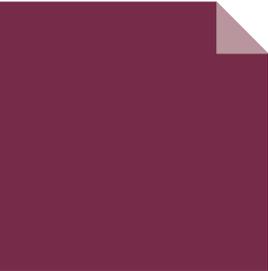




PA-X REPORT: INTERIM TRANSITIONS

PA-X REPORT: MULTI-LEVEL PROCESSES



# The Features of Transitional Governance Today

First Edition

Emmanuel De Groof



This research draws on the PA-X Peace Agreement Database ([www.peaceagreements.org](http://www.peaceagreements.org)), a database of all peace agreements at any stage of the peace process from 1990 to 2016. The database is fully searchable and supports both qualitative and quantitative examination of peace agreements.

Author: Emmanuel De Groof  
Political Settlements Research Programme (PSRP)  
Global Justice Academy  
School of Law  
Old College  
The University of Edinburgh  
South Bridge  
Edinburgh  
EH8 9YL

Tel. +44 (0)131 651 4566  
Fax. +44 (0)131 650 2005  
E-mail: [PoliticalSettlements@ed.ac.uk](mailto:PoliticalSettlements@ed.ac.uk)  
[www.politicalsettlements.org](http://www.politicalsettlements.org)  
[@PolSettlements](https://twitter.com/PolSettlements)

**Acknowledgements:** This research is an output from the Political Settlements Research Programme (PSRP), funded by UK Aid from the UK Department for International Development (DFID) for the benefit of developing countries. The information and views set out in this publication are those of the author. Nothing herein constitutes the views of the Department. Any use of this work should acknowledge the author and the Political Settlements Research Programme. For online use, we ask readers to link to the original resource on the PSRP website. Thanks are due to Christine Bell for peer review and editorial advice, and to the PSRP team for useful feedback on various versions of the draft. Thanks to Tim Epple, Harriet Cornell and Rick Smith of Smith Design Agency for proofreading and production work.

**About the author:** Emmanuel De Groof is an Associate of the Political Settlement Research Programme. He is being trained as a diplomat for the Kingdom of Belgium while remaining active in academia as a Guest Lecturer at the University of Maastricht, Visiting Professor at the University of Kigali, and as an author in the fields of international law, diplomacy, and development cooperation.

This Report is intended to accompany the book State Renaissance for Peace – Transitional Governance under International Law, Cambridge University Press (2020). This book, which unveils the international legal framework applicable to conflict-transitions, refers in more detail to the contemporary features of transitional governance identified in this report.

This report reflects only the author's analysis and does not necessarily represent the views of the Belgian Ministry of Foreign Affairs or other institutions he is affiliated to.

Cover images: Fragments from 'The Ferry to Antwerp' from Jacob Jordaens.  
Owner: SMK, National Gallery of Denmark. Photo credit: Jakob Skou-Hansen.  
All images may be subject to copyright.

# Contents

Introduction	01
<hr/>	
Practice 1 - Legal Internationalisation of the Transitional Period	03
<hr/>	
Practice 2 - Time Limits to the Transition	07
<hr/>	
Practice 3 - Subject-matter Limit to the Transition	18
3.1 Administer the country and ensure security	18
3.2 Prepare for the future without entrenching it	23
<hr/>	
Practice 4 - The Practice and Discourse of Inclusivity	27
4.1 1994 - 2010	27
4.2 2010 onwards	34
<hr/>	
Practice 5 - Domestic Ownership of Transitional Justice	42
<hr/>	
Concluding Observations	48
<hr/>	

# Introduction

This report presents an overview of relevant practice in relation to transitional governance (TG), that is, temporary governance arrangements put in place to manage transitions from violent conflict and increasingly social crisis.<sup>1</sup> Since 1989, TG became disassociated from decolonization, secession or dissolution processes. It became a process whereby transitional authorities (TA) introduce a wholesale constitutional transformation ('reconstitutionalisation') with the intention to bring peace and stability ('peace-through-transition paradigm').<sup>2</sup>

By unveiling the current factual features of TG, the report lays the groundwork for an analysis of how international law – as it currently stands and as it may develop – applies to TG.<sup>3</sup> It focuses on the period during which a state's constitution and institutions are held in abeyance during a transition, especially in the context of an armed conflict, or a threat to international peace and security. This period will be called the *transitional period* (or *interregnum*).

A transition, generally, connotes a *renaissance* (almost akin to a creation) of a state when its constitution and institutions are overhauled in response to conflict and increasingly 'mere' violent social crisis. In more detail,<sup>4</sup> a transition concerns (a) the transformation of a state's regime (neutrally understood as 'the institutional structure of the state and government'<sup>5</sup>) (b) by nonconstitutional means (broadly understood<sup>6</sup>), (c) on the basis of legal instruments or of texts with a temporary constitutional status, (d) regardless of their form (international agreements,<sup>7</sup> domestic intra-state agreements,<sup>8</sup> interim or transitional constitutions,<sup>9</sup> domestic/unilateral acts or declarations,<sup>10</sup> or a combination thereof), (e) and regardless of whether their origin is based in consensual, or oppositional politics.

This report suggests that five features of TG can increasingly be observed, and are likely to be further socialised by practitioners including diplomats, mediators and constitutional experts.

- 1) **Legal internationalisation.** First, increasingly, transition instruments provide that the exercise of public authority during the transitional period must be guided by the respect of international legal norms, and, increasingly, TA pledge to let the transition and its outcome be guided by international law. This will be called the *legal internationalisation of the transitional period*.

- 2) **Time-limited.** Second, the transitional period is most often limited in time, and TG, even if programmed to last for a long period, is specified not to be prolonged artificially. This will be called the *time limits* (limits *ratione temporis*) to the transitional period.
- 3) **Functionally limited to transitional governance.** Third, practice indicates that TA generally should not be free to entrench the future constitutional status or dominate the present. Rather, they must execute the transition and administer the country on a provisional basis, including by restoring security, and prepare for the future without foreshadowing their own transition to power. This will be called the subject-matter limit (limits *ratione materiae*) to the transitional period.
- 4) **Inclusive.** Fourth, over the two last decades, 'inclusivity' and 'domestic ownership' have been systematically promoted in relation to TG. It has become a mantra that "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>11</sup> This will simply be called the *practice and discourse of inclusivity*.
- 5) **Transitional Justice.** Fifth, state practice amply confirms the conviction that transitional justice (TJ) is part and parcel of TG.<sup>12</sup> In the vast majority of cases, TA are required, or impose on themselves, to address the past of their respective countries in one way or another. In addition, there is consensus that TJ must be 'owned' by the population of the state in transition. The fifth practice analysed in this report will thus be called *domestic ownership of transitional justice*.

The report contains an overview of relevant examples for each of these five features. The examples are based on the instruments, often agreements but sometimes unilateral texts, purporting to trigger a transition. Sometimes references to temporary governance arrangements that have failed are included as they, too, can suggest what the so-called international community is 'socialised' to expect from TG. For the same reason, reactions are included from the UN Security Council<sup>13</sup> (UNSC) or other international actors such as diplomatic contact groups as they are increasingly involved in TG, and regularly shed their light on the five following practices.

## Practice 1 - Legal Internationalisation of the Transitional Period

Transitional governance (TG) is increasingly becoming an international project. International assistance to TG has a broad impact on both legal and non-legal components of statebuilding and constitutionmaking undertaken using transitional arrangements. In the legal sphere, the internationalisation of the transitional period is manifest in an increased reliance on international law, especially human rights instruments. The reception of international law into TG and transitional constitutionmaking is not an isolated phenomenon as today also ('traditional') constitutional law is being more and more internationalised.<sup>14</sup> International law increasingly serves as the residual law in times of transition, as the following (broadly chronological) overview shows.

1. In Cambodia, the internationalisation of transitional legal order is contained in the [Agreement on a Comprehensive Political Settlement of the Cambodia Conflict \(Framework for a Comprehensive Political Settlement of the Cambodia Conflict or Paris Accords\)](#), 23 October 1991, which contains a reference to the Universal Declaration of Human Rights (UDHR),<sup>15</sup> and undertakes "to ensure respect for and observance of human rights and fundamental freedoms in Cambodia."<sup>16</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>17</sup>
3. In South Africa, international law played a fundamental role in the transition. As far back as the [National Peace Accord](#), 14 September 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>18</sup> International law strongly influenced the transitional constitution making process.<sup>19</sup>

4. In 2000, the Burundian Transitional Government committed itself to abiding by 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 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (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>20</sup>
5. The Afghan transitional period was also characterised by the internationalisation of the transitional legal order.<sup>21</sup> From 2001, the TA committed to the respect of international law. The [Bonn Agreement](#) stated that these authorities were to act in accordance with international law<sup>22</sup> and with UNSC resolutions.<sup>23</sup> The UNSC, too, stated that "the transitional administration [...] should respect Afghanistan's international obligations."<sup>24</sup> The deference to international law also impacted on the constitutionmaking process. McCool observes that the constitution's adherence to international law was a 'red line' for the international community,<sup>25</sup> and as a result the post-transition constitution effectively includes a solid reference to international law.<sup>26</sup>
6. The 2002 [Pretoria Agreement](#) regarding the Congolese transition, provided that the compliance with international legal instruments<sup>27</sup> constituted a 'transition principle'.<sup>28</sup> The delegates of the Inter-Congolese Dialogue reaffirmed their attachment to several international and regional legal instruments.<sup>29</sup> The UNSC confirmed that the TA was to implement international human rights.<sup>30</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>31</sup> [The Law of the Administration for the State of Iraq for the Transitional Period \(TAL\), 8 March 2004](#), affirmed the respect of the people for international law,<sup>32</sup> and referred to various UNSC resolutions.<sup>33</sup>
8. In Nepal, the internationalisation of the interim legal order stems from the fact that the [Comprehensive Peace Agreement, 21 November 2006](#), 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](#), 4 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."<sup>34</sup>
10. The Guinean TA committed to the respect of human rights. On 10/11 January 2009, the Economic Community of West African States (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>35</sup> This was echoed by the dozens of states and organisations composing the International Contact Group on Guinea (ICG-G).<sup>36</sup> This contact group "urged CNDD and the Government to contribute to [...] respect for human rights."<sup>37</sup> The 2010 [Ouagadougou Joint Declaration](#) confirms the respect for "individual and collective liberties",<sup>38</sup> and "public liberties, including freedom of the press and opinion."<sup>39</sup>
11. From the outset, the Libyan National Transitional Council (TNC) committed itself to abiding by international law, including international human rights law and humanitarian law. This commitment was asserted in several instruments. On 22 March 2011, the TNC promised its "respect for human rights and the guarantee of equal rights and opportunities for all its citizens."<sup>40</sup> Also, on 25 March 2011, this council affirmed its "strict compliance"<sup>41</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>42</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."<sup>43</sup> The UNSC, too, emphasised that the TNC was bound by international law.<sup>44</sup>

Several years later, the [Libyan Political Agreement, 17 December 2015](#), (to which the UNSC continued referring in 2017 and 2018<sup>45</sup>) in its Preamble "affirm[ed] their [the parties'] commitment to take into consideration the general international law, including the international humanitarian law and obligations stemming from international treaties to which Libya is a party, as well as the pertinent Security Council Resolutions."

12. The [Yemen GCC Transition Agreement \('GCC Agreement'\)](#), 23 November 2011, provided that the members of the government of national unity "shall have a high standard of accountability and commitment to human rights and international humanitarian law."<sup>46</sup>

On 21 October 2011, the UNSC had already "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>47</sup> After the Houthi take-over in 2014, 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>48</sup> Several years later, in 2019 the UNSC repeated this plea when it "reaffirm[ed] the need for all parties to comply with their obligations under international law, including international humanitarian law and international human rights law."<sup>49</sup>

13. In Guinea Bissau, the 2012 *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>50</sup>
14. Various actors have recalled that the TA of the Central African Republic ('CAR') are to respect international law. The UN Human Rights Council has called on the CAR TA to respect international human rights.<sup>51</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>52</sup>
15. Without directly referring to international law as a relevant source of law in the Burkinabe domestic order, the *Charte de la Transition*, 16 November 2014, builds on regional instruments<sup>53</sup> – the African Charter on Democracy and the ECOWAS Protocol on Democracy and Good Governance – which contain references to international law, especially international human rights instruments.<sup>54</sup> ECOWAS and the Contact Group for Burkina Faso furthermore urged the Burkinabe TA to "protect human rights."<sup>55</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>56</sup>

These examples confirm an increased reliance on international law in times of transition.

## Practice 2 – Time Limits to the Transition

The transitional period (or interregnum) is limited in time (*ratione temporis*), and TG, even if programmed to last for a long period, *cannot be prolonged* artificially. From the various cases under analysis, it stems that TA must manage TG without frequent or long interruptions, and subsequently transfer power. The time limitations to TG have a general and specific component. The powers of TA are to be for a limited duration, and in several cases transition leaders or even all transition office-holders are ineligible to hold office after the transition ('ineligibility-after-transition practice').

This is true of transitions in Afghanistan, Burkina Faso, Burundi, Cambodia, Central African Republic, Comoros, Côte d'Ivoire, Democratic Republic of the Congo (DRC), Guinea-Bissau, Iraq, Kyrgyzstan, Liberia, Libya, Mali, Nepal, Somalia, Sudan, Syria, Ukraine and Yemen. The following table indeed shows how transition instruments, and, as the case may be, the UNSC or regional organisations, impose temporal limits on TG. Details on most of the cases mentioned in the table are provided below.

