<sup>1770</sup> *Ibid.*

<sup>1771</sup> A. Bleckmann, ‘Die Praxis des Völkergewohnheitsrecht als konsequente Rechtsetzung’ in R. Bernhardt, W. K. Geck, G. Jaenicke, H. Steinberger (eds.), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte*, Springer-Verlag, Berlin, Heidelberg, New York, 1983, p. 91: “[es] [w]ird ersichtlich, dass dann Übung und Äusserung der Rechtsüberzeugung nicht, wie die Lehre vorauszusetzen scheint, in zwei unterschiedlichen Akten zu suchen sind, sondern in einem einzigen Akt zusammenfallen”. Bleckmann insists on the seriousness of practice (which can be evidenced by institutional guarantees). *Ibid.*, p. 98.

OPINIO NECESSITATIS – Second, the conviction that common DIG practices reflect the political exigencies of our times finds confirmation in the peace-through-transition paradigm. This paradigm replaced the ITA model and adjusted the until then prevailing UN consensus on statebuilding (which has been coined as the ‘New York consensus’<sup>1772</sup>). As DIG practices give effect to this paradigm, there is little doubt that they reflect a “social sedimentation”<sup>1773</sup>, i.e. an “accumulation of the patterns of behaviour and convictions of the members of a given society, the international society”<sup>1774</sup>, and that there is a “broad social consensus, that is to say a widespread awareness in the society concerned of the necessity of respecting certain rules of conduct”<sup>1775</sup>. There is no need, here, to come back to the social or socialized reasons for justifying the increased recourse to DIG<sup>1776</sup>.

NO ‘CUSTOM ENTREPRENEURSHIP’ – The conviction that DIG practices, as observed in this part of the thesis, are required by law (*opinio iuris*) and by social and political exigencies (*opinio necessitatis*) is alive. Yet, the stage of maturity of particular customary rules is open for debate, especially since DIG (as defined in this thesis) is a relatively new phenomenon. Difficulties may thus arise “when judges are confronted with customs that are *undergoing transformation*”<sup>1777</sup>. This cannot be denied, as cannot be doubted, more generally, that “the Rubicon which divides custom (in our sense of ‘usage’) from law is crossed silently, unconsciously and without proclamation”<sup>1778</sup>. True, “the temptation to adapt or re-interpret the concept of customary law in such a way as to ensure that it provides the ‘right’ answers is strong, and at least to some, irresistible”<sup>1779</sup>. (Similarly, discussions about general principles of law risk to reflect the predilections of their authors<sup>1780</sup>, but this source of law is not relevant for the purposes of this dissertation<sup>1781</sup>). True, one should avoid either de-emphasizing material practice or *opinio iuris*<sup>1782</sup> as constitutive elements of custom, at the risk of trying to overregulate activities that are not legally restrained, or of adventuring oneself in the uncertain waters of the ‘*coutume sauvage*’<sup>1783</sup>.

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<sup>1772</sup> M. Kahler, ‘Statebuilding after Afghanistan and Iraq’, *op. cit.*

<sup>1773</sup> L. Condorelli, ‘Custom’ in M. Bedjaoui, *International Law: Achievements and Prospects*, *op. cit.*, p. 180.

<sup>1774</sup> *Id.*

<sup>1775</sup> *Id.*, p. 181.

<sup>1776</sup> Part III, Introductory caveats, second point.

<sup>1777</sup> F. Francioni, ‘International Law as a Common Language for National Courts’, *op. cit.*, p. 588. Emphasis added.

<sup>1778</sup> Sir Johan Fisher Williams, *Aspects of Modern International Law*, London 1939, OUP, p. 44.

<sup>1779</sup> B. Simma, P. Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’, 12 *Aust. YBIL* 82 1988-1989, p. 83.

<sup>1780</sup> V. Đ. Degan, *Sources of International Law*, *op. cit.*, p. 14.

<sup>1781</sup> Most authors agree that general principles of law concern municipal law analogies, especially of principles valid *in foro domestico* concerning procedure, evidence and judicial process, in case of a *non liquet*. For a general discussion, cf. M. N. Shaw, *International Law*, CUP, 2014, p. 71.

<sup>1782</sup> For someone who infers *opinio iuris* partly from state practice, cf. C. Tams, *Enforcing Obligations Erga Omnes in international law*, CUP, 2005, p. 238

<sup>1783</sup> R.-J. Dupuy, ‘Coutume sage et coutume sauvage’ in C. E. Rousseau, *La communauté internationale, Mélanges offerts à Charles Rousseau*, 1974, p. 75.

However, this thesis does not take a strong position on the stage of maturity of a custom-based (i.e. chiefly based on custom) *ius in interregno*. But it accepts that the actual practice of states in transition can be “expressive, **or creative**, of customary rules”, to paraphrase the ICJ<sup>1784</sup> as well as the Special Rapporteur on the identification of customary law<sup>1785</sup>. Furthermore, a *ius in interregno* does not operate at a detailed level. In the future, it might or might not be further refined. International law leaves most aspects of regime change unregulated. In such a case, there is nothing the critical positivist lawyer can do to elaborate on it; international law is not ubiquitous. Whenever the law is silent, ambiguous or non-existent, there is more leeway for political and diplomatic action. As a result of the flexible stance the present author adopts in relation to the stage of maturity of a *ius in interregno*, which is recognized to be robust and only germinating, the temptation to be a norm entrepreneur is resisted, and the risk of creating a ‘*coutume sauvage*’ averted.

## 2. UNSC practice

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ENGAGEMENT UNSC AT VARIOUS POINTS OF INTERREGNUM – Dozens of UNSC resolutions directly relate to DIG. The UNSC regularly adopts binding resolutions under Chapter VII of the UN Charter, and sometimes establishes a sanctions regime at this occasion. The UNSC:

- Endorses existing transition instruments<sup>1786</sup>;
- Monitors DIG;
- Calls on transitional authorities to:
  - Respect their limited mandate,
  - Engage in an inclusive transition,
  - Organize TJ,
  - Respect international law generally<sup>1787</sup>;
- Adopts or threatens to take sanctions against individuals trying to derail the transition<sup>1788</sup>.

UNSC RESOLUTIONS UNDER CH. 7 UN CHARTER WITH REGARD TO DIG – In line with the UNSC’s greater reliance on a legal-regulatory approach to peace and security<sup>1789</sup>, the UNSC increasingly adopts binding resolutions in relation to DIG. It has adopted binding resolutions (under Chapter VII of the UN Charter) with regard to (projected) transitions in (in reverse chronological order) South Sudan<sup>1790</sup>, Somalia<sup>1791</sup>, Libya<sup>1792</sup>, Mali<sup>1793</sup>, Côte d’Ivoire<sup>1794</sup>,

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<sup>1784</sup> Tunisia/Libya Continental Shelf Case, 1982 ICJ Reports, p. 46, par. 43.

<sup>1785</sup> [Fourth report on identification of customary international law](#), *op. cit.*, p. 21 (draft conclusion 4).

<sup>1786</sup> Chapter 3, Section C, for examples.

<sup>1787</sup> See the references to UNSC resolutions throughout Part III.

<sup>1788</sup> See below in this section.

<sup>1789</sup> See Introduction, Section A.1.

<sup>1790</sup> S/RES/2187 dd. 25 November 2014.

<sup>1791</sup> S/RES/2182 dd. 24 October 2014 relating to Somalia, in which the UNSC is “[h]ighlighting in particular the FGS’s commitment to establish interim regional administrations by the end of 2014 which is an essential step under the “Vision 2016” programme, and emphasizing the importance of this being an inclusive and consultative process”.

CAR<sup>1795</sup>, Yemen<sup>1796</sup>, Guinea-Bissau<sup>1797</sup>, Libya<sup>1798</sup>, Haiti<sup>1799</sup>, and Afghanistan<sup>1800</sup>. Seven of these resolutions were adopted in 2014. This corroborates the finding that the UNSC increasingly addresses threats to international peace and security by monitoring DIG, in line with the peace-through-transition paradigm<sup>1801</sup>. Comforted by its broad discretionary powers in determining whether there is a ‘threat to peace’, and by the gradual expansion of this “very vague and elastic hypothesis”<sup>1802</sup> concept over the years<sup>1803</sup>, the UNSC has taken several detailed resolutions on DIG.

**OTHER UNSC RESOLUTIONS WITH REGARD TO DIG** – The above enumeration of binding UNSC resolutions is not exhaustive. Also, UNSC resolutions do not always indicate on which basis they were adopted. In such case, their classification depends on the analysis of the operative part of the resolution. Art. 25 of the UN Charter generally states that “members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”<sup>1804</sup>. The UN occasionally “underscor[es] that Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Council’s decisions”<sup>1805</sup>. In other words, also when an explicit reference to Chapter VII of the UN Charter is lacking, UNSC resolutions relating to DIG can be binding if the language used is

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<sup>1792</sup> S/RES/2174 dd. 27 August 2014.

<sup>1793</sup> S/RES/2164 dd. 25 June 2014.

<sup>1794</sup> S/RES/2153 dd. 29 April 2014 in which the UNSC refers to the Ouagadougou Agreement and “[d]ecides that the Ivorian authorities shall submit biannual reports to [a] Committee [...] on progress achieved in relation to DDR and SSR”.

<sup>1795</sup> S/RES/2149 dd. 10 April 2014.

<sup>1796</sup> S/RES/2140 dd. 26 February 2014.

<sup>1797</sup> S/RES/2048 dd. 18 May 2012.

<sup>1798</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>1799</sup> S/RES/1529 dd. 29 February 2004, § 1.

<sup>1800</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, furthermore, explicitly refers to S/RES/1378. Cf. also T. Maruhn, ‘Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus’, *op. cit.*, p. 496.

<sup>1801</sup> Introduction, Section A.1.

<sup>1802</sup> B. Conforti, *The Law and Practice of the United Nations*, Kluwer Law International, The Hague, London, Boston, 2000, p. 173.

<sup>1803</sup> 2005 World Summit Outcome, UNGA Res. 60/1 dd. 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: “the report from the UN Secretary-General: “The 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 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>1804</sup> Cf. also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, § 114: “[t]he language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council”.

<sup>1805</sup> S/RES/2165 dd. 14 July 2014, Preamble. Cf. also *Legal Consequences for States*, ICJ Reports (1971), §§ 114 – 116. *Contra*: B. Simma (ed.), *The Charter of the United Nations – a commentary*, *op. cit.*, p. 613.

not merely exhortatory<sup>1806</sup>, i.e. when the resolutions are “of an operational nature”<sup>1807</sup> and/or constitute decisions rather than recommendations.

**RETRIBUTIVE POWER OF UNSC** – UNSC resolutions are often paired with the threat or application of sanctions against so-called spoilers of the transition. The UNSC reserves itself the power to take sanctions against anyone trying to impede the transition. Although a full overview cannot be given here, during this decade, the UNSC used this power or threatened to do so against (potential) ‘transition spoilers’<sup>1808</sup> in (in reverse chronological order) Burkina Faso, Yemen, Central African Republic, Guinea Bissau, Somalia, and Côte d’Ivoire, as the following lines indicate.

- 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”<sup>1809</sup>.
- In February 2014, after determining that the situation in Yemen constitutes a threat to international peace and security, the UNSC established a committee to monitor the activities of individuals or entities that may aggravate this threat by “obstructing or undermining the successful completion of the political transition”<sup>1810</sup>. On 14 April 2015, the UNSC adopted sanctions against Ahmed Saleh because he “hinder[ed] Yemen’s peaceful transition”<sup>1811</sup>.

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<sup>1806</sup> For example, in its resolution S/RES/1383 dd. 6 December 2001, the UNSC “[c]alls on all Afghan groups to implement this Agreement in full, in particular through full cooperation with the Interim Authority which is due to take office on 22 December 2001”. For a more recent binding UNSC resolution (without reference to UN Charter Ch. VII), also impacting on the transition, cf. S/RES/2186 dd. 25 November 2014 (Guinea-Bissau).

<sup>1807</sup> B. Conforti, *The Law and Practice of the United Nations*, *op. cit.*, p. 152.

<sup>1808</sup> The term ‘spoilers’ was coined by S. J. Stedman. Cf., for example, his article ‘Spoiler Problems in Peace Processes’. Nadin, Cammaert and Popovski describe spoilers as groups that “readily position themselves against the efforts of the international ‘custodians of the peace’ (usually UN missions) and transitional governmental arrangements, in a bid to spoil any peace that does not accord with their interests”. P. Nadin, P. Cammaert, V. Popovski, *Spoiler Groups and UN Peacekeeping*, International Institute for Strategic Studies, 2015, p. 12.

<sup>1809</sup> UN News Centre, ‘International community ‘will not tolerate’ obstacles to Burkina Faso transition, says UN political chief’, 4 February 2015.

<sup>1810</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”. Cf. also S/PRST/2014/18, Statement by the President of the Security Council dd. 29 August 2014, and S/2013/173 dd. 19 March 2013 § 9, mentioning “actions aimed at undermining [...] the transition process despite [...] the [UNSC’s] readiness to consider further measures, including under Article 41 of the Charter of the United Nations”. 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).

<sup>1811</sup> S/RES/2216 dd. 14 April 2015, Annex, § 2. Cf. also S/RES/2204 dd. 24 February 2015 in which the UNSC emphasized the critical importance of the sanctions regime.

- In December 2013, the UNSC closely monitored the transition in the CAR, and “decide[d] that any attempt to delay, impede or violate the transitional arrangements [...] shall be considered as an impediment to the peace process and could lead to the imposition of appropriate measures”<sup>1812</sup>. After the possibility of a sanctions regime was (implicitly) mentioned, dozens of states and organizations gathering in the contact group for CAR “stressed the need for the imposition of sanctions against all CAR individuals and entities attempting to hinder the transition”<sup>1813</sup>. Less than a month after this statement, a UNSC sanctions regime was established, aiming “individuals and entities [...] as engaging in or providing support for acts that undermine the peace, stability or security of the CAR, *that impede the political transition process*”<sup>1814</sup>.
- The UNSC urged both political and military stakeholders in Guinea-Bissau to refrain from any action that could hamper the transition. It considered applying targeted sanctions against potential spoilers<sup>1815</sup>.
- In Somalia, the UNSC decided that individuals or entities can be sanctioned if they engage in or provide “support for acts that threaten the peace, security or stability of Somalia, including acts that threaten the Djibouti Agreement of 18 August 2008 or the political process”<sup>1816</sup>. This agreement forms the backbone of the Djibouti peace process in the context of which a new Transitional Federal Government was formed early 2009<sup>1817</sup>.
- With regard to Côte d’Ivoire, too, the UNSC decided on 15 November 2004 (during the first transitional period from 13 January 2003 to 4 March 2007<sup>1818</sup>) that sanctions could be applied against ‘spoilers’ of the reconciliation process<sup>1819</sup>.

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<sup>1812</sup> S/RES/2127 dd. 5 December 2013, § 10.

<sup>1813</sup> Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, § 19. Cf. also § 9.

<sup>1814</sup> S/RES/2149 dd. 10 April 2014.

<sup>1815</sup> It “urge[d] stakeholders in Guinea-Bissau, including political and military leaders to refrain from any action that could hamper the electoral process and the implementation of reforms, which are key to the long-term stability of Guinea Bissau. The Security Council recall[ed] its resolution 2048 (2012) and, in this regard, reiterate[d] its readiness to consider further measures, as it deems necessary, including targeted sanctions against individuals who undermine efforts to restore the constitutional order”, S/PRST/2013/19, p. 2. Cf. also S/RES/2048 dd. 18 May 2012, § 6.a.

<sup>1816</sup> S/RES/1844 dd. 20 November 2008, § 8.a.

<sup>1817</sup> For an [overview](#), cf. ‘Somali Peace Process’ on AMISOM webpage.

<sup>1818</sup> The transition period based on the Linas-Marcoussis agreement dd. 13 January 2003.

<sup>1819</sup> S/RES/1572 dd. 15 November 2004, § 9: “[d]ecides 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”. Implemented on the EU level by Council Decision 2004/852/CFSP dd. 13 December 2004. An overview of sanctions can be found [online](#). The measures imposed were reviewed on a regular basis “in the light of progress accomplished in the peace and national reconciliation process in Côte d’Ivoire as defined by the Linas-Marcoussis and Accra III Agreements”, S/RES/1572 dd. 15 November 2004, § 13.

- In 2004, the UNSC considered assisting the DRC in “mobilizing the resources necessary to deter spoilers from derailing the transition”<sup>1820</sup>.

INCREASED RECOURSE TO BINDING POWERS IN RELATION TO DIG – For a decade at least, the UN regularly considers adopting sanctions against ‘spoilers’ allegedly ‘derailing’ the transition. Such action is sometimes backed up by regional action<sup>1821</sup>. There are historical precedents or analogies for this approach<sup>1822</sup>. Yet, together with the rise of DIG, this practice has become more common. We are beyond the stage of mere *ad hoc* regulation of DIG, certainly when the list of ‘sanction resolutions’ is complemented with all UNSC resolutions in relation to DIG deriving their binding nature from their operational parts (i.e. when they serve as decisions rather than recommendations).

When transitional authorities disobey binding UNSC resolutions, they risk breaching articles 25<sup>1823</sup>, 39<sup>1824</sup>, 41<sup>1825</sup>, and 103<sup>1826</sup> of the UN Charter, thus violating international law and potentially engaging the international responsibility of their state. A similar logic can be applied, under the law of IOs, for transitional authorities breaching the norms emanating from, or the resolutions taken by their parent organization. In other words, the obligatory nature of DIG practices may also stem from, or be corroborated by, decisions or resolutions taken by regional organizations such as the AU or ECOWAS.

It should finally be recalled that UNSC practice, on which this part extensively relies, is not, in itself, formative of custom<sup>1827</sup>. Yet, this practice is often echoed and endorsed in the

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<sup>1820</sup> *Id.*, § 119. Emphasis added. See also S/2004/650 dd. 16 August 2004 §§ 57, 65, and 119.

<sup>1821</sup> Regional organizations can suspend or withdraw their financial support to states in transition on the grounds that *ius in interregno* is not abided by. The EU threatened with a suspension of its support at the occasion of the transition in the Central African Republic. The EU thus “stressed in Brazzaville that the democratic credentials of the transitional institutions would be critical for the resumption of any type of support”. Informal meeting of the Central African Republic configuration of the Peacebuilding Commission, Chairman’s Summary, 16 May 2013, § 6.

<sup>1822</sup> One may mention the powers of the High Representative with respect to potential spoilers of the peace process. The High Representative had the “power to dismiss local officials deemed to be obstructing implementation of the accord and to issue interim laws if the local parties are ‘unable’ (that is, unwilling) to do so”. (R. Caplan, *International Governance of War-torn Territories*, *op. cit.*, p. 21).

<sup>1823</sup> “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”

<sup>1824</sup> E. de Wet, ‘Threat to Peace’, MPEPIL. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”; “A determination under art. 39 UN Charter is therefore a threshold requirement for the adoption of binding measures under Chapter VII of the UN Charter”.

<sup>1825</sup> “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations”.

<sup>1826</sup> “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

<sup>1827</sup> V. Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, *op. cit.*, p. 377: “[g]enerally speaking, the Council’s resolutions are not legislative in the sense of applying outside the framework of particular cases of restoration of international peace and security. Moreover, they cannot — by analogy with General Assembly resolutions — be said to reflect either *opinio juris*, nor the

conclusions of contact groups and can also reinforce the conviction of states in transition that specific behaviour in relation to DIG is not only desirable but also compulsory.

### *3. Effect of noncompliance or ineffectiveness?*

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For ease of reference, the relevant unilateral declarations, evolving customary rules and UNSC practice in relation to DIG are analyzed together under the concept of *ius in interregno*. The sources assisting us in formulating a *ius in interregno* are sometimes combined. To the extent that the requirement of inclusivity, for example, is self-imposed, the transitional authority committing itself to inclusive DIG is estopped from reneging on it. In addition, to the extent that the UNSC recalls these requirements in binding resolutions, transitional authorities must implement them.

DIG practices are vulnerable to criticism both on normative and on practical grounds. In political science, the assistance model (which includes assistance to statebuilding and constitutionbuilding) as applied to states in transition, has been severely criticized on this double basis. The normative criticism was addressed in the introduction to this part of the thesis; this section addresses some basic notions of the criticism based on the (alleged) lack of effectiveness of DIG<sup>1828</sup>.

CONTESTED EFFECTIVENESS (OBSERVATION) – Since it became en vogue more than twenty years ago, DIG has sometimes generated doubtful results. In Rwanda, the non-implementation of the August 1993 Arusha Agreements, which was to establish a Broad-Based Transitional Government (BBTG), was followed by a genocide starting in April 1994. Anno 2016, the close to disastrous situations in the DRC, South Sudan, Iraq, Libya<sup>1829</sup>, and maybe to a lesser extent Afghanistan, testify to the fact that DIG does not yield desirable results, to say the least. In other states, like Burundi (failed coup during May 2015 and ongoing unrest in 2016 as President Nkurunziza remains in office after contested elections) and CAR (the continuing conflict between Séléka alliance and anti-Balaka during the 2014-2015 transition; continuing unrest after 2016 elections), the political situation remains delicate at the time of writing.

CONTESTED EFFECTIVENESS (LITERATURE) – With regard to two strands of practices –inclusion and TJ– traditionally observed during DIG, Arnault observes that they do not always make a

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generality of the requisite state practice. It is undeniable on the one hand that the cumulative actions of the Security Council under Chapter VII, in instituting collective responses to situations involving breaches of community norms, have had an impact on the shaping of an international public policy and that core norms of human rights, humanitarian law and international criminal law have been affected and strengthened through the impetus thus provided.”

<sup>1828</sup> This is the conventional critique on the effectiveness of liberal peace-building. Cf. E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 23.

<sup>1829</sup> M. Djaziri, ‘Les défis économiques d’une société éclatée’, *Moyen-orient, Libye, De la révolution au chaos*, nr. 25, Janvier-Mars 2015, p. 48: “*la première transition qui a suivi l’intervention occidentale de mars 2011 s’est traduite par une forte régression sociale, une disparition de l’Etat et une insécurité permanente grandissante*”.

positive difference<sup>1830</sup>. With regard to another DIG practice, the provision of security during the interregnum, Lyons observes that in some cases “the transitional period *contributed little to the demilitarization of politics*. Weak interim regimes failed to institutionalize consultation and joint decision making, thereby leaving in place the powerful and unreconstructed institutions of war”<sup>1831</sup>. With regard to the continuous insistence on inclusivity during the interregnum, Horowitz observed that despite “very strong recommendations for extensive popular participation, there is no even a scintilla of evidence that it improves the durability or the democratic content of constitutions”<sup>1832</sup>. Failures of DIG may partly be attributable to a widening gap between commitments made by transitional authorities and their implementation, in sum, between words and deeds. In spite of the emphasis on ownership and inclusion, for instance, the actual compliance with these requirements, especially in the context of peacebuilding and DIG, leaves much to be desired<sup>1833</sup>. From an international legal perspective, the contested effectiveness of DIG is of limited relevance. Partial noncompliance (e.g. lack of inclusivity in transitions in Afghanistan, Libya and Iraq) or lack of effectiveness do not diminish the legal relevance of DIG practices, for two reasons.

First, noncompliance does not, in itself, disconfirm the validity of a legal rule. To the extent that a *ius in interregno* is based on currently germinating customary rules, it should be recalled that for a rule to be established as customary, the corresponding practice must not be in absolute rigorous conformity with the rule. Breaches of customary rules do not automatically invalidate these rules. Although this issue is more delicate when norms are in the process of being created (a *ius in interregno* is in its infancy), the ICJ considered that:

“in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”<sup>1834</sup>.

Second, in international law a broad conception of legal compliance should be favored. Compliance “occurs through indirect processes of acculturation and legitimation [...], [and] is not a discernable end point but an ongoing process of articulating and inculcating law-compliance as a cherished value”<sup>1835</sup>. The lack of effectiveness of DIG practices has not induced states to abandon their commitment to these practices, as was shown in this part of the

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<sup>1830</sup> J. Arnault, ‘Legitimacy and Peace Processes – International Norms and Local Realities’ in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*

<sup>1831</sup> T. Lyons, ‘Post-conflict elections and the process of demilitarizing politics: the role of electoral administration’, *Democratization*, 11:3, p. 57. Emphasis added.

<sup>1832</sup> L. Diamond, F. Fukuyama, D. L. Horowitz, M. F. Plattner, ‘Reconsidering the Transition Paradigm’, *Journal of Democracy*, Volume 25, Number 1, January 2014, p. 100.

<sup>1833</sup> E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 4; p. 13.

<sup>1834</sup> ICJ Nicaragua Case, *op. cit.*, § 186. Emphasis added. There is no perfectly consistent practice, there can be an “*individual deviation [which] may not lead to the conclusion that no rule has crystallized*” (A. Cassese, *International Law*, *op. cit.*, p. 120).

<sup>1835</sup> G. H. Fox, ‘International Law and the Entitlement to Democracy After War’, *Global Governance* 9, 2003, pp. 190-191.

thesis. And when norms are (arguably) in the process of germination, this temporal dimension should also be considered. Before dismissing a *ius in interregno* for its lack of effectiveness or even sheer analytical power, one should let some time pass. Only time will confirm whether socialized DIG practices will further ascend into the realm of law.

**POTENTIAL ACQUIESCENCE** – If states find that the overall normative underpinnings of current DIG practices are inadequate or that “fundamentally troubling questions are emerging regarding the value system underpinning the approach of the international community”<sup>1836</sup>, this would provoke the following interrogations. Ought these states to provoke a paradigm shift? Should they overtly distance themselves from the prevalent DIG practices? Would, failing any reaction about practices seemingly garnering sufficient *opinio iuris*, these states risk being viewed as acquiescing to these practices?

These questions need not be addressed in this study. It is clear that, for want of alternatives, the overall project continues at the time of writing<sup>1837</sup>. In other words, as long as the prevailing DIG practices are not seriously challenged, there is perhaps little to halt its transformation into a series of customary rules. These questions are also of lesser relevance if one adopts a (critical) international legal positivist perspective. From that perspective, the context-dependent consequences of DIG practices are relatively irrelevant. To the extent that states in transition, acting through transitional authorities, have committed themselves to and/or implement DIG practices, such conduct accounts for international *practice*, even if the expected results were not achieved. If transitional authorities implement this practice because they are convinced that doing so is legally required, then *opinio iuris* is also ascertained. This *opinio iuris* is further corroborated when states reiterate this, or at least acquiesce.

The following image can be useful to summarize the above observations. To go from one river bank to the other, imagine you would need to take a ferry. Over time, it seems that the ferry prefers a specific route and way of navigating. It has developed a set of ‘rules’ to cross the river, i.e. to operate the transition from one river bank to the other; these ‘rules’ are pattern-based (practice), and respond to a certain conviction that they are to be implemented (*opinio iuris*). It may be that these patterns, even if only basic, are the result of socialization, even if their effectiveness is contested. Observing these rules does not inform us on (a) how deep or wild the waters are on one day or the other (the situation in a particular transitioning state which may facilitate or complicate the transition), (b) the intrinsic quality of the ferry itself (how well the transition procedures are designed, and whether they are efficient), (c) and whether or not the grass is greener on the other side (whether or not the situation after the transition constitutes a general improvement).

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<sup>1836</sup> E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, p. 12.

<sup>1837</sup> *Id.*, p. 13.

## Section C. Operationalizing self-determination as a benchmark of *ius in interregno*

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“at least outside colonial or quasi-colonial contexts, both self-determination and the cognate right to democratic self-government are inherently *non-self-executing*. They are critical standards; they do not themselves determine particular institutions or outcomes. They can be used to disqualify institutions or outcomes which are evidently inconsistent with self-determination or democratic rule, and to justify attempts to remedy them”<sup>1838</sup>.

As a fundamental principle of *ius in interregno*, the principle of internal self-determination serves as a benchmark for evaluating various aspects of DIG. This principle does more than only prohibit internally imposed constitutionalism. It constitutes a polyvalent legal benchmark for assessing various DIG practices and legally sanctions the practices analyzed under Chapter 6. In the following lines we shall explore how the principle of self-determination can be operationalized in relation to DIG. This issue is only explored here (rather than under Chapter 6) as it bridges the study of DIG from a domestic perspective (Parts II & III) and the analysis of DIG from an external perspective (Part IV).

The violation of the principle of internal self-determination, as further specified by the inclusivity requirement, in principle may have legal consequences. Self-determination is key for understanding under which conditions DIG respects international law. As it further specifies this principle, inclusivity serves as a yardstick for assessing whether the various dimensions of DIG are carried out in conformity with international law<sup>1839</sup>. This section briefly focuses on the actors that are in a position to invoke the principle of self-determination in relation to DIG, i.e. the people (1), transitional authorities (2), and external states (3).

### 1. *The perspective of the people*

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The peoples of states are the right-holders of the principle of self-determination, and can of course be affected by DIG. Peoples can invoke the right to self-determination either to oppose an exclusive transition procedure (defensive right of internal self-determination), or to trigger inclusive DIG (offensive right of internal self-determination)<sup>1840</sup>. Such entitlements could be called *ius contra interregnum* or *ius ad interregnum*, respectively. Linked to a scrutiny of the precepts of *ius in interregno*, invoking the principle of self-determination may either (i) weaken or (ii) confirm the legal position of transitional authorities<sup>1841</sup>.

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<sup>1838</sup> J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, p. 66.

<sup>1839</sup> As the emphasis is on the perspective of the actors that are in a position to invoke the principle of self-determination, this section does not distinguish between the objects of self-determination-based vindications (e.g. transitional constitutionmaking; prohibition of internally or externally imposed constitutionalism; ownership of TJ).

<sup>1840</sup> The distinction between defensive & offensive right to self-determination is based on B. Simma (ed.), *The Charter of the United Nations – a commentary*, OUP, 1995, pp. 56 – 72.

<sup>1841</sup> I do not here deal with the question whether the principle of self-determination may be invoked against UN assistance missions or other actors involved in DIG when they seem to trespass this principle by encroaching too much on the transition. See below, Chapter 8.

(1) DEFENSIVE RIGHT OF INTERNAL SELF-DETERMINATION IN CONTEXT OF DIG – First, should transitional authorities refuse to implement an inclusive transition, then arguably the people can invoke this principle against these authorities. In other words, the people may wish to scrutinize whether transitional authorities observe their role in accordance with the inclusivity requirement, and with other *ius in interregno* precepts linked to the principle of self-determination. Even if it is not justiciable, in theory this principle may strengthen arguments in favor of an alteration or even invalidation of the transition.

An alteration of DIG can be envisaged when transitional authorities are still in a position to meaningfully expand DIG to the benefit of actors previously excluded from it, e.g. can ensure that the constitutionmaking process will be inclusive ('progressive implementation of inclusivity'<sup>1842</sup>). If such commitments cannot be made, e.g. if a sectarian group intends to unilaterally impose a new constitutional framework or to perpetuate the interregnum to the profit of its adherents, the people could search to invalidate the transition. In some circumstances, it might even be argued that the foundation of the transition itself is contrary to international law<sup>1843</sup>.

(2) OFFENSIVE RIGHT TO INTERNAL SELF-DETERMINATION IN CONTEXT OF DIG – Second, as a right-holder of the principle of self-determination, the people could invoke the right to internal self-determination to *trigger* a nonconstitutional transition. The AU PSC recognized that the people, if animated by legitimate aspirations, may disobey provisions prohibiting nonconstitutional changes of government by provoking a nonconstitutional transition<sup>1844</sup>.

If it is true that "the beneficiaries of the right of self-determination [...] are not precluded from either declaring or achieving independence without consent of the parent state"<sup>1845</sup>, then, *a fortiori*, it may be argued, the people is not precluded from triggering a nonconstitutional transition *within* their state in order to obtain reparation of a violation of the principle of self-

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<sup>1842</sup> Chapter 6, Section C.2.2.2 and C.2.2.4.

<sup>1843</sup> If an international legal instrument such as a treaty enshrines a transition text that is contrary to the principle of self-determination, there is no doubt as to its unlawfulness under international law (VCLT, art. 53, "Treaties conflicting with a peremptory norm of general international law"). If not, the question is more delicate, and the answer twofold. First, an analogy with unilateral declarations of independence could be made. The ICJ Advisory Opinion on 'the question of the Accordance with international law of the unilateral declaration of independence in respect of Kosovo' notwithstanding, unilateral declarations of independence in some cases can be contrary to international law. UN practice confirms that a unilateral declaration of independence can violate international law: in the case of Rhodesia (1965), "the illegality stemmed from the *breach of the right of self-determination* and from the fact that independence was declared by effective authorities that *were not representative* of the entire people or, indeed, of the majority of the population of the territory whose independence they were declaring". The same is true of South Africa's Bantustans' unilateral declarations (J. Vidmar, 'Conceptualizing Declarations of Independence in International Law', *op. cit.*, pp. 173-174). *Mutatis mutandis*, and depending on a number of factual circumstances, the principle of self-determination may be invoked to legally assess or even (partly) invalidate a domestic act or declaration founding the transition. Second, if such acts or declarations constitute unilateral declarations of States and are contrary to *ius cogens* (which self-determination arguably is), they are null and void (See 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations').

<sup>1844</sup> AU, Peace and Security Council Communiqué PSCPR/COMM (CCLX), 261st Meeting, Ethiopia, 23 February 2011.

<sup>1845</sup> J. Vidmar, 'Conceptualizing Declarations of Independence in International Law', *op. cit.*, p. 168.

determination. According to this line of reasoning, this principle may occasionally frame the very *initiation* of nonconstitutional DIG (stage 2). If the factual circumstances permit it, the people could then argue that they may trigger a nonconstitutional transition in conformity with a *ius in interregno* if this is the only way to obtain reparation for violations of this principle.

The connection between the protection of basic human rights and internal self-determination should briefly be underscored. One way to ‘measure’ the extent to which the principle of internal self-determination is (not) conformed to, is by looking at the human rights record. As this principle and core human rights are interdependent, it would ground a right of resistance against ‘tyranny and oppression’<sup>1846</sup>:

“the realization of the right of self-determination is a *conditio sine qua non* for the effective guarantee and observance of individual human rights. [...] Hence domination or subjugation of a ‘people’ by a State or government constitutes a denial of the fundamental individual human rights of the members of the group. [...] [A]lthough the need for respect of the right of self-determination for the effective exercise of individual human rights cannot be denied, *the opposite is equally true*. [...] It therefore seems impossible to say that internal self-determination could be seen to be respected if fundamental human rights, and in particular the right to life, of the members of a ‘people’ are violated on a widespread scale by the parent State”<sup>1847</sup>.

Exercising the right of resistance against violations of core human rights by triggering DIG may be called *remedial transition*. In addition, when the incumbent resorts to forcible actions depriving the people of their right to self-determination, this situation would arguably entitle the injured people to seek and receive support in triggering a transition<sup>1848</sup>. If external states are then asked to provide assistance in triggering opposition-based DIG, such a request would need to be carefully examined, it shall be concluded under Chapter 9.

## 2. *The perspective of transitional authorities*

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In the pre-transition stage (stage 1), self-determination can be invoked by (nascent, even oppositional) transitional authorities claiming to represent the people. The considerations of the above paragraph about peoples’ entitlements then apply *mutatis mutandis*. During the interregnum (stage 3), the power of transitional authorities to promote their own vision of DIG is however restrained. At the same time, the principle of self-determination may occasionally be invoked to strengthen the power of transitional authorities, e.g. to invalidate laws of the previous regime that violate this principle. Like “an occupant can remove or require the removals of law that discriminate on these bases as violating the principle of internal self-

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<sup>1846</sup> P.H. Kooijmans, *Tolerance, Sovereignty and Self-Determination*, NILR, 1996, p. 211, at p. 213, cited in D. Raič, *Statehood and the Law of Self-determination*, *op. cit.*, p. 239.

<sup>1847</sup> D. Raič, *Statehood and the Law of Self-determination*, *op. cit.*, p. 242.

<sup>1848</sup> *Friendly Relations Declaration*, under principle e: “Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter”.

determination and of the idea that a government must represent the whole population”<sup>1849</sup>, transitional authorities can also remove laws that are contrary to this principle, or, for that matter (and in light of the internationalization of the interim legal order<sup>1850</sup>), any other laws contrary to international law, generally. This constitutes an exception to the conservation principle discussed above<sup>1851</sup>.

### *3. The perspective of external actors (renvoi)*

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DIG in conflict-riven states is increasingly an issue of international concern. The principle of self-determination allows us to legally frame international involvement with DIG. States and IOs closely follow DIG, and the UNSC is often seized of situations relating to transitions. In the next chapter, it will be argued that external states must be respectful of the limits *ratione temporis* and *ratione materiae* to DIG, and must not impede the progressive realization of self-determination during the interregnum. Under Chapter 9, we shall see that, in principle, states are not allowed to coerce other states into DIG by lending support to oppositional transitional authorities.

SELF-DETERMINATION AS AN ACTION-DEPENDENT RIGHT – Only under strictly limited circumstances may states trigger DIG by supporting or empowering an oppositional transitional authority<sup>1852</sup>. These circumstances define when non-forcible intervention in aid of a *ius-in-interregno*-complying oppositional transitional authority may be envisaged. A correct assessment, then, must *also* be based on the analysis of whether (a) the incumbent respects the principle of self-determination; and (b) the oppositional transitional authority (incipiently) abides by this principle. This is how this ‘non-self-executing’ principle “may actually be used as a challenge to non-intervention”<sup>1853</sup>.

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<sup>1849</sup> See J. L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, *op. cit.*, p. 253.

<sup>1850</sup> Chapter 7, Section A.

<sup>1851</sup> Chapter 5, Section B.1.

<sup>1852</sup> These conditions concern a number of procedures to be followed before endorsing oppositional transitional authorities. If the incumbent government violates the principle of self-determination, and, in contrast, the oppositional transitional authority (prospectively) abides by the same principle, this combined circumstance may, *under limited and specific procedural conditions*, justify third endorsement of oppositional transitional authorities. If, on the other hand, it appears that the oppositional transitional authority does not (incipiently) abide with the principle of internal self-determination, this would negatively affect the possibility for third states or organizations to endorse that authority. See Chapter 10, Section B.3.

<sup>1853</sup> J. Salmon, ‘Internal Aspects of the Right to Self-Determination’, in C. Tomuschat, *Modern Law of Self-Determination*, *op. cit.*, p. 331. On p. 332, an overview of state opinions regarding exceptions to the non-intervention principle in name of self-determination follows.

The crisis conditions surrounding the establishment and functioning of transitional authorities seem to be incompatible with the proposition –advanced in the first leg of the hypothesis<sup>1854</sup>– that DIG is governed by a set of rules and obligations. This part of the dissertation however shows that this assumption is inaccurate. The first leg of the hypothesis was indeed –at least partly– confirmed: the above considerations suggest that an international rule of law regulating transitional authorities is currently germinating<sup>1855</sup>. DIG in conflict-riven states, rather than being subjected to the state of nature, is increasingly regulated by international norms, which, in some cases, are sanctioned. Contrary to the view that “the rule of law vacuum [is] evident in so many post-conflict societies”<sup>1856</sup>, DIG is less and less observed in a legal void, despite the fact that, on the domestic plane, the constitutional structure of the state in transition is in abeyance. An international rule of law regulating the conduct of states in transition is currently germinating (hence the partial verification of the first leg of the hypothesis), and can *grosso modo* be defined as follows.

- DIG is limited *ratione temporis* and *ratione materiae* (Chapter 5).
  - Limitations *ratione temporis*: transitional authorities must accept that their powers and mandate are limited. They must direct the transition towards permanent institutions, and then relinquish power. They must exercise these duties on a temporary basis, i.e. with the (proclaimed) aim of being replaced on the basis of new elections or laws. This implies that they are barred from suspending or perpetuating the interim rule, and generally from re-presenting their leaders and/or members after the transition.
  - Limitations *ratione materiae*: The powers of transitional authorities are limited *ratione materiae* because they exercise a fiduciary type of administration. The fiduciary nature of DIG precludes them from carrying out activities that would go beyond their mandate:

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<sup>1854</sup> Pro memoriam, the hypothesis was formulated in two parts, as follows: although international law does not prescribe the exact form of government to be pursued *after* DIG, it does increasingly (a) regulate how transitional authorities must pursue DIG, and (b) define the conditions under which third states and organizations may impact or engage with DIG.

<sup>1855</sup> For the conception of ‘rule of law’ used in this thesis, refer to Introduction, Section B.1.

<sup>1856</sup> ‘The rule of law and transitional justice in conflict and post-conflict societies’, S/2004/616 dd. 23 August 2004. Rule of law support to post-conflict countries should be preceded by and based upon a thorough analysis of what the state of the law is during transitional periods. This is an important observation, as the UNSC has “mandated support for the rule of law in many peacekeeping and political missions, including in Afghanistan, Burundi, the Central African Republic, Chad, Cote d’Ivoire, the Democratic Republic of the Congo, Guinea-Bissau, Haiti, Iraq, Liberia, Sierra Leone, South Sudan, the Sudan and Timor-Leste. There are currently 18 Security Council mission mandates that include strengthening the rule of law”, E. Selous, G. Bassu, ‘The Rule of Law and the United Nations’ in J. R. Silkenat, J. E. Hickey Jr, and P. D. Barenboim, eds., *The Legal Doctrines of the Rule of Law and the Legal State*, New York, Springer, 2014, p. 357.

- Transitional authorities prepare for the future without fully predefining it.
  - They respect state continuity both internally (vis-à-vis their own citizens) and externally (vis-à-vis other international legal persons, and foreign investors).
  - They concentrate on managing the present, including the transition procedure. The final responsibility for administering the country during the transition lies with them even if they receive extensive assistance from international actors.
- DIG must be carried out in an inclusive way and in conformity with the principle of internal self-determination. In addition, transitional authorities commit to a form of TJ – now a standard in conflict-riven states– and, subject to a few limitations, may choose how to implement TJ (Chapter 6).
  - DIG is increasingly characterized by the internationalization of the interim legal order<sup>1857</sup>, through direct references to, and application of, international law standards. From the domestic and international sources cited above, it flows that transitional authorities consider that they must act in accordance with international law (including human rights law, humanitarian law and international criminal law)<sup>1858</sup>. They pledge to let DIG as well as its outcome be guided by international law (Chapter 7).

Together, these duties form the benchmark against which the activities of transitional authorities can be legally assessed. Transitional authorities must respect these duties to the extent they exercise effective power, which also depends on the stage of the transition. The actual compliance with these duties, or the commitment to abide by them during the early stages of the transition, is a factor to be taken into account by third states and IOs that wish to deal with them; this point will be developed under Part IV, to which we turn now.

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<sup>1857</sup> Introduction, Section A.4. *Pro memoriam*: the internationalization of the interregnum refers to (a) the international legal references abounding in transition instruments, (b) international assistance during the transition (the ‘assistance model’ coined by Saul), and/or (c) the international context in which the transition is triggered (e.g. an international conference or internationally brokered negotiations).

<sup>1858</sup> Their paying deference to international law stands in sharp contrast to other organizations –take the Taliban in Afghanistan or the Warlords in Somalia– often overtly distancing themselves from such norms. Regarding the former, Wolfrum and Philipp discuss the non-recognition of the Taliban in spite of its effective control, and observe the specific criteria that have inspired the non-recognition, i.e. “that they did not adhere to international obligations entered into by Afghanistan” because they did not turn over Bin Laden (in spite of a UNSC resolution to that effect) and because they violated International Human Rights Law”. These authors consider that “the effective control of a country is not sufficient for recognition but that such effective control must be accompanied by a commitment to the most fundamental rules of the community of States.” See R. Wolfrum, C. Philipp, ‘The Status of the Taliban: Their Obligations and Rights under International Law’, *op. cit.*, pp. 559-601.



## PART IV – EXTERNAL INFLUENCE ON DOMESTIC INTERIM GOVERNANCE

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With but few exceptions<sup>1859</sup>, external actors today play a significant role in DIG. As a result, “the concern for the constitutional character of a country has become an important element of international politics”<sup>1860</sup>. This point was emphasized from the outset, when we observed that the peace-through-transition paradigm is strongly rooted in the international community. In Chapter 1 we discussed the international influence on modern DIG, as well as the increasing predominance of the assistance model<sup>1861</sup>. More generally, “external actors [...] have become [...] supervisors of all aspects of postwar transitions”<sup>1862</sup>. Although external influences on DIG and constitutionmaking processes have always existed, assistance to DIG has intensified<sup>1863</sup>.

This part of the thesis concentrates on the position of external states and IOs vis-à-vis transitional authorities. It challenges the assumption that international law *de lege lata*, or at least the law as it is currently developing, could not be informative as to how external assistance to DIG must be pursued. The literature has predominantly concentrated on the question of how belligerent occupation curtails the right of peoples to self-determination. The issue as to whether this right can be affected by external actors *independently* of any occupation has attracted less attention in scholarship<sup>1864</sup>. This issue is crucial, especially since the law of occupation has a limited relevance for *domestic* interim governance<sup>1865</sup>, regardless of whether DIG is accompanied by belligerent occupation.

This part of the thesis is subdivided in three chapters. Chapter 8 analyses how external assistance to DIG is legally circumscribed. It mainly deals with *consensual* transition procedures. Both the limits of third party assistance to DIG generally, and to (interim)

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<sup>1859</sup> In Egypt, except for the monitoring of elections international support for DIG was not sought.

<sup>1860</sup> U. K. Preuss, 'Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization', *op. cit.*, p. 493.

<sup>1861</sup> Chapter 1, Section B.

<sup>1862</sup> G. H. Fox, 'International Law and the Entitlement to Democracy After War', *Global Governance* 9 (2003), p. 179.

<sup>1863</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 427.

<sup>1864</sup> This thesis is based on cases of DIG both in the presence and absence of belligerent occupation. *Ius in interregno* is not incompatible with the law of belligerent occupation (as some reasoning by analogy under Part III of the thesis indicated). For Youssef, belligerent occupation and state reconstruction in accordance with the principle of self-determination seem to be incompatible, e.g. in Iraq: “*la construction de l'Etat de droit [...] n'est possible qu'après le retrait des troupes étrangères afin de permettre aux Irakiens de disposer vraiment d'eux-mêmes*” (N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 98). This thesis does not find that there such incompatibility is *necessarily* present. Blount, Elkins and Ginsburg, for example, note that in the context of belligerent occupation, it may be “that the coercive relationship between occupier and occupied plays out in more subtle ways with respect to constitutional design”. J. Blount, Z. Elkins, T. Ginsburg, 'Does the Process of Constitution-Making Matter?', CUP, 2012, p. 49.

<sup>1865</sup> K. E. Boon, 'Obligations of the New Occupier: The Contours of Jus Post Bellum', *op. cit.*, p. 64: it “is of limited applicability to modern war-to-peace situations [because] it does not bind IOs”. Cf. also P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 451: “in the few instances where occupation law actually does apply, it often has a minimal impact”.

constitution-making specifically are examined. Chapter 9 analyzes under which conditions states are allowed to engage with opposition-based transitional authorities. It focuses in particular on the *empowerment* of oppositional transitional authorities. Chapter 10 examines whether the external empowerment of oppositional transitional authorities is permissible when the incumbent violates *ius cogens*.

## CHAPTER 8. LIMITS TO INVOLVEMENT WITH CONSENSUAL DOMESTIC INTERIM GOVERNANCE

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What are the limits to external assistance to DIG and interim constitutionmaking? This chapter addresses this question, and concentrates on the foundation of the transition (stage 2) and the transition procedure itself (stage 3).

**INTERNATIONALIZATION DIG REGARDLESS OF POLICY PREFERENCES** – From a policy perspective, commentators regularly advocate a greater involvement by the international community with DIG. For Papagianni, “the international community has an important role to play in assisting powersharing governments to manage their countries’ political transition”<sup>1866</sup>. For some, this policy observation could be extended to the international community’s role in DIG generally, also when it departs from the powersharing model. For Samuels, for instance, the international community should reinforce its monitoring role during transitions: “the international community, and particularly the regional actors, should take a *more proactive approach* to requiring that any new government act in accordance with its constitutional obligations”<sup>1867</sup>. In a sense, this issue has become a moot point. As discussed in the introduction to the thesis, it seems that external involvement with DIG, whether commendable or not, has become commonplace.

**RESPECT OF CORE IUS IN INTERREGNO BY EXTERNAL ACTORS** – In light of the above observation, the question as to whether or how the international community should expand its role in DIG is to receive a different emphasis. From a legal perspective, the relevant enquiry is what external actors, when providing assistance to DIG, are legally *prevented* from doing under the principle of self-determination (in its ‘negative’ component, i.e. seen as a right of non-intervention)<sup>1868</sup>, and under a *ius in interregno* generally. The answer to this question, as elaborated on in this chapter, is that external actors assisting DIG must respect, and refrain from obstructing, the obligations incumbent on transitional authorities. Before developing this argument, we shall briefly define a number of concepts that are central to this chapter.

### Section A. Concepts of assistance and consent

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In this introductory section, we shall clarify two concepts that will be used throughout this chapter, assistance (1) and consent (2), before outlining the chapter argument (3).

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<sup>1866</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, pp. 42-54.

<sup>1867</sup> K. Samuels, ‘Postwar constitution building’ in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 175. Emphasis added.

<sup>1868</sup> About the link between the right to self-determination and the right to non-intervention, cf. B. Conforti, ‘The Principle of Non-Intervention’, *op. cit.* Cf. also J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, pp. 40-41.

## 1. Defining assistance

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In this chapter, assistance to DIG is defined broadly; ranging from political and financial support to transitional authorities, to (so-called) technical support in drafting processes, to rule-of-law and statebuilding assistance, and to constitutional assistance. Arguably, in order to reduce the risk of constitutional geopolitics, “external influence should [...] be channeled through multilateral institutions”, Dann argues<sup>1869</sup>. Ghai and Galli also find that intervention by external parties in constitutionbuilding processes “should be on a multilateral basis”<sup>1870</sup>. This chapter nevertheless adopts the perspective of individual states; the main assumption is thus that assistance is provided by individual states. This approach will allow us to define the minimum legal constraints on external assistance in DIG

In principle, the legal restraints to DIG are, *mutatis mutandis*, applicable to groups of states or IOs. But because the main focus is on the role of outside states, only a few considerations about IOs will be included. In addition, and for reasons elucidated under the previous part of the thesis<sup>1871</sup>, occasionally reference will be made to deontological rules e.g. for mediators (acting on behalf of states or IOs). This chapter therefore uses the neutral terminology of ‘external actors’.

