

Introduction

Transitional Governance Today

Of regime transitions there is no end. Since time began, constitutions and institutions of states, empires or other political organisations have been profoundly modified. History and legends are replete with instances of interim governance, broadly understood.¹ These range, to give random examples spanning three continents and two millennia, from Numa Pompilius' one-year interregnum after Romulus' death in 717 BC, the Scythian interregnum in Median dynasty history between 653 to 625 BC bridging the reigns of Phraortes and Cyaxares in Persia, and the Ottoman Interregnum (1402–3), to the interregnum of the Kingdom of Loango in the basin of the Kouilou and Niari rivers (1786).

Historically, transitional governance ('TG') concentrated mainly on regime succession. During the twentieth century the function of interim governance diversified. Throughout that century, interim institutions were created to deal not only with matters of regime or personal succession² but also to overthrow or restore political regimes,³ to resist foreign occupation⁴ or protest against international border settlements,⁵

¹ Historically, interregnums have seldom been studied from an international legal perspective. In one paragraph entitled 'Ministers sent during an interregnum by the nation itself or by regents', Vattel briefly mentions that diplomats appointed during an interregnum have the same rights as those appointed outside of such context. E. de Vattel, *Le Droit Des Gens, Ou, Principes de La Loi Naturelle, Appliqués À La Conduite et Aux Affaires Des Nations et Des Souverains*, W. S. Hein, 1995, p. 62.

² 1917 Russian Provisional Government (Russian Republic as transition between Russian Empire and the Russian Federation); 1944–50 Regency Prince Karel of Belgium (legal impossibility of King Leopold III to rule); 1989–91 provisional governments in the context of the fall of communism.

³ 1912 Chinese provisional government (Xinhai Revolution and overthrow imperial dynasty).

⁴ 1919–48 Provisional Government of Republic of Korea (resistance against Japanese empire); 1944–6 Gouvernement provisoire de la République française (resistance against German occupation).

⁵ 1913 Provisional Government of Western Thrace (protest against border settlement of the 1913 Treaties of Bucharest and Constantinople); 1914 Autonomous Republic of Northern Epirus (protest against Protocol of Florence to the 1913 Treaty of London).

to struggle against domestic repression,⁶ to strive for independence⁷ or to indirectly control foreign territory.⁸

After 1989, the context, nature and function of TG changed. It became increasingly dissociated from decolonisation, secession or dissolution processes, and emerged more frequently in the context of non-international armed conflicts.⁹ It became a process whereby transitional authorities ('TA') introduce a constitutional transformation on the basis of interim laws. TG furthermore became an international project, and one with formidable ambitions: ending war, conflict or crisis by reconfiguring the state order. This model attracted international attention, notably from the UN Security Council, and became a playing field of choice in international politics. Also without recourse to armed force, international actors could impact a state apparatus – through state renaissance.

Against this background, this book analyses how international law – as it currently stands and develops – applies to TG. As Roscoe Pound famously said, *the law must be stable, and yet it cannot stand still*.¹⁰ The law applicable to TG, too, stands on firm grounds, yet cannot stand still. For ease of reference, the words *ius in interregno* will refer to

⁶ 1915–18 Armenian 'Republic of Van' (resistance against Ottoman rule during Russian occupation).

⁷ 1915 Nationalist Provisional Government of India (independence from British rule); 1918 Estonian Provisional Government (independence from Russian Federation/German occupation); 1918 Latvian Provisional Government (independence from Russian Federation/German occupation); 1922 Provisional Government of Ireland (transition towards independence from Great Britain after Anglo-Irish Treaty); 1946–7 Interim government of India (decolonisation); 1948–9 Provisional Government of Israel (proclamation new state); 1954–62 Provisional Government Algerian Republic (decolonisation); 1971–2 Provisional Government of the People's Republic of Bangladesh (independence from Pakistan).

⁸ 1937–40 Provisional Government of the Republic of China (vassal government of Japanese Empire).