TABLE A: Overview limitations *ratione temporis* to interregnum

Transitions	Limitations transitional period on the basis of transition instruments & UNSC resolutions	Ineligibility
Afghanistan	' <a href="#">Bonn Agreement</a> '...; Preamble, § 7; art. I.4; art. I.5. S/2002/278 (2002)	No specific rule on ineligibility but dissolution TA.
Burkina Faso	Charte de la Transition of 16 November 2014, artt. 20, 21.	Charte de la Transition of 16 November 2014, artt. 4, 13, 16.
Burundi	<a href="#">Arusha Agreement</a> , protocol II, Chapter II, 'Transitional Arrangements' (artt. 1 - 11); S/RES/1545 (2004); S/RES/1577 (2004); S/RES/1602 (2005).	<a href="#">Arusha Agreement</a> , Ch. 1, Art. 20, § 11.

Transitions	Limitations transitional period on the basis of transition instruments & UNSC resolutions	Ineligibility
Cambodia	<p><u>Paris Accords</u>, art. 23;  S/RES/745 (1992), § 3;  S/RES/783 (1992), § 2;  S/RES/792 (1992), Preamble §3; §2.</p>	<p>No specific rule on ineligibility but dissolution SNC.</p>
Central African Republic	<p>Déclaration de N'Djamena, § 4;  S/RES/2127 (2013), §§ 5 &amp; 6;  S/RES/2149 (2014), § 8.</p>	<p><u>Charte Constitutionnelle</u> du 18 juillet 2013, art. 106.  S/RES/2127, § 3.</p>
Comoros	<p><u>Accords d'Antananarivo</u>, art. 3.b;  <u>Accord-cadre de réconciliation nationale</u> of 17 February 2001, titre II;  <u>Accord sur les dispositions transitoires aux Comores</u>, I. Principes.</p>	<p><u>Accords d'Antananarivo</u>, art. 3.a;  <u>Accord-cadre de réconciliation nationale</u> of 17 February 2001, III, art. 18.</p>
Côte d'Ivoire	<p><u>Linass-Marcoussis Agreement</u>, 3.a., IX;  S/RES/1933 (2010).</p>	<p><u>Linass-Marcoussis Agreement</u>, art. 3.c;  <u>Premier accord complémentaire à l'accord politique de Ouagadougou</u> (unnumbered).</p>
DRC	<p><u>Pretoria Agreement</u>, IV;  S/RES/1457 (2003); S/RES/1468 (2003);  S/RES/1565 (2004); S/RES/1592 (2005);  S/RES/1635 (2005).</p>	<p>No specific rule on ineligibility but dissolution TA (<u>Draft Constitution of the Transition</u>, art. 205).</p>
Guinea	<p><u>Déclaration conjointe de Ouagadougou</u>, artt; 1-12;  ECOWAS Final communiqué 10/11 January 2009, artt. 13.1, 13.3.</p>	<p><u>Déclaration conjointe de Ouagadougou</u>, art. 8;  ECOWAS Final communiqué 10/11 January 2009, § 13;  S/2009/422, § 7;  S/PRST/2009/27.</p>

Transitions	Limitations transitional period on the basis of transition instruments & UNSC resolutions	Ineligibility
Guinea-Bissau	ECOWAS Final communiqué 3 May 2012, § 21; S/PRST/2013/19.	Pacto de Transição Política, art. 5.3; ECOWAS Final communiqué 3 May 2012, § 25.
Iraq	<a href="#">Transitional Administration Law</a> , artt. 2B, 58B, 59, 60, 61; <a href="#">Agreement on Political Process</a> .	No specific rule on ineligibility but dissolution GC.
Kyrgyzstan	Provisional Government Decree No. 19, 20 (April 2010).	Above-cited article by J. Nichol (text primary source not available).
Liberia	<a href="#">Accra Comprehensive Peace Agreement</a> , art. 35.	See analysis by N.Roehner. <sup>57</sup>
Libya	<a href="#">Constitutional Declaration art. 30</a> ; Libyan Supreme Court ruling of 6 November 2014.	Art. 21 of the 2011 Constitutional Declaration.
Mali	<a href="#">Accord Cadre de mise en oeuvre de l'engagement solennel</a> , art 5; S/RES/2423 (2018), § 2; S/RES/2480 (2019), § 1.	Implicitly in <a href="#">Accord Cadre de mise en oeuvre de l'engagement solennel</a> , art. 6.a.
Nepal	<a href="#">Interim Constitution of Nepal, 2063 (2007)</a> , artt. 1, 167, schedules 2, 3 (with reference to <a href="#">Comprehensive Peace Agreement</a> of 22 November 2006).	N/A although art. 45.4 of the <a href="#">Interim Constitution</a> limits the term of the 'legislature-parliament'.
Somalia	<a href="#">Somali Transitional Charter</a> , artt. 3.2, 3.3, 71.9.	' <a href="#">Somali Transitional... Charter</a> , art. 32.4 (for members of parliament)

Transitions	Limitations transitional period on the basis of transition instruments & UNSC resolutions	Ineligibility
Sudan	2019 Political Agreement on establishing the structures and institutions of the transitional period, Chapter 2, § 6 & 7; Chapter 5, § 2.	2019 Political Agreement on establishing the structures and institutions of the transitional period, Chapter 2, § 12.
Syria	Coalition's Principles nr. 4; Basic principles for a political settlement to the Syrian conflict, February 2015. See also Final communiqué of the Action Group for Syria and its § 9 about "irreversible steps in the transition according to a fixed time frame".	Transition was not initiated.
Ukraine	<u>Second Minsk Agreement</u> , art. 11; S/RES/2202 (2015) with reference to 'Package of Measures for the Implementation of the Minsk Agreements', § 11.	Transition aborted/collapsed.
Yemen	<u>GCC agreement</u> , art. 6, 7, 10; S/RES/2216 (2015); S/RES/2402 (2018), § 1; S/RES/2456 (2019), § 1.	Transition aborted/collapsed.

The following overview provides more details for most cases mentioned in the table, roughly in chronological order.

1. In Cambodia, the [Agreement on a Comprehensive Political Settlement of the Cambodia Conflict \(Framework for a Comprehensive Political Settlement of the Cambodia Conflict or Paris Accords\)](#), 23 October 1991, explicitly limits the transitional period,<sup>58</sup> and various UNSC resolutions repeat the time limits to the transitional period to the interim rule.<sup>59</sup> No ineligibility requirements seem to have been inserted in the [Paris Accords](#), yet it seems that the Supreme National Council was dissolved after the transition.
2. As regards the transition in Comoros, three different transitional instruments explicitly limit the duration of the respective transitional periods.<sup>60</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>61</sup>
3. In Burundi, the 2000 [Arusha Agreement](#) details when the transitional period is to start and to finish.<sup>62</sup> During this transition, the Burundian authorities had the temporary responsibility for managing a step-by-step transition procedure,<sup>63</sup> in line with the 'objectives of the transitional arrangements'. These objectives included "the holding during the transition period of elections."<sup>64</sup> 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>65</sup> On 31 May 2005, the UNSC, in unmistakable terms, "call[ed] on the TA strictly to adhere to this timetable."<sup>66</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>67</sup>

4. In Afghanistan, public authority was exercised by two subsequent TA, the Interim Authority and TA. In its preamble, the [Bonn Agreement](#), 5 December 2001, states that "these interim arrangements [...] are not intended to remain in place beyond the specified period of time."<sup>68</sup> In the same vein, this agreement provides that "the Interim Authority *shall cease to exist* once the TA has been established by the Emergency Loya Jirga",<sup>69</sup> which, in turn, shall "lead Afghanistan until such time as a fully representative government can be elected through free and fair elections."<sup>70</sup> In 2002, the United Nations Secretary-General (UNSG) accentuated these temporal limits.<sup>71</sup> The Afghan TA – the Interim Authority and TA – were thus to follow a strict schedule in managing TG 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, 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>72</sup> The 2002 [Pretoria Agreement](#) however allowed for an extension of the transitional period:

"because of problems specifically linked to the organisation 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>73</sup>

This excerpt, reiterated in similar wordings in the Draft Constitution of the Transition, 1 April 2003,<sup>74</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 TG 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 TA as a means to avoid the illicit exploitation of the country.<sup>75</sup> On 20 March 2003, the UNSC again insisted on a speedy establishment of the TA, and "stresse[d] that any effort to undermine or delay its establishment would be unacceptable."<sup>76</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>77</sup> In the same sense, the *Comité international d’accompagnement de la transition* (CIAT) “exert[ed] political pressure for progress in areas of the transition where delays have been encountered.”<sup>78</sup> The UNSC consistently supported the TA,<sup>79</sup> while urging them to implement the transition according to the agreed timetable.<sup>80</sup> The above-cited [Pretoria Agreement](#) and UNSC resolutions unmistakably indicate that TG must not be unduly prolonged.

6. In Iraq, the [Agreement on Political Process](#) (‘APP’), 15 November 2003, 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>81</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>82</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>83</sup> The [TAL](#) provided that the Coalition Provisional Authority (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>84</sup>

7. In Côte d'Ivoire, the *Troisième accord complémentaire à l'accord politique de Ouagadougou*, 28 November 2007, schedules with precision according to which timetable specific tasks are to be carried out. The Ivorian 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 Agreement*. 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>85</sup> As to the ineligibility-after-transition rule, at least two instruments indicate that transition leaders were not to re-present themselves at the elections following the transition procedure.<sup>86</sup>
  
8. In Guinea, ECOWAS called "for the *speedy establishment of the NTC*."<sup>87</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>88</sup> On 12 March 2009, several states and organisations 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>89</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>90</sup> Importantly, this contact group considered the non-compliance with the transition agenda as a potential violation of the African Union (AU) Constitutive Act/Lomé Declaration on Unconstitutional Changes of Government.<sup>91</sup> The ineligibility-after-transition rule was repeatedly confirmed both by the TA themselves,<sup>92</sup> ECOWAS,<sup>93</sup> the various states and organisations of the International Contact Group on Guinea, the AU,<sup>94</sup> and the UNSC.<sup>95</sup>

9. In Libya, the Constitutional Declaration, 3 August 2011, regulated the transition, including the adoption of the constitutional draft by referendum and the approbation of a permanent government,<sup>96</sup> in much detail.<sup>97</sup> On 11 March 2014, the Libyan parliament amended the Constitutional Declaration in order to prolong the transitional period.<sup>98</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>99</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>100</sup>
10. The Yemen GCC Transition Agreement ('GCC Agreement'), 23 November 2011, defined the beginning and end of the interregnum. It provided in some detail which schedule had to be followed<sup>101</sup>, and divided the interregnum in two phases.<sup>102</sup>

TG 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 organise the foundations of governance during the transitional period in Yemen'. This declaration foresaw a transition of (maximum) two years, including a reconstitutionalisation process.<sup>103</sup>

The 2011 GCC Agreement is not explicit about the ineligibility-after-transition practice.<sup>104</sup> As a matter of fact, the sitting President Saleh did quit his position after the elections of 21 February 2012, although continued to wield considerable power in the country until his assassination in December 2017. After his removal from power, the second phase of the Gulf Cooperation Council's (GCC) 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.

Several years into the war, in 2019 the UNSC "reaffirm[ed] the need for the full and timely implementation of the political transition following the comprehensive National Dialogue Conference, in line with the Gulf Cooperation Council Initiative and Implementation Mechanism."<sup>105</sup>

11. In Guinea Bissau, the *Pacto de Transição Política*, 16 May 2012, provides that the transition period lasts twelve months counting from its signature.<sup>106</sup> On 27 and 28 February 2013, ECOWAS however took the "decision supporting the extension of the tenure of the transitional organs in Guinea-Bissau"<sup>107</sup>. 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 TA 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 TA to find a sustainable solution to the current crisis.<sup>108</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>109</sup> In sum, ECOWAS' exceptional and explicit mention of support for an extension of the transition established by the *Pacto de Transição Política*, and the severe reaction in the framework of the UNSC point to the fact that, in principle, TG procedures and schedules must be strictly followed. As to the ineligibility-after-transition practice, both the *Pacto de Transição Política*<sup>110</sup> and ECOWAS confirm that the president and prime minister of the transition "shall not be eligible to contest in the envisaged presidential election."<sup>111</sup>

12. In CAR, the *Déclaration de N'Djamena*, 18 April 2013, limits the duration of the interregnum. In April 2014, the UNSC pressured the TA to timely implement the transition roadmap.<sup>112</sup> Furthermore, on 3 April 2013, the Economic Community of Central African States (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>113</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>114</sup> The (non-amendable) requirement of ineligibility was finally enshrined in the *Charte Constitutionnelle du 18 juillet 2013*,<sup>115</sup> and was also confirmed by the UNSC.<sup>116</sup>

13. In Burkina Faso, the *Charte de la Transition*, 16 November 2014, 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 that obstacles to the transition would not be tolerated.<sup>117</sup> The *Charte de la Transition* confirmed the ineligibility rules already enshrined in the *Avant-Projet de la Charte de la transition*.<sup>118</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>119</sup>
14. Temporal limitations to the interregnum also concern Kyrgyzstan,<sup>120</sup> Liberia<sup>121</sup> and Ukraine<sup>122</sup>, for instance. They show that a transition may not lightly be suspended or prolonged.

## Practice 3 - Subject-matter Limits to the Transition

Transitional Governance (TG) is limited substantively (*ratione materiae*). The limitations *ratione materiae* influence their powers in at least two ways. Practice indicates that TA cannot adopt decisions for the present which go beyond their managerial mandate, nor can they take a full grip on the post-transition stage. Rather, they must execute the transition and administer the country on a provisional basis, including by restoring security (3.1) and preparing for the future without entrenching it (3.2).