FORMS OF ASSISTANCE TO DIG – Assistance to DIG can take various forms, which are often dependent on the *actor* offering the assistance. The conclusion to Part I offers an overview of the range of external assistance providers<sup>1872</sup>. Further, a distinction can also be made on the basis of the *form* of assistance being offered: through normative activity, through advisory activity, through mediation, through education, and through promotion of standards<sup>1873</sup>. In relation to that, one can examine the *specific type* of assistance offered. External actors can offer technical assistance: providing a venue for dialogue, sharing expertise, facilitating the exchange of various experiences, providing training or finance, promoting peer group communication, etc.<sup>1874</sup>. They can also try to influence the substantive aspects of DIG. In addition, a distinction can be made on the basis of the *degree* of external assistance: is the degree of influence total, partial or only marginal<sup>1875</sup>? Lastly, forms of assistance should also be distinguished depending on *when* during the interregnum it is offered. Thus, external support can impact the constituent transition instrument, the exercise of public powers during

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<sup>1869</sup> *Id.*, p. 461.

<sup>1870</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, IDEA, 2006, p. 10.

<sup>1871</sup> Part III, Introductory caveats, 2.

<sup>1872</sup> Part I, Conclusion, 2.2.

<sup>1873</sup> G. Malinverni, ‘The Venice Commission of the Council of Europe’, *The International Influences of National Constitutional Law in States in Transition*, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 96, 2002, p. 390.

<sup>1874</sup> IDEA, *From Authoritarian Rule to Democratic Governance: Learning from Political Leaders*, *op. cit.*, pp. 37-39. For example, “the UN, United States, EU, and some EU member states also offered technical expertise to support the NDC and the constitutional process”. P. B. Holzapfel, ‘Yemen’s Transition Process: Between Fragmentation and Transformation’, *op. cit.*, p. 16.

<sup>1875</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 428.

the interregnum, transitional constitutionmaking – these activities all take place at different intervals.

CONSTITUTIONAL ASPECTS OF ASSISTANCE TO DIG – Constitutional assistance at the outset of *and* during the interregnum is a crucial form of assistance to DIG. We shall see in this chapter that at least two constitutional components of DIG may benefit from external assistance. First, the *foundation* of the transition, i.e. the drafting and entry into force of the supraconstitutional constituent transition instrument<sup>1876</sup>. Second, transitional constitutionmaking during the interregnum, i.e. the *constitutionmaking process* triggered by the transition in view of establishing the post-transition constitutional framework<sup>1877</sup>.

NEUTRALITY INT'L LAW VIS-A-VIS DOMESTIC NONCONSTITUTIONALITY – We have already seen, under Chapter 4, that international law generally adopts a position of neutrality vis-à-vis domestic nonconstitutionality. This observation is relevant for DIG based on transition instruments having (only or primarily) a domestic legal nature, like interim constitutions or unilateral declarations. DIG can also be triggered by instruments of an international legal nature, notably treaties, which can be either internationally lawful (e.g. a validly concluded treaty) or internationally unlawful (e.g. a treaty vitiated by fraud, corruption, coercion or a violation of *ius cogens*). Thus, DIG is either based on nonconstitutional domestic instruments, regarded as neutral under international law, or on nonconstitutional international legal instruments, which are regarded either as lawful or unlawful under international law.

EXTERNAL ASSISTANCE TO TRANSITIONAL CONSTITUTIONMAKING – Our enquiry here concentrates on the legality of external assistance to a particular form of constitutionmaking, i.e. transitional or interim constitutionmaking. The constitutionmaking process on the occasion of DIG can refer to two kinds of processes: (a) those pertaining to (constituent) transition instruments which regulate the course of the interregnum (e.g. the Iraqi Transitional Administration Law) or (b) those pertaining to the transition or constitutional texts<sup>1878</sup> which regulate the post-transition stage (e.g. the Iraqi constitutionmaking process).

Especially in the former case, assistance to interim constitutionmaking does not always concern constitutional documents *sensu stricto*. We have seen above that transition instruments take various forms yet fulfill the triple function of transitional constitutionalism, i.e. peace through transition, self-regulation and constitutional reconfiguration<sup>1879</sup>. Interim constitutionmaking can generate various documents including peace agreements or declarations that aim at breaking with the previous regime. The exact denomination of the transition instruments is irrelevant as long as they fulfill these functions and pursue this purpose.

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<sup>1876</sup> Chapter 3.

<sup>1877</sup> Chapter 6.

<sup>1878</sup> Chapter 6, Section B.3. Table 11.2, c. *α*.

<sup>1879</sup> Chapter 3, Section B.2.

## 2. Defining consent

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The validity of consent has frequently been examined in relation to the use of force<sup>1880</sup>. Premised on the idea that, for the purposes of legal analysis, the civilian and forcible/military aspects of DIG are severable<sup>1881</sup>, this thesis is not concerned with consent to the use of force. But validity of consent plays a crucial role in *any* area in which the principle of non-intervention in domestic affairs might be relevant. The reason for this is that

“valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent”<sup>1882</sup>.

The reconstitutionalization process of a state pertains to the heart of its *domaine réservé*. The issue of consent to external assistance to DIG is therefore crucial. When transitional authorities agree that the very catalyzer of DIG (i.e. the constituent transitional instrument) be shaped under external assistance, there is no doubt that such consent must be valid. Actually, consent to the internationalization of interim constituent power should not be lightly presumed, precisely because this matter touches upon the heart of a state’s *domaine réservé*.

REPRESENTATIVE CONSENT (INVITATION USE OF FORCE) – In case of duality of government or of a government of national unity, consent to the use of force must arguably be given by both governmental bodies or by all governmental factions, respectively. If doubts as to the legitimate representative of the state persist, “international law [...] imposes a duty of abstention”, Corten argues<sup>1883</sup>. With regard to inclusive transitional governments that embrace former warring parties, Nolte observes: “transition governments which, following a peace agreement, are composed of all important parties to an internal conflict, cannot, as a general rule, invite foreign troops without the *consent of its main component political forces*. Invitations which are issued under duress cannot justify a military intervention”<sup>1884</sup>. The

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<sup>1880</sup> Cf. for example K. Bannelier, T. Christakis, ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’, *Leiden Journal of International Law*, Issue 4, Vol. 26, 2013, pp. 855-874. This article analyzes the legality of a military intervention *at the request of the transitional authorities of Mali* under interim president Dioncounda Traoré. The request was posterior to the formation of the Transitional Government of National Unity on 21 August 2012. This significantly limits the chance that there was an external intervention in an internal strife in violation of the principle of self-determination. Bannelier and Christakis add to that that the interim government was internationally recognized (*id.*, p. 865).

<sup>1881</sup> Introduction, Section B.1.

<sup>1882</sup> DASR, art. 20.

<sup>1883</sup> O. Corten, *The Law Against War – The Prohibition on the Use of Force in Contemporary International Law*, Hart Publishing, Portland, 2012, p. 280.

<sup>1884</sup> G. Nolte, ‘Intervention by Invitation’, MPEPIL. In the same sense, cf. K. Bannelier, T. Christakis, ‘Under the UN Security Council’s Watchful Eyes: Military Intervention by Invitation in the Malian Conflict’, *op. cit.* The topic of the use of force consented to by transitional authorities is also relevant in relation to Yemen’s consent to the US waging a drone air war on its territory against al Qaeda (“for the first time on June 27th last year, without mincing words, the Yemeni Foreign Minister Abu Bakr al - Kurbi admitted that Yemen has explicitly requested the intervention of the U.S. drones for “special cases” and hit certain strategic points of al – Qaeda”, N. Perazzo, ‘Between Fragile Transition and war in the shadows’, 5 December 2012. It also raises questions with regard to Syria’s invitation to Russia during the Autumn of 2015 to intervene in the former’s civil strife.

ultimate justification for this approach is that, under the principle of self-determination, the “people and not the government of a State here enjoy a right which can be considered infringed when a foreign State intervenes to favour one or other party in an internal political conflict”<sup>1885</sup>.

REPRESENTATIVE CONSENT (CONSENT TO ASSISTANCE TO TRANSITIONAL CONSTITUTIONMAKING) – The same reasoning applies, *mutatis mutandis*, in the realm of DIG. Since DIG must be pursued in conformity with the principle of self-determination, any request for assistance from states or IOs may only be accepted if it emanates from transitional authorities that are truly inclusive and representative<sup>1886</sup>, or at least seriously commit to progressively expanding representation and participation during the interregnum. The same concern explains why transitional authorities may only be recognized if this is not at variance with the principle of self-determination. This excludes the recognition of an unrepresentative transitional authority<sup>1887</sup>. This assertion self-evidently calls for extra scrutiny when transitional authorities have oppositional origins, an issue we shall consider under Chapter 9. In the present chapter, valid consent plays a role at various stages of the transition:

- Consent to be bound by an externally designed constituent transition instrument (e.g. the 2001 Bonn Agreement);
- Consent to receiving assistance for observing public powers during the interregnum;
- Consent to the internationalization of the constitutionmaking process, which will affect the post-transition constitutional structure.

### 3. Chapter argument & structure

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CHAPTER ARGUMENT: EXTERNAL ACTORS MUST AVOID MISALIGNMENT WITH CORE IUS IN INTERREGNO – In a nutshell, the argument of this chapter is the following. External states are bound to respect the obligations incumbent on transitional authorities during the interregnum. These obligations, unveiled under Part III of the thesis, are *opposable* to external states. Where international law

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<sup>1885</sup> *Id.*, p. 289.

<sup>1886</sup> In the same sense: “[t]he law of self-determination is argued to be useful because it affords international actors a high level of discretion to determine when a request for their involvement is a sufficient reflection of the will of the people. However, it is also contended that the sustainability of this legal framework rests on international actors exercising their discretion responsibly. This entails refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people, unless there is strong contextual justification for such a course of action”, M. Saul, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement', *op. cit.*, p. 168.

<sup>1887</sup> Saul has argued that it was not in the interest of stability that the international community had recognized the Somali Transitional Federal Government, created in 2004 during the IGAD-led Somalia National Reconciliation Conference. Instead, “the responsible approach would be, as had generally been the case up until October 2006, for international actors to prioritize the political principle of self-determination, delay extensive intervention, and work to facilitate negotiation between the two sides in order to produce a government with a stronger claim to be an embodiment of the will of the people”, M. Saul, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement', *op. cit.*, p. 168.

is rather neutral vis-à-vis domestic nonconstitutionality (as discussed under Chapter 3<sup>1888</sup>), this position of neutrality is not replicated vis-à-vis DIG. In other words, even if DIG originates from nonconstitutionality, not all forms of external assistance to DIG are permitted under international law.

CONSENT TO ASSISTANCE TO DIG – It is possible that, at the very start of the transition, transitional authorities *consent* to foreign states assisting them in reconstructing the country during the interregnum. For Saul, “a consensual basis for involvement has a valuable role. It allows states on both sides of the debate to support international involvement in post-conflict reconstruction, because it provides a platform to claim consistency with sovereignty *and thereby to avoid discussion of the permissible level of interference*”<sup>1889</sup>. While it is difficult to disagree with the first proposition of this citation, the second proposition (presented in italics) can surely be contested.

CONSENT TO ASSISTANCE TO DIG DOES NOT EXHAUST RELEVANCE OF IUS IN INTERREGNO – Consent-based international involvement with DIG is preferable, also from a legal vantage point. Yet, even if initial consent were given, this would not absolve the assisting state of all international legal obligations. *To the extent that* legally sanctioned practices *progressively* amount to distinctive legal norms which, for ease of reference, have been regrouped under the heading of a *ius in interregno*, then this body of norms, even if rudimentary, also applies beyond the moment of initial consent (if there is consent). In short, not all forms of external assistance are permissible, even if initial consent was given.

In other words, even if the receiving state expresses consent to, and, as a matter of principle, accepts external assistance during the interregnum, this would not render all forms of subsequent external assistance permissible under international law. Similarly, even if DIG starts on the basis of a transition instrument deemed lawful under domestic or international law, this would not render all forms of assistance to DIG *ipso facto* lawful. The reverse question –i.e. whether the lack of initial consent to external assistance / the unlawful external imposition of a transition instrument precludes the lawfulness of any subsequent conduct by that external actor– will only be referred to in passing.

Under the preceding part of the thesis, we saw that transitional authorities must pursue DIG in accordance with the principle of internal self-determination<sup>1890</sup>, and a number of other, more specific precepts grouped under the term *ius in interregno*. In this chapter, it is submitted that, because the constitutional and institutional structures of the state are in limbo during the interregnum, compliance with a *ius in interregno* remains relevant *beyond* the moment of consent. What is more, as suggested under Chapter 4<sup>1891</sup>, compliance with the principle of self-determination then calls for heightened scrutiny: during the interregnum, the institutional

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<sup>1888</sup> Chapter 3, Section A.2.

<sup>1889</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 64.

<sup>1890</sup> Chapter 6; Chapter 7.

<sup>1891</sup> Chapter 4, Section A.2.6.

and constitutional structures of the state are held in abeyance, thus rendering the state fragile, which makes the threshold for violating this principle easier to reach.

INT'L LEGAL BASIS FOR RESPECT OF CORE IUS IN INTERREGNO BY EXTERNAL ACTORS – On which legal basis is a *ius in interregno* opposable to other states? Under Chapter 7, the internationalization of the interim legal order was already discussed. Transitional authorities systematically commit to the legal internationalization of the transitional legal order. In light of the increased (and, arguably, residual) role of international law during the interregnum, DIG must not be seen as a state of exception, and cannot be pursued in a legal vacuum. The role of international law as the residual law for DIG also applies to external actors, in the following respect:

- Transitional authorities' compliance with international law is a factor to be taken into account when evaluating the legality of international support to oppositional transitional authorities (This issue will be discussed under Chapter 9);
- External actors can demand that transitional authorities abide by their self-imposed obligations or by international law generally<sup>1892</sup>;
- External actors cannot act at variance with the international obligations incumbent on transitional authorities.

Only the last point is of interest for this chapter. **To the extent that** treaties, unilateral declarations, UNSC resolutions and customary rules pertaining to DIG have entered the realm of international law, **external actors must respect these norms grouped under the chapeau concept of *ius in interregno*. If external actors do not at least respect the core of a *ius in interregno*, they risk engaging their responsibility** for aiding and assisting or even directing and controlling, –depending on the degree of their involvement– the transitional authority in violating a *ius in interregno*. The legal basis of this reasoning will be elucidated further below<sup>1893</sup>.

ANALOGY PARADOX ITA & DIG – To a lesser degree and under more subtle forms, DIG can suffer from the same contradictions that affect ITA. The paradox inherent to ITA was already mentioned under Chapter 5<sup>1894</sup>. In essence, it concerns the conceptual discrepancy between the goal pursued –democracy, self-determination– and the means of reaching this goal –unelected rule, encroachment on sovereignty–. Carati describes that ITA “envisages the respect of the state sovereignty and self-determination, on the other hand, it requires a prolonged and forcible interference in its domestic affairs”<sup>1895</sup>. This paradox might materialize, if to a lesser

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<sup>1892</sup> Thus, the Venice Commission encouraged the Tunisian National Constituent Assembly to recognize the superior status of international treaties, and to refer in the new constitution's preamble to international general principles and international custom. Opinion 733/2013 on the final draft constitution of the Republic of Tunisia (2013), §§ 38 – 40.

<sup>1893</sup> Chapter 8, Section C.

<sup>1894</sup> Chapter 5, Summary.

<sup>1895</sup> A. Carati, 'Intervention and Promotion of Democracy. The Paradoxes of External Democratization and the Power-Sharing Between International Officials and Local Political Leaders', *op. cit.*, p. 136. On p. 138, he adds that “in order to develop a democratic and independent regime the sovereignty has to be infringed to build a sovereign state”.

degree and with more subtlety, in the realm of international assistance to DIG; especially when such assistance exceeds the agreed boundaries. For example, states and IOs can exercise significant influence on DIG, which, in some cases, may amount to interference in a state's domestic affairs, thus a violation of its sovereignty. For Saul,

“actors with authority in the aftermath of war that are concerned about the *perceived* consistency of a reconstruction process with the notion of self-determination at stake should seek to maximize the quantity and quality of popular involvement across all dimensions of governance”<sup>1896</sup>.

This issue is not a matter of political *perception* alone, we saw in Part III. Consistency with self-determination during DIG is also a legal matter. This situation results in a number of *prohibitions* for external actors engaged in DIG, as discussed in the following section.

## Section B. Prohibitions applicable to external actors

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In order to be internationally lawful, DIG must conform to, or at least aim at progressively realizing, the principle of internal self-determination. Under art. 2 §4 of the UN Charter, states must refrain from all activities that would be inconsistent with the purposes of the UN, including the development of friendly relations based on the respect of self-determination<sup>1897</sup>. The perusal of practice under Part III demonstrated the current relevance of the principle of self-determination, in its internal variant, through DIG: states must not hinder the realization of *internal* self-determination during the *whole period of the interregnum*.

The realization of self-determination depends greatly on how DIG is pursued, and how the transition state is reconstitutionalized, as we saw under part III of the thesis. These modalities can also be influenced by external actors. Such actors are prevented from impeding the realization of internal self-determination during the whole interregnum.

As to the constitutional aspects of a transition, two issues must be differentiated. First, how does international law evaluate or regulate, if at all, the nonconstitutionality (either unconstitutionality or supraconstitutionality<sup>1898</sup>) that characterizes the beginning of the transition (stage 2 of the transition). Second, how does international law relate to and evaluate external assistance during DIG, including assistance to nonconstitutional interim constitutionmaking (stage 3 of the transition). Both issues will be dealt with in this section, alongside the following aspects of DIG:

- The foundation of DIG: prohibition on imposing constituent transition instruments (1);

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<sup>1896</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 38.

<sup>1897</sup> UN Charter, art. 1§2.

<sup>1898</sup> Chapter 3, Section A.1.

- The provisional nature of DIG: prohibition on violating the limits *ratione temporis* of the interregnum (2);
- The substantive limits to DIG: prohibition on violating the limits *ratione materiae* of the interregnum (3);
- The inclusivity of DIG: prohibition on favoring particular groups during the interregnum (4);
- The domestic ownership of transitional constitutionmaking: prohibition on externally imposing transitional constitutionmaking (5);
- The domestic ownership of TJ: prohibition on externally imposing modes of TJ (6).

As illustrated in the following table, these prohibitions are relevant at distinct stages of the transition process (this also justifies the distinction between the first and the fifth prohibition):

**TABLE 13: prohibitions applicable to external actors (per stage)**

Stage 1. Pre-transition	Stage 2. Foundation of transition	Stage 3. Transition procedure	Stage 4. Post-transition
Prohibition of empowerment of <i>oppositional</i> transitional authorities, save under strict conditions (cf. Chapter 9).	1. Prohibition on imposing constituent transition instruments / prohibition on creating a <i>consensual</i> transitional authority	2. Prohibition on violating limits <i>ratione temporis</i> to DIG.  3. Prohibition on violating limits <i>ratione materiae</i> to DIG.  - prohibition on leaving definitive imprint on post-transition order - respect for state continuity - respect transitional authorities' primary responsibility for DIG  4. Prohibition on favoring groups during interregnum or otherwise undermine inclusivity  5. Prohibition on externally imposed transitional constitutionmaking	6. Acceptance of domestically defined TJ

In the following subsections, each of these prohibitions will be addressed in turn.

### 1. Prohibition on instigating domestic interim governance

In light of the principle of self-determination, states or IOs must not impose any form of DIG on other states. Any involvement with the interregnum must in principle be consent-based. Two consequences flow from this.

1. During the *pre-transition stage*, external actors must not empower *oppositional* transitional authorities so as to pre-define the course of DIG;

2. When coming close to the moment of *founding* DIG,
  - a. External actors must not impose constituent transition instruments;
  - b. External actors must not prematurely recognize or artificially create transitional authorities in view of truncating consent<sup>1899</sup>.

The first issue concerns the external empowerment of oppositional transitional authorities. The second issue concerns the external imposition of constituent transition instruments or the external creation of transitional authorities. The first issue will be dealt with under Chapters 9 & 10, while the second issue will be dealt with in the present chapter and subsection. This subsection thus deals with the external instigation and framework-setting of consensual DIG.

Transition instruments are often shaped in international contexts. This is of course true of international conventions but the same observation often applies to (especially internationalized<sup>1900</sup>) intrastate agreements and even domestic laws, acts or constitutions. In the latter case, one speaks of ‘transnational constitutions’, which “are often clearly shaped by external participants, and may require further external participants as guarantors to effectuate the transition”<sup>1901</sup>.

If constituent transition instruments are negotiated and elaborated in international settings, the transition state must consent to the possible internationalization of interim constituent power. This mitigates the risk that DIG is considered as a product of coercion. From a legal perspective, the consent to the internationalization of interim constituent power prevents the constituent transition instrument from being invalidated *ex post*, which, as we shall see, is (at least theoretically) possible under international law. Consent to the internationalization of interim constituent power must be *valid*. This triggers the question of who is authorized to bind the state during the interregnum. In order to gauge the validity of consent, one must consider, in the words of the ILC,

“whether the agent or person who gave the consent was authorized to do so on behalf of the State (and if not, whether the lack of that authority was known or ought to have been known to the acting State), or whether the consent was vitiated by coercion or some other factor”<sup>1902</sup>.

**RESPONSIBILITY EXTERNAL ACTORS TO VERIFY THAT T.A. IS INCLUSIVE** – In light of the core of a *ius in interregno* unveiled under Part III of the thesis, valid consent may only emanate from

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<sup>1899</sup> M. Saul, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement', *op. cit.*, p. 198. In Cambodia, “international efforts *facilitated* the bringing together of the two main factions to form a single entity, the Supreme National Council, *which was created solely for the purpose of consenting to the international involvement*”. Emphasis added.

<sup>1900</sup> Chapter 3, Section C.2. *Pro memoriam*: (a) the signatories are subjects of international law (international personality); (b) they have been endorsed by other subjects of international law (international endorsement by co-signature); (c) the intrastate agreements contain various references to international law (international law referencing); (d) they have consistently been invoked or referred to in binding UNSC resolutions (UNSC invocation); (e) their implementation is internationally monitored (international monitoring).

<sup>1901</sup> V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1256.

<sup>1902</sup> DASR, Commentaries to art. 20. See also, in the domain of the law of treaties, VCLT, art. 7.

transitional authorities that are inclusive – or at least credibly and meaningfully committed to inclusivity. External actors searching to assist transitional authorities must control this:

“The law of self-determination is argued to be useful because it affords international actors a high level of discretion to determine when a request for their involvement is a sufficient reflection of the will of the people. However, it is also contended that the *sustainability of this legal framework rests on international actors exercising their discretion responsibly*. This entails *refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people*”<sup>1903</sup>.

**PROHIBITION IMPOSED INTERIM POLITY (LITERATURE)** – As external assistance to DIG, generally, must be consent-based, any form of externally imposed interim polity is prohibited. Any imposed post-conflict transition would be incompatible with the principle of self-determination<sup>1904</sup>. This has deontological consequences for mediators acting on behalf of outside states. Rather than being “facilitators of a dialogue and negotiation process in a politically and legally set framework”, these mediators often *dominate* the process by *predetermining* the rules of DIG<sup>1905</sup>. When offering their assistance to DIG, mediators should thus be sensible to the prohibition on imposed interim polity.

**EXAMPLES & COUNTEREXAMPLES** –Several commentators have seriously questioned whether, in a number of countries, DIG resulted from genuinely domestic interim polities or, on the contrary, derived from externally imposed constituent transition instruments. The following illustrations, relating to Afghanistan, Burundi, Iraq, and Somalia, can be skimmed by the reader who is only interested in the recapitulative part, after paragraph 4.

**1. AFGHANISTAN (BONN AGREEMENT): THREATS & ELITE CONSENSUS** – The Bonn Conference produced the 2001 Bonn Agreement regulating DIG in Afghanistan. During this conference, Rabbani’s government consented to the transfer of power<sup>1906</sup>. But the withdrawal of former Afghan king Mohammed Zahir Shah was obtained under pressure<sup>1907</sup>, and the US ambassador “threatened that the US would hold accountable anyone who opposed the peace process”<sup>1908</sup>. McCool observes that “the Bonn Conference was, in effect, a gathering of some interested groups which set out to allocate positions of power and determine a sequence of events and timeline for this to take place”<sup>1909</sup>. Papagianni confirms this<sup>1910</sup>.

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<sup>1903</sup> M. Saul, 'Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement', *op. cit.*, p. 168.

<sup>1904</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 70: “an imposed governance arrangement would be in breach [of the right to self-determination], as this would hinder enjoyment of all of the elements that are covered in the standard definition of the right”.

<sup>1905</sup> C. Daase, ‘The Law of the Peacemaker: The Role of Mediators in Peace Negotiations and Lawmaking’, *Cambridge Journal of International and Comparative Law* (1)3, 2012, p. 109. Emphasis added.

<sup>1906</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 160: “Rabbani’s government was represented at Bonn and consented to the outcome (the official transfer of power was implemented on 22 December through Rabbani signing a document at the inauguration of Karzai)”.

<sup>1907</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, p. 422.

<sup>1908</sup> *Id.*, pp. 411-412.

<sup>1909</sup> C. McCool, ‘The role of constitution-building processes in democratization’, *op. cit.*, pp. 7-8.

**2. BURUNDI (ARUSHA AGREEMENT): POLITICAL PRESSURE** – In Burundi, the Arusha Agreement was also concluded under pressure. For Vandeginste, “international pressure (and third party enforcement) [which] has decisively contributed to the design and initial implementation of the power-sharing arrangement”<sup>1911</sup>. The fact that the Arusha Agreement may have been produced under pressure is not insignificant considering that this agreement “clearly shaped the framework for the continued mediation of the conflict *and in the end decisively shaped Burundi’s current Constitution*”<sup>1912</sup>.

**3. IRAQ (‘TAL’): EXTERNAL IMPOSITION** – In Iraq, the constituent transition instrument, the 2004 TAL, was produced both under internal and external pressure. The internal imposition was discussed earlier<sup>1913</sup>. The external imposition results from the fact that the TAL was promulgated during US occupation, and “emanated from negotiations between the CPA and the IGC: an occupying power and its appointed body”<sup>1914</sup>. As this law was “partly drafted and officially approved and signed into law by their occupiers”<sup>1915</sup>, it is widely considered as a product of US administration. In addition, the drafting discussions were carried out in secrecy<sup>1916</sup>. As a consequence, the TAL was “resisted by the Iraqi people because it reflected the will of the occupying power”<sup>1917</sup>. It was not explicitly endorsed by the UN either<sup>1918</sup>. “*C’est une transition imposée, hasardeuse et mal menée*”, Youssef summarizes<sup>1919</sup>.

**4. SOMALIA (RECOGNITION TFG): PREMATURE** – The international recognition of the Somali Transitional Federal Government (created in 2004 during the IGAD-led Somalia National Reconciliation Conference) arguably runs counter to the principle of self-determination. In the

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<sup>1910</sup> K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *op. cit.*, pp. 749 - 750: “the Afghan participants at the Bonn Conference were initially chosen by the West and at a difficult moment the *international community exerted pressure* to push the process forward”. Emphasis added.

<sup>1911</sup> S. Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error', *op. cit.*, p. 83. See also, in the same sense, H. Wolpe, 'Making peace After Genocide – Anatomy of the Burundi Process', United States Institute of Peace, Peaceworks No. 70, 2011.

<sup>1912</sup> S. Vandeginste, 'Power-Sharing, Conflict and Transition in Burundi: Twenty Years of Trial and Error', *op. cit.*, p. 72. Emphasis added.

<sup>1913</sup> Chapter 6, Section B.1.1.

<sup>1914</sup> J. Benomar, 'Constitution-Making After Conflict: Lessons for Iraq', *op. cit.*, pp. 92-93.

<sup>1915</sup> *Id.*

<sup>1916</sup> K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *op. cit.*, p. 751.

<sup>1917</sup> L. Brahimi, 'State-building in Crisis and Post-Conflict Countries', *op. cit.*, p. 8.

<sup>1918</sup> D. Romano, 'Reflections on an Iraqi Sojourn: Alice Through the Looking Glass?', Policy Options, November 2004: “the TAL was dealt a severe blow by the United Nations, however, when Security Council Resolution 1546 failed to refer to it and hence provide it with international recognition”. Yet, the UNSC endorsed the transition roadmap as established by the TAL but never acknowledged TAL’s existence, which “is an indication that it recognized that the document was lacking internal and international legality”. P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 453.

<sup>1919</sup> N. Youssef, *La Transition démocratique et la garantie des droits fondamentaux*, *op. cit.*, p. 98.

literature, concerns were voiced about international intervention being excessive and bypassing Somalia's sovereignty<sup>1920</sup> as well as the will of its people<sup>1921</sup>.

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The examples relating to Afghanistan, Burundi, Iraq, and Somalia show that, according to a number of commentators, the initiation of DIG can be the product of external pressure. In extreme cases, states and IOs try to coerce another state into a transition process through military means<sup>1922</sup>. Regularly, states voice their concerns about DIG being initiated by external actors. Russia, for instance, voiced such concerns with regard to a prospective transition in Syria<sup>1923</sup>. In other cases, however, the constituent transition instrument is clearly not externally imposed. The 2002 Pretoria Agreement and the ensuing transition, for instance, cannot be said to result from an imposed interim polity<sup>1924</sup>.

**INVALIDATION EXTERNALLY IMPOSED TRANSITION INSTRUMENT (IN TEMPORE UTILE) – If a constituent transition instrument was externally imposed –and provided it was not subsequently acquiesced to<sup>1925</sup>– its validity can be questioned under international law, in two ways. When it**

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<sup>1920</sup> A. Ainte, 'Somalia – Legitimacy of the Provisional Constitution', *op. cit.* Ainte describes how "Somali diaspora leader Abdi Dirshe has complained that the level of external oversight of the Roadmap has undermined Somalia's sovereignty"

<sup>1921</sup> *Id.*, p. 202. For Saul, "the responsible approach would be [...] for international actors to prioritize the political principle of self-determination, delay extensive intervention, and work to facilitate negotiation between the two sides in order to produce a government with a stronger claim to be an embodiment of the will of the people".

<sup>1922</sup> Brownlie and Apperley observed this with regard to the Rambouillet peace talks. I. Brownlie and C. J. Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', *op. cit.*, pp. 878-905, § 82 a.f., see also § 7: "a major justification for the threat of force (in the first instance) and the aerial bombardment (subsequently, to fulfill the threats of force) was to induce Yugoslavia to accept the 'demands' of the Contact Group", these demands referring to the peace talks at Rambouillet. Cf. also P. Gaeta, 'The Dayton Agreements and International Law' (1996) 7 EJIL 147. If it had been signed by Serbia and Yugoslavia, and not only by Kosovo, then the Rambouillet Accords (Interim Agreement for Peace and Self-Government in Kosovo) (cf. S/1999/648 dd. 7 June 1999 for full text), which can certainly be seen as an instrument triggering a transition process *sensu lato*, would probably have had the status of an internationalized intrastate agreement. This agreement was invoked by the UNSC on 10 June 1999, in the same resolution in which it established UNMIK and authorized member states to use all necessary means to secure and enforce the withdrawal of Federal Republic of Yugoslavia forces from Kosovo (S/RES/1244 dd. 10 June 1999. See especially Annex 2, § 8). Their invocation is however anomalous: "[w]hat eventually emerged, after further "negotiations" and continuing threats of force, was the draft Interim Agreement for Peace and Self-government in Kosovo, which was drawn up without the participation of Yugoslavia. The draft surfaced in February when Yugoslavia was summoned to talks. It was made clear during the discussions that the Yugoslav side would not be permitted to make amendments to the Draft Agreement. In the event the Federal Republic of Yugoslavia refused to sign. Thus no Agreement was concluded and the "Rambouillet Accords" constituted a set of proposals and nothing more", I. Brownlie and C. J. Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', *op. cit.*, pp. 878-905, § 86.

<sup>1923</sup> Russia insisted that there be "no attempt to impose any kind of a transition process". Cf. "Talks come up with plan for Syria, but not for Assad's exit", NYT, 30 June 2012.

<sup>1924</sup> D. Curtis, 'Transitional Governance in Burundi and the Democratic Republic of the Congo', *op. cit.*, p. 180. It was only after "several months of consultations, shuttle diplomacy, and negotiations [that] an all-inclusive peace agreement was signed in Pretoria in December 2002". This agreement laid the foundation for further negotiations and led to the adoption of a transitional constitution in April 2003.

<sup>1925</sup> When, despite the constituent transition instrument being imposed, transitional authorities willingly install post-transition institutions, this may evidence their *acquiescence* of that instrument. Cf. also the remarks further below

is enshrined in an international treaty, a transition instrument can be invalidated under the law of treaties if the transitional authority was *coerced* into DIG<sup>1926</sup>. Even when it is embodied in a domestic legal act, the validity of a transition instrument can be challenged under international law if it appears that this act is the product of a violation of the principle of self-determination.

**DOES THE INVALIDITY OF A TRANSITION INSTRUMENT AFFECT THE WHOLE INTERREGNUM?** – A hypothesis to explore is whether, just like *ius ad bellum* in principle does not affect considerations under *ius in bello*, the validity *vel non* of a transition instrument would leave the legal assessment of subsequent external assistance to DIG unaffected. For example, would the external imposition (and, arguably, invalidity) of the Iraqi TAL –which outlined a transition roadmap, including the constitutionmaking process– *ipso facto* result in this process being null and void? The *relation* between an *ex hypothesi* unlawful, externally imposed transition instrument and the legality *vel non* of external assistance to the interregnum is not addressed in this thesis.

In political science, it has been suggested that ‘good’ DIG could serve as a corrective to an earlier externally imposed constituent transition instrument. Referring to Arendt’s distinction between ‘liberation’ and ‘constitution’, Arato asked whether “the democratization process initiated by externally imposed liberation could succeed *if the constitution-making process escaped the framework of imposition*”<sup>1927</sup>. Transposed to the realm of law, the question is whether the illegal (because externally imposed) initiation of DIG would automatically affect the legality of any subsequent external assistance to DIG (including assistance to transitional constitutionmaking). In other words, would the illegality tainting an externally imposed transition instrument necessarily result in the illegality of subsequent external assistance to DIG, or of the associated constitutionmaking process?

This issue deserves an in depth-analysis, which should take into consideration (a) whether the external actor unlawfully initiating DIG is the same actor that offers assistance to DIG (e.g. as in Iraq<sup>1928</sup>), and (b) whether the externally imposed constitutional framework was subsequently acquiesced to<sup>1929</sup>. Besides these few considerations, the question whether or how the adagium *ex iniuria ius non oritur* affects the (legal, constitutional and institutional) consequences flowing from unlawful transition instruments is not further considered.

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with regard to the (potential) acquiescence of the German and Japanese post-World War constitutional order. See Chapter 8, Section B.3.1.

<sup>1926</sup> VCLT, art. 51. Cf. also J. A. Frowein, ‘Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung’ in R. Bernhardt, W. K. Geck, G. Jaenicke, H. Steinberger (eds.), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte*, *op. cit.*, pp. 260 – 261: “[z]wang gegen den Saat durch Drohung oder Anwendung von Gewalt muss nach Ansicht der Kommission zur absoluten Nichtigkeit führen, weil es sich hierbei um Verletzungen von Völkerrechtsnormen handelt, deren Einhaltung alle Staaten angeht”. With reference to Yearbook ILC 1966 II, S. 246 a.f. Cf. also *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Jurisdiction of the Court, Judgment*, ICJ Reports 1973, p. 3. Cf. § 24.

<sup>1927</sup> A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 537. Emphasis added.

<sup>1928</sup> For Arato, “the occupying power could and should have removed itself from the picture as the referee of the process”. A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 547.

<sup>1929</sup> The issue of acquiescence is only dealt with in passing. Cf. Chapter 3, Section A.2. Chapter 7, Section B.3.

## 2. Prohibition on violating limits *ratione temporis*

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THE ROLE OF SELF-DETERMINATION BEYOND STAGE 2 – During the interregnum, external actors, too, must respect the limits *ratione temporis* to DIG. Self-determination has a role to play beyond the foundation of DIG. The contentions that a “contravention of the right to self-determination in international law *could be avoided* through a consensual *basis*”<sup>1930</sup> or that “a consensus *basis* for intervention is an opportunity for discussion of the self-determination issue *to be avoided* in debates about international involvement in a state”<sup>1931</sup> are therefore, on their own terms, inaccurate. As a continuing principle, self-determination applies throughout the interregnum.

As noted, the prohibition on impeding the progressive realization of internal self-determination through DIG applies beyond the moment of consent (the prohibition on imposing a constituent transition instrument) or beyond the foundation of DIG (the prohibition on artificially creating transitional authorities). External actors providing assistance to DIG must respect the limitations *ratione temporis* of the interregnum. This obligation mirrors the fact that transitional authorities must pursue DIG on a temporary basis before relinquishing power<sup>1932</sup>.

EXTERNAL INFLUENCE ON THE TRANSITION AGENDA – The obligation for external actors to respect the limitations *ratione temporis* of the interregnum is not insignificant: “instead of encouraging national leaders to initiate inclusive political processes, external actors often prevent adequate consultation by *imposing deadlines* related to their own *timetables and interests*”, Papagianni observes<sup>1933</sup>. Horowitz notes that “especially if the conflict might turn back to violence, many third parties will put *reaching a quick constitutional settlement above all other goals*”<sup>1934</sup>. Varol also observes that external actors “anxious to terminate their involvement in a constitutional reconstruction, may [...] *impose external time restraints* on the design process”<sup>1935</sup>.

The scenario of external actors imposing their agendas on DIG is not rare. One can imagine that states with commercial interests (and a considerable number of their citizens) in transition states –such as Italy in Tunisia and Libya– have an interest in a timely closure of the interregnum. In September 2013, the Italian minister of foreign affairs thus insisted on a swift end to the transition in Tunisia<sup>1936</sup>. Whenever external actors attempt to exert influence on the

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<sup>1930</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 193.

<sup>1931</sup> *Id.*, p. 71.

<sup>1932</sup> Chapter 4, Section A.2.

<sup>1933</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 43.

<sup>1934</sup> D. L. Horowitz, ‘Conciliatory Institutions and Constitutional Processes in Post-Conflict States’, *op. cit.*, p. 1229.

<sup>1935</sup> O. O. Varol, ‘Temporary Constitutions’, *op. cit.*

<sup>1936</sup> Interview with Emma Bonino in *Le Temps* dd. 7 September 2013: “[a]près avoir rencontré tous mes interlocuteurs, j’ai tenu à leur dire que pour les entrepreneurs italiens installés en Tunisie dont la présence est fructueuse, la situation doit se débloquer le plus tôt possible et que le processus prenne fin”.

transition agenda, the *nationally defined or approved* transition agenda should be taken as a point of reference.

RESPECTING THE TRANSITION AGENDA: A DEONTOLOGICAL OBLIGATION – A *Ius in interregno* prohibits external actors from artificially influencing the duration of the interregnum. As a matter of deontology, the UN requires practitioners to “protect the mediation process from the undue influence of other external actors, *especially with regard to unrealistic external deadlines or incompatible agenda*”<sup>1937</sup>. More recently, the 2015 Review of the UN Peacebuilding architecture advised against haste and impracticable timelines during transitions, and against transitions being influenced or driven by mediation groups with “varying levels of international legitimacy”<sup>1938</sup>.

RESPECTING THE TRANSITION AGENDA: A LEGAL OBLIGATION – The interregnum must not be artificially prolonged, shortened, or otherwise influenced, be it by the domestic transitional authorities themselves (bound by self-imposed time limits) or by external states or IOs. This is not only a matter of policy or deontology but also, arguably, of law. As external actors must respect how transitional authorities abide by the precepts of a *ius in interregno*, they must not aid, assist or direct them in violating it<sup>1939</sup>. Arguing otherwise would prevent the principle of self-determination from having a meaningful role for DIG. That is, undue influence on the transition agenda can negatively affect the reconstitutionalization process and redefinition of the social contract.

EXAMPLES & COUNTEREXAMPLES – In Bosnia and Herzegovina, for example, the constitution was “adopted under extreme time pressure [and] did not reflect stakeholder agreement on the nature of the state and of the political system, and therefore *does not reflect a vision of a common future within a shared state*”<sup>1940</sup>. This transition process (*sensu lato*) illustrates how time pressure undermines the meaningful realization of self-redetermination. In a number of other countries, external time constraints imposed on DIG have been severely criticized. The facts surrounding transitions in Afghanistan, Iraq, Somalia and Yemen, show how the duration of DIG including the constitutionmaking process can be influenced by external actors. The following illustrations can be skimmed by the reader who is only interested in the recapitulative part, after paragraph 4.

**1.** The Bonn Agreement regulated DIG in Afghanistan. This agreement had been agreed on “under extreme time pressure”<sup>1941</sup>. Following this agreement, “international actors [...] required the constitution-design process in Afghanistan to be completed within two years – a

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<sup>1937</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 15. Emphasis added. Cf. also M. Saliternik, ‘[Procedural Justice in Peace Negotiations](#)’, NYU Research Plan, September 2013.

<sup>1938</sup> 2015 Review of the UN Peacebuilding architecture, *op. cit.*, § 33.

<sup>1939</sup> Chapter 8, Section C.

<sup>1940</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 88. Emphasis added.

<sup>1941</sup> *Id.*, p. 384.

formidable challenge in a society emerging from twenty-five years of civil war”<sup>1942</sup>. Following a hastily concluded transition instrument, the ensuing transition itself, too, thus followed a tight time schedule.

2. In Iraq, the US occupation “forced a *rushed* constitutional-design process, which was completed in less than six months through a process that excluded Sunni factions”, Varol notes, and adds:

“the quick production of the Iraqi Constitution did little to assuage sectarian conflict in Iraq and may have hastened Iraq’s descent into civil war. These *temporal restraints* on the constitutional-design process often *do not permit sufficient deliberation* over contentious questions about constitutional procedure and substance, and invite short-term cognitive biases to infect a durable document”<sup>1943</sup>.

In the same vein, Jackson and Welikala observe how the occupying powers exerted pressure on the duration of the Iraqi transition. This prevented any consensus from ripening. For Dann and Al-Ali, too, “the views and opinions of the Iraqi people were at best secondary”<sup>1944</sup>, also because of the time pressure on the Iraqi constitutionmaking process.

3. In Somalia, similar concerns were raised. Sainte observed: “a key challenge to the domestic legitimacy of the constitutional process relates to [...] the extent to which the process has been engineered and *accelerated to hit external benchmarks*. The public consultation phase of the constitutional process was *truncated under pressure* (widely perceived as coming from international partners) to deliver a draft constitution before the end of transition on 1 August”<sup>1945</sup>.

4. With regard to Yemen, one observer noted that DIG could “be meaningful only to the extent it reflects local needs and realities. The supposed achievements of the Yemeni process *rushed* under international pressure are unlikely to be lasting”<sup>1946</sup>.

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RESPECTING THE TRANSITION AGENDA UNDER THE PRINCIPLE OF INTERNAL SELF-DETERMINATION – External actors involved in DIG in Afghanistan, Iraq, Somalia and Yemen have been exposed to criticism because they tried to artificially accelerate DIG in these countries. This stands in contrast with the South African constitutionmaking process, for example<sup>1947</sup>. External time

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<sup>1942</sup> O. O. Varol, 'Temporary Constitutions', *op. cit.*

<sup>1943</sup> *Ibid.* Emphasis added.

<sup>1944</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 458.

<sup>1945</sup> A. Ainte, 'Somalia – Legitimacy of the Provisional Constitution' in A. Ramsbotham and A. Wennmann, *Legitimacy and Peace Processes, From Coercion to Consent*, *op. cit.*

<sup>1946</sup> O. Hammady, 'International support to legal and constitutional reforms in the MENA transitional processes', presentation during International Expert Seminar of 21 and 22 September 2015.

<sup>1947</sup> V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1273. “the constitution-drafting process that followed [the Transitional Administrative Law] arguably failed to allow enough time for the major groups to work by real

pressure can negatively affect the progressive realization of internal self-determination. As a matter of policy but arguably also on legal grounds this should be avoided altogether. More haste, less speed.

To be sure, external actors may place confidence in domestically agreed-on or self-imposed time limits, and may exercise non-coercive pressure in ensuring that these limits be respected<sup>1948</sup>. But they are prevented from imposing their own agenda on transitional authorities. They must be all the more sensible to this prohibition during the interregnum. The threshold of coercive pressure is more easily reached when, during a state renaissance, the constitutional structure of a state is held in abeyance<sup>1949</sup>. In sum, external imposition of the transition agenda is detrimental and contrary to the (progressive) realization of self-determination during the interregnum.

### 3. Prohibition on violating limits *ratione materiae*

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External actors must respect the fiduciary nature of DIG. Transitional authorities do not have unbridled freedom in foreshadowing the future, affecting rights acquired in the past, or managing the present<sup>1950</sup>. The fact that transitional authorities have to respect these limits *ratione materiae* has consequences for external actors, which mirror the three obligations just mentioned. The *marge de manoeuvre* of these actors is equally limited in three ways: they must not entrench the future constitutional order (3.1); they must respect the body of past laws and treaties (3.2); and they must accept that domestic transitional authorities bear the primary responsibility for administering the country in the interim (3.3).

#### 3.1. Prohibition on leaving post-transition imprint through transition instruments

States and IOs are prohibited from influencing DIG with a view to leaving a definitive imprint on the post-transition stage. Under Chapter 3, the triple function of constituent transition instruments was discussed:

- Resolving conflicts and creating the conditions for peace (peace through transition);
- Regulating the exercise of public powers *ad interim* (defining the interim rule);
- Projecting and preparing the coming constitutional order (constitutional reconfiguration).

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consensus or for sustained public outreach and participation prior to a vote. In contrast to the two years of the Multi-party Negotiation Process in South Africa followed by two years of constitution-drafting, the 2005 constituent assembly in Iraq had *only a few months and did not take advantage of an extension period contemplated by the TAL under pressure from the occupying authorities*<sup>1948</sup>. IDEA, 'Interim Constitutions in Post-Conflict Settings', *op. cit.*: "[t]he urgency of the timeframe was essentially dictated by President Bush's campaign promise that Iraq would have a constitution by the 2006 mid-term elections. The drafting committee was given six months to draft the permanent constitution, and due to internal sectarian divisions (along with continuing insecurity), this ended up being just two weeks. Due to the unrealistic timeline, the final days of the Iraqi process were messy and *highly pressured*<sup>1949</sup>."

<sup>1948</sup> Thus, Akashi writes that "the time-frame specified by the [Paris] Agreements and implemented by UNTAC served to exert a form of pressure on the parties to maintain progress on the path towards democratic elections and a comprehensive peace". Y. Akashi, 'The limits of UN diplomacy and the future of conflict mediation', *Global Politics and Strategy*, 37:4, 2008, p. 88.

<sup>1949</sup> Chapter 4, Section A.2.6.

<sup>1950</sup> Chapter 5.

The prohibition on pre-defining the post-transition era concerns the third function of constituent transition instruments, i.e. constitutional reconfiguration (the constituent transition instrument as *regulator of the post-transition order*). The prohibition on imposing a constituent transition instrument, discussed above, primarily concerns the second function of constituent transition instruments, as it relates to the course of DIG itself (the constituent transition instrument as *regulator of public powers during the interregnum*).

In line with the fiduciary nature of DIG, substantive questions are to be deferred to the legislature set up in accordance with the post-transition constitution. For the same reason, external actors (regardless of their role in post-conflict reconstruction) must not impose long-term institutional arrangements, and “ought to be as unobtrusive as possible”; “they should certainly not impose substantive outcomes on the parties to a constitutional process”<sup>1951</sup>. In Libya, for instance, one was well aware of the danger that external actors might abuse the weakness of the state, and be tempted to pre-define the post-transition order. One observer notes:

“the Interim Constitutional Declaration drafters were instructed not to allow the transitional authority to undertake any long-term institutional arrangement. This was explained by the fear that international actors might use the relative weakness of Libyan rebels to obtain commitments on political agendas”<sup>1952</sup>.

From a historical perspective, two transition processes raising questions in this regard come to mind: to what extent did external actors influence the constitutional order in Germany and Japan? The same question can be asked with regard to more recent transitions, notably in Bosnia-Herzegovina and Iraq. Although, except for the latter case, these cases concern transition processes *sensu lato* (thus fall outside the ambit of this study), they shed some light on the distinction between external upstream constraints on the interregnum and external downstream constraints on the post-transition stage<sup>1953</sup>.

**1. POST WORLD WAR LONG-TERM INSTITUTIONAL ARRANGEMENTS (GERMANY)** – It is well-known that the occupying powers played a tremendous role in the German constitutional transition. But have they *durably entrenched* its definitive outcome? It cannot be disputed that the occupying powers left a strong imprimatur on post-war Germany by imposing a break with the previous constitutional structure and triggering wholesale constitutional revisions. Yet, for two reasons it cannot be said that they have *entrenched* the German constitutional structure: the Basic Law was *ratified* by Germany, and could be *replaced*.

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<sup>1951</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 460.

<sup>1952</sup> O. Hammady, 'International support to legal and constitutional reforms in the MENA transitional processes', presentation during International Expert Seminar of 21 and 22 September 2015.

<sup>1953</sup> For the distinction between upstream and downstream constraints, cf. J. Elster 'Forces and Mechanisms in the Constitution-Making Process', *op. cit.*, where the definitions were reproduced.

First, the Basic Law was ratified in the week of 16 to 22 May 1949 by the parliaments of more than two thirds of the participating German *Länder*. Second, the 1949 Basic Law provides that it would “cease to apply on the day on which a constitution freely adopted by the German people takes effect”<sup>1954</sup>. It is thus of a provisional nature and remains so as it can (still) be fully replaced in accordance with its own amendment procedures. In other words, while external actors clearly imposed upstream constraints on the state transformation of post-World War Germany, they have not imposed downstream constraints.

