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BOOK REVIEW

Emmanuel H. D. De Groof and Micha Wiebusch, *International Law and Transitional Governance: Critical Perspectives*, Routledge, 2020, 165pp, IBSN 9780367178109, US$48.95
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This edited book brings together a group of highly qualified contributors with diversified backgrounds to investigate the role played by international law in shaping conflict-related national transitions and steering international response to unconstitutional change of government. It aspires to advance that international law plays an important role in this respect, with set principles already in action. This review starts by recapitulating the main ideas contributed by the authors in the ten chapters of the tome, and then moves to assessing the work as a whole by focusing on the validity of its main argument.

In the first two chapters, Emmanuel De Groof and Micha Wiebusch define the term 'transitional governance' as the exercising of public power by interim or transitional authority governed by transitional constitutional regulations in the context of conflict or large-scale political unrest.[1] They identify five features for the phenomenon, which are: temporary exercise of public powers, that follows a non-constitutional rupture, with supra-constitutional aspirations, internationalized notwithstanding its formally domestic nature, and constitutes a contemporary phenomenon of international law reflective of post-Cold War international zeitgeist.[2]

Adam Day and David M. Malone study, in the following chapter, the rise of conflict-related transitional governance in the post-Cold War period. They argue that the improvement in relations among the major world powers triggered an era of 'new activism' by the UN Security Council, making transitional governance a dominant mode of international engagement in post-conflict settings. According to them, this made domestically-driven, internationally-supported transitional governance the preferred response to major conflicts. They point to risks prevalent at this course of action, including difficulties in executing exit strategies. They add that even in instances where an international engagement *does* come to an end, animosities among national actors set aside during the period of international involvement can resurface with a vengeance. They also point to an emerging tendency of international mediators and administrators to underestimate the deep roots of these conflicts as soon as international personnel and authority are withdrawn.[3]

In the fourth chapter, Christine Bell and Robert A. Forster discuss the dynamics of transitions. In doing so, they identify five types of political crises that trigger transitional governance. These, according to them, are: *coup d'états* or attempted *coup d'états*, uprisings against authoritarian regimes, electoral disputes, attempts to exit from periods of sustained civil conflict, and – ironically – international territorial administrations that provide for internationally supervised transitional processes. Upon reviewing transitional arrangements in negotiated agreements, the two writers suggest that there are five main legal options for instruments that govern the

[1] E. H. D. De Groof and M. Wiebusch, *International Law and Transitional Governance: Critical Perspectives* (2020), 1.
[2] Ibid., at 7–15.
[3] Ibid., at 19–20.

transitional period, which are either: to reform the instrument within the existing constitutional framework, to create a constitutional amendment within the existing order, to initiate other context-specific legal mechanism ambiguous as to whether it is inside or outside the existing order, to introduce a supra-constitutional amendment effected by a peace agreement leaving the existing order partially in place, or to fashion a novel supra-constitutional replacement of the existing order.[4]

In his chapter on comparative constitutional law, Sumit Bisarya introduces the world of international assistance to constitution-making, examining different examples of organizations commonly active in this field and the legal constraints at play. He concludes that international advice to constitution-making is here to stay. But as international advice becomes increasingly institutionalized, he suggests that recipients of such advice need to understand the nature of the institutions providing assistance and the constraints shaping their advice.[5]

In a chapter that adds an important jurisprudential dimension to the volume, Noam Wiener gives definitions for the terms 'legitimacy', 'legality', and 'democratization' in the context of state recognition. He discusses legitimacy and legality in relation to governments and attempts to extrapolate his conclusions to transitional settings. Since transitional governments are often the 'stem-cells' of the nascent state, he argues they should be granted external legitimacy as long as they enjoy the internal legitimacy of their subjects. He further clarifies that legality is a means of creating legitimacy and while democracy can increase the legitimacy of a transitional regime, it is not a requirement *sine qua non* for a legitimate regime. Yet, although democratization is not required for domestic transitional governments to be internationally legal, Wiener argues that internal legitimacy is crucial for the success of a transitional regime.[6]

