

INTRODUCTION

Over the last twenty years, states and international organisations have been heavily involved in the reconstruction of post-conflict states, through the provision of military, financial, technical, and administrative assistance.¹ This trend for extensive international involvement is related to the lack of state capacity in the aftermath of war and the threat that an ineffective state can pose for both international peace and security and the realisation of human rights.² Examples of situations that figure prominently in the now extensive, wide-ranging, and multi-disciplinary literature include periods in the recent past of Cambodia, Haiti, Bosnia and Herzegovina, Sierra Leone, Kosovo, East Timor, Afghanistan, Liberia, and Iraq.³

One topic that has received a particularly high level of attention in the policy work is the question of how a population should be involved in decision-making on reconstruction.⁴ A key reason for this is the centrality of popular involvement in governance to the effectiveness and legitimacy of internationally enabled reconstruction efforts.⁵ In contrast, little specific attention has been given to this issue from an international legal perspective.⁶ The rest of this introduction explains why and how this

¹ See UN Department of Economic and Social Affairs and UN Development Programme, *The Challenges of Restoring Governance in Crisis and Post-Conflict Countries*, UN Doc. ST/ESA/PAD/SER.E/101 (2007), p. xi.

² See UN High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, UN Doc. A/59/565 (2004), p. 25; Kreijen, *State Failure*, p. 87.

³ See, e.g., Paris and Sisk (eds.), *Dilemmas of Statebuilding*; Bowden et al. (eds.), *Role of International Law in Rebuilding Societies after Conflict*; Stromseth et al., *Can Might Make Rights?*

⁴ See, e.g., Orr, 'Governing When Chaos Rules'; Donais, 'Empowerment or Imposition?'; Chesterman, 'Ownership in Theory and Practice'; Narten, 'Dilemmas of Promoting Local Ownership'; Pietz and von Carlowitz, 'Local Ownership in Peacebuilding Processes in Failed States'.

⁵ See Orr, 'Governing When Chaos Rules', 141; Donais, 'Empowerment or Imposition?', 20.

⁶ See, though, Cogen and De Brabandere, 'Democratic Governance and Post-Conflict Reconstruction'; Fox, 'International Law and the Entitlement to Democracy after War'; Bowden and Charlesworth, 'Defining Democracy in International Institutions'.

book examines the role that international law has had in the practice of popular involvement in the governance of post-conflict reconstruction.

The rationale and essence of the book

The term post-conflict reconstruction is used by this book as a reference to ‘the mechanics of achieving a stable, reconstituted, and sustainable society after conflict’.⁷ It can involve reform of infrastructure, physical construction, and more ad hoc projects, such as a programme of disarmament, demobilization, and reintegration (DDR). The term population is used as a reference to the individuals that constitute a state and are affected on a regular basis by the exercise of public authority.⁸ The term governance is used as shorthand for decision-making on reconstruction at the level of general political authority. The population of a state can be involved in the governance of post-conflict reconstruction in two main ways. One is through participation in the selection of the actors that will exercise political authority. The other is through the communication of views to the actors that exercise political authority. This can be direct, through governmental consultations with groups of individuals, for instance. It can also be indirect, such as through the means of a free media.

The theory behind the view that there can be a positive correlation between the level of popular involvement in post-conflict governance and the legitimacy and effectiveness of reconstruction is persuasive. Popular input in decision-making improves the legitimacy of reconstruction, because it generates a sense of influence which offsets the sense of imposition that stems from the dependence of reconstruction on external actors. Moreover, an increase in legitimacy helps with effectiveness, because it promotes facilitation, rather than resistance, by the target population.⁹ However, post-conflict periods often involve circumstances – such as political flux, a lack of security, and a general lack of capacity – which are not conducive to popular governance. In particular, mechanisms for

⁷ Ní Aoláin et al., *On the Frontlines*, p. 87.

⁸ See also Hansen and Wiharta, *Transition to a Just Order* (‘A Policy Report’), para. 9.