**2. POST WORLD WAR LONG-TERM INSTITUTIONAL ARRANGEMENTS (JAPAN)** – The post-Second World War constitution in Japan is seen as an imposed constitution, more so than the German post-war constitution. This is so despite the fact that “numerous non-governmental groups and private individuals produced draft constitutions or proposals”<sup>1955</sup>. While it is uncontested that the “Japanese people as a whole [...] were excluded from the process of constitution-making”, a number of elements seem to indicate that the Allied Forces’ imprint on the post-transition stage was not irreversible. The Japanese cabinet accepted the model constitution by the US, and Emperor Hirohito (reigning since 1926) approved it. After the constitution came into effect, the Allied Forces (under General MacArthur) explicitly suggested that the constitution be submitted to popular referendum<sup>1956</sup>. But “the Japanese government did not want to go to its people for a referendum on the new Constitution”<sup>1957</sup>. It is, in any event, not until 1951 (signing of the Security Treaty between the US & Japan) that some critics started viewing the Japanese constitution as an alien transplant, which raises the question whether the constitution had been acquiesced in the meantime<sup>1958</sup>. In sum, here too, while external actors imposed upstream constraints on the state transformation of post-World War Japan, they have not imposed downstream constraints

**3. RECENT LONG-TERM INSTITUTIONAL ARRANGEMENTS (B&H)** – More recently, external actors have left an indelible imprimatur on the post-transition order of other countries. The 1995 Dayton Agreement, “drafted by a group of lawyers while the conflict was still underway”<sup>1959</sup>, included a long-term power-sharing arrangement with effects going well beyond the transition

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<sup>1954</sup> Basic Law for the Federal Republic of Germany, art. 146, [translation](#) by Prof. Tomuschat.

<sup>1955</sup> S. B. Hamano, ‘Incomplete Revolutions and not so Alien Transplants: the Japanese constitution and human rights’, *op. cit.*, p. 426.

<sup>1956</sup> Letter from Douglas Mac Arthur to Shigeru Yoshida dd. 3 January 1947, cited in S. B. Hamano, ‘Incomplete Revolutions and not so Alien Transplants: the Japanese constitution and human rights’, *op. cit.*, p. 440: “the Allied Powers have decided, in order to insure to the Japanese people full and continuing freedom of opportunity to reexamine, review and if deemed necessary amend the new constitution [...] that [...] it should again be subjected to their formal review and that of the Japanese Diet. [...] [T]hey may additionally require a referendum or some appropriate procedure for ascertaining directly Japanese opinion with respect to it. In other words, as the bulwark of future Japanese freedom, the Allied Powers feel that there should be no future doubt that the constitution expresses both the free and considered will of the Japanese people”.

<sup>1957</sup> *Id.*, p. 440.

<sup>1958</sup> *Ibid.*, p. 427 fn. 49. From an international legal perspective, the question then becomes the following. Does (a) the domestic ownership with regard to downstream constraints in combination with (b) the acquiescence of the outcome of the externally imposed constitutionmaking process render the prohibition to leave a definitive imprint on the post-transition stage inoperative because it is without object?

<sup>1959</sup> IDEA, ‘Interim Constitutions in Post-Conflict Settings’, *op. cit.*, p. 12.

procedure. This was criticized by several commentators, not least because the “Dayton Accords saw the creation of a fictional state that was recognized by powerful elements of the international community”<sup>1960</sup>. For Dann and Al-Ali, the external influence on the constitutionmaking process in Bosnia-Herzegovina was not marginal or even partial but *total*. The National Congress of Bosnia-Herzegovina considered the Dayton Agreement to be unlawful under international law<sup>1961</sup>. This position is not uncontested but it confirms that it is not unseen to subject a constituent transition instrument to an international law assessment<sup>1962</sup>.

**4. RECENT LONG-TERM INSTITUTIONAL ARRANGEMENTS (IRAQ)** – The US administration pre-defined the post-transition order in Iraq. This is not seriously contested. The US administration wanted the transition to “turn out in the right way, i.e., that the enemies of the United States, whether successors to the old Baath or the friends of Iran, [would] not inherit political power in the country”<sup>1963</sup>. A controversial point in this regard is not only the De-Baathification program but also the 2004 TAL<sup>1964</sup>. This transition instrument was promulgated during US occupation, and is widely regarded as a product of US administrator P. Bremer<sup>1965</sup>.

It was already observed that the TAL *anticipated* a number of crucial issues which “should have been left to the debate on the permanent constitution in a legitimate elected assembly”<sup>1966</sup>. Given the fiduciary nature of DIG, the question of division of power between the constituencies of Iraq, for example, should have been deferred to the *post-transition stage*. Nevertheless, the TAL included a provision enshrining the so-called Kurdish veto<sup>1967</sup>. In spite of the wide criticism, this provision was eventually adopted<sup>1968</sup>. The Kurdish veto is perceived as the direct result of an external actor’s intention to leave a permanent imprimatur on a post-transition constitutional order.

### 3.2. Respect for state continuity

External actors involved in the transition must respect a state’s constitutional structure and institutional nature insofar as these were not altered by the transition instruments. As with belligerent occupation, external actors must respect the laws in force. In addition, external actors must uphold their international treaties with the transition state.

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<sup>1960</sup> *Id.*, p. 13. See also K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 51.

<sup>1961</sup> [‘Bosnians Want the Constitution of the Republic of Bosnia-Herzegovina Back’](#), Online Newsletter dd. 24 February 2006.

<sup>1962</sup> For a fine analysis, cf. P. C. Szasz, ‘The Dayton Accord: The Balkan Peace Agreement’, *Cornell International Law Journal*, Vol. 30, Issue 3, Art. 8, 1997.

<sup>1963</sup> A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 545.

<sup>1964</sup> TAL.

<sup>1965</sup> L. Brahimi, ‘State-building in Crisis and Post-Conflict Countries’, *op. cit.*, p. 8.

<sup>1966</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, pp. 92-93. See also Chapter 5.

<sup>1967</sup> TAL, art. 61: “[t]he general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it”. Because three governorates are led by Kurdish, this results in the so-called ‘Kurdish veto’.

<sup>1968</sup> This raises the question whether the issue was acquiesced by the Iraqi transitional authorities or the population. S. Wheatly, ‘The Security Council, Democratic Legitimacy and Regime Change in Iraq’, *op. cit.*, p. 550.

### 3.3. Respect for assistance model

TELEOLOGY EXTERNAL ASSISTANCE TO DIG – During the interregnum, external actors must not go beyond acts of mere assistance if their mandate is limited in this sense, considering that the final responsibility for DIG rests with the transitional authorities. Even if they enjoy international assistance, transitional authorities bear the responsibility for administering the country during the interregnum. This conclusion was inferred from practice described under Part III. Transitional authorities’ powers are confined by the transition agenda: administering the country *ad interim* and consolidating security<sup>1969</sup>. External actors should direct their assistance accordingly, i.e. to realize similar aims. The substantive limits to the interregnum are incompatible with any form of (indirect) neo-trusteeship<sup>1970</sup>.

### 4. Prohibition on undermining inclusivity

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PRACTICAL RELEVANCE: EXCLUSION UNDER EXTERNAL INFLUENCE – A *ius in interregno* is protective of the progressive realization of internal self-determination. Respecting the progressive realization of self-determination during DIG is not without significance. External actors “increasingly face international pressure to help build governance structures and institutions that advance self-determination”<sup>1971</sup>. Sometimes they try to exclude certain groups from DIG by “favour[ing] the participation of certain political groups and leaders over others based on their own interests and understanding of a country’s political realities”<sup>1972</sup>. They could go as far as excluding a country’s entire population from a transition procedure<sup>1973</sup>.

LIMITATION IN FAVORING (POTENTIAL) T.A. – While external actors are not under an obligation to facilitate or, even less so, to guarantee that DIG be inclusive, at least they must not assist transitional authorities in violating a *ius interregno* by aiding them in undermining inclusivity. Like under IHL, transition procedures “should not be distorted to promote transformations that undercut self-determination”<sup>1974</sup>. Favoring one particular group, for instance, hinders the progressive inclusivity of the interregnum. In the words of the UN Secretary-General: “efforts that bolster the power of unrepresentative leaders, or empower one

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<sup>1969</sup> The UN are certainly in a good position to contribute to the consolidation of security in transitioning state. The UNSC has listed the ‘consolidation of internal and external security’ as a key objective of successful peace-building: “[t]his involves the deployment of peacekeepers and/or military observers to ensure security or negotiate access in order to promote security sector reform, including the creation of a neutral police force broadly representative of the community; disarmament, demobilization and reintegration; judicial and penal reform; and mine clearance and capacity-building for mine action”. S/2001/394 dd. 20 April 2001, p. 4.

<sup>1970</sup> A. Carati, 'Intervention and Promotion of Democracy. The Paradoxes of External Democratization and the Power-Sharing Between International Officials and Local Political Leaders', *World Political Science Review* 9, no. 1, 2013, p. 132. Carati thus argued that the “power-sharing between international officials and local political” in Afghanistan, Bosnia-Herzegovina, East Timor, Haiti and Kosovo arguably resulted in a violation of their sovereignty.

<sup>1971</sup> J. Stromseth, *Can Might Make Rights?*, CUP, 2006, p. 19.

<sup>1972</sup> M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 29.

<sup>1973</sup> *Id.*: “the level of external involvement in the assistance model has the potential to exclude the population from influence over the decision-making on reconstruction”.

<sup>1974</sup> K. E. Boon, 'Obligations of the New Occupier: The Contours of Jus Post Bellum', *op. cit.*, p. 75.

group at the expense of another, can exacerbate the causes of conflict or create new sources of tension. International actors need to be mindful of these considerations”<sup>1975</sup>. Transitional authorities must take measures favoring the progressive realization of self-determination during the interregnum, and external actors must not take measures impeding this. External actors are accordingly prevented from assisting or directing transitional authorities which pursue exclusive/unrepresentative DIG. In short, they are prevented from assisting or directing transitional authorities that pursue exclusive/unrepresentative DIG.

**MULTILATERAL ORGANIZATIONS: LIMITATION IN FAVORING (POTENTIAL) T.A.** – The chance that an external actor favors one specific group or segment of society decreases (without disappearing) when assistance to DIG is multilateral, Dann and Al-Ali suggest<sup>1976</sup>. At the same time, multilateral or regional IOs need to remain careful in this regard: regional organizations (sometimes through agencies such as the European Endowment for Democracy or the EU Civil Society Facility<sup>1977</sup> or the Middle East and North Africa Incentive Fund) may actually be tempted to empower their favorite political group during the interregnum.

**RESPECT & PROMOTE INCLUSIVITY (DEONTOLOGICAL OBLIGATION)** – From a deontological point of view, external actors are expected to promote inclusive DIG. This expectation goes beyond the legal prohibition on undermining inclusivity, yet (indirectly) confirms it. The UN is thus expected to support processes “that help governments to ‘broaden ownership’ to as wide an array of domestic stakeholders as possible”<sup>1978</sup>. It requires mediators to cultivate inclusivity by “strengthening the negotiating capabilities of one or more of the conflict parties”<sup>1979</sup>.

**RESPECT & PROMOTE INCLUSIVITY (LITERATURE)** – In line with this, Samuels argues that “the international community should [also] *commit sufficient aid to supporting inclusive and participatory processes* with long enough time-frames to allow proper dialogue and consensus building”<sup>1980</sup>, while Papagianni remarks that “transitional periods are opportunities to expand participation beyond the signatories of peace agreements. *Political engagement by third parties is often needed* [...] to allow [...] the wider public to participate meaningfully in the transitional process”<sup>1981</sup>, and adds:

“[i]n addition to offering security guarantees, *the role of external actors during the transitional periods is to encourage -and when necessary pressure- national leaders to engage in inclusive political processes* at the national level, to implement joint agreements with their former enemies,

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<sup>1975</sup> Report of the Secretary-General on peacebuilding in the immediate aftermath of conflict dd. 11 June 2009, A/63/881-S/2009/304, §§ 11 & 12.

<sup>1976</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 456.

<sup>1977</sup> R. Balfour, 'Changes and continuities in EU-Mediterranean relations after the Arab Spring' in S. Biscop, R. Balfour, M. Emerson (eds.), *An Arab Spring for EU Foreign Policy?*, Egmont Paper 54, January 2012.

<sup>1978</sup> *Id.* Balfour explains that “the aim of supporting ‘deep democracy’ through the Civil Society Facility and the European Endowment for Democracy, for instance, raises questions about *which groups to support* [...]”. *Id.*, p. 34.

<sup>1979</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 14.

<sup>1980</sup> K. Samuels, 'Postwar constitution building' in R. Paris and T. D. Sisk, *The dilemmas of statebuilding – Confronting the contradictions of postwar peace operations*, *op. cit.*, p. 175.

<sup>1981</sup> K. Papagianni, 'Power sharing, transitional governments and the role of mediation', *op. cit.*, p. 44. Emphasis added.

and to reach out to non-signatories of the peace settlement; [i]t is therefore important that national leaders are in the driving seat of transitional politics with external actors, when necessary, *pushing for inclusive political processes and for the expansion of political participation*<sup>1982</sup>.

For several commentators, thus, external actors must not impede inclusive DIG (negative obligation), and, in addition, must promote inclusive DIG (positive obligation). Some authors specifically recommend that, at least as a matter of deontology, external actors ensure the inclusivity of transitional constitutionmaking<sup>1983</sup>. This study does not pretend that the latter deontological obligation is entering the realm of law; it only argues that impeding inclusive DIG –e.g. by supporting non-inclusive DIG– is unlawful<sup>1984</sup>. In this sense, doubts have been raised with regard to external assistance to DIG in Iraq, the DRC, Yemen, Libya and Syria.

EXCLUSION DURING INTERREGNUM IN IRAQ – External assistance to DIG in Iraq has been heavily criticized as it favored an exclusive transition: “the process of political reintegration [of armed groups] was perhaps most fatally undermined by the dearth of attention paid, by both the Coalition Provisional Authority (CPA) in Iraq and the Bush administration in Washington, to this critical component of state building”<sup>1985</sup> as the “Shia and Kurdish were [...] not integrated”<sup>1986</sup>; “by the time a reintegration strategy emerged, it was irresponsive to political realities and badly implemented”<sup>1987</sup>. From the outset, the inclusivity of the transition was thus undermined. This was further reinforced by the lack of transparency surrounding it. Even the constituent transition instrument, the TAL, was elaborated in secrecy<sup>1988</sup>.

EXCLUSION OR INCLUSION DURING INTERREGNUM IN DRC, YEMEN, LIBYA, SYRIA – In other countries, no efforts were spared to make DIG inclusive. This is the case of the transition in the DRC<sup>1989</sup>, and perhaps in Yemen where “the international community played an important role in keeping the sides at the table”<sup>1990</sup>. Also, while *initially* the (prospective) representative character of the Libyan Transitional National Council was not seriously contested, this rapidly deteriorated when the political exclusion law was adopted, or, even more so when the

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<sup>1982</sup> K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, pp. 53-54.

<sup>1983</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 453. See also pp. 459-460: “we can note that external actors have generally tried to ensure that the constitutionmaking processes are as inclusive as possible in order to enhance the society’s ownership over the new constitution. However, such external attempts often fail. [...] Nevertheless, the failure does not diminish the value of such attempts to provide channels for more participation in the political processes in the first place”.

<sup>1984</sup> This is so for reasons related to the structure of international law, discussed under Section C, below.

<sup>1985</sup> D. H. Ucko, ‘Militias, tribes and insurgents – The challenge of political reintegration in Iraq’ in M. Berdal, D. H. Ucko (eds.), *Reintegrating Armed Groups After Conflict*, *op. cit.*, p. 89.

<sup>1986</sup> *Id.*, p. 92.

<sup>1987</sup> *Id.*, p. 109.

<sup>1988</sup> J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, pp. 92-93. Benomar adds that this law “should have been at least presented as a draft to an inclusive national dialogue before being finalized”.

<sup>1989</sup> In 2010, Papagianni writes: “in the Democratic Republic of Congo, the war continued in the east of the country following the establishment of the transitional government in 2003, and efforts to bring rebel groups into the political process continue to this day [...] the role of third parties in mediating between the transitional governments and the non-signatories has been indispensable”. K. Papagianni, ‘Mediation, Political Engagement, and Peacebuilding’, *Global Governance: A Review of Multilateralism and International Organizations*, vol. 16, no. 2, 2010, pp. 243–263.

<sup>1990</sup> P. B. Holzapfel, ‘Yemen’s Transition Process: Between Fragmentation and Transformation’, *op. cit.*, p. 16.

government split. In Syria, finally, at least one state affirmed that there should be “no attempt to exclude any group from the [transitional] process”<sup>1991</sup>.

The (progressive) implementation of inclusivity serves to redress transitions that started off as oppositional, unrepresentative or elite-based. This also excludes any external imposition with respect to the constitutionmaking process during the interregnum, a topic to which we turn now.

### 5. Prohibition on externally imposed transitional constitutionmaking

“international and comparative ‘constitutional engineers’ should be humble and accept the limitations of their influence on the building or reform of institutions in post-conflict countries as these processes are ultimately influenced by indigenous political forces. In most cases, constitutions cannot be imposed from the outside”<sup>1992</sup>

Transitional constitutionmaking cannot be externally imposed. The prohibition on impeding the progressive realization of internal self-determination during the interregnum also applies to transitional constitutionmaking<sup>1993</sup>. Although they are not unrelated, distinctions should be made between: the prohibition on imposing a constituent transition instrument (subsection 1, above); the prohibition on pre-defining the post-transition era through constituent transition instruments (subsection 3.1, above); and the prohibition on pre-defining the post-transition era through transitional constitutionmaking. This section addresses the latter issue.

Today, a state’s post-conflict constitutional transformation increasingly becomes an international project. Assistance to interim constitutionmaking is explicitly part of mission and policy statements of several states and IOs<sup>1994</sup>. Since the end of the Cold War, the UN – through UNSC, UN missions<sup>1995</sup> and/or UNDP– has been closely involved in at least thirty reconstitutionalization processes<sup>1996</sup>. But also regional IOs (such as ECOWAS in Liberia and Mali) and contact groups are involved with such processes. As a result,

“international involvement in intra-state constitution-making is regarded as an emerging pattern of connecting domestic governance of states with the international and transnational space characteristic of a globalizing world of overlapping jurisdictions and increasingly permeable state borders”<sup>1997</sup>.

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<sup>1991</sup> ‘Talks come up with plan for Syria, but not for Assad’s exit’, NYT, 30 June 2012.

<sup>1992</sup> K. Papagianni, ‘Political Transitions after Peace Agreements: The Importance of Consultative and Inclusive Political Processes’, *op. cit.*, p. 53.

<sup>1993</sup> Chapter 6, Section B.3. Table 11.2, c.β.i.

<sup>1994</sup> Cf. references under Chapter 1, Section B. Cf. mandates of UN missions mentioned in annexes.

<sup>1995</sup> UNSMIL in Libya, UNOCI in the Ivory Coast, UNAMA in Afghanistan. The ‘Constitution Commission Support Unit’ created by UNAMA.

<sup>1996</sup> This was observed above. Chapter 1, Section B.1.1.

<sup>1997</sup> U. K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization’, *op. cit.*, p. 494. Emphasis added.

LEGAL-REGULATORY APPROACH TO P&S & INCREASED INTERNATIONALIZATION TRANSITIONAL CONSTITUTIONMAKING – The change of approach from a politico-military to a legal-regulatory vision of international peace and security, as based on the peace-through-transition paradigm<sup>1998</sup>, is most palpable when external assistance to constitutional transformations is concerned. The growing interconnectedness between *international* peace and security and *domestic* reconstruction and interim governance, as observed by Daudet<sup>1999</sup>, sharply resonates with transitional constitutionmaking; its internationalization is pivotal to the internationalization of the interregnum.

External assistance to constitutionmaking has been harshly criticized. For some, it would be the symptom of a '*mission civilicatrice*'<sup>2000</sup> anachronistically pursued by a number of states and IOs; a neocolonial enterprise in disguise. Whether justified or not, this critique does not alter the circumstance that, *as a matter of fact*, external actors are more and more engaged in statebuilding *cum* constitutionmaking enterprises. Whether deplorable or not, it seems timely to analyze how such engagement can be evaluated from an international legal perspective.

HISTORIC ACCEPTANCE THIRD MEDIATION OF CONSTITUTIONS – What is the role of international law in the face of this reality? A currently germinating *ius in interregno* challenges the assumption that “there is no general legal regime that regulates external influence on constitution-making processes”<sup>2001</sup>. It builds on the assumption that this issue, too, can be read through the lens of public international law. External assistance to constitutionmaking is not entirely a new issue. Let us briefly turn to a couple of scholars from the past who have written about external assistance to constitutionmaking. In 1758, Vattel wrote that because constitutional matters “*n’intéressent que la Nation, aucune Puissance Etrangere n’est en droit de se mêler, ni ne doit y intervenir autrement que par ses bons offices, à moins qu’elle n’en soit requise, ou que des raisons particulières ne l’y appellent*”<sup>2002</sup>; Vattel thus accepted that outside states may act as mediators of constitutional affairs, if they were requested to do so. In 1858, von Martens confirmed that states may assist each other in their constitutional transformation processes<sup>2003</sup>. Over the centuries, “the traditional view has always been that the State does not suffer limitations [...] regarding its own organization of government”<sup>2004</sup>. Especially its constitution remains at the heart of its *domaine réservé*.

PROHIBITION OF EXTERNALLY IMPOSED TRANSITIONAL CONSTITUTIONMAKING & LINK WITH CORE IUS IN INTERREGNO – This study argues that the prohibition on *internally* imposed

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<sup>1998</sup> This was discussed under Introduction, Section A.1 and under Chapter 1, Section B.

<sup>1999</sup> Y. Daudet, 'L'exercice de compétences territoriales par les Nations Unies', *op. cit.*: « *les aspects internationaux et internes sont fréquemment mêlés et l'assistance à la reconstruction de l'État, question interne, devient partie intégrante du maintien et de la construction de la paix, question internationale* ».

<sup>2000</sup> R. Paris, 'International Peacebuilding and The 'Mission Civilatrice'', *op. cit.*, pp. 637-656.

<sup>2001</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 460.

<sup>2002</sup> Vattel, *Le Droit Des Gens, Ou, Principes de La Loi Naturelle, Appliqués À La Conduite et Aux Affaires Des Nations et Des Souverains*, *op. cit.*, p. 37.

<sup>2003</sup> G. F. von Martens, *Précis du droit des gens moderne de l'Europe. Tome premier*, Guillaumin, Paris, 1858, pp. 211 and 220.

<sup>2004</sup> B. Conforti, *The Law and Practice of the United Nations*, *op. cit.*, p. 136.

constitutionmaking<sup>2005</sup> is paired with a prohibition on *externally* imposed constitutionalism, or what Preuss has called ‘external constitutionalization’<sup>2006</sup> by imposition. This prohibition builds on the limits *ratione materiae* to DIG, and is associated with the prohibition on external actors entrenching the post-transition era, be it on the basis of a constituent transition instrument or through transitional constitutionmaking. The prohibition on externally imposed constitutionalism resonates with the conservation principle which, as Cohen argued, also applies to postconflict constitutionmaking<sup>2007</sup>. It is also in line with the inclusivity requirement, which privileges contracted over unilateral constitutionmaking processes. More generally, the prohibition on *externally* imposed constitutionalism protects the right of a people to self-determination.

ASSESSING CONSENT TO ASSISTANCE TO TRANSITIONAL CONSTITUTIONMAKING (DEONTOLOGY) – The prohibition on *externally* imposed constitutionalism is confirmed in deontology. Ensuring national ownership is one of the UN’s guiding principles on assistance to constitutionmaking processes. These principles emphasize that transitional authorities must explicitly consent to any assistance in the constitutionmaking process<sup>2008</sup>. Further, the UN Guidance for Effective Mediation requires practitioners involved in transitions to cultivate inclusivity by “protect[ing] the mediation process from the undue influence of other external actors”<sup>2009</sup> so as to avoid dependency on external actors<sup>2010</sup>. For the same reason, deontology requires a systematic emphasis on (domestic) ‘ownership’, and international mediators operating in post-conflict contexts are expected to “cultivate consent”<sup>2011</sup>.

The conditions for valid consent were already discussed above<sup>2012</sup>. In cases of internationally assisted transitions, the analysis of the state’s consent to the (partial or complete) ‘internationalization of constituent powers’<sup>2013</sup> –i.e. the exercise of constituent powers by third states or IOs– is sometimes a difficult analysis to make. Ensuring consent-based and domestically-led transitional constitutionalism is not merely a theoretical issue. Where “external influence consists only of advice from external experts, which is sought voluntarily by the domestic actors while control over the process and substance of the constitution

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<sup>2005</sup> Chapter 6, Section C.2.1.2.

<sup>2006</sup> U. K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization’, *op. cit.*, p. 467.

<sup>2007</sup> J. L. Cohen, ‘The Role of International Law in Post-Conflict Constitution-Making: Toward a Jus Post Bellum for ‘Interim Occupations’’, *op. cit.*, pp. 498 - 532.

<sup>2008</sup> ‘Guidance note of the Secretary-General on UN assistance to constitution-making processes’, *op. cit.*, p. 4: “[t]he UN should recognize that constitution-making is a *sovereign national process*, and that to be successful the process must be *nationally owned and led*. The UN should be particularly *sensitive* to the need to provide advice and options *without* causing national actors to fear that UN or other international assistance could lead to a *foreign imposed constitution*. Any assistance will need to *stem from national and transitional authorities’ requests*”. Emphasis added.

<sup>2009</sup> *Id.*, p. 15.

<sup>2010</sup> *Id.*, p. 20.

<sup>2011</sup> 2012 UN Guidance for Effective Mediation, *op. cit.*, p. 9.

<sup>2012</sup> Chapter 8, Section A.2.

<sup>2013</sup> N. Maziau, ‘L’internationalisation du pouvoir constituant. Essai de typologie : le point de vue hétérodoxe du constitutionnaliste’, R.G.D.I.P., 2002, pp. 549-579: “*le droit international couvre, de plus en plus, les matières touchant à l’exercice du pouvoir constituant*”.

remains clearly in hands of the nation at hand”<sup>2014</sup>, assistance to this process is only *marginal* and hence is entirely unproblematic under a *ius in interregno*. In some cases the constitutionmaking process is genuinely domestic, while in other cases, one doubts whether the consent to the internationalization of constituent powers was real or fictitious.

**DOMESTIC TRANSITIONAL CONSTITUTIONMAKING IN SOUTH AFRICA & AFGHANISTAN** – The South African constitutionmaking process was surely inspired by other constitutional systems worldwide, yet it was based on a genuine domestic negotiation process: “we don’t model ourselves on any other country, but rather absorb and benefit from the experiences and techniques used in other countries”<sup>2015</sup>. Also, even if there are doubts as to the validity of the 2001 Bonn Agreement, and as to the inclusivity of Afghanistan’s transition, the constitutionmaking process itself can hardly be described as externally imposed, McCool observes<sup>2016</sup>. For example, UNAMA established a ‘Constitution Commission Support Unit’ to support the constitution-making process in Afghanistan, but “the role of the Islamic Transitional Administration [was] to *lead* the process of developing the Constitution”<sup>2017</sup>. The drafting of the new Afghan constitution was an overwhelmingly ‘Afghan’ process, Afsah and Guhr confirm<sup>2018</sup>. This is so despite the quasi-imposition of the Bonn Agreement itself<sup>2019</sup>.

**IMPOSED TRANSITIONAL CONSTITUTIONMAKING (B&H, CAMBODIA, IRAQ)** – In other cases, however, e.g. the transitions in Bosnia and Herzegovina, Cambodia, and Iraq, one can seriously doubt the domestic or at least inclusive nature of the transitional constitutionmaking process.

**1.** In Bosnia and Herzegovina, the constitution was reportedly adopted under pressure: “the parties on the ground who consented to the agreement and had formal ownership of it were *coerced* into signing it and had little say over the consent of the ‘agreement’”<sup>2020</sup>. Gaeta observed that this constitution was negotiated with external actors, and that it “is not the outcome of an ‘internal’ constitution-making process”<sup>2021</sup>.

**2.** In Iraq, the sequence and development of the constitutionmaking process was controlled by the US. For Arato, the post-war constitutional processes in Iraq “can be safely described as constitution-making through external imposition”<sup>2022</sup>. As indicated earlier, the imposition of

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<sup>2014</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 429.

<sup>2015</sup> A. Sachs, ‘South Africa’s Unconstitutional Constitution: the Transition from Power to Lawful Power’, *op. cit.*, p. 1253.

<sup>2016</sup> C. McCool, ‘The role of constitution-building processes in democratization’, *op. cit.*, p. 6.

<sup>2017</sup> Islamic Transitional Administration of Afghanistan, United Nations Assistance Mission in Afghanistan, United Nations Development Programme, Support to the development of a new Constitution for Afghanistan, AFG/02/012/01/34.

<sup>2018</sup> E. Afsah, A. Guhr, ‘Afghanistan: Building a State to Keep the Peace’, *op. cit.*, pp. 424-425.

<sup>2019</sup> Chapter 8, Section B.1.

<sup>2020</sup> D. Chandler, *Empire in Denial – The Politics of State-building*, *op. cit.*, p. 128.

<sup>2021</sup> P. Gaeta, ‘The Dayton Agreements and International Law’, *op. cit.*, p. 160.

<sup>2022</sup> A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 545. See also “The appointment in June 2004 of the IIG, with the blessing of the UN, gave some managerial responsibilities to the Iraqis, but did not change the central premise of the political process, namely that the transition to elections and

the TAL, on the one hand, and the ensuing constitutionmaking, on the other, should be subject to separate analyses. In any event, while “the Constitutional Committee did manage to evolve into a relatively representative body”, consensus-building was subsequently sacrificed due to domestic US political reasons, and the US and other actors directly intervened in the constitutionmaking process<sup>2023</sup>.

3. Regarding the constitutionmaking process in Somalia, finally, Ainte observes that “the constitutional process grew from the TFC and transitional institutions, whose legitimacy was fundamentally challenged as having been developed outside Somalia with *too much foreign influence*”<sup>2024</sup>. This author further notes that “Somali diaspora leader Abdi Dirshe has complained that the *level of external oversight* of the Roadmap has *undermined Somalia’s sovereignty*”<sup>2025</sup>. In the same vein, for Mosley too, there is “*pressure, largely external, to adhere to the ‘Vision 2016’ agenda – especially the revision, finalization and approval by referendum of the provisional constitution, and then the holding of direct national elections under the new order*”<sup>2026</sup>.

NEED FOR CASUISTIC APPROACH – Whether interim constitutionalism was externally imposed should be carefully analyzed on a case by case basis. But, as a matter of principle, a *ius in interregno* forbids external actors to negatively impact the realization of self-determination during the interregnum. Crucially, this prohibition also pertains to transitional constitutionmaking.

## 6. Respect for domestic ownership of transitional justice

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It is generalized practice that transitional authorities conceptualize a form of TJ *sensu lato* at the latest towards the end of the interregnum. External actors must also respect domestic TJ choices. We shall see that external actors must respect the domestic choice made with regard to TJ (6.1), and analyze how this choice, where relevant, impacts the jurisdiction of the International Criminal Court (6.2).

### 6.1. Respect for domestic transitional justice choice

Transitional authorities have considerable leeway in choosing which TJ mechanism to apply, within the limits of the provision that no amnesty be granted for war crimes, genocide,

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*constitutional drafting was to be managed by the USA and a select political grouping. The IGC then more or less reproduced itself in the IIG, a risk Pollack (2004) had identified before its appointment. Significantly, the CPA did not initiate or encourage a process of broad consultation and negotiation aimed at reaching agreement on the interim government and then on the transitional framework”.*

<sup>2023</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 439. Cf. also pp. 440 and 442.

<sup>2024</sup> A. Ainte, 'Somalia – Legitimacy of the Provisional Constitution', *op. cit.*, p. 64.

<sup>2025</sup> *Id.*, p. 60. Emphasis added.

<sup>2026</sup> J. Mosley, 'Somalia's Federal Future – Layered Agendas, Risks and Opportunities', Chatham House, September 2015. Emphasis added.

crimes against humanity and other serious violations of international human rights and humanitarian law ('serious crimes'). External actors may *assist* transitional authorities in designing TJ mechanisms, and for some even have an obligation to do so under 'the responsibility to rebuild'<sup>2027</sup>. But the choice for domestic TJ ultimately lies with the transitional authorities. This is why, also in the domain of TJ, "foreign actors must see their role as one of support and facilitation of domestic policies"<sup>2028</sup>. Thus, "for a truth commission to succeed [...] it must be regarded by a broad cross-section of society as legitimate *and independent from extraneous political influences*"<sup>2029</sup>. This also requires that external actors should avoid advocating a rushed approach to TJ<sup>2030</sup>. It finally implies that, when consultations take place about TJ processes, they should be inclusive<sup>2031</sup>.

**DOMESTIC CHOICE TJ AVENUE (OPINIO IURIS)** – Whichever way is chosen to realize TJ, there is general agreement that it must be 'owned' by the population of the state in transition. The modality of TJ cannot be externally imposed. As discussed under Part III of the thesis, this position is shared by several transition states as well as other states.

**DOMESTIC CHOICE TJ AVENUE (UN & ICC PRACTICE)** – In the same vein, a UNSG report finds that "reconciliation cannot be imposed"<sup>2032</sup>. UN technical assistance to TJ is thus based on national consultations, as for instance in Côte d'Ivoire, Guinea, Mali and Uganda<sup>2033</sup>. Furthermore, assistance to transitional states by the ICC Office of the Prosecutor must not be intrusive: "the OTP should not directly engage with domestic authorities in the effort to enhance their legal system [...] maintaining an *advising* and pedagogical role vis-à-vis their activities"<sup>2034</sup>. This is required by the principle and policy of (positive) complementarity.

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<sup>2027</sup> ICISS Report of the International Commission on Intervention and State Sovereignty, pp. 41-42.

<sup>2028</sup> D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation After Violent Conflict, A Handbook*, *op. cit.*, p. 163.

<sup>2029</sup> E. Stover, H. Megally, H. Mufti, 'Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq', *op. cit.*, p. 852. Emphasis added.

<sup>2030</sup> *Id.*, p. 164.

<sup>2031</sup> For a counter-example, cf. TJ in Iraq: "[w]hen consultations did take place they tended to be between CPA officials and Iraqi exiles that had returned to Iraq or with members of the CPA-appointed Iraqi Governing Council (IGC). As a result, Iraq's transitional justice process could potentially be viewed as an American process operating under an Iraqi facade". E. Stover, H. Megally, H. Mufti, 'Bremer's Gordian Knot: Transitional Justice and the US Occupation of Iraq', *op. cit.*, p. 835.

<sup>2032</sup> S/2001/394.

<sup>2033</sup> See A/68/213 dd. 29 July 2013: "[g]enuine and inclusive participation in the design of transitional justice mechanisms ensures that they not only respond to the needs and expectations of victims, but provide transformative change for sustainable transitions to peace and reconciliation. In Guinea, OHCHR supported the Co-Chairs of the Provisional National Reconciliation Commission, national authorities and civil society to build stronger participation and provided technical assistance for the planning and organization of national consultations. Similarly, in Côte d'Ivoire, UNOCI provided technical assistance to the Dialogue, Truth and Reconciliation Commission for a plan of action on national consultations and for an awareness-raising campaign. UN-Women contributed to the inclusion of women in the consultations on the Amnesty Act in Uganda and in Mali UNDP assisted the Minister of Justice in pursuing criminal justice and truth-seeking mechanisms for the recent violence through a colloquium for national stakeholders".

<sup>2034</sup> P. P. Soares, 'Positive Complementarity: Fine-Tuning the Transitional Justice Discourse', *op. cit.*, p. 208.

The ownership of TJ is in line with the precept that DIG must be carried out inclusively, and in conformity with the principle of internal self-determination. Scholars like Siebert<sup>2035</sup> and Sriram<sup>2036</sup> insist on the ownership of TJ. External actors “must *facilitate* instead of impose, *empower* the people instead of ‘picking the fruits of sorrow’, *support* local initiatives instead of drowning the post-conflict society in a sea of foreign projects”<sup>2037</sup>. In sum, the prohibition on imposing externally designed, or impeding domestically conceived TJ implies that external actors, when assisting states in transition, adopt a facilitative role. When external actors impose a TJ avenue or impede a domestically conceived TJ avenue, they risk violating the non-intervention principle.

## 6.2. Complementarity and independence of the ICC

The relation between transitional authorities and the ICC is case-dependent. The Court’s jurisdiction is either actively searched for or, on the contrary, carefully avoided. Two scenarios are particularly relevant in the context of post-conflict DIG. First, the transitory state inherent to DIG may be invoked to challenge the jurisdiction of the ICC. This, then, triggers the question of how to define whether the judiciary of a state in transition is ‘able’ and ‘willing’ to discharge its duties (6.2.1). Second, the particular context of DIG can be invoked for instrumentalizing the ICC. This triggers the question of how one can avoid that the ICC be politicized by states in transition (6.2.2). Let us address both questions in turn.

### 6.2.1. Ability and willingness test: flexible standards

**COMPLEMENTARITY** – The commitment to organizing a form of post-conflict justice is to be taken into account in the following circumstances: when the Prosecutor to the ICC considers initiating investigations *proprio motu* on crimes within the jurisdiction of the Court<sup>2038</sup>; when the UNSC considers referring a situation to the Prosecutor<sup>2039</sup>; and when a representative of a state party to the Rome Statute considers doing this<sup>2040</sup>. In view of the principle of complementarity that is central to the functioning of the ICC<sup>2041</sup>, a situation should not be submitted to the Court’s jurisdiction if the issue can appropriately be dealt with on the national level.

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<sup>2035</sup> “The most effective dialogue and peace structures are those that are carefully designed by national stakeholders themselves to collectively address their conflict and broken constitutional instruments. They are the authentic structures and common spaces that have grown into an ‘immune system’ that strengthens a society from within”, H. Siebert, ‘National Dialogue and Legitimate Change’, *op. cit.*

<sup>2036</sup> For a discussion on TJ and its importation or imposition, see C. L. Sriram, ‘Transitional Justice and the liberal peace’ in E. Newman, R. Paris, O. P. Richmond, *New Perspectives on Liberal Peacebuilding*, *op. cit.*, pp. 121-123, noting that “[t]ransitional justice, and trials in particular, are frequently imported from the outside and occasionally externally imposed. In this they are similar to the liberal peacebuilding of which they are a part”.

<sup>2037</sup> D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation After Violent Conflict, A Handbook*, *op. cit.*, p. 164.

<sup>2038</sup> Rome Statute, art. 15.1.

<sup>2039</sup> *Id.*, art. 13.b.

<sup>2040</sup> *Id.*, art. 13.a.

<sup>2041</sup> *Id.*, Preamble, tenth consideration; art. 17.

ABILITY TEST: FLEXIBILITY IN CONTEXT OF DIG – True, the “total or substantial collapse or unavailability of [a state’s] national judicial system”<sup>2042</sup> must be taken into account in the evaluation of a state’s ability or inability to carry out its own proceedings. Yet, in transition states such collapse or unavailability is considered to be *temporary*. Consequently, *evidentiary standards* for proving that a transition state’s judiciary has substantially collapsed or is unavailable will be *more demanding* than under normal circumstances. Regarding the case of Libya, referred to the ICC by the UNSC<sup>2043</sup>, the Prosecutor thus argued:

“in relation to ‘inability’, the Prosecutor submits that ‘while Article 17 sets out benchmarks to enable the Court to identify cases that cannot be genuinely heard before national courts, the Statute’s complementarity provisions should *not become a tool for overly harsh structural assessments* of the judicial machinery in developing countries or *in countries in the midst of a post-conflict democratic transition* which, as Libya notes, will not possess a sophisticated or developed judicial system”<sup>2044</sup>.

ABILITY TEST: PRECEDENT ICC IN LIBYA – In essence, the Prosecutor’s argument was that the ability test should be applied with lenience for states in transition. Following this argument, the ICC accepted the challenge against the admissibility of the case *Prosecutor v. Saif Al-Islam Gaddafi*. It considered that Libya, even if in transition, would be able and willing to prosecute Al-Islam Gaddafi<sup>2045</sup>. This is also the case, the Court confirmed, when the security situation leaves much to be desired:

“the Chamber is of the view that not simply any ‘security challenge’ would amount to the unavailability or a total or substantial collapse of the national judicial system rendering a State unable to obtain the necessary evidence or testimony in relation to a specific case or otherwise unable to carry out genuine proceedings”<sup>2046</sup>.

POSITIVE COMPLEMENTARITY – The assessment of a state’s willingness to carry out proceedings should be made with reference to the state’s own law<sup>2047</sup>. In the context of DIG, substantiating a state’s unwillingness and even inability is harder than usual. The reason is that, as observed under Part III of the thesis, transitional authorities often announce ambitious reforms of their country’s judicial system and reaffirm their commitment to combatting impunity. For transition states, the standards used for assessing their willingness and ability to carry out proceedings are therefore flexible. This is in line with the principle and policy of positive complementarity. This policy allows the Office of the Prosecutor to assist transitional

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<sup>2042</sup> *Id.*, art. 17.3.

<sup>2043</sup> S/RES/1970 dd. 26 February 2011, §§ 4-8.

<sup>2044</sup> Decision dd. 11 October 2013 on the Admissibility of the case against Abdullah Al-Senussi, §187. On 2 November 2011, the Prosecutor reported that “[t]he Office was informed that the new Libyan authorities are in the process of preparing a comprehensive strategy to address crimes, including the circumstances surrounding the death of Muammar Gaddafi. In accordance with the Rome Statute the International Criminal Court should not intervene if there are genuine national proceedings”. L. Moreno-Ocampo, ‘Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)’, 2 November 2011, § 19.

<sup>2045</sup> Judgment dd. 24 July 2014 on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’.

<sup>2046</sup> *Id.*, § 261.

<sup>2047</sup> *Id.*, § 221.

authorities in their investigations and examinations, obviating the need for the ICC's intervention<sup>2048</sup>.

In conclusion, when intervening in the context of DIG the Prosecutor and Court must take a flexible stance with regard to the willingness and ability test. This is also the case when transitional authorities are only “*in the process of preparing a comprehensive strategy to address crimes*”<sup>2049</sup>. The temporary reconstruction of the judiciary in times of transition does not necessarily correspond to a ‘total’ or even ‘substantial’ collapse or unavailability of the judiciary.

### 6.2.2. Avoiding the politicization of the ICC

The danger that the Court be politicized during transitions is high. States often refer situations to the ICC during an interregnum. The attempt to politicize the ICC on such occasions is quite noticeable. Gaeta remarks, in this regard:

“in states in which civil war is taking place, it may be that a state's request for an investigation is chiefly motivated by the wish to expose internationally the crimes allegedly being perpetrated by the other side. By requesting ICC intervention, that state could be *using the Court as a political weapon in the hope that its intervention could assist it in achieving its domestic political and military aims*”<sup>2050</sup>

**HANDPICKED REFERRAL TO ICC** – The period of self-referral is generally handpicked, and almost systematically relates to potential wrongdoings by the former regime, or by the opponent. In the CAR, transitional leader C. Samba Panza referred the situation to the ICC, manifestly trying to target members of the pre-transition government<sup>2051</sup>. In the DRC, a referral letter was signed on 3 March 2004, thus during the interregnum (from 16 December 2002 until 19 December 2005), whereas in Côte d’Ivoire a referral letter was signed on 14 December 2010, right after the (second) transitional period. Similarly, in Ukraine, the interim government headed by former opposition politician Yatsenyuk lodged a declaration under the Rome Statute on 17 April 2014, “accepting the jurisdiction of the Court over alleged crimes committed on its territory from 21 November 2013 to 22 February 2014”<sup>2052</sup>. The period under investigation runs from the beginning of the Euromaidan demonstrations on 21 November 2013 until the ousting of Yanukovich on 22 February 2014. Since exactly this period was referred to the ICC, it is fair to see the interim government’s referral letter as an instrument for delegitimizing Yanukovich’ government.

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<sup>2048</sup> OTP Strategy Plan 2012 – 2015.

<sup>2049</sup> L. Moreno-Ocampo, ‘Statement to the United Nations Security Council on the situation in Libya, pursuant to UNSCR 1970 (2011)’, § 19.

<sup>2050</sup> P. Gaeta, ‘Is the Practice of Self-Referrals a Sound Start for the ICC’, *Journal of International Criminal Justice* 2, 2004, pp. 951–952.

<sup>2051</sup> CAR, referral letter of 30 May 2014 signed by C. Samba Panza.

<sup>2052</sup> Report on Preliminary Examination Activities 2014 dd. 2 December 2014. Cf. also the Draft Decree of the Parliament Amending the Declaration of Parliament dated 25 February 2014, which is explicit about the political goal of the self-referral.

JURISDICTION IN TIMES OF DIG: DIFFICULT BALANCE – In order for the Court and Prosecutor to preserve their independence when hearing or investigating cases associated with transitions, the period of referral should be critically examined. In the case of Ukraine, for example, because this country is not a party to the Rome Statute, the Court cannot, at the risk of acting *ultra vires*, exercise jurisdiction over acts exceeding this period. But at the same time, the Court may compromise its independence if it were to rubber stamp the interim government’s choice, and would be prevented, in light of its limited temporal jurisdiction, from investigating crimes potentially committed by both sides of what eventually evolved into a civil war. If, like in Ukraine, the Court finds itself between Scylla (acting *ultra vires*) and Charybdis (compromising its independence), the Court may decide not to exercise its jurisdiction at all.

In conclusion, self-referrals by transitional authorities, be they a party to the Rome Statute or not, should be carefully examined. Declarations by the Court’s Prosecutor according to which all allegations, no matter which political side, are to be examined, are therefore to be welcomed<sup>2053</sup>. In the context of DIG, the Court and its organs must critically scrutinize the situation before deciding whether and how to exercise jurisdiction, lest the Court be instrumentalized for legitimizing regime changes.

### Section C. Legal implications

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The last section of this chapter discusses two legal implications of the prohibitions discussed above in relation to external involvement with DIG. First, when external actors violate these prohibitions, they may engage their international responsibility under international law. Second, the above allows us to describe which kind of external pressure in relation to DIG is permissible.

#### 1. Potential engagement of international responsibility

In the above, the following prohibitions for external actors were discussed: prohibitions on (i) imposing constituent transition instruments; (ii) violating the limits *ratione temporis* of the interregnum; (iii) violating the limits *ratione materiae* of the interregnum; (iv) favoring particular groups during the interregnum; (v) externally imposing transitional constitutionmaking; (vi) externally imposing modes of TJ.

POTENTIAL ENGAGEMENT OF INT’L RESPONSIBILITY – International law is not indifferent to the *mode* of observing public authority during the interregnum. If, notwithstanding persistent objectors,

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<sup>2053</sup> In this sense, Moreno Ocampo declared before the UNSC: “[t]here are allegations of crimes committed by NATO forces, allegations of crimes committed by NTC-related forces, including the alleged detention of civilians suspected to be mercenaries and the alleged killing of detained combatants, as well as allegations of additional crimes committed by pro-Gaddafi forces. These allegations will be examined impartially and independently by the Office”. *Id.*, § 18. It seems a similar commitment was made with regard to the DRC. Gaeta, ‘Is the Practice of Self-Referrals a Sound Start for the ICC’, *op. cit.*, p. 952.

a *ius in interregno* further germinates, external actors (states and potentially IOs) may engage their responsibility under international law if their influence on DIG, depending of course on the degree of assistance or control they exercise vis-à-vis transitional authorities, runs contrary to the core of a *ius in interregno*. The ILC's DASR, widely regarded as reflecting international custom<sup>2054</sup>, provide:

“A State which *aids* or *assists* another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State”<sup>2055</sup>.

The same applies for states *directing* and *controlling* other states in the commission of internationally wrongful acts<sup>2056</sup>. Similar provisions apply for IOs<sup>2057</sup>. External actors are therefore not allowed to support *any* sort of transition instrument or procedure. They must adjust or retract their support during the interregnum when it becomes clear that the chosen transitional authority is violating the core obligations of *ius in interregno*. To the extent that a *ius in interregno* acquires legal force, external actors do not have unbridled freedom in supporting transitional authorities. They must respect a *ius in interregno* as anchored in the principle of self-determination, particularly when the constitutional aspects of DIG are concerned.

INT'L RESPONSIBILITY: DIRECTION & CONTROL OVER IUS IN INTERREGNO-VIOLATING DIG – If, with regard to specific acts or policies, states and IOs go beyond acts of assistance, and place transitional authorities under “*de facto* international trusteeship”<sup>2058</sup> or “under [their] supervision”<sup>2059</sup>, the conduct of the transitional authorities can arguably be considered the act of the supervising state(s) or IO(s)<sup>2060</sup>. In this case, the external actors directing a transitional authority for example in violating the limitations *ratione materiae* of the interregnum (thus acting *ultra vires*) engages its international responsibility. What is the legal basis for this? As noted above, a state or IO “which directs and controls another [resp. a] State in the commission of an internationally wrongful act by the latter is internationally responsible for that act” if that state or IO “does so with knowledge of the circumstances of the internationally wrongful act” and “the act would be internationally wrongful if committed by that state [or organization]”<sup>2061</sup>. If states or IOs direct and control transitional authorities in the commission of acts in contravention with the core obligations under a *ius in interregno* identified under Part III of

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<sup>2054</sup> A. Pellet, ‘The ILC’s articles on state responsibility for internationally wrongful acts and related texts’ in J. Crawford, A. Pellet, S. Olleson, *The Law of International Responsibility*, OUP, 2010. For a brief discussion about the DASR being essentially a codification of customary international law, cf. A. Aust, *Handbook of International Law*, CUP, 2010, pp. 376-377.

<sup>2055</sup> DASR, art. 16.

<sup>2056</sup> DASR, art. 17.

<sup>2057</sup> DARIO, art. 14.

<sup>2058</sup> F. Reyntjens, ‘Briefing: Democratic Republic of Congo: Political Transition and Beyond’, *op. cit.*, 307-317.

<sup>2059</sup> ICG Report nr. 203, 11 June 2013, ‘Central African Republic: Priorities of the Transition’, p. 11.

<sup>2060</sup> DASR, art. 8. Cf. also DASR, art. 17.

<sup>2061</sup> DASR, art. 17; DARIO, art. 15.

the thesis, the supervising state(s) or IO can engage their responsibility for that, at least to the extent that said obligations have entered the realm of international law.

