Creating Popular Governments in Post-Conflict Situations: The Role of International Law

Matthew Saul

I. Introduction

There is no specific international legal framework for the post-conflict development of a popular mandate for governance. There is, though, the international law on political participation, which specifies an electoral process as a means for a population to be involved in governance. This law applies regardless of the post-conflict condition of a state. Accordingly, there is a basis upon which to depict *jus post bellum*—understood as “(t)he laws and norms of justice that apply to the process of ending war and building peace”—as regulating the process of creating governments in post-conflict settings.

Still, the extant law targets the conditions of a stable state, in which the government is expected to have sufficient control of the territory to respect and ensure the rights of the individuals within its jurisdiction. In such a state, control of the territory is expected to stem from the support of the population for the government. In contrast, governance in post-conflict settings is often sustained through the provision of external military, financial, technical, and administrative assistance. Dependence on external actors for territorial control can be expected to affect the nature of the relationship between the population and the government. It might mean that an interim 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, especially if there are signs of a lack of support amongst a population for its continuing authority. Either way, there is reason to take a particular interest in how the extant law on political participation operates in post-conflict settings.

Interest in the relevance of the extant law on political participation can be expressed in two ways. One is about the substance of the law. Is what the law prescribes appropriate for post-conflict settings? The other is about the impact of the law. Does the law have useful effects in practice?

* Research Fellow on the MultiRights project at the Norwegian Centre for Human Rights, University of Oslo.


2 See Art. 2 of the ICCPR (n. 1).

3 See Art. 1 of the ICCPR (n. 1).

The issue of whether the substance of the international legal requirement of an electoral process and associated standards are appropriate for the post-conflict period has been addressed as part of the broader debate on the value of democracy promotion. Gregory Fox, for instance, has drawn upon theories about the nature of compliance in international law to argue that given the likelihood of a lack of capacity to fully comply in the short term, the appropriateness of the law for post-conflict settings should be assessed through consideration of the compliance record over the long term.\(^5\) The value of the substance of international law related to electoral processes has also been considered as part of the debate on the relationship between post-conflict power sharing agreements and international law. Christine Bell, for example, in mapping case law of human rights bodies related to power sharing arrangements, has highlighted how legal specifications on political participation can provide a basis for human rights bodies to assess whether or not a political system operates with a free and fair franchise, but struggle as a framework for human rights bodies to engage with broader questions about the legitimacy of a regime.\(^6\) Still, little attention has been given to the actuality of the constraint the law of political participation places on the decision making of an interim post-conflict government with regard to the process for the creation of a new popularly mandated government. This is an important issue. If the law is overly constraining, it will hinder the ability of the interim government to tailor the process for the identification of a new government to suit the context. If it is overly lenient, it leaves open the possibility that the self-interest of the interim government will drive the process for the identification of a new government.

This chapter addresses how the extant law on political participation relates to the decision making of post-conflict interim governments. A particular focus of the analysis is on how the construction of the legal requirement of an electoral process and the associated mechanisms for compliance relate to the practice that unfolded in Sierra Leone during 2000–05. The relevance of the chapter for the *jus post bellum* debate is two pronged. In identifying and assessing how the right to political participation has operated after conflict, the chapter highlights and helps to develop a clearer understanding of an important legal component of *jus post bellum*. In addition, as the central argument that underpins the analysis is relevant for other sectors that require reconstruction after conflict (such as the security, justice, economic, and social sectors), the chapter also provides a basis for reflecting on how international law might contribute to *jus post bellum* more generally.

As a means to highlight the importance of the issue at stake and to provide a reference point for the subsequent analysis, the chapter proceeds with consideration of how popular governance relates to the legitimacy and effectiveness of post-conflict reconstruction and what this suggests about the scope for a useful role for international

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law.\textsuperscript{7} Attention is then turned to the nature of the extant international legal framework for the development of a popular mandate for governance, specifically its substantive requirements and compliance mechanisms. This leads to discussion of the practice in Sierra Leone. Here, the analysis addresses compliance with the law, but a core concern is with how the nature of the legal framework relates to the broader reconstruction process and what this suggests about its appropriateness. The central argument of the chapter that informs the analysis is that the suitability of this extant legal component of \textit{jus post bellum} is linked to the balance that it strikes between coercion and flexibility \textit{vis-à-vis} the decision making of interim government.

\section*{II. The Value and Complexity of Popular Governance in the Aftermath of War}

The question of how a population should be involved in decision making on reconstruction has received a particularly high level of attention from policy scholars.\textsuperscript{8} 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, through the means of a free media, for example. A key reason the approach taken to popular governance in the aftermath of war has received attention in the policy debate is its centrality to the legitimacy and effectiveness of internationally enabled reconstruction efforts.\textsuperscript{9}

Popular input in decision making can improve the legitimacy of reconstruction because it generates a sense of influence which offsets the sense of imposition that stems from the dependence on external actors for reconstruction.\textsuperscript{10} An increase in legitimacy helps with effectiveness because it generates positive engagement on behalf of the target population, rather than resistance.\textsuperscript{11} However, post-conflict periods often

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\textsuperscript{7} Reconstruction is defined as “the mechanics of achieving a stable, reconstituted, and sustainable society after conflict.” Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi Cahn, \textit{On the Frontlines: Gender, War, and the Post-Conflict Process} (Cambridge University Press 2011) 87.