⁹ 'Most civil wars today end in negotiated settlements, and in most instances an essential part of such agreements is agreement on a defined political pathway through which a transitional process to consolidate peace is to unfold. These transition paths often feature the formation of transitional governments, sometimes constitution-making processes, and, at some point, an electoral process and event to give post-war governance a new sense of legitimacy. The transition sequences and institutional choices made in war-settlement negotiations often determine the nature and timing of initial post-war elections; in turn, these electoral processes deeply affect the nature of the state that emerges for years to follow.' T. D. Sisk, 'Elections and Statebuilding after Civil War, Lurching toward Legitimacy' in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, Routledge, 2013, p. 259.

¹⁰ R. Pound, *Interpretations of Legal History*, Cambridge University Press, 1923, p. 1.

international law, with both stable and evolving components, applicable to TG. TG is increasingly subject to regulation. This is undoubtedly so on the domestic legal level. Domestic laws provide much detail as to how TG must be executed. The objective of domestic laws and post-sovereign (staged) constitution-making¹¹ is to ‘avoid the legal and institutional state of nature’¹² during transitions. I will argue that, for the better or for the worse, international law increasingly guides and complements domestic laws in this endeavour.

The portrayal of the interregnum as a legal and institutional vacuum has always been a misrepresentation. This is likely to be even more so in the future unless there will be a major reversal of the practices and beliefs increasingly associated to TG today. Absent such a reversal, the vision expressed in 1920, more than a century ago, by the International Committee of Jurists that the role of international law remains relative in times of state transformation,¹³ will need to be strongly nuanced.

In the following lines, I will detail how post-Cold War TG differs from previous forms of TG (Section A), detail the scope of this book (Section B) and present its argument: there is no absolute freedom in times of transition (Section C).

A Contemporary Transitional Governance

This book focuses on the period during which a state’s constitution and institutions are held in abeyance, especially in the context of an armed conflict, or of a threat to international peace and security. This period will be called the *transitional period* or *interregnum*.

A *transition*, generally, refers to the renaissance of a state when its constitution and institutions are overhauled. In more detail, it concerns (1) the transformation of a state’s regime, understood as ‘the institutional structure of the state and government’¹⁴ (2) by non-constitutional means,

¹¹ A. Arato, *Constitution Making under Occupation*, Columbia University Press, 2009; A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *New York Law School Law Review*, Vol. 51, 2006–7, pp. 536–55.

¹² A. Arato, ‘Post-Sovereign Constitution-Making and Its Pathology in Iraq’, *op. cit.*, p. 541.

¹³ Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands Question, October, 1920.

¹⁴ 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*, *op. cit.*

(3) on the basis of legal instruments or of texts aspiring to such status, (4) regardless of their form (international agreements,¹⁵ domestic intra-state agreements,¹⁶ interim or transitional constitutions,¹⁷ domestic/unilateral acts or declarations¹⁸ or a combination thereof), (5) and regardless of their consensual or oppositional origin.

In law, the word transition is frequently used in the field of transitional justice ('TJ'). TJ examines how society (best) deals with questions of individual and societal responsibility after widescale violent conflict. In this book, the term transition will be detached from the TJ literature. Furthermore, a transition does not specifically refer to a 'market transition', a 'security transition' or even to the democratic transition paradigm, which was declared moribund in the wake of the millennium turn.¹⁹

TG or interim rule refers to public authority exercised during the interregnum. More accurately, TG refers to the exercise of public powers *ad interim*, including in relation to staged constitution-making procedures.²⁰ Since the end of the Cold War, the international community increasingly supports TG, often with the declared intention to bring peace and security in conflict-riven states. This model has become particularly popular after the acclaimed South African two-staged transition from apartheid to post-apartheid (1994–7), based on the 1994 interim constitution.²¹

¹⁵ E.g. the Sun City Agreement of 19 April 2002 and the Pretoria Agreement of 16 December 2002 regarding the transition in the DRC.