In the chapter entitled 'Legitimizing transitional authorities through the international law of self-determination', Matthew Saul investigates the significance of a commitment to the international law of self-determination for the legitimacy of a transitional authority. In addressing this issue, he starts by highlighting that the principle of self-determination is central to justify the legitimacy of exercising governmental authority by a transitional entity. Otherwise, he posits, a transitional government has no claim to represent the will of the people, particularly in situations where international actors exert influence over the formation of the transitional authority. In such circumstances, he argues, a commitment to obey the international law of self-determination may help a transitional authority to persuade its domestic and international audiences that its purpose is advancement, rather than denial, of governance by and for the people.[7]

In the eighth chapter, Zinaida Miller asks, 'when does a transition end?' After a thorough analysis, far removed from international law, as to whether a static set of rules determine the end of transitions or rather if context governs the situation, she concludes that the determination of an end to a transitional stage is embedded in three principles: holding actors accountable for forms of violence, understanding the distributed nature of power in and after transition, and the defined objectives of the transition.[8]

The central question for the brief survey undertaken by Vasuki Nesiah was whether transitional governance forms the new face of colonialism or the path to create new democracies. He observes that while charges of colonial assumptions, practices, and consequences haunt every aspect of the field of transitional governance, from constitution-making to democracy promotion, international support to transitional governance struggles to free itself from colonialism. He argues that this

[4]Ibid., at 36–41.
[5]Ibid., at 62–70.
[6]Ibid., at 67–85.
[7]Ibid., at 98–108.
[8]Ibid., at 116–29.

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relationship between the denial of colonialism, and its replication, is pivotal in understanding international engagement in transitional governance. In that sense, he concludes ambivalently that the theories and practices of transitional governance are a guide to the ambitions and traumas captured by the dual drive to expel colonialism and replicate it.[9]

Finally, De Groof and Wiebusch end with a chapter reiterating that the intention of their work was to clarify the role of international law in shaping transitional contexts and steering constitutional regime changes.[10] But did the book achieve its stated goal? This review turns to this point.

While international support to transitional governance is a recent phenomenon much informed by the spirit of the post-cold war era, transitional governance is relatively old and could be traced to the conflict-ridden post-colonial epoch. The decolonized state, which typically fosters no claim to traditional forms of legitimacy normally derived from loyalty to a dynasty or a national core, had proven to be more susceptible to armed conflict and political unrest leading to cycles of constitutional ruptures that are to be cured, or worsened, by transitional arrangements.

Nonetheless, transitional government *cannot* 'rightfully be characterized as an international legal practice, and analyzed as such'.[11] While no customary norms of international law had emerged over time to guide a situation of transition, no treaties are agreed at the international level to govern the matter. International response to unconstitutional change of government does not take the form of principled action guided by the UN General Assembly, and is always incapable of subjection to judicial monitoring by the ICJ. Indeed the UN Security Council considers transitional governance a tool for international intervention in post-conflict settings. It is rightly observed by Day and Malone in their chapter, that the phenomenon is one of 'new activism' by the UN Security Council.[12]

Curiously, Matthew Saul anchored the legitimacy of a transitional government in the right to self-determination. The right to self-determination is centred on the exercise of the people's sovereignty through democratic governance. 'The free and genuine expression of the will and wishes of the peoples concerned' is the method for exercising that right.[13] Agitation and political unrest that define a constitutional rupture can by no means be considered as availing the appropriate ambience for the free and genuine exercise of the will of the people. In actuality, a transition puts the will of the people in limbo pending the full preparation of the scene for the exercise of self-determination at the successful close of the transition. Until that happens, the temporary exercise of state powers by a transitional authority is governed by no more than the doctrine of necessity.

Based on the medieval Bracton's maxim, that says 'which is otherwise not lawful is made lawful by necessity', the doctrine of necessity has become the basis of extra-constitutional actions of administrative authority designed to restore order. This modern usage could be traced to the 1954 judgment of Chief Justice of Pakistan Muhammad Munir, which validated the extra-constitutional use of emergency powers by Governor General Ghulam Mohammad on the basis of this doctrine. That stream of authority was since tapped by a number of judicial decisions in common law countries.[14]

Nonetheless, the doctrine of necessity gives rise to a rule of constitutional law, not a rule of international law. While it confers legitimacy on extra-constitutional actions of a national government running a transition, it does not validate international response to the unconstitutional change that led to that transition. This poses the following question: how can the UN Security

[9]Ibid., at 141–6.
[10]Ibid., at 154–9.
[11]Ibid., at 2.
[12]Ibid., at 20.
[13]A. Cassese, *Self-Determination of Peoples: A Legal Appraisal* (1981), at 131.
[14]See L. Wolf-Phillips, 'Constitutional Legitimacy: A Study of the Doctrine of Necessity', (1979) 1(4) *Third World Quarterly*, at 97–133.