### 3.1 - Administer the country and ensure security

TG mostly centres around two tasks. First, to stick to the main assignment, that is: bringing the transition – including any constitutionmaking or reform process – to completion. Second, to ensure the day-to-day conduct of state affairs, i.e. essential government services, which includes the core business of the Weberian state: demilitarising politics, monopolising legitimate force, providing security, and restoring effective control over the state territory. The portfolio of TA is thus limited: do not lose sight of daily business and priorities, and in the meantime pursue state transformation.

The tasks of monitoring transitions and ensuring security have been increasingly 'delegated' to domestic constituencies, even where international peace and security were concerned.<sup>123</sup> The following rough sketch of state practice illustrates how TA bear the responsibility for (a) completing a transition and (b) ensuring the daily business of state affairs in a secured environment. TA worldwide have been concerned with, and responsible for the execution of the transition roadmap and the provision of security. This trend was evident in South Africa, Burundi, Afghanistan, DRC, Haiti, Liberia, Côte d'Ivoire, Iraq and Nepal. Since 2010, it was confirmed in Yemen, Guinea Bissau, Central African Republic, Burkina Faso, Ukraine, and Libya.

1. The portfolio of TA is generally limited in two regards: do not lose sight of daily business and priorities, and in the meantime pursue state transformation. In South Africa, 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<sup>124</sup> as well as to a more secure environment following the 1991 [National Peace Accord](#).<sup>125</sup>
2. The 2000 [Arusha Agreement](#) regulates in detail which transitional institutions were to be created and how the transition was to be governed.<sup>126</sup> The Burundian TA had the general responsibility for administering the country during the transitional period. The UN peacekeeping operation ('ONUB') was there only to assist the TA.<sup>127</sup> When, from 2007 onwards, the UN Integrated Office in Burundi ('BINUB') was established to support Burundi's post-transition period<sup>128</sup> it was again "emphasise[d] that *the Government of Burundi bears the primary responsibility* for peacebuilding, security and long-term development in the country."<sup>129</sup> The assistance from ONUB and then BINUB notwithstanding, the Burundi transitional institutions bore primary responsibility for the transition.

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>130</sup> The Transitional Government, then, had the obligation to consolidate security, also through a disarmament, demobilisation, and reintegration (DDR) program.<sup>131</sup> The [Arusha Agreement](#) provided that power had to be monopolised,<sup>132</sup> and, in its protocol III, provided that the "institutions have the primary duty to guarantee the security of all citizens."<sup>133</sup>

3. 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>134</sup> and formally had only an advisory role.<sup>135</sup> To this end, the UNSC endorsed a UN Assistance Mission (UNAMA), and declared its willingness to support the TA and the implementation of the [Bonn Agreement](#).<sup>136</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 recognising that the responsibility for the Agreement's implementation ultimately rests with the Afghans themselves.*"<sup>137</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>138</sup> On this occasion, the concept of 'light footprint' was coined.<sup>139</sup>

From the outset, the Afghan TA were entrusted with the country's administration on a daily basis.<sup>140</sup> This responsibility also concerned the safeguarding of security.<sup>141</sup> In similar wording to the [Bonn Agreement](#), the UNSC repeated that the responsibility for providing security and order resides with the Afghans.<sup>142</sup> This held true even following the creation of an 'International Security Assistance Force'<sup>143</sup> whose mandate was expanded during the transition to allow it to support the Afghan TA and its successors in the maintenance of security.<sup>144</sup> As a component of the restoration of security, the [Bonn Agreement](#) provides for the integration of all armed forces. In 2004, Afghanistan was pressured to implement the DDR program and continue the formation of the Afghan National Army, yet had scant resources at its disposal for doing so.<sup>147</sup> Giustozzi nonetheless observes that the "wider disarmament and demobilization effort was largely owned by Afghan players."<sup>148</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 was considered responsible for executing the transition, part of which concerned the consolidation of security.

4. The Pretoria Agreement, 16 December 2002, foresaw a detailed transition to be implemented by the Congolese domestic authorities. The UNSC supported it from the outset of the inter-Congolese dialogue starting mid-October 2001: before the transition even started.<sup>149</sup> From the outset, the transition was (formally) led by the DRC. It was however closely monitored by the UNSC.<sup>150</sup> The transition was furthermore followed by the UN peacekeeping operation ('MONUC')<sup>151</sup>, and by the CIAT, which, for Reyntjens, "was instrumental in avoiding breakdown through flexible interventions each time the transition was in jeopardy."<sup>152</sup> In light of the many actors being involved in various (including political, legal, developmental and economic<sup>153</sup>) aspects of the transition, "the DRC was put under a *de facto* international trusteeship", Reyntjens considers.<sup>154</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>155</sup>

The Congolese TA were repeatedly reminded that they bear the primary responsibility for maintaining order and security.<sup>156</sup> The UNSG noted that restoring security is one of the "core tasks of the transition",<sup>157</sup> and to this end urged the transitional government to establish the Supreme Defence Council in accordance with the Pretoria Agreement.<sup>158</sup> The UNSC asked the TA to reform the security sector and to implement a DDR program,<sup>159</sup> which was largely dysfunctional,<sup>160</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>161</sup>

5. After Aristide's departure from Haiti during February 2004, a TA was installed, and assisted by the UNSC.<sup>162</sup> To that end, the UN peacekeeping operation MINUSTAH was set up. Its mandate concentrated on assisting the TA with a DDR program and security reform.<sup>163</sup>
6. In addition to the countries mentioned above, TA were set up during the same decennium (2000 – 2010) in Liberia,<sup>164</sup> Côte d'Ivoire,<sup>165</sup> Iraq<sup>166</sup> and Nepal<sup>167</sup> so as to implement the procedures of the transition, attend to the daily affairs of the state, and ensure security.

7. From 2010 onwards, TA continued to be created and were accorded the responsibility of governing the transition and ensuring safety and security. The patterns described above were generally confirmed. Domestic TA 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) TG in Yemen,<sup>168</sup> Guinea Bissau,<sup>169</sup> Central African Republic,<sup>170</sup> Burkina Faso<sup>171</sup> and Ukraine<sup>172</sup>. The same is true of Libya, where TG was generated by oppositional forces.
  
8. In Libya the Transitional National Council's ('TNC') primary mission was to administer the transition. It was to monitor the transition until permanent institutions were in place. The UNSC decided to assist the TNC in this endeavour<sup>173</sup>, and, to this end, established a UN support mission (UNSMIL).<sup>174</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>175</sup> Yet, the transition was to be genuinely Libyan.<sup>176</sup> The TNC bore the general responsibility for administering the country in the interim. According to the [Constitutional Declaration](#), 3 August 2011, it was "*liable for managing the State* until the National Public Conference is elected."<sup>177</sup> In particular, it had the obligation of consolidating security.<sup>178</sup> In sum, the Libyan TA 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 organisations<sup>179</sup>) confirmed this double role.<sup>180</sup>

### 3.2 - Prepare for the future without entrenching it

TA must concentrate their business on administering the country and ensuring security (see above). Therefore they are not supposed to negatively affect their country's future nor have it cast in stone (just as pre-transition governments are sometimes barred from taking actions that would hinder the transition, e.g. in Rwanda and Burundi). It is for this reason that one must "separate discussions on [transitional] frameworks from debates on new constitutional arrangements."<sup>183</sup>

Practice confirms that TA have limited powers in pre-defining – other than procedurally – the future of their country. The following analysis of TG in practice reveals that the pre-definition of broad supraconstitutional principles is allowed though, although obligations taken up during the transition which fit the TA's fiduciary role will be inherited by the post-transition government.

At maximum TA may pronounce a set of general principles to which the coming constitutional order must conform. In several cases, without listing which supraconstitutional principles should predetermine the post-transition constitutional order (which is the maximum commonly allowed), such 'silent transitional instruments' almost exclusively focus on the procedural steps to be taken during the interregnum. Such transition instruments confirm the finding that TA must concentrate on their role during the interregnum without entrenching the coming constitutional order. The following perusal of practice does not include these 'silent transition instruments' but rather concentrates on cases in which general principles concerning the post-transition – the maximum possible – were explicitly consecrated in transition instruments. The list is therefore limited, and concerns countries like Cambodia and South Africa in the 1990s, and Burundi, Afghanistan, DRC, Iraq, Somalia, and Libya after the turn of the millennium.

1. The [Paris Accords](#), 23 October 1991, which governed the transition in Cambodia, provided that the constitution must abide by a set of pre-defined rights and principles.<sup>184</sup> It furthermore provided that "Cambodia will follow a system of liberal democracy",<sup>185</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 approve a new Cambodian Constitution."<sup>186</sup> In collaboration with the UN Transitional Authority in Cambodia (UNTAC), the Supreme National Council was thus to facilitate the transition without however (fully) predetermining Cambodia's political future.
2. Similarly, the [South African Interim Constitution, 1993](#) (in force 1994), famously enshrined thirty-four general principles by which the definitive constitution had to abide.<sup>187</sup> Jackson commented on this, observing that "non-elected members of the South African Multi-party Negotiating Process decided on the thirty-four basic principles."<sup>188</sup> In the *Certification judgment*,<sup>189</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 to be amended.
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>190</sup> Eleven such principles were listed under the chapter 'Constitutional Principles of the Post-Transition Constitution'.<sup>191</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>192</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>193</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>194</sup>

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>195</sup>
6. In Iraq, the [TAL](#), 8 March 2004, contained key constitutional principles, but also went beyond that. It was, as Benomar notes, "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."<sup>196</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>197</sup>

On 8 June 2004 the UNSC confirmed in similar wording that this limitation must be respected by the IGC,<sup>198</sup> and reaffirmed the right of the Iraqi people "freely to determine their own political future."<sup>199</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 TA.<sup>200</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) TA is circumscribed.

7. In Somalia, two interim transition instruments came into force after the turn of the millennium. The [Transitional Federal Charter](#), 29 January 2004, "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>201</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 [Provisional Constitution](#), 1 August 2012, provides that the "specific allocation of powers and responsibilities are subject to further negotiations."<sup>202</sup>

8. Regarding the transition in Libya, the [Constitutional Declaration](#), 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>203</sup> This declaration did 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>204</sup> and enumerates a number of 'rights and public freedoms' to which the coming constitutional order was to conform.<sup>205</sup> Several years later, the [Libyan Political Agreement](#), 17 December 2015, enumerated 26 'governing principles' which were to guide its implementation.

The above examples show how TG is limited substantively: TA cannot adopt decisions for the present which go beyond their managerial mandate, nor can they take a full grip on the post-transition stage.

## Practice 4 - The Practice and Discourse of Inclusivity

The commitment to ensuring inclusive transitions is now the rule rather than the exception. Without going here into detail in what the many facts of inclusion are,<sup>206</sup> it is clear that at least since 1994, inclusivity has increasingly been emphasised as an umbrella principle for transitions. It thus appears that, over a period spanning almost three decades and in more than hundred jurisdictions, "ensuring that political settlements are inclusive is key to the attempts of negotiating transitions from conflict."<sup>207</sup>

Even though not always successfully, this was for example the case in countries like South Africa, Comoros, Burundi, Afghanistan, DRC, Liberia, Côte d'Ivoire, Somalia and Iraq (4.1). Since 2010, inclusivity was again promoted for (purported) transitions in countries like Kyrgyzstan, Libya, Yemen, Syria, Guinea-Bissau, the CAR, South Sudan, Burkina Faso, Ukraine and Sudan (4.2). The following lines provide more detail, and show how the (at least formal) commitment to ensuring inclusive transitions has become commonplace.

### 4.1. 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>208</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>209</sup> In spite of the pitfalls inclusivity has generated in other contexts,<sup>210</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.
2. In 1999, the importance of inclusivity was emphasised in the context of the transition in Comoros. One of the principles guiding TG in Comoros was precisely that the signatory parties to the transition instruments committed to inclusive TG before elections take place.<sup>211</sup>

3. Legal texts relating to the Burundi transition starting in 2000 repeatedly confirm the inclusivity requirement in relation to the composition of the TA, the composition of political parties, and the constitutiondrafting process. First, the 2000 [Arusha Agreement](#) required inclusivity throughout the two-step transition.<sup>212</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>213</sup> and that the transitional Executive was to function in the spirit of national unity.<sup>214</sup> It also provided that the post-transition government was to be representative.<sup>215</sup> Second, no political party participating in the transition could be registered if it was established on the basis of ethnic or regional exclusivity.<sup>216</sup> Third, the [Arusha Agreement](#) required that a constitutional text be drafted during the transition "founded on the values of unity without exclusion."<sup>217</sup>

The UNSC reiterated the need for inclusive TG in Burundi on several occasions.<sup>218</sup> Thus, the UNSC urged the armed movement 'Palipehutu-FNL' to integrate itself into the transitional institutions.<sup>219</sup> It 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>220</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>221</sup> Yet, as the [Arusha Agreement](#) and UNSC resolutions show, inclusivity was surely seen as a condition for and basis of the transition. When a constitutional review was tabled during 2014, the UNSC referred back to the spirit of inclusivity which animated the [Arusha Agreement](#),<sup>222</sup> which was also regularly invoked in the aftermath of the 2015 political crisis.

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 TG.<sup>223</sup> Inclusivity in the context of the Afghan transition will therefore be addressed in some detail. The Afghan TA 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>224</sup> This agreement provided that a 'Emergency Loya Jirga' (a grand assembly) shall decide on a broad-based transitional administration.<sup>225</sup> The UNSC was also vocal about the Afghan transition being "broad-based, multi-ethnic and fully representative."<sup>226</sup> There is no doubt that the UNSC "recognised the importance of having a representative government lead the reconstruction."<sup>227</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>228</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>229</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>230</sup> Peace talks with Taliban, through their delegation based in Qatar,<sup>231</sup> began only in June 2013. In 2017, the US administration confirmed it is open to talks with the moderate Taliban.<sup>232</sup>

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.

