14 Conclusion: Towards a fuller understanding of the foundations, practice, and future of the role of international law in post-conflict reconstruction policy

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What role does international law have in post-conflict reconstruction policy? By addressing certain areas of practice where there is a particularly close relationship between law and policy and/or potential for the relationship to be particularly antagonistic, the individual chapters of this book have made an important contribution to a fuller understanding of the ways in which international law and policy on reconstruction interact in the aftermath of conflict. This concluding chapter attempts to help further develop the knowledge base. It does so by drawing on the individual chapters to identify and reflect upon key points that correspond with the three main research questions that underpin the book as a whole: how does international law regulate policy making on post-conflict reconstruction? How does international law relate to the implementation of the best practice postulates on post-conflict reconstruction? What potential is there for international law to be harnessed more effectively towards the interests of achieving a sustainable peace through reconstruction after conflict?

How does international law regulate policy on post-conflict reconstruction?

This question is about the substantive requirements of the relevant international law, but it is also about the form that the requirements take and the nature of the associated compliance mechanisms. The book as a whole has provided insights of general relevance both in terms of the contents of international law and the way in which it operates to exert an influence in the aftermath of conflict.

The degrees of legalisation of policy making

One reference point that can help to frame discussion of the regulatory nature of international law is found in the three dimensions of legalisation: obligation,
precision, and delegation. Each of these components can be chartered from high to low. Obligation is about the degree to which an actor is bound by the rule. At one end of the obligation continuum is an unconditional intent to be legally bound, at the other is 'explicit negation of intent to be legally bound'. Precision is about the degree of ambiguity in the conduct that is required, authorised, or proscribed by a rule. High precision is found in determinate rules with only limited scope for interpretative discretion, lower precision is found in standards that might only be meaningful with reference to a specific context. Delegation refers to the extent to which 'third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules'. Variations in these components, along with political and social factors, can be expected to affect international law’s influence on actors with authority for policy making in the aftermath of war.

The chapters of the book draw attention to variations in the nature of legalisation that characterise the various bodies of law that can have a bearing on the practice of post-conflict reconstruction. Consider, for instance, Saul’s chapter on the identification of an interim government in the immediate aftermath of conflict. This is an issue that is central to the fundamental international legal concepts of sovereignty and the right of all peoples to self-determination, but Saul argues that it hinges, ultimately, on the international law of governmental status. This is fairly unremarkable in the normal run of things, as a state is expected to have a government and external actors are expected to be able to readily distinguish the government from any other actors purporting to exercise authority. In the aftermath of war, though, the issue can be complicated. The traditional position in international law where there is uncertainty is to look for the actor with effective control of territory. Where independent control of territory is missing, the question is argued by Saul to fall on the level of international recognition for which there is no clear standard. In this area, then, there is a high level of obligation; in the sense that it is clear that extensive international involvement in a state will breach the sovereignty of the state and the right to self-determination, unless there is a basis to preclude wrongfulness, which is most readily found in consent. But precision is low; the law largely leaves the details of how a government should be identified to be worked out in the light of the context. Discretion is also facilitated because there is no third actor to which authority to determine the matter has been delegated.

2 Ibid at 410.
3 Ibid at 401.
4 Ibid at 415.
5 Ibid at 401.
6 Ibid at 419; see also M Finne more and S J Toope, ‘Alternatives to “Legalisation”: Richer Views of Law and Politics’ (2001) International Organization 745, 755 drawing attention to other considerations that will also be likely to affect law’s impact on politics, such as the importance of social processes of interaction. ‘To be effective, obligation needs to be felt, and not simply imposed through a hierarchy of sources of law’.

Other areas of post-conflict reconstruction have been subject to different levels of legalisation. Consider Buyse’s chapter on regulation of administration of the media sector. This chapter deals in particular with the right to freedom of expression found in Article 10 of the European Convention on Human Rights (ECHR). The right takes a legal form. The provision is clear that everyone within a contracting state has the right and the practice of the European Court of Human Rights (ECtHR) has helped to elucidate the type of activity that is covered. Moreover, a degree of authority to determine compliance, subject to the principle of subsidiarity, has been delegated to the ECtHR. As such, this might be considered to be an area where policy is subject to a relatively high degree of legalisation. At the same time, the jurisdiction of the ECtHR is largely dependent on individual applicants and there can be long delays from the point at which an application is made and the judgment is passed. Moreover, Article 10 ECHR, among several others, includes a limitation clause, which, in turn, is understood by reference to the amorphous and ubiquitous notion of a ‘margin of appreciation’. The operation of the limitation clauses and what sort of activity they will cover is inherently linked to the circumstances in which a restriction is introduced. This means that the provision is less ‘legalised’ than the right to life, for instance, which specifies the three instances where deprivation of life will not be considered a violation of the Convention and where, typically, there is no margin of appreciation. However, the construction of the limitation clause for freedom of expression does not mean that the actors are afforded complete discretion. There is an expectation that any limitation to the freedom will be determined in light of an assessment of the necessity and proportionality of the measure, which is to include consideration of the scope for the same aim to be included in a less restrictive manner and consideration of whether ‘the advantage of pursuing the aim by the means in question outweighs the cost to rights’.