The emphasis on domestic responsibility and national ownership in the context of DIG certainly appears to be laudable from a policy perspective, as it may contribute to fighting a “*culture de la dépendance envers la communauté internationale*”<sup>2062</sup>. As discussed above, at first sight it might also seem justified from a legal perspective, notably in view of state sovereignty and self-determination. But the insistence on the domestic ownership and national responsibility of DIG should not obscure the following consideration: transitional authorities do not always bear exclusive responsibility for mismanaged DIG when they administer the interregnum only in part or in name.

Where DIG is highly exposed to and even malleable by the international community, one can legitimately critique the point of departure –discussed under Chapter 1<sup>2063</sup>– taken by the PBC, the UNGA, the UNSC as well as international contact groups for its simplicity. The pretense of conceptual clarity –the responsibility, in principle, of domestic transitional authorities– cannot be used as a smoke screen to avoid the legal analysis of the domestic/international interplay on the occasion of DIG. On three occasions, at least, states and IOs have themselves challenged this so-called conceptual clarity by confirming that responsibility for the transition must be shared. With regard to the purported transition in Syria, for example, a number of states agreed that “participating 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>2064</sup>. With regard to the transition in Afghanistan, furthermore, a substantial number of states and IOs have indicated that, “with the conclusion of the Transition process, our *common responsibility* for Afghanistan’s future does not come to a close”<sup>2065</sup>. Also, in 2002 the former US ambassador to the UN affirmed that “if it comes to conflict [in Iraq] [...] the US understands the obligation it has, the prospects of turmoil and unintended consequences, understands fully the *responsibility* to leave the area in a better state”<sup>2066</sup>.

In these cases, the traditional affirmation of domestic responsibility for DIG seems to be nuanced by statements emphasizing a shared or common responsibility. Such statements seem to acknowledge that when states or IOs are involved in DIG, their involvement may trigger

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<sup>2062</sup> Interview with Carlos Westendorp cited in Y. Daudet, ‘L’exercice de compétences territoriales par les Nations Unies’, *op. cit.*, p. 30. It is also in this sense that Saul understands the concept of ownership, i.e. as opposed to international imposition. Cf. M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 42-43.

<sup>2063</sup> Chapter 1, Section B.2.3.1.

<sup>2064</sup> Cf. ‘London 11 Final Communiqué’, 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.

<sup>2065</sup> Conference Conclusions ‘Afghanistan and the international community: from transition to the transformation decade’, *op. cit.*, p. 4, § 12. This part of the conclusions concentrates on security issues.

<sup>2066</sup> K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, *op. cit.*, p. 352.

their responsibility and liability. The formulation of a *ius in interregno* might assist us in understanding when this is the case.

## 2. Permissible pressure

ALLOWED EXTERNAL PRESSURE AT OCCASION OF DIG – None of the above prohibitions discussed above exclude diplomatic pressure (short of coercion) by appointed mediators, especially if their role is explicitly regulated by the transitional framework. Also, external actors may lawfully exert (non-coercive) pressure on transitional authorities. They may encourage or even exert pressure on transitional authorities to:

- Execute the domestically defined transition agenda *in tempore utile* and to administer the country *ad interim*. Such ‘procedural influence’<sup>2067</sup> was for example exercised in Burundi and the DRC, by South Africa and by the CIAT, respectively. In the case of the Burundi transition, the “South African mediation applied *sustained pressure* to move the process forward, and regional summits of heads of state firmly endorsed agreements reached, thus leaving little space for manoeuvre by parties critical of these agreements and preventing future re-negotiation”<sup>2068</sup>. In the DRC, CIAT “made an effort to make the former belligerents feel responsible for the successful implementation of the transitional agenda and the consequences of spoiling it”<sup>2069</sup>, and made clear that there was no alternative to the transition procedure<sup>2070</sup>. Nothing prevents an external actor from reminding transitional authorities of the limits *ratione temporis* they had themselves set on the interregnum
- Widen the inclusivity of DIG. Thus, for one observer, “the support provided to certain civil society organizations in the [MENA] region turned out to be decisive in terms of enhancing popular participation in legal and constitutional reforms”<sup>2071</sup>. Nothing prevents external actors from exercising diplomatic influence or pressure (short of coercion) in view of increasing the inclusivity of the constitutionmaking process. There may even be an important role for external actors “in advocating for wide participation in constitutional discussion”<sup>2072</sup>. The presence and involvement of third parties can be necessary for expanding representation and participation<sup>2073</sup>. Inclusivity can be invoked by external actors wishing to influence the transition in that direction (e.g. the external pressure to

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<sup>2067</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 463.

<sup>2068</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 46. With a reference to ICG, Elections in Burundi: the Peace Wager, ICG Africa Briefing, 9 December 2004.

<sup>2069</sup> M. de Goede and C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *op. cit.*

<sup>2070</sup> *Communiqué du Comité International d’Accompagnement de la Transition* dd. 1 December 2004: “*il n’existe aucune alternative au processus de transition qui doit déboucher sur la tenue d’élections libres et transparentes en juin 2005. A cet égard, le CIAT condamne toute action, de l’intérieur ou de l’extérieur, visant à déstabiliser ce processus et l’instauration d’une paix durable dans la région* ».

<sup>2071</sup> O. Hammady, ‘International support to legal and constitutional reforms in the MENA transitional processes’, presentation during International Expert Seminar of 21 and 22 September 2015.

<sup>2072</sup> K. Papagianni, ‘Power sharing, transitional governments and the role of mediation’, *op. cit.*, p. 52.

<sup>2073</sup> *Id.*, p. 44. Emphasis added.

organize a national dialogue in Tunisia<sup>2074</sup>), but cannot entitle these actors to call, for instance, for a post-transition power-sharing government (as this concerns a long-term post-transitional arrangement).

- Carry out transitional constitutionmaking. The prohibition of externally imposed constitutionalism does not prevent actors from promoting constitutional or rule-of-law reforms as long as these initiatives are consent-based and solidly anchored in domestic political processes<sup>2075</sup>.

Such encouragements or even exhortations are not *per se* unlawful, provided they are non-coercive. External actors may thus exhort transitional authorities to abide by their own obligations, and may condemn any action that is contrary to these obligations or that risks derailing a transition carried out in conformity with the precepts of a *ius in interregno*.

## Summary of Chapter 8

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External influence on DIG can materialize as early as the foundation of the transition stage. A domestic transition instrument imposed upon a state goes against the prohibition on imposed interim polity, and violates the principle of internal self-determination. If the transition instrument is an international treaty, it may be challenged on the same ground<sup>2076</sup>.

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<sup>2074</sup> Cf., for example, the interview by Belhassen Ennouri with a vice president of l'UTICA, Slim Ghorbal: “[t]he national dialogue was launched by the UGTT but the external foreign assistance helped the real implementation and advancement of the national dialogue. The external support promoted the national dialogue because they wanted that Tunisia gets out from the political crisis of 2013. So we entered in discussions with the government chaired by Ali Ariadh and the politicians to convince them about the idea of the national dialogue” Cited in B. Ennouri, *The National Dialogue in Tunisia*, on file with author. See also interview with Emma Bonino, *Le Temps*, 7 September 2013. See also the “sanctions and embargoes to be used in attempts to persuade Syrian President Bashar al-Assad first to go to a negotiating table with the opposition”. R. Balfour, ‘EU Conditionality after the Arab Spring’, *European Institute of the Mediterranean*, June 2012.

<sup>2075</sup> *Id.*: “the rule of law practices of external state-building tend towards irrational and arbitrary forms of law-making precisely because the law-making process in the internationalised phantom states, which are the product of Empire in Denial, is *separate from the domestic political process*”

<sup>2076</sup> A treaty can be invalidated if it was concluded under coercion (art. 52 VCLT) or in violation of *ius cogens* (art. 53 VCLT). Coercion however does not comprise economic or political coercion, and there must be a “direct causal relationship between coercion and the conclusion of the treaty” (M. E. Villiger, *Commentary on the 1969 Vienna Convention of the Law of Treaties*, Martinus Nijhoff Publishers, 2009, pp. 644 - 645). The Dayton Agreement, for instance, was concluded under coercion, Šarčević argues. E. Šarčević, ‘Völkerrechtlicher Vertrag Als „Gestaltungsinstrument“ Der Verfassunggebung: Das Daytoner Verfassungsexperiment Mit Präzedenzwirkung?’, *op. cit.*, pp. 327-328: “Verträge werden danach nichtig, wenn sie nach Art. 52 durch Androhung oder Anwendung von Gewalt abgeschlossen werden und nach Art. 53 im Zeitpunkt des Abschlusses im Widerspruch zum *ius cogens* stehen. Obwohl es unstrittig ist, dass das Daytoner Friedensabkommen auf amerikanischen Druck und durch Androhungen von Zwangsmaßnahmen vornehmlich politischer und wirtschaftlicher Natur (Absage der Finanzunterstützung für den Wiederaufbau des Landes, Absage der humanitären Hilfe, Rückzug der Internationalen Gemeinschaft aus B-H u.a.) zustande kam, lassen sich alle Drohungen gegenüber den Vertragsparteien schwerlich exakt von denen gegenüber den Vertragsvertretern (Art. 51 WVK) trennen. Aus den zahlreichen Äußerungen der für die Vertragsparteien handelnden Personen sind lediglich Anzeichen dafür zu entnehmen, dass sowohl die Staatsvertreter als auch die Vertragsparteien z.Zt. des Vertragsabschlusses in der Weise unter Zwang standen, dass die angedrohten Zwangsmaßnahmen für den Vertragsabschluss ursächlich waren”. Cf. also J. Benomar, ‘Constitution-Making After Conflict: Lessons for Iraq’, *op. cit.*, p. 88.

Members of the international community have (continuing) obligations that extend beyond the foundation of the transition. Independently from the question of whether external states or IOs had a role to play in adopting the transition instruments triggering and regulating the transition procedures, they have to comply with a number of norms during the interregnum:

- They must not try to artificially alter the limitations *ratione temporis* to the interim rule;
- They must respect the fiduciary nature of DIG;
- They must not impede the progressive realization of internal self-determination during the transition process;
- They must respect the international legal framework that is applicable to the internationalized interregnum;
- They must not impede domestic efforts to realize a form of post-conflict justice.

The relative decrease in domestic accountability mechanisms during the transition period might justify an increased engagement by the ‘international community’, yet any pressure exercised must not amount to coercion, and must be in line with the norms just enumerated.

EXTERNAL DIPLOMATIC PRESSURE: FOCUS ON BRINGING PROCEDURES IN LINE WITH IUS IN INTERREGNO – Also, because the general thrust of a *ius in interregno* is based on procedure, diplomatic pressure should be geared towards confirming the centrality of procedure for DIG: reminding parties as to what the transition agenda is without jeopardizing the transition or imposing their own deadlines; reminding parties that transitional authorities have fiduciary powers in the first place, encouraging transitional authorities to abide by the procedural prerequisites that flow from the application of internal self-determination to DIG, etc. In this sense, external actors are supposed to play a facilitative role<sup>2077</sup>. More generally, the circumstance that external actors must align their assistance to DIG with the core of a *ius in interregno* calls for *moderation* if their ambitions turn out to be too strongheaded. If external actors prevent transitional authorities from carrying out their core obligations under a *ius in interregno*, their international responsibility is engaged to the extent that these obligations have entered the realm of international law.

Under the following chapter, it will be argued that (oppositional) transitional authorities cannot be handpicked at the whim of international actors’ preferences. At the risk of violating the principle of non-intervention in domestic affairs, oppositional transitional authorities may be ‘empowered’ only under strict conditions. These conditions will be outlined in the following chapter.

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<sup>2077</sup> Y. Ghai, G. Galli, *Constitution Building Processes and Democratization*, *op. cit.*, p. 10. In the same sense, I. S. Spears, ‘Africa: The Limits of Power-Sharing’, *op. cit.*, p. 116.



## CHAPTER 9. LIMITS TO INVOLVEMENT WITH OPPOSITIONAL DOMESTIC INTERIM GOVERNANCE

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Increasingly, states and IOs, often in group format, assess the ‘legitimacy’ or ‘democratic potential’ of a political body presenting itself as a potential alternative to a (governmental) regime within a state deemed to be ‘illegitimate’ or ‘undemocratic’. Some actors are deemed more fit to lead the interregnum:

"an *acceptable alternative government* should be readily available, one that promises to be effective, so that, ideally, all that would be involved is regime change and not regime reconstruction or nation building"; "Regime changes will be most difficult when there is no likely successor and no coherent internal political process that can produce an effective and *acceptable candidate* and when, as a result, the occupation will be extended and expensive"<sup>2078</sup>

Such parlance is not politically innocent. Nor is this delicate issue a legally settled issue. It is related to the question who, especially in the pre-transition stage, triggers and determines DIG, and why. Thus, “one of the key aspects in the functioning and effects of transitional regimes involves the issue of *who initiates* [...] the transitional process”<sup>2079</sup> because “the interim governments that now occur in the context of post-war transitions tend to be *initiated and often managed by external actors*”<sup>2080</sup>. The early involvement by external actors can substantially define, perhaps even generate, transitions triggered by opposition movements. How can this issue be understood from a legal perspective? This is the research problem of this chapter.

The right of internal self-determination, understood as the right to decide freely on a form of government, “does not present any particular problems” for Simma: “*any outside pressure* designed to enforce the installation of a particular form of government [...] must be defined as an *internationally prohibited intervention*”<sup>2081</sup>. Admittedly, there is no doubt that the external imposition of any form of government is unlawful under the principles of self-determination and non-intervention. In situations of DIG the issue however becomes subtler. That is because, for states in transition, the installation of a particular government occurs *after a considerable lapse of time*, the interregnum. The question, then, becomes whether external states or IOs may intervene before a (prospective) interregnum, not to install a specific form of government but *to influence the course of DIG itself*.

A variety of external actors, as already noted<sup>2082</sup>, can influence the interregnum and, thus, the ensuing reconfiguration of the state order. Moreover, “international agencies are oftentimes

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<sup>2078</sup> M. Reisman, 'The Manley O. Hudson Lecture: Why Regime Change Is (Almost Always) a Bad Idea', *op. cit.*, pp. 524-525.

<sup>2079</sup> K. Guttieri and J. Piombo, 'Issues and Debates in 'Transitional Rule'', *op. cit.*, p. 5. Own emphasis.

<sup>2080</sup> *Ibid.*, p. 12.

<sup>2081</sup> B. Simma (ed.), *The Charter of the United Nations – a commentary*, *op. cit.*, p. 63. See also N. Bhuta, 'New Modes and Orders', *op. cit.*, p. 65. Emphasis added.

<sup>2082</sup> Chapter 1, Section B.

the main agents of transition as they intervene to strengthen or even create government where internal authority is deemed too weak to run a transition”<sup>2083</sup>. This chapter is about states and IOs triggering or supporting DIG in other states, for instance by creating or participating in contact groups that (purport to) endorse oppositional transitional authorities. It examines the legality *vel non* of indirect creation or empowerment of new regimes. These regimes are *indirectly* created when oppositional transitional authorities are used as intermediaries. This chapter as well as the following focus on transitions by *replacement*<sup>2084</sup>, especially on oppositional transitional authorities set up in Syria and Libya in the context of the so-called Arab Spring. Especially the initial phases of replacement (stage 1 ‘before the transition’; stage 2 ‘founding the transition’) will retain our attention. Crucially, the core of a *ius in interregno* as identified under Part III of the thesis, applies both to oppositional and consensual transitional authorities wielding effective power during the interregnum. This chapter however concentrates on the initial phases of DIG by replacement, whereby oppositional transitional authorities are leading the interregnum, or intend to do so.

The following research question will guide us through this chapter. Which legal leeway do states have in (indirectly) initiating (nonconstitutional, per definition) DIG in other states? We have already seen, under Chapter 4<sup>2085</sup>, that there is no doubt as to the legality of external support to peoples’ struggle for self-determination and liberation from colonial and foreign domination and alien subjugation<sup>2086</sup>. Contrary to NLM, however, transitional authorities do not represent a legal category, and DIG is not subject to a special international legal regime. The research problem here thus reflects a different context and reality. In the absence of a legal regime comparable to the one applicable to NLM, it seems opportune to identify the legal criteria for, or limits to, engaging with oppositional transitional authorities. Can, in the absence of such criteria, regime transitions outside the context of decolonization be (indirectly) provoked at any moment, and for unidentified reasons?

It will be argued that it is in principle prohibited for states to coerce a state into opposition-based DIG. In line with this dissertation’s general focus on civilian transitional authorities / the civilian aspects of DIG, only the *non-forcible* aspects of external impact on opposition-based DIG will be examined. This chapter does not deal with the question as to whether unilateral armed intervention in the domestic affairs of a so-called rogue state may, under certain conditions, be justified, a question fiercely debated en lien with the doctrine of humanitarian intervention. Also, the topic of external imposition of transition instruments is not revisited here as it was analyzed under the preceding chapter<sup>2087</sup>.

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<sup>2083</sup> J. Strasheim, H. Fjelde, 'Pre-Designing Democracy: Institutional Design of Interim Governments and Democratization in 15 Post-Conflict Societies', *op. cit.*, p. 338.

<sup>2084</sup> For the distinction between replacement and transplacement, cf. the introduction of Chapter 4.

<sup>2085</sup> Chapter 4, Section B.2.

<sup>2086</sup> UNGA/RES/2787 dd. 6 December 1971. Cf. also UNGA/RES/3103 dd. 12 December 1973.

<sup>2087</sup> Chapter 8, Section B.1.

Two sections will guide us through this chapter. The first section sketches the factual context, focuses primarily on the role of contact groups, and recalls that the existing literature with regard to recognition of government or belligerency does not adequately address the issue at stake (A). The second section succinctly explains that the non-forcible yet coercive empowerment of oppositional DIG is generally prohibited under international law (B).

## Section A. External empowerment of oppositional transitional authorities

After observing that the influence of contact groups was central to the empowerment of the Libyan and Syrian transitional authorities (1), this practice will be given a label, ‘transformative empowerment’ (2), and will be placed in the legal context (3).

### 1. Observing a practice: contact groups empowering oppositional transitional authorities

Which legal leeway do contact groups have for triggering nonconstitutional DIG indirectly, i.e. by supporting and empowering transitional authorities? In legal terms, how far is a contact group allowed to exert influence on a state’s interregnum, thus, eventually, on the reconfiguration of that state’s political and constitutional order? The answer to these questions depends both on the type of transitional authority that is being supported and on the manner in which such influence is being exercised.

How can oppositional transitional authorities best be described in light of the peace-through-transition paradigm and the nonconstitutionality characterizing the transitions under scrutiny? As discussed under Chapter 4, the reality of oppositional transitional authorities is distinguishable from other realities such as resistance movements, armed (opposition) groups, opposition groups, insurgency, or belligerency. Oppositional transitional authorities are political or civilian (non-military) entities that have the publicly proclaimed aim of introducing a new political regime and of nonconstitutionally reconfiguring the constitutional order in a state, without collaborating with the incumbent regime (note that such collaboration would amount to DIG by *transplacement*). They pursue a state-order-reconfiguration aim within the existing state, without aiming for secession. Their main features thus are:

- their civilian (non-military) role or character;
- their proclaimed state-order-reconfiguration aim;
- their choice to reach this aim by unilateral and nonconstitutional means.

These features characterize two oppositional transitional structures created during the so-called Arab Spring: the Syrian National Council / Syrian National Coalition (‘SNC’) and the Libyan Transitional National Council (‘TNC’). From the beginning both the SNC and the TNC were clear about their aim: pursuing a reconfiguration of the state order within their respective states. This broad aim was publicly announced, however undetailed their plans and

intentions. The following lines demonstrate that the very *raison d'être* of said oppositional transitional authorities was to realize this aim.

On 2 October 2011, seven months after the beginning of the Syrian revolution, a consensus was reached on establishing the SNC. The 'basic principles' of this oppositional umbrella organization included the "overthrow [of] the regime using all legal means", the "manage[ment] the transitional period" in order to avoid any political vacuum<sup>2088</sup>, and the organization of the elections of a constitutional assembly<sup>2089</sup>. On 20 April 2013, the SNC issued a declaration in which it listed the 'basic principles' guiding its struggle. The fifth principle provides that "the Coalition [...] is aiming at a political solution and a transition in Syria on the basis that Bashar Al Assad and his close associates cannot take part in it or be part of this solution for Syria". The eighth principle clarifies that this coalition will preserve but reorganize the state institutions and structures. In the fourteenth principle, it "calls on the international community to accelerate its support for all Coalition institutions including the current interim government".

According to the Constitutional Declaration, the Libyan TNC was "the supreme power in the State of Libya and shall undertake the works of the supreme sovereignty including legislation and laying down the general policy of the State"<sup>2090</sup>. This transition instrument also defines how, and in light of which standards, the permanent constitution should be drafted<sup>2091</sup>, even though the knowledge and means for achieving this end were reduced:

"whilst the TNC members and the rebel groups knew what they wanted to get rid of –the Qaddafi regime and its convoluted governance/pseudo administrative framework– the question and reality they faced once the regime fell was: *did they have any constructive ideas* that transcended the demise of the Qaddafi regime to the pivot of the main grievance – a *nuanced State building agenda?*"<sup>2092</sup>.

Furthermore, from the outset, both the Syrian and Libyan transitional oppositional authorities received explicit support from contact groups. What is more, arguably their politico-legal origin and institutional advancement *depended* on contact groups. The circumstances in which international community actors interacted with both oppositional transitional authorities are sufficiently known<sup>2093</sup>. The following overview only offers a *tour d'horizon* of how these

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<sup>2088</sup> <http://www.syriancouncil.org/en/objectives.html>. Now only available *en cache*. To the same end, the London 11 group considers to set up a 'transition coordination committee'. See 'Planning Under Way for Possible Syrian Collapse', The Wall Street Journal.

<sup>2089</sup> <http://www.syriancouncil.org/en/mission-statement.html> (not available anymore).

<sup>2090</sup> Constitutional Declaration dd. 3 August 2011, *op. cit.*, art. 17.

<sup>2091</sup> Draft Constitutional Charter For the Transitional Stage, artt. 1-16; 31-33.

<sup>2092</sup> J. N. Maogoto, A. Coleman, 'Changing the Guard – The Price of Democracy: Lessons from the Arab Spring on Constitutionalism' in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.*, p. 11. Emphasis added.

<sup>2093</sup> For an overview of how Syrian and Libyan oppositional structures were acknowledged and endorsed by particular states, regional and global organizations, cf. S. Talmon, 'Recognition of the Libyan National Transitional Council', *op. cit.*; S. Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *op. cit.*,

authorities were internationally endorsed and created following the ‘disqualification’<sup>2094</sup> of the incumbent governments. It specifically relates to oppositional transitional authorities in Syria (1.1) and Libya (1.2). It will become apparent from this overview that the very existence of these authorities –i.e. their foundation and institutional continuation– was conditional on the support of contact groups.

### 1.1. The creation and endorsement of the Syrian oppositional transitional authority

In the case of Syria, members of the international community purported to de-legitimize the Syrian incumbent. Notwithstanding calls for an inclusive transition, they attempted to empower the opposition-based Syrian National Council (subsequently the Syrian National Coalition). The following overview of facts, in a chronological order, can be skimmed or skipped by the reader who is only interested in the recapitulative part, at the end of this subsection.

About three months after Syria was suspended from the Arab league, the ‘Group of Friends of the Syrian People’ (the ‘contact group’) convened for the first time in February 2012, in Tunisia, with the participation of numerous countries and IOs<sup>2095</sup>. The conclusions of this meeting show in several respects how states and IOs endorsed and strengthened the position of the Syrian National Council. The participants of the contact group called for accountability for the “regime’s gross human rights violations”<sup>2096</sup>. They committed to “reduc[ing] diplomatic ties with the Syrian regime”<sup>2097</sup>. Crucially, they “recognize[d] the Syrian National Council as a legitimate representative of Syrians seeking peaceful democratic change”<sup>2098</sup>, and agreed to “increase [their] engagement with and practical support for the Syrian opposition”<sup>2099</sup>.

In April 2012, the contact group met again, in Istanbul; and in July, in Paris. The chairman’s conclusions to the Paris meeting indicated that the group “commended and encouraged the opposition efforts to present a united front as a *credible alternative* to the current regime”, and “decided to greatly increase assistance to the opposition”<sup>2100</sup>. In the meantime, several states and IOs issued the ‘Action Group for Syria Final Communiqué’ of 30 June 2012. In this text, better known as the ‘Geneva Communiqué’, they declared their determination “to work

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p. 219, p. 226 a.f.; cf. also P. Thielbörger, ‘Die Anerkennung oppositioneller Gruppen in den Fällen Libyen (2011) und Syrien (2012)’, *op. cit.*

<sup>2094</sup> About the link between disqualification and legitimacy of exercise, cf. J. d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, *op. cit.*

<sup>2095</sup> The Chairman’s Conclusions of the International Conference of the Group of Friends of the Syrian People, 24 February 2012, § 1: “more than 60 countries and representatives from the United Nations, the League of Arab States, the European Union, the Organisation of Islamic Cooperation, the Arab Maghreb Union and the Cooperation Council for the Arab Gulf States”

<sup>2096</sup> *Id.*, § 8.

<sup>2097</sup> *Id.*, § 10.

<sup>2098</sup> *Id.*, § 12.

<sup>2099</sup> *Id.*, § 12.

<sup>2100</sup> See ‘Group of Friends of the Syrian People: 3<sup>rd</sup> Conference’, 6 July 2012.

urgently and intensively to bring about [...] the launch of a Syrian-led political process leading to a transition that meets the legitimate aspirations of the Syrian people”<sup>2101</sup>.

In November 2012, the Syrian National Council (which had already been recognized by a good number of states) merged with the Syrian National Coalition. On 11 November 2012 the formation of the *National Coalition for Syrian Revolutionary and Opposition Forces* (the ‘Coalition’), based in Cairo, was agreed on. The Coalition was first recognized by the member states of the Cooperation Council for the Arab states of the Gulf, by France, then by Turkey and Qatar, and Britain<sup>2102</sup>. It then enjoyed the support of regional organizations<sup>2103</sup>, including the EU, also a member of the ‘Group of Friends of the Syrian People’. The EU Council conclusions of 19 November 2012 indicate how EU member states welcomed the formation of the Coalition, and backed it as a ‘credible alternative’ to the incumbent<sup>2104</sup>.

These acts of support and recognition were criticized by Iran and Syria itself, the latter calling the Coalition a “*creation of the foreign states* and ineligible to take part in any national dialogue”<sup>2105</sup>. On 5 December 2012, the US nonetheless “expressed fresh support for the coalition”<sup>2106</sup>; at the same time, “pressure [was] building on a new Syrian opposition coalition to choose leaders and transform itself into a political force that could earn *formal recognition* from the United States and other countries as a viable alternative to the Syrian government”<sup>2107</sup>.

In December 2012, the fourth ministerial meeting of the contact group gathered. Under the section ‘Recognizing the National Coalition of Syrian Revolution and Opposition Forces and the mechanisms of achieving democratic transition’, the chairman’s conclusions of the Marrakech meeting indicated that the participants (again) welcomed the foundation of the Coalition in Doha<sup>2108</sup>.

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<sup>2101</sup> Action Group for Syria Final Communiqué, 30 June 2012, § 3. Cf. also § 4 and, especially, § 6 on the ‘agreed principles and guide-lines for a Syrian-led transition’.

<sup>2102</sup> ‘Syria criticizes 3 countries for recognizing opposition’, IHT, 19 November 2012.

<sup>2103</sup> See, about the Gulf Cooperation Council for example, ‘Opposition in Syria war is urged to pick leaders; U.S. and others want to see a political structure that could replace regime’, IHT, 7 December 2012.

<sup>2104</sup> See also ‘European Union Backs Syrian Opposition Coalition’, NYT, 19 November 2012. See the conclusions of the 3199th Foreign Affairs Council meeting: “the EU welcomes the agreement reached on 11 November in the meeting of the Syrian opposition groups gathered in Doha and in particular the formation of the National Coalition for Syrian Revolutionary and Opposition Forces. *The EU considers them legitimate representatives of the aspirations of the Syrian people.* [...] The EU looks forward to this new coalition continuing to work for full inclusiveness, subscribing to the principles of human rights and democracy and engaging with all opposition groups and all sections of Syrian civil society. The EU stands *ready to support this new Coalition* in these endeavours and its relations with the international community. The EU encourages the Coalition to engage with the UN/LAS Special Representative and to put forward its programme for a political transition with a view to *creating a credible alternative* to the current regime”.

<sup>2105</sup> ‘Syria criticizes 3 countries for recognizing opposition’, IHT, 19 November 2012. Emphasis added to highlight that in this case the perception that the oppositional transitional authority was created by third states concretely exists.

<sup>2106</sup> ‘Opposition in Syrian war is urged to pick leaders; U.S. and others want to see a political structure that could replace regime’, IHT, 7 December 2012.

<sup>2107</sup> *Id.*

<sup>2108</sup> The Chairman’s Conclusions of the fourth Ministerial Meeting in Marrakech on 12 December 2012.

In January 2013, representatives of the Coalition met envoys from more than fifty countries in Paris. Meeting in February 2013, the EU Council again referred to the Geneva Communiqué, and confirmed “its engagement in strengthening its support to the National Coalition for Opposition and Revolutionary Forces, including its technical structures”<sup>2109</sup>. In March 2013, the Arab League decided to transfer Syria’s seat to the Coalition<sup>2110</sup>. In April 2013, the Coalition issued a declaration in which the ‘basic principles’ guiding the struggle are listed. The fourteenth principle “call[ed] on the international community to accelerate its support for all Coalition institutions including the current interim government”.

On 15 May 2013, the UNGA adopted a resolution, opposed by twelve countries<sup>2111</sup>, on the situation in Syria in which it “welcome[d] the *establishment* of the National Coalition for Syrian Revolutionary and Opposition Forces [...] and note[d] the *wide international acknowledgement*, notably at the fourth Ministerial Meeting of the Group of Friends of the Syrian People, of the Coalition as the *legitimate representative* of the Syrian people”<sup>2112</sup>.

On 27 May 2013, the EU Council conclusions called for a “transitional governing body which would exercise full executive powers”<sup>2113</sup> and for a “stronger and more united opposition [as] a credible alternative for all Syrians”<sup>2114</sup>. On 27 September 2013 the UNSC adopted a resolution annexing and endorsing the abovementioned Geneva Communiqué of 30 June 2012<sup>2115</sup>.

During early October 2013 the Coalition, through the ‘Government on forming Ministry of defense’, and the Free Syrian Army took steps to further institutionalize their reciprocal ties<sup>2116</sup>. On 22 October 2013 the ‘London 11 Final Communiqué’ was issued<sup>2117</sup>. Representatives of the Coalition attended the meeting. In the final communiqué<sup>2118</sup>, it was agreed that President Assad had no role to play in the transition. It was also agreed that “participating 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, including ensuring serious consequences in the event of non-compliance”<sup>2119</sup>.

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<sup>2109</sup> EU Council Conclusions dd. 18 February 2013, § 4.

<sup>2110</sup> ‘Opposition takes seat at Arab League Summit’, BBC News, 26 March 2013.

<sup>2111</sup> Belarus, Bolivia, China, Cuba, Democratic People’s Republic of Korea, Ecuador, Iran, Nicaragua, Russian Federation, Syria, Venezuela, Zimbabwe.

<sup>2112</sup> A/RES/67/262 dd. 15 May 2013. Emphasis added. Resolution adopted with 107 yes votes, 12 no votes and 59 abstentions.

<sup>2113</sup> EU Council Conclusions on Libya dd. 27 May 2013, § 2.

<sup>2114</sup> *Id.*, § 3.

<sup>2115</sup> S/RES/2118 dd. 27 September 2013, § 16.

<sup>2116</sup> Media statement of the Syrian Coalition, 8 October 2013. See also the statement by the Supreme Military Council dd. 5 October 2013.

<sup>2117</sup> 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.

<sup>2118</sup> [Final Communiqué from London 11 Meeting on Syria](#), 22 October 2013.

<sup>2119</sup> *Id.*, § 17. Emphasis added.

In November 2013, Mr. Brahimi confirmed that “the National Coalition will play a very important role in forming the [opposition] delegation”<sup>2120</sup>. The Coalition declared “that it will participate in Geneva II, provided that it will result in Assad’s step down and the formation of a transitional government with full powers”<sup>2121</sup>. On 12 January 2014, the contact group and the coalition gathered in Paris. In the final communiqué they “welcome[d] the invitation sent by the UN Secretary General, which convenes the parties to a Geneva II Conference to fully implement the Geneva Communiqué”; and stated that “as the legitimate representative of the Syrian people, the National Coalition should establish a delegation”<sup>2122</sup> to this conference.

The Geneva II Middle East peace conference started on 22 January 2014. Much to the disappointment of the Coalition<sup>2123</sup>, neither the UN nor the UN Special Envoy to Syria recognized the Coalition. But the Special Envoy agreed to deal with the ‘Special Representative of the Syrian Coalition to the UN’, Dr. Ghadbian. Shortly before the talks took place, the Coalition exercised diplomatic leverage resulting in the exclusion of Iran from the Geneva II talks.

At the time of writing, the Coalition has representations or liaison offices in Germany, Turkey, France, Qatar, UK, USA, and Hungary. For the Coalition, “the expansion of diplomatic representation of the Syrian Coalition is one of the important indicators of withdrawal of international legitimacy from the regime of Bashar al-Assad”<sup>2124</sup>.

CONCLUSION – There is thus no doubt that the foundation and institutional development of the Syrian National Council (‘Council’) / Syrian National Coalition (‘Coalition’) <sup>2125</sup> was supported by the states and IOs composing the ‘Group of Friends of the Syrian People’, among other actors. Events including: the establishment of the Syrian National Council in October 2011; its involvement into the Syrian National Coalition; the suspension of Syria from the Arab League; the creation of the ‘Group of Friends of the Syrian People’; their regular meetings to support/‘recognize’ the Syrian National Coalition, all indicate that the increasing relevance and leverage of the Council/Coalition hinged on early external support, notably by said contact group.

## 1.2. The creation and endorsement of the Libyan oppositional transitional authority

The Libyan pre-transition period started with civil unrest and protests in Benghazi in mid-February 2011. The Libyan Transitional National Council (the ‘Council’) was self-proclaimed

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<sup>2120</sup> ‘Geneva Conference on Syria set for January, UN Chief announces’, UN News Centre, 25 November 2013.

<sup>2121</sup> ‘Coalition Response to Lavrov: Geneva II must Not be an Attempt to Divert Responsibility’, media statement of the Syrian Coalition, 16 November 2013.

<sup>2122</sup> ‘Ministerial meeting on Syria – Paris Declaration of the Core Group’ dd. 12 January 2014.

<sup>2123</sup> ‘Jamous to Brahimi: FSA and Syrian Coalition Represent the People of Syria’, media statement of the Syrian Coalition, 7 November 2013.

<sup>2124</sup> ‘Bassam Abdullah Appointed as Ambassador to Germany’, media statement of the Syrian Coalition, 1 November 2013.

<sup>2125</sup> The Syrian National Council evolved into the Syrian National Coalition.

on 5 March 2011. On 17 March 2011, the UNSC adopted resolution 1973<sup>2126</sup>. Only twelve days later, on 29 March 2011, the International Contact Group (the ‘contact group’) for Libya was created in London to accompany the transition<sup>2127</sup>.

The first meetings of the contact group took place in Doha on 13 April 2011, and Rome on 5 May 2011. On 22 May 2011, the High Representative of the EU opened the ‘EU Office’ in Benghazi<sup>2128</sup>. From June 2011 onwards, various states started recognizing or otherwise endorsing the Council<sup>2129</sup>, and many Libyan embassies abroad shifted allegiance. The contact group reconvened in Abu Dhabi on 9 June 2011, and Istanbul on 15 July 2011. At the latter meeting, the “participants agree[d] to deal with the National Transitional Council (NTC) as the legitimate governing authority in Libya”<sup>2130</sup>.

On 3 August 2011, the Council’s Constitutional Declaration was published. The contact group reconvened in Istanbul on 25 August 2011, and in Paris on 1 September 2011 where it was re-baptized as the ‘Friends of Libya Group’. On 16 September 2011, the Council was granted Libya’s seat at the UNGA<sup>2131</sup>. After the fall of Sirte on 20 October 2011 and the declaration of liberation on 23 October 2011, it formed a transitional administration, one month later. The General National Congress organized the election of a constituent assembly on 20 February 2014, and intended to organize a constitutional referendum by December 2014. At the time of writing, the constitutional referendum never took place as the transition failed and gave way to two governments which are still competing for power. At the time of writing, the Constitution Drafting Assembly is continuing the constitutionmaking process while trying to cope with the security situation as well as its own financial limitations.

**CONCLUSION** – The creation and development of the Council was largely conditional on the support of the contact group. The decisive role of this contact group on the Libyan transition is evidenced by the facts described above: the creation of the contact group to accompany the transition, the subsequent establishment of the Council; the Council’s transformation into a transitional administration; the external representation channels it established with various states; the acts of support and recognition by the contact group, culminating in the acceptance of the Council’s credentials at the UNGA. There is no doubt that the relevance and leverage of the Council largely depended on the early support of the ‘Friends of Libya’.

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<sup>2126</sup> S/RES/1973 dd. 17 March 2011.

<sup>2127</sup> ‘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, § 12. See also The Chair’s Statement of 29 March 2011.

<sup>2128</sup> See ‘Remarks by EU High Representative Catherine Ashton at the opening of the EU Office in Benghazi’, dd. 22 May 2011.

<sup>2129</sup> S. Talmon, ‘Recognition of the Libyan National Transitional Council’, *op. cit.* See also Wikileaks for a vast overview of diplomatic cables in this regard. On the role of non-public documents in assessing *opinio iuris*, see B. D. Lepard, *Customary International Law – A New Theory with Practical Applications*, CUP, 2010, p.220: “there is no per se bar against considering nonpublic statements or documents as evidence of a belief by states that a particular rule should or should not be recognized as an authoritative legal rule”.

<sup>2130</sup> The Chair’s Statement of 15 July 2011.

<sup>2131</sup> ‘After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country’s Representative for Sixty-Sixth Session’, UNGA press release, 16 September 2011.

## 2. Labeling a practice: transformative empowerment

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The contact groups for Libya and Syria, consisting of powerful members of the international community, co-catalyzed (attempts to) DIG in these countries. They did so by assisting oppositional transitional authorities that were set up to dismantle and re-define the state apparatus. The number and political weight of the members of these contact groups perhaps gives the impression that their involvement with (prospective) DIG had a multilateral basis. Also, their systematic but vague commitment to ‘inclusivity’ might give the impression that (prospective) DIG in these countries would be based on a domestic consensus. In reality, neither in Syria nor in Libya was there either domestic consensus or international agreement on DIG.

Undeniably, the involvement by the Syrian and Libyan contact groups represents a *collective* initiative (given the group format of these contact groups). Their initiatives were however a form of *concerted unilateralism* (given the strong presence or marked absence of some powers). These self-selected contact groups were created outside the context of the established multilateral fora, and their conclusions cannot be seen as the fruit of multilateral diplomacy. Concerted unilateralism, the state-order-reconfiguration aim shared between contact groups and oppositional transitional structures, and the context of prolonged and sequenced DIG constitute the factors which, if combined, lend considerable power to these contact groups.

Did states and IOs try to provoke a regime change through *military* intervention in Syria or Libya? This is possible but contested. It is almost uncontestable, though, that several states and IOs have pursued this aim, in vain or successfully, through *political* means, i.e. by supporting oppositional transitional authorities. With regard to Libya, Wilson observes that “while it is one thing for states and international actors to formally deny any intention of effecting regime change [...], the reality is that the very actions which they have taken or supported have directly resulted in this”<sup>2132</sup>. And, despite the denials, the chronological overviews above show that contact groups have overtly stated and publicly recognized that they intended contributing to a regime change both in Libya and Syria. For the remainder of this chapter, this practice, and the effects it purports to generate, will be labeled ‘transformative empowerment’.

The adjective ‘transformative’ refers to the state-order-reconfiguration aim publicly proclaimed both by the oppositional transitional authority and the supporting contact group. Their *shared* aim, thus, is to introduce a new political regime by nonconstitutionally reconfiguring a state’s legal order, without that state’s consent. The voluntary character of transformative empowerment, and the fact that the endorsing contact group is (or can reasonably be said to be) cognizant of the publicly proclaimed ambitions of the oppositional

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<sup>2132</sup> G. Wilson, ‘The United Nations Security Council, Libya and resolution 1973: protection of civilians or tool for regime change?’ in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, *op. cit.* pp. 118-119.

transitional authorities, indicate that these ambitions are –at least putatively– *shared*. For example, the fourth proclaimed aim of the Syrian Coalition was “overthrowing the Syrian regime”<sup>2133</sup> while the proclaimed aim of the Libyan TNC was to “be the basis of rule in the transitional stage until a permanent Constitution is ratified in a plebiscite”<sup>2134</sup>. The contact groups for Syria and Libya were, or should have been, cognizant of this.

The noun ‘empowerment’ refers to the diplomatic, political, material and/or financial support lent by contact groups to oppositional transitional authorities to achieve that aim. *How* is such support given? On the scale of intensity ranging from (a) verbal critique or condemnation addressed to a state or government; (b) an unfriendly but lawful act (‘retorsion’); (c) sanctions applied as countermeasures, and (d) non-forcible but coercive intervention in a state’s domestic affairs; to (e) the use of force against a government, the practice of transformative empowerment can be considered –depending on the context and circumstances– either as a retorsion, a countermeasure or as a coercive and illicit intervention.

In one breath, the terms ‘transformative empowerment’, refer to the diplomatic, political, material and/or financial support given by contact groups to oppositional transitional structures with a view to introducing a new political regime and reconfiguring the (interim) constitutional order of a state, in a nonconstitutional fashion and without the consent of that state. Transformative empowerment is a *method*, observed in practice, for indirectly achieving regime change. This observation relates to only two cases. But the concept of transformative empowerment based on that observation may also be relevant for other –past and future– scenarios, especially considering the proliferation of DIG and contact groups.

As a relatively novel practice, transformative empowerment needs to be differentiated from past collective diplomatic enterprises e.g. against the background of decolonization. We saw under Chapter 4 that regional organizations like the OAU had enormous power in acting as a ‘broker’ between the UN and NLM<sup>2135</sup>. In spite of the relatively vague criteria for recognizing NLM, the OAU and its Liberation Committee were mandated by the UN to exercise this power in the specific context of decolonization. Regional organizations sitting in contact groups also chose to collaborate with oppositional transitional authorities, but without having a general mandate for doing so. Thus, regional organizations played a role in (purportedly) empowering nonstate actors not (yet) exercising effective control over the state apparatus, both during decolonization and during the Syrian and Libyan revolts. But the analogy between NLM and oppositional transitional authorities, already tested in this study<sup>2136</sup>, does not go further. The respective context and *modus operandi* is different. Contrary to NLM, oppositional transitional authorities aim at reconfiguring the constitutional order within their countries through DIG rather than by seceding or liberating themselves from a state.

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<sup>2133</sup> Cf. <http://www.etilaf.org/en/about-us/principles.html> consulted on 9 December 2013 (now only available *en cache*).

<sup>2134</sup> Constitutional Declaration dd. 3 August 2011, Preamble, § 3.

<sup>2135</sup> Chapter 4, Section B.2.

<sup>2136</sup> Chapter 4, Section B.2.1.2.

Furthermore, contrary to the OAU Liberation Committee, contact groups assisted the Syrian and Libyan transitional authorities at an early stage, i.e. before their political allegiance or popular following (the principal criterion for recognizing NLM) were secured.

Transformative empowerment has been associated with the *vernacular* use of the word ‘recognition’, especially in the press and media. But it needs to be sharply distinguished from recognition as a *legal doctrine or institution*. The following subsection argues that the practice of transformative empowerment must be conceptually distinguished from the doctrine of recognition, and that, as a result, this doctrine cannot be used to legally assess transformative empowerment.

### *3. Evaluating a practice: the irrelevance of the doctrine of recognition*

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The doctrine of recognition provides no assistance for analyzing the legality of transformative empowerment. In international law, recognition refers to the “acknowledgement of the existence of an entity or situation indicating that the full legal consequences of that existence will be respected”<sup>2137</sup>; or to “the act by which a State confirms [...] a specific legal situation or consequence”<sup>2138</sup>. Traditionally, the doctrine of recognition applies not only to states but also to governments, belligerency, and insurgency, to which the non-recognition of unlawful situations may be added. Yet, neither the doctrine of recognition of government (3.1) nor the doctrine of recognition of belligerency (3.2) cover or regulate the practice of transformative empowerment.

#### *3.1. Recognition of government*

There is a vast literature about recognition, most notably about the doctrine of premature recognition and the distinction between political and legal recognition. Neither this doctrine nor this distinction however assist us in legally analyzing the transformative empowerment of the Syrian and Libyan transitional authorities.

When an oppositional transitional authority is recognized *as the government*, but one or more governmental features (effective control over state territory; the capacity to enter into international relations<sup>2139</sup>) are lacking, such recognition is traditionally seen as premature. Recognition is governed by a duty of restraint: “so long as the issue has not been definitely decided in favour of the rebellious party, recognition is premature and unlawful”<sup>2140</sup>. The theory of unlawful premature recognition remains relevant today, but, in the context of DIG, only so when an oppositional transitional structure is being recognized *as the government*.

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<sup>2137</sup> M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995*, Macmillan Publishers Limited, 1997, p. 1.

<sup>2138</sup> J. Frowein, ‘Recognition’, MPEPIL.

<sup>2139</sup> Montevideo Convention on the Rights and Duties of States, 26 December 1933. See, generally, S. Magiera, ‘Government’, MPEPIL.

<sup>2140</sup> H. Lauterpacht, *Recognition in International Law*, *op. cit.*, p. 7 & p. 283. Cf also N. Henry, *Les gouvernements de fait devant le juge*, *op. cit.*, § 178.

States and IOs are careful when drafting official statements, and generally recognize an oppositional transitional structure *as a 'valid interlocutor' or a 'legitimate representative'*<sup>2141</sup> rather than as a 'government'<sup>2142</sup>. Thus, the contact group for Syria recognized the Syrian National Council “as a *legitimate representative* of Syrians seeking peaceful democratic change”<sup>2143</sup>. The Council of the EU “consider[ed] them *legitimate representatives* of the aspirations of the Syrian people”<sup>2144</sup> and “strengthen[ed] its *support* to the National Coalition”<sup>2145</sup>. Similarly, the US “expressed fresh *support* for the coalition”<sup>2146</sup>, without however according formal recognition. In the same vein, the contact group for Libya “agree[d] to deal with” the National Transitional Council “as the legitimate governing *authority* in Libya”<sup>2147</sup>, without recognizing it. Outright recognition of the Syrian and Libyan transitional authorities was thus generally avoided. Regarding the latter authority, Youssef observes:

“there were several obstacles to the blunt recognition of the NTC as the democratic replacement for Gaddafi at the early stage of conflict. The NTC was not a democratically elected government that for example suffered from a military coup. Gaddafi could not be trusted with an orderly transition to democracy but neither could the NTC; it was their first appearance on the political scene and were barely introduced to the international community. This is not to say that they were not competent or democratic per se but at that point in time they had not proven their good or bad faith to the international community”<sup>2148</sup>.

In addition, at the time they received explicit public support, neither the Syrian nor the Libyan transitional authorities exhibited classical governmental features. These features seldom characterize oppositional transitional structures in the pre-transition stage. In any event, because neither the Syrian nor the Libyan transitional authority were recognized *as governments*, the theory of unlawful premature governmental recognition has no or limited relevance, and certainly not for legally assessing the support these authorities received from a substantial part of the international community. Does such support then constitute a form of *political* recognition?

In the legal literature, a distinction is sometimes drawn between ‘legal’ and ‘political’ recognition. Talmon, for instance, insists on this distinction<sup>2149</sup>. Thielbörger, too, differentiates

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<sup>2141</sup> Amoroso observes that the vocabulary of ‘(sole) representative of the people’ is akin to the vocabulary used in relation to NLM. D. Amoroso, ‘Il ruolo del riconoscimento degli insorti nella promozione del principio di autodeterminazione interna: considerazioni alla luce della ‘Primavera Araba’’, *op. cit.*, p. 3. Cf. also p. 22.

<sup>2142</sup> *Id.*, p. 3.

<sup>2143</sup> The Chairman's Conclusions of the International Conference of the Group of Friends of the Syrian People, 24 February 2012, § 12. Emphasis added.

<sup>2144</sup> Cf. the conclusions of the 3199th Foreign Affairs Council meeting, *op. cit.* Emphasis added.

<sup>2145</sup> *Id.*, § 4. Emphasis added.

<sup>2146</sup> ‘Opposition in Syrian war is urged to pick leaders; U.S. and others want to see a political structure that could replace regime’, IHT, 7 December 2012. Emphasis added.

<sup>2147</sup> The Chair's Statement of 15 July 2011, *op. cit.* Emphasis added.

<sup>2148</sup> M. A. E. Youssef, ‘Security Council Resolution 1973: a new interpretation of the notion of protection of civilians?’, *op. cit.*, p. 165.

<sup>2149</sup> Succinctly, for Talmon legal recognition would flow from the facts (from the facts, legal consequences follow); while political recognition would not create any legal obligations, neither for the recognizer nor for the recognized.

between legal and political recognition<sup>2150</sup>. Recognizing a group merely as ‘interlocutor’ would be an act of political recognition. If an organization is recognized as the “legal entity that will lead the Libyan people to the critical new phase of a transitional process to benefit Libya, peace and stability in the region”<sup>2151</sup>, such a recognition would be merely political, too.

On the other hand, if recognition of ‘belligerency’, for instance, is accorded to a group fulfilling the conditions to this effect, this act of recognition constitutes a legal act. Similarly, if a political body is recognized *as* the government of a state, such recognition constitutes a legal act, even if –to the extent that this body does not have the features of a government– this legal act would be *unlawful*. Characterizing recognition as ‘legal’ or ‘political’ therefore depends on whether or not the wordings used to label the ‘recognized’ entity (the words that follow ‘as’) coincide with a legal category (‘state’, ‘government’, ‘belligerency’).