⁹ See Donais, ‘Empowerment or Imposition?’, 20; Hansen, ‘From Intervention to Local Ownership’, 135; Stromseth et al., *Can Might Make Rights?*, pp. 52–3; Talentino, ‘Perceptions of Peacebuilding’, 153; cf. Widner, ‘Constitution Writing in Post-Conflict Settings’, 1532 (querying the strength of the argument that more representative constitution-making processes lead to better outcomes in terms of conflict resolution).

popular involvement in governance – such as national elections, consultations, and a free media – can draw attention to differences amongst members of a society and (re-)ignite underlying societal tensions that might have fuelled a prior conflict.¹⁰ Hence, there is a risk that attempts to involve a population in decision-making might actually hinder rather than enhance a reconstruction effort. This underpins why a central message from the policy debate on best practice in this area is that the legitimacy and effectiveness of post-conflict reconstruction can benefit from a proactive approach to popular involvement in governance, but that this must be tailored to suit the context in order to avoid negative side effects.¹¹

Post-conflict contexts can vary in a host of significant ways, including the level of social differentiation within a community (for instance, ethnic, religious, or tribal),¹² the level of on-going hostility, the extent to which state and civil infrastructure has been shattered by the conflict, levels of economic activity, the strength of security, and the position of neighbouring states.¹³ The scope for contexts to vary widely and the importance of taking an approach to popular governance that is appropriate for the context create the possibility that it could be preferable for the actors with authority in the aftermath of war to be permitted to determine the approach taken to popular involvement in governance without any international legal restraint. The idea that this is in fact the case is supported to some extent by a review of the policy literature in this field, which generally does not address the potential relevance of international law in any detail.¹⁴ Indeed, even when there has been what can appear to be a clear example of an abuse of authority in relation to the practice of popular governance – for instance, the suggestion of incumbent government involvement in extensive electoral fraud during the 2009 elections in Afghanistan – subsequent commentaries have not addressed the scope

¹⁰ See Hansen and Wiharta, *Transition to a Just Order ('A Policy Report')*, para. 37; Johnstone, *Power of Deliberation*, p. 144; Smith, *Towards a Strategic Framework for Peacebuilding*, p. 26.

¹¹ See Donais, 'Empowerment or Imposition?', 20–1.

¹² Caplan, *International Governance*, p. 136.

¹³ For consideration of the relative importance of different contextual factors in post-conflict settings, see Marenin, 'Understanding Mission Environments'; also Wedgwood and Jacobson, 'State Reconstruction after Civil Conflict'.

¹⁴ Although the scope for international law to have some bearing on the approach taken to popular involvement in governance has been acknowledged, see, e.g., Ponzio, *Democratic Peacebuilding*, p. 139, p. 164; Cubitt, *Local and Global Dynamics of Peacebuilding*, p. 61; Nordlund, 'Conclusion', 291.

for accountability through international law.¹⁵ The projected absence of international legal restraint with regard to popular governance measures in the aftermath of war is striking, because one would expect some of the most fundamental norms of international law – such as the right to self-determination and the right to political participation – to be directly relevant for this issue.

One purpose of this book, then, is the satisfaction of curiosity: what has happened to relevant international legal norms in the practice of popular governance in the aftermath of war? This is the doctrinal strand of the book, which unpacks the scope and content of the international law most relevant for post-conflict popular governance and locates where it fits in practice. The second purpose of the book relates to the scope for the present body of international law directed at popular governance to be inappropriate for post-conflict settings. As the core of the international legal framework for popular governance was created before the recent trend for extensive international involvement in post-conflict reconstruction, the likelihood that international law will be more of a hindrance, than a facilitator, of good practice is increased.¹⁶ This is the more applied strand of the book, which evaluates the appropriateness of the extant international law in terms of how the law relates to the transition of states from conflict to peace.

By identifying and exploring the role of international law in the practice of popular governance after conflict, the book aims to develop a clearer understanding of the nature and significance of not only some of the most fundamental norms in international law (including the law on self-determination, state sovereignty, and the right to political participation), but also the associated compliance machinery (such as the UN Human Rights Committee, the law of state responsibility, and social mechanisms). The book also seeks to contribute to two of the key debates surrounding post-conflict situations. One of these is the *jus post bellum* project. This is a reference to the work of scholars who seek to leverage international law in the aftermath of war in the interests of a just and sustainable peace.¹⁷

¹⁵ See, e.g., Worden, ‘Afghanistan: An Election Gone Awry’; also, ICG, ‘Afghanistan: Elections and the Crisis of Governance’.