¹⁶ E.g. the Bonn Agreement of 5 December 2001 for Afghanistan, the Arusha agreement of 28 August 2000 for Burundi, but also the Accra Accord of 17 June 2003 for Liberia, the Lomé Accord of 7 July 1999 for Sierra Leone, and the Abuja Accord of 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.

¹⁷ E.g. the Charte de la Transition of 13 November 2014 for Burkina Faso or the Interim Constitution of 27 April 1994 for South Africa.

¹⁸ E.g. the Constitutional Declaration of 3 August 2011 for Libya.

¹⁹ T. Carothers, 'The End of the Transition Paradigm', *Journal of Democracy* 13, no. 1, 2002, pp. 5–21.

²⁰ IDEA, 'Constitutionbuilding after Conflict: External Support to a Sovereign process', Policy Paper, May 2011, p. 11: 'constitution building is often *one element in a larger process of change* that affects the constitution'. Own emphasis.

²¹ The intellectual ownership of this model can probably be attributed to the Constitutional Committee of the African National Conference, and to Suzuki Yasuzo. See A. Sachs, 'South Africa's Unconstitutional Constitution: the Transition from Power to Lawful Power', *Saint Louis University Law Journal*, Vol. 41, 1996–7, pp. 1249–58, and p. 1255. See, for the Japanese origin, S. B. Hamano, 'Incomplete Revolutions and Not so Alien

Considering TG to be fruitful or not depends of course on the yardsticks used to measure success.²² In several cases, TG has failed under any standards. At the time of writing, the disillusioning situation in Afghanistan, DRC, Iraq, Libya, South Sudan, and Yemen are self-explanatory. TA are often set up in so-called anocracies, that is countries where power is not firmly vested in institutions but spread among competing elite groups.²³ The result is that ‘transitions are often more unstable and insecure than even the preceding periods of conflict’.²⁴ The combination of fragile TA and competition for power can be a recipe for failure. In spite of past failures, at the time of writing some commentators (and plenty of citizens) were calling for transitions in Algeria, Sudan and Venezuela. The conviction that TG can bring peace and stability has received a blow in expert circles but remains nevertheless deeply entrenched in legal culture, and is now being mainstreamed. This is what I will call the ‘peace-through-transition paradigm’.

Since 1994, international assistance to TG has been deployed in various states. After the turn of the millennium, we are witnessing a sharp increase of internationally assisted TG. In its basic structure, TG was replicated *inter alia* in Afghanistan (2001); Burkina Faso (2014); Burundi (1998); Cambodia (1991); Central African Republic (2013); Comoros (2001); Côte d’Ivoire (2007); the DRC (2002); Guinea (2010); Guinea-Bissau (2012); Iraq (2004); Kyrgyzstan (2010); Liberia (2003); Libya (2011); Mali (2012); Nepal (2006); Rwanda (1994); Sierra Leone (1999); Somalia (2004); Sudan (2005); and Ukraine (2014).²⁵ At the time of writing, a transition was still being considered for war-shattered

Transplants: the Japanese Constitution and Human Rights’, *University of Pennsylvania Journal of Constitutional Law*, Vol. 1, no. 3, 1998–9, p. 428.

²² For a discussion, see also H. Ludsin, ‘Peacemaking and Constitution-Drafting: A Dysfunctional Marriage’, *University of Pennsylvania Journal of International Law*, Vol. 33, 2011, p. 252.

²³ This is the definition by Systemic Peace: ‘[a]lso included in the anocracy category in this treatment are countries that are administered by transitional governments’; ‘Research indicates that anocracies have been *highly unstable and transitory regimes*, with over fifty percent experiencing a major regime change within five years and over seventy percent within ten years’. M. G. Marshall, B. R. Cole, Center for Systemic Peace, ‘Global Report 2014, Conflict, Governance, and State Fragility’, p. 21. Own emphasis. In the same sense, K. Guttieri, J. Piombo (eds.), *Interim Governments – Institutional Bridges to Peace and Democracy?*, United States Institute of Peace Press, 2007, p. 4.

