Emmanuel H. D. De Groof and Micha Wiebusch (eds), **International Law and Transitional Governance: Critical Perspectives**, Routledge, New York 2020, 186 pages, GBP 36.99, ISBN 9781032236414

The war in Ukraine has not only brought back old Cold War divisions; it has also brought back the belief in the remedial effects of international law. International law is once more handed the task of facilitating accountability and rebuilding.[1] International legal institutions and actors are being mobilised for solutions that promise governance and accountability in and after conflict.

The memory of international law's failures and limitations in this department is short. One could even say that the memory does not even stretch back as far as the summer of 2021, when the Taliban took control over Afghanistan, forcing the occupying forces (the USA and the UK, as well as the relevant international actors) to leave. This defeat of external and international actors had the potential to shatter the illusion that interveners or occupiers taking on the mantle of ‚international actors' have a significant role to play in what was considered by them to be a newer and better form of transitional governance. The 'new' model had promised a 'light footprint' of international actors in a domestically-driven process.

The contributions in *International Law and Transitional Governance: Critical Perspectives* were written at a time when there was a widespread belief that this 'light footprint' might not only work for Afghanistan, but that it could also be applied to other post-conflict states as a 'model' (2). References to the 'light footprint' model should not prima facie be held against the editors and contributors, given that the book was published before the events in Afghanistan. With hindsight one is mistress of the world. Rather, it makes the thinking-together about international law and its limitations in transitional governance more urgent. In other words, with both the 'heavy' and the 'light' footprint approach potentially delegitimised, but the demand for transitional governance remaining, this is a timely and necessary book. The sharpness of some of these critiques comes to the fore in excellent contributions by Zinaida Miller and Vasuki Nesiah, which are (mis?)placed at the end of the collection. A special mention must also be given to the Preface penned by South African lawyer, activist, and writer Albie Sachs, who sets the tone for a critical perspective, by describing transitional arrangements in conflict-affected states as 'possibly the least transportable of all political mechanisms' (xx).

I highlight two points that seek to deepen the conversation on the critique of comparative constitutional law and international law regarding transitional governance. The editors, Emmanuel H. D. De Groof and Micha Wiebusch, state that in their enquiry of international law and transitional governance, 'the journey becomes the destination' (1); I

1 See the suggestions for a Special Tribunal for Crimes of Aggression to investigate international crimes committed by Russian leaders and military commanders, and support for investigations into the war in Ukraine by the International Criminal Court and the International Court of Justice.

pick up this metaphor of the journey in my two points. First, I reference the collection's point of departure (namely the framing of the project); and second, I reference transitional governance's compass (meaning the aftermath of Afghanistan no longer providing the direction of travel).

We begin at the point of departure, namely the editorial decision on the framing of transitional governance. This is the meeting point between the constitutional law and international law elements in the volume. Before reading this volume, I admit to having had a fairly general notion of transitional governance; something along the lines of 'institutional efforts of rebuilding during or after conflict'. The editors have a rather longer definition: 'public power exercised by interim governments or other forms of transitional authority governed by transitional legal regulations (such as interim constitutions or transitional charters) in the context of conflict or large-scale political unrest.' (1). The legal link to transitional governance is made explicit through constitutionalism. In their chapter, Christine Bell and Robert A. Forster claim that transitional governance arrangements are always linked to the breakdown or renewal of constitutional processes. In their co-authored chapter, the editors state that [t]ransitional governance is 'paired with efforts to "re-constitutionalize" the state' (7). To define transitional governance as inextricably linked to constitutionalism, however, has potentially exclusionary consequences. Understanding transitional governance as necessarily involving a constitutional process could betray an assumption that transitions can only be truly *read* as 'governance' if they take on a constitutional form.

There is scope here, then, to question what type of constitutions are imagined and whether these are constitutions that follow the liberal legal form familiar from Western political history and theory. It is well known that Western constitutionalism comes with its own (colonial) baggage and propensity for supporting exploitative liberal economic policies. Sumit Bisarya gestures towards the contemporary dynamics of constitutional 'transportability', to use Sachs's term, with reference to 'a cottage industry of external constitution-making advice' (59). However, there is more one could navigate in terms of constitutionalism and transitional governance from a colonial perspective. Constitutions of the 18th Century were not only a means of civilising the colonised; constitutions were often themselves technologies of exclusion.[2] Nesiah reminds us in her powerful chapter of the elephant in the room of transitional governance, namely that it has failed to foreground the transition from colonialism (139). Indeed, forms of colonialism and settler-colonialism continue through constitutionalism. Some post-colonial states deploy their own constitutions for colonial ends. One might think here of the USA, India, or Israel. These states cemented their independence through a constitution and yet mobilise and legalise discrimination and oppression through constitutional means: The USA regarding its Indigenous people, India regarding Kashmir, and Israel as settler colony through the occupation of Palestine. The