The distinction between ‘legal’ and ‘political’ recognition in no way indicates whether the legal act of recognition is in conformity with international law, or produces any valid effects. The *label* used to recognize one or the other organization *as* interlocutor, *as* belligerent party, *as* legitimate representative or *as* government, *in itself* cannot even be instructive in this regard (even though undoubtedly, notably in light of the theory of estoppel<sup>2152</sup>, the precise wordings used must be taken into consideration when conducting this analysis).

In sum, the characterization of ‘legal’ or ‘political’ bears no link with the legal basis or effects of recognition. When analyzing whether or not a specific act of recognition is legally justifiable, this distinction is useless: it does not provide any insight on the legality of an act of recognition or support. As qualifiers of recognition, the words ‘legal’ and ‘political’ are, slightly ironically, uninformative for such an assessment. For the purposes of the present analysis, this distinction should thus be dismissed.

How can the confusion surrounding the distinction between political and legal recognition (not to mention the various meanings ascribed to *de facto* government or recognition<sup>2153</sup>) be avoided? It is suggested that the word (political) *acknowledgement* be used instead of

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<sup>2150</sup> P. Thielbörger, ‘Die Anerkennung oppositioneller Gruppen in den Fällen Libyen (2011) und Syrien (2012)’, *op. cit.*

<sup>2151</sup> ‘Greece Recognizes Libyan rebels’, *The New Age*, 23 August 2011.

<sup>2152</sup> The latter observation is especially relevant in light of the obligation of estoppel. The confines of the obligation of estoppel are proportional to and dependent on the conduct adopted and the precise wordings used by the ‘recognizer’. Under this obligation, the vocabulary used is never insignificant since any act of recognition, as a unilateral act, can create legitimate expectations protected by estoppel. In this sense, Talmon rightly emphasizes that “*with regard to recognition statements wording is all important*”. S. Talmon, ‘Recognition of Opposition Groups as the Legitimate Representative of a People’, *op. cit.*, pp. 219 & 226 a.f.

<sup>2153</sup> Talmon distinguishes six senses in which the word *de facto* has been used, i.e. to describe “(1) an effective government, i.e. a government wielding effective control over people and territory, (2) an unconstitutional government, (3) a government fulfilling some but not all the conditions of a government under international law, (4) a partially successful government, i.e. a belligerent community or a military occupant, (5) a government without sovereign authority, and (6) an illegal government under international law”. S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Clarendon Press, Oxford 1998, p. 60.

(political) recognition. The word acknowledgement, also used in practice<sup>2154</sup>, is defined as “an act of accepting that something exists or is true, or that something is there”<sup>2155</sup>. The acknowledgement of a transitional authority usually constitutes an ‘indication of willingness to enter into official relations’ rather than a ‘manifestation of an opinion on legal status’<sup>2156</sup>; these elements are perfectly distinguishable<sup>2157</sup>.

Transformative acknowledgement, then, refers to the acceptance that an oppositional transitional structure is in the right position to (aspire to) install a new regime and introduce a constitutional order in a state –even in a nonconstitutional fashion and without the consent of the incumbent– and is therefore considered worthy of becoming a formal interlocutor, and of receiving (further) endorsement. It usually follows the disqualification<sup>2158</sup> (but not necessarily the withdrawal of recognition) of the incumbent government; disqualification can be accompanied by the freezing of assets to the advantage of the oppositional transitional structure<sup>2159</sup>. It is in this sense that contact groups *acknowledged* the Syrian and Libyan transitional authorities.

### 3.2. Recognition of belligerency (renvoi)

The inadequacy of the belligerency doctrine for examining DIG was explained earlier<sup>2160</sup>: this thesis primarily deals with civilian transitional authorities, or the non-forcible, civilian aspects of DIG. Here, the doctrine of belligerency is not appropriate for framing transformative acknowledgement or empowerment either, for the following reasons:

- The doctrine of belligerency is irrelevant for examining DIG when it takes place against the background of an international armed conflict;
- The criteria for recognition of belligerency do not reflect the obligations incumbent on transitional authorities as identified under Part III;

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<sup>2154</sup> Cf. e.g. A/RES/67/262 dd. 15 May 2013, Preamble, § 26: “the wide international acknowledgement, notably at the fourth Ministerial Meeting of the Group of Friends of the Syrian People, of the Coalition as the legitimate representative of the Syrian people”

<sup>2155</sup> Oxford Advanced Learner’s Dictionary.

<sup>2156</sup> S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, *op. cit.*, pp. 23 – 43.

<sup>2157</sup> *Id.*, pp. 39 – 40: “[w]hile non-recognition may only express the recognizing government’s unwillingness to enter into normal official (diplomatic) relations, recognition may only express to recognizing governments’ willingness to enter into such relations. Recognition of a ‘government’, while establishing a presumption that a government exists, need not necessarily mean that, in the opinion of the recognizing government, the recognized ‘government’ is, in fact, a government in the sense of international law”.

<sup>2158</sup> d’Aspremont and de Brabandere write that “there will be an expansion of the disqualification role”. See J. d’Aspremont, E. De Brabandere, ‘The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise’, *op. cit.*, p. 214. They do not portray the legal framework for this disqualification role, but observe that an assessment of legitimacy of exercise increasingly becomes a ground for ‘disqualification’.

<sup>2159</sup> See S. Talmon, ‘Recognition of the Libyan National Transitional Council’, *op. cit.* Cf also, for example, Libya Rebels Get Formal Backing, and \$30 Billion, NYT, 15 July 2011.

<sup>2160</sup> Chapter 4, Section B.1.2.

- Recognition of belligerency has fallen in disuse. No statement of recognition of belligerency was made with regard to the Libyan or Syrian belligerents, which confirms the abandonment of this institution.

### 3.3. Recapitulation

Contact groups may engage with oppositional transitional authorities with a view to introducing DIG without the target state's consent. Under the conditions described above, such engagement constitutes an act of transformative empowerment. The formal endorsement by contact groups of the Libyan and Syrian transitional authorities does not amount to 'formal' or 'legal' recognition, be it of government or belligerency. The institution of recognition is, in any event, of no avail for examining how transformative empowerment must be assessed from an international legal perspective.

As discussed under Chapter 3, regional legal frameworks do not shed more light on this issue. International law is short of a *lex specialis* (either on the regional or the global level) with regard to nonconstitutional transitions generally, or transformative empowerment specifically.

Although, needless to say, the Syrian and Libyan oppositional transitional authorities were founded in diverse circumstances, in various respects they raise similar legal challenges, which may be theoretically relevant beyond the particular contexts they were generated in. Transformative empowerment is marked by highly sensitive and volatile contexts. Political scientists and international lawyers alike would perhaps be inclined to conclude that, in this domain, the jungle makes the law. Is there, absent any *lex specialis*, a place for the law in this political jungle? Is the support or 'recognition' of oppositional transitional structures by external actors in anticipation of DIG a *neutral* act under international law? In order to answer this question, it is necessary to analyze the practice of transformative empowerment under *general* public international law. In the following section, this practice will be confronted to one of international law's fundamental principles, namely the principle of non-intervention in domestic affairs.

#### Section B. Transformative empowerment under the principle of non-intervention

If applied coercively, transformative empowerment is prohibited under the principle of non-intervention (1), unless the measure is taken or allowed by the UNSC (2).

## 1. The principle of non-intervention

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Under the principle of non-intervention, introduced below, no state has the right to intervene, directly or indirectly, in the internal or external affairs of any other state<sup>2161</sup>. In the following lines we address the question of whether this principle can contribute to our understanding of the legal leeway states may have in applying transformative empowerment. How does this principle guide or constrain external actors that are committed to indirectly imposing regime change?

**FOCUS ON INITIAL STAGES OF TRANSITION PROCESS** – At their inception, and given their oppositional and nonconstitutional origin, oppositional transitional authorities do not embrace government officials or representatives of the incumbent regime. The question as to how the non-intervention principle would regulate external involvement with oppositional transitional authorities is thus especially relevant during these early stages, i.e. in the pre-transition stage or at the moment the transition is founded. In contrast, when the transition is completed, and on the assumption that a fully-fledged and effective government results from it, matters concerning recognition, attribution, consent or representation do not pose particular theoretical or practical difficulties. Interactions by external actors would then take place *in tempore non suspecto*, so to speak. As mentioned above, this chapter and the following analysis are only relevant for the early stages of DIG.

**AMBIT OF NON-INTERVENTION PRINCIPLE** – The non-intervention principle applies to areas other than the use of force, too<sup>2162</sup>. Scholarship often concentrates on *forcible* regime change rather than on *coercive but non-forcible* regime change<sup>2163</sup>. An examination of the use of force, especially when examined in relation to transformative empowerment, goes beyond the scope

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<sup>2161</sup> Based on the principle of equal sovereignty (UN Charter, art. 2 § 1), and codified by the 1945 UN Charter (UN Charter, art. 2 § 7), the non-intervention principle was further enshrined in the 1965 UNGA resolution, and in the 1970 Friendly Relations Declaration (A/RES/25/2625 dd. 24 October 1970, ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’). Here I use the latter legal reference: “[n]o state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, [...] all [other] forms of interference or attempted threats against the personality of the state or against its political [...] elements, are condemned. No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state”. See below for the legal basis of this principle: “[t]he new and broader definition of intervention forbids not only direct military force but also indirect interference through economic, political, and diplomatic means”, P. Kunig, ‘Prohibition of Intervention’, MPEPIL.

<sup>2162</sup> UN Charter, art. 2, § 4. See also *Nicaragua Case, op. cit.*: there is no general right to intervene in support of an opposition group; and a distinction must be made between arming and training a rebel group (threat or use of force) vs. supplying funds (not a threat or use of force, but rather a violation of principle of non-intervention).

<sup>2163</sup> For one author, among many others, primarily focusing on forcible regime change: G. Fox, ‘Regime change’, MPEPIL.

of this thesis<sup>2164</sup>. Although, in practice, there is often a confusion between *coercive* and *forcible* intervention (e.g. the “embellishment of downright aggression into intervention”<sup>2165</sup>), in law, a whole range of coercive actions, while being proscribed under the principle of non-intervention, can be undertaken without further objections under the prohibition of the use of force.

It has been observed that “attempts to elevate pro-democratic intervention into one of the few limitations to the prohibition to use force have failed to bring about a new entitlement to use (or threat to use) force under international law”<sup>2166</sup>. It is difficult to disagree with this proposition. But the question posed here is radically different: is there any legal leeway for contact groups or external actors to indirectly impose regime change (through transformative empowerment)? Can such action be condoned under the principle of non-intervention?

**DEFINITION NON-INTERVENTION PRINCIPLE** – Based on the principle of equal sovereignty<sup>2167</sup>, and codified by the 1945 UN Charter<sup>2168</sup>, the non-intervention principle was further enshrined in the 1965 UNGA resolution, and in the 1970 Friendly Relations Declaration. This declaration’s third principle is pivotal to our further discussion, and is quoted in full:

“No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.

No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another state, or interfere in civil strife in another state”.

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<sup>2164</sup> The topic of the use of force consented to by transitional structures is delicate (cf. also Chapter 8, Section A.2). Some voices seem to argue that force can be deployed at the request of a transitional structure installed almost immediately after its international endorsement. J. J. Paust writes that, as an alternative to a UNSC resolution, “[o]ne possible scenario could involve the outside recognition of a governmental entity’s consent to or request for outside military support for self-determination assistance and/or collective self-defense against continued armed attacks on Syrian people by the Assad government”, J.J. Paust, ‘Use of Military Force in Syria by Turkey, NATO, and the United States’, U. Pa. J. Int’l L., vol. 34, issue 2, pp. 445 - 446. Focusing on transitional governments that embrace former warring parties, G. Nolte writes: “[t]ransition governments which, following a peace agreement, are composed of all important parties to an internal conflict, cannot, as a general rule, invite foreign troops without the consent of its main component political forces. Invitations which are issued under duress cannot justify a military intervention”. For scholarship drawing connections between (armed) intervention by invitation, the international legal competence of a government, and interim governance: M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, pp. 77 a.f.

<sup>2165</sup> G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, *op. cit.*, p. 553.

<sup>2166</sup> J. d’Aspremont, ‘Duality of government in Côte d’Ivoire’, *op. cit.* In the same sense, J. Vidmar, ‘Human Rights, Democracy and the legitimacy of governments in international law: practice of states and UN organs’, *op. cit.*, pp. 71-73, writing that “in international law *de lege lata* the responsibility to protect and humanitarian intervention may [thus] be no more than a contemporary interpretation of article 39 [of the UN Charter]”.

<sup>2167</sup> UN Charter, art. 2 § 1.

<sup>2168</sup> *Id.*, § 7.

The scope of the prohibition is quite large. The preamble to this declaration states that “any attempt aimed at the *partial or total disruption* of the national unity and territorial integrity of a state or country or at its political independence is incompatible with the purposes and principles of the Charter”. The declaration furthermore broadly forbids “all [...] forms of *interference* or attempted threats against the personality of the state *or* against its political, economic and cultural elements”. In spite of the broad wordings, the scope of the non-intervention principle is limited in two ways. Only when (i) outside coercion is exercised (ii) in the ‘*domaine réservé*’, is the principle violated<sup>2169</sup>.

(1.1) DEFINITION OF COERCION – Coercion forms “the very essence of prohibited intervention”, the ICJ found<sup>2170</sup>. But what is coercion? Not all unfriendly acts are coercive. A simple critique or condemnation is not coercive<sup>2171</sup>. Also, pressure and influence are part of normal foreign policies between states<sup>2172</sup>, and states have the right to react, also negatively, to events that occur within third states. Intervention in a state’s political choice is coercive when the measure used to intervene is “objectively capable of modifying [this] choice[s]”<sup>2173</sup>. According to its ordinary meaning<sup>2174</sup>, coercion signifies “the action of making somebody do something that they do not want to do”<sup>2175</sup>; “the use of force or threats to make someone do something”<sup>2176</sup>. In inter-State relations “coercion [...] involves the government of one State compelling the government of another State to think or act in a certain way by applying various kinds of pressure, threats, intimidation or the use of force”<sup>2177</sup>. The ILC commentaries to the 2001 DASR define coercion as “conduct which forces the will of the coerced state”<sup>2178</sup>. In the text of UNGA resolution 2131 and of the Friendly Relations Declaration, coercion is associated to the *subordination* of sovereign rights.

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<sup>2169</sup> O. Corten, P. Klein, *Droit d'ingérence ou obligation de réaction ? Les Possibilités d'action visant à assurer le respect des droits de la personne face au principe de non-intervention*, Revue belge de droit international, 1990/2; Collection de Droit International 26, Editions Bruylant, Bruxelles, 1992, p. 10: “[d]eux éléments doivent donc être démontrés pour conclure à l'existence d'une intervention illicite. Premièrement, il faut une utilisation de ‘moyens de contrainte’; à défaut, il ne saurait être question d'intervention interdite. [...] Deuxièmement, ces moyens de contrainte doivent porter sur des matières où l'Etat a préservé des droits souverains”. See also *ibid.*, pp. 13 a.f.

<sup>2170</sup> *Nicaragua Case*, *op. cit.*, §§ 202-204: “in view of the generally accepted formulations, the principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another state”.

<sup>2171</sup> *Id.*

<sup>2172</sup> *Id.*, p. 16.

<sup>2173</sup> B. Conforti, ‘The Principle of Non-Intervention’, *op. cit.*, pp. 471-472.

<sup>2174</sup> VCLT, art. 31.1.

<sup>2175</sup> Oxford Advanced Learner’s Dictionary.

<sup>2176</sup> Macmillan Dictionary.

<sup>2177</sup> C.C. Joyner, ‘Coercion’, MPEPIL.

<sup>2178</sup> DASR, commentaries to art. 18. These commentaries adopt a relatively broad definition of coercion: “coercion could possibly take other forms, e.g. serious economic pressure, provided that it is such as to deprive the coerced State of any possibility of conforming with the obligation breached”.

(1.2) TRANSFORMATIVE EMPOWERMENT IS POTENTIALLY COERCIVE – Does the support to a political group that intends to unilaterally reconfigure the state order constitute an act of coercion? True, “the requirement of coercion is to be determined from the view of the target state”<sup>2179</sup>. When external actors unilaterally endorse oppositional transitional authorities, targeted states generally argue that they have been subject to an act of coercion, and that the non-intervention principle was breached.

ABSENCE OF CONSENT – Yet, the absence of consent by the target state, in itself, is not sufficient for concluding that there is coercion<sup>2180</sup>. In addition, the external actor’s behavior must be *compelling*<sup>2181</sup>. Not all external involvement with oppositional transitional authorities reaches the threshold of compelling behavior. Moral support to an embryonic oppositional authority (e.g. the Uganda National Transition Council or the Transitional Authority of China<sup>2182</sup>) does not automatically amount to coercion, even if its expression goes against the will of the incumbent power.

SUBORDINATION OF RIGHTS – But what happens when, in an act of concerted unilateralism, several states and IOs financially, politically and diplomatically support an oppositional transitional authority, are cognizant of its state-reconfiguration aim, declare it to be the sole legitimate representative of the people, and, as the case may be, assist it in gaining effective control? It would be difficult to deny that such action aims at subordinating a sovereign’s rights and

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<sup>2179</sup> Talmon, 'Recognition of Opposition Groups as the Legitimate Representative of a People', *op. cit.*, p. 28.

<sup>2180</sup> This analysis does not examine the question of *ex post* 'consent' by an externally created transitional authority. In case of 'notional' consent by a transitional authority without effective control, a couple of salient questions remain. Saul writes: "one should still question whether status that is dependent on international recognition should be sufficient for a government to be competent to provide valid consent to a process which puts it in effective control of the state and makes the notional authority real". This question can be paraphrased as follows: one should still question whether status that is dependent *on transformative enforcement (even with the consent of the transitional authorities)* should be sufficient for a government to be competent to provide valid consent to a process which puts it in effective control of the state and makes the notional authority real. The answer to this question would be the following: yes, this is possible, as long as the international actors enforcing the transitional authority do this in relation to transitional authorities that purportedly respect the transition obligations. In this way, the transition itself compensates for the initial lack of effective control and political independence. This is the only way by which transitional authorities can progressively detach themselves from the international community, i.e. work towards a 'détutelage': "It is far from guaranteed that the government could resist the desires of the international actors, explicit or implicit, as to how the state and civil infrastructure is developed. One might query, for example, how much leverage the Haiti Transitional Government had when developing the Interim Co-operation Framework in partnership with the international actors that would finance and enable the reconstruction it envisaged to be implemented". M. Saul, 'From Haiti to Somalia', *op. cit.*, p. 140. Also, see A.-M. Slaughter, W. Burke-White, 'The Future of International Law is Domestic' (or, 'The European Way of Law'), *Harvard International Law Journal*, vol. 47, pp. 328-329: "[t]oday [...] the objectives of international law and the very stability of the international system itself depend critically on domestic choices previously left to the determination of national political processes – whether to enforce particular rules, establish institutions, or even engage in effective governance. [...] International Law assumes an intensive interaction between international law and domestic politics".

<sup>2181</sup> "Coercion in inter-State relations involves the government of one *State* compelling the government of another State to think or act in a certain way by applying various kinds of pressure, threats, intimidation or the use of force", C. Joyner, 'Coercion', MPEPIL; "the application of a coercive means by the actor towards the target to achieve a distinctive external, pre-determined goal", V. Mayer-Schönberger, 'Into the Heart of the State: Intervention through Constitution-Making', *op. cit.*, p. 315.

<sup>2182</sup> Chapter 4, Section A.2.1.

privileges. In sum, even if unaccompanied by armed force, transformative empowerment can be coercive.

(2.1) **DOMAINE RESERVE** – In itself, coercion is not contrary to the non-intervention principle. The ICJ has confirmed that only where coercion is used in the *domaine réservé* can the non-intervention principle be violated<sup>2183</sup>. The *domaine réservé* concerns the areas of state activity that are internal or domestic affairs of a state<sup>2184</sup>. Does the practice of transformative empowerment –which aims at provoking a nonconstitutional reconfiguration of the state order– concern the *domaine réservé*? As far back as 1858, von Martens wrote that the constitutional system of a country is a domestic matter, “*une affaire intérieure de la société, qu’elle peut régler à l’exclusion de tous les étrangers*”<sup>2185</sup>. But also more recently it “appears to be the prevailing opinion among public international lawyers who regard the domestic affairs of a state, including its constitutions, as remaining outside the jurisdiction and evaluation of other states”<sup>2186</sup>. Dann and Al-Ali, for instance, observe that constitutionmaking is “traditionally the hallmark of sovereignty and the ultimate expression of national self-determination”<sup>2187</sup>. Clearly, the nonconstitutional reconfiguration of a state goes, in principle, to the heart of the *domaine réservé*.

(2.2) **TRANSFORMATIVE EMPOWERMENT RARELY ESCAPES THE DOMAINE RESERVE** – By endorsing an oppositional political body whose *raison d’être* consists in nonconstitutionally reconfiguring the state order, the external actor pursues the same goal. The external involvement with a state’s reconfiguration directly touches upon that state’s *domaine réservé*. Does this imply that transformative empowerment automatically concerns the *domaine réservé*?

(2.3) **THE ISSUE OF ERGA OMNES NORMS** – Importantly, states, whether acting individually or collectively, are in principle entitled to take certain measures towards a state committing serious and systematic breaches of fundamental and nonderogable human rights. Such human rights are valid ‘towards all’, *erga omnes*<sup>2188</sup>. This is because *erga omnes* norms concern the “obligations of a State towards the international community as a whole” which are “the concern of all States” and for whose protection all States have a “legal interest”<sup>2189</sup>. By definition, *erga omnes* norms fall outside the *domaine réservé* of any state<sup>2190</sup>: “a state acting

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<sup>2183</sup> “[a] prohibited intervention must [...] be one bearing on matters in which each state is permitted, by the principle of state sovereignty, to decide freely”, ‘Nicaragua Case’, *op. cit.*, § 205.

<sup>2184</sup> K. S. Ziegler, ‘Domaine réservé’, MPEPIL.

<sup>2185</sup> G. F. von Martens, *Précis du droit des gens moderne de l’Europe*, *op. cit.*

<sup>2186</sup> U. K. Preuss, ‘Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change through External Constitutionalization’, *op. cit.*, p. 473.

<sup>2187</sup> P. Dann, Z. Al-Ali, ‘The Internationalized Pouvoir Constituant’, *op. cit.*, p. 424.

<sup>2188</sup> J. Frowein, ‘Obligations Erga Omnes’, MPEPIL: “[a]lthough *ius cogens* and obligations *erga omnes* have different legal consequences, they are related to each other in important aspects. A rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all states seem to have a legal interest”. This position is confirmed by the *Barcelona Traction Case*, *op. cit.*

<sup>2189</sup> *Barcelona Traction Case*, *op. cit.*, § 33.

<sup>2190</sup> The category of *erga omnes* norms concerns the “obligations of a State towards the international community as a whole” which are “the concern of all States” and for whose protection all States have a “legal interest”. *Barcelona Traction*, Light

in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction”, the IDI observed<sup>2191</sup>. The sphere of human rights is no longer considered to be the internal affairs of the state. Consequently, measures taken in response to serious breaches of human rights do not necessarily amount to an unlawful intervention. This is true even when such measures are applied coercively.

NEAR CERTAINTY THAT TRANSFORMATIVE EMPOWERMENT CONCERNS THE DOMAINE RÉSERVÉ – Does this imply that measures such as transformative empowerment escape the *domaine réservé* when the incumbent power is violating *erga omnes* norms? In order to answer this question, a distinction must be drawn between the *context* and *various objects* of such measures:

- Coercive measures may be taken in response to violations of *erga omnes* norms;
- Coercive measures impact *acta iure gestionis* (e.g. commercial activity) or *acta iure imperii*. The constitutional definition of a state clearly falls under the latter category.

It is one thing to say that there is a right to ‘intervene in’, or engage with, the non-domestic and/or *erga-omnes*-related affairs of a state. It is quite another to assert that, under the non-intervention principle, all means can be deployed to this end. There is no unbridled freedom to intervene in a state’s domestic affairs –particularly the redefinition of its constitutional order– *at the occasion of* a non-domestic issue. Thus, the policy or context of human rights violations by the incumbent does not automatically remove transformative empowerment from the sphere of the *domaine réservé*.

It would consequently be hard to defend the idea that transformative empowerment, even in response to violations of *erga omnes* obligations, would not, at least *a priori*, constitute a breach of the non-intervention principle<sup>2192</sup>. There seems to be only one, rather theoretical exception to this: when the context of violations of *erga omnes* norms and the object of transformative empowerment *coincide*. In other words, only where there is a direct contradiction between *erga omnes* rights and the constitutional texts of the target state would transformative empowerment ‘escape’ the *domaine réservé*.

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and Power Company, Limited, *Belgium v Spain*, Merits, second phase, ICJ GL No 50, [1970] ICJ Rep 3, ICGJ 152 (ICJ 1970), (1970) 9 ILM 227, (1970) 64 AJIL 653, 5th February 1970, International Court of Justice [ICJ], § 33 (*Barcelona Traction Case*). Scholarship generally agrees that this category of norms includes the prohibition of aggression, the right to self-determination, and fundamental and nonderogable human rights, notably the right to life and the prohibition of torture.

<sup>2191</sup> IDI, ‘The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States’, Session of Santiago de Compostela, 1989, art. 2.

<sup>2192</sup> For a more liberal understanding based on a right to intervene, see R. Quadri, *Diritto Internazionale Pubblico*, Liguori Editore, Napoli, 1968, p. 277: “*nell’intervento gli Stati agiscono come gestori dell’ordinamento giuridico internazionale. [...] Attraverso l’intervento e la comunità internazionale che agisce in quanto Autorità, sia nella garanzia dell’ordine giuridico violato, sia nella creazione di un ordine giuridico nuovo*”. This is linked to a restrictive understanding of the *domaine réservé*: “*A noi sembra che si esageri ogni qualvolta si pretenda di estendere la sfera riservata allo Stato oltre i rapporti che si svolgono nell’ambito della persona statale, fra Stato ed organi. Questi e questi solo debbono in realtà riguardarsi come un noli me tangere, come sottratti ad ogni forma di ingerenza, anche a fini benefici, di ordinamenti stranieri?*” (p. 615).

CONCLUSION – Transformative empowerment, thus, by definition concerns the *domaine réservé* of a state, unless the constitutional texts proper of the target state are, themselves, contrary to fundamental and nonderogable human rights; but that seems a rather unrealistic hypothesis. As a result, coercive transformative empowerment quasi systematically implies an intervention in the domestic affairs of a state. For this reason, coercive transformative empowerment is in principle prohibited under the principle of non-intervention, except under the two following circumstances: if the UNSC authorizes it in conformity with a *ius in interregno* (notably with due regard to the principle of self-determination) or if it can be justified as a countermeasure. We shall address the UNSC authorization in the following lines; the conditions for applying transformative empowerment as a countermeasure will be discussed under Chapter 10.

## 2. Transformative empowerment by the UNSC

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Under the UN Charter, the UNSC, bearing the primary responsibility for the maintenance of international peace and security<sup>2193</sup>, is to determine the existence of any threat to or breach of international peace and security<sup>2194</sup>, and may decide on (forcible or non-forcible) measures to give effect to its decisions<sup>2195</sup>. The UN Charter also clarifies that, although the UN must respect the principle of non-intervention, this principle shall not prejudice the application of measures the UNSC may take to maintain or restore international peace and security<sup>2196</sup>. To this end, the UNSC can take measures directly impacting the *domaine réservé*<sup>2197</sup>.

CONTEXT OF UNSC COERCIVE MEASURES: THREAT TO INT'L PEACE & SECURITY – We have already seen that the UNSC has imposed sanctions against ‘spoilers’ of DIG. In addition, and in light of the broad and non-exhaustive formulation of art. 41 of the UN Charter, the UNSC may also decide to apply coercive transformative empowerment by supporting an oppositional transitional authority, if this measure is necessary for maintaining or restoring international peace and security. Under the same circumstances, the UNSC might also authorize states to apply transformative empowerment as a coercive measure.

OTHER LIMITS TO POWERS OF UNSC – Of course, in discharging its duties the UNSC must act in accordance with the purposes and principles of the UN<sup>2198</sup>. As the ICTY confirmed, the UNSC is not *legibus solutus*<sup>2199</sup>, and must respect international law. If and when the UNSC envisages applying or authorizing transformative empowerment as a (non-forcible but coercive) measure to maintain or restore international peace and security, it must take two elements into account.

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<sup>2193</sup> UN Charter, art. 24.

<sup>2194</sup> *Id.*, art. 39.

<sup>2195</sup> *Id.*, art. 41.

<sup>2196</sup> *Id.*, art. 2.7.

<sup>2197</sup> O. Corten, *Droit D'ingérence Ou Obligation de Réaction ?*, *op. cit.*, p. 379: “le Conseil de sécurité peut évidemment prendre des mesures coercitives dans tout domaine, à partir du moment où la paix et la sécurité internationales sont menacées”.

<sup>2198</sup> UN Charter, art. 24.2.

<sup>2199</sup> ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, § 28.

First, on the sole basis of a lack of or threat to democracy, the UNSC is not entitled to apply or authorize transformative empowerment. The absence of democracy or legitimacy, in itself, does not constitute a threat to international peace and security. With regard to the transition in Afghanistan, for instance, the UNSC adopted measures without invoking the concept of democracy<sup>2200</sup>. In the same vein, when authorizing military interventions in internal conflicts “considerations of democratic legitimacy [...] have hardly played a role in the Security Council's determinations”<sup>2201</sup>.

Second, the *marge de manoeuvre* of the UNSC to empower an oppositional transitional authority is limited. It must be based on a conscientious assessment of the transitional authority's compliance with the core of a *ius in interregno*, or of the reasonable prospects in this regard. Disregarding the core obligations of a *ius in interregno* would be contrary to the bedrock principle undergirding it, namely the principle of self-determination<sup>2202</sup>, which arguably is a *ius cogens* norm. The UNSC, too, must pay regard to this principle, and must respect the precepts of a *ius in interregno* when it envisages transformative empowerment. It must consequently ensure and monitor that the chosen transitional authority respects the limits *ratione temporis* and *materiae* of the interregnum and commits to inclusivity, as described under part III of the thesis.

In short, if the UNSC envisages applying transformative empowerment to maintain or restore international peace and security, a *ius-in-interregno*-based assessment is to be favored over considerations of democratic legitimacy. To facilitate this assessment, it is preferable that the UNSC provide detailed reasons for its decision, especially when potentially impacting the definition of a state's legal order<sup>2203</sup>. The (continued) legality of UNSC transformative empowerment also hinges on this assessment. In sum, the legality of transformative empowerment applied as a UNSC measure hinges on a correct assessment of the chosen oppositional transitional authority's compliance with the core obligations under a *ius in interregno*.

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<sup>2200</sup> The analysis of relevant UNSC resolutions shows that the UNSC “denied legitimacy of the Taliban government in Afghanistan based on its grave human rights violations and threats to international peace and expressed its support for a change of government. [...] [O]ne cannot conclude that the Resolution [...] challenged the legitimacy of the Taliban authority on the basis of lacking democratic (electoral) practices. Indeed, the use of the term ‘democracy’ itself was avoided”. J. Vidmar, ‘Democracy and Regime Change in the Post-Cold War International Law’, *op. cit.*, p. 364.

<sup>2201</sup> M. Payandeh, ‘The United Nations, Military Intervention, and Regime Change in Libya’, *52 Va. J. Int'l L.* 355 (2011-2012), pp. 368-369 and p. 371: “the Security Council has authorized military interventions in internal conflicts for numerous reasons: to avert or mitigate a humanitarian crisis, to interfere with massive human rights violations, or to avoid or contain destabilizing effects on neighboring states or a region. [...] Considerations of democratic legitimacy, on the other hand, have hardly played a role in the Security Council's determinations”.

<sup>2202</sup> Chapter 6.

<sup>2203</sup> S. Wheatly, ‘The Security Council, Democratic Legitimacy and Regime Change in Iraq’, *EJIL* 17, 2006, pp. 531 – 551.

The following and final chapter analyzes whether, and if so how, members of the international community can apply transformative empowerment when the UNSC remains inactive in the face of *ius cogens* violations committed by the incumbent government.



## CHAPTER 10. DOMESTIC INTERIM GOVERNANCE AS A RESPONSE TO IUS COGENS VIOLATIONS

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When applied as a coercive measure, transformative empowerment is, in principle, prohibited under international law<sup>2204</sup>. This final chapter examines whether this prohibition is also applicable in extreme circumstances – i.e. when the incumbent power, against which oppositional DIG would be engaged, violates *ius cogens*. In line with the main thrust of this study, the aim is not to analyze whether, as a response to such violations, *forcible* action is permissible. The question is rather whether, or under which conditions, it is possible to counter such violations by means of DIG, and without having recourse to the use of force. Before turning to this analysis, a better understanding of the concept of *ius cogens* –and of the reason why it is used in this section– is needed.

IUS COGENS – In spite –or rather because– of the relative character of the *domaine réservé*, a number of rules have become incumbent upon all states. This is the result of the progressive development of international law during the last decades. As observed above, it is now generally accepted that a number of international legal obligations or prohibitions do not fall under the *domaine réservé* of any state anymore. A peremptory norm of general international law (*ius cogens*) is a norm “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted”<sup>2205</sup>. On the basis of this definition, *ius cogens* is characterized by the absence of persistent objectors. *Ius cogens* is by definition valid *erga omnes*<sup>2206</sup>, even if not all *erga omnes* rules –e.g. the protection of the environment<sup>2207</sup>– amount to *ius cogens*, especially in the case of persistent objectors.

IUS COGENS (EXAMPLES) – Scholarship<sup>2208</sup> generally agrees –some call it a truism<sup>2209</sup>– that this category includes the following: the prohibition of aggression; the right to self-

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<sup>2204</sup> Chapter 9, Section B.1.

<sup>2205</sup> VCLT, art. 53.

<sup>2206</sup> J. A. Frowein, ‘Obligations erga omnes’, MPEPIL: “a rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all states seem to have a legal interest”.

<sup>2207</sup> F. Francioni, ‘International ‘soft law’: a contemporary assessment’ in V. Lowe, M. Fitzmaurice, *Fifty Years of the International Court of Justice*, CUP, 1996, p. 177. F. Francioni, ‘Realism, Utopia and the Future of International Environmental Law’, Law 2012/11, with reference to Principle 21 of the 1972 Stockholm Declaration enouncing the “responsibility [of states] to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.

<sup>2208</sup> O. Corten, *Droit D’ingérence Ou Obligation de Réaction ?*, *op. cit.*, pp. 88 and 95: “[i]l existe des matières que tous les Etats ont soustrait à leur domaine réservé, comme l’interdiction de l’agression, le droit à l’autodétermination ou certains droits fondamentaux de la personne”; “[c]ertains droits ont acquis une valeur de coutume universelle et sortent donc du domaine réservé de tous les Etats. Ces droits constituent le ‘noyau dur’ des droits de la personne, que l’on qualifie aussi de droits ‘indérogeables’. L’engagement souscrit à leur égard est un engagement absolu et leur violation n’est en aucun cas excusable”. In the same sense, Nguyen Quoc, *Droit International Public*, *op. cit.*, p. 440: “[i]l ne paraît cependant pas douteux que la protection des droits fondamentaux de l’individu échappe depuis longtemps au domaine réservé des Etats. Il suffit de considérer le nombre et l’importance des instruments conventionnes consacrés à la question, le développement sur cette base de règles coutumières sinon même de normes de jus cogens”. In the same sense, cf. B. R. Roth, *Governmental Illegitimacy in International Law*, *op. cit.*, p. 31.

<sup>2209</sup> A. Cassese, ‘Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community’, *EJIL* 10 (1999), 23–30, p. 70.

determination<sup>2210</sup>; fundamental and nonderogable human rights, notably the right to life and the prohibition of torture<sup>2211</sup>. For the IDI, there is a “wide consensus [...] to the effect that the prohibition of acts of aggression, the prohibition of genocide, obligations concerning the protection of basic human rights, obligations relating to self-determination” are examples of obligations reflecting fundamental values of the international community<sup>2212</sup>. Violations of *ius cogens* per definition touch upon issues of international peace and security<sup>2213</sup>.

**DISTINCTION IUS COGENS & LEGITIMACY/DEMOCRACY CONSIDERATIONS** – The state obligations which would be corollaries to the ‘right to legitimacy’ or the ‘right to democracy’ –the obligation to adopt a *legitimate* and *democratic* form of government– cannot be classified under the category of *erga omnes* obligations. The very legal existence of legitimacy or democracy, either as rights or obligations, is controverted, as we saw under Chapter 2.

**CONNECTION BETWEEN NONDEROGABLE HUMAN RIGHTS & SELF-DETERMINATION** – In many cases, there is an intrinsic link between the protection of fundamental and nonderogable human rights and internal self-determination. This was already observed under Chapter 7<sup>2214</sup>, where it was noted that a way to gauge whether the principle of internal self-determination is (not) conformed with, involves looking at the incumbent’s human rights record. This point should be borne in mind when, towards the end of this chapter, the principle of self-determination will briefly be revisited<sup>2215</sup>.

**TWO REASONS FOR BASING FURTHER ANALYSIS ON ASSUMPTION OF IUS COGENS VIOLATIONS** – There are two reasons, one practical and one theoretical, why the analysis under this section concentrates on *ius cogens* violations.

First, in order to verify whether transformative empowerment can *ever* be justified under international law, the gravest context of international law violations –breaches of peremptory norms by the incumbent– must be envisaged. This approach will facilitate the drawing of lines regarding what is permissible for external actors engaged with oppositional transitional authorities.

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<sup>2210</sup> A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*, *op. cit.*, p. 140: “the conclusion is justified that self-determination constitutes a peremptory norm of international law”.

<sup>2211</sup> Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422, § 99.

<sup>2212</sup> IDI Krakow resolution (2005/1) on ‘obligations and rights *erga omnes* on international law’.

<sup>2213</sup> Cf. 1980 DASR, art. 19, and the description of ‘international crime’. In the same sense, P.-M. Dupuy, ‘The Deficiencies of the Law of State Responsibility Relating to Breaches of “Obligations Owed to the International Community as a Whole”’: Suggestions for Avoiding the Obsolescence of Aggravated Responsibility’ in A. Cassese (ed.), *Realizing Utopia*, OUP, 2012, p. 225; A. Garwood-Gowers, ‘The responsibility to protect and the Arab Spring: Libya as the exception, Syria as the norm?’, *op. cit.*, p. 601: R2P “bolsters the legitimacy of the broader, ongoing UNSC trend towards an expansive interpretation of the concept of ‘threat to the peace”.

<sup>2214</sup> Chapter 7, Section C.1.

<sup>2215</sup> Chapter 10, Section B.3.2.

Second, the first section of this chapter focuses on the limits to assistance to opposition-based DIG in Syria and Libya. When the Arab Spring erupted, it seems that fundamental and nonderogable human rights were violated in both countries. Investigations evidenced that, both in Syria<sup>2216</sup> and Libya<sup>2217</sup>, the Arab Spring uprisings and their subsequent repression evolved into a situation where fundamental and non-derogable human rights of civilians, notably the right to life and the prohibition of torture, were massively violated. The analysis of a potential legal basis for transformative empowerment therefore refers to the context of *ius cogens* violations in both countries.

Now that the concept and relevance of *ius cogens* is clarified, we can ask whether, and if so how, members of the international community can apply transformative empowerment when the UNSC remains inactive in the face of *ius cogens* violations. Before analyzing whether *ius cogens* violations entitle states to coerce *ius cogens*-violating states into an opposition-based transition, the question first to be addressed is: what are the legal consequences generally flowing from such violations? In Section A, we shall see that states must cooperate on the UN level in addressing *ius cogens* violations, and that this obligation does not entitle them to unilaterally apply transformative empowerment. This is why, in Section B, we shall analyze whether, in the absence of any multilateral response to *ius cogens* violations, states may unilaterally apply transformative empowerment against a state that perseveres in violating *ius cogens*. The following table presents an overview of the argument presented in this final chapter.

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<sup>2216</sup> UNGA, Human Rights Council, 'Report of the independent international commission of inquiry on the Syrian Arab Republic', 23 November 2011; 'I wanted to die – Syria's torture survivors speak out', Amnesty International 2012; UN Human Rights Office of the High Commissioner, 'Open Wounds – Torture and ill-treatment in the Syrian Arab Republic', 14 April 2014; Sir Desmond de Silva QC, Sir Geoffrey Nice QC, Professor David Crane, 'A Report into the credibility of certain evidence with regard to torture and execution of persons incarcerated by the current Syrian regime', 2014 (Note that this report was commissioned by a law firm acting for Qatar); 'Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the situation in Syria', UN press release, 21 July 2011.

<sup>2217</sup> UN Support Mission in Libya, UN Human Rights Office of the High Commissioner, 'Torture and deaths in detention in Libya', October 2013; Human Rights Watch, 'Libya – Country Summary', January 2015; UN Support Mission in Libya, UN Human Rights Office of the High Commissioner, Report on Human Rights Situation in Libya, 16 November 2016.

**TABLE 14: Steps preceding unilateral transformative empowerment against *ius cogens*-violating state**

Degree external involvement	Non-coercive but compulsory steps preceding coercive unilateral transformative empowerment of oppositional transitional authority ('OTA')		Coercive but non-forcible unilateral transformative empowerment
Level external involvement	Multilateral (preponderance UN security system)  ➔ <i>Section A 'Obligation of multilateral reaction to serious breaches of ius cogens'</i>	Unilateral (last resort)  ➔ <i>Section B 'As a last resort, transformative empowerment as a non-forcible countermeasure'</i>	
Compulsory steps	Obligation of multilateral reaction: <ul style="list-style-type: none"> <li>▪ Non-recognition &amp; non-assistance</li> <li>▪ Cooperation <ul style="list-style-type: none"> <li>○ UNSC/UNGA</li> <li>○ Prohibition of exclusion</li> </ul> </li> <li>▪ Direct negotiations with incumbent leader</li> </ul>	<ul style="list-style-type: none"> <li>▪ Provide hard evidence of <i>ius cogens</i> violations</li> <li>▪ Defend liberal interpretation of non-performance requirement</li> <li>▪ Abide by procedural safeguards: <ul style="list-style-type: none"> <li>○ Responsibilization</li> <li>○ Notification</li> <li>○ Negotiation</li> </ul> </li> <li>▪ Qualification transformative empowerment (choice of OTA) in conformity with <i>ius in interregno</i></li> </ul>	Reversibility requirement: retract support to OTA if: <ul style="list-style-type: none"> <li>▪ wrongdoer resumes obligations and if <i>in tempore utile</i>;</li> <li>▪ OTA does not abide by core obligations under <i>ius in interregno</i></li> </ul>
Stage of transition process	Pre-transition		Foundation of DIG

## Section A. Obligation of multilateral reaction to serious breaches of *ius cogens*

When a state commits serious breaches of *ius cogens*, this entails three consequences for other states under international law. First, they must not recognize as lawful a situation created by a serious breach of *ius cogens*, nor render aid or assistance in maintaining that situation. Second, they must cooperate to bring an end to this situation. Third, they must seek to settle the issue peacefully. These obligations are required under general international law, and corroborated under the R2P framework. In the following subsections, the normative basis of these obligations and their practical implications –especially for those states reacting to *ius cogens* violations in Syria and Libya– will be considered.

### 1. Non-recognition

#### 1.1. Normative basis

**NON-RECOGNITION: A MINIMUM OBLIGATION IN THE FACE OF SERIOUS BREACHES OF *IUS COGENS*** – States must not recognize as lawful a situation created by a serious breach of *ius cogens*, nor render aid or assistance in maintaining that situation<sup>2218</sup>. This obligation of non-recognition and non-

<sup>2218</sup> DASR, art. 41.2.

assistance is enshrined in the authoritative DASR, widely regarded as reflecting international custom<sup>2219</sup>.

The *obligation* of non-recognition only applies to situations created by serious breaches of *ius cogens*<sup>2220</sup>. Collective non-recognition “forms the prerequisite for any concerted community response against such breaches and marks the *minimum necessary response* by States to serious breaches of *ius cogens*”<sup>2221</sup>. As it forms the precondition for the application of sanctions, it should also *precede* any coercive action<sup>2222</sup>.

NON-RECOGNITION: A COLLECTIVE CONCERN BUT AN INDIVIDUAL RESPONSIBILITY – Acts of non-recognition:

“rest on the assumption of international solidarity in the face of a violation of a norm of *jus cogens*. They stem from an understanding that a *collective response* by all States is necessary to counteract the effects of such a violation. In practice, it is most likely that this collective response will be coordinated through the competent organs of the United Nations”<sup>2223</sup>.

In the past, the duty of non-recognition was recalled by the UNSC and UNGA on a number of notorious occasions: the unilateral declaration of independence in South Rhodesia<sup>2224</sup>; the Bantustans in South Africa<sup>2225</sup>; the creation of the Turkish Republic of Northern Cyprus<sup>2226</sup>; the Iraqi annexation of Kuwait<sup>2227</sup>, and more recently Crimea’s annexation to Russia<sup>2228</sup>. In these cases, the UNSC/UNGA called upon all states not to recognize as lawful the consequences of these situations. Calls for non-recognition were thus formulated at the UN level. The UN is the most appropriate forum to coordinate non-recognition. But this approach may not be followed. The obligation of non-recognition is borne by the individual (member) states<sup>2229</sup>, and the determination of the existence of a serious breach of *ius cogens*, if not already made by the UNSC, is made at their own risk<sup>2230</sup>.

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<sup>2219</sup> Chapter 8, Section C.1.

<sup>2220</sup> DASR, art. 41 (2). Cf. also commentary to art. 40. Cf. also S. Talmon, “The Duty not to “Recognize as Lawful” a Situation Created by the Illegal Use of Force or other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?” in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff Publishers, 2005, pp. 101, 103.

<sup>2221</sup> DASR commentaries, p. 115. Cf. Also V. Gowlland-Debbas, *Collective responses to illegal acts in international law: United Nations action in the question of Southern Rhodesia*, *op. cit.*, p. 281 a.f.

<sup>2222</sup> *Id.*, p. 278.

<sup>2223</sup> S. Talmon, “The Duty not to “Recognize as Lawful”, *op. cit.*, p. 121.

<sup>2224</sup> Cf. GA Res 1747 (XVI) (27 June 1962); SC Res 202 (6 May 1965); GA Res 2022 (XX) (5 November 1965).

<sup>2225</sup> E.g. UNSC/RES/402 dd. 22 December 1976.

<sup>2226</sup> UNSC/RES/541 dd. 18 November 1983.

<sup>2227</sup> UNSC/RES/662 dd. 9 August 1990.

<sup>2228</sup> A/RES/68/262 dd. 1 April 2014.

<sup>2229</sup> D. Raič, *Statehood and the Law of Self-determination*, Kluwer Law International, The Hague, 2002, p. 242, p. 108.

<sup>2230</sup> S. Talmon, “The Duty not to “Recognize as Lawful”, *op. cit.*, p. 113.

## 1.2. Practical implications

ACTIVE ABSTENTION DOES NOT AMOUNT TO TRANSFORMATIVE EMPOWERMENT – The duty of non-recognition cannot amount to more than a “duty of active abstention” by which states are required to “refrain from any action implying recognition of the legality of the situation in question”<sup>2231</sup>. This duty of active abstention can of course affect diplomatic relations with a government involved in gross and persistent breaches of *ius cogens*, and amount to what d’Aspremont would call the ‘disqualification’ of such government<sup>2232</sup>. In the previous chapter, we have seen that the Syrian and Libyan incumbent governments were disqualified by large swathes of the international community.

In the past, the obligation of non-recognition of *ius cogens* violations was mostly associated with illegal *territorial* acquisitions, annexations or creations (e.g. in Namibia, Palestine, South Africa and Northern Cyprus), which thus constitute the most ‘common’ object of non-recognition<sup>2233</sup>. In the aftermath of the Arab Spring, neither the Libyan nor the Syrian governments have made *territorial* claims. In the absence of such claims, the only way for states to duly respect the obligation of non-recognition was to actively abstain themselves from positing acts that could be interpreted as a recognition of *ius cogens* violations committed by Libya and Syria since 2011. In particular, states were required to abstain from rendering aid or assistance in maintaining these violations: concretely, by not providing any lethal or nonlethal aid to the *ius cogens*-violating governments.

The obligation of non-recognition does not go as far as to *oblige* states to disrupt or review the diplomatic recognition of governments violating *ius cogens*. This remains a discretionary decision. It is thus natural that neither the UNGA nor the UNSC called for the non-recognition of the Libyan or Syrian governments, which would be a highly exceptional move. When the Arab Spring uprisings were being repressed, many states however decided to disqualify the incumbent powers in Syria and Libya, either by suspending their diplomatic relations or by suspending IO membership.

This disqualification, while not compulsory, might be explained as a discretionary act of non-recognition. It naturally *precedes* the practice of transformative empowerment, as the overviews in relation to Syria and Libya under the first section of his chapter illustrate. In spite of this chronological association, the practice of transformative empowerment cannot be justified under the chapeau of the duty of non-recognition or non-assistance. This practice is

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<sup>2231</sup> *Id.*, p. 112.

<sup>2232</sup> About the disqualification of governments violating fundamental norms of international law in the exercise of public power (‘illegitimacy of exercise’), cf. J. d’Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, *op. cit.*, p. 878.

<sup>2233</sup> S. Talmon, ‘The Duty not to “Recognize as Lawful”’, *op. cit.*, p. 103. Talmon observes that “there is virtually no [state] practice to support a duty of non-recognition with regard to situations created by serious breaches of other *ius cogens* norms such as [...] torture and other cruel, inhuman or degrading treatment, crimes against humanity, or other basic rules of international humanitarian law”.

based on positive, deliberate action, and goes well beyond the duty of ‘active abstention’. In other words, this duty cannot account for the practice of transformative empowerment.

As transformative empowerment cannot be justified as an act of non-recognition, we need to verify whether it can be justified as one of the other obligatory reactions to serious breaches of *ius cogens*, i.e. the obligation of cooperation (2) and the obligation of peaceful settlement (3).

## 2. Cooperation

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### 2.1. Normative basis

When *ius cogens* violations occur, states must cooperate to halt them. This is the second legal consequence of *ius cogens* violations. Cooperation must precede any unilateral measures. International cooperation is one of the stated purposes of the UN<sup>2234</sup>, and all states have pledged themselves to cooperate for the achievement of peaceful and friendly international relations<sup>2235</sup>. The importance of international cooperation is also emphasized in the Friendly Relations declaration<sup>2236</sup>, and constitutes a fundamental pillar of R2P<sup>2237</sup>.