\textsuperscript{9} See Orr, “ Governing When Chaos Rules” (n. 8) 141; Donais, “Empowerment or Imposition?” (n. 8) 20.


\textsuperscript{11} See Donais, “Empowerment or Imposition?” (n. 8) 20; Annika Hansen, “From Intervention to Local Ownership: Rebuilding a Just and Sustainable Rule of Law after Conflict” in Carsten Stahn and Jann K. Kleffner (eds), \textit{Jus Post Bellum: Towards a Law of Transition from Conflict to Peace} (TMC Asser
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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 popular involvement in governance—such as national elections, consultations, and a free media—can draw attention to differences amongst a society and re-ignite underlying societal tensions that have fuelled a prior conflict. 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 a key message from the policy debate on best practice in this area: that the legitimacy and effectiveness of post-conflict reconstruction can benefit from a proactive approach to popular involvement in governance, but that it must be tailored to suit the context in order to avoid negative side-effects.

Consider the specific case of national elections.

The utility of elections in the post-conflict period has been the subject of considerable debate. A generally accepted position is that an electoral process is likely to be of value in a post-conflict situation, but this will depend on matching the approach taken—particularly with regard to “timing, sequencing, mechanics, and administration issues”—to the context in question. For example, in a situation where there is a major concern about the legitimacy of an interim government, it might be in the best interests of a situation for the elections to be held very close to the end of a conflict. In contrast, where there is a major risk of violence if elections are held, then it might be preferable to delay elections.

Post-conflict contexts can vary in a variety of ways, including the level of social differentiation amongst a community (for instance, ethnic, religious, or tribal), the level of ongoing hostility, the extent to which state and civil infrastructure has been shattered by the conflict, the levels of economic activity, the strength of security, and...
the position of neighboring states. The scope for contexts to vary widely and the importance of tailoring the approach to popular governance to the context are significant in terms of the likely relevance of international law. There is a risk that legal specifications could hinder contextual sensitivity, or lead the population to perceive a lack of space for autonomous decision making by the interim government. Hence, the possibility arises that it could be preferable (for the overall legitimacy and effectiveness of a reconstruction process) for the actors with authority in the aftermath of war to be permitted to determine the approach taken to popular governance without any international legal restraint.

However, it is also important to recognize that the actor with authority for how popular governance initiatives are approached is not without self-interest in the matter. For instance, if the actor in question is an interim government that is kept in authority through international support, there is a risk that they might seek to delay an election not because they judge it the right thing to do for the context, but rather because they recognize that such an occurrence will remove their authority. A self-interested approach to the questions of popular governance could clearly be damaging for the legitimacy and effectiveness of a reconstruction process. This is a reason to be interested in the scope for such actors to be held accountable for the approach taken.

One might expect the domestic legal system to be a key source of accountability for issues of popular governance. However, in the post-conflict setting the domestic legal system can be a site of reconstruction that does not function in a manner that places meaningful restraint on the government. This can place the onus on international law as a source of legal accountability. An international legal framework for popular governance has the potential to make a number of useful contributions to the practice of post-conflict reconstruction. It could provide a basis for action to address conduct deemed inappropriate with regard to the approach taken to the involvement of the population in governance. In turn, the possibility of sanction could serve as a motivator for an appropriate approach, whilst also operating as a source of reassurance for the affected population that the actors in authority undertake decision making in a responsible manner. As these benefits could contribute to the legitimacy and effectiveness of

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19 On the idea that a post-conflict government that is dependent on international actors is more likely to disregard the interests of the population, see Michael Barnett and Cristoph Zürcher, “The Peacebuilder’s Contract: How External Statebuilding Reinforces Weak Statehood” in Roland Paris and Timothy D. Sisk (eds), The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations (Routledge 2009) 23, 31–5.


21 See also Barnes, “The Contribution of Democracy to Rebuilding Postconflict Societies” (n. 14) 92.

the reconstruction process, there is also a basis upon which to suggest that there should be international legal regulation of the approach taken to popular governance.

However, it is evident that—even starting from the position of a clearly defined category of post-conflict situations in mind, and focusing on just one aspect of popular governance—it will be difficult to craft an appropriate international legal framework for popular governance. This is because two of the key considerations that should underpin its design are far from complimentary. A move to strengthen accountability, be it through more detailed provisions or more coercive supervisory arrangements, will be likely to constrain the discretion of an interim government to allow for the particular circumstances of the target situation to be accommodated. This chapter does not seek to propose an ideal international legal framework. But the idea that the law should strike a balance between contextual discretion and accountability provides a useful reference point for the assessment of the relevance of extant law for the development of a popular mandate in the sections that follow.

III. International Legal Regulation of the Development of a Popular Mandate for Governance

The creation of a popular mandate for governance is about involving the population of a state in the selection of the actors that will exercise general political authority. It is possible to envisage a range of processes that will help to connect a governance arrangement to the will of the people in a post-conflict setting. For instance, representatives of different groups within a society might come together to select leaders. Alternatively, leaders might be selected on the basis of consultations with members of the population. The approach required by extant international law is national elections, an approach found in a number of human rights instruments. The most generally applicable provision is Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"). As such, a focus on the meaning of this provision and its compliance procedures is a reasonable starting point, in an attempt to establish a view on the

23 For additional reasons to query the desirability and feasibility of such an enterprise, see Christine Bell, “Peace Settlements and International Law: From Lex Pacificatoria to Jus Post Bellum,” University of Edinburgh School of Law Research Paper Series No. 2012/16 <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2061706_code941689.pdf?abstractid=2061706&mirid=3> (accessed 24 July 2013) 52–6; although see also Inger Österdahl and Esther van Zandel, “What Will Jus Post Bellum Mean? Of New Wine and Old Bottles” (2009) 14 Journal of Conflict and Security Law 175, 192 “When combining the concept of local ownership with the concept of a ‘tailor-made’ jus post bellum, one can think of designing a framework of jus post bellum rules which is flexible enough to take local preferences and sensibilities into account, while not compromising on the minimum set of rules which states are to abide by.”