2 See for example *Miranda Frances Spieler*, The Legal Structure of Colonial Rule during the French Revolution, The William and Mary Quarterly 66-2 (2009), p. 365-408.

question that the editors' definition of transitional governance raises is whether it allows for non-constitutional forms of Indigenous self-determination? And if not, whether this excludes these groups from transitioning from occupation?

Let us move to the metaphor of the compass. Arguably, with the failure of the internationalised transitional governance mechanisms in Afghanistan, the compass employed for the journey of the past two decades is damaged. In the volume discussed here, the 'light footprint' approach devised for Afghanistan, and deemed transportable to other conflict and post-conflict spaces, is described as the newer, and also mostly 'better' model. The editors and contributors stress that transitional governance is to be understood as '*formally domestic*' (13 emphasis in original), meaning that political authority remains reserved for the favoured domestic actors (13).[3]. The insistence on this model derives mostly from the delegitimization of international territorial administration (ITA). ITAs in East Timor and Kosovo were critiqued by some as cost ineffective,[4] and by others as the West's *mission civilisatrice*.[5] The compass engaged in the journey was employed to guide the 'directional shift from ITA to domestic transitional governance' (14).

Both the domestic and the international run risk of being idolised in this binary. For example, Noam Wiener references the 'increased internal legitimacy that domestic transitional governments may enjoy' (84). Matthew Saul does this work for international law, explaining that it has a stabilising effect during the transitional period, 'mediating the movement from the political and legal structures of one regime to another.' (95). He goes on to state that the UN system can act as a guide to the values likely to be relevant to both domestic and external/international audiences of transitional authorities (97). In her chapter, Miller refreshingly warns against the traps of this binary of exaggerated attention to the local that obscures systemic problems on the one hand, and on the other the trap of creating blueprints that ignore the importance of context. (115).

So, what happens when the newer and 'better' model itself proves to be faulty? The Taliban were able to secure governance over Afghanistan, essentially winning the war between it and what it deemed as Western occupying powers, not with but *against* the external and international actors. They rejected the international 'support'. Day and Malone presciently set out the risks involved in domestically-driven, internationally-supported transitional governance, including putting in place viable exit strategies (19). However, with the colossal failure of the 'light footprint' approach in Afghanistan, and the regressive politics of the Taliban in terms of gender, the question remains whether this model too has been delegitimised, and if so, where this leaves international institutions and actors? Due to the short-term memory of failures, it appears crucial to not focus all scholarly efforts

3 Quoting *Matthew Saul*, Popular Governance of Post-Conflict Reconstruction, Cambridge 2014, p. 6-7.

4 *Simon Chesterman*, You, the People: the United Nations, Transitional Administration and State-building, Oxford 2004, p. 3.

5 *Roland Paris*, International Peacebuilding and the 'mission civilisatrice', Review of International Studies 28-4 (2002).

on highlighting the problems with the Taliban regime, however grave. At the very least, the compass should be taken apart and its constitutive parts examined for faults. Ideally, the destruction of the compass can prompt a focus on accountability and reparations – not of the harms caused through conflict or the transitioning governance structures, but harms caused by the international actors themselves (Miller, 126). Here it becomes crucial to consider the evasions employed through the 'transitional' moniker. Or, as Miller states 'the work that "temporariness" does in maintaining long-term rule.' (123). Such a focus on accountability and reparations of the international bodies and actors involved in transitional governance would require a rendering explicit of the colonial pasts as 'an ever-present co-traveler of postcolonial futures (Nesiah 145).'

The collection edited by De Groof and Wiebusch is a key resource for facilitating discussions on the future of transitional governance and international law. It provides for an excellent overview of the field and a powerful critical stimulus to navigate a change of direction. This critical stimulus can be particularly fruitful for questions concerning the remedial role of international law and comparative constitutionalism in the war in Ukraine. For a critical reader, this may include drawing on a longer-term memory of the disciplines' failures when it comes to accountability and rebuilding. For the event that a critical reader would like to read from cover to cover, I recommend beginning with the back cover, specifically the final substantial contribution (Nesiah) and reading in reverse order.

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