²⁴ C. L. Sriram, M.-J. Zahar, ‘The Perils of Power-Sharing: Africa and Beyond’, *Africa Spectrum*, Vol. 44, no. 3, 2009, pp. 11–39.

²⁵ See Table 3.1.

Syria.²⁶ Since 2015, opposition leaders in Burundi have regarded TG as a way out of the lingering crisis caused by the President's third term in office. In Venezuela, the opposition leader tried to trigger a transition during Spring 2019 to radically change the political landscape, and to end a socioeconomic crisis. In Sudan, the military and the opposition reached an agreement about a transition early July 2019 after widespread protests about the political and socioeconomic situation there.

Contemporary TG mostly exhibits four characteristics which we shall discuss in turn. First, its perceived instrumentality builds on the widespread peace-through-transition paradigm: TG copes with a situation of armed conflict, threat against international peace and security or serious crisis (1). TG is furthermore self-regulated and provisional: the interregnum is guided by a set of domestically valid secondary norms and institutions (2). Also, TG is non-constitutional as it contradicts, sidesteps or (partly) overrules existing constitutional rules and procedures (3). Finally, it is domestic as it primarily befalls on national actors to pursue TG (4). These characteristics distinguish contemporary TG from prior forms of interim governance (5).

1 *Peace through Transition*

In our day and age, armed conflicts or threats to peace and security are commonly addressed – successfully or in vain – by the triggering of a domestic transition resulting in the wholesale constitutional and institutional reconfiguration of a country, that is a state *renaissance* in the literal sense of a *rebirth*. The peace-through-transition paradigm posits that state reconfiguration is a means of coping with violent conflict. It is nurtured by a socialised discursive practice according to which the redefinition of the social contract is an effective conflict resolution mechanism. Consolidated after the South African transition, this conviction appears for example from official statements with regard to Syria,²⁷

²⁶ Cf. the Statement of the International Syria Support Group of 17 May 2016, especially the last part on 'advancing a political transition', with reference to the Mediator's Summary of the 13–27 April Round of UN Facilitated Intra-Syrian Talks and to S/RES/2254 of 18 December 2015.

²⁷ In August 2015, the UNSC demanded that all parties in the Syrian conflict 'work urgently towards . . . launching of a Syrian-led political process leading to a political transition' so as to enable the Syrian people to determine their future 'through the establishment of an inclusive transitional governing body' (S/PRST/2015/15 of 17 August 2015, § 9). This call was repeated in December 2015 (S/RES/2254 of 18 December 2015) and May 2016 (cf. the Statement of the International Syria Support Group of 17 May 2016).

Guinea-Bissau,²⁸ Yemen²⁹ and Libya,³⁰ which illustrate how deeply it is ingrained in international diplomatic culture. The 2015 Review of the UN Peacebuilding Architecture seems to suggest that this is a naive

²⁸ In December 2013, the UNSC President affirmed that ‘the consolidation of peace and stability in Guinea-Bissau can *only* result from a consensual, inclusive and nationally owned transition process’ (S/PRST/2013/19, Statement by the President of the UNSC of 9 December 2013. Own emphasis). After determining that the situation in Guinea-Bissau constituted a potential threat to international peace and security, the UNSC actively monitored the transition. See also S/RES/2048 of 18 May 2012, Preamble. On that date, the UNSC, ‘[m]indful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations’, seized itself of the matter. See furthermore S/RES/2103 of 22 May 2013, S/RES/2157 of 29 May 2014, S/RES/2186 of 25 November 2014, and S/RES/2203 of 18 February 2015.