Another interesting aspect in terms of the legalisation of policy making, to which the book as a whole draws attention, is the scope in some instances for the requirements of international law to be interpreted in the light of the demands of post-conflict settings. Consider, for example, Sweeney’s chapter on displacement and restitution. The chapter demonstrated that there has been a tendency in policy materials to over-claim the obligation and precision elements of post-conflict housing legalisation. Yet the reality of, at least European, human rights law is that whilst there are obligations, the precision element is marked by scope for a degree of ‘transitional relativism’.

The significance of the social and political context of policy making

The debate on compliance in international law stresses that the impact of law on policy actors is far from solely a reflection of the nature of the legal framework, but also the broader social and political environment. While a rationalist approach stresses the importance of a calculation of given interests (such as reputation), a constructivist approach refers to theories that take state interests as constructed socially through the influence of ideas10 (such as the importance of human rights), with social mechanisms operating to condition and influence the conduct of states—including coercion (implicit and explicit), persuasion, and acculturation.11 In a post-conflict reconstruction setting, the socialisation explanation for compliance might be expected to assume extra importance. This is on the grounds that the extensive international involvement, which in many cases underpins the authority of the governing actors, interrupts the connection between the government and the population of the state. This is significant because the domestic environment, particularly a concern for domestic legitimacy,12 along with the operation of compliance communities (including politicians, domestic judges, and non-governmental organisations),13 has been identified as a key driver for compliance with certain areas of international law, especially human rights in international law. Accordingly, the domestic impetus for compliance with international law can be reduced during post-conflict reconstruction.

The potential importance of socialisation as a factor that helps to determine the impact of international human rights on policy making during post-conflict reconstruction is brought into focus by Sharp’s chapter on security sector reform (SSR), and Waldorf’s chapter on legal empowerment. Sharp demonstrates that key SSR actors such as the OECD are aware of the importance of human rights and how key documentation has, over time, come to embody commitment to human rights as a key element of SSR. But the chapter also draws attention to a policy-practice divide in which a concern for human rights in documentation is not matched in the implementation: ‘the holism and more ambitious governance objectives of the SSR concept are often brushed aside in favour of traditional interest-based security assistance programs that may do more to promote the hard security and counter-terrorism objectives of the donor country than the human security of ordinary individuals living in the recipient country’. Sharp notes that this can be a result of a number of factors, including that the human rights goals can require a long-term commitment when international partners are often short-term focused. However, Sharp also argues that the divide might stem ‘in part from a failure to appreciate the extent to which some of the goals of SSR—including accountability and respect for human rights— are not merely wishful ideals, but are in fact grounded in well-established international legal principles and obligations’.

Waldorf’s chapter on legal empowerment might be seen to stand in contrast to Sharp. The chapter addresses the dramatic surge of legal empowerment programming over the past ten years in post-conflict states. Part of what makes legal empowerment distinct from rule of law programming is that it allows international actors to take the norms, institutions, and practices of local customary law on their own terms. What Waldorf observes, however, is how international actors in this area, particularly the UN Development Programme (UNDP), struggle to engage with customary law on its own terms; instead, they are compelled to hybridise it in a way that conforms with global human rights norms.

Taken together, these two chapters draw attention to the significance of the sector of reconstruction for the influence that international law, particularly human rights law, can have on actors with authority. The sector is important because it can come with different sorts of demands in terms of the achievability of reconstruction objectives that might be more or less susceptible to international legal regulation. But the sector is also important because different sectors can be associated with different sets of international stakeholders that can have different connections and commitments in relation to international law.14

The chapters of the book also show how the regulatory strength and content of international law is subject to development through overlapping regulatory initiatives. One example of this is found in Swaine’s chapter on gender policy which addresses the women, peace and security agenda (WPS) resolutions of the UN Security Council (UNSC) (from 1325 (2000) to 2122 (2013)). These resolutions represent the potential for the UNSC to harness for the purpose of developing international legal norms that are crafted specifically for conflict and post-conflict settings in a manner that can be developed over time, with a broader thematic focus on gender equality being channelled into more precise topics, such as sexualised violence during conflict. The resolutions also demonstrate the scope for there to be interplay between different sources of international law. While the resolutions were adopted under Chapter VI of the UN Charter, the normative strength of the provisions is enhanced to the extent that they refer to and complement binding international legal instruments such as the Convention on the Elimination of Discrimination against Women (CEDAW). In addition, the resolutions draw attention to the relevance of CEDAW’s provisions for policy makers who might otherwise have been inclined to give provisions designed to address

12 B Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (OUP 2009) 124.
14 In this respect, see also Tuner and Houghton’s chapter, which identifies significance in the move from the UNDP to the UNSC at the focal point for UN involvement of constitution making.
but as a strand in a web or fabric of controls, but it adds complexity to projects that attempt to view international law's post-conflict operation in a holistic manner. It also points to the value of a case study approach to research in this area. The variability in the way the law regulates can also help to explain some of the differences in the way that the law has related to implementation in practice—the subject to which we now turn.