¹⁶ For critique of the operation of international criminal law in post-conflict settings, see Kelsall, *Culture under Cross-Examination*; Drumbl, *Atrocity, Punishment, and International Law*.

¹⁷ See, e.g., Stahn, ‘“*Jus ad bellum*”, “*jus in bello*” . . . “*jus post bellum*”?’, Österdahl and van Zandel, ‘What Will *Jus Post Bellum* Mean?’, Stahn et al., (eds.), *Jus Post Bellum*; Orend, ‘*Jus Post Bellum*’, 591; Cohen, *Globalization and Sovereignty*, pp. 223–65.

By helping to determine the appropriateness of the international legal regime for popular governance, the book provides a basis for determining whether this is an area that could benefit from the creation of a specific post-conflict regulatory framework. The findings presented in this book are also relevant for the policy debate on best practice for international engagement in post-conflict reconstruction. In particular, by highlighting the extent to which actors with authority have been constrained by international law in the practice of popular governance, the book helps to show how much discretion there is in this area for the recommendations of policy scholars to be followed.¹⁸

Identifying post-conflict situations and the choice and nature of the case studies

The term post-conflict is used by this book to describe a period when the main hostilities have ended but domestic government remains unable to assert effective control (in the sense of an ability to preserve public order) over the territory in question.¹⁹ This definition acknowledges that in most situations there will not be a clear demarcation between conflict and post-conflict.²⁰ The stress on the absence of a government with independent effective control of the territory is related to the nature of international law. As one of the essential criteria for statehood in international law is an independently effective government – and, for the most part, states will have an effective government – there is little reason to suspect that the circumstances of ineffective states will have been considered when many of the rules and principles of international law were created.²¹ The result is that a post-conflict situation in which there is no effective government is more likely to present a challenge for the relevance of international law

¹⁸ This is important in the light of the critiques which challenge the extent to which international actors are fully committed to the mantra of contextual sensitivity and ownership by the affected populations that they include in the policy documents; see, e.g., Sending, 'Why Peacebuilders Fail to Secure Ownership'.

¹⁹ See Suhrke, 'Peace In Between', 7, noting that the factors which lead to and sustain such an environment will be numerous, but might include weak state and civil infrastructure, and the persistence of low-level violence stemming from 'criminal elements generated by the war-time economy, demobilized but demilitarized or reintegrated ex-combatants . . . frustrated expectations of rapid reconstruction and large-scale unemployment'.

²⁰ See Verdirame, 'UN Accountability for Human Rights Violations in Post-Conflict Situations', 83; Keen, 'War and Peace', 10–11; Sambanis, 'Using Case Studies to Expand Economic Models of Civil War', 269.

²¹ On statehood as an international legal concept, see Crawford, *Creation of States*.

than a situation in which independent effective governance is possible. This is especially so in situations where international actors provide the basis for the development of territorial control, as dependence on external actors can be expected to affect the nature of the relationship between the population and the government. It might mean that a government is more inclined to pursue political participation proactively as a means of enhancing its legitimacy and consolidating its control, but it also might lead to the calculation that political participation is not a priority, particularly if there are signs of a lack of support amongst a population for its continuation in authority.

The book is focused on case studies of two post-conflict situations in which control of the territory and the capacity to reconstruct was dependent on international actors, but the formal responsibility for decision-making rested with domestic government: Sierra Leone and Afghanistan. As such, it represents something of a departure from the considerable body of literature that has focused on the international legal challenges related to situations of direct international administration.²² This focus is hinged on the contention that the ‘assistance model’ deserves detailed attention from an international legal perspective in its own right, as it also represents a scenario that does not sit easily with the traditional explanation for state authority in international law.

The assistance model is similar to direct international administration in that a major source of governmental authority is control of the territory secured by external actors.²³ This means that there is also some scope here to draw analogies with the concept of trusteeship²⁴ – an analogy which has been used as grounds to call for authority to be exercised in the best interest of the population during direct international administration.²⁵ Yet in the assistance model, the external actors do not exercise direct political authority. Political authority is reserved for the favoured domestic actors. These domestic actors are subject to the influence of the external actors,

²² See, e.g., De Brabandere, *Post-Conflict Administrations in International Law*; Stahn, *Law and Practice of International Territorial Administration*; Wilde, *International Territorial Administration*; Fox, *Humanitarian Occupation*; Knoll, *Legal Status of Territories Subject to Administration*; Chesterman, ‘Review Essay’.