²⁹ From late 2011 onwards, the UNSC followed the transition in Yemen, indicating that it did so ‘mindful of its primary responsibility for the maintenance of international peace and security’ (S/RES/2051 of 12 June 2012, Preamble). See also S/RES/2140 of 26 February 2014, in which the UNSC ‘determin[ed] that the situation in Yemen constitutes a threat to international peace and security in the region’, ‘[w]elcomes the recent progress made in the political transition of Yemen and expresses strong support for completing the next steps of the transition’. Acting under Chapter VII of the UN Charter, the UNSC insisted in February 2015 on ‘the full and timely implementation of the political transition’ (S/RES/2204 of 24 February 2015, § 1).

³⁰ After the uprisings in Libya in early 2011, the UNSC and, shortly after, the AU observed that the situation posed a threat to international peace and security. Indeed, the UNSC determined in its resolution 1973 that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security (S/RES/1973 of 17 March 2011, Preamble). On 26 April 2011, The AU Ad-Hoc High-Level Committee on Libya ‘stressed the serious *threat that this situation poses for peace, security and stability in the region as a whole*, and reaffirmed AU’s conviction on the need for an urgent African action’. Own emphasis. See ‘Report of the chairperson of the commission on the activities of the AU High Level Ad Hoc Committee on the situation in Libya’, 26 April 2011, § 15. Both at the global and regional level, detailed transitions were proposed to address this threat. Although differing on various points, fundamentally both the UNSC and the AU committed to the peace-through-transition paradigm, convinced that TG was the only way to remedy the threat to international peace and security. On 16 September 2011, the UNSC looked forward to the establishment of a transitional Government of Libya, and communicated a number of guidelines that were to be followed by the National Transitional Council. In so acting, the UNSC seconded the basic idea underpinning the proposals and exhortations previously made by the AU (cf. S/RES/2009 of 16 September 2011, §§ 2 a.f.). Indeed, on 26 April 2011 the AU Ad-Hoc High-Level Committee on Libya had ‘reaffirmed the relevance of the elements of the Roadmap articulated by the Transitional National Council (“TNC”). It invited the Libyan authorities and the TNC to a meeting . . . to discuss this Roadmap, in particular the establishment and the management of an inclusive transitional period that would lead to political reforms meeting the aspirations of the Libyan people’ (‘Report of the chairperson of the commission on the activities of the AU High Level Ad Hoc Committee on the situation in Libya’, op. cit., § 17.2. Own emphasis). On 25 May 2011, the Assembly of the AU again ‘stressed that the ceasefire should lead to *the establishment of a consensual and inclusive*

stance,³¹ and some authors harshly criticise the idea of linking peace-making to state renaissance.³² The paradigm is nevertheless widespread. Sometimes diplomatic actors even consider TG as a *preventive* measure.³³

Both state actors and international commentators believe in a causality between TG and peace. The peace-through-transition discourse is appropriated to remedy or anticipate a threat to international peace and security. Comforted by the conceptual expansion of the definition of threats to international peace and security,³⁴ United Nations Security Council ('UNSC') resolutions provide in detail how transitions must respond to such threats; or endorse transition agendas defined elsewhere.³⁵ The UNSC has adopted resolutions under Chapter VII of the UN Charter with regard to transitions in South Sudan,³⁶ Somalia,³⁷ Libya,³⁸ Mali,³⁹ Côte d'Ivoire,⁴⁰ Central African Republic ('CAR'),⁴¹ Yemen,⁴² Guinea-Bissau,⁴³ Libya,⁴⁴

transitional period during which the necessary reforms to meet the legitimate aspirations of the Libyan people would be carried out, culminating in elections' ('African Union Decision on the Peaceful Resolution of the Libyan Crisis' of 25 May 2011, under reference EXT/ASSEMBLY/AU/DEC(01.2011)). As a result, Libya swiftly received UNSC-mandated constitutional assistance (V. Sripathi, 'United Nations Constitutional Assistance in Statebuilding' in D. Chandler, T. D. Sisk (eds.), *Routledge Handbook of International Statebuilding*, Routledge, 2013, p. 143).