24 The two key considerations identified here—contextual sensitivity and accountability—can perhaps be read as subsets of one of the six conditions that Larry May identifies (ch. 1, this volume) for jus post bellum: rebuilding. However, it should be stressed that they are used here in relation to a setting in which an interim government is kept in authority by external actors that have not been party to the main conflict. This is different from the setting upon which May’s theory is constructed, where “[r]ebuilding is the condition that calls upon all those who participated in devastation during war to rebuild as a means to achieve a just peace.” Larry May, text to fn. 10 in ch. 1, this volume. As such, the relevance of contextual sensitivity and accountability for May’s condition of rebuilding should not be too readily assumed.

25 For an overview, see Gregory H. Fox, “The Right to Political Participation” in Gregory H. Fox and Brad R. Roth (eds), Democratic Governance in International Law (Cambridge University Press 2000) 53–70.
appropriateness of the extant international legal framework for this aspect of the post-conflict reconstruction process.

A. The requirements of Article 25 of the ICCPR

Article 25 of the ICCPR reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country.

The key elements of this provision—rights for individuals to take part in the conduct of public affairs, to vote and be elected at genuine periodic elections, and to have access to public service—clearly have some connection to the development of a popular mandate for governance in the aftermath of war. However, the lack of precision in the terms of the provision entails that the exact nature and extent of its relevance is not readily apparent.26

A useful guide to the meaning of Article 25 is found in the work of the UN Human Rights Committee (“HRC”), particularly the HRC’s General Comment on Article 25 from 1996.27 This comment sets out what the committee understands as required to ensure fulfillment of each of the three key elements of the Article. Aspects of particular note when contemplating the development of a popular mandate for governance include the view that it is implicit in Article 25 that:

• the freely chosen representatives do in fact exercise governmental power;28
• to be periodic means that elections “must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors”;29
• voters must be free to form opinions and oppose the government without undue influence or coercion of any kind;30

26 See Fox, “The Right to Political Participation” (n. 25) 55; Wippman (ed.), International Law and Ethnic Conflict (n. 16) 235; Brad R. Roth, Governmental Illegitimacy in International Law (Oxford University Press 1999) 330, 332. The lack of precision has been explained on the basis of the Cold War tensions that provided a backdrop for the negotiation of the ICCPR (1948–66). The vague nature of its terms allowed for a broad range of different approaches to governance to be within the law, and ensured the agreement of states with different views on how a state should be organized.
27 UN Human Rights Committee (HRC), CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (12 July 1996) UN Doc. CCPR/C/21/Rev.1/Add.7 (General Comment No. 25); (on the debate regarding the value of the practice of international election monitoring for the meaning of Art. 25 of the ICCPR, compare Fox, “The Right to Political Participation” (n. 25) 85–6, with Roth, Governmental Illegitimacy in International Law (n. 26) 342).
28 General Comment No. 25 (n. 27) para. 7.
29 General Comment No. 25 (n. 27) para. 9.
30 General Comment No. 25 (n. 27) para. 19.
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- voter education and registration campaigns are necessary;\(^{31}\)
- an independent electoral authority should be created to oversee the process;
- the security of ballot boxes must be guaranteed;\(^{32}\) and
- conditions on eligibility to vote or stand for office cannot be based on factors such as descent or political affiliation.\(^{33}\)

The issue of multiparty elections is not tackled directly, but when one reads that “elections must be held at intervals […] which ensure that the authority of government continues to be based on the free expression of the will of the electors”\(^ {34}\) with the statement that “political parties play a […] significant role in the election process,”\(^ {35}\) the implication appears one of incompatibility with one party states.\(^ {36}\) The comment also identifies the rights of freedom of expression, assembly, and association as essential conditions for the effective exercise of the right to vote, and indicates what these rights require in the context of Article 25 (this includes steps to combat illiteracy, paragraph 12).\(^ {37}\)

The work of the HRC helps to make clear the nature of the international legal limits that a post-conflict government encounters with regard to the approach taken to the development of a popular mandate. However, in many instances the requirements of the right remain imprecise. This entails discretion for post-conflict governments with regard to the approach taken to compliance with the law. For instance, the specification of the HRC with regard to timing is that “elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.” Such a formulation indicates that elections must occur at some point following conflict, but provides scope for debate about exactly when they must occur to remain compliant with the law. Moreover, the focus of the law is relatively limited. It makes an electoral process mandatory and sets procedural standards, but leaves a number of elements unregulated. For instance, in terms of the voting system, the HRC identifies that “the principle of one person, one vote, must apply” and that votes should be of equal worth, but also recognizes that “the Covenant does not impose any particular electoral system.”\(^ {38}\) As such, it is for the post-conflict government to determine matters such as whether or not there will be a majority based or proportional representation based approach to elections.