NO GENERAL OBLIGATION OF COOPERATION – Admittedly, there is no *general* obligation of cooperation under international law<sup>2238</sup>. In a number of *specific* fields, however, jurisprudence and literature accept an obligation of cooperation. The ICJ held that states are under an obligation to see to it that any impediment resulting from the violation of *erga omnes* be brought to an end<sup>2239</sup>. The IDI observed that there is a “duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world”<sup>2240</sup>. It also observed that the obligation of states to ensure the observance of human rights “implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world”<sup>2241</sup>. Special obligations of cooperation concern compliance not only with *erga omnes* norms and human rights, but also,

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<sup>2234</sup> UN Charter, art. 1§1 & 1§3.

<sup>2235</sup> *Id.*, art. 56 *cum* art. 55.

<sup>2236</sup> UNGA Res. 2625 (XXV) dd. 24 October 1970, fourth principle.

<sup>2237</sup> ‘Implementing the responsibility to protect’, *op. cit.*, p. 9.

<sup>2238</sup> The *International Law Commission* (‘ILC’) explicitly recognizes that “there is no general obligation on the part of third States to cooperate in suppressing internationally wrongful conduct of another state”. Scholarship also admits that “a general obligation to cooperate is not feasible in the present international system, but [that] obligations to cooperate may be –and actually are- acceptable in *specific* [...] contexts”. J. Delbrück, “The international obligation to cooperate – an empty shell or a hard law principle of international law? – a critical look at a much debated paradigm of modern international law” in H. Hestermeyer et al (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Nijhoff, 2012.

<sup>2239</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, § 159.

<sup>2240</sup> IDI resolution on ‘domaine réservé’, Santiago 1989.

<sup>2241</sup> *Id.*

arguably, with international humanitarian law<sup>2242</sup> and, for some authors, with international environmental law and international economic law<sup>2243</sup>.

**OBLIGATION OF COOPERATION A FORTIORI APPLICABLE TO IUS COGENS BREACHES** – If a special obligation of cooperation exists in the fields of human rights law, and perhaps international environmental law and international economic law, then, *a fortiori*, such an obligation exists when serious breaches of *ius cogens* are in play. As was already observed, (a) *ius cogens* by definition covers norms accepted and recognized by the international community as a whole and (b) states have agreed that no derogation to *ius cogens* is to be permitted<sup>2244</sup>. The ILC explicitly recognized that there are “special obligations of cooperation” in putting an end to unlawful situations arising from serious breaches of *ius cogens*<sup>2245</sup>.

Under a minimalist conception of the obligation of cooperation, states must at the very least *enter into contact with each other* to give effect to this special obligation of cooperation<sup>2246</sup>. This is further corroborated by the obligation of peaceful settlement, which will be dealt with after briefly considering the practical implications of the obligation of cooperation.

## 2.2 Practical implications

The obligation of cooperation has two implications: the UNSC or the UNGA must be seized (2.2.1), and excluding interested states from cooperating is prohibited (2.2.2).

### 2.2.1. Priority collective security system

In one of the earlier versions of the DASR, it was foreseen that ‘international crimes’ had to be systematically verified and sanctioned at the UN level<sup>2247</sup>. This draft was not approved. This circumstance does not alter the fact that the obligation of cooperation is best met through the collective security system: “*les intérêts collectifs doivent faire l’objet de délibérations collectives*”<sup>2248</sup>. When violations of *ius cogens* occur, and even more so considering that such violations constitute at least a threat to international peace and security<sup>2249</sup>, (i) the UNSC or, in subsidiary order, (ii) the UNGA should be seized of the matter<sup>2250</sup>.

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<sup>2242</sup> UN Charter, art. 1 §3.

<sup>2243</sup> J. Delbrück, ‘The international obligation to cooperate’, *op. cit.*, p. 5.

<sup>2244</sup> 2001 *Draft Articles on State Responsibility*, commentaries, p. 65.

<sup>2245</sup> *Id.*

<sup>2246</sup> J. Delbrück, ‘The international obligation to cooperate’, *op. cit.*, pp. 4-5.

<sup>2247</sup> P. Klein, ‘Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law’, *EJIL*, Vol. 13 No. 5, 2002, p. 1243. This article retraces Riphagen's reasons for stating that international crimes must be verified/sanctioned at the UN level, and emphasizes the primacy of the UN in this regard, adding that this primacy does not prevent states from acting in case of UN inactivity (*ibid.*, p. 1254).

<sup>2248</sup> A. Rougier, ‘La théorie de l’intervention d’humanité’, *RGDIP*, 1910, p. 501.

<sup>2249</sup> Chapter 10, introduction.

<sup>2250</sup> Seventh Report of G. Arangio-Ruiz (1995) cited in P.-M. Dupuy, ‘The Deficiencies of the Law of State Responsibility Relating to Breaches of ‘Obligations Owed to the International Community as a Whole’, *op. cit.*, p. 221.

(1) UNSC – Under the UN Charter, the UNSC bears the primary responsibility for the maintenance of international peace and security. The 2005 World Summit Outcome explicitly associates R2P to this responsibility incumbent on the UNSC<sup>2251</sup>. It is thus only natural that the UNSC be seized of situations related to *ius cogens* violations; this can even be done preventively, as the UNSC meeting of 9 November 2015 about the *possibility* of a new genocide in Burundi demonstrates.

The UNSC has been seized of the situation both in Syria and Libya. In Syria, it has established a supervision mission (later suspended) and ordered the verification of chemical weapons, but has never authorized states to intervene militarily in Syria. This can partly be explained by the fact that China and Russia, as permanent members of the UNSC, wished to avert the risk that an authorization to protect a population by armed force (such as the one given in Libya<sup>2252</sup>) would again be interpreted by Western states as a basis for facilitating regime change<sup>2253</sup>. Three draft resolutions were thus vetoed<sup>2254</sup>. The UNSC has also been seized of the situation in Libya. It has adopted several resolutions on Libya<sup>2255</sup>, has referred the situation to the ICC, has organized the deployment of a support mission, and has authorized all necessary measures (excluding an occupation force) to protect civilians in Libya under resolution 1973.

(2) UNGA – The World Summit Outcome furthermore “emphasizes the role for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”<sup>2256</sup>. The UNGA must be kept informed of all sessions relating to the maintenance of international peace and security, especially when the UNSC ceases to deal with a dossier involving international peace and security. Any state is entitled to bring any question relating to the maintenance of international peace and security before the UNGA<sup>2257</sup>. Once the UNGA is seized of such a question, it must refer it to the UNSC if action is deemed necessary. States may request that special UNGA sessions be convened within fifteen days, or urgent sessions within twenty-four hours<sup>2258</sup>. While this is formulated as a mere entitlement, this arguably becomes a necessity when the UNSC is not able to fulfill its primary responsibility of maintaining international peace and security.

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<sup>2251</sup> 2005 World Summit Outcome, *op. cit.*, § 139.

<sup>2252</sup> Note, however, that the ‘R2P value’ of UNSC resolution 1973 is contested.

<sup>2253</sup> N. Ronzitti, ‘NATO’s Intervention in Libya: a Genuine Action to Protect a Civilian Population in Mortal Danger or an Intervention aimed at Regime Change?’ in Symposium: the Libyan Crisis and International Law, *The Italian Yearbook of International Law*, Vol. XXI (2011), p. 3; R. Dickinson, ‘Responsibility to Protect: Arab Spring Perspectives’, *op. cit.*, p. 116; A. Garwood-Gowers, ‘The responsibility to protect and the Arab Spring: Libya as the exception, Syria as the norm?’, *op. cit.*, p. 609.

<sup>2254</sup> UN Doc. S/2011/612; UN Doc. S/2012/77.

<sup>2255</sup> The UNSC convened on 26 February, 17 March, 27 October, and 31 October 2011 when it adopted resolution 1970, 1973, 2016, 2017 respectively.

<sup>2256</sup> 2005 World Summit Outcome, *op. cit.*, § 139.

<sup>2257</sup> UN Charter, art. 11.

<sup>2258</sup> UNGA Rules of Procedure, Rules 8 & 9. Cf. also rule 15.

With regard to the situation in Syria, the UNGA convened on 3 August 2012 when it deplored the inactivity of the UNSC and called for a political transition, and again on 15 May and 18 December 2013, when it condemned human rights violations committed in Syria, welcomed the establishment of the Syrian oppositional transitional authority as an interlocutor for a political transition, and again urged the UNSC to take measures. With regard to the situation in Libya, the UNGA convened on 1 March 2011 when it suspended Libya from the Human Rights Council.

### 2.2.2. Prohibition of systematic exclusion

Notwithstanding the prerogatives of “regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security”<sup>2259</sup>, the obligation of cooperation at the UN level entails that group initiatives should not impede any UN action, or, conversely, that group initiatives should only be undertaken when the collective security system proves to be deadlocked or inactive.

Thus, the contact groups for Syria and Libya cannot be used to bypass the existing multilateral fora, which should be given priority where possible. As discussed under Chapter 1, contact groups are mostly “self-selecting”<sup>2260</sup> or “self-serving”<sup>2261</sup> as they include states with interests in particular conflicts, or with a special relationship with parties to conflicts. As a result, in spite of what they may proclaim to be, contact groups cannot be characterized as agents of the international community. This is a significant limitation because contact groups are increasingly used as “a new form of an international coordination mechanism”<sup>2262</sup>.

In addition, when diplomatic solutions to *ius cogens* crises are sought, which by definition are of interest to the community of states as a whole, interested states should not be arbitrarily excluded from such processes. If a situation is of concern to all states, the systematic exclusion of particular states from negotiations is thus vulnerable to critique on legal grounds.

With regard to Syria, both the Syrian Coalition, individual states, and even the UN<sup>2263</sup>, have until recently deliberately excluded Iran from negotiations about a prospective transition in Syria. Thus, in a *communiqué* of 9 October 2013<sup>2264</sup>, the Syrian Coalition rejected Iran’s participation in the Geneva talks, a position consistently reiterated since then<sup>2265</sup>. Several states have repeatedly banned Iran from negotiations about a transition in Syria. Even the

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<sup>2259</sup> UN Charter, art. 52. Cf. also 2005 World Summit Outcome, *op. cit.*, § 139, mentioning the cooperation with regional organizations to uphold R2P. For a concrete example, cf. Constitutive Act of the African Union, art. 4 (h).

<sup>2260</sup> *Id.*, p. 6, p. 26.

<sup>2261</sup> *Id.*

<sup>2262</sup> M. de Goede and C. van der Borgh, ‘A Role for Diplomats in Postwar Transitions?’, *op. cit.*

<sup>2263</sup> ‘Russia attacks UN withdrawal of invitation to Iran’, *The Guardian*, 20 January 2014.

<sup>2264</sup> National Coalition of Syrian Revolution and Opposition Forces, ‘The coalition Rejects Iran’s Participation in Geneva and Considers It an Occupier With Whom It Is Impossible to Negotiate’, 10 October 2013.

<sup>2265</sup> ‘Iran confirms it will attend international talks over Syria’s future’, *The Guardian*, 28 October 2015.

UNSG reportedly rescinded an invitation to Iran to attend the so-called Geneva talks<sup>2266</sup>. Given that the UNSG is supposed to serve as an honest, neutral broker at the service of the obligation of cooperation underpinning the UN Charter as a whole, such a last-minute decision is politically and even legally speaking contestable, regardless of the political reasons behind this move. On 17 May 2016, the International Syria Support Group, with Iran participating, further discussed a prospective transition in Syria<sup>2267</sup>.

### 2.2.3. Recapitulation

In short, states confronted with *ius cogens* violations in Libya and Syria had to cooperate through the collective security system, that is, through the UNSC and, in case of inactivity of the UNSC, through the UNGA. This obligation of cooperation is part and parcel of R2P, and is clearly enshrined in the ICISS report, the World Summit Outcome and related documents. It cannot be denied that UN fora were at least addressed in an attempt to alleviate the suffering of the population in Libya and Syria. Both under the R2P framework and international law generally, this step was actually unavoidable. The obligation of cooperation furthermore entails that interested states cannot be arbitrarily excluded from diplomatic processes which aim at finding a negotiated solution to a situation that is contrary to *ius cogens*.

Importantly, regardless of whether the available multilateral fora are seized of the matter, states are not exempted from entering in direct contact with the leaders of countries violating *ius cogens* if they consider applying coercive or forcible action in response to such violations. Such a direct contact is a necessary component of the obligation of peaceful settlement, as the following lines indicate.

## 3. Peaceful settlement

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### 3.1. Normative basis

Serious violations of *ius cogens* are generally accompanied by a dispute, i.e. a “disagreement on a point of law or fact”<sup>2268</sup>, which, given the nature of *ius cogens*, concerns all states. States must seek to peacefully settle any dispute resulting from or associated with serious breaches of *ius cogens*. Because *ius cogens* obligations must be respected *erga omnes*, any state can invoke their violation. The obligation of peaceful settlement persists even when the obligation of cooperation through the collective security system is not honored.

The historical pedigree and fundamental nature of the obligation of peaceful settlement is uncontested. Since the 1928 Briand-Kellogg Pact, the “settlement or solution of all disputes or conflicts of *whatever nature or of whatever origin* they may be [...] shall never be sought

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<sup>2266</sup> ‘Russia attacks UN withdrawal of invitation to Iran’, The Guardian, 20 January 2014.

<sup>2267</sup> Cf. the [Statement of the International Syria Support Group dd. 17 May 2016](#).

<sup>2268</sup> PCIJ, Series A, No. 2, p. 11. Cf. also South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, ICJ Reports 1962, p. 328.

except by pacific means”. The UN Charter confirms that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, must seek a pacific settlement of their dispute<sup>2269</sup>. In its Uniting for Peace resolution, the UNGA clearly associates the maintenance of international peace and security to the obligation of peaceful settlement of disputes<sup>2270</sup>. The resort to pacific measures –including through encouragement and assistance– is also a fundamental pillar of R2P<sup>2271</sup>.

The principle of peaceful settlement of international disputes applies to all kinds of disputes, *no matter their gravity*, and also applies to issues of *ius cogens*<sup>2272</sup>. When abstraction is made of the cases of legitimate self-defense or UNSC authorization to resort to armed force<sup>2273</sup>, the obligation of pacific settlement of disputes is relevant no matter how grave the situation is: it is applicable to disputes between *ius cogens*-violating sovereigns and all other states.

Concretely, this entails a *proactive conduct*, i.e. at minimum the obligation to negotiate with the *ius cogens*-breaching state before envisaging coercive and certainly forcible measures<sup>2274</sup>. Among the peaceful means for settling disputes listed under art. 33 of the UN Charter, the obligation of negotiation is listed first because it naturally precedes all others, and hence constitutes the *minimum core* of the obligation of pacific settlement of disputes. What is more, as very well expressed by the ICJ, the obligation to negotiate actually constitutes “a principle which underlies all international relations”<sup>2275</sup>.

### 3.2. Practical implications

Before considering coercive measures, states must directly deal with the incumbent power, and assist and encourage it to meet its responsibilities in halting *ius cogens* violations. If, as mostly occurs in practice, negotiations are chosen as the most adequate (or at least initial) dispute settlement mechanism, they must be meaningful<sup>2276</sup>. In law, this obligation persists irrespective of the nature of the *ius-cogens*-breaching governments or their leaders, i.e. irrespective of how rogue, unpopular or criminal they may be, or what kind of precedents or penchants for violence and repression they may have<sup>2277</sup>. Such (potential) obstacles to

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<sup>2269</sup> UN Charter, art. 33. Friendly Relations Declaration, second principle.

<sup>2270</sup> UNGA/377(V) dd. 3 November 1950.

<sup>2271</sup> ‘Implementing the responsibility to protect’, *op. cit.*, p. 9, §§ 28 a.f.

<sup>2272</sup> 1982 Manila Declaration, A/37/590 § 12.

<sup>2273</sup> UN Charter, art. 51.

<sup>2274</sup> G. Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of the Principles of Friendly Relations*, Recueil Des Cours, Collected Courses, 1972, Volume 137, p. 540.

<sup>2275</sup> North Sea Continental Shelf, Judgment, *ICJ Reports 1969*, § 86.

<sup>2276</sup> *Ibid.*, § 85.

<sup>2277</sup> S. Rashid, ‘Preventive diplomacy, mediation and the responsibility to protect in Libya: a missed opportunity for Canada’, *op. cit.* This author puts it excellently, with regard to the situation in Libya: “Collectively, these characteristics suggest that the prospects for successful mediation may have been small. But that does not mean that windows of opportunity were absent or that efforts to find a diplomatic solution should not have been attempted” (p. 40).

dialogue do not diminish the obligation of peaceful settlement of disputes even though negotiation and mediation *techniques* may have to be adapted to the circumstances<sup>2278</sup>.

Of course, by conducting negotiations, states do not *ipso facto* recognize the situation created by the *ius cogens* violations, nor render aid or assistance in maintaining that situation. Quite the contrary, the aim of entering into negotiations is precisely to *reverse* that situation. The obligation of non-recognition and non-assistance does not diminish the relevance of the obligation of negotiation; both obligations are actually mutually reinforcing.

Under international law, there is no doubt that there must be, or should have been, direct and proactive negotiations between the community of states and the incumbent leaders of Libya and Syria. This obligation *a fortiori* prevents any state or IO (or any international legal person, for that matter) from jeopardizing such negotiations. In the following lines, we shall observe that a peaceful settlement was hampered *ab initio* both in Syria and Libya (3.2.1), and then reflect on the question whether the obligation of peaceful settlement including direct negotiations remains any relevant today (3.2.2).

### 3.2.1. Lack of direct negotiations with incumbent leaders in Libya and Syria

“while in some respects the NATO intervention in Libya furthered the values underpinning the R2P, the end result was the overthrow of the Gaddafi regime. The statements of major international figures made it apparent that this was an objective they, whether indirectly or otherwise wished to bring about. Much has also been made in respect of the Syrian crisis of the argument that the regime of President Assad ought to be replaced”<sup>2279</sup>.

#### a. Syria

The obligation of negotiation concerns contacts with the incumbent leader in Syria. The assertion by individual states<sup>2280</sup>, UN officials<sup>2281</sup> or by the Syrian Coalition to the effect that there is “No Place for Assad and His Inner Circle in Any Transitional Process”<sup>2282</sup> should be rejected, at least on legal grounds. The spokesman for this coalition, S. Meslet, “point[ed] to the need for unity in the face of Assad’s murderous regime and for laying out specific and clear framework for negotiations with the Assad regime, most importantly in *excluding Assad*

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<sup>2278</sup> *Id.*, pp. 42-43.

<sup>2279</sup> G. Wilson, ‘Applying the Responsibility to Protect to the ‘Arab Spring’’, *op. cit.*, pp. 170-171.

<sup>2280</sup> UK, US: ‘Geneva meeting agrees ‘transition plan’ to Syria unity government’, *The Telegraph*, 30 June 2012; ‘UN envoy calls for transitional government in Syria’, *BBC*, 30 June 2012. France: ‘Syria crisis: geneva talks sound death knell for Assad regime’, *The Guardian*, 1 July 2012.

<sup>2281</sup> Assad’s speech of 6 January 2013, outlining his proposed road map for transition, was met with strong criticism by the EU foreign affairs chief, among others. On 29 January 2013 L. Brahimi’s tabled his six principles for a political transition in Syria. Under the third principle he wrote: “I think [that] it is largely understood that [...] that the President would have no role in the transition”. ‘Brahimi’s 6 principles for a political transition in Syria’, UN Report dd. 31 January 2013.

<sup>2282</sup> National Coalition of Syrian Revolution and Opposition Forces, statement of 14 January 2015.

and his inner circle from any transitional arrangement”<sup>2283</sup>. The Syrian Coalition also declared it would “participate in Geneva II, provided that it will result in Assad’s step down and the formation of a transitional government with full powers”<sup>2284</sup>. On 22 October 2013, a contact group meeting took place<sup>2285</sup>, also attended by representatives of the Syrian National Coalition. In the ‘London 11 Final Communiqué’, all participants agreed that Assad had no role in the transition<sup>2286</sup>, a position reiterated by several states<sup>2287</sup>. The refusal to enter into contact or purport to work towards a negotiated solution with the incumbent leader even of a state violating *ius cogens* might or might not be politically or morally defensible, it should be rejected under the obligation of negotiation and of peaceful settlement<sup>2288</sup>.

#### a. Libya

Several indications point to the fact that, during the first half of 2011 when the crisis in Libya started, contact group members and other interested states did not comply with the obligation of negotiation with the incumbent power, or even obstructed a negotiated settlement. This was despite the establishment of an AU *Ad Hoc High Level Committee* tasked with seeking a diplomatic solution for the crisis, and the development of a *Proposal for a Framework Agreement on a Political Solution to the Crisis in Libya*, which called for the formation of an inclusive transitional government<sup>2289</sup>. Campbell notes that “the principal media outlets of the NATO countries and the outlet of Qatar went into overdrive to savage, dismiss and marginalize the AU” before describing in some detail which negotiated solution had been proposed by the AU, and which concrete efforts the AU had already taken to this end<sup>2290</sup>.

Worse still, a negotiation proposal by the AU would have been actively undermined. The AU Assembly, preferring “close coordination among all stakeholders”<sup>2291</sup>, called for a negotiated and peaceful settlement and publicly lamented “the attempts to marginalize the continent in the management of the Libyan conflict”<sup>2292</sup>. Commentators observed that “the AU continued

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<sup>2283</sup> National Coalition of Syrian Revolution and Opposition Forces, ‘Syrian Coalition: No Place for Assad and His Inner Circle in Any Transitional Process’, 14 January 2015.

<sup>2284</sup> National Coalition of Syrian Revolution and Opposition Forces, ‘Coalition Response to Lavrov: Geneva II must Not be an Attempt to Divert Responsibility’, 17 November 2013.

<sup>2285</sup> 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.

<sup>2286</sup> Final Communiqué from London 11 Meeting on Syria, 22 October 2013.

<sup>2287</sup> France, for instance, confirmed its refusal to talk with Assad. ‘French PM Valls says no compromise with Syria’s Assad possible’, Reuters, 15 September 2015.

<sup>2288</sup> National Coalition of Syrian Revolution and Opposition Forces, ‘Coalition Response to Lavrov: Geneva II must Not be an Attempt to Divert Responsibility’, 16 November 2013.

<sup>2289</sup> ‘Proposal for a Framework Agreement on a Political Solution to the Crisis in Libya’ dd. 7 July 2011, enclosure to S/2011/455 dd. 26 July 2011. Cf. also ‘AU sys non-Africans sidelining Libya peace plan’, Reuters, 26 April 2011.

<sup>2290</sup> H. G. Campbell, *NATO’s failure in Libya – Lessons for Africa*, Africa Institute of South Africa, Pretoria, 2012, p. 90.

<sup>2291</sup> AU Doc. EXT/ASSEMBLY/AU/DEC/(01.2011) dd. 25 May 2011, § 9.

<sup>2292</sup> *Id.*, § 8.

to push for a solution to the crisis [...] through a negotiated settlement with Gaddafi, but was increasingly *sidelined* in the following months<sup>2293</sup>. NATO, the contact group, the UNSC and the Libyan oppositional transitional authority seem to have stifled a negotiated settlement:

- As to the role of NATO, Dembinski and Reinold observe that “in the case of Libya, *NATO did not participate in the search for a negotiated solution*. Quite to the contrary, the Alliance *even undermined a negotiated solution* by insisting that Gaddafi must go and supporting at least indirectly the uncompromising position of the Transitional Council<sup>2294</sup>. If it is true that NATO member states categorically refused to enter into direct contact with the Libyan government, then they have dismissed a crucial step under the R2P framework and international law generally, namely violating the obligation of negotiation.
- As to the role of the ‘Friends of Libya’ diplomatic coalition, Ronzitti observes that “the Contact Group interpreted the UN Resolution on the use of force as a license for bringing about regime change, rather than as a mandate for finding a political solution and an accommodation with the Gaddafi regime”, and then asks: “was the Libyan intervention a hegemonic intervention aimed at a regime change rather than a genuine humanitarian intervention? This suspicion has its own foundation. *The attempt to mediate was not supported by the Contact Group*”<sup>2295</sup>. If contact group member states refused to directly deal with the Libyan government indeed, this would have amounted to disregarding a crucial step under the R2P framework, i.e. the obligation of negotiation.
- Even the UNSC, which “must call upon the parties to settle their dispute” by peaceful means<sup>2296</sup>, would at least indirectly have impeded negotiation efforts by applying the no-fly zone too severely. According to Youssef, “despite the fact that Resolution 1973 ‘noted’ the African Union’s PSC’s decision, the appointed Heads of States were rejected authority to fly to Libya. *This closed a vital chance to explore the demands of Gaddafi and the NTC but also measure their willingness to cooperate*”<sup>2297</sup>. In addition, as already observed, some members of the UNSC have been reproached for adopting an expansive reading of resolution 1973 by (indirectly) facilitating an imposed regime change, thus squandering any negotiated solution with the incumbent leader, although this resolution precisely called for a ceasefire and a peaceful solution<sup>2298</sup>.

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<sup>2293</sup> *Id.*, p. 11. In the same sense, cf. H. Campbell, *Global NATO and the Catastrophic Failure in Libya*, NYU Press, 2013, pp. 134-140.

<sup>2294</sup> M. Dembinski, T. Reinold, ‘Libya and the Future of the Responsibility to Protect - African and European Perspectives’, *op. cit.*, p. 25.

<sup>2295</sup> N. Ronzitti, ‘NATO’s Intervention in Libya: a Genuine Action to Protect a Civilian Population in Mortal Danger or an Intervention aimed at Regime Change?’, *op. cit.*, p. 3.

<sup>2296</sup> UN Charter, art. 33 § 2.

<sup>2297</sup> M. A. E. Youssef, ‘Security Council Resolution 1973: a new interpretation of the notion of protection of civilians?’, in C. Panara, G. Wilson, eds., *The Arab Spring, New Patterns for Democracy and International Law*, Martinus Nijhoff Publishers, Leiden, Boston, 2013, p. 152.

<sup>2298</sup> UNSC/RES/1973 dd. 17 March 2011, §§ 1-2.

- The National Transitional Council, finally, failed to support the AU's peacemaking proposal<sup>2299</sup> which included the establishment of a transition period, and which had been accepted by Gaddafi: "Libya's opposition Transitional National Council has *rejected* outright the African Union's proposal to negotiate a way out from the country's deepening crisis"<sup>2300</sup>, invoking the circumstance that the roadmap did not include any 'exit' for Gaddafi. Yet, according to Omorogbe it seems that "Gaddafi was at this point willing to agree to dialogue with the TNC, and was prepared not to play a role in the peace negotiation process"<sup>2301</sup>.

In sum, various actors obstructed negotiations with the incumbent head of state after the Arab Spring uprisings had erupted, and went against the grain of what the *International Crisis Group*, among other influential voices, had advised from the start, namely that a ceasefire was "to be followed by *negotiations* to secure a transition to a post-Qaddafi, legitimate and representative government"<sup>2302</sup>. In spite of this clear message, calls for mediation were sparse. Besides the abovementioned AU and UNSC requests for a peaceful settlement, only China, Russia, Turkey and the Libyan regime itself called for negotiations or mediation<sup>2303</sup>.

### 3.2.2. Current relevance of obligation of negotiation

The systematic exclusion of the incumbent government or interested states from negotiations aiming at putting an end to *ius cogens* violations, even if perhaps acceptable from a moral/political vantage point, is vulnerable to critique under international law, at least if one accepts that the obligation of negotiation is part and parcel of the obligation to react against the atrocities and torture committed by the Libyan and Syrian regimes in the aftermath of the Arab Spring.

One way to give effect to the obligation of negotiation and peaceful settlement is by envisaging an (even short-lived) inclusive transitional period during which power is temporarily shared between competing factions whilst accepting that, in light of the limits *ratione materiae* to DIG, inclusivity should not spill over in the post-transition stage. Despite the fact that the peace-through-transition paradigm is deeply entrenched in legal culture, at the time of writing this option, while being on the table, has not been exhausted in Syria and Libya.

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<sup>2299</sup> S. Koko, M. Bakwesegha-Osula, 'Assessing the African Union's Response to the Libyan Crisis', African Centre for the Constructive Resolution of Disputes (ACCORD), 2012.

<sup>2300</sup> 'Libyan rebels reject African Union road map', Aljazeera, 12 April 2011. Cf. also K. Fahim, 'Truce Plan for Libya Is Rejected by Rebels', NYT, 11 April 2011.

<sup>2301</sup> E. Y. Omorogbe, 'The African Union, responsibility to protect and the Libyan crisis', *Netherlands International Law Review*, Volume 59, Issue 02, August 2012, p. 161.

<sup>2302</sup> ICG, 'A Ceasefire and Negotiations the Right Way to resolve the Libya Crisis', 10 March 2011.

<sup>2303</sup> S. Rashid, 'Preventive diplomacy, mediation and the responsibility to protect in Libya: a missed opportunity for Canada', *op. cit.*, pp. 45 - 46.

The Syrian government did not participate in the first Geneva peace talks, which led to the ‘Action Group for Syria Final Communiqué’ of 20 June 2012. Direct peace talks in Geneva commenced only by the end of January 2014. In March 2015, the US Secretary of State broke a taboo by suggesting that the incumbent head of state of Syria should be included in negotiations about a transition<sup>2304</sup>. In 2015, several actors insisted that a successful way out of the Syrian armed conflict is through an inclusive transition, with more and more states reconsidering their initial reluctance to negotiate with the incumbent leader.

At the end of October 2015, the discussion about a transitional government came back on the table<sup>2305</sup>. But neither government representatives nor delegates from the Syrian National Coalition were invited to the first round of these peace talks. In addition, in a joint statement, the central question of Assad’s participation in a transitional government was carefully avoided<sup>2306</sup>. Yet, it seemed the inclusion of the incumbent leader was at least informally considered: Russia and Iran demanded that Assad be part of the transition; the US agreed with this proposition provided the transition be swift<sup>2307</sup>.

A major shift on negotiations about an inclusive transition occurred a day after the Paris attacks of 13 November 2015, when world leaders agreed that inclusive negotiations should lead to a credible, inclusive, non-sectarian government within six months<sup>2308</sup>. End 2015, international collaboration seemed to be widening and several states seem to be willing to directly negotiate with the Syrian head of state about the eradication of the so-called *Islamic State* and a political transition in Syria. In 2016, as the incumbent power was regaining control over several parts of previously rebel-held territories, direct negotiations were again considered. But neither the Syrian government nor the opposition took part in the Vienna peace talks of 17 May 2016.

In Libya, inclusive negotiations with the incumbent leader were thwarted *ab initio*, and became virtually impossible after Gaddafi’s death in October 2011. Currently, the obligations to hold inclusive negotiations would imply that the existence of the two competing governments (with one based in Tobruk and the other in Tripoli) must at least be taken into account when international negotiations take place about a renewed transition aimed at alleviating the suffering of the Libyan people. The *Political Agreement for a Government of*

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<sup>2304</sup> ‘Kerry Suggests There Is a Place for Assad in Syria Talks’, New York Times, 15 March 2015.

<sup>2305</sup> ‘Syria Conflict: Powers backing rivals meet in Vienna’, BBC, 30 October 2015. During Autumn 2015, Germany, Iran, Russia and Saudi Arabia, the UK, the UK, have at least pondered about the creation of a transitional government. ‘Germany calls for Syria transitional government’, Yahoo news, 27 September 2015. ‘Forming Transitional Government: Iran Solution for Syria Crisis’, Alalam, 25 October 2015. ‘U.S., Russia, Saudi Arabia, Turkey meet on possible transitional government for Syria’, Triblive, 23 October 2015. Position of UK, cf. ‘Deal to end civil war in Syria could allow president Bashar al-Assad to stay’, The Observer, 26 September 2015.

<sup>2306</sup> Joint statement dd. 30 October 2015, signed by China, Egypt, the EU, France, Germany, Iran, Iraq, Italy, Jordan, Lebanon, Oman, Qatar, Russia, Saudi Arabia, Turkey, United Arab Emirates, the United Kingdom, the United Nations, and the United States.

<sup>2307</sup> ‘Iran confirms it will attend international talks over Syria’s future’, The Guardian, 28 October 2015.

<sup>2308</sup> ‘Vienna talks: Syrian regime and opposition to meet, collaborate before the new year’, Albawaba news, 16 November 2015.

*National Accord*, signed on 17 December 2015, seems to be a significant step in this direction. But, in spite of the wide international support for this agreement, most recently at a ministerial meeting in Vienna on 16 May 2016, the Government of National Accord it installs struggles to impose its authority in Libya and therefore requests international assistance (rather than boots on the ground).

### 3.2.3. Recapitulation

From the outset, states confronted by *ius cogens* violations in Libya and Syria should have been in contact with the incumbent leaders so as to find a negotiated solution where possible. Both under the R2P framework and international law generally, this step was legally unavoidable yet was deliberately omitted. One way to belatedly remedy this omission would be to consider inclusive negotiations about a state transformation process through DIG.

The emphasis on prior exhaustion of non-coercive measures is even more salient when states are said to be in transition, or pushed into a situation of DIG, as was the case with Libya and potentially will be the case with Syria. This is because during a period of transition, institutional and constitutional structures are held in abeyance, thus rendering the state fragile, and making the threshold for outside states to violate the principles of self-determination and non-intervention easier to reach. Especially in such circumstances, states must first seek a pacific settlement by entering into direct negotiations with the incumbent leaders, no matter how ‘rogue’ they are.

## 4. Conclusion

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The first reaction countries witnessing *ius cogens* violations must adopt is to avoid any acts that could be interpreted as acts of recognition of these violations. Concretely, states must abstain from rendering any aid or assistance in prolonging these violations. The second reaction against *ius cogens* violations is to cooperate through the collective security system, that is, through the UNSC and, in case of inactivity by the UNSC, through the UNGA. Interested states cannot be arbitrarily excluded from diplomatic processes which aim at finding a negotiated solution to a situation that is contrary to *ius cogens*. The third reaction is to negotiate directly with the incumbent leaders. Negotiations should be undertaken before contact groups purport to endorse and empower oppositional transitional authorities.

These three steps are compulsory. They are actually legally inescapable under international law. We have seen that, in the cases of Syria and Libya, members of the international community largely disregarded these steps. The Syrian and Libyan oppositional transitional authorities received considerable support from contact groups. Because both oppositional transitional authorities clearly had a state transformation agenda, the extensive support given to them, without (in itself) amounting to forcible intervention, arguably constituted a *coercive*

measure. At the same time, specific states were systematically refused the opportunity of contributing to a DIG-based durable solution, and negotiations with the incumbent leaders were hindered.

Because, in the case of Syria and Libya, the contact groups did not reconcile the practice of transformative empowerment with the obligations of cooperation and negotiation, they arguably violated international law. This practice is, in principle, incompatible with the principle of non-intervention, and, in neither of the two cases, was attuned to the obligations incumbent on states faced with *ius cogens* violations.

Only if the obligation of collective reaction –non-recognition, cooperation, and peaceful settlement– fails in all its practical and procedural aspects is it relevant for states to examine how they may lawfully alter a situation at variance with *ius cogens*. In light of the conclusion we just reached –i.e. that the transformative empowerment by contact groups of the Syrian and Libyan oppositional transitional authorities was largely unlawful– this examination is largely irrelevant for these cases.

But, for other (present or future) cases, it is still relevant to examine whether, provided all the steps discussed in the present subsection were first undertaken, states may apply coercive measures intended to curb the state apparatus, and to facilitate a transition toward a stable and law abiding government. If these steps are not successful –i.e. if a multilateral response to *ius cogens* violations, although actively pursued, turns out to be unrealistic– may states then unilaterally apply transformative empowerment against a state persistently violating *ius cogens*? This question is addressed in the following and last section of this study.

## Section B. As a last resort, transformative empowerment as a non-forcible countermeasure?

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A situation caused by gross and persistent breaches of *ius cogens* must be solved by multilateral cooperation and direct negotiations with the regime committing these breaches, even if this regime was disqualified. This subsection asks whether, in case of such breaches and in the face of inactivity or failure of multilateral institutions to act upon them, states, acting individually or in group format, have, if not the obligation, at least the possibility to go further than that, at their own discretion<sup>2309</sup>. The scenario studied here is one under which transformative empowerment is applied as a coercive measure outside the UN system, by states acting unilaterally (or in cooperation with other states within contact groups<sup>2310</sup>). The coercion would thus consist in imposing transformative empowerment upon the state that is unwilling and unable to rectify its *ius cogens*-violating behavior.

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<sup>2309</sup> It is assumed that the obligation of cooperation, even in the face of *ius cogens* violations, cannot *oblige* states to take countermeasures. Cf. C. Hillgruber, ‘The Right of Third States to Take Countermeasures’, *op cit.*, pp. 292 - 293.

<sup>2310</sup> Chapter 9, Section A.2.

INACTIVITY OR PARALYSIS UN INSTITUTIONAL FRAMEWORK – TRANSFORMATIVE EMPOWERMENT AS A RESPONSE TO IUS COGENS VIOLATIONS? – The test of legality regarding coercive reactions to violations of *ius cogens* norms in the case of inactivity or the paralysis of multilateral institutions outside the context of decolonization must also, somehow, be accounted for. The present analysis of unilateral coercive transformative empowerment takes up this challenge.

In one of the earlier DASR drafts, it was foreseen that ‘international crimes’ had to be systematically verified and sanctioned at the UN level<sup>2311</sup>, but this draft was not approved. In the absence of such a verification system, and when the multilateral system is deadlocked, (groups of) states make themselves available, pretending to fill this gap<sup>2312</sup>. Expecting that the UN swiftly and systematically reacts to all situations involving *ius cogens* violations is unrealistic, Gaja observes<sup>2313</sup>. Both Leben and Frowein underscore that the recourse to unilateral action directly results from the repeated weakness or inability of the multilateral collective security system to react to internationally wrongful acts:

- *"le caractère aléatoire de la mise en jeu du mécanisme de la responsabilité internationale, et la faiblesse des garanties offertes par les organisations internationales, ne peuvent que pousser les Etats à adopter par eux-mêmes les mesures assurant une certaine répression de ce qu'ils considèrent être des violations flagrantes du droit international"*<sup>2314</sup>.
- *"in neuster Zeit [hat] die Erkenntnis, dass das Sanktionssystem der Vereinten Nationen weithin funktionsunfähig ist, dazu geführt, dass Drittstaaten bei Verstößen gegen grundlegende Normen der Völkerrechtsordnung wie der Gefährdung des Friedens auch rechtliche Reaktionen prüfen und teilweise zur Anwendung bringen"*<sup>2315</sup>.

A PRIORI UNLAWFULNESS OF UNILATERAL COERCIVE TRANSFORMATIVE EMPOWERMENT – The question remains whether, if applied as a unilateral action, transformative empowerment can be validated as a measure against *ius cogens* violations. Where transformative empowerment is applied as a coercive unilateral measure, the chances become extremely slim that it will *prima facie* be considered respectful of the principle of non-intervention, especially since the measure (indirectly) aims at reconfiguring the constitutional order of the target state through DIG. This conclusion, which suffers few (and rather theoretical) exceptions, was already

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<sup>2311</sup> See P. Klein, ‘Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law’, EJIJL, Vol. 13 No. 5, 2002, p. 1243. This article retraces Riphagen's reasons for stating that international crimes must be verified/sanctioned at the UN level, and concludes that there is primacy on the UN level, but that this primacy does not prevent states from acting if there is no action at the UN level (*ibid.*, p. 1254).

<sup>2312</sup> M. Moe, ‘[The Contact Group on Bosnia-Herzegovina and Kosovo: The Institution and its Mediation Role](#)’, pp. 39-50.

<sup>2313</sup> In 1987, G. Gaja wrote, when commenting the *Barcelona Traction Case*: “[t]he Court thus identified obligations existing towards the international community as a whole with obligations existing towards all States, which possess corresponding ‘rights’. The lack of distinction on the part of the Court between these obligations finds some justification in the present state of (lack of) organization in international society. Moreover, it would make little sense to say that an obligation existed if the corresponding rights could be exercised by all the other States only jointly: this would never take place in practice”. G. Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’, *op. cit.*, p. 152.

<sup>2314</sup> C. Leben, ‘Les contre-mesures inter-étatiques et les réactions à l'illicite dans la société internationale’, *Annuaire français de droit international*, volume 28, 1982, p. 76.

<sup>2315</sup> *Id.*, p. 253.

reached above<sup>2316</sup>. For this reason, one needs to ask whether the *prima facie* unlawfulness inherent in unilateral coercive transformative empowerment can somehow be cured.

In international law, the conditions that can cure unlawfulness are articulated in the ILC's DASR. The DASR are regarded as a reflection of customary law, and can constitute a basis for a theorization-within-the-law enterprise like the current one<sup>2317</sup>. Applied to unilateral coercive transformative empowerment, the DASR inform us as to whether, or under which conditions, unilateral coercive transformative empowerment might be valid.

RELEVANCE OF COUNTERMEASURE FRAMEWORK AS A SUBSIDIARY REACTION – The DASR set out six ‘circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State concerned’<sup>2318</sup>. Here, only the third circumstance –countermeasures– can possibly be relevant. Countermeasures are “measures that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation”<sup>2319</sup>. Of course, and in line with the primacy of the UN security system discussed above, recourse to countermeasures can only be a subsidiary means for sanctioning unlawful behavior:

*“si favorable que l'on soit aux contre-mesures, celles-ci devraient être tenues pour illicites lorsqu'elles sont décidées en violation des dispositions arrêtées par les Nations unies [...] ou sans qu'aient été préalablement utilisés les mécanismes de sanction organisés dans ces cadres. Si 'police' unilatérale il faut admettre, ce n'est jamais que lorsqu'il est établi que la sanction collective n'est pas ou ne peut pas être efficace”*<sup>2320</sup>.

Thus, it is only when the UNSC (or, under the Uniting for Peace resolution, the UNGA) is unable to take effective measures, or when ‘soft enforcement’ mechanisms are unavailable or ineffective<sup>2321</sup>, that the countermeasure framework ought to be considered<sup>2322</sup>. For Francioni, thus, “when a state [...] becomes a systematic defaulting state [...] it would have little sense to exclude the operation of ordinary countermeasures under customary international law”<sup>2323</sup>.

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<sup>2316</sup> Chapter 9, Section B.1. This conclusion suffers a (theoretical) exception only where the constitutional order proper is in direct violation with *ius cogens*.

<sup>2317</sup> In the same sense, D. J. Bederman, 'Counterintuiting Countermeasures', *The American Journal of International Law* 96, no. 4 October 1, 2002, p. 823: “international law codification projects such as the articles have come to be regarded as a legitimate forum for the creation of international legal process values and mechanisms”.

<sup>2318</sup> DASR, Commentaries to Chapter V of Part I. The six circumstances are: consent (art. 20); self-defense (art. 21); countermeasures in respect of an internationally wrongful act (art. 22); *force majeure* (art. 23); distress (art. 24); and necessity (art. 25).

<sup>2319</sup> DASR, Commentaries to Chapter II.

<sup>2320</sup> J. Verhoeven, *Droit international public, op. cit.*, p. 662.

<sup>2321</sup> The (as far as I know inexistent) scenario of a treaty-based enforcement and monitoring mechanism with regard to transformative empowerment is disregarded here.

<sup>2322</sup> In the same sense, P.-M. Dupuy, *The Deficiencies of the Law of State Responsibility Relating to Breaches of 'Obligations Owed to the International Community as a Whole': Suggestions for Avoiding the Obsolescence of Aggravated Responsibility*, *op. cit.*, p. 211.

<sup>2323</sup> F. Francioni, 'International 'soft law': a contemporary assessment', *op. cit.*, p. 178. Cf. also J. A. Frowein, 'Obligations *erga omnes*', MPEPIL: “present-day international law seems to permit non-forcible proportionate

COUNTERMEASURE FRAMEWORK: PRESENTED UNDER GENERAL TERMS – As hinted at earlier, besides countermeasures none of the other ‘circumstances precluding wrongfulness’ (consent, self-defense, *force majeure*, distress or necessity) can be relevant for framing unilateral coercive transformative empowerment<sup>2324</sup>. Stated differently, it is *only* by framing this particular practice as a countermeasure that its lawfulness *vel non* can be examined. Countermeasures can be applied under various forms, Quadri wrote<sup>2325</sup>, and as Wolfrum had adumbrated, it is not absurd to suggest that they assist us in legally contextualizing transformative empowerment<sup>2326</sup>. As a result, the countermeasure framework constitutes the discursive framework allowing us to examine the legal constraints on unilateral coercive transformative empowerment.

POSSIBLE ASSOCIATION COUNTERMEASURE FRAMEWORK & TRANSFORMATIVE EMPOWERMENT – The *ratio legis* of the countermeasure framework is reconcilable with the philosophy behind transformative empowerment. Countermeasures allow for the restoration of a legal relationship ruptured by unlawful behavior. The latter element –the invocation of unlawful state behavior– can easily be associated with the discourse –the allegation of unlawful behavior– commonly adopted by states or contact groups lending support to oppositional DIG. Transformative empowerment is in practice mostly framed as a response to legal noncompliance. This is confirmed by the discourse surrounding the transformative empowerment of the Syrian and Libyan oppositional transitional authorities<sup>2327</sup>: the finger is pointed at (allegedly) unlawful behavior by the state against which the oppositional transitional authorities operate; state reconfiguration is perceived as a corrective of such behavior.

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countermeasures of States against violations of obligations *erga omnes* where no institutional system exists or an existing system does not function properly”.

<sup>2324</sup> A note about the irrelevance of other ‘circumstances precluding wrongfulness’. The first of these circumstances –consent– is not pertinent because transformative empowerment is applied without the consent of the target state. The second circumstance –self-defense– is not relevant either as only non-forcible measures in relation to DIG are analyzed in this thesis. The fourth circumstance –*force majeure*– is incompatible with the policy of transformative empowerment, based on the premise that the support to the oppositional transitional authority is deliberate. The fifth –distress– exonerates the state (actor) that has “no other reasonable way, in a situation of distress, of saving its life”, a scenario manifestly irrelevant for the purposes of this analysis. The sixth –necessity– is very restrictive; it can only be invoked when it is “the only way for the State to safeguard an essential interest against a grave and imminent peril”, a justification that is not relevant either for this analysis.

<sup>2325</sup> “*la rappresaglia può manifestarsi nelle forme più svariate*”, R. Quadri, *Diritto Internazionale Pubblico*, *op. cit.*, p. 266.

<sup>2326</sup> Without going into detail, P. Thielbörger just points to the fact that the countermeasure framework can be relevant in this regard: “[b]efinden sich also Staaten automatisch im Bruch des Völkerrechts, wenn sie Oppositionsbewegungen als ‘Vertreter eines Volkes’ oder gar als ‘neue Regierung’ anerkennen, ohne dass die dafür aufgezeigten Voraussetzungen gegeben sind? Die Frage ist grundsätzlich zu bejahen. [...] Es stellt sich stets die Frage der Rechtfertigung”. P. Thielbörger, ‘Die Anerkennung oppositioneller Gruppen in den Fällen Libyen (2011) und Syrien (2012)’, *op. cit.*, p. x, own emphasis; “*Are states automatically violating international law when they recognize opposition movements as ‘representative of the people’ or even as ‘new government’ if the necessary preconditions for this are not fulfilled? Fundamentally, the question must be answered affirmatively. But the question of the ‘circumstance precluding wrongfulness is still there’*” (own translation). Wolfrum and Philip write about the ‘flip side’ of the medal, when they observe that “non-recognition [under certain circumstances] is to be seen as a *retortion* that is to say a counter-measure through which states attempt to enforce international obligations”, R. Wolfrum, C. Philipp, ‘The Status of the Taliban: Their Obligations and Rights under International Law’, *op. cit.*, p. 574.

<sup>2327</sup> Cf. overviews under Chapter 9, Section A.1.

Now that the conceptual link between countermeasures and transformative empowerment is clarified, let us examine how the countermeasure framework informs us about the legality *vel non* of unilateral coercive transformative empowerment. This is the transformative-empowerment-as-countermeasure argument. We will explore whether, from a legal perspective, this argument holds water. The answer to this question will allow us to understand what the precise legal leeway –if any– is for this practice. Can external actors trigger oppositional DIG in a state violating *ius cogens*?

Answering this question depends on two separate analyses. First, can the countermeasure framework offer a sound theoretical basis for applying transformative empowerment (‘theoretical compatibility question’) (1)? Second, can this practice possibly comply with the substantive and procedural prerequisites for taking countermeasures (‘practical compatibility question’) (2)? In addition, we shall examine whether transformative-empowerment-as-countermeasure would need to be qualified as to its object, i.e. what kind of oppositional transitional authorities it may concern (3), before concluding that the possibility of resorting to this practice is highly restricted in law (4).

### *1. Theoretical compatibility: coercive transformative empowerment as a solidarity countermeasure?*

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Whether the countermeasure framework can offer a sound theoretical basis for applying transformative empowerment depends on the position of the injured state (1.1), the occurrence of *ius cogens* breaches (1.2), and the definition of solidarity countermeasures (1.3).

#### *1.1. The de iure injured state*

**OBJECT AND LIMITS OF COUNTERMEASURES** – The theoretical compatibility question calls for a careful reading of art. 49.1. DASR: “an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations”. At first sight this article reads as a one-on-one issue. This provision includes both an ‘active identity requirement’, regarding the identity of the state entitled to take countermeasures (the ‘injured state’) and a ‘passive identity requirement’ regarding the identity of the state against which the countermeasure is directed (the ‘responsible state’, or the ‘wrongdoer’). The latter requirement is linked to a self-evident but fundamental precondition for applying countermeasures: prior unlawfulness<sup>2328</sup>. Countermeasures must not be taken as an anticipative measure or vis-à-vis non-responsible states<sup>2329</sup>, as we shall discuss below<sup>2330</sup>.

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<sup>2328</sup> The countermeasure framework can only be invoked if the state(s) or organization(s) seeking to legally justify the practice of transformative empowerment are capable of substantiating that they proceeded with this practice *in response to an internationally wrongful act*: “[a] fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the state taking the countermeasure” (DASR, commentary to art. 49 DASR).