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Council, while not acting in the application of enforcement measures under Chapter VII of the UN Charter, intervene in a transition, a matter which is essentially within the domestic jurisdiction of a state? The issue of domestic jurisdiction is of significance to this quest for two reasons.

First, it justifies posing the question of Vasuki Nesiah as to whether transitional governance is the new face of colonialism or the path to democracy. When there are no concrete legal norms governing international action, and when the Security Council is the only UN organ that acts (mostly swayed by superpowers and realpolitik considerations and because states targeted by the action of the UN Security Council are mostly former colonies), concerns over neo-colonialism cannot be easily set aside. In fact, supporting transitions is becoming the preferred conduit for interfering with decolonized states. It is now the means for installing pro-Western rulers, keeping at bay unorthodox forms of government, or advancing constitutional models popular in Europe and North America. Furthermore, while successful at forestalling local corruption, internationally supported transitions open doors to multinational corruption, unleash trans-boundary trafficking of all sorts, and allow for unbridled exploitation of national resources at scales that were not available before for local middlemen.[15] The current international law regime, which is fundamentally based on the concept of excluding domestic jurisdiction, is inherently oblivious of such concerns and ill-equipped to address these afflictions.

Second, as the home to a sizable proportion of governance transitions, Africa is a continent known for its own home-grown traditions for interference in unconstitutional changes. Primarily, the continent is striving to exempt unconstitutional changes from the domestic jurisdiction of states. In the Organisation of African Unity (OAU) Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, adopted in Lomé in July 2000, the OAU agreed on a definition of unconstitutional change and measures that the OAU would progressively take to respond to an unconstitutional change. The AU Constitutive Act 2000 included, in Article 4(p), the rejection of unconstitutional change of government among the principles of the African Union. In Article 30, it provides that 'governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'. Furthermore, in 2007 the African Charter on Democracy, Elections and Governance expanded the definition of unconstitutional change to include any refusal by an incumbent government to relinquish power to the winning party and any amendment of the constitution, which is an infringement on the principles of democratic change of government. In a recent article, Erika de Wet surveyed how the AU responds to unconstitutional changes on the basis of the above principles.[16] Those are indeed elements of state practice and *opinio juris* that can generate customary rules of international law specific to Africa that exempt the AU response to unconstitutional change from the domestic jurisdiction of states. Despite its significance, the pioneering African state practice in this respect features nowhere in the tome.

As it seems, it is difficult to agree with the authors that international law doctrine addressing international support to transitional government had emerged and crystallized to guide UN action at a global scale. Yet, the book responds to a gap in international law literature that received little

[15]See A. Cooley and J. Heathershaw, *Dictators without borders: power and money in Central Asia* (2016), which argues that the 'globalized transition' for Central African states has generally failed to produce polities that conform to the liberal-ideal type of marketized democracies; E. Knowles and K. MacLachlan, 'Money and War in Afghanistan, Corruption as the Hidden Enemy of Mission Success', (2015) 2 *Fletcher Sec. Rev.* 67; C. Cheng and D. Zaum 'Selling the peace? Corruption and post-conflict peace-building', in *Corruption and post-conflict peace-building: Selling the peace*? (2013), 1–25; M. Kodi, 'Corruption and governance in the DRC during the transition period (2003–2006)', *Institute for Security Studies Monographs*, Vol. 2008, No. 148; P. Williams, 'Organized Crime and Corruption in Iraq', (2009) 16(1) *International Peacekeeping*. This last article examines the evolution of organized crime in Iraq from a largely state-controlled phenomenon under Saddam Hussein to a free market criminality under the internationally supported transition.

[16]E. de Wet, 'The African Union's Struggle against Unconstitutional Change of Government: From a Moral Prescription to a Requirement under International Law?', (2021) 32(1) EJIL 199–226.

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attention of scholarship. As stimulating and thought provoking as it is, the book succeeded in identifying this subject as a future topic of study and a likely candidate for international regulation.

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