As a result, several commentators found that the Afghan transition was neither representative nor participatory. While Johnson,<sup>232</sup> Afsah and Guhr<sup>234</sup> criticise the lack of representativity (and legitimacy) of the Bonn peace process and its results, Saul considers that the lack of popular participation characterised the whole transition: its foundation, the interregnum itself,<sup>235</sup> but also the constitutionmaking process.<sup>236</sup> The latter point is not settled since authors like Afsah, Guhr and McCool consider that the constitution making process was fairly inclusive.<sup>237</sup>

TABLE B: *Afghan transition: inclusivity (or lack thereof)*

Moment of transition	Degree of inclusion
Bonn process & <u>Agreement</u> (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>238</sup>
Emergency Loya Jirga (11-19 July 2002)	The participants in the loya jirga 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>239</sup>
Afghan Transitional Administration (13 July 2002 – 3 January 2004)	Bonn vision of expanding membership of TA not fulfilled <sup>240</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>241</sup>
Constitutional Loya Jirga (CLJ) (December 2003 – January 2004)	Consensus about CLJ being representative of Afghan society. Mandate Constitutional Commission also related to public participation. <sup>242</sup>

In spite of these trenchant critiques, three points should be emphasised. First, the Bonn process explicitly committed to inclusivity. It "recognised the need to expand representation in the government and the political process beyond the Bonn group."<sup>243</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 recognised by the UNSC.<sup>244</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>245</sup> Third, the situation of women was significantly addressed during the transition in Afghanistan,<sup>246</sup> an improvement also recognised by the UNSC<sup>247</sup> and commended by several states.<sup>248</sup>

Even beyond the transition, the inclusivity requirement continues to leave a mark. Years after the transition, an Afghan representative recognised that inclusivity had been central to the Afghan transition<sup>249</sup> and continued to commit to this requirement.<sup>250</sup> During 2012, more than forty states and twenty organisations insisted on more inclusivity in Afghanistan,<sup>251</sup> including for women.<sup>252</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 TG, seems to have influenced the approach to other transitions which followed during the 2000s and the 2010s.

5. In the DRC, the 2002 [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>253</sup> should be nuanced to the extent that this agreement was the result of inclusive negotiations. 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>254</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"<sup>255</sup>, and to appropriate representation of local powers and "effective participation of women on all levels of responsibility."<sup>256</sup> The latter confirms women's participation as one of the 'basic principles for a peaceful transition'.<sup>257</sup> The UNSC welcomed the commitment to inclusivity.<sup>258</sup> The CIAT was instrumental in keeping the transition inclusive,<sup>259</sup> and systematically insisted on this point.<sup>260</sup>
6. During 2003, TA 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>261</sup>

7. In neighbouring 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>262</sup>
8. In Somalia, between 2004 and 2012 two consecutive TA emerged, the 'Transitional National Government' and the 'Transitional Federal Government'. In September 2011, dozens of states and organisations <sup>263</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>264</sup>
9. In Iraq, the inclusivity requirement formed the basis of the decision to replace the US-led Coalition Provisional Authority CPA by domestic TA,<sup>265</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>266</sup> The UNSC endorsed the formation of the IIG,<sup>267</sup> and insisted on the "convening of a national conference reflecting the diversity of Iraqi society."<sup>268</sup> The 2004 TAL insisted that the National Assembly include all Iraqi communities, and also have women participating.<sup>269</sup>

The inclusivity requirement was however not implemented because "at each stage of the transition, the US and its Iraqi allies decided against wider inclusion in the political process."<sup>270</sup> According to Jackson, by the time the Sunnis were included in the discussions their participation was rejected by other groups.<sup>271</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."<sup>272</sup> This created a 'legitimacy problem',<sup>273</sup> as Brahimi,<sup>274</sup> Papagianni<sup>275</sup> and Welikala<sup>276</sup> confirm. Neither the transition nor the TAL were the fruit of public debate or consultations, as the below table indicates.

TABLE C: *Inclusivity in the Iraqi transition*

Moment of transition	Degree of representativity, ownership and transparency
Coalition Provisional Authority ('CPA') (21 April 2003 – 28 June 2004)	US-led (this is not a domestic TA).
Iraqi Governing Council ('IGC') (13 July 2003 – 1 June 2004)	US-appointed (composed of allies or supporters of US occupation). Advisory role (possible veto by head of CPA).
<u>Law of the Administration for the State of Iraq for the Transitional Period (TAL)</u> (8 March 2004)	<ul style="list-style-type: none"> <li>- Drafted behind closed doors.</li> <li>- Imposition of some rules,<sup>277</sup> also against Shi'ite groups.<sup>278</sup></li> </ul>
Iraqi Interim Government (28 June 2004 – 3 May 2005)	<ul style="list-style-type: none"> <li>- Same political balance as IGC.</li> <li>- Did not initiate process broad consultation/negotiation.</li> <li>- Transition and constitution drafting still largely in the hands of US.<sup>279</sup></li> </ul>
Iraqi National Conference (mid-August 2004)	<ul style="list-style-type: none"> <li>- Missed opportunity to expand participation.</li> <li>- No participation of opponents US occupation.</li> <li>- Domination by political parties of interim government.</li> <li>- Refusal by opposition groups to participate.<sup>280</sup></li> </ul>
Elections (30 January 2005)	Boycott by a number of political groups. <sup>281</sup>
Iraqi Transitional Government (3 May 2005 – May 2006)	Result of contested elections.
2005 Constitutional Commission	<ul style="list-style-type: none"> <li>- Reflection composition members Transitional National Assembly with few Sunni Arabs.<sup>282</sup></li> <li>- 2005 Constitution rejected by Sunni population.<sup>283</sup></li> </ul>

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>284</sup> This inevitably affected the acceptance of the post-transition.<sup>285</sup> Yet, there was a formal commitment to inclusivity, and it cannot be denied that domestic TA were created to realise a more inclusive transition. Further, the UNSC certainly insisted on TG being inclusive.

#### 4.2. 2010 onwards

After 2010, political constituencies guiding (attempted) transitions in Kyrgyzstan, Libya, Yemen, Syria, Guinea-Bissau, the CAR, South Sudan, Burkina Faso, Ukraine and Sudan 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 TA was created and Bakiyev fled.<sup>286</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>287</sup> and that all political parties and a wide array of civil society leaders participated in the constitution making process.<sup>288</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>289</sup> It purportedly affirmed its legitimacy by highlighting its connection with local representative bodies.<sup>290</sup> The Constitutional Declaration, 3 August 2011, confirmed this.<sup>291</sup> According to one observer, TG 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>292</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, emphasised the importance of full inclusivity. On 10 April 2011, Gadhafi confirmed his acceptance of the AU Roadmap, including the "dialogue between the Libyan parties and the establishment of an inclusive transition period."<sup>293</sup> The TNC refused to consider this roadmap, and did not show up at meetings where this was discussed.<sup>294</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 TNC] was simply rejecting the very rationale underpinning the AU's initiative, namely inclusiveness."<sup>295</sup>

The AU Peace and Security Council ('PSC') made its recognition of the TNC conditional upon the establishment of an all-inclusive transitional government.<sup>296</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>297</sup> On 26 August 2011, the PSC again called for the formation of an inclusive transitional Government.<sup>298</sup>

On several occasions, the UNSC confirmed its position that the Libyan transition was to be inclusive.<sup>299</sup> After the TNC's declaration of liberation, the UNSC again highlighted the importance of an inclusive, representative transitional Government.<sup>300</sup>

The inclusivity requirement also concerned women's participation;<sup>301</sup> UNSMIL, too, systematically called for women's participation in the constitution-making process.<sup>302</sup>

In spite of these exhortations, inclusive negotiations were undermined both by NATO and, indirectly, by the UNSC.<sup>303</sup> Furthermore, minority groups like the Berbers and the Toubous were not fairly represented in the transitional institutions.<sup>304</sup> Lastly, the widely condemned 'law of political exclusion', approved in May 2013 (and subsequently revoked by the Tobruk-based legislature<sup>305</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>306</sup>) and the further disintegration of the country since 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) representability from the outset, the PSC insisted on an all-inclusive transition, and the UNSC on consultative, inclusive political process in anticipation of the constitution-making phase. Also the [Libyan Political Agreement](#), 17 December 2015, in its introduction attaches importance to the fact that “[t]he dialogue’s political track included key players in the Libyan democratisation process.”

12. In Yemen, the Implementation Mechanism of the GCC Initiative provided for the establishment of a national unity government<sup>307</sup> and for a national dialogue conference<sup>308</sup> for “all forces and political actors, including youth, the Southern Movement, the Houthis, other political parties, civil society representatives and women.”<sup>309</sup> The 2011 [GCC Agreement](#) provided for appropriate women’s participation,<sup>310</sup> a requirement which resulted in concrete reform initiatives.<sup>311</sup> The National Dialogue Conference, representing both the South and the North of the country and including civil society, youth’s and women’s representatives, completed its work early 2014 and produced a draft post-transition constitution.

The UNSC repeatedly called for inclusive TG.<sup>312</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>313</sup> On 12 June 2012, the UNSC called for an expansion of the transition beyond the participants to the [GCC Agreement](#),<sup>314</sup> and demanded that the national dialogue conference be “fully-inclusive, participatory, transparent and meaningful.”<sup>315</sup> On 26 February 2014, the UNSC again emphasised the need for an inclusive and Yemeni-led transition.<sup>316</sup>

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>317</sup> but Holzapfel nuances: several groups including 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).”<sup>318</sup> For Holzapfel, the transition came to gradually include not only the Houthi’s but also other previously excluded groups.<sup>319</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>320</sup> The UNSC also called for a “consensus solution”<sup>321</sup> and for a “peaceful, inclusive, orderly and Yemeni-led political transition process”,<sup>322</sup> and urged that the Houthi refrain from undermining the transition,<sup>323</sup> a demand reiterated during April 2015.<sup>324</sup>

In 2018, the UNSC reiterated that “inclusivity [...] is key to advancing national peacebuilding processes and objectives in order to ensure that the needs of all segments of society are taken into account”, and put much emphasis on the role of youth and civil society in this regard.<sup>325</sup>

13. Syria. A transition in Syria was never agreed. Yet, significant portions of the international community purported to direct this country towards inclusive TG. 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>326</sup> and called “on the international community to support [this] government.”<sup>327</sup> Beginning February 2012, a draft UNSC resolution calling for an inclusive transition was not adopted;<sup>328</sup> and the Arab League project to create a unity government not implemented.

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 international organisations<sup>329</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>330</sup> It was also a vocal supporter of the SNC, “a loosely-aligned umbrella organisation comprised of seven different blocs”,<sup>331</sup> for some “a coalition of mostly exiled dissidents.”<sup>332</sup> Contrary to, for instance, the Damascus-based National Coordination Committee, which reportedly “favour[ed] a negotiated political settlement and dialogue with the Regime”,<sup>333</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>334</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>335</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>336</sup> This TA would “include members of the present government and the opposition and other groups and shall be formed on the basis of mutual consent.”<sup>337</sup> This communiqué was endorsed by the contact group during July 2012.<sup>338</sup>

In spite of these exhortations, inclusive TG has not yet been pursued at the time of writing. This approach was, however, again discussed during a meeting in Vienna on 30 October 2015.<sup>339</sup> In 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>340</sup> The grand majority of states and organisations agreed that any transitional government would need to include members of the regime and the opposition. But 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>341</sup> Since then, several states have shown willingness to directly negotiate with the Syrian head of state, 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. On 18 November 2017, a Syrian National Dialogue Congress was held aiming at “expand[ing] the scope of participants in the Syrian peace process through inviting the representatives of various tribal, ethnic and religious groups to join it.”<sup>342</sup> This approach has not *per se* been abandoned since then.<sup>343</sup>

14. In Guinea-Bissau, after a coup deposed President Pereira on 12 April 2012, a TA 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>344</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>345</sup> By the end of 2013, it repeated this approach.<sup>346</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>347</sup> Other UNSC resolutions consistently called for an inclusive transition,<sup>348</sup> also based on women's participation.<sup>349</sup>
15. In the CAR, the inclusivity requirement led to a revision of the composition of the TA: "*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>350</sup> This followed a decision by ECCAS "to establish an inclusive National Transitional Council (NTC) – to replace the less inclusive National Assembly."<sup>351</sup> Not only the UNSC<sup>352</sup> but also the participants of the contact group<sup>353</sup>, the EU Council<sup>354</sup> and Parliament<sup>355</sup> have echoed the inclusion requirement. In addition, dozens of states and organisations emphasised that women were to be involved in the transition.<sup>356</sup>
16. 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>357</sup> even before the transition started.<sup>358</sup>
17. In Burkina Faso the 2014 *Charte de la Transition* considers inclusivity as a necessity<sup>359</sup> and as a guiding principle for the whole transition<sup>360</sup> also applicable to women's participation.<sup>361</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 organisations, religious and traditional leaders as well as the military, to work out the composition of the transitional government."<sup>362</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>363</sup>

18. In Ukraine, the 'Agreement on the Settlement of Crisis in Ukraine', 21 February 2014, called for the creation of a coalition and formation of a unity government within ten days after its signature.<sup>364</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>365</sup> Several states thus expressed that the transition was to be inclusive (a position however not shared by the interim government).<sup>366</sup> The Venice Commission "re-emphasise[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>367</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>368</sup>
  