The scope for a post-conflict government to operate in the manner it deems suitable and remain within the parameters of the law is increased by a couple of additional features of Article 25. One of these is found in the first clause of Article 25, which reads that: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions” (emphasis added). This indicates that it is within the law for reasonable restrictions to be placed on the exercise of the right protected by Article 25. The drafting history of the

\(^{31}\) General Comment No. 25 (n. 27) para. 11.

\(^{32}\) General Comment No. 25 (n. 27) para. 20.

\(^{33}\) General Comment No. 25 (n. 27) para. 15.

\(^{34}\) General Comment No. 25 (n. 27) para. 9.

\(^{35}\) General Comment No. 25 (n. 27) para. 26.


\(^{37}\) General Comment No. 25 (n. 27) para. 12.

\(^{38}\) General Comment No. 25 (n. 27) para. 21.
provision suggests that it should be read as focused on matters of eligibility to vote, and this finds support in the nature of the examples given by the HRC in its comment. But as Fox and Nolte have noted, “neither the legislative history nor the text precludes use of this clause to evaluate more far-reaching restrictions on the right to be elected, such as excluding a party from taking part in elections.” In addition, the assessment of whether particular restrictions would be reasonable is an issue for which there is a lack of clear guidance. This vagueness gives post-conflict governments the space to claim that questionable electoral practices are in fact consistent with Article 25.

A post-conflict government can derive additional discretion with regard to how it approaches compliance with the requirements of Article 25 given that according to Article 4 of the ICCPR, it is possible to derogate from Article 25. Article 4 reads:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

In its General Comment 29 on Article 4, the HRC has stressed that for a suspension of rights to be valid, a state “must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation.” The HRC has also noted that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation,” and indicated that the assessment of a derogating measure will concentrate on whether it was both necessary and proportionate in relation to the situation at stake. This means that although the fact of a recent conflict within a state will not in and of itself justify a derogation, if there is a clear connection

40 General Comment No. 25 (n. 27) paras 4, 10.
41 Fox and Nolte, “Intolerant Democracies” (n. 39) 46.
43 On the relevance of the margin of appreciation concept in relation to the HRC and its assessment of compliance with the ICCPR, see Conte and Burchill, Defining Civil and Political Rights (n. 42) 43–6.
44 This is a point of distinction with regard to the corresponding provision in the American Convention on Human Rights, Art. 27(2), see Fox and Nolte, “Intolerant Democracies” (n. 39) 54.
45 HRC, “CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency” (31 August 2001) UN Doc. CCPR/C/21/Rev.1/Add.11 (General Comment 29) para. 5.
46 HRC, General Comment 29 (n. 45) para. 3; the comment mentions “armed conflict” and “a natural catastrophe, a mass demonstration including instances of violence, [and] a major industrial accident”; see also Sarah Joseph, “Human Rights Committee General Comment 29” (2002) 2 Human Rights Law Review 81, 83 (“It would however seem that the emergency does not have to actually threaten the entire nation; its impact can probably be geographically confined so long as it reaches the necessary threshold of extreme seriousness”).
47 HRC, General Comment 29 (n. 45) para 5.
between the conduct of elections and a return to extensive violence, there is scope for a departure from the requirements of the provision, such as a delay in the holding of the election, to be within the law. In this respect, there is a requirement of a declaration of a public emergency within its territory, and a requirement of a notification, through the UN Secretary General, to the other state parties — although it is arguable that derogation can be relied upon even without appropriate notification.

A final point related to the latitude afforded post-conflict governments in this area is about the value of the work of the HRC in terms of establishing the meaning of the Article 25. The interpretations provided by the HRC are the most authoritative, and provide a useful guide for ensuring that conduct is definitely consistent with the law. However, the interpretations of the HRC are not legally binding upon the state parties. This means that even where the HRC has addressed a particular issue, there is still scope for this to be contested as a point of law. This scope is increased where, as Roth has noted, there is not a clear explanation of the methodology that has been adopted by the HRC in formulating its view (particularly in the sense of how the assertions of what is the law relate to the interpretive rules found in Vienna Convention of the Law of Treaties). To the extent that this is the case with the comment on Article 25, there is a basis for a post-conflict government to resist compliance with certain aspects of the HRC’s account — such as the implication that there is a requirement of multi-party elections — on the grounds that the assertion in question remains contentious as a point of law.

In sum, international law sets out a framework for the development of a popular mandate in the post-conflict setting. The law provides direction with regard to the timing and procedure of a mandatory electoral process. Hence, there is a basis for actors with authority to be held accountable under international law for the approach taken to the development of a popular mandate for governance. However, the efficacy of the international law in this area as a source of accountability is brought into doubt by factors such as the vague nature of many of the requirements and the grounds for contestation of the authentic meaning. This is a reason to depict the nature of the extant

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48 See also UN Commission on Human Rights, “The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights” (28 September 1984) UN Doc. E/CN.4/1985/4, paras 39–41, stressing that the internal conflict and unrest must constitute a threat to life of the nation, and that this would include the physical integrity of the population.


50 HRC, General Comment 29 (n. 45) paras 5, 16, 17.

51 See Joseph, “Human Rights Committee General Comment 29” (n. 46) 96.

52 White, “The United Nations and Democracy Assistance” (n. 36) 72; see also Roth, Governmental Illegitimacy in International Law (n. 26) 334.