**How does international law relate to the implementation of the best practice postulates on post-conflict reconstruction?**

The chapters in this book have dealt with a range of sectors of post-conflict reconstruction and a range of international law. One common theme is that, in many instances, the law that has been studied has not been created with the challenges of a post-conflict reconstruction setting in mind. This is a reason to suspect that in many areas international law could be vulnerable to the risks that the discipline of regulatory studies has identified as attaching to any area of regulation. In particular, the risk of being irrelevant because of a failure of targeted actors to comply, the risk of being non-responsive to existing social norms and values and the risk of being incoherent in circumstances where the social values or norms are overwhelming. The chapters of this book demonstrate that these risks have materialised to different degrees and with different consequences for the relevance of international law for policy on post-conflict reconstruction.

It is possible to chart the policy relevance of international law on a sliding scale from complement to complicate. ‘Complement’ means that the operation of international law coincides with and helps to move the policy recommendations forward in a relatively coherent manner. ‘Complicate’ means that international law is working against a particular policy objective. The extent to which individual chapters can be pinpointed on this scale varies and it is possible to find aspects of both in the individual chapters. However, an attempt to position certain chapters on this scale can help to give an indication of the range of ways in which international law interacts with policy in practice.

**A complementary role for international law?**

Saul's chapter on identifying government to lead reconstruction includes perhaps one of the strongest examples of international law 'complementing' policy objectives. This is in the sense that the importance of formal consistency with

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15 This theme was also particularly evident in a paper that Sorena McLoud presented at the Lancaster workshop on the regulation of private military security companies.


of international law, both hard and soft, on reconstruction policy. The chapter describes the Constitutional Court drawing upon the UN Commission on Human Rights, Guiding Principles on Internal Displacement, to give judicial meaning to policies to address the humanitarian emergency of displacement. Yet the chapter also draws attention to one way in which international law can complicate policy making on matters of reconstruction. This is a reference to international law providing different frameworks which potentially overlap and which compete for the development of policy. The authors show how international law helped to frame the policy approach to internal displacement in humanitarian terms (characterised by the urgency of the present and the challenge of distributing resources to the displaced) and the benefits that has had in terms of an emerging movement towards a greater voice for internally displaced women. It also shows how international law connects to the impetus for a move to a transitional justice approach (concerned with the past – specifically, with the memory of past atrocities and the award of reparations for them) under the new administration, as a basis for addressing the effects of armed conflict. This move included alteration of the legal framework for dealing with internal displacement by the 2011 Victims’ Law. The result of the co-existence of progressive legal regimes has been a messy complexity with different implications for internally displaced women. The potential for the impetus from international law for an emphasis on transitional justice to be a complicating factor is also found in other chapters.

In this respect, McAuliffe’s chapter on the rule of law reform draws clear attention to the scope for international law to complicate policy making. Here, international criminal law is implicated in the impetus towards prioritising measures to address past atrocities. As McAuliffe notes: “Undue delay” is seen as one of the key indicators of unwillingness or inability in the ICC’s Article 17 complementarity regime, while the permission extended to the UN Security Council under Article 16 of the Rome Statute to defer an ICC investigation or prosecution for an admittedly renewable period of 12 months suggests that a year is seen as a milestone beyond which delay becomes impermissible. The concern raised by McAuliffe is that the impetus international criminal law creates, in turn leads resources to be pulled away from more ordinary law reform initiatives. Ordinary reform initiatives can be just as important for the realisation of sustainable peace, especially where the lack of reform hinders the scope for corrupt governance actors to be held to account. McAuliffe’s call is not for past atrocities to be overlooked, but for the balancing of the resources to be undertaken in a manner that is more in line with the key rule of law challenges for a particular context. The impetus for immediate action that surrounds the operation of international law in the aftermath of conflict can make it difficult for this call to be actioned.

A key international actor for determining the impact of international criminal law on post-conflict reconstruction policy is the International Criminal Court (ICC). This point is picked up on in Annika Jones’ chapter on the approach to dealing with past atrocities after conflict. Jones recognises the importance of a locally
owned process that is sensitive to the context, as well as that international criminal justice is just one option among many for how a society might seek to deal with past atrocities. One concern for Jones is that the operation of the ICC can encourage states not only to prioritise transitional justice, but also within it to prioritise a particular type of criminal justice, one that draws heavily on the ICC’s system of justice. In this respect, Jones calls attention to the important role that the Prosecutor of the ICC and the Court’s Pre-Trial Chambers have to play, in that ‘clarity as to the requirements for admissibility under Article 17 of the Rome Statute and the factors that the Prosecutor will consider in deciding to proceed with an investigation under Article 53 of the Rome Statute may prevent mimicking of the ICC’s system of justice where it is not beneficial or appropriate to do so’.

It is also important to reiterate at this point the argument of Waldorf in relation to international human rights law and legal empowerment policy. While the essence of legal empowerment is giving the poor access to justice on the basis of local law as it is, Waldorf identifies the