19. In Sudan, the Constitutional Charter for the 2019 Transitional Period foresaw the creation of a power-sharing government: "The Sovereignty Council consists of 11 members, of whom five are civilians selected by the Forces of Freedom and Change,<sup>369</sup> and five are selected by the Transitional Military Council. The eleventh member is a civilian, selected by agreement between the Transitional Military Council and the Forces of Freedom and Change." The Constitutional Charter for the 2019 Transitional Period furthermore entrusted state agencies with "[g]uarantee[ing] and promot[ing] women's rights in Sudan in all social, political, and economic fields, and combat all forms of discrimination against women, taking into account provisional preferential measures in both war and peace"<sup>370</sup> and "strengthen[ing] the role of young people of both sexes and expand their opportunities in all social, political and economic fields."<sup>371</sup>

20. Other States and Organisations. The above overview is not exhaustive, and could be complemented with multiple references to legal instruments, state practice, relevant resolutions and a myriad of policy texts confirming the conviction that TG must be inclusive.<sup>372</sup> For example, the notion of participatory constitution making was explicitly endorsed by Fiji, Nepal, Tunisia and Zimbabwe.<sup>373</sup> All EU member states, including the UK at the time of writing,<sup>374</sup> Turkey, Iceland and Norway underline the importance of 'inclusiveness' in transition settings.<sup>375</sup> This conviction is shared by states like India,<sup>376</sup> the Philippines,<sup>377</sup> and the US<sup>378</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>379</sup> an issue of high relevance for TG but mentioned only in passing here. Finally, the overview above indicates that several transition states emphasise the importance of women's participation during the interregnum,<sup>380</sup> a vision shared by other states including Cameroon,<sup>381</sup> Fiji,<sup>382</sup> Morocco,<sup>383</sup> and the Philippines.<sup>384</sup>
21. Other States and Organisations (contd). The general inclusivity approach is collectively affirmed, not only through the UNSC but also through regional organisations (like ECOWAS, GCC or EU<sup>385</sup>), or through contact groups. Contact groups assemble dozens of states and organisations. 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>386</sup>) have all insisted on TG being inclusive. This confirms that the commitment to ensuring *inclusive* transitions has become commonplace.

## Practice 5 – Domestic Ownership of Transitional Justice

The conviction that TJ, quite broadly understood (truth and reconciliation commissions; post-conflict criminal justice; fact-finding missions), should be part and parcel of TG is confirmed by state practice.<sup>387</sup> For some commentators, "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>388</sup> In most cases, indeed, TA commit themselves to organising TJ. If not, the UNSC underscores the relevance, and even compulsory nature, of TJ and the fight against impunity.

In addition, there is consensus that TJ must be 'owned' by the population of the state in transition, and that it cannot be externally imposed. This position is shared by Angola,<sup>389</sup> China,<sup>390</sup> Costa Rica,<sup>391</sup> Japan,<sup>392</sup> Korea,<sup>393</sup> Liechtenstein,<sup>394</sup> Serbia and Montenegro,<sup>395</sup> the Philippines,<sup>396</sup> and the EU states (with individual but concurring positions by Germany<sup>397</sup> and the UK<sup>398</sup>) as well as most states mentioned in the overview below.

Before the turn of the millennium, TA in Cambodia, Rwanda and South Africa committed to TJ. After the turn of the millennium, TA in Burundi, Afghanistan, DRC, Liberia, Iraq, Nepal, Haiti, Côte d'Ivoire, Guinea, Libya, Yemen, Central African Republic, Burkina Faso, Ukraine, Guinea Bissau, Gambia and Sudan also pledged to organise TJ.

1. The [Paris Accords](#), 23 October 1991, 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>399</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>400</sup> Although this limitation has been criticised in scholarship,<sup>401</sup> it confirms that such crimes cannot escape the purview of transitional justice.
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>402</sup> These crimes could not be amnestied, and could not be submitted to the jurisdiction of the traditional *gacaca* courts.<sup>403</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>404</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>405</sup> and to the organising TJ. The three categories of TJ mentioned in the introduction of this section 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>406</sup> For the organisation of international criminal justice<sup>407</sup> and the establishment of a commission of inquiry,<sup>408</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>409</sup>

The Burundi TA considered TJ to be a mandatory component of the transition. The UNSC (echoed by the UN country office<sup>410</sup>) adopted a similar approach. From the outset, the UNSC called on the TA to bring the perpetrators of human rights and international humanitarian law violations to justice.<sup>411</sup> Between 2008 and 2010, it often referred to the TJ process.<sup>412</sup> When national consultations about TJ were completed and published,<sup>413</sup> the UNSC commended this,<sup>414</sup> and encouraged the government to establish the proposed mechanisms.<sup>415</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>416</sup> After this reminder, the Burundi government admitted that TJ constitutes the "last component of the implementation of the [Arusha Agreement](#)."<sup>417</sup>

5. Steps taken to realise a form of TJ in Afghanistan were initially quite timid. The [Bonn Agreement](#) did not address TJ, and "no mechanism was established to deal with the abuses of the past."<sup>418</sup> Nadery deplores 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>419</sup> An Afghan Independent Human Rights Commission was however established, and proposed a national strategy for TJ. Eventually, a general amnesty bill was adopted,<sup>420</sup> excluding crimes against humanity from its scope.<sup>421</sup>

6. After the transition in the DRC, various TJ mechanisms were applied, more or less successfully. The UNSC strongly encouraged the TA to establish a truth and reconciliation commission.<sup>422</sup> Notwithstanding serious criticism,<sup>423</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>424</sup> The UNSC monitored TJ initiatives, and encouraged the TA to put an end to impunity.<sup>425</sup> In 2004 the UNSC stated that the members of the TA may also be responsible for human rights abuses. It then asked the TA to take up all instances of human rights abuses, "in particular those perpetrated by members of the Transitional Government."<sup>426</sup> The UNSC later reiterated this demand.<sup>427</sup>
7. In 2003, in spite of strong opposition by the Liberian transitional government against TJ measures (or even a justice sector reform),<sup>428</sup> the UNSC continued insisting on this, and actively monitored the progress made by a truth and reconciliation commission.<sup>429</sup>
8. In Iraq, the Coalition Provisional Authority (CPA) Order of 10 December 2003<sup>430</sup> established the *Iraqi Special Tribunal for Crimes Against Humanity* for the purpose of trying Iraqi's accused of serious crimes. This tribunal was criticised because it was set up by the US CPA (rather than being domestically 'owned'), disregarded fair trial guarantees, and used the death penalty.<sup>431</sup> Since then, there have been expressions of support for the establishment of a truth and reconciliation process in Iraq.<sup>432</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>433</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."<sup>434</sup>

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>435</sup> In 2004, the UNSC urged the Transitional Government of Haiti to put an end to impunity.
11. The three main categories of TJ mentioned above (truth and reconciliation commissions; domestic or international criminal justice; international fact-finding missions or inquiries) 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>436</sup> which "underlin[ed] the importance of including all Ivoirians in the reconciliation process at the national and local levels."<sup>437</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>438</sup> It furthermore urged Côte d'Ivoire to strengthen its combat against impunity,<sup>439</sup> and threatened to sanction "those who are determined to be a threat to the peace and national reconciliation process."<sup>440</sup> In 2007, both parties to the transition had agreed to renew the amnesty law, excluding serious crimes from its scope.<sup>441</sup> The situation in Côte d'Ivoire was auto-referred to the ICC, an initiative welcomed by the UNSC.<sup>442</sup> Third, an international commission of inquiry was set up after each of the two transitions.<sup>443</sup>
12. The Guinean TA, too, committed to the organisation of TJ. In a promise addressed to dozens of states and organisations 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 TA [...] to fight against impunity."<sup>444</sup>

13. Libya. From the outset, the Libyan Transitional Council committed itself to organising TJ. The achievement of TJ was considered a "key goal" of the transition.<sup>445</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>446</sup> The AU PSC supported this initiative.<sup>447</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>448</sup> Finally, both a national fact-finding commission and an international commission of inquiry were set up.

Several years after the Arab Spring, the [Libyan Political Agreement](#), 17 December 2015, mentioned as a 'governing principle' the "activat[ion of] transitional justice and national reconciliation mechanisms in order to uphold the truth and achieve accountability, reconciliation, reparation and reform of state institution, in line with the Libyan legislations in force and international standards."<sup>449</sup> In the same vein it provided that the Government of National Accord should pursue the priority of "continu[ing] to support the dialogue, national reconciliation and transitional justice."<sup>450</sup>

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 reconciliation without further delay."<sup>451</sup> The UNSC reaffirmed the need to implement the [GCC Agreement](#), 23 November 2011, including "steps to address transitional justice and to support national reconciliation."<sup>452</sup> It furthermore "stresse[d] that all those responsible for human rights violations and abuses must be held accountable."<sup>453</sup> During the transition, a Yemeni TJ law was adopted. Several years later, 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>454</sup>
15. Central African Republic (CAR). The UNSC has firmly insisted that the CAR commit itself to TJ. It prompted the TA to elaborate national accountability mechanisms; it furthermore supported the work of an international commission of inquiry,<sup>455</sup> an initiative welcomed by the participants of the contact group.<sup>456</sup> The UNSC finally emphasised that the ICC may exercise its jurisdiction with regard to serious crimes.<sup>457</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>458</sup> It was created by presidential decree on 4 December 2014, and was chaired by Archbishop Ouedraogo.
17. With respect to Ukraine, the Second Minsk Agreement, 12 February 2015, 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>459</sup> At the same time, the ICC was 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>460</sup>
19. In Gambia, a draft bill on the Truth, Reconciliation and Reparations Commission (TRRC) was finalised in July 2017.<sup>461</sup> In April 2018, a roundtable discussion took place to re-emphasise the importance of TJ.<sup>462</sup>
20. In Sudan, the Preamble of the Constitutional Charter for the 2019 Transitional Period foresaw as one of its goals to "striv[ing] to implement measures to achieve transitional justice." This Charter furthermore entrusts state agencies during the transitional period with "implementing transitional justice and accountability measures for crimes against humanity and war crimes, and present the accused to national and international courts, in application of the no-impunity principle."<sup>463</sup>

## Concluding Observations

This report suggests that TG is increasingly characterised by five recurring features, which can be summarised as follows. Increasingly, the exercise of public authority during the interregnum must be guided by the respect of international legal norms, and, increasingly, TA pledge to let the transition and its outcome be guided by international law. There are generally limits *ratione temporis* and *ratione materiae* to the interregnum. Finally, the discourse and practice of inclusivity is now commonplace in relation to TG, including in relation to transitional justice, itself increasingly part and parcel of TG. These features appear from a close observation of practice by transitional authorities, transitional instruments and relevant reactions by international actors including the UNSC.

The next question then is whether these practices could in any way become legally binding, for instance by giving rise to nascent customary law. At the risk of being dismissed as *coutume sauvage*,<sup>464</sup> nascent custom is to be ascertained from practice by states in transition and by the TA whose acts can be attributed to states if it is clear they assume that international law exists. The above overview provides a stepping stone for further analysis in this regard. Another question relates to the significance such a nascent custom may have for 'third actors', i.e. states and international organisations increasingly trying to influence TG in the age of 'constitutional geopolitics' (defined as external actors' political interest and involvement in shaping the constitutional identity of other states), and for the development of international law generally.

These questions are tackled in the (forthcoming) book *Transitional Governance under International Law*, which argues that transitions do not unfold in a full juridical vacuum anymore, and that, if current trends continue, neither TA nor external actors will be able to act as they please when realising or contributing to state renaissance.

## References

- 1 The peace and transition agreements referred to in this report are mostly available from [www.peaceagreements.org](http://www.peaceagreements.org).
- 2 E. De Groof, 'The need for a *ius in interregno*: why international law should focus more on domestic interim governance', *EUI Law*, 2015/38.
- 3 E. De Groof, *Transitional Governance under International Law*, Cambridge University Press, forthcoming. See also E. De Groof, M. Wiebusch (eds.), 'International Law and Transitional Governance', Routledge, forthcoming.
- 4 These criteria will be explained in full detail in E. De Groof, *Transitional Governance under International Law*, Cambridge University Press. The definitions summarised in the introduction of this report are those used (and expanded on) in the book *Transitional Governance under International Law*, forthcoming. The brief introductions to the five practices illustrated in this report are also based on the book. I am grateful to Cambridge University Press for this.
- 5 Cf. Arato's analytical distinction between regime and government: a regime is the institutional structure of the state. 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.
- 6 Nonconstitutionality, broadly understood, concerns constitutional modifications outside the existing constitutional (amendment) procedures, or the establishment of (transitional) institutions not foreseen by the previous constitution. A nonconstitutional rupture must have taken place, e.g. against the background of a revolution, an agreement between warring factions, an external intervention, or a restoration of an older (constitutional) regime. Broadly defined, such a rupture is already consumed when transition instruments, at the time of their entry into force, partly aspire to a legal force superior to the existing and forthcoming constitutions. (Note that the definition I adopt of supraconstitutionality is also broader than what Bell and Forster describe as the "supraconstitutional arrangements involv[ing] peace agreements that sweep away and displace the existing constitutional order without formally amending it". See their contribution in E. De Groof, M. Wiebusch (eds.), 'International Law and Transitional Governance', Routledge, forthcoming. A constitutional rupture is also consumed when, like in South Africa, the "adoption into statute gives an impression of legal continuity to what amounts to a constitutional revolution" (H. Corder, 'Towards a South African Constitution', *The Modern Law Review*, Vol. 57, No. 4, July 1994, p. 504). See also A. Sachs, 'South Africa's Unconstitutional Constitution: the Transition from Power to Lawful Power', *Saint Louis University Law Journal*, vol. 41, 1996-1997. A wide criterion of 'rupture' and 'nonconstitutionality' is used throughout this report.
- 7 E.g. the Pretoria Agreement dd. 16 December 2002, the Sun City Agreement dd. 19 April 2002 regarding the transition in the DRC.
- 8 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*, Cambridge University Press, 2012, p. 5.
- 9 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.