53 White, “The United Nations and Democracy Assistance” (n. 36) 72.

54 Roth, Governmental Illegitimacy in International Law (n. 26) 332.


57 On the benefit of this quality as a general matter see Roth, Governmental Illegitimacy in International Law (n. 26) 338.
regulation as a light approach with regard to its impact on the discretion of an interim post-conflict government. This theme is expanded on through consideration of the mechanisms for ensuring compliance with the law.

B. Generating compliance with Article 25 of the ICCPR

The significance that international law will have in practice is not only about its substantive requirements, but also the factors that can compel compliance. The stronger the coercive nature of the compliance mechanisms, the more difficult it will be for a post-conflict government to simply disregard the law where it runs contrary to what it judges to be best for the context. In relation to Article 25 of the ICCPR, a number of factors might compel a government to comply with the law. These include consequences for the legal authority of government in question under international law, action by other states, and assessment by an international court. Thinking about these possibilities is an opportunity to develop a clearer idea of how likely it is that a post-conflict government would seek to comply with the requirements of Article 25 regardless of the implications for the success of post-conflict reconstruction. Such inquiry also serves to highlight the options that are available for concerned international actors under international law, with regard to a post-conflict government that chooses to determine the approach taken to the development of a popular mandate on the basis of its own interests rather than the best interests of a situation.

In the first place, it should be noted that there is no explicit link made in Article 25 between the violation of its requirements and the continuation of governmental authority as a matter of international law. This means that a disregard of the law will not directly impact the authority of the government to enter into agreements related to the reconstruction process. Still, a disregard of the law could lead to a refusal of other states to afford recognition of governmental status. This could have consequences for the standing of the government from an international legal perspective, but it would require an extensive and coordinated effort to extinguish governmental status. This might be possible where there is evidence of a grave and serious breach of a peremptory norm, but it is unlikely for a breach of the obligation to develop a popular mandate for governance, which is generally not identified with this status.

Another possible basis for an international response stems from the erga omnes partes nature of the obligations created by human rights instruments such as the ICCPR. This means that it is open to any other state party to invoke responsibility for a breach of the treaty, regardless of whether or not it is directly injured. This provides

58 See also Roth, Governmental Illegitimacy in International Law (n. 26) 332.
a basis to demand cessation and to call for reparation for the injured party. This could serve as part of a strategy to encourage a non-compliant government to become compliant. As signaling that the government is not complying with its international legal obligations could impact its legitimacy. But for this sort of consideration to affect the thinking of an interim government supposes that the government is concerned about its legitimacy and views attempting to comply with the law as a means to improve its legitimacy. At least in relation to a situation where the government is willfully disregarding the legal obligations for the development of a popular mandate, this can hardly be assumed.

Article 54 of the International Law Commission’s Articles on State Responsibility provides a basis for countermeasures to coerce compliance. However, the nature of the measures that are permissible in this context remains uncertain and largely untested in practice. Practice reveals examples of economic sanctions and cessation of certain types of relations. The utilization of such measures against a non-compliant interim post-conflict government are unlikely, given that they would risk contributing to destabilization of the situation and would not necessarily persuade a change in policy. In this respect, the scope for a removal of the support that was keeping the government in authority, which would be possible without a legal explanation, might be a more effective deterrent. But the extent to which it would influence the thinking of an interim government is likely to be linked to the scope for a coordinated effort amongst all actors providing support. This is unlikely to be readily achieved, given the risk that its implementation would pose of a return to conflict. It should also be stressed that there is no duty on states to monitor or to invoke responsibility where a breach of the obligation is found. This helps to explain why it is possible for international actors to continue to provide support in spite of the approach taken by an interim post-conflict government to the legal requirement to develop a popular mandate.

The scope for international legal accountability to arise from within the state through members of the affected population taking action in an international judicial forum is also limited. The relevant forum for the ICCPR is the HRC. It is possible for individuals to bring claims directly to the HRC (when the state in question is a party to the First Optional Protocol). However, there are factors that reduce the relevance of this possibility in a post-conflict setting. These include the considerable period of time that can elapse before a decision will be made and publicized; and the need for individuals to have the motivation and capacity to bring a claim. Factors such as these reduce the prospect of a judicial judgment being passed during a period of time where it might be most useful as a means of generating a change in conduct from an interim government. But even if it was possible for a decision to be rendered in a timely manner, the non-legally binding nature of the decisions of the HRC further weakens its value as a source of constraint on the discretion of an interim post-conflict government.

63 Fewer states have agreed to the First Optional Protocol than are states parties to the ICCPR (114 compared to 167 states parties).
C. An appropriate international legal framework?

The analysis of the requirements of Article 25 and its associated compliance mechanisms supports the depiction of the extant international legal framework for the development of a popular mandate for governance in the aftermath of war as a light approach to regulation. This is a reference to the idea that the provisions are of such a nature that they allow for a broad range of approaches to the conduct of an electoral process to come within the parameters of the law. It is also a reflection of the limited possibility of an international judicial forum hearing the concerns during the practice, and the lack of a requirement for other state parties to take action, which means that a departure from the law has the potential to prompt little in the way of a legal response.

Such a light approach to regulation can be read in two ways with regard to appropriateness for the post-conflict setting. In terms of the call for the approach taken to the development of a popular mandate for governance to be tailored to the context, it has merit. This is because although the law directs a post-conflict government to hold a national election, it affords the government room to tailor the approach taken to an electoral process to suit the needs of the circumstances. In terms of the call for a basis for accountability, however, it appears more problematic. This is because the law provides little to guard against the risk that a government will tailor the popular mandate process to suit its own interests rather than those of the situation. To help develop a clearer view on the appropriateness of this framework, it is useful to consider how it has fared in practice.