²³ This can help to explain why some examples of the assistance model have been included in studies on direct international administration; see, e.g., Stahn, *Law and Practice of International Territorial Administration*; De Brabandere, *Post-Conflict Administrations in International Law*.

²⁴ On the concept of trusteeship, see Bain, *Between Anarchy and Society*, p. 23.

²⁵ Stahn, *Law and Practice of International Territorial Administration*, pp. 411–12.

but not to the extent that there is a complete absence of autonomy. As a result, the assistance model has the potential to create different and in some respects more complex challenges for international law than situations of direct international administration. In relation to the latter, a major question has been whether relevant international law is applicable, given the absence of ratification of important treaties (such as the International Covenant on Civil and Political Rights, ICCPR) by the international organisations that have undertaken administration.²⁶ In the assistance model, the domestic government will be bound by all of the state's international legal obligations, but whether it will take notice of the obligations owed to its population when political authority is sustained by external actors is less certain.²⁷

In relation to Sierra Leone, the war in question, between the government and a group of rebels including despondent members of the military, was declared officially over by the government in 2002. However, there was a fragile peace from the year 2000 onwards. As such, it is the period from 2000 (when the reconstruction process was clearly under way) until 2005 (the point at which international military presence in support of the government was withdrawn) that is of most interest.

With regard to Afghanistan, this book identifies the start of the post-conflict period with the retreat of the Taliban in 2001, which followed US-led external military activity and fighting by the collection of Afghanistan-based groups known as the Northern Alliance. This retreat signalled the end of this particular set of hostilities and allowed for the commencement of the reconstruction process. However, in contrast to Sierra Leone, governmental authority still remains heavily linked to an extensive, external military presence (although the process of military draw down has commenced).²⁸ Part of the reason for the difficulties of the government of Afghanistan in exercising control of the territory is a militant insurgency which has been connected to the regrouping of the Taliban and its

²⁶ See, e.g., Cerone, 'Reasonable Measures in Unreasonable Circumstance'; Verdirame, *The UN and Human Rights*, pp. 230–99.

²⁷ This links to the argument that as a general matter it is a concern for legitimacy at the domestic rather than the international level that is most likely to lead a government to comply with international human rights obligations; see Simmons, *Mobilizing for Human Rights*, p. 124.

²⁸ As of May 2012 there were 100,000 military personnel, from forty-two countries, as part of the NATO-led International Security Assistance Force (ISAF) (www.isaf.nato.int/troop-numbers-and-contributions/index.php). By January 2014, the total had changed to 57,004 from forty-nine countries.

initiation of a new jihad in 2002–2003.²⁹ The intensity of the fighting associated with the militant insurgency has varied over time. Such fighting is a reason to query the use of the term post-conflict to describe this situation,³⁰ but while the insurgency has affected reconstruction efforts, it has not halted the general reconstruction process. The main focus of this study is on the period from 2001 (the commencement of the reconstruction process) to 2010 (following the completion of the second set of national elections).

The combination of Sierra Leone and Afghanistan – rather than one or more of the other examples in which governance of reconstruction has been led by domestic actors but dependent on international actors (such as Haiti, Iraq, or Liberia) – is useful for testing the relevance of international law for popular governance of post-conflict reconstruction for one main reason. This is the extent of the variance in some of the contextual elements that are likely to affect what is desirable and feasible in terms of involvement of the population in governance.

A crucial difference between the two contexts is with regard to stability. Stability was restored relatively rapidly in Sierra Leone, whereas stability has continued to prove elusive in Afghanistan. Consequently, mechanisms for more direct involvement of the population in governance, such as consultations on key issues, can be expected to have been more feasible in Sierra Leone than Afghanistan. Another difference is in terms of the nature of the actors available to lead the reconstruction in the immediate aftermath of the war. In Sierra Leone there was a recently elected government; in Afghanistan there was no set of actors with a clear claim to be representative of the will of the people. This is a reason for the choice of who should initially govern to have been more problematic in Afghanistan. Moreover, in terms of procedures aimed at the development of popular mandate for governance, Sierra Leone had recent experience of internationally monitored elections, whereas, prior to the conflict, Afghanistan had been governed by the unelected Taliban. This is one reason why the process chosen to select the future leaders has been more contentious and more difficult to implement in Afghanistan than in Sierra Leone. The contrasting contexts place Sierra Leone and Afghanistan at either end of a spectrum in terms of how demanding the questions of popular governance can be expected to have been. The focus on these two disparate cases is intended to help ensure that the conclusions drawn

²⁹ Suhrke, *When More Is Less*, p. 51.