- 10 E.g. the Constitutional Declaration dd. 3 August 2011 for Libya.
- 11 'Situation of human rights in Burundi' (A/51/459), report dd. 7 October 1996, § 37.
- 12 S/PV.4903 dd. 26 January 2004.
- 13 V. Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance', *European Journal of International Law*, Volume 11, Issue 2, 2000, 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 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."
- 14 See for example H. Tourard, *L'Internationalisation des constitutions nationales*, L.G.D.J., 2000.
- 15 See Article 15, III, Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (Framework for a Comprehensive Political Settlement of the Cambodia Conflict or Paris Accords). Cf. also Annex 5 ('Principles for a New Constitution for Cambodia'). LINK FOR DIGITAL: <https://www.peaceagreements.org/view/306/>
- 16 *Id.*, art. 15.2.a.
- 17 Protocol of Agreement between the Government of the Republic of Rwanda and the Rwandese Patriotic Front on Miscellaneous Issues and Final Provisions, 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." LINK FOR DIGITAL: <https://www.peaceagreements.org/view/506/>
- 18 National Peace Accord, 14 September 1991, art 1.2. Cf. also art. 2.3. LINK FOR DIGITAL: <https://www.peaceagreements.org/view/462/>
- 19 C. Jackson, 'What's in a name? Reflections on timing, naming, and constitution-making', 49 *Wm. & Mary L. Rev.*, 2007-2008, 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.
- 20 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."
- 21 Bonn Agreement, art. V.2, V.3, V.5; Conference Conclusions 'Afghanistan and the international community: from transition to the transformation decade', A/66/597-S/2011/762 of 9 December 2011. LINK FOR DIGITAL: [https://peacemaker.un.org/sites/peacemaker.un.org/files/AF\\_111205\\_BonnConference.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/AF_111205_BonnConference.pdf)

- 22 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."
- 23 *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."
- 24 S/RES/1378 dd. 14 November 2001.
- 25 C. McCool, '[The role of constitution-building processes in democratisation](#)', IDEA, 2004, p. 23: "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: Constitution-Making and International Law in Post-Conflict Afghanistan', *Vanderbilt Journal of Transnational Law* 39, 2006. LINK FOR DIGITAL: <http://constitutionnet.org/sites/default/files/Afghanistan.pdf>
- 26 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 'Afghanistan and the international community: from transition to the transformation decade', op. cit.
- 27 Among which the UDHR, the 1966 IPCPR, the 1966 ICESCR, and the 1981 African Charter on Human Rights and the Rights of Peoples.
- 28 Pretoria Agreement, III.3.
- 29 2002 'Draft Constitution of the Transition', Preamble.
- 30 S/RES/1493 dd. 28 July 2003, § 6. It "emphasi[zed] 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."
- 31 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."
- 32 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."
- 33 Art. 59.C.

- 34 Ouagadougou Political Agreement of 4 March 2007, S/2007/144 dd. 13 March 2007, p. 3, Preamble, § 7.
- 35 Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.6.
- 36 S/2009/140 dd. 12 March 2009. For an enumeration of the states and organisations attending this meeting, refer to the conclusions of this contact group (annexes).
- 37 S/2009/140 dd. 12 March 2009, § 12.
- 38 Preamble.
- 39 Art. 1.
- 40 *Id.*
- 41 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*). CACHE LINK FOR DIGITAL: <https://web.archive.org/web/20130403130010/http://www.ntclibya.org/english/prisoners/>.
- 42 *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).
- 43 TNC Executive Bureau, 'Summary of the second meeting of the transitional Cabinet', 27 November 2011, on file (cited in UN Human Rights Council, Report of the International Commission of Inquiry on Libya, A/HRC/19/69, 2 March 2012), p. 50, § 99.
- 44 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.
- 45 SC/13120 of 14 December 2017; S/RES/2441 dd. 5 November 2018.
- 46 See § 10.b of this agreement.
- 47 S/RES/2014 dd. 21 October 2011, § 5. See also S/RES/2051 dd. 12 June 2012, § 11.
- 48 *Id.*, § 8.
- 49 S/RES/2456 dd. 26 February 2019, Preamble, § 5.
- 50 *Pacto de Transição Política* dd. 16 May 2012, art. 1.2.
- 51 A/HRC/23/L.3 dd. 7 June 2013.

- 52 'Declaration of the third meeting of the International Contact Group on the Central African Republic', Bangui, 8 November 2013, § 14.
- 53 '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*.
- 54 African Charter on Democracy, Chapter 2, art. 2, art. 3.1. CEDEAO Protocol, Preamble, art. 1.a.
- 55 'ECOWAS names contact group on Burkina Faso', 7 November 2014.
- 56 UN News Centre, 'International community 'will not tolerate' obstacles to Burkina Faso transition, says UN political chief', 4 February 2015.
- 57 N. Roehner, UN Peacebuilding - *Light Footprint or Friendly Takeover?*, CreateSpace Independent Publishing Platform, Berlin, 2012.
- 58 Paris Accords, art. 1.
- 59 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.
- 60 *Accords d'Antananarivo, art. 3.b; Accord-cadre de réconciliation nationale* dd. 17 February 2001, titre II, Cf. also arts. 15 and 17; *Accord sur les dispositions transitoires aux Comores* dd. 20 December 2003, titre III.
- 61 *Accords d'Antananarivo, art. 3.a. Accord-cadre de réconciliation nationale* dd. 17 February 2001, III, art. 18.
- 62 Arusha Agreement, art. 13.1.
- 63 *Id.*, protocol II, Ch. II, 'Transitional Arrangements' (arts. 1 – 11).
- 64 Arusha Agreement, art. 12.2.g.
- 65 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.
- 66 *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.
- 67 Arusha Agreement, Protocol II, Ch. II, art. 13. *Id.*, Ch. 1, art. 20, § 11.
- 68 Bonn Agreement, Preamble, § 7.
- 69 *Id.*, art. I.5.
- 70 *Id.*, art. I.4.

- 71 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 TA 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 TA."
- 72 Pretoria Agreement, IV. Emphasis added.
- 73 *Id.* Emphasis added.
- 74 Draft Constitution of the Transition, art. 196.
- 75 S/RES/1457 dd. 24 January 2003.
- 76 S/RES/1468 dd. 20 March 2003.
- 77 'Third special report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo' of 16 August 2004, S/2004/650, § 54 ('Third UNSG Special Report on DRC Mission'), § 38.
- 78 *Id.*, § 56.
- 79 See, for example, S/RES/1555 dd. 29 July 2004.
- 80 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.
- 81 Agreement on Political Process dd. 15 November 2003.
- 82 TAL, art. 3.
- 83 *Id.*, § 3.
- 84 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).
- 85 S/RES/1933 dd. 30 June 2010.
- 86 Linas-Marcoussis Agreement dd. 23 January 2003, art. 3.c. *Premier accord complémentaire à l'accord politique de Ouagadougou* dd. 27 March 2007, unnumbered.
- 87 Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.1. Emphasis added.
- 88 *Id.*, § 13.3. Emphasis added.

- 89 S/2009/140 dd. 12 March 2009, § 9.
- 90 S/2009/422 dd. 17 August 2009, § 4. Cf. also § 6.
- 91 "The Group recalls the measures taken to date by the international organisations 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.
- 92 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.
- 93 Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.5.
- 94 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 organisations attended the meeting: the United Nations, the International Organisation of la Francophonie, the European Union, the Mano River Union, the Organisation 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.
- 95 See S/PRST/2009/27 dd. 28 October 2009 (statement by the UNSC president about Guinea).
- 96 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 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.
- 97 *Id.*, art. 30.
- 98 *General National Congress – Libya 7th Amendment to the Constitutional Declaration General National Congress (GNC)*.
- 99 O. Hammady, M. Meyer-Resende, 'Saving Libya's Constitution-Making Body', Carnegie Endowment for international peace, 18 December 2014.
- 100 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."

- 101 *Id.*, art. 6.
- 102 2011 Yemen Transition Agreement, arts. 7, 10.
- 103 Houthi Constitutional Declaration: "[w]ithin a maximum period of two years, the State's transitional authority 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."
- 104 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.
- 105 S/RES/2456 dd. 26 February 2019, § 1.
- 106 *Pacto de Transição Política* dd. 16 May 2012, art. 1.3.
- 107 '[Decision of 27-2 February 2019 supporting the extension of the tenure of the transitional organs in Guinea-Bissau](https://documentation.ecowas.int/download/en/legal_documents/decisions/Transition%20Organ%20in%20Guinea%20Bissau-Extension.pdf)', taken at the forty-second ordinary session of the ECOWAS Authority of Heads of State and Government. LINK FOR DIGITAL: [https://documentation.ecowas.int/download/en/legal\\_documents/decisions/Transition%20Organ%20in%20Guinea%20Bissau-Extension.pdf](https://documentation.ecowas.int/download/en/legal_documents/decisions/Transition%20Organ%20in%20Guinea%20Bissau-Extension.pdf)
- 108 S/PV/6963 dd. 9 May 2013, 'The situation in Guinea-Bissau'.
- 109 S/PRST/2013/19 dd. 9 December 2013.
- 110 The *Pacto de Transição Política* dd. 16 May 2012, art. 5.3.
- 111 The 'Final communiqué' dd. 3 May 2012 of the 'Extraordinary summit of ECOWAS heads of state and government' held in Dakar, § 25.
- 112 S/RES/2149 dd. 10 April 2014, § 8. Cf. also S/RES/2127 dd. 5 December 2013, §§ 5 and 6. Emphasis added.
- 113 Informal meeting of the Central African Republic configuration of the PBC Commission, Chairman's Summary, 16 May 2013, § 2.
- 114 *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 [...]."

- 115 *Charte Constitutionnelle*, 18 July 2013, art. 106.
- 116 S/RES/2127 dd. 5 December 2013, § 3. Emphasis added.
- 117 UN News Centre, 'International community 'will not tolerate' obstacles to Burkina Faso transition, says UN political chief', 4 February 2015.
- 118 *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.
- 119 Arts. 4, 13, 16.
- 120 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.
- 121 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.
- 122 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).
- 123 About the tension created between the internationalisation of the transition (and what M. Saul calls the 'assistance model') and the sometimes artificially created domestic responsibility of transitional authorities, see, besides the forthcoming book *Transitional Governance under International Law*, 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.
- 124 Record of Understanding between ANC and Government dd. 26 September 1992, 2.e, § 2.a and especially § 2.b.
- 125 [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). LINK FOR DIGITAL: <https://www.peaceagreements.org/view/462/>
- 126 Arusha Agreement, Protocol II, Ch. II, 'Transitional Arrangements' (arts. 1 – 11).

- 127 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.
- 128 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.
- 129 S/RES/1719 (2006), § 7.
- 130 Arusha Agreement, Protocol II, Ch. II, art. 22.8. Cf. also Protocol II, Ch. I, art. 12.
- 131 Ceasefire Agreement dd. 2 December 2002.
- 132 Arusha Agreement, Ch. I, art. 22.9.
- 133 *Id.*, Protocol III, art. 1.3.a.
- 134 Bonn Agreement, Annex II.2.
- 135 *Id.*, Annex II.3. S/RES/1401 dd. 28 March 2002, § 1.
- 136 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 recognising that the responsibility for the Agreement's implementation ultimately rests with the Afghans themselves."
- 137 A/56/875-S/2002/278 dd. 18 March 2002 § 98, basic principle b. Emphasis added.
- 138 E. Afsah, A. Guhr, 'Afghanistan: Building a State to Keep the Peace', Max Planck Yearbook of United Nations Law, 9, 2005, p. 417.
- 139 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.
- 140 Bonn Agreement, art. III.C.1. Emphasis added.
- 141 *Id.*, annex 1.1.
- 142 S/RES/1510 dd. 13 October 2003, Preamble. See also S/RES/1563 dd. 17 September 2004.

- 143 S/RES/1413 dd. 23 May 2002; S/RES/1386 dd. 20 December 2001.
- 144 S/RES/1510 dd. 13 October 2003, § 1.
- 145 *Id.*; Bonn Agreement, V.1.
- 146 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.
- 147 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?*, United States Institute of Peace Press, Washington D.C., 2007 p. 290: "[t]he Bonn Agreement recognised 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."
- 148 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*, Routledge Studies in Intervention and Statebuilding, London, New York, 2009, p. 67 and p. 83.
- 149 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.
- 150 S/RES/1445 dd. 4 December 2002, § 9. S/RES/1493 dd. 28 July 2003.
- 151 S/RES/1279 dd. 30 November 1999. S/RES/1565 dd. 1 October 2004.
- 152 F. Reyntjens, 'Briefing: Democratic Republic of Congo: Political Transition and Beyond', *African Affairs* 106, no. 423 (27 November 2006), pp. 307-317.
- 153 See e.g. the advising role of a UN panel to the TA with regard to the exploitation of natural resources. Cf. S/RES/1457 dd. 24 January 2003, § 9.
- 154 F. Reyntjens, 'Briefing: Democratic Republic of Congo: Political Transition and Beyond', *op. cit.*, pp. 307-317.
- 155 Third UNSG Special Report on DRC Mission, *op. cit.*, § 119.
- 156 *Id.* Emphasis added.
- 157 *Id.*
- 158 *Id.*, § 15.