In identifying relevant practice, a useful consideration is the manner in which a post-conflict government is able to control its territory. It is more likely that the drafters of Article 25 were targeting governments with an independent capacity for control of the state’s territory, on the basis that it is the common condition of states. As such, it is reasonable to be more interested in post-conflict situations in which governance is dependent on external actors, especially military support, than situations in which the governance is sustainable without external support. The dependence on external support increases the likelihood that difficulties with the light approach to regulation found in Article 25 will be made apparent. This is because it weakens the link between authority and the views of the population that one would expect to help drive a responsible approach to the development a popular government by an interim government.

While there have been a number of examples of practice of the development of a popular mandate for governance in the aftermath of war in circumstances where governance has been dependent on an international military presence, the focus in the following section is on the case of Sierra Leone. Specifically, the period following the war between the government of President Kabbah and a group of rebels (including


65 Sierra Leone ratified the ICCPR in 1996, and is a party to the First Optional Protocol, 1966.
despondent members of the military), which at one point forced President Kabbah into exile in Guinea. This war was officially declared over in 2002, but there was a tentative peace from 2000 onwards, and the extensive external military presence that secured the authority of the government did not leave until 2005. The focus on Sierra Leone is explained by the relatively conducive nature of the context to the suitability of the extant international legal framework. In particular, there was recent experience of an internationally monitored electoral process, and a government (President Kabbah’s) with a basis to expect that its authority would be enhanced through an electoral process. Such factors support the view that if the extant, light international legal framework was not satisfactory in Sierra Leone, it is unlikely that it will have been more suitable in more demanding contexts.

IV. The Practice of Developing a Popular Mandate for Governance in Sierra Leone

During 2000–05 there was one clear attempt to develop a popular mandate for the exercise of general political authority in Sierra Leone. It was in the form of a national election, which the incumbent government of President Kabbah won convincingly. Determining the extent to which international law was a factor in the decision of the government to hold elections and the way that the subsequent process unfolded is difficult, not least because the government often specified a commitment to the advancement of democracy in Sierra Leone without any reference to international law. Support for the view that the decision making on the development of a popular mandate for governance was motivated to come within the terms of the relevant international legal requirements is found in a number of considerations. One of these is that international human rights law provides a starting point for an assessment of the government’s commitment to democracy. If the government were to have just abandoned the law, it would be difficult for it to make a convincing case that it was committed to democracy. Another consideration is that the government stated its commitment to international human rights law on various occasions.

66 “Speech by the President of Sierra Leone His Excellency, Alhaji Dr. Ahmad Tejan Kabbah at the ceremony marking the conclusion of disarmament and the destruction of weapons” (18 January 2002) <http://www.sierra-leone.org/Speeches/kabbah-011802.html> (accessed 24 July 2013).
68 Local elections were held in May 2004.
the strength of these claims, it would be likely to be concerned to come within the relevant legal parameters. In addition, accounts of the electoral process by external observers provide a basis to argue that the practice did, for the most part, come within the parameters of the law.72 It is through considering how international law relates to particular issues that arose during the electoral process that a clearer understanding of the suitability of the extant international law is formed.

One of the key issues that arose in the practice of the development of a popular mandate for governance of post-conflict reconstruction in Sierra Leone was with regard to the timing of the parliamentary and presidential elections. In line with the constitution, the elections were due to be held in 2001 (a five-year term of office—the previous elections were in 1996). Yet the elections were not held until 14 May 2002 (around one year overdue). The explanation given by the government for the delay was the on-going condition of war.73 No notice of derogation was sent to the UN Secretary General, but it is reasonable to posit that the circumstances were such in Sierra Leone that the conduct of elections in line with the scheduled date could have had consequences that would have satisfied the substantive requirements of Article 4 of the ICCPR (on derogation in times of public emergency). Although a disarmament process was underway, it was not complete, and the ceasefire remained tentative. To hold elections in such a setting would have risked reigniting a conflict that already involved a number of failed peace agreements. Thus, there is reason to welcome the discretion that the law provided the government. This point is supported by the fact that the criticisms that were directed at the government by opposition groups and NGOs concentrated on aspects of governmental conduct that stemmed from the delay but were not about the fact of a delay in and of itself.

In particular, the government was criticized for how it approached the composition of the government during the period of delay and for failing to wait longer before the initiation of an electoral process once conditions were deemed suitable. With regard to the composition of the government during the delay, opposition groups called for an interim government to be formed. Such a call would address the concern that the period of delay was being used as means for the government to cement its position. However, there is also a risk that such an approach could bring actors together who could not, as a result of competing perspectives on how the state should be developed, function as an effective government vis-à-vis leadership of the reconstruction process.74 Moreover, this was a situation in which the incumbent government already had a claim to popular endorsement (having been elected in 1996), whereas the most vociferous opposition group, the RUF, had little evidence to support such a claim (a point

74 For instance, it was during this period of delay that the details of the Special Court for Sierra Leone were negotiated (actually signed two days before the declaration of the end of war).
Creating Popular Governments in Post-Conflict Situations

illustrated by its struggles as a political party in the elections of 2002). Accordingly, a requirement that the government include opposition groups would have been likely to add little, in terms of the connection between the government and the population during the period of delay. As such, it is reasonable to be satisfied in this instance that the extant law does not condition the legality of a delayed electoral process on such steps.