<sup>2329</sup> Cf. DASR, comment 4 to art. 49.1.

<sup>2330</sup> Chapter 10, Section B.1.2.

DE IURE INJURED STATES – Is only the directly injured state allowed to take countermeasures? This question is relevant to the extent that transformative empowerment (i) is a collective enterprise, e.g. by contact groups, in which case there is not always a direct (tangible) relationship between (all) the members of the contact group and the state deemed to have committed an internationally wrongful act; (ii) is framed as a response to large-scale human rights violations taking place *within* a state's territory, in which case there is no directly injured state. Without being directly and tangibly injured, a state can only claim to be injured by invoking one scenario: by arguing that it is the victim *de iure* of a violation of *erga omnes* norms, and especially *ius cogens* norms (which per definition are valid *erga omnes*). This category of norms was already introduced above<sup>2331</sup>; suffice it here to recall that the community of states as a whole has an interest in their compliance.

CONTESTED TERMINOLOGY OF 'INJURED STATES' – Because the injury resulting from violations of *erga omnes/ius cogens* obligations is only of a legal nature, the terms 'non-injured state' for designating the legally-but-not-materially-injured state do not seem to be adequate. It has therefore been argued that, "instead of the uniform use of 'injured state', a different term for designating the state or states affected by the violation of an *erga omnes/ius cogens* obligation should be introduced"<sup>2332</sup>. In any event, when a state becomes an injured state only as a matter of law, the question becomes whether, being only legally and not tangibly injured, it can take any remedial action, i.e. can resort to so-called solidarity countermeasures.

TRANSFORMATIVE EMPOWERMENT AS A SOLIDARITY COUNTERMEASURE? – The issue of solidarity countermeasures is not uncontroverted in law. Yet, it seems to be the only way to legally frame unilateral coercive transformative empowerment. Exploring this line of reasoning is not a cynical exercise in justifying or condoning uncontrolled indirect regime change. Quite to the contrary, this approach allows us to detect what the maximum reach of the law is, i.e. to unveil which limits the law (and, more accurately, the countermeasure framework) imposes on the practice of transformative empowerment, even in relation to the arguments seemingly more accommodating to actors intending to apply it as a last resort coercive measure.

## 1.2. Prior unlawfulness: need for substantiation

PRESUPPOSITION OF UNLAWFULLNESS – Countermeasures can only be applied in response to prior wrongful acts. To be more precise, the countermeasure framework can only be invoked if the state(s) seeking to legally justify the practice of transformative empowerment are not only willing to, but also capable of, *substantiating* that their approach can be justified as a response to an internationally wrongful act<sup>2333</sup>. Because anticipatory countermeasures are excluded<sup>2334</sup>,

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<sup>2331</sup> Chapter 9, Section B.1.

<sup>2332</sup> K. Zemanek, 'New Trends in the Enforcement of *erga omnes* obligations', Max Planck UNYB 4, 2000, p. 29.

<sup>2333</sup> "A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the state taking the countermeasure", DASR, commentary to art. 49.

states are barred from pre-emptively endorsing oppositional transitional authorities. Unilateral coercive transformative empowerment can never be justified as a countermeasure in the absence of *proven* allegations of prior unlawful conduct<sup>2335</sup>.

**PRESUPPOSITION OF VIOLATION OF IUS COGENS** – If transformative empowerment is founded *exclusively* on grounds *unrelated* to allegations of unlawful conduct –e.g. the desire to secure specific economic advantages, or to see certain political ideologies implemented– or *exclusively* in the name of ‘illegitimacy’ or ‘undemocratic behavior’, then no resort can be had to the countermeasures framework (or, for that matter, to any justification under international law). Moreover, it is not sufficient for legally injured states to invoke *any* sort of unlawful behavior to justify the recourse to solidarity countermeasures. Unless they are directly injured by the ‘target state’, they must argue they are victims *de iure* of violations of *ius cogens* norms, which, being accepted and recognized by the international community as a whole, are valid *erga omnes*<sup>2336</sup>.

**ILLUSTRATIONS** – Practice amply confirms the possibility of distinguishing between legality and democracy/legitimacy reasons. Collective responses to *ius cogens* violations need not be framed as issues of ‘legitimacy’ or ‘democracy’. In this sense, "it was [...] gross and systematic violations of human rights and the grave humanitarian situation which triggered a collective response and denial of governmental legitimacy to Gaddafi"<sup>2337</sup>, rather than considerations of democracy or legitimacy. To give another example, it is the violation of human rights and fundamental freedoms in combination with the violation of the right to self-determination which were invoked against the Ian Smith government, not (just) general considerations of legitimacy<sup>2338</sup>. Furthermore, international reactions in the cases of Southern Rhodesia (1965), the Homelands (1976 – 1982), Northern Cyprus (1974) and Kuwait (1990) “were not about democracy”<sup>2339</sup>.

**ACTORI INCUBIT PROBATIO; RISK OF ASSESSING PRIOR UNLAWFULLNESS** – A state resorting to countermeasures must prove that it is in its right to do so. Indeed, as the ILC recalled, “a State which resorts to countermeasures based on its unilateral assessment of the situation does so *at its own risk* and may incur *responsibility* for its own wrongful conduct in the event of an

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<sup>2334</sup> O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, Clarendon Press, Oxford, 1988, p. 52-53.

<sup>2335</sup> In these cases, the non-intervention principle would be the principal legal point of reference to interpret the practice of transformative empowerment in legal terms.

<sup>2336</sup> See the introduction to Section C.

<sup>2337</sup> See J. Vidmar, ‘Democracy and Regime Change in the Post-Cold War International Law’, *op. cit.*, pp. 367 and 380.

<sup>2338</sup> V. Gowlland-Debbas, *Collective responses to illegal acts in international law: United Nations action in the question of Southern Rhodesia*, *op. cit.*, p. 203.

<sup>2339</sup> J. Vidmar, ‘Human Rights, Democracy and the legitimacy of governments in international law: practice of states and UN organs’, *op. cit.*, p. 59.

*incorrect assessment*<sup>2340</sup>. For Frowein, countermeasures can be taken provided there is not the slightest doubt about the commission of internationally wrongful acts<sup>2341</sup>.

It goes beyond the scope of this thesis to enquire as to what the precise standards of proof should be to substantiate *ius cogens* violations<sup>2342</sup>. It seems that these standards are variably applied before the ICJ, and not firmly established before other jurisdictions<sup>2343</sup>. In order to remedy this lack of consistency or normative gap, the idea has been voiced to establish an international ‘Commission of Inquiry’, i.e. an “international non-judicial oversight mechanism” to monitor the respect for *ius cogens* norms on human rights<sup>2344</sup>. In the meantime, states are left to their own device for proving *ius cogens* violations.

### 1.3. Solidarity countermeasures

**SOLIDARITY COUNTERMEASURES IN THE DASR** – Art. 54 DASR provides that the countermeasure framework “*does not prejudice* the right of any State, entitled under article 48, par. 1 [regarding *erga omnes* obligations], to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached”<sup>2345</sup>. When referring to this ‘savings clause’, the ILC, in 2001, observed that “the current state of international law on countermeasures taken in the general or collective interest is *uncertain*”<sup>2346</sup>, adding that this matter should be left to the further development of international law.

**OPEN-ENDED NATURE OF SAVINGS CLAUSE** – Given the open-ended nature of the savings clause, the question becomes: is there sufficient state practice, in 2016, to sustain the existence and validity of solidarity countermeasures. Faced with the inconclusive observation of the ILC

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<sup>2340</sup> DASR, commentary to art. 49. Emphasis added. In the same sense, O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, p. 62. If a state “invokes lawful countermeasure as a defence, she will bear the burden of establishing the breach committed by the applicant state”.

<sup>2341</sup> J. A. Frowein, ‘Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung’ in R. Bernhardt, W. K. Geck, G. Jaenicke, H. Steinberger (eds.), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte*, *op. cit.*, pp. 258-259: “*dass Drittstaaten bei Verletzungen der Menschenrechte ihre Position formulieren, den Rechtsbrecher anprangern, die Rechtfertigung verlangen, ist im Sinne der Völkerrechts und der internationalen Ordnung zu begrüßen. Repressalien werden von ihnen nur angewendet werden können, wenn die Verletzung ein hohes Mass an Eindeutigkeit erreicht*”.

<sup>2342</sup> The question how the administration of evidence is to be implemented falls outside the scope of the thesis. It can reasonably be argued that the notification itself should be accompanied by the (substantiated) allegation that the responsible state is responsible indeed, and, what is more, has transgressed *erga omnes* obligations. It cannot be analyzed here in light of which standards of proof, violations of *erga omnes* obligations are to be (independent and/or multilaterally?) established.

<sup>2343</sup> J. Devaney, *The law and practice of fact-finding before the International Court of Justice*, EUI thesis, 2014.

<sup>2344</sup> A. Cassese, ‘A Plea for a Global Community Grounded in a Core of Human Rights’ in A. Cassese (ed.), *Realizing Utopia*, *op. cit.*, pp. 141-142. In favor of a fact-finding mission to assess *ius cogens* norms on human rights: M. Dembinski, T. Reinold, ‘Libya and the Future of the Responsibility to Protect - African and European Perspectives’, PRIF-Report No. 107, p. 25.

<sup>2345</sup> DASR, art. 54. Own emphasis.

<sup>2346</sup> DASR, comments 6 & 8 to art. 54. Emphasis added.

quoted above, Bederman ironically posited that the savings clause might represent the “most significant act of indirect progressive development among the countermeasure clauses”, and continued: “a savings clause that notionally makes no law is actually intended to induce significant state practice and is expected to tend toward the progressive development that will be achieved through time”<sup>2347</sup>. For another commentator, the savings clause must be seen as confirming the existence of solidarity countermeasures<sup>2348</sup>. In any event, since the DASR were adopted, and notwithstanding the remaining controversies surrounding solidarity countermeasures (1.3.1), a wealth of literature has examined state practice regarding solidarity countermeasures, widely confirming their legal validity (1.3.2).

### 1.3.1. Controversies

CONTROVERSIES SURROUNDING SOLIDARITY MEASURES – Solidarity countermeasures are controversial<sup>2349</sup>, mainly for two reasons: (i) a policy reason, related to the risk of abuse and instability in the case of systematic reliance on such countermeasures; and (ii) a legal reason, based on the classical ‘bilateralist’ approach to international law and the alleged insufficiency of state practice.

(1) POLICY CONCERN: BETWEEN ANARCHY AND SHERIFF BEHAVIOUR – From a policy perspective, solidarity countermeasures touch upon a difficult balance<sup>2350</sup>. A blunt refusal to accept such measures may create the risk that, in a legal system without a central sanctioning mechanism, violations of *erga omnes* norms would go unsanctioned, which may lead to anarchy. On the other hand, an over-use of such countermeasures for political purposes could lead to abuse, a might-makes-right context, i.e. the “risk that some states will use a norm violation as a pretext for engaging in predatory behavior”<sup>2351</sup>. To these concerns it could be retorted, first, that the collective security system must always take precedence over the countermeasure framework, as observed above<sup>2352</sup>, and, second, that the recourse to this framework is in any event procedurally constrained, as we shall see below<sup>2353</sup>.

(2) LEGAL CONCERN VOICED IN BILATERALIST SCHOOL OF INT’L LAW – The classical, bilateralist conception of how international law is structured would preclude the legal existence of solidarity countermeasures, which, along with the notion of *erga omnes* and *ius cogens* norms, defies this conception of international law. Considering the evolution “from bilateralism to

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<sup>2347</sup> D. J. Bederman, ‘Counterintuiting Countermeasures’, *op. cit.*, pp. 827-828.

<sup>2348</sup> A. Bird, ‘Third State Responsibility for Human Right Violations’, *EJIL* Vol. 21 no. 4, 2011, p. 896.

<sup>2349</sup> Cf. for a discussion, A. Orakhelashvili, *Peremptory Norms in International Law*, OUP, 2006, pp. 270-272. Against solidarity countermeasures, cf. B. Conforti, A. Labella, *An introduction to international law*, *op. cit.*, pp. 127 – 128.

<sup>2350</sup> P.-M. Dupuy, ‘The Deficiencies of the Law of State Responsibility Relating to Breaches of “Obligations Owed to the International Community as a Whole”: Suggestions for Avoiding the Obsolescence of Aggravated Responsibility’ in A. Cassese (ed.), *Realizing Utopia*, *op. cit.*, pp. 210-226.

<sup>2351</sup> A. Posner, ‘Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law’, U. of Chicago Law & Economics, Online Working Paper No. 419.

<sup>2352</sup> Chapter 10, Section A.2.

<sup>2353</sup> Chapter 10, Section B.2.2.

community interests”<sup>2354</sup> in international law, it seems rather absurd to bluntly refuse the validity of ‘solidarity countermeasures’ on such a thin, conceptual basis<sup>2355</sup>. In any event, one can go back to the 17<sup>th</sup> century to find support for the assertion that solidarity countermeasures may be applied under certain circumstances<sup>2356</sup>. Moreover, in the absence of a directly injured state, the bilateralist position could lead to the ineffectiveness of primary rules assorted with *erga omnes* effects:

“Let us assume that in the case of an infringement of human rights, no State may seek a reparation or adopt a countermeasure: does this not mean that an obligation exists, whose violation is automatically condoned? Does this not convey the impression that the term ‘obligation’ is misused, because States are practically free to ignore the rule imposing it?”<sup>2357</sup>

### 1.3.2. Confirmation of validity of solidarity countermeasures in case of *ius cogens* violations

Since 2001, when the ILC adopted the DASR but preferred to leave the issue of solidarity countermeasures open for further development, a wealth of scholarship has confirmed the relevance and legal validity of such measures.

IDI – In 2005, the IDI stated that all states to which *erga omnes* obligations are owed “are entitled to take non-forcible countermeasures” should a widely acknowledged grave breach of such obligations occur<sup>2358</sup>. It furthermore noted that “measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances”<sup>2359</sup>.

LITERATURE (REFERENCE TO STATE PRACTICE) – More recently, and after scrutinizing recent state practice and legal developments regarding solidarity countermeasures, Proukaki argued that, according to current law, the violation of *erga omnes* rules justifies the resort to such measures<sup>2360</sup>. On the basis of the observation of extensive state practice, this author argued that customary law recognizes the right to take solidarity countermeasures<sup>2361</sup>. For this author

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<sup>2354</sup> B. Simma, ‘From Bilateralism to Community Interest in International Law’, RdC 250, 1994.

<sup>2355</sup> See also the dissenting opinion of Judge Weeramantry in the *Case Concerning East Timor, a contrario*: “[i]f a direct obligation-right relation existed between Australia and East Timor, there would seem to be no need for the existence of a legal interest on the part of other States in the observance of the obligation *erga omnes* to respect the right of peoples to self-determination”. Cf. also P. Picone, ‘Le reazioni collettive ad un illecito *erga omnes* in assenza di uno Stato individualmente leso’, *Comunità internazionale e obblighi ‘erga omnes’ - studi critici di diritto internazionale*, Jovene Editore, Napoli 2013, p. 627.

<sup>2356</sup> J. I. Charney, ‘Third State Remedies in International Law’, *op. cit.*, p. 61.

<sup>2357</sup> G. Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’, Walter de Gruyter, Berlin, New York, 1989, p. 155.

<sup>2358</sup> *Id.*, art. 5.

<sup>2359</sup> *Id.*

<sup>2360</sup> E. K. Proukaki, *Countermeasures, The Non-Injured State and the Idea of International Community*, *op. cit.*, pp. 204-208.

<sup>2361</sup> *Id.*, p. 202: “during the discussions in the ILC there was *never a general or strong opposition to the concept [of solidarity measures]* with many states providing their support for the recognition of the right of states not directly injured to

“there is ample evidence of state practice and *opinio iuris* that confirms the existence of a customary norm on solidarity measures”<sup>2362</sup>.

LITERATURE (REFERENCE TO ERGA OMNES NORMS) – Several authors consider that solidarity countermeasures can only be taken in response to large-scale or systematic breaches of *erga omnes* norms. In spite of an inconclusive ICJ jurisprudence<sup>2363</sup>, which neither supports nor excludes solidarity countermeasures, positions of states expressed during readings of ILC confirm they were favorable to the right to take countermeasures “in specific disputes involving serious breaches of obligations *erga omnes*”, Tams writes<sup>2364</sup>. For Gowlland-Debbas, “unilateral countermeasures short of military force are increasingly accepted as reactions to violations of *erga omnes* obligations”<sup>2365</sup>. Simma, finally, also defends the validity of solidarity countermeasures, at least in reaction to violations of gross and persistent breaches of human rights<sup>2366</sup>. In conclusion, the initial skepticism regarding the legal validity of solidarity countermeasures in response to *ius cogens* violations has almost vanished today.

#### 1.4. Thin theoretical compatibility between solidarity countermeasures and transformative empowerment

REQUIREMENTS OF JUSTIFICATION & SUBSTANTIATION – The invocation and substantiation of prior unlawfulness provides a first benchmark against which transformative empowerment is to be justified. The link to prior unlawfulness implies that this practice must be justified on the basis of prior breaches of *ius cogens*, which must be evidenced.

EXCLUSION IDEOLOGY-BASED COUNTERMEASURES & HIGH THRESHOLD – The invocation of *ius cogens* violations rather than democracy or legitimacy considerations for justifying countermeasures, echoes a fundamental function of international law: its use as a formal and self-referential argumentative practice, as a common reference frame and discourse in a pluralist international society<sup>2367</sup>. In combination with the requirement that allegations must be proven (*actori*

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exercise unilateral coercive peaceful measures for inducing the wrongdoer to comply with its international obligations”.

<sup>2362</sup> *Id.*, p. 204.

<sup>2363</sup> Cf. however the denial of existence of *actio popularis* in international law in South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, ICJ Reports 1966, p. 6.

<sup>2364</sup> C. J. Tams, *Enforcing Obligations Erga Omnes in International Law*, *op. cit.*, p. 250. Cf. also p. 230: “as regards the types of breaches prompting countermeasures, States have not responded against isolated or minor violations, but only if the previous breach had assumed considerable proportions. Although an exact threshold is difficult to establish, it seems fair to say that countermeasures were taken in response to large-scale or systematic breaches”.

<sup>2365</sup> V. Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, *EJIL 11 (2000), Vol. 11 No. 2*, p. 378.

<sup>2366</sup> B. Simma, P. Alston, ‘The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles’, *op. cit.*, p. 87: “the existence of [a wide range of customary law obligations] would probably entitle all States –not just the parties to human rights treaties *inter se*– to apply remedies or countermeasures at least in cases of gross and persistent breaches of such obligations”. Cf. also B. Simma, *Fragen der zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte in Staatsrecht-Völkerrecht-Europarecht*, Festschrift für H.-J. Schlochauer, 1981, p. 647.

<sup>2367</sup> Introduction, Section B.1. Part I, Conclusion, 2.2.

*incumbit probatio*), this approach substantially reduces the possibility of lawfully applying transformative empowerment as a coercive measure. There is a conceptual, factual but also evidentiary distinction between (specific) governmental violations of *ius cogens* obligations and (general) ‘undemocratic’ or ‘illegitimate’ governmental behavior. In contrast with the flexibility and indeterminacy characterizing the threshold for substantiating the latter allegation, providing proof of the former allegation is quite a demanding enterprise.

**THEORETICAL COMPATIBILITY: STRICT CRITERIA** – In conclusion, the theoretical compatibility test informs us that, if unilateral coercive transformative empowerment is to be justified under the countermeasure framework, this can only be done under strict conditions: (a) the systematic violations of *ius cogens* by the incumbent, (b) the substantiation that these violations have actually occurred, (c) the inactivity of the UN institutional framework in the face of these violations. In addition, the case must be made that solidarity countermeasures may lawfully be taken in response to *ius cogens* violations.

**INSUFFICIENCY THEORETICAL COMPATIBILITY TEST:** Even if, under the above-mentioned conditions, actors are entitled to take solidarity countermeasures so as to ensure the cessation of *ius cogens* violations, the question remains *under which conditions and following which procedures* they may do so. Which prerequisites must non-directly injured states respect when taking measures to ensure the cessation of *ius cogens* violations? In the following lines, this question shall be explored. If states successfully argue that transformative empowerment may be imposed as *ultimum remedium*, i.e. after all multilateral avenues were exhausted, they would still need to ensure that this remedy be *practically consistent* with the countermeasures framework. The question of practical compatibility is crucial, especially if one expects that the rules and procedures of this framework should be internalized in domestic legal orders<sup>2368</sup>.

## 2. Practical compatibility: compliance with stringent conditions

Countermeasure prerequisites can be divided into two categories: substantive and procedural conditions. The former category informs us as to who can take what kind of countermeasures; it comprises, besides the identity requirement already addressed above, the ‘non-performance’, ‘reversibility’ and ‘proportionality’ prerequisites. The latter category informs us as to specific procedures that must be followed *before* countermeasures can be taken, and comprises the prerequisites of ‘responsibilization’, ‘notification’, and ‘negotiation’.

On a textual interpretation of the DASR, the conditions applicable to countermeasures, generally, are not applicable to solidarity countermeasures, specifically. The savings clause under art. 54 about ‘measures’ (rather than countermeasures) ‘taken by states other than an

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<sup>2368</sup>The internalization of international rules and transnational legal processes is considered crucial by the *new international legal process school*, which promotes the understanding of how international law is used and invoked in practice, and emphasizes that international law must be solution-oriented (M. E. O’Connell, ‘Legal Process School’, MPEPIL). I mention this school here, and tackle the practical compatibility question, to anticipate the ‘reality deficit’ trap.

injured state' does not explicitly refer to the conditions applicable to countermeasures, which, as a consequence, would not be applicable to solidarity countermeasures. This argument is not convincing. It cannot be denied that said conditions must be applied *differently* to solidarity countermeasures. But simply neutralizing the procedural safeguards built into the countermeasure framework when solidarity measures are concerned would leave the door wide open for abuse. This approach would also be contrary to the ILC's cautious approach about solidarity measures. Thus, if the DASR "do not prejudice the right [...]", in other words do not exclude the right of any state to take lawful measures against states breaching *ius cogens*, then surely that right, if confirmed through the progressive development of international law, must be exercised in accordance with the procedural prerequisites applicable to all kinds of countermeasures.

It will therefore be assumed in the following lines that the substantive (2.1) and procedural prerequisites (2.2) applicable to the countermeasure framework apply, *mutatis mutandis*, to solidarity countermeasures. The relevance of these prerequisites has concrete policy implications (2.3).

## 2.1. Relevance of substantive prerequisites

The substantive countermeasure prerequisites are 'non-performance', 'reversibility', and 'proportionality'. In the following lines, we shall address each of these prerequisites in turn, and examine whether or how they can be integrated into the practice of transformative empowerment.

### 2.1.1. Non-performance

Countermeasures are limited to "the non-performance for the time being of international obligations of the State taking the measures towards the responsible State"<sup>2369</sup>. This 'non-performance requirement' is to be read in conjunction with the 'moderation requirement' under art. 50 § 1 DASR, which provides that countermeasures shall not affect obligations relating to (a) the use of force, (b) fundamental human rights, (c) obligations of humanitarian character, or (d) other peremptory norms. Can the suspension of the non-intervention principle—recall: its *a priori* breach by the practice of transformative empowerment brought us to consider the countermeasure framework—be justified in light of the moderation requirement? This question depends on two other parameters, namely (i) whether the principle of non-intervention is a *ius cogens* principle, in which case it would be impossible to suspend it under art. 50 DASR, and (ii) whether the 'provisional non-performance of an obligation' can affect the principle of non-intervention.

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<sup>2369</sup>DASR, art. 49.2.

(1) NON-INTERVENTION IS NOT ALWAYS A PEREMPTORY NORM – The moderation requirement provides that countermeasures shall not affect peremptory norms. But the non-intervention principle is not such a norm *insofar as the prohibition of the use of force is not concerned*<sup>2370</sup>. The segment of (political, diplomatic and economic) activities that is relevant under the non-intervention principle, without being relevant under the prohibition of the use of force, has grown over time as a result of the progressive expansion of the concept of intervention<sup>2371</sup>. While the prohibition of the use of force is undoubtedly a *ius cogens* norm, the obligation of non-intervention, for the most part, is not. Its non-forcible suspension is therefore not ruled out under the countermeasure framework. As a result, it is not excluded that, all other things being legal, states may apply solidarity countermeasures to temporarily intervene in matters within the domestic jurisdiction of another state<sup>2372</sup>.

(2) SUSPENSION OF NON-INTERVENTION? – Does transformative empowerment, justified as a countermeasure, permit the *suspension* of a *negative* obligation such as the principle of non-intervention? This question is relevant in light of the following condition. Countermeasures must be “limited to the *non-performance* for the time being of international obligations of the State taking the measures towards the responsible State”<sup>2373</sup>? The suspension of the principle of non-intervention can only be justified under the countermeasure framework if the condition of ‘non-performance’ (*inexécution*) applies not only to positive obligations, e.g. under a bilateral treaty of commerce & friendship, but also to *proscriptions*. In other words, does the countermeasure framework envisage the possibility that the execution of a negative obligation be withheld<sup>2374</sup> or temporarily rendered inoperative<sup>2375</sup>? Granted, countermeasures are generally implemented through actions such as the freezing of assets, the suspension of trade or development relations, an embargo, the expulsion from an IO, etc. These actions relate to the suspension or non-performance of *positive* conduct. A broad interpretation of non-performance might however be defended in light of the fact that:

- The countermeasure framework, generally, is not anchored in the idea of privity or connectedness; it need not concern the suspension of performance of the *same* or *closely related* obligations<sup>2376</sup>.
- The application of *solidarity* countermeasures, in particular, cannot, at the risk of becoming irrelevant, hinge on the existence of a bilateral, reciprocal, legal relation such as

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<sup>2370</sup> The prohibition of the use of force is only part of the prohibition of intervention. Chapter 9, Section B.1.

<sup>2371</sup> “The new and broader definition of intervention forbids not only direct military force but also indirect interference through economic, political, and diplomatic means”. P. Kunig, ‘Prohibition of Intervention’, MPEPIL.

<sup>2372</sup> P. Kunig, *ibid.*: “[s]elf-help against breaches of international law [...] [is] regarded as [a] valid argument[s] in favour of the admissibility of interference”.

<sup>2373</sup> DASR, art. 49.2. Emphasis added.

<sup>2374</sup> DASR, commentary 6 to art. 49.

<sup>2375</sup> In this sense, cf. the Second report on State responsibility dd. 30 April 1999 by J. Crawford, Special Rapporteur.

<sup>2376</sup> DASR, commentary 5 to Ch. II. Note also that in the *Gabčíkovo* case, the ICJ decided that the Czech republic had not correctly applied the countermeasure framework on the basis of a proportionality test rather than on the basis of a ‘non-performance’-test.

a treaty of commerce & friendship, which lends itself more easily to the termination of a positive obligation.

In sum, the non-performance requirement and the suspension of the non-intervention principle can be reconciled. But it might not always be an easy argument to make. On this argument depends the legal justification for temporarily suspending the principle of non-intervention in order to apply transformative empowerment as a solidarity countermeasure. The difficulty of this argument reduces the leeway for justifying transformative empowerment, without however excluding this possibility. Further, this possibility also depends on how two other substantive prerequisites – *reversibility* and *proportionality*– can be reconciled with coercive unilateral transformative empowerment.

### 2.1.2. Reversibility

INSTIGATE THE INCUMBENT TO RESUME IUS COGENS OBLIGATIONS – The reversibility requirement is a relative requirement: “the duty to choose measures that are reversible is not absolute”<sup>2377</sup>. This requirement is reflected in three different provisions<sup>2378</sup>. The expectation is that “countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations [of the responsible state]”<sup>2379</sup>. Is, in practice, this requirement compatible with transformative empowerment?

The *mere passage of time* is an important variable to take into account. Transformative empowerment is not a measure taken overnight, as the overview pertaining to the support of the Syrian and Libyan oppositional transitional authorities indicate<sup>2380</sup>. Also, as we shall see, it must be preceded by a number of procedural safeguards<sup>2381</sup>, which should leave enough time for the responsible state to adjust its behavior. The reversibility requirement can even be met *after* the wrongdoer was summoned (in vain) to correct its behavior, and became the target of transformative empowerment. This is true both from the perspective of the responsible state and the external states:

- Transformative empowerment, even if applied coercively<sup>2382</sup>, does not prevent the wrongdoer from resuming its obligations. On the contrary, to the extent it is applied as a deterrent or corrective<sup>2383</sup> rather than punitive act, it precisely instigates that state to resume its obligations.

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<sup>2377</sup> DASR, ILC commentary 9 to art. 49.

<sup>2378</sup> DASR, artt. 49.3, 52.3.a, art. 53. The two latter provisions enshrine the obligation of termination of countermeasures when the unlawful conduct by the responsible state has ceased.

<sup>2379</sup> DASR, art. 49.3.

<sup>2380</sup> Chapter 9, Section A.1.

<sup>2381</sup> Chapter 10, Section B.2.2.

<sup>2382</sup> Cannizzaro also remarks that in the practice of responses to *ius cogens* violations, “countermeasures have been mainly inspired by a coercive aim”. E. Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’, EJIL 2001, p. 909.

<sup>2383</sup> J. I. Charney, ‘Third State Remedies in International Law’, *op. cit.*, p. 87 a.f.

- Furthermore, from the moment the wrongdoer reconciles itself with the law, nothing prevents external actors from reviewing or withdrawing their initial support. The (often rather discrete<sup>2384</sup>) representation or communication channels with oppositional transitional authorities can be suspended at any time; the support they received can (and sometimes must<sup>2385</sup>) be retracted at any time<sup>2386</sup>.

### 2.1.3. Proportionality

The proportionality requirement requires that countermeasures be “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”<sup>2387</sup>. Proportionality concerns the legal constraints within which a certain measure is afforded<sup>2388</sup>. Does the practice of transformative empowerment in response to *ius cogens* violations withstand the proportionality test?

VARIABLES ON WHICH PROPORTIONALITY TEST DEPENDS – In spite of the “steady erosion of proportionality’s indeterminacy”<sup>2389</sup>, this requirement remains open-ended<sup>2390</sup>, and its application remains contingent upon a number of variables<sup>2391</sup>. One variable concerns the need to assess proportionality in light of the alleged unlawful conduct, and in light of the “importance of the issue of principle involved”<sup>2392</sup>. In this section, it is assumed that the responsible state has (allegedly) engaged in *ius cogens* violations. The graver the unlawful conduct, the more liberty countermeasure-applying states have. Cannizzaro thus remarks that there is an:

“intuitive difference in the reaction to the violation of a bilateral treaty posing reciprocal rights and the reaction to a serious breach of *erga omnes* obligations. It is reasonable to suppose that in the first case the response may be kept in a reciprocal withdrawal of rights, while in the second case the reaction *may pursue the aim of imposing compliance with the breached rule*”<sup>2393</sup>.

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<sup>2384</sup> For a study of discrete diplomacy on the basis of ‘disguised embassies’ like representative offices or front missions, special missions, and mediation, see G. Berridge, *Diplomacy: Theory and Practice*, 4th ed., Houndmills, Basingstoke, Hampshire, New York, PalgraveMacmillan, 2010, p. 207.

<sup>2385</sup> Chapter 10, Section B.3.

<sup>2386</sup> This is all the more so because transformative empowerment does not amount to ‘legal’ governmental recognition. It is used as a flexible diplomatic tool that is not premised on permanence.

<sup>2387</sup> DASR, art. 51.

<sup>2388</sup> T. M. Franck, ‘On Proportionality of Countermeasures in International Law’, *American Journal of International Law*, October 2008, p. 765.

<sup>2389</sup> *Id.*

<sup>2390</sup> K. Zemanek, ‘New Trends in the Enforcement of *erga omnes* obligations’, *op. cit.*, p. 30: “there is no mechanism for assessing the overall proportionality of conduct taken by way of ‘collective countermeasures’”.

<sup>2391</sup> DASR, commentary 6 to art. 51: “[p]roportionality must be assessed taking into account not only the purely ‘quantitative’ element of the injury suffered, but also ‘qualitative’ factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach. Article 51 relates proportionality primarily to the injury suffered but ‘taking into account’ two further criteria: the gravity of the internationally wrongful act, and the rights in question”.

<sup>2392</sup> DASR, commentary 7 to art. 51.

<sup>2393</sup> E. Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’, *op. cit.*, p. 896. Emphasis added.

All in all, for a countermeasure to be effective there has to be a “*permissible level of escalation* in response to illegal acts”, Bederman writes<sup>2394</sup>. For Conforti, proportionality does not presuppose a “perfect equivalence between the two violations”<sup>2395</sup>. The constraints within which solidarity countermeasures in response to *ius cogens* violations can be taken are flexible. Thus, all other things being legal, even a practice as intrusive as transformative empowerment, applied as *ultimum remedium*, is not be ruled out under the proportionality requirement.

The proportionality test, however, also depends on another variable, namely the nature of the oppositional transitional authority chosen to guide the *ius cogens*-violating state through a DIG. In order to withstand the proportionality test, the *object* of transformative empowerment must be chosen carefully and within the limits allowed for by *ius in interregno*, a point we shall come back to below<sup>2396</sup>.

#### 2.1.4. Conclusion: compatibility between transformative empowerment and substantive prerequisites

Transformative empowerment as a coercive unilateral countermeasure has only a thin theoretical basis, and therefore must be carefully and sparsely applied. It can only be applied as a last resort. Especially when it is adopted in group format, it must be justified as a solidarity countermeasure in response to proven *ius cogens* violations. In addition, in any given situation, transformative empowerment must conform to the substantive prerequisites of the countermeasure framework. Its validity depends on a liberal interpretation of the non-performance and reversibility requirements. In line with this approach, one may argue that transformative empowerment as a solidarity countermeasures may, under strict conditions and in limited circumstances, be permissible under international law. For this assertion to be valid, however, a number of procedural conditions, to which we turn now, must be respected *before* transformative empowerment is applied.

## 2.2. Preponderance of procedural prerequisites

States or contact groups can apply transformative empowerment as a last resort measure in response to *ius cogens* violations, but only if they respect a number of procedural prerequisites. They must “call upon the responsible State [...] to fulfill its obligations”<sup>2397</sup> and “notify the responsible State of any decision to take countermeasures”, and “offer to negotiate

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<sup>2394</sup> D. J. Bederman, 'Counterintuiting Countermeasures', *op. cit.*, p. 820 (citing relevant jurisprudence). Emphasis added.

<sup>2395</sup> B. Conforti, A. Labella, *An Introduction to International Law*, *op. cit.*, p. 121.

<sup>2396</sup> Chapter 10, Section B.3.

<sup>2397</sup> DASR, art. 52.1.a.

with that State”. In short, the procedural prerequisites of *responsibilization, notification* and *negotiation* must be followed<sup>2398</sup>.

**HISTORY OF PROCEDURAL PREREQUISITES** – The requirement that countermeasures must be preceded by procedural safeguards has a long history in international law. As far back as 1650, prior demand for redress was considered as a precondition for resorting to countermeasures<sup>2399</sup>. Throughout the eighteenth century, the prior demand for redress continued to be regarded as a prerequisite for the resort to countermeasures<sup>2400</sup>. According to nineteenth century scholarship, countermeasures “had to be preceded by a prior demand”<sup>2401</sup>. In 1934, the IDI adopted a resolution concerning countermeasures, and confirmed the requirement of prior notification<sup>2402</sup>.

This was confirmed in practice. For example, in 1840, after Sicily allegedly violated a treaty concluded with Great Britain, Great Britain addressed requests for compensation to Sicily, which were “followed by a warning to Sicily that reprisals would be taken against her within a week if the British demands were not met”<sup>2403</sup>. In 1850, Great Britain warned that she would take countermeasures against Greece if demands for compensation were not met<sup>2404</sup>. On the basis of an examination of state practice, doctrine and jurisprudence dating from 1800 to 1945, Elagab concluded that the resort to countermeasures had to be preceded by a demand for reparation<sup>2405</sup>. After 1945, this conclusion was confirmed in international jurisprudence<sup>2406</sup> and state practice<sup>2407</sup>.

**COMPULSORY NATURE OF PROCEDURAL PREREQUISITES** – Taken as a last resort measure and as a response to *ius cogens* violations, unilateral transformative empowerment must be reconciled with said procedural prerequisites. As noted earlier, the procedural safeguards embedded in

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<sup>2398</sup> DASR, art. 52.1.b. Cf. also R. Quadri, *Diritto Internazionale Pubblico*, *op. cit.*, p. 269: “*il ricorso alla rappresaglia deve presentarsi come necessario. Dovrà normalmente essere preceduto da una protesta e, ove possibile, da negoziati diretti a stabilire il fondamento della protesta e delle richieste di riparazione e soddisfazione con essa avanzate. Potrà dunque aver luogo solo quando la richiesta di risarcimento del danno o di soddisfazione sia rimasta infruttuosa*”.

<sup>2399</sup> O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, p. 10, citing R.G. Marsden, *Documents Relating to Law and Custom of the Sea, 1649-1767*, vol. ii, 1916, pp. 7-8. Thus, the reprisals taken in 1650 by Great Britain against France were “ordered after ‘all fair courses have been taken and observed [...] in seeking and demanding redress and reparation, yet none could be obtained”.

<sup>2400</sup> *Id.*, pp. 10-11. For a brief historical overview, see D. Gaurier, *Histoire du droit international – De l’Antiquité à la création de l’ONU*, *op. cit.*, pp. 696-700.

<sup>2401</sup> O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, p. 16.

<sup>2402</sup> IDI resolution on the ‘Régime des représailles en temps de paix’, Paris 1934: “*dans l’exercice des représailles, l’Etat doit [...] [m]ettre au préalable l’Etat auteur de l’acte illicite en demeure de le faire cesser et d’accorder éventuellement les réparations requises*”.

<sup>2403</sup> *Id.*, p. 20.

<sup>2404</sup> *Id.*, p. 21.

<sup>2405</sup> O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, p. 36.

<sup>2406</sup> Naulilaa Incident Case, 1929, Annual Digest, vol. 4, 1927-8, case no. 179, p. 274; RIAA, vol. ii, 1949, p. 1013; Case Concerning the Air Service Agreement of 27 March 1946, 1978, ILR, vol. 54, 1979, p. 304; Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment), ICJ Reports, 1980, p.3.

<sup>2407</sup> For a discussion, see O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, pp. 69-76.

the countermeasure framework are also relevant for solidarity measures<sup>2408</sup>. Reflecting on the role of solidarity countermeasures in the international order, Koskenniemi suggested that such procedural safeguards are not available:

“a legally circumscribed solidarity measure should be taken in accordance with international procedures, principles of due process, transparency, and the possibility of administrative or perhaps judicial review. *If those are not available, the redefinition of a political process as a law-applying process presents more problems than it solves*”<sup>2409</sup>.

The DASR however refer in detail to procedural prerequisites which, long before they were adopted in 2001, already had quite some pedigree. Procedural safeguards *are* thus rendered compulsory under the countermeasure framework. Quite surprisingly, however, the importance of these prerequisites has not been emphasized in the literature, despite the fact, as a solitary voice observes, that “the *primacy thrust* of these provisions [on countermeasures] is to *superimpose procedural values of rectitude and transparency* on states’ assessments of countermeasure options”<sup>2410</sup>.

URGENCY CANNOT BE INVOKED AGAINST APPLYING PROCEDURAL PREREQUISITES – The procedural safeguards of responsabilization, notification and (proposed) negotiation suffer an exception. The IDI confirmed that, “*except in case of extreme urgency*, the State perpetrating the violation shall be formally requested to desist before the measures are taken”<sup>2411</sup>. But coercing a state into a transition by triggering oppositional DIG is not exactly a practice that can be carried out in great haste. The offer (and acceptance) of diplomatic, political, material and/or financial support to empower oppositional transitional authorities requires time and coordination.

This implies that transformative empowerment may *only* be applied after *all* procedural prerequisites have been duly complied with. The passage of time indeed allows for the serene compliance with the requirements of responsabilization, notification and (proposed) negotiation. The necessity of abiding by these procedural requirements prevents transformative empowerment from being undertaken as an urgent countermeasure, which would have absolved states from following these requirements<sup>2412</sup>. Because it is inconceivable for states to invoke urgency to absolve themselves of these requirements, the procedural

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<sup>2408</sup> Chapter 10, Section B.2.

<sup>2409</sup> M. Koskenniemi, ‘Solidarity Measures: State Responsibility as a New International Order?’, *British Yearbook of International Law*, (2001) 72 (1), p. 355. Emphasis added.

<sup>2410</sup> D. J. Bederman, ‘Counterintuiting Countermeasures’, *The American Journal of International Law* 96, no. 4 October 1, 2002, p. 819. Bederman pertinently adds that “the central conceptual mission of the countermeasure provisions [is] the search for a polite international society” (id., p. 819), and that these provisions are “largely framed in terms of what might be called ‘international legal process’” (id. p. 822 – 823) and are “intended to marginally restrain atavistic state behavior” (id., p. 824). Throughout the article, Bederman emphasizes the need for formalism in the area of countermeasures.

<sup>2411</sup> *Id.*, art. 4. Emphasis added.

<sup>2412</sup> DASR, art. 52 § 2: “the injured state make take such urgent countermeasures as are necessary to preserve its rights”, notwithstanding the requirements of notification and negotiation.

requirements, applicable by default, gain considerable legal weight. As a result of the time-consuming nature of transformative empowerment, these requirements are, without exception, legally compulsory.

CONCRETE APPLICATION PROCEDURAL PREREQUISITES – Concretely, before applying transformative empowerment, states must:

- Call upon the responsible state to fulfill its obligations;
- Notify it of their intention to acknowledge and endorse an oppositional transitional structure so as to trigger DIG;
- Propose to negotiate with the responsible state as to how the unlawful conduct can cease.

If, in response to this interaction, the responsible state resumes its obligations, then the contact group must terminate the practice of transformative empowerment<sup>2413</sup>, if it had initiated it in the first place. The obligatory notification before applying this practice functions as a *mise en demeure*. One commentator suggested that the specifics of this *mise en demeure* be similar to the procedure applicable to the termination or suspension of a treaty<sup>2414</sup>. Notification would then “indicate the [counter]measure proposed to be taken [...] and the reasons there for”; transformative empowerment may then only take place after the expiry of a three months period<sup>2415</sup>. Building a reason-giving requirement and precise stopgap period into the countermeasure notification procedure is only a *de lege ferenda* consideration. One could even go a step further, and consider the creation of an information-sharing system based on the notification requirement<sup>2416</sup>.

Under current law, the existing procedural safeguards merely aim at motivating the wrongdoer to rectify, within the briefest of delays, its unlawful conduct *before* it sees its political regime walking the DIG path. If, in spite of these procedural safeguards, the wrongdoer perseveres, and no commitment to a peaceful settlement can be obtained<sup>2417</sup>, transformative empowerment may be applied provided it continues to pursue a law-inducement aim<sup>2418</sup>.

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<sup>2413</sup> DASR, art. 53.

<sup>2414</sup> O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, pp. 76-77.

<sup>2415</sup> VCLT, art. 65.1 is here paraphrased.

<sup>2416</sup> In the absence of a system of collective recognition, there is a need to create an effective information-sharing system so as to ensure the progressive development of an institutional memory with regard to transformative empowerment. More emphasis on this, and a systematic centralization i.e. building of institutional memory about this, can contribute to more consistency in the practice of collective countermeasures. Also, transformative empowerment as a countermeasure can be framed under the R2P framework. Koroma notes that “responsibility to protect re-conceives the controversial doctrine of humanitarian intervention as a responsibility (to protect) rather than a right (to intervene)” (reference). The obligation of cooperation can be an application of the ‘responsibility to react’ (“to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions”, but short of forcible interventions. Externally triggered transitions can constitute a specific application of the ‘responsibility to react’.

<sup>2417</sup> Elagab has argued that the availability of effective international procedures for a peaceful settlement of the matter does not bar the application of countermeasures if recourse to countermeasures “is the only feasible method for inducing the defaulting party” to accept such procedures (p. 189), “will facilitate acceptance of third party

Self-evidently, the mere compliance with procedural safeguards does not, *ipso facto*, render transformative empowerment lawful. Would it not be absurd to have an intervention in a state's domestic affairs condoned because of compliance with a number of –critical, but non-substantive– procedures? There is no need to recall here that unilateral coercive transformative empowerment is a last resort measure, and must integrate all non-procedural prerequisites discussed above, too. Importantly, states resorting to transformative empowerment must be able to prove that their measure constitutes a lawful response to prior violations of *ius cogens*.

**PROCEDURALIZING INDIRECT REGIME CHANGE** – The countermeasure framework provides a basis for the argument that any external involvement with oppositional DIG must follow procedural conditions and assurances. In the absence of a central sanction mechanism in international law, this approach gives due weight to the *adjusting* (rather than *punitive*) role of external actors. This context explains the “necessity for retaining non-forcible countermeasures as a means of enforcing international legal order”<sup>2419</sup>. The general emphasis on prior procedure is in line with the obligation under the UN Charter to settle international disputes by peaceful means<sup>2420</sup>. The countermeasure framework thus *proceduralizes and regulates* indirect regime change by transformative empowerment.

### 2.3. Policy implication of procedural prerequisites: obligation of moderation

**PROCEDURAL ASSURANCES BEFORE APPLYING TRANSFORMATIVE EMPOWERMENT AS A COUNTERMEASURE** – It follows from the above that an *obligation of moderation* is incumbent on external actors intending to empower oppositional transitional structures, also when they are associated in contact groups and claim to represent the international community. Taken together, the presupposition of prior unlawfulness and the procedural prerequisites discussed above, corroborate the existence of such an obligation of moderation. This is the combined effect of the substantive and procedural checks and balances that must be integrated into unilateral coercive transformative empowerment, which in any event may only be considered as an *ultimum remedium*. The countermeasure framework indicates that, even when taken as a last resort, states or contact groups do not have a blank check to diplomatically, politically, materially or financially support an oppositional transitional authority with a view to indirectly introducing a new political regime. It is only in very specific, objectively justified and procedurally contained situations that international law allows for *some* latitude in this regard. These procedural assurances deter actors from the abuses against which detractors of solidarity countermeasures had cautioned.

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settlement procedure” (p. 184) or is “necessary as a means of stimulating the offending party to agree to a settlement” (p. 214). O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*

<sup>2418</sup> DASR, commentary 1 to art. 49: “[c]ountermeasures are not intended as a form of punishment for wrongful conduct, but as an instrument for achieving compliance with the obligations of the responsible state”.

<sup>2419</sup> O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, p. 214.

<sup>2420</sup> UN Charter, art. 2.3. See also DASR, art. 50.2.a. In this sense, “the commitment to peaceful settlement of disputes will be deemed to prevail over the right to take reprisals under customary law”, O. Y. Elagab, *The Legality of Non-Forcible Counter-Measures in International Law*, *op. cit.*, p. 165.

IN CONCRETO APPLICATION OF TRANSFORMATIVE EMPOWERMENT AS A COUNTERMEASURE – If the argumentation above, with its nuances and reservations, is valid, it entails that specific procedures must be integrated into the practice of, and discourse surrounding, transformative empowerment. This would considerably restrain indirect state reconfiguration endeavors, even if taken as a last resort remedy against *ius cogens* violations. Furthermore, the practice of transformative empowerment would be rendered more transparent. The information we receive nowadays about the contexts of this practice is obscured either by its confidential/diplomatic nature or, on the other end of the spectrum, by the equivocating effect of press propagation. The implementation of the notification requirement would ensure that legal arguments are submitted and (formally) communicated as to the reasons and circumstances of transformative empowerment.

This, in turn, would allow international legal doctrine to gradually increase its understanding of how the rules and principles invoked in legal discourse relate to the broader international legal argumentative framework. The legal reframing of certain debates would generate a more ‘legalized’ understanding of controverted concepts like legitimacy and democracy, also because *opinio iuris* on these matters would become more transparent. Formalization through procedures is needed, one would expect, to rationalize the political and oftentimes volatile contexts of transformative empowerment<sup>2421</sup>. The political indeterminacies or imbalances that, today and in the distant future, are likely to prevail in the geopolitical contexts giving rise to transformative empowerment precisely call for more formalism.

### 3. The necessary qualification of transformative empowerment as a countermeasure

If external actors are successful in empowering a transitional authority intending to pursue DIG, this practice may eventually result in the creation of a new regime. But this must not be the *immediate* goal of transformative empowerment which, in order to be lawful, must aim at triggering DIG as limited by *ius in interregno* rather than at inducing a haphazard regime change.

International law does not rule out the possibility that unilateral transformative empowerment be exercised as a last resort measure. The above theoretical and practical compatibility tests have shown this. Coercive and unilateral transformative empowerment must comply with the countermeasure prerequisites detailed above. But so far, the question of whether oppositional transitional authorities may be empowered in this way has been purely abstract: can *any sort of DIG* be externally triggered after compliance with said prerequisites?

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<sup>2421</sup> D. J. Bederman, ‘Counterintuiting Countermeasures’, *op. cit.*, p. 820: “for an area as rife with political expediency as the law of countermeasures, formalism may actually be a good thing”; “the primary thrust of these provisions is to superimpose procedural values of rectitude and transparency on states’ assessments of countermeasure options”.

In political speech, oppositional transitional authorities are sometimes labeled as ‘legitimate partners’ or ‘acceptable alternatives’<sup>2422</sup>. In law, criteria of legitimacy or acceptability are meaningless. The question thus becomes which oppositional transitional authorities may be empowered (3.1). We will also ask how this issue relates to the principle of internal self-determination (3.2).

### 3.1. Empowerment of a *ius-in-interregno*-abiding transitional authority

What if the favored oppositional transitional authority, being endowed with (partial or functional) international legal personality<sup>2423</sup>, violates international law? Would it for instance not be absurd if, in response to *ius cogens* violations by the incumbent government, states endorsed an oppositional transitional authority which, itself, would be committing such violations? Even if the theoretical and practical compatibility tests succeed, transformative empowerment cannot be used to let *any* oppositional transitional authority guide a transition. Let us assume that an incumbent government is responsible for *ius cogens* violations, and that other states who intend to resort to transformative empowerment acted in accordance with the conditions detailed above. Not even then do these states have unbridled freedom in choosing which transitional authority to endorse.