- ³¹ 2015 Review of the UN Peacebuilding Architecture of 30 June 2015, A/69/967-S/2015/490, §§ 31, 32 and 33.
- ³² H. Ludsin, 'Peacemaking and Constitution-Drafting: A Dysfunctional Marriage', op. cit.
- ³³ The fragile contexts of apparent calm but with a risk of renewed violence – as in Côte d'Ivoire anno 2015 – would justify a transition to 'prioritise the birth of a new [social] contract' as a preventive measure. See 'Côte d'Ivoire: Ivory Coast Needs a Transition Phase', AllAfrica, 24 March 2015.
- ³⁴ 2005 World Summit Outcome, UNGA Res. 60/1 (24 October 2005), §§ 6 and 69. See also 'In Larger Freedom: Towards Development, Security and Human Rights for All', UN Doc/59/2005, 24–5.
- ³⁵ See for example S/RES/2118 of 27 September 2013 in which the UNSC endorses the transition agenda of the Geneva Communiqué of 30 June 2012.
- ³⁶ S/RES/2187 of 25 November 2014.
- ³⁷ S/RES/2182 of 24 October 2014.
- ³⁸ S/RES/2174 of 27 August 2014.
- ³⁹ S/RES/2164 of 25 June 2014.
- ⁴⁰ S/RES/2153 of 29 April 2014 in which the UNSC refers to the Ouagadougou Agreement and '[d]ecides that the Ivorian authorities shall submit biannual reports to [a] Committee . . . on progress achieved in relation to DDR and SSR'.
- ⁴¹ S/RES/2149 of 10 April 2014.
- ⁴² S/RES/2140 of 26 February 2014.
- ⁴³ S/RES/2048 of 18 May 2012.
- ⁴⁴ S/RES/2009 of 16 September 2011 in which the UNSC directly addressed itself to the National Transitional Council on the topic of the transition.

Haiti⁴⁵ and Afghanistan⁴⁶ (reverse chronological order). The UNSC furthermore reserves the power to take sanctions against ‘spoilers’ impeding transitions.⁴⁷ Individual states also insist on TG.⁴⁸ Instruments triggering TG are often explicit about the peace-through-transition paradigm. Transition instruments (‘TI’) in Burundi,⁴⁹ Côte d’Ivoire,⁵⁰ DRC⁵¹ and Nepal,⁵² for instance, enshrine it explicitly. The peace-through-transition paradigm has become common currency. The emphasis hereby lies on the constitutional and procedural aspects of conflict-related transitions,⁵³ and TG is presented as an alternative to direct international territorial administration or forcible intervention, confirming a ‘greater reliance on a legal-regulatory approach’ in international cooperation.⁵⁴

2 *Self-Regulation and Temporality*

The peace-through-transition paradigm relies on the self-regulatory and provisional nature of TG. Interim rule is generally self-constrained in two regards. TI not only ‘proclaim themselves to be transitional or interim in

⁴⁵ S/RES/1529 of 29 February 2004 § 1.

⁴⁶ S/RES/1386 of 20 December 2001 in which the UNSC refers to the Bonn Agreement, which regulates the transition in Afghanistan. This agreement refers to S/RES/1378. For a discussion, cf. T. Marauhn, ‘Konfliktbewältigung in Afghanistan zwischen Utopie und Pragmatismus’, *Archiv des Völkerrechts*, Bd. 40, 2002, p. 496.

⁴⁷ Chapter 5, Section B.2.3, *in fine*.

⁴⁸ ‘Thousands gather in Burkina Faso to denounce “military coup”’, *The Guardian*, 2 November 2014; in November 2014, for example, ‘the presidents of Ghana, Nigeria and Senegal have urged Burkina Faso to appoint a transitional government’.

⁴⁹ The 2000 Arusha Agreement mentions the ‘institution of a new political, economic, social and judicial order in Burundi’ (Arusha Agreement, art. 5.1) following the ‘speedy establishment of the transitional institutions’ (art. 5.3) under the chapter ‘solutions’ (Chapter 2) immediately following the chapter ‘nature and historical causes of the conflict’ (Chapter 1), leaving no doubt as to the *conflict resolution function* of TG.