In terms of the timing of elections once conditions were deemed suitable, the concern was that the short period of notice given (around six months) was not sufficient.75 In particular, concerns were expressed about the infrastructure that was in place for voter registration and the capacity of the National Election Commission that was charged with overseeing the process.76 If one sees the quick organization as simply a means for the government to capitalize on the popularity that it was enjoying as a result of being associated with the international support,77 then the lack of attention to this issue in international law might be seen as problematic. This is because a rapid rush to elections increases the likelihood of a flawed election process, which will not be conducive to building a culture of a responsible approach to future elections. However, a key part of the explanation for the quick organization of the elections was the interest of the government in silencing the call for an interim government to be created.78 From this perspective it can be seen as positive for the reconstruction process that the government was not hindered by international law, as it helped to ensure that the reconstruction process could proceed without the question of whether or not the government had sufficient legitimacy to lead the process.

Another point of interest is with regard to the procedural matters concerning the elections. The electoral process has been criticized in a number of respects. For instance, it has been reported that “(t)here is no doubt that the SLPP [Sierra Leone People’s Party] benefited from the perks of incumbency, certain electoral rules, an apparent policy of low-key harassment and a confused registration process which suffered from omissions, multiple and underage registrations, and a non-functioning voter transfer system.”79 There is little reason to suspect that occurrences such as these affected the overall outcome of the elections,80 but they are problematic for a number of reasons. In particular, they can affect the way in which the electoral process is perceived by the public, and thereby reduce its value as a means of generating a sense of connection between the people and the government. Accordingly, there is reason to

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78 See International Crisis Group, “Ripe for Election” (n. 75) 2; International Crisis Group, “Politics as Usual?” (n. 76) 4.
79 See Harris, “Post-Conflict Elections or Post-Elections Conflict” (n. 77) 42.
80 Harris, Civil War and Democracy in West Africa (n. 76) 110.
be concerned about the present condition of international law related to electoral procedures. Although the law prohibits a host of activity that can bring the nature of an election into question, it hardly serves as a guarantee that such activity will not occur.

A more stringent compliance mechanism might have incentivized greater effort to comply with the law. However, the nature of the context in which the elections were held must be kept in mind. The elections were held amidst a shattered state and civil infrastructure, and involved the participation of groups that had recently been on opposing sides in an armed conflict. In relation to this setting, it is questionable whether the electoral procedure could have been readily enhanced. And it is difficult to imagine that the gains that this would produce for the situation would outweigh the cost, in terms of the other aspects of the reconstruction process that could be neglected as result of the redirection of resources. This is a reason to welcome the light approach to regulation. In addition, the present condition of the law meant that it was possible for interested international actors to project the elections as a success.81 If the law had been more demanding, this could have drawn more attention to the failings of the process, and made the message of a success less convincing; with potential implications for the level of external support that the government would receive for the reconstruction.

A further point of note stems from the results of the elections. Kabbah won the presidential election with over 70 percent of the votes. In the parliamentary election, Kabbah’s SLPP party won 83 of the 112 seats.82 This reflected a significant increase in the popularity of president Kabbah and his party in comparison to the 1996 elections. In terms of explanation for this increase in popularity, a prominent suggestion has been the association of President Kabbah with the presence of the UN and broader international support.83 This view is supported by the disappointing showing of the SLPP in the subsequent election in 2007, when the UN military presence had already left. But at the time of the 2002 election, the concern was expressed that the absence of viable opposition in parliament and the failure of President Kabbah to accommodate representatives of other parties in the cabinet could be problematic for the stability of the situation. In particular, it was suggested that it could be a factor in encouraging the return of “regional and ethnic inequities and abuses that fuelled the civil war in the early 1990s.”84 There was, though, little reason to query this approach to the establishment of government from the perspective of Article 25 of the ICCPR. The variation on proportional representation that was adopted as the voting system satisfied the limited requirements of the law.85 And it is difficult to argue that the approach taken to the formation of the government departed from the requirement that the elected representatives should exercise authority. One might consider that there should be more provision in the law to guard against the scope for a one-party system to develop in the aftermath of war. However, it is important to recognize that the concerns that were expressed at the time with regard to stability did not materialize.

81 See Harris, Civil War and Democracy in West Africa (n. 76) 110.
82 International Crisis Group, “Politics as Usual?” (n. 76) ii.
83 Harris, “Post-Conflict Elections or Post-Elections Conflict” (n. 77) 42.
84 International Crisis Group, “Politics as Usual?” (n. 76) 2.
85 See Harris, Civil War and Democracy in West Africa (n. 76) 105 (describing the District Block System).
The flexibility that President Kabbah was afforded by the law in terms of the selection of the government also had benefits for the reconstruction process. The legitimacy of the previous term of the government was affected by the suspicion of corrupt behavior on behalf of some of its members. If President Kabbah’s discretion was more constrained, in terms of selection of the government, it might have been more difficult to keep actors associated with corruption out of government. Moreover, the dominance of the SLPP in Parliament can also be seen as a positive development for the efficacy of the reconstruction process, because it reduced the likelihood of necessary legislative and constitutional revisions being delayed.