- 159 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."
- 160 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.
- 161 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.
- 162 S/RES/1542 dd. 30 April 2004, 7.I.a.
- 163 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 "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."
- 164 The National Transitional Government of Liberia was to 'scrupulously implement' the 2003 Accra Peace Agreement (cf. art. XXII.1).
- 165 *The Troisième accord complémentaire à l'accord politique de Ouagadougou dd. 28 November 2007, art. 4, affirms the "redéploiement de l'Administration et des services publics sur l'ensemble du territoire national."* This agreement also enumerates specific tasks of the transition, like the organisation of a fiscal and customs administration and DDR program. Immediately after assuming office, the Government of National Reconciliation was to undertake a DDR program, 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.*
- 166 In Iraq, the 2004 Transitional Administration Law foresaw a detailed transition procedure to be followed by domestic TA 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.
- 167 The 2007 Interim Constitution details the responsibilities of the TA. The Seven Point Agreement dd. 1 November 2011 includes a DDR program in its first part entitled 'Integration and rehabilitation of the Maoist combatants'.
- 168 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.

- 169 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).
- 170 The *Charte constitutionnelle* dd. 18 juillet 2013 provides, with reference to a ‘Feuille de route de la transition’ and a ‘chronogramme électoral’, how the TA 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.
- 171 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).
- 172 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, arts. 9-10.
- 173 S/RES/2009 dd. 16 September 2011, Preamble, § 11. Emphasis added.
- 174 *Id.*, § 12.
- 175 *Id.*, § 12.b.
- 176 At a European University Institute (EUI) conference in March 2013, the UN Special Representative to Libya, Ian Martin, insisted on the ‘local ownership’ of the post-conflict organisation in Libya, and stressed that the Libyan 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 EUI, ‘Libya in Transition, reflections by Ian Martin’, 8 March 2013. On file with author.
- 177 See art. 30 on p. 8, Part Three, Form of State Governance during the Transitional Stage.
- 178 *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 detriment 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, *op. cit.*, p. 50, § 99).

- 179 Including the Arab League, the EU, the GCC, the NATO, and the UN.
- 180 U.S. Dep't of State Press Release, Forth Meeting of the Libya Contact Group - Chair's Statement dd. 15 July 2011.
- 181 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."
- 182 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.
- 183 K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *Development in Practice*, vol. 15, no. 6, 2005, p. 747.
- 184 Paris Accords, 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."
- 185 *Id.*, Annex 5, art. 4.
- 186 *Id.*, art. 12.
- 187 SA Interim Constitution, Schedule 4.
- 188 V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1282.
- 189 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).
- 190 Arusha Agreement, Protocol II, Ch. II, 'Transitional Arrangements' (arts. 1 – 11).
- 191 *Id.*, Protocol II, Ch. I, 'Constitutional Principles of the Post-transition Constitution' (arts. 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).
- 192 Arusha Agreement, Protocol II, Ch. II, art. 22.8.d.

- 193 K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *op. cit.*, p. 751.
- 194 E. Afsah, A. Guhr, 'Afghanistan: Building a State to Keep the Peace', *op. cit.*, pp. 384-385.
- 195 2002 Pretoria Agreement, Part III.
- 196 J. Benomar, 'Constitution-Making After Conflict: Lessons for Iraq', *Journal of Democracy*, Volume 15, Number 2, April 2004, pp. 92-93.
- 197 TAL, Annex dd. 1 June 2004. Emphasis added.
- 198 S/RES/1546 dd. 8 June 2004, § 1.
- 199 S/RES/1546 dd. 8 June 2004, Preamble, § 3. See also S/RES/1511 dd. 16 October 2003.
- 200 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."
- 201 IDEA, 'Interim Constitutions in Post-Conflict Settings', Discussion Report, 4-5 December 2014,, p. 21, observation by A.-S. Jama.
- 202 A. Ainte, 'Somalia – Legitimacy of the Provisional Constitution', *Accords*, Issue 25, 2014, p. 60.
- 203 Constitutional Declaration dd. 3 August 2011, art. 30.
- 204 *Id.*, art. 4.
- 205 *Id.*, part II.
- 206 See further, C. Bell and J. Pospisil, 'Navigating Inclusion in Transitions from Conflict: The Formalised Political Unsettlement', *Journal of International Development*, 29:5, 2017; and *Navigating Inclusion in Peace Processes, Conciliation Resources*, March 2019. An entire chapter entitled 'The practice and discourse of inclusion' of the book *Transitional Governance under International Law* is furthermore dedicated to the analysis of inclusivity under international law and notably the principle of self-determination.
- 207 C. Bell and J. Pospisil, *ibid.*
- 208 See, for example, A. Sachs, 'South Africa's Unconstitutional Constitution: the Transition from Power to Lawful Power', *op. cit.*, p. 1253.
- 209 L. Brahimi, 'State-building in Crisis and Post-Conflict Countries', 7th Global Forum on Reinventing Government Building Trust in Government 26-29 June 2007, Vienna, Austria, 2007, p. 6. He added: "[e]ven the most extremist groups and individuals who did their damnest 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.*).

- 210 See the chapter on inclusion in *Transitional Governance under International Law*.
- 211 Accord sur les dispositions transitoires aux Comores, I. Principes.
- 212 Arusha Agreement, art. 7.
- 213 *Id.*, Protocol II, art. 15.13.
- 214 *Id.*, art. 15.16.
- 215 *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.
- 216 Arusha Agreement, Protocol II, art. 14.5.
- 217 *Id.*, Protocol II, Preamble, § 2.
- 218 S/PRST/2001/26 dd. 26 September 2001.
- 219 S/RES/1545 dd. 21 May 2004, Preamble, § 7.
- 220 S/RES/1577 dd. 1 December 2004, Preamble, § 5.
- 221 K. Papagianni, 'Power sharing, transitional governments and the role of mediation', Centre for Humanitarian Dialogue, Oslo Forum 2008, 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."
- 222 S/RES/2137 dd. 13 February 2014.
- 223 Chapter 1, Section A.1.
- 224 Bonn Agreement, Preamble, § 7. This provision was repeated word for word by the UNSC. S/RES/1383 dd. 6 December 2001, § 6.
- 225 Bonn Agreement, art. I.4.
- 226 S/RES/1378 dd. 14 November 2001, § 1.
- 227 M. Saul, *Popular Governance of Post-Conflict Reconstruction*, Cambridge University Press, 2014, p. 196.

- 228 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.
- 229 *Id.* For Johnson, "[i]n retrospect, Bonn should have attempted to draw in moderate Taliban elements and include them in the government" (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. 314). In the same sense, IDEA, 'Interim Constitutions in Post-Conflict Settings', *op. cit.*, p. 20, observation by B. Rubin.
- 230 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.
- 231 '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.
- 232 'Tillerson Open to Peace Talks With 'Moderate' Taliban', Foreign Policy, 23 October 2017.
- 233 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."
- 234 E. Afsah, A. Guhr, 'Afghanistan: Building a State to Keep the Peace', Max Planck Yearbook of United Nations Law, 9, 2005, p. 421.
- 235 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.
- 236 For Saul, "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).
- 237 C. McCool, 'The role of constitution-building processes in democratisation', *op. cit.*, p. 26.
- 238 M. Saul, *Popular Governance of Post-Conflict Reconstruction*, *op. cit.*, p. 158.

- 239 C. McCool, 'The role of constitution-building processes in democratisation', op. cit., p. 10.
- 240 *Ibid.*
- 241 ICG Asia Report no. 56, 'Afghanistan's Flawed Constitutional Process', 12 June 2003.
- 242 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."
- 243 K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', op. cit., p. 749.
- 244 S/RES/1419 dd. 26 June 2002, § 1.
- 245 J. A. Thier, 'The Making of a Constitution in Afghanistan', New York law school Review, Volume 51, 2006 2007, p. 567.
- 246 C. McCool, 'The role of constitution-building processes in democratisation', op. cit., p. 9.
- 247 S/RES/1419 dd. 26 June 2002, § 1.
- 248 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."
- 249 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) dd. 26 January 2004, p. 39.
- 250 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.
- 251 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."

- 252 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 organisations 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."
- 253 A. M. B. Mangu, 'The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter', *African Human Rights Law Journal*, Volume 3, Number 2, 2003, p. 252.
- 254 Pretoria Agreement, III.5.
- 255 Preamble at p. 3.
- 256 Preamble, § 8 at p. 3.
- 257 *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.
- 258 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."
- 259 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, pp. 123-125. Cf. also the Communiqué of the International Committee to support the Transition dd. 24 August 2004.
- 260 "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". 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', *op. cit.*, pp. 123-125. 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 entity have decided to temporarily 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 head*

*quarters 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."

- 261 2003 Accra Agreement, art. XVIII.2.a.
- 262 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."
- 263 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 EU, the League of Arab States, and the Organisation of the Islamic Conference.
- 264 Cf. Chairman's Summary of High Level Meeting on Somalia dd. 23 September 2011.
- 265 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."
- 266 K. Annan, N. Mousavizadeh, *Interventions – A Life in War and Peace*, Penguin Books, London, 2012, p. 356.
- 267 S/RES/1546 dd. 8 June 2004, § 1.
- 268 *Id.*, § 4.b.
- 269 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."
- 270 K. Papagianni, 'Power sharing, transitional governments and the role of mediation', *op. cit.*, p. 45.
- 271 V. C. Jackson, 'What's in a name?', *op. cit.*, p. 1275.
- 272 A. Arato, 'Post-Sovereign Constitution-Making and its Pathology in Iraq', *New York Law School Law Review* 51, 2007 2006, pp. 553-554.
- 273 A. Arato, 'Post-Sovereign Constitution-Making and its 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."

- 274 L. Brahimi, '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.
- 275 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 criticised 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.
- 276 IDEA, 'Interim Constitutions in Post-Conflict Settings', *op. cit.*, p. 19.
- 277 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 its Pathology in Iraq', *op. cit.*, p. 549.
- 278 *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."
- 279 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."
- 280 *Id.*, p. 755.
- 281 *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."
- 282 *Id.*, p. 754: "the recently appointed Constitutional Commission is composed only of members of the TNA and thus includes very few Sunni Arabs."
- 283 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."
- 284 K. Papagianni, 'Transitional Politics in Afghanistan and Iraq: Inclusion, Consultation, and Public Participation', *op. cit.*, p. 751.

- 285 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."
- 286 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.
- 287 'Kyrgys 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. But the declared intention it contains confirms the socialisation of inclusion as a requirement for TG.
- 288 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 criticise the legitimacy of the provisional government."
- 289 Founding Statement of the Interim Transitional National Council, on file, § 2.
- 290 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." CACHE LINK FOR DIGITAL: <https://web.archive.org/web/20130607172209/http://www.ntclibya.org/english/about/>
- 291 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.
- 292 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 at the European University Institute.
- 293 'The leader of the 1st 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.
- 294 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.
- 295 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. See also E. De Groof, 'First Things First: R2P Starts with Direct Negotiations', *The International Spectator*, Vol. 51, Issue 2, 2016.
- 296 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."

- 297 '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.
- 298 AU Peace and Security Council Communiqué dd. 26 August 2011, PSC/AHG/COMM.(CCXCI), § 3.
- 299 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.
- 300 *Id.*, § 2.
- 301 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*, Martinus Nijhoff Publishers, Leiden, Boston, 2013, p. 118.
- 302 H. Youssef, 'The Arab League and the Rule of Law' in IDEA, *Rule of Law and Constitution Building, The Role of Regional Organisations*, 2014, p. 43.
- 303 E. De Groof, 'First Things First: R2P Starts with Direct Negotiations', op. cit., pp. 30-48.
- 304 L. Plun, 'Libye, de la révolution au chaos', *Moyen-Orient*, nr. 25, Janvier-Mars 2015, p. 17: "[é]mergeant de territoires marginalisés, les Berbères –environ 10% de la population totale- et les Toubous Ouelque 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 territorialités spécifiques et de leurs structures politiques." See also p. 18: "le Conseil national de transition (CNT) formé dans la précipitation [...] a ou être une interface efficace a 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."
- 305 'Libya revokes bill which banned Gaddafi-era officials from office', BBC, 2 February 2015.
- 306 *Id.*
- 307 Implementation Mechanism, Part III.
- 308 *Id.*, Part IV.
- 309 *Id.*, § 20.
- 310 The 2011 GCC Agreement, art. 26.
- 311 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."

- 312 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.
- 313 S/RES/2014 dd. 21 October 2011. Emphasis added. See also S/RES/2051 dd. 12 June 2012.
- 314 S/RES/2051 dd. 12 June 2012.
- 315 S/RES/2051 dd. 12 June 2012.
- 316 S/RES/2140 dd. 26 February 2014.
- 317 F. Al-Muslimi, 'Violence in Yemen overshadows National Dialogue', Al-Monitor, January 2014.
- 318 P. B. Holzapfel, 'Yemen's Transition Process: Between Fragmentation and Transformation', United States Institute of Peace, 2014, p. 6.
- 319 Holzapfel describes in the following terms how the transition gradually came to include not only the Houthis' 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 organisations, 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.
- 320 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."
- 321 *Id.*, § 5. Cf. also S/RES/2201 dd. 15 February 2015, § 5.
- 322 S/RES/2201 dd. 15 February 2015, Preamble.
- 323 S/RES/2216 dd. 14 April 2015, § 1.
- 324 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."