⁵⁰ With respect to the transition in Côte d’Ivoire, the 2003 Linas-Marcoussis Accord provides: ‘a Government of National Reconciliation will be set up immediately after the conclusion of the Paris Conference to ensure a return to peace and stability’ (Linas-Marcoussis Accord of 13 January 2003, art. 3.a). Own emphasis.

⁵¹ The 2002 Pretoria agreement mentions among its ‘transition objectives’, ‘the setting up of structures that will lead to a new political order’ (Pretoria Agreement, II.5) in the DRC.

⁵² In Nepal, the ‘progressive restructuring of the state’ is a principal component of the 2011 Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal of 22 November 2011, Preamble.

⁵³ Berghof Foundation and UNDP/PPA, *Constitutions and Peace Processes – A Primer*, 2020.

⁵⁴ P. Chitalkar, D. M. Malone, ‘The UN Security Council and Iraq’, *UNU Working Paper Series*, Nr. 1, November 2013, p. 4. Own emphasis.

character⁵⁵ (limitations *ratione temporis*), but also, beyond these self-evident temporal limits, confine public powers during the interregnum (limitations *ratione materiae*).⁵⁶ A set of institutions and rules govern the transition itself.⁵⁷ These rules, sometimes called transitional provisions,⁵⁸ are mostly secondary, power-conferring norms in the Hartean sense. The transition itself is subject to rules and procedures to avoid a legal hiatus between the demise of the old regime and the establishment of a new order.

States in transition thus have, to some degree, their ‘hands tied’. The story of how Ulysses avoided the fatal temptation of the Sirens has become part of the established imaginary in constitutional literature but is also relevant beyond that field. Let us take a listen to Ulysses himself:

We must keep clear of the Sirens, who sit and sing most beautifully . . . Therefore, take me and bind me to the crosspiece half way up the mast; bind me as I stand upright, with a bond so fast that I cannot possibly break away . . . If I beg . . . to set me free, then bind me more tightly still.

I had hardly finished telling everything to the men before we reached the island of the two Sirens. . . . Meanwhile I look a large wheel of wax . . . Then I stopped the ears of all my men, and they bound me hands and feet to the mast . . . but they went on rowing themselves.

When we had got within earshot of the land . . . the Sirens . . . began with their singing . . . and as I longed to hear them further I made by frowning to my men that they should set me free; but they quickened their stroke, and . . . bound me with still stronger bonds till we had got out of hearing of the Sirens’ voices.⁵⁹

Ulysses’ self-constraint allowed him and his crew to transit safely through the Strait of Messina without giving in to the beautiful but deadly Sirens. This parable is often used to symbolise the utility of ‘permanent’ constitutions. But, perhaps even more, it shows that of *interim* constitutionalism and *transitional* governance as well: the need for self-regulation or ‘structured caution’⁶⁰ in tempestuous times. Interim constitutionalism is

⁵⁵ C. Jackson, ‘What’s in a Name? Reflections on Timing, Naming, and Constitution-Making’, *Wm. & Mary L. Rev.*, 49, 2007–8, p. 1260.

⁵⁶ Chapter 6.

⁵⁷ Chapter 3, Section B.2 about the purpose of TI, under ‘self-limitation’.

⁵⁸ Democracy Reporting International (DRI), ‘Ensuring a Smooth Transition to the new Constitutional Order: Transitional Provisions in the Libyan Draft Constitution and Political Agreement’, January 2016.

⁵⁹ Homer, *The Odyssey*, translated by Samuel Butler, CreateSpace Independent Publishing Platform, 2018. First phrase lightly adapted.

⁶⁰ A. Sachs, ‘South Africa’s Unconstitutional Constitution’, *op. cit.*, p. 1252.