QUALIFYING THE OPPOSITIONAL TRANSITIONAL AUTHORITY – Coercive unilateral transformative empowerment applied as a countermeasure must be *qualified*. This is necessary by virtue of the proportionality requirement applicable to countermeasures, and because “countermeasures shall not affect [...] obligations under peremptory norms of general international law”, notably the principle of internal self-determination. In line with the obligations generally incumbent on external actors involved with DIG<sup>2424</sup>, coercive transformative empowerment must consist in endorsing an (oppositional) transitional authority that abides by its own obligations.

COMPLIANCE WITH IUS IN INTERREGNO – States envisaging the application of transformative empowerment as a (non-forcible but coercive) measure must consider that their *marge de manoeuvre* to empower an oppositional transitional authority is limited. Their decision must be based on a conscientious assessment of the transitional authority’s compliance with the core of a *ius in interregno*, or of the reasonable prospects in this regard<sup>2425</sup>. Disregarding the core of a *ius in interregno* is contrary to the bedrock principle undergirding it<sup>2426</sup>, namely the principle of self-determination, arguably a *ius cogens* norm. States must thus respect the precepts of a *ius in interregno* when they envisage applying transformative empowerment. They must ensure and monitor that the chosen transitional authority acts within the limits

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<sup>2422</sup> Chapter 9, Introduction.

<sup>2423</sup> Chapter 4, Section A.2.6.

<sup>2424</sup> Chapter 8.

<sup>2425</sup> When it comes to the commitment to abide by specific norms, a parallel may be drawn with the recognition of putschist governments that had pledged to organize elections. J. d'Aspremont, ‘Legitimacy of Governments in the Age of Democracy’, *op. cit.*, p. 902.

<sup>2426</sup> Chapter 6.

*ratione temporis* and *materiae* of the interregnum, and commits to inclusivity, as described under Part III of the thesis.

The (continued) legality of transformative empowerment hinges on the same assessment. Transformative empowerment can, and indeed must be suspended if the transitional authority, in the course of the interregnum, does not abide anymore by the core obligations of a *ius in interregno*. The legality of the conduct of the endorsing states depends on this assessment. More accurately, the legality of unilateral transformative empowerment applied as a coercive measure (also) hinges on a correct assessment of the selected oppositional transitional authority's compliance with the core obligations under a *ius in interregno* as anchored in the principle of self-determination.

### 3.2. Revisitation of the principle of internal self-determination

On the basis of the above considerations, the function of the principle of self-determination in the modern international legal order should briefly be revisited.

TRANSFORMATIVE EMPOWERMENT IN AID OF INTERNAL SELF-DETERMINATION – This study is concerned only with one component of self-determination: *internal* self-determination of the *people of a state*; it is neither involved with external self-determination nor with internal self-determination understood as a right to secession. We saw that this principle informs us as to the conditions under which DIG is pursued in conformity with international law<sup>2427</sup>. Self-determination serves as an overarching norm covering the various aspects of the requirement of progressive inclusivity, which constitutes a concrete yardstick for assessing whether DIG is lawful.

The final argument of this study is that, under certain circumstances, external actors can invoke the violation of the principle of internal self-determination by the incumbent government to support what we have called a 'remedial transition'<sup>2428</sup>. Internal self-determination is valid *erga omnes*<sup>2429</sup>, it was noted under Chapter 6 (this is not uncontested<sup>2430</sup>). We also observed that there is a strong connection between the principle of internal self-determination and fundamental and nonderogable human rights<sup>2431</sup>: it will be easier to substantiate that this principle was violated when gross and persistent breaches of such rights were committed against the people. In such a situation, the *erga omnes* and, as Cassese concluded, the *ius cogens* character of internal self-determination is beyond doubt<sup>2432</sup>. This is an important observation because, throughout this chapter, the development of the

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<sup>2427</sup> Chapter 6.

<sup>2428</sup> Chapter 7, Section C.1.

<sup>2429</sup> Chapter 6, Section A.

<sup>2430</sup> J. Summers, *Peoples and International Law*, *op. cit.*, pp. 387-392; J. Summers, 'The internal and external aspects of self-determination reconsidered', *op. cit.*, p. 397.

<sup>2431</sup> Chapter 7, Section C.1.

<sup>2432</sup> A. Cassese, *Self-determination of Peoples: a Legal Reappraisal*, *op. cit.*, p. 140.

transformative-empowerment-as-countermeasure argument was premised on the hypothesis that *ius cogens* violations were in play.

Where the principle of internal self-determination reaches the level of *ius cogens*, external actors may justify their practice of transformative empowerment and support to a ‘remedial transition’ on the basis of persistent breaches of this principle. The Friendly Relations Declaration declares that its provisions shall *not* “be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States *conducting themselves in compliance with the principle of equal rights and self-determination of peoples*”. This implies that actions of states aiming at affecting the political status of a state violating the principle of self-determination, are judged with more lenience under the same principle<sup>2433</sup>.

**OPERATIVE LEVELS OF INTERNAL SELF-DETERMINATION** – In this dissertation, the principle of internal self-determination thus operates on two levels. First, for transitional authorities, DIG is one of the means of implementation of the principle of self-determination. This principle informs how DIG must be observed; at the same time, DIG specifies the scope of this principle today<sup>2434</sup>. Second, for external actors, too, the principle of internal self-determination is part of the analytical framework for analyzing nonconstitutional transitions<sup>2435</sup>. It sheds light on the question as to whether it is lawful and opportune for them to endorse oppositional transitional authorities. External actors envisaging the application of transformative empowerment must analyze:

- Whether the incumbent government respects the principle of internal self-determination; if not, this principle “may actually be used as a challenge to non-intervention”<sup>2436</sup>;
- Whether the oppositional transitional authority’s abides by the principle of internal self-determination, and accepts that DIG must be pursued to realize this principle. Transformative empowerment must thus be applied *in aid of* internal self-determination. Two scenarios can be envisaged.

First, if the oppositional transitional authority does *not* abide by the principle of internal self-determination (e.g. disregards the requirement of inclusivity during the interregnum), this would prevent other states from empowering it, in light of the proportionality requirement *cum* the normative hierarchy in international law. Transformative empowerment in aid of internal self-determination excludes installing governments that refuse to commit to a progressively inclusive transition. The representative character of the

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<sup>2433</sup> Friendly Relations Declaration, principle e, *in fine, a contrario*.

<sup>2434</sup> Chapter 6.

<sup>2435</sup> See also D. Amoroso, ‘Il ruolo del riconoscimento degli insorti nella promozione del principio di autodeterminazione interna: considerazioni alla luce della ‘Primavera Araba’’, *op. cit.*

<sup>2436</sup> J. Salmon, ‘Internal Aspects of the Right to Self-Determination’, in C. Tomuschat, *Modern Law of Self-Determination*, *op. cit.*, p. 331. On p. 332 an overview of state opinions regarding exceptions to the non-intervention principle in name of self-determination follows.

Syrian coalition, for example, has been contested since its creation. Amoroso notes: “*anche la rappresentatività della Coalizione, tuttavia, risulta controversa, atteso che tale organizzazione non appare appoggiata da alcuni gruppi islamisti e dalle fazioni curde*”<sup>2437</sup>. This coalition also refuses any dialogue with the incumbent power. *A fortiori*, the principle of internal self-determination rules out endorsing puppet governments.

Second, if the oppositional transitional authority abides by the principle of self-determination whilst the government violates it, transformative empowerment can be envisaged provided all legal prerequisites are respected. Crucially, the temporal and substantive limitations to the interregnum entail that the support to an oppositional transitional authority does not translate into a long-term post-transition institutional arrangement. This is because the interregnum is supposed to generate a culture of progressive inclusion, participation and representation during the process of redefining the social contract. Also, giving a role to leaders in the transition is not the same as accepting their role in the post-transition stage as transition leaders are generally not re-eligible after the interregnum<sup>2438</sup>.

#### *4. The restricted possibility of resorting to the transformative-empowerment-as-countermeasure argument*

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As a unilateral coercive measure with direct effects on a state’s *domaine réservé*, transformative empowerment will rarely be lawful, even if it is applied in response to *ius cogens* violations. It can only be applied to endorse an oppositional government after multilateral reactions fail, and if a number of other prerequisites are fulfilled. Under the principles of proportionality and non-performance, it is hard to make that case. The difficulty of this argument accentuates the exceptional nature of transformative empowerment applied as a unilateral coercive measure.

As a result, it is more difficult for states to argue that they may lawfully support a *ius in interregno*-abiding and self-determination-promoting oppositional transitional authority –even as a last resort measure– than to argue, as they did in the past, that they could lawfully support NLM (especially since the UNGA “moved from declaring that states had the right to aid national liberation movements to declaring that they had the obligation to do so”<sup>2439</sup>).

Let us reframe this conclusion by reference to the concepts of ‘legitimacy of origin’ and ‘legitimacy of exercise’, already mentioned under Chapter 2<sup>2440</sup>. On an exceptional basis, remedial action by non-tangibly injured states applying transformative empowerment against a state violating *ius cogens* may be valid. If multilateral options are exhausted and the obligatory reactions to *ius cogens* violations are not fruitful, external actors may, under strict –notably

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<sup>2437</sup> *Id.*, p. 12.

<sup>2438</sup> Cf. the ineligibility-after-transition practice unveiled under Chapter 5.

<sup>2439</sup> D. W. Glazier, ‘Wars of National Liberation’, MPEIL. Cf. UNGA/RES/2621 dd. 12 October 1970.

<sup>2440</sup> Chapter 2, Section B.1. J. D’Aspremont, ‘Legitimacy of government in the age of democracy’, *op. cit.*, p. 916.

procedural– conditions, apply transformative empowerment against the recalcitrant government. This is the case even if this government had come to power in a democratic or legitimate way –it has ‘legitimacy of origin’– but subsequently exercised its powers in violation of *ius cogens* –it fails the ‘legitimacy of exercise’ test–. In other words, grave illegitimacy of exercise may exceptionally lead not only to the disqualification of the incumbent government, but also, under certain conditions, justify the practice of transformative empowerment. In the words of Proukaki:

“unilateral coercive measures taken for the purpose of overthrowing foreign governments or for imposing a certain political system *must be treated with caution*. This is because states must not be given an opportunity to abuse the law on countermeasures by using them as a mechanism for imposing their values on the rest of the world. Countermeasures must then be applied only after the *most stringent conditions* are met, namely that there has been a breach of genuinely *erga omnes* legal interests owed to a group of states or to the international community as a whole”<sup>2441</sup>.

Justifying the support to oppositional transitional authorities as a countermeasure can only be done as a last resort, as it must be preceded by *all* the steps described in this chapter. Not even in the context of systematic *ius cogens* violations can a nonconstitutional transition lightly be imposed upon a state. This can only be done if attempts at a peaceful settlement and serious, meaningful negotiations with the incumbent (no matter how rogue) did not bear fruit. If multilateral reactions fail because of the international community’s paralysis, the respect for stringent procedural prerequisites imposes difficult-to-reach standards. In conclusion, lawfully applying transformative empowerment as a unilateral countermeasure is a strictly circumscribed possibility.

Yet, not accepting that, as an *ultimum remedium*, transformative empowerment might be justified under strict conditions would be to deny (a) the decentralized nature of international law as well as (b) the current “shift away from a purely bilateralist paradigm to one which sets out a framework for third state responsibility when serious human rights violations are committed”<sup>2442</sup>. It would also imply that, in the absence of a multilateral settlement or solution, a government systematically committing serious breaches of *ius cogens* cannot be sanctioned by its replacement: “if, for one reason or another, institutional response mechanisms do not work, we have to choose between the subjectivism of a decentralized response in defence of general interests and the absence of any consequence for the most serious wrongful acts”<sup>2443</sup>. While accepting, with Hillgruber, that “a legal system heavily dependent on self-help must necessarily accept that its legal subjects repeatedly act as *iudex in causa sua* too”<sup>2444</sup>, this risk of arbitrariness is significantly reduced in light of all the checks and balances exposed in this thesis and chapter. These safeguards aim at minimizing the risk of subjectivism. Under *ius in interregno*, unilateral coercive transformative empowerment can

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<sup>2441</sup> E. K. Proukaki, *Countermeasures, The Non-Injured State and the Idea of International Community*, Routledge Research in International Law, London, New York, 2010, p. 178. Emphasis added.

<sup>2442</sup> A. Bird, ‘Third State Responsibility for Human Right Violations’, *op. cit.*, p. 900.

<sup>2443</sup> D. Alland, ‘Countermeasures of General Interest’, *EJIL* 13 (2002), pp. 1221-1239.

<sup>2444</sup> C. Hillgruber, ‘The Right of Third States to Take Countermeasures’, *op. cit.*, p. 277.

only be applied as an *ultimum remedium*, i.e. if a multilateral peaceful settlement fails and provided all said safeguards were considered. This implies that a small and strictly regulated possibility remains for (eventually) inducing indirect regime change through DIG, itself also increasingly subject to the rules of a *ius in interregno*.

## Summary of Chapters 9 & 10

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Chapter 9 & 10 analyzed under which circumstances opposition-based DIG may be externally triggered. The terminology of ‘transformative empowerment’ was proposed to refer to external support to oppositional transitional authorities in view of indirectly triggering a nonconstitutional regime change without the consent of the target state. When applied coercively, this practice is, in principle, forbidden under international law because it directly affects the heart of a state’s *domaine réservé*.

This rule suffers from an exception if the UNSC –with due regard to the precepts of *ius in interregno*– applies or authorizes transformative empowerment under Chapter VII of the UN Charter. A second exception concerns transformative empowerment applied as a countermeasure. But this exception is rare. Within the array of nonforcible actions in response to *ius cogens* violations, transformative empowerment as a countermeasure might be permissible if it (a) is taken as a last resort measure and (b) complies with a number of prerequisites.

The community of states must first exhaust the available multilateral fora and means for responding to *ius cogens* violations: collective non-recognition; cooperation; peaceful settlement. The obligation to collectively react to *ius cogens* violations translates into concrete guidelines, such as the prohibition (a) to categorically exclude states from negotiations touching upon the interests for the community of states as a whole or (b) to undermine negotiations with the incumbent power about a future transition.

In case of inactivity or failure at the multilateral level, the assessment of the legality of transformative empowerment can only be based on the countermeasure framework. The countermeasure framework thus offers the ultimate possibility for legally justifying coercive transformative empowerment. In other words, it is the last resort legal ground that states can invoke to coerce another state into opposition-based DIG. The countermeasure framework provides a number of checks and balances in guiding those states that envisage the application of transformative empowerment. Only under strict conditions may states, individually or in group format, indirectly trigger oppositional DIG.

**STRINGENCY CONDITIONS OF APPLICATION** – Far from accepting that states and IOs have a blank check in indirectly imposing their regime preferences around the world, the involvement with nonconstitutional transitions must comply with specific conditions. If transformative

empowerment is justified as a countermeasure, it must strictly adhere to a number of conditions, which can be summarized as follows:

- The (prior) occurrence of substantiated gross and persistent breaches of *ius cogens* by a state,
- May give rise to the practice of transformative empowerment of civilian oppositional transitional authorities, provided that this practice:
  - Be taken as a last resort measure;
  - Follow the procedural requirements of responsabilization, notification and (proposed) negotiation, but to no avail, and;
  - Select an oppositional transitional authority which abides by its own obligations.

These conditions must be cumulatively fulfilled. They must form the basis of an “effective third state enforcement regime that minimizes undesirable side effects”<sup>2445</sup>. Given the stringency of the test, and the limited circumstances in which it applies, the theory of transformative empowerment in aid of a remedial transition (if correctly applied, and considering the general reservations about the stage of development of *ius in interregno*) should be less controversial than the idea that countermeasures can be applied by all states in response to violations of democracy<sup>2446</sup>. It should be even less controversial than four theories which seem to promote the disruption of territorial integrity, or the involvement of the use of armed force, but nevertheless have gained some traction during the last decade:

- The theory of ‘remedial secession’<sup>2447</sup>. Simma, for instance, writes that “a right of secession may arise if the [minority] group concerned is exposed to extremely brutal discrimination”<sup>2448</sup>.
- The theory of ‘forcible humanitarian countermeasures’ as developed by Cassese, according to which, under strict conditions, the use of *forcible* countermeasures by groups of states may be legitimized if the UNSC does not react to serious breaches of international humanitarian law<sup>2449</sup>.

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<sup>2445</sup> J. I. Charney, 'Third State Remedies in International Law', *op. cit.*, p. 59.

<sup>2446</sup> J. d'Aspremont, 'Post-Conflict Administration as Democracy-Building Instruments', 9 *Chicago Journal of International Law*, 2008: “there is a fair amount of practice as well as scholarship buttressing the idea that, in the case of the violation of democracy, all states –or at least those state party to the ICCPR, when the obligation arises under that treaty– are entitled to take countermeasures against the offending state”.

<sup>2447</sup> A. Buchanan, *Justice, Legitimacy, and Self-Determination*, OUP, p. 335: “if the state persists in serious injustices toward a group, and the group’s forming its own independent political unit is a remedy of last resort for these injustices, then the group ought to be acknowledged by the international community to have the claim-right to repudiate the authority of the state and to attempt to establish its own independent political unit”. See also, J. Vidmar, ‘Conceptualizing Declarations of Independence in International Law’, *op. cit.*, p. 15.

<sup>2448</sup> B. Simma (ed.), *The Charter of the United Nations – a commentary*, *op. cit.*, p. 63. See also N. Bhuta, ‘New Modes and Orders’, *op. cit.*, p. 8

<sup>2449</sup> A. Cassese, ‘A Follow-Up: *Forcible Humanitarian Countermeasures* and *Opinio Necessitatis*’, *European Journal of International Law*, vol. 10 no. 4, 1999, pp. 791-800. In the same sense, P.-M. Dupuy, ‘The Deficiencies of the Law of

- The theory of ‘humanitarian intervention’ (to be distinguished from R2P<sup>2450</sup>), which would allow for the “threat or use of armed force against another state that is motivated by humanitarian considerations”,<sup>2451</sup>.
- Theories defending forcible regime change of illegitimate non-democratic systems<sup>2452</sup>.

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State Responsibility Relating to Breaches of ‘Obligations Owed to the International Community as a Whole’: Suggestions for Avoiding the Obsolescence of Aggravated Responsibility’, *op. cit.*, p. 211.

<sup>2450</sup> R2P is to be strictly disassociated from the concept of ‘humanitarian intervention’ defined as “coercive interference in the internal affairs of a state, involving the use of armed force, with the purposes of addressing massive human rights violations or preventing widespread human suffering” (J. Welsh, *Humanitarian Intervention and International relations*, OUP, 2006, p. 3). R2P may encompass ‘humanitarian intervention’ authorized by the UN Security Council (‘UNSC’) but, as the ICISS report shows, is much broader than that (Implementing the responsibility to protect – Report of the Secretary-General, A/63/677 dd. 12 January 2009, § 7. *Contra*: R. Dickinson, ‘Responsibility to Protect: Arab Spring Perspectives’, 20 *Buff. Hum. Rts. L. Rev.* 91 2013-2014, p. 97: “humanitarian intervention has perhaps *merged* into an emergent concept of a ‘responsibility to protect’”. “[a]lthough R2P is understood by some as another name for humanitarian intervention, R2P takes a broader view which, as a last resort allows for the possibility of humanitarian intervention. It provides for a much larger set of policy tools to forestall the need for such intervention in recognition that prevention is the best form of protection”, S. Rosenberg, ‘Responsibility to Protect: A framework for Prevention’ in Alex J. Bellamy, Sara E. Davies, Luke Glanville, *The Responsibility to Protect and International Law*, Luke Glanville, Leiden, Boston, 2010, p. 158. Rosenberg argues that “the prevention obligation of the R2P doctrine, insofar as it requires states to take action in the face of genocide, crimes against humanity, war crimes and ethnic cleansing, short of military intervention, rests upon established norms of international human rights law” (*id.*, p. 162).

<sup>2451</sup> V. Lowe, A. Tzanakopoulos, ‘Humanitarian Intervention’, MPEPIL. Note that Reisman contends that regime change may be imposed through foreign intervention ‘in the most egregious instances of widespread human rights violations’ (W. M. Reisman, ‘Why Regime Change is (Almost Always) a Bad Idea’, *op. cit.*, p. 51). For a discussion of this theory, cf. J. Crawford, ‘The Right of Self-Determination in International Law: Its Development and Future’, *op. cit.*, pp. 43 a.f.

<sup>2452</sup> For an overview of arguments in this sense, cf. G. H. Fox, ‘Regime Change’, MPEPIL. Cf. Especially literature by W. M. Reisman. J. J. Paust, ‘International Law, Dignity, Democracy and the Arab Spring’, *Cornell International Law Journal*, Vol. 46, Issue 1.

## GENERAL CONCLUSION

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This thesis purported to legally frame a politico-legal phenomenon –DIG– that seems to be subject to the tides of high-voltage politics. In 2001, Francioni wrote: “today, international law pervades areas traditionally reserved to the domestic jurisdiction of states such as human rights of nationals, criminal law, trade and use of natural resources, the management and conservation of the environment, and even the conservation of cultural heritage”<sup>2453</sup>. In 2016, the growing impact of international law is also being felt in the field of DIG; and, conversely, DIG norms and practices have enriched international law.

In light of the peace-through-transition paradigm, DIG is arguably becoming a center piece of the international collective security system. Although international law does not prescribe the exact form of government to be pursued after completion of DIG, it does regulate, to a limited extent, (a) the manner in which transitional authorities are to administer the interim rule; and (b) the conditions under which states may engage with DIG. Yet, as these obligations and conditions, formulated under the heading of *ius in interregno*, are (only) germinating under international law, the hypothesis formulated (in stronger terms) at the beginning of the dissertation is only partly verified: a *ius in interregno* is itself in transition. In any event, this study confirms the current emergence of legal norms in relation to DIG through an extensive analysis of practice, jurisprudence and scholarly writings. It demonstrates the multiple ways in which DIG is replete with international legal significance.

Throughout the dissertation, the analysis of the non-forcible aspects of DIG was prioritized. This critical choice is based on the rationale that this analysis can, and indeed, must be severed from use-of-force-related issues potentially relevant for DIG, including such issues as states in transition consenting to the use of force, humanitarian intervention, forcible countermeasures against so-called failing or rogue states, transformative occupation, etc. Transitional authorities were, thus, conceptually distinguished from related but distinct concepts like NLM or armed (opposition) groups. For the same reason, DIG was analyzed through the lens of how states in transition purport to regulate a nonconstitutional regime change themselves, and in particular, focusing on how transition instruments define the course of the interregnum, or on what domestic transitional authorities consider to be their core tasks. In addition, the dynamics between transitional authorities and external actors were also scrutinized independently of questions related to the use of force. In this vein, the last chapter, examined whether, and how, it is possible to counter *ius cogens* violations without having recourse to the use of force, which, in any event, remains an *ultimum remedium* under international law.

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<sup>2453</sup> F. Francioni, ‘International Law as a Common Language for National Courts’, *op. cit.*, p. 588.

This study is based on the conviction that today “the political-diplomatic aspects of international law have acquired a greater significance than in the past”<sup>2454</sup>. In addition, it advances the idea that, for a nuanced understanding of state transformation processes, future scholarly research should concentrate on aspects of state transformation, to which only little attention has been paid so far. Thus, DIG is not unrelated to the often debated questions surrounding regime change, namely ‘democracy’ and ‘legitimacy’, but these concepts are mostly relevant for the period preceding or following the transition *as such*. By relying on the reflective, self-regulating character of transition instruments –and drawing on the rich practice surrounding DIG– this study addressed and promoted DIG as an object of analysis in its own right. Bearing the functions of transitional constitutionalism –peace through transition; self-regulation; and constitutional reconfiguration– in mind, this study thus focused on recurrent practices during diverse interregna, while largely deemphasizing their origin or outcome. For the purposes of this dissertation, thus, the journey became the destination.

In order to analyze transitions, this dissertation drew heavily on the analytical framework offered by international law, thus complementing the transitology literature in political science. In analyzing transitions, this thesis progressively unveiled a *ius in interregno*, while noting that it remains under development. Slightly ironically, perhaps, the international-law-based analysis results in the acknowledgement that, in light of the rudimentary nature of a *ius in interregno*, politics significantly influence how DIG is pursued; law is not ubiquitous. Yet, the role of politics is not absolute either: international law prescribes clear rules of behavior and procedure limiting the *marge de manoeuvre* of domestic and external actors purporting to influence DIG. Importantly, within the field of DIG, there are limits on the discretion of transitional authorities and external actors. Thus, in spite of a number of reservations (A), a *ius in interregno* warrants a *contrôle marginal* of DIG practices (B).

## A. RESERVATIONS

The development of a *ius in interregno* is not, and need not be, smooth, which has led to a number of reservations being expressed throughout the thesis. These reservations, rather than undermining the strength of the argument, expose its nuances. They can be translated into four key questions. Can international law play any useful role in relation to a politico-legal phenomenon as complex and contingent as DIG? What is the stage of development of a *ius in interregno*? What if *ius in interregno* is not always complied with; or how is it affected by the observation that, as a pacifying or stabilizing measure, DIG often fails? Is a *ius in interregno* too rudimentary to play any significant role in practice?

### 1. International law’s role in the face of a complex and contingent phenomenon

The complexity and contingency of each instance of DIG cannot be overemphasized. Can international law play any useful role in analyzing a politico-legal phenomenon as complex

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<sup>2454</sup> B. Conforti, A. Labella, *An introduction to international law*, Martinus Nijhoff Publishers, 2012, *op. cit.*, p. 5.

and contingent as DIG? Actually, this thesis argues, it is international law's primary mission to use the existing references of the international legal vocabulary to analyze this, and other, complex and contingent phenomena of our time. The parameters of international law offer a common forum, a common frame for debate in an increasingly decentralized and heterarchical international society. Only in this way can debates on as politically sensitive and volatile a domain as DIG gain serenity. This is the case even if one argues that notions like 'transition', 'post-conflict', 'governance', 'ownership' and 'inclusivity' are techno-political constructs of our time. While such observations may be critically descriptive of a certain situation, they do not diminish the pertinence of applying international legal language, as one among many registers, to contemporary politico-legal realities –as well as to their distinctive practices and repeated discourses– including DIG:

“there is a question as to whether general rules of public international law govern external influence over constitutionmaking processes. Such rules could form the basis of a more general legal regime that could govern external influence on constitution-making processes anywhere and at any time”<sup>2455</sup>.

This thesis has attempted to take up this challenge by investigating how general rules of public international law apply not only to external influence over constitutionmaking processes, but to DIG generally. The role of external actors with regard to DIG could only be understood after a study of the legal position of the domestic actors most concerned with DIG, namely transitional authorities. Self-evidently, the recourse to international law for interpreting DIG is not driven by the utopian ambition of having all controversies surrounding DIG legally settled, 'once and for all'. On the contrary, it accepts the dialectical nature of international law: power relations are internalized in the law, and the reference to law serves as a tool for continually re-interpreting these relations: “rights generally [...] cannot escape from the predicament of indeterminacy. Rights, on this view, are not beyond politics but are themselves intense manifestations of political battle”<sup>2456</sup>. This observation arguably applies to law more generally<sup>2457</sup>. Legal principles, for instance, Cassese remarked:

“are the expression and result of conflicting views of States on matters of crucial importance. When States cannot agree upon definite and specific standards of behaviour because of their principled, opposing attitudes, but need, however, some sort of basic guideline for their conduct, their actions and discussions eventually lead to the formulation of principles”<sup>2458</sup>.

Because power relations are internalized into the law, the formulation and development of a *ius in interregno* offers an analytical tool, *also to the benefit of actors who directly or*

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<sup>2455</sup> P. Dann, Z. Al-Ali, 'The Internationalized Pouvoir Constituant', *op. cit.*, p. 451.

<sup>2456</sup> J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', *Human Rights Quarterly*, Volume 28, Number 1, 2006, p. 199.

<sup>2457</sup> J. Salmon, 'Le droit international à l'épreuve au tournant du XXI siècle', *op. cit.*

<sup>2458</sup> A. Cassese, *Self-determination of Peoples*, *op. cit.*, p. 128. It is also in this sense that self-determination, a backbone principle of *ius in interregno*, “becomes a capacious architecture that accommodates the conflicting powers and fault-lines of the international order”. N. Bhuta, 'New Modes and Orders', *op. cit.*, p. 10.

*indirectly would be the victim of unlawful DIG practices.* For instance, if external actors coerce a state into DIG, or favor specific groups during the interregnum –thus undermining the inclusivity of the transition–, the states who are the victim of such practices could organize their defense by invoking legal standards which, for ease of use and convenience, have been grouped under the term *ius in interregno*. As Conforti noted, “a State can greatly enhance its position within the international community by proving its compliance with the rules of international law”<sup>2459</sup>. It can also, as the case may be, defend its position by raising and proving noncompliance by other states. By conducting *warfare*, states unduly targeted by ‘constitutional geopolitics’ may protect themselves by referring to the relevant legal standards, and thereby emancipate themselves from the (primary) level of political debate.

## 2. The current maturation of *ius in interregno*

What is the current stage of development of *ius in interregno*? This thesis does not adopt a strong position on the stage of maturity of *ius in interregno*. In light of the repeated practices described in Part III of the thesis, one can conclude that it is neither merely *in statu nascendi* nor just a project *de lege ferenda*. Being in its infancy, it may be moving *towards* the stage of law *de lege lata*, but this evolution can be halted should today’s widespread practices and emergent principles in the field of DIG be aborted in the distant or less distant future; observing how international law applies to DIG, and how DIG may impact international law, may well be the task of a lifetime. The evolving status of a *ius in interregno* can also be attributed to the fact that it draws on a multiplicity of sources, whereby each category of sources –practice and *opinio iuris*, agreements, unilateral declarations– has their own shortcomings.

The practice underpinning a *ius in interregno* is relatively abundant. Yet it must be acknowledged that a *ius in interregno* is based, especially, on the practice of ‘non-Western’ states<sup>2460</sup>. But the resolutions of the UNSC, the conclusions of contact groups, or the acquiescence of other states indicate that a *ius in interregno* is not merely of regional relevance. True, UNSC practice, on which this thesis extensively relied, is not, in itself, formative of custom<sup>2461</sup>. But this practice was often echoed and endorsed in the conclusions of contact groups. While such conclusions cannot be considered as reflecting readily accepted *universal* practice or *opinio iuris*, they do allow us to unveil state practice / *opinio iuris* concerning DIG stemming from large collectives of states and IOs. Thus, their informative, and even normative potential should not be underestimated. Furthermore, the legal status of agreements regulating DIG is sometimes contested. Are they of political or also of legal nature? In responding to this issue, this thesis adopted a flexible approach, which reflects the

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<sup>2459</sup> B. Conforti, A. Labella, *An Introduction to International Law*, *op. cit.*, p. 5.

<sup>2460</sup> Note however that even “practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule”. M. Akehurst, ‘Custom as a source of international law’ *in* M. Koskenniemi, *op. cit.*, p. 268.

<sup>2461</sup> V. Gowlland-Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, *op. cit.*, p. 377.

lack of formality of international law when it comes to defining the *sources* of international law, even when treaties are concerned. Unilateral declarations, finally, are characterized by a similar lack of formality, and, even if enshrined in domestic instruments, may also be instructive for the analysis of DIG under international law.

The flexibility of international law as regards its sources allowed us to conclude that a large number of legal instruments are informative for the formulation of a *ius in interregno*. However, this flexibility does not diminish their international legal relevance. The distinctive feature of ‘transition instruments’ as defined in this thesis –whether enshrined in agreements, constitutional texts or declarations– is that they have a supraconstitutional origin and fulfill the functions of transitional constitutionalism: specifically, they purport to lay the foundation for peace in a post-conflict setting, to regulate the interregnum, and to redefine the social contract. Complemented with a further analysis of DIG practice, the analysis of this broad but conceptually distinctive category of transition instruments will indicate whether the current evolution of *ius in interregno* shall be confirmed, or rejected, in the future.

### 3. The ineffectiveness of DIG or the noncompliance with *ius in interregno*

*Ius in interregno* is not always complied with, and, similarly, DIG, as a pacifying or stabilizing measure, often fails. How is the formulation of a *ius in interregno* then legally relevant? Crucially, the fact that DIG is sometimes ineffective does not mean that DIG practices cannot form the basis of a *ius in interregno*. Similarly, the occasional lack of compliance with a *ius in interregno* does not affect its legal relevance (note taken of the reservation about the evolving maturity of *ius in interregno*). Let us address both points in turn.

First, when transitions unfold against the backdrop of conflict, one may question whether it is desirable to pursue DIG in the first place. Admittedly, “merely introducing a new constitutional law or transforming an existing basic law will be irrelevant unless it is a *result of a transformation in the sources and nature of power, authority and representation in the political life of that state*”<sup>2462</sup>. Are reconstitutionalization processes in the context of DIG not doomed to fail unless they take into account the fact that state transformation processes are laborious processes, contingent and historically determined<sup>2463</sup>? Should this truism be systematically overlooked during DIG? Or, is it a good reason for *re-assessing* the practices and discourses undergirding DIG? If practice-based law does not sufficiently consider the social fabric of domestic situations, this would be a persuasive reason for being more critical towards the international practices underpinning it.

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<sup>2462</sup> N. Bhuta, ‘New Modes and Orders’, *op. cit.*, pp. 19 - 20.

<sup>2463</sup> IDEA, ‘Constitutionbuilding after Conflict: External Support to a Sovereign process’, *op. cit.*, p. 11: Issue of failure of DIG: “any assumption that a referendum followed by the enactment of a constitution marks a conclusive transformation of conflict into a political contest within rules misunderstands the nature and difficulties of transitions and romanticizes constitutions as well as elections”.

Yet, this critique is to be conducted at the policy level rather than at the legal level. For example, it is well-nigh certain that the vocabulary of ‘inclusion’ or ‘ownership’ often justifies other, less attractive, practices; DIG practices are not necessarily defensible from a moral or ethical viewpoint. But international law *takes the operative power of speech very seriously*, and we cannot dismiss recurrent commitments to ‘inclusion’ or ‘ownership’ merely because these commitments ought to be subjected to a deeper, and certainly welcome, critique from a practical and political perspective. This thesis accepts the warning against the “cure-all view on interim governments”<sup>2464</sup> or on DIG generally. But, more fundamentally, it also cautions against the interpretation that repeated DIG practices should be deprived of any legal significance on the grounds that these practices may not always be politically commendable, or tend to hide other realities.

Second, and related to the first point, the compliance with a *ius in interregno* leaves much to be desired. However, because a *ius in interregno* is currently germinating, this should not be a major stumbling block to advancing the thesis argument. But, even if a *ius in interregno* were a fully-fledged body of well-defined norms, occasional noncompliance would not *ipso facto* affect its validity under international law. If noncompliance is treated as such, i.e. as the breach of a rule rather than as the recognition of a new rule, this actually *confirms* the legal validity of a rule. Furthermore, this thesis adopted a broad conception of compliance<sup>2465</sup> and the lack of effectiveness of DIG has not caused states to abandon their commitment to the practices and legal principles –limits *ratione temporis* and *ratione materiae*; self-redetermination and TJ; preeminence of international law during the interregnum– that are almost systematically associated with it. Finally, as shall be emphasized in the following point, a *ius in interregno* remains rudimentary. At present, transitional authorities must merely respect the core requirements of what Youssef called *l’Etat légal intérimaire*. For a transition to be successful, these minimum requirements must, without any doubt, be *complemented* by domestic legal norms and social practices. And on particular points, specific procedures (e.g. the notification procedure) should be further detailed and broadly informed by a *ius in interregno*. Specifically, it was argued that the countermeasure framework, for instance, should inform international legal practice and discourse with regard to oppositional DIG, and ultimately influence state behavior. But, generally speaking, a *ius in interregno* is not overly prescriptive: a number of lines must not be crossed, but within these boundaries discretionary powers remain large.

#### 4. The rudimentary nature of *ius in interregno*

Is a *ius in interregno* too rudimentary to play any significant role in practice? *Ius in interregno* is rudimentary indeed, and does not provide a unique roadmap for DIG. It does not offer a one-size-fits-all solution to the problems of transitional states. It is also sensitive to the

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<sup>2464</sup> J. Strasheim, ‘Interim Governments: Short-Lived Institutions for Long-Lasting Peace’, GIGA Focus, nr. 9, 2014.

<sup>2465</sup> Chapter 7, Section B.3.

justified critique that DIG is often portrayed as techno-politics, as a transferable expertise. Although they may be the symptom of bureaucratic universalism, generalized DIG practices nevertheless allow for the formulation of a *ius in interregno*, which is based on a ‘*skeletonization*’ of DIG practices. The formulation of a *ius in interregno* is arguably based on the rather *superficial* commonalities of DIG practices. But the response to this critique must simply be relegated to *other domains*; namely critical theory of international law (to the extent that the rudimentary nature of a *ius in interregno* reflects the rudimentary nature of international law itself), IR (to the extent that the normative paradigms and beliefs underpinning DIG are biased), and of course international practice (to the extent that practitioners find that DIG practices must be reconsidered). This thesis contends that it is on those levels that the critique must be addressed. Perhaps DIG, like statebuilding, “take[s] institutions that are the products of a particular history and trajectory of political development and posit[s] them as the principal solutions to undesirable political dynamics and outcomes”<sup>2466</sup>. Yet, as long as practices and institutions based on the peace-through-transition paradigm continue to proliferate unabated, and are wedded to the conviction that they correspond to law and to a social necessity, it will be difficult to contest that DIG practices, beyond being a body of norms *in statu nascendi* or a project *de lege ferenda*, are en route to becoming part and parcel of international law proper.

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In spite of the contingency and complexity of each instance of DIG, the evolving nature of a *ius in interregno*, the ineffectiveness that sometimes characterizes DIG, the occasional noncompliance with a *ius in interregno*, and its rudimentary nature, a *ius in interregno* is not an empty shell. While it leaves a considerable margin of appreciation to states in transition, a number of red lines cannot be crossed. As a final consideration of this thesis, we shall now recapitulate the limits forming the basis of a *contrôle marginal* of DIG.

## *B. MARGINAL REVIEW*

*Ius in interregno* allows us to define the limits to the discretionary powers both of (1) transitional authorities and (2) external actors engaged with DIG.

### *1. Limits to discretionary powers of transitional authorities*

To the extent they exercise effective power, transitional authorities must respect a number of core duties.

First, the powers of transitional authorities are limited *ratione temporis*: transitional authorities must accept that their powers and mandate are time-bound. They must direct the transition towards developing permanent institutions, and then relinquish power. They must

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<sup>2466</sup> N. Bhuta, 'Against State-Building', *op. cit.*, p. 526.

exercise these duties on a temporary basis, i.e. with the aim of being replaced on the basis of new elections or laws. This implies that they are barred from suspending or perpetuating the interim rule, and generally from re-presenting their leaders and/or members after the transition.

Second, the powers of transitional authorities are limited *ratione materiae*: transitional authorities exercise a fiduciary type of administration. This precludes them from carrying out activities that exceed their mandate. Specifically, transitional authorities are required to prepare for the future but without fully predefining it. They must respect state continuity both internally (*vis-à-vis* their own citizens) and externally (*vis-à-vis* other international legal persons, and foreign investors). They must concentrate on managing the present, including the transition procedure. The final and primary responsibility for administering the country during the transition lies with them, even if they receive extensive external assistance.

Third, transitional authorities must pursue DIG in an inclusive way, and in conformity with the principle of internal self-determination. For our purposes, the inclusivity requirement is to be dissociated from the concept of (procedural or substantive) democracy. Instead, inclusivity permits the principle of self-determination to be ‘deployed’ during the interregnum, so as to realize, in light of the Nicaragua principle<sup>2467</sup>, *any form of government permitted by international law*. Inclusivity thus constitutes a mode of implementation of the principle of self-determination in the context of DIG. In addition, it *further extends and specifies* the contours of this principle (e.g. by the redefinition of ‘the people’, and by the compulsory involvement of women’s groups and other representative groups during the interregnum). Taken together with the limits *ratione temporis* and *ratione materiae*, inclusivity confirms the continuing relevance of the principle of internal self-determination. This logic is also valid for TJ. Subject to a few limitations, transitional authorities committing to a form of TJ (now standard in conflict-striven states) have wide discretion as to how they implement it.

Fourth, transitional authorities pledge to let DIG, as well as its outcome, be guided and underpinned by international law, including human rights law and humanitarian law. Transitional authorities must act in accordance with international law, which thus becomes the residual law of the interregnum.

Together, these duties form the benchmark for legally assessing the activities and the legitimacy of transitional authorities. As a *ius in interregno* defines the limits to the transitional authorities’ powers, it also allows us to conceptually isolate transitional authorities *legitimately* pursuing DIG, and to distinguish them from political bodies *illegitimately* aiming at provoking a state transformation. The principle of self-determination forms the overarching legal benchmark against which DIG practices must be assessed. Fundamentally, a *ius in interregno* requires that the interregnum become an effective medium for self-redetermination.

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<sup>2467</sup> Part I, Conclusion, 2.1.

As it is an overriding and continuing principle, self-determination must be realized and respected throughout the interregnum, by both transitional authorities and external actors.

## 2. Limits to discretionary powers of external actors

One cannot deny that there is a “lack of knowledge about the long causal chain running from outside help to internal conditions to changes of regime”<sup>2468</sup>. Yet, this does not alter the fact that clear international principles of behavior apply to external actors trying to influence DIG. This thesis has substantiated that these international principles apply, no matter how difficult it may be to apply these standards to specific cases. This challenge is especially true when addressing the complex division of labor between domestic and external actors during DIG, from which this thesis –at least for the legal analysis– explicitly made abstraction<sup>2469</sup>. This thesis simply argued that the obligations incumbent on transitional authorities must also be respected by external actors, at least to the extent that these obligations have entered the realm of international law.

These obligations, recapitulated in the previous section, are thus in a sense *mirrored*. When external actors try to leave their mark on a transition –on the interregnum generally, on the constitutionmaking process specifically– they must also respect the core requirements of a *ius in interregno*. They must respect the limits *ratione temporis* and limits *ratione materiae* to DIG. They must not take measures that impede the progressive realization of self-determination during the interregnum, including when it is realized through TJ initiatives. If, in line with the assistance model, external actors *assist* transitional authorities in pursuing DIG, they are prevented from doing so in violation of the core obligations incumbent on transitional authorities. Undeniably, the intensity of this general prohibition depends on the legal force of these core obligations. In any event, if external actors aid or assist transitional authorities in violating the core obligations, they engage their international responsibility *to the extent these requirements have legal force*<sup>2470</sup>.

May external actors lawfully aid or assist *oppositional* transitional authorities? This is the last *problématique* addressed in this thesis. The examination concentrated on the support provided to oppositional transitional authorities that were reacting against national governments violating *ius cogens*. This specific, limited approach allowed us to examine whether, in the most exceptional circumstances, external actors could *indirectly* impose a regime change, i.e. by supporting oppositional transitional authorities pursuing a nonconstitutional state

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<sup>2468</sup> R. A. Dahl cited in G. H. Fox, ‘International Law and the Entitlement to Democracy After War’, *Global Governance* 9, 2003, p. 189.

<sup>2469</sup> Part I, Conclusion, 1.

<sup>2470</sup> About this automacity, cf. S. Von Schorlemer, ‘Verfahrensrechtliche Aspekte bei Ansprüchen aus Verletzungen von *Erga-omnes*-Normen’, in E. Klein, *Menschenrechtsschutz durch Gewohnheitsrecht*, Kolloquium 26.-28. September 2002, Potsdam, p. 241: “*internationale Verantwortlichkeit kann mit der herrschenden Ansicht als eine neue Rechtsbeziehung angesehen werden, die automatisch entsteht, wenn eine zurechenbare Völkerrechtsverletzung –sei sie ein Handeln oder ein Unterlassen– vorliegt*”. Emphasis added.

transformation through DIG ('transformative empowerment'). *Ius cogens* is, per definition, valid *erga omnes*, i.e. it concerns the international community of states as a whole. By definition it falls outside a state's *domaine réservé*, and thus, reactions to *ius cogens* violations, in principle, do not constitute a breach of the non-intervention principle.

But this logic is subject to an exception, specifically when states directly target another state's constitutional system *on the occasion of* violations of *ius cogens*. Unless the constitutional texts are, themselves, written in violation of *ius cogens* –which would be highly exceptional– it was concluded that transformative empowerment is contrary to the principle of non-intervention. For this reason, first we analyzed what the general reactions must be to *ius cogens* violations –non-recognition, cooperation and direct negotiation–, and only then examined whether or not transformative empowerment, as a unilateral last-resort measure, could exceptionally be justified as a countermeasure. Thus we concluded that external actors are required to follow specific procedures, in first order (general reactions to *ius cogens* violations) and subsidiary order (procedural prerequisites) before applying transformative empowerment. These specific procedures include; the offer to negotiate with the incumbent government (in both cases), and, when transformative empowerment is applied, following procedures of *responsibilization* and *notification* (comparable to a *mise en demeure*).

In sum, even when external instigation of DIG is allegedly justified as a reaction to *ius cogens* violations, it is subjected to strict procedural requirements. These are necessary, but not sufficient conditions for justifying transformative empowerment. In addition, the favored oppositional transitional authority must (demonstrate a reasonable prospect of success to) act in compliance with a *ius in interregno*. The supposition is that, where states empower *ius-in-interregno*-abiding oppositional transitional authorities, they act in consideration of the principle of self-determination. In short, oppositional DIG can only be unilaterally 'empowered' (a) when the situation could not be solved at the UN level, and (b) after a number of stringent conditions were met. This significantly reduces the likelihood that the external instigation of DIG –thus, the indirect provocation of a regime change– can be justified under international law. The highly exceptional justification for such a course of action confirms the continuing relevance and validity of the non-intervention principle.

As noted above, rather than focusing on issues like humanitarian intervention, remedial secession or forcible countermeasures –which all may impact DIG–, this study concentrated on non-forcible external influences on DIG, which also warrant a cautious approach to the principle of non-intervention. Under a *ius in interregno*, transformative empowerment can only be applied as an *ultimum remedium*, i.e. if a multilateral peaceful settlement fails, and provided a number of specific procedural prerequisites, discussed in detail above<sup>2471</sup>, are complied with. At the same time, a *small and strictly regulated possibility* remains for (eventually) inducing indirect regime change through DIG, which is itself also subject to the

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<sup>2471</sup> Chapter 10, Section B.2.2 and Section B.2.3.

rules of a *ius in interregno*. The door is not completely closed. But the conditions for realizing the potential of this modest possibility are much more stringent than, for instance, theories developed in the literature in relation to humanitarian intervention, remedial secession or forcible countermeasures.

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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. By replacing ITA, DIG has arguably become a center piece of the international collective security system. In light of both its relevance and frequency today, DIG and its ideological basis –the peace-through-transition paradigm– must be deconstructed from an international legal perspective. Thus, it is important that a critical analysis of DIG not be left in the hands of political science alone. A *ius in interregno*, lying at the intersection of comparative constitutional law and international law, complements this analysis. Because DIG is recurrent today, and likely to be repeated in the future, a refined legal model for analyzing internationalized DIG is arguably overdue. By developing the notion of a *ius in interregno* and pointing at the current germination of a number of robust but clear norms both for domestic and external actors engaged with DIG, this dissertation attempted to contribute to laying the groundwork for this model.

The *ius in interregno* developed in this thesis takes into account *when* in the transition process, *which* actors (purportedly) pursue or influence DIG, and *how* they exercise their leverage in this regard. It takes into account the important fact that transitional constitutionalism concerns the core of a state's *domaine réservé*. This study has shown that the domestic nature of DIG does not render an international legal assessment of this practice redundant, especially because fundamental legal principles, notably the principles of self-determination and non-intervention, are in play. It has also shown that neither transitional authorities nor external actors can pretend to act *legibus soluti* when realizing or contributing to the reconstitutionalization of states in transition.

The many actors involved with transitions will benefit from the further unveiling of a legal framework with regard to DIG. Given the increasingly significant budgets allocated to assist DIG<sup>2472</sup>, the further development of the legal framework is of importance for many states. The analysis of the financial repercussions of DIG, just as a number of other issues related to DIG, are food for thought for another day. Issues left unaddressed in this dissertation include: DIG in relation to the use of force<sup>2473</sup>; the role of the judiciary in times of transition<sup>2474</sup>; a detailed

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<sup>2472</sup> Cf. Chapter 1, Section B.2.

<sup>2473</sup> For some considerations, see Chapter 9, Section B.1 and Chapter 8, Section A.2.

<sup>2474</sup> See for example N. Brown, 'Egypt: a Constitutional Court in an Unconstitutional Setting'; T. Ginsburg, Y. Ngenge, 'The judiciary and constitution building in 2013' in IDEA, *Constitution Building: A Global Review (2013)*, 2014, p. 25 a.f.

analysis of IOs' (including the World Bank Group) impact on DIG<sup>2475</sup>; the socio-economy of DIG<sup>2476</sup>; and the division of labor between domestic transitional authorities and external actors during DIG (which has repercussions for the issue of international responsibility during transitions)<sup>2477</sup>. In the future, as a more elaborated *ius in interregno* develops, it should take account of these unexplored important issues.

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<sup>2475</sup> Note for example the role of the *Organisation de la Francophonie* in this domain. When mentioning international organizations potentially influencing transition procedures, organizations actively involved in the legal and institutional reconfiguration of countries –e.g. the UNSC and ECOWAS– were referred to rather than organizations like the World Bank Group having (at least historically) chiefly a socio-economic purpose. The World Bank Group defines its overarching mission as a “world free of poverty”. (‘A Common Vision for the World Bank Group’). At least initially, the World Bank had a strictly economic and functionalist orientation. It concentrated its actions on human development through market-oriented reforms. It is in principle prohibited from interfering in political affairs. (IBRD Articles of Agreement, artt. III, sections 5, 6 and 10). Over time, however, the World Bank has radically expanded its political authority, and, for instance, also started dealing with rule-of-law reform, and perhaps has contributed to the spread of DIG. This triggers the question whether the World Bank would trespass its own mandate, thus act *ultra vires*, a question not addressed within the confines of this thesis. Although the non-negligible role of the World Bank group for DIG will not be discussed, it is merely suggested that some of the thesis’ conclusions may apply *mutatis mutandis* to this group.

<sup>2476</sup> For some considerations, see Chapter 5, Section B.1.

<sup>2477</sup> Part I, Conclusion, 1.

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