³⁰ Donais, *Peacebuilding and Local Ownership*, p. 97.

from the analysis on the relevance of international law have a broader significance than the two situations in question.

In exploring these two cases, the focus is on three prominent aspects of the practice of popular governance that international law can reasonably be anticipated to have had some impact on. The first is the practice of determining which domestic actors to support as the government in the immediate aftermath of war. The second is the development of a popular mandate for governance as part of a programme of reconstruction. And the third is a reference to the mechanisms for direct and indirect popular input into the decision-making on reconstruction. In relation to each of these dimensions, consideration is given to a series of key questions, including the following: what has international law required? Why would actors with authority comply with this law? Have the requirements of the law been met? What consequences can be construed as following from the present condition of the law for the reconstruction process? And, what do these consequences suggest about the relevance of the law?

The answers that the book provides to these questions are based on an examination of an extensive range of policy literature, international legal doctrine, and other relevant documentation, including international resolutions and agreements, records of statements made in domestic and international fora, and reports of states, international organisations, and NGOs.

The central argument of the book that informs the analysis is that the relevance of international law for popular governance in the aftermath of war will depend on how it balances two competing considerations: the need for flexibility, to allow actors with authority to tailor popular governance measures to suit the context, and the need for accountability, to motivate best practice and reduce the scope for the perception of and actual occurrence of an abuse of authority.

The outline of the book

The book has four main parts. Part I provides the conceptual and theoretical framework for the rest of the book. It proceeds with Chapter 1, which addresses the process of post-conflict reconstruction, in particular the types of decisions that are made, the sites at which they are made, and the actors that are involved. Chapter 2 considers the legitimacy and effectiveness issues that arise for a programme of reconstruction as a result of the dependence on international actors and the recommendations that

have arisen in an attempt to secure best practice. In particular, this chapter addresses the value of popular governance as a source of legitimacy and effectiveness and how it should be approached in order to maximise both. It also considers the prospects of international legal regulation of popular governance making a positive contribution to the practice of post-conflict reconstruction.

Part II of the book identifies and explores the international law that is relevant for the practice of popular governance. Chapter 3 addresses how international law can be expected to inform the issue of which domestic actors will receive international support as the government of a state in the immediate aftermath of conflict. Particular attention is given to the international legal concepts of sovereignty and self-determination and the associated law on governmental status. Chapter 4 concentrates on the requirements of the ICCPR in relation to three aspects of popular governance: the creation of a popular mandate, the generation of direct input into decision-making on reconstruction, and the development and protection of the public sphere. Attention is also given to the regional international legal instruments that deal with popular governance.

Part III of the book seeks to help develop a clearer understanding of the relevance of the international law addressed in Part II. It does so through consideration of the way in which international law relates to the practice of popular governance. Chapter 5 explores practice in Sierra Leone. Chapter 6 is focused on Afghanistan.

Part IV of the book, in the form of Chapter 7, is concerned with the scope for the international law of popular governance to be supplemented with international legal regulation targeted at a specific situation. Attention is given to three potential sources of ad hoc international legal regulation: UN resolutions, peace agreements, and aid agreements. A particular focus is on the way in which these instruments have been utilized with regard to Sierra Leone and Afghanistan and how this relates to the respective reconstruction processes. The book concludes with a recap of its arguments and some thoughts on the implications of its arguments for related issues in international law and politics.

A major argument of the book is that both the substance and the compliance mechanisms of the international legal framework for popular governance are light touch in nature. This underpins the contention that the appropriateness of the international legal framework for popular governance of a post-conflict situation rests on the priorities of the actors that are vested with political authority. If the actors with political authority are able and willing to prioritise the best interests of the population