325 S/RES/2419 of 6 June 2018, Preamble, § 11.

326 Arab League Council Resolution 7444 dd. 22 January 2012 (S/2012/71), 'Elements of the Arab plan to resolve the Syrian crisis', § 4.a.

327 *Id.*, § 6.

328 S/2012/77 dd. 4 February 2012.

329 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."

330 *Id.*, § 5.

331 E. O'Bagy, 'Syria's Political opposition', Middle East Security Report 4, Institute for the study of war, April 2012, 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.

332 *Id.*, p. 9.

333 E. O'Bagy, 'Syria's Political opposition', p. 6. Cf. the *communiqué de presse* dd. 28 May 2014, on file: "[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 voute pour une sortie de crise saine et crédible."

334 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."

335 S/RES/2043 dd. 21 April 2012.

336 See 'Action Group for Syria Final Communiqué' dd. 30 June 2012. See second part. Annexed to UNSC draft resolution S/2012/538.

337 *Id.*

338 See 'Group of Friends of the Syrian People: 3rd 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."

- 339 '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.
- 340 'Kerry Suggests There Is a Place for Assad in Syria Talks', New York Times, 15 March 2015.
- 341 'Vienna talks: Syrian regime and opposition to meet, collaborate before the new year', Albawaba news, 16 November 2015.
- 342 'Syrian National Dialogue Congress to be held in Sochi on November 18', TASS Russian News Agency, 31 October 2017. LINK FOR DIGITAL: <https://tass.com/world/97346>
- 343 'The Syrian Conundrum: a Shared end goal, but how to get there?', The Washington Post, 25 February 2018.
- 344 '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."
- 345 S/RES/2103 dd. 22 May 2013.
- 346 S/PRST/2013/19 dd. 9 December 2013.
- 347 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).
- 348 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 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'.
- 349 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[ed] the cooperation between UNIOGBIS, National authorities and civil society organisations 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).
- 350 *Déclaration de N'Djamena*, § 3.

- 351 Informal meeting of the Central African Republic configuration of the PBC, Chairman's Summary, 16 May 2013, § 2. Emphasis added.
- 352 Cf. annexes for list of relevant resolutions.
- 353 Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, § 9.
- 354 Chairman's Summary, 16 May 2013, § 6.
- 355 European Parliament resolution of 17 January 2013 on the situation in the Central African Republic (2013/2514(RSP)).
- 356 '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).
- 357 S/RES/2187 dd. 25 November 2014.
- 358 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 then US Ambassador to the UN. Cf. also the caveat about socialised practices expressed at the beginning of Part III.
- 359 2014 *Charte de la Transition*, Preamble.
- 360 Id., art. 1: "*la présente Charte consacre les valeurs suivantes pour guider la transition: [...] l'inclusion.*"
- 361 Id., art. 12: "*le Conseil national de la transition [...] prend en compte les jeunes et les femmes.*"
- 362 'ECOWAS names contact group on Burkina Faso', 7 November 2014.
- 363 UN News Centre, 'International community 'will not tolerate' obstacles to Burkina Faso transition, says UN political chief', 4 February 2015.
- 364 Agreement on the Settlement of Crisis in Ukraine' dd. 21 February 2014, art. 1.
- 365 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.
- 366 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. Strashheim, 'Interim Governments: Short-Lived Institutions for Long-Lasting Peace', GIGA Focus, nr. 9, 2014, p. 6.
- 367 722/2013, '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.

368 Opinion no. 766/2014, § 73.

369 Constitutional Charter for the 2019 Transitional Period, 4 August 2019, Chapter 4, § 10.b.

370 *Id.*, Chapter 1, § 7.

371 *Id.*, Chapter 1, § 8.

372 For policy texts, see for example the Briefing Note '[Preventing Violence through Inclusion](#)', Inclusive Peace & Transition Initiative, January 2018. In relation to peace processes, Conciliation Resources, PSRP, Accord, '[Navigating Inclusion in peace processes](#)', Issue 28, March 2019: "There is a broad global consensus that inclusion matters in peace processes." Cf. also the nuanced study '[Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict](#)', World Bank, United Nations, Washington D.C., 2018: "the importance of nationally led, inclusive processes came up *continually, across many different contexts*." Own emphasis. LINKS FOR DIGITAL:  
 1. <https://www.inclusivepeace.org/sites/default/files/IPTI-Briefing-Preventing-Violence-through-Inclusion.pdf>  
 2. [http://www.politicalsettlements.org/wp-content/uploads/2019/02/Accord28\\_NavigatingInclusionInPeaceProcesses-WEBVERSION.pdf](http://www.politicalsettlements.org/wp-content/uploads/2019/02/Accord28_NavigatingInclusionInPeaceProcesses-WEBVERSION.pdf) 3. <https://openknowledge.worldbank.org/handle/10986/28337>

373 IDEA, *Constitution Building: A Global Review* (2013), 2014, p. 5.

374 For the UK position, cf. for example DFID, *Eliminating World Poverty: Building our Common Future*, Cm 7656, July 2009, p. 73, where priority is given to supporting inclusive political settlements. Cf. also DFID, *Building Peaceful States and Societies*, A DFID Practice Paper, 2010; Department for International Development, Foreign and Commonwealth Office, Ministry of Defence, *Building Stability Overseas Strategy*, July 2011.

375 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.

376 *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 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."

377 For a description of how inclusivity was put into practice in the transition 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."

- 378 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."
- 379 S/PV.4903 (Resumption 1) dd. 26 January 2004, p. 4.
- 380 For the impact this has on a novel understanding of the principle of self-determination and the notion of 'people', see the forthcoming book *Transitional Governance under International Law*.
- 381 S/PV.4903 (Resumption 1) dd. 26 January 2004 p. 40.
- 382 V. Buadromo, 'Fiji, The constitutional process: a view from the Fiji Women's Rights Movement'.
- 383 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 organisations, but also, and above all, women. We cannot overemphasise 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."
- 384 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.*
- 385 Cf., for example, with regard to the inclusion of civil society in transitions, EU Regulation 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, Preamble, § 6.
- 386 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.
- 387 S/PV.4903 dd. 26 January 2004.
- 388 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. 166.
- 389 S/PV.4903 dd. 26 January 2004 p. 26: "[e]very process of national reconciliation must, however, be participative, must enjoy popular adherence."
- 390 *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."

- 391 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."
- 392 *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."
- 393 *Id.*, p. 28: "reconciliation cannot be imposed upon a society from the outside."
- 394 *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."
- 395 *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."
- 396 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."
- 397 *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."
- 398 *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."
- 399 '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.
- 400 *Id.*, art. 9.
- 401 K. Ainley, 'Transitional justice in Cambodia: the coincidence of power and principle', in R. Jeffery (ed.), *Transitional justice in the Asia-Pacific*, Cambridge University Press, pp. 125-156.
- 402 S/RES/955 dd. 8 November 1994, § 1.

- 403 J. Fierens, 'Gacaca Courts: Between Fantasy and Reality', *Journal of International Criminal Justice*, 3, 2005, p. 902.
- 404 R. Slye, 'Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission', *Michigan Journal of International Law*, Volume 20, Issue 2, 1999, p. 267.
- 405 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, arts. 7.18.a & 7.18.b.
- 406 *Id.*, art. 8. Also see, in the same agreement, Protocol II, art. 18.2.
- 407 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.
- 408 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.
- 409 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."
- 410 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.
- 411 S/RES/1545 dd. 21 May 2004, Preamble, § 9.
- 412 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.
- 413 The OHCHR 'Rapport des consultations nationales sur la mise en place des mécanismes de justice de transition au Burundi' dd. 20 April 2010.
- 414 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.
- 415 S/RES/1959 dd. 16 December 2010, § 13.
- 416 S/RES/2137 dd. 13 February 2014. Cf. also § 15.

- 417 UN Peacebuilding Commission Chair's visit to Burundi and to other stakeholders (21-31 May 2014), report dd. 3 June 2014, p. 3.
- 418 A. N. Nadery, 'Peace or Justice? Transitional Justice in Afghanistan', *International Journal of Transitional Justice* 1, no. 1, March 1, 2007.
- 419 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 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.
- 420 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.
- 421 L. Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide*, Oxford and Portland, Oregon, 2008, p. 133.
- 422 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.
- 423 '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."
- 424 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."
- 425 S/RES/1493 dd. 28 July 2003.
- 426 Third UNSG Special Report on DRC Mission, op. cit., § 111.
- 427 S/RES/1592 dd. 30 March 2005.

- 428 N. Ansorg, F. Haass, A. Mehler, J. Strasheim, 'Institutionelle Reformen zur Friedenskonsolidierung', GIGA Focus, Nr. 6, 2012, 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 Machtbefugnisse, um sich persönlich zu bereichern und eine grundlegende Justizreform zu blockieren." [...] Die Besetzung staatlicher Machtpositionen mit Vertretern ehemaliger Kriegsparteien bei spielsweise 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 begehen sowohl Rebellen als auch die Regierung Kriegsverbrechen. Daher 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."
- 429 S/2008/183 dd. 19 March 2008, §§ 48-49.
- 430 Coalition Provisional Authority Order No. 48.
- 431 For a discussion, 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.
- 432 For example, the Islah Reparations Project.
- 433 TAL, art. 58.
- 434 'TRC has been formed to restore justice system, reconcile society', Interview with Surya Kiran Gurung, Kathmandu Post, 16 February 2015.
- 435 J. R. Quinn, 'Haiti's Failed Truth Commission: Lessons in Transitional Justice', *Journal of Human Rights*, 8:3, 2009, 265-281.
- 436 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.
- 437 S/RES/2162 dd. 25 June 2014.
- 438 *Id.*
- 439 *Id.*
- 440 S/RES/2153 dd. 29 April 2014, § 25.

- 441 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."
- 442 Cf. for example S/RES/2162 dd. 25 June 2014.
- 443 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.
- 444 Final communiqué of the Extraordinary Summit ECOWAS heads of state and government dd. 10/11 January 2009, § 13.6.
- 445 NTC Executive Bureau, 'Summary of the second meeting of the transitional Cabinet', 27 November 2011, op. cit., p. 50, § 99.
- 446 See the *Report dd. 2 March 2012* of the International Commission of Inquiry on Libya, §§ 108 – 109.
- 447 AU Peace and Security Council Communiqué dd. 26 August 2011, PSC/AHG/COMM.(CCXCI), § 3.
- 448 S/RES/1970 dd. 26 February 2011, §§ 4-8. See the *Meeting Outcomes of the Interim National Council* held on 19 March 2011, National Transitional Council. 19 March 2011 (on file), decision 1.3. Although the TNC "reiterated their support for the ICC and their interest to work cooperatively together to ensure justice for Libya's victims" (Second Report of the Prosecutor of the International Criminal Court to the UNSC pursuant to UNSCR 1970 dd. 2 November 2011), the Prosecutor v. Saif Al-Islam Gaddafi case was later found inadmissible.
- 449 See the 26th 'Governing Principle' following the Preamble.
- 450 Annex 2, Priorities of the Government of National Accord. See second political priority.
- 451 S/RES/2051 dd. 12 June 2012, § 10.
- 452 *Id.*, § 3.c.
- 453 S/RES/2051 dd. 12 June 2012, § 7.
- 454 S/RES/2201 dd. 15 February 2015, Preamble.

- 455 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.”
- 456 Conclusions of the fourth meeting of the International Contact Group on the Central African Republic dd. 21 March 2014, § 19.
- 457 “[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.
- 458 See ‘*Avant-Projet de la charte de la transition*’ dd. 9 November 2014, arts. 17 & 18.
- 459 Minsk Agreement dd. 12 February 2015, art. 5.
- 460 S/RES/2203 dd. 18 February 2015, Preamble.
- 461 ‘[Gambia concludes draft bill on truth commission](#)’, TCTJ, 24 April 2017, consulted on 8 April 2018. LINK FOR DIGITAL: <https://www.ictj.org/news/gambia-concludes-draft-bill-truth-commission>
- 462 This round table was attended by the Belgian authorities. At the time of writing, the ‘Constitutional Review Commission to draft and guide the process of promulgating a new Constitution for The Gambia’ (cf. the [Constitutional Review Commission Bill](#) of December 2017) is being set up to guide the transition. LINK FOR DIGITAL: <http://www.icnl.org/research/library/files/Gambia/constrev.pdf>
- 463 Constitutional Charter for the 2019 Transitional Period, 4 August 2019, Chapter 15, § 67.g.
- 464 R.-J. Dupuy, ‘*Coutume sage et coutume sauvage*’ in C. E. Rousseau, *La communauté internationale, Mélanges offerts à Charles Rousseau*, 1974, p. 75.

## About Us

The Political Settlements Research Programme (PSRP) is centrally concerned with how political settlements can be made both more stable, and more inclusive of those affected by them beyond political elites. In particular, the programme examines the relationship between stability and inclusion, sometimes understood as a relationship between peace-making and justice.

The programme is addressing three broad research questions relating to political settlements:

1. How do different types of political settlements emerge, and what are the actors, institutions, resources, and practices that shape them?
2. How can political settlements be improved by internally-driven initiatives, including the impact of gender-inclusive processes and the rule of law institutions?
3. How, and with what interventions, can external actors change political settlements?

The Global Justice Academy at The University of Edinburgh is the lead organisation. PSRP partners include: Austrian Study Centre for Peace and Conflict Resolution (ASPR), Conciliation Resources (CR), International IDEA, The Institute for Security Studies (ISS), The Rift Valley Institute (RVI), and the Transitional Justice Institute (TJI, Ulster University).

Find out more at: [www.politicalsettlements.org](http://www.politicalsettlements.org)