In sum, the Sierra Leone example provides clear reasons to be satisfied with the present approach to international legal regulation of the approach taken to development of a popular mandate for governance. The law can be seen as one of the factors that created an impetus for elections to be held, but it still allowed for the timing of elections to follow the best interests of the situation, for the electoral procedures to be in line with what is reasonably achievable, and for the approach taken to composition of the government to be based on an assessment of what is in the best interests of the situation. The law can hence be read as consistent with the best practice literature on post-conflict reconstruction, which recognizes a role for elections but calls for contextual sensitivity in how they are implemented. In addition, the practice is revealing with regard to the call for accountability of interim governments. The government generally operated in line with the parameters set by the law, and the discretion that the legal parameters provide was largely exercised in the best interests of the situation. This provides support for the idea that the absence of a stronger accountability mechanism might not be problematic, as it demonstrates that is not fundamentally unreasonable to expect interim post-conflict governments to exercise the discretion that they are presently afforded by international law in a responsible manner.

V. Conclusion

Presently, international law does not include a regulatory framework created specifically for the development of a popular mandate for governance following armed conflict. Yet there is an international legal framework that is applicable in such situations. This chapter has proceeded on the basis that this framework was not created with the complexities of the post-conflict setting in mind and that is a reason to be concerned about its suitability vis-à-vis the legitimacy and effectiveness of post-conflict reconstruction.
To help determine the appropriateness of the extant law, practice in Sierra Leone has been considered. This has helped to show that the present approach to international legal regulation can have value in the post-conflict setting. This is in the sense that in a context, such as Sierra Leone, where the government was arguably motivated to comply with international human rights law, the law on political participation helps to ensure the occurrence of elections, but allows for the details of the process to be tailored to suit the circumstances of a situation. In relation to Sierra Leone, it has been shown that the current condition of the law facilitated the timing of elections to follow the interests of the situation, for the procedures to be in line with what is reasonably achievable, and for the approach taken to the composition of the government to be based on an assessment of what is in the best interests of the situation. Such flexibility is in line with the call from the policy debate in this field for the approach taken to popular governance to be tailored to suit the context in question, in order for it to have maximum benefit for the legitimacy and effectiveness of a reconstruction process.

However, this flexibility is at the expense of the strength of the law as a basis for accountability. This has been suggested to be potentially problematic, particularly because of the interest that a post-conflict government has in exercising its authority for the process in a manner that prioritizes its own interests. Yet to try to address this concern through the creation of more detailed provisions or stringent compliance mechanisms, or to develop a more rigid interpretative practice for the post-conflict setting, could impinge on the discretion of an interim government to tailor the approach to suit the context. In this respect, the review of the practice in Sierra Leone has been argued to demonstrate that it is not fundamentally unreasonable to expect a post-conflict government to exercise the discretion it is afforded by the law in a largely responsible manner. As such, it supports retaining the status quo in terms of the extant international legal framework.

The focus of the chapter has been on international legal regulation of the development of a popular mandate for governance after conflict. But the arguments also have relevance when thinking about what international law might contribute to jus post bellum more generally. There are many other important decisions on reconstruction that must be made by interim governments following conflict across a range of sectors (e.g. security, economic, justice, and social sectors). In these instances, the best practice literature also points to the importance of the approach taken being tailored to the context. This underpins why scholars have warned against the development of an international legal blueprint for reconstruction. The analysis in this chapter is consistent with this call, but it shows that this is not a reason to dismiss the potential for international law to be useful. This chapter has shown that a light touch approach to regulation—through broad standards and limited compliance mechanisms—can be useful as a means of motivating a best practice approach, while still allowing the scope for policy making in a manner that is sensitive to the context. It should not be assumed

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89 On the interpretative practice of human rights bodies vis-à-vis assessment of post-conflict power sharing arrangements see Bell, “Power-Sharing and Human Rights Law” (n. 6); also Martin Wählisch, ch. 17, this volume.

that such an approach would be useful for other sectors where the decisions that need
to be made can vary considerably from those surrounding an electoral process. But it
could be worth exploring the possibility as part of a fuller investigation into the extant
and future legal components of *jus post bellum*.91

Finally, it is important to stress that the Sierra Leone context was arguably one of the
most ideal, in terms of the potential suitability of the extant, light touch international
legal framework (this was on the basis that there was recent experience of an electoral
process and an interim government with a basis to expect enhancement of its author-
ity through an electoral process). As such, the argument that the nature of the extant
international legal framework for developing a popular mandate was appropriate in
the Sierra Leone context should not be assumed to be susceptible to extension to all
post-conflict situations. Nonetheless, the case study helps to indicate that any attempt
to change the regulatory framework to enhance accountability in response to a finding
of a misuse of discretion in other situations would need to be carefully measured, so
as to avoid removing benefits and creating complications for situations where greater
accountability does not appear so pressing. A more definitive determination of whether
the present law is sufficient will require consideration of how it has fared in more
demanding post-conflict contexts. In the meantime, the perception of the suitability
of the extant law will benefit from interim post-conflict governments recognizing and
proceeding to exercise responsibly the discretion they are afforded by the extant inter-
national law: prioritizing what is in best interests of situation rather than self-interest.

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91 A light touch approach to regulation could, for instance, be a way for the six conditions that May
identifies for *jus post bellum* to be given a more concrete form without completely losing the flexibility that is
inherent in May’s depiction of the conditions as “not strictly speaking *lex lata* but […] also more than mere
*lex ferenda*.” Larry May, text to n. 35 in ch. 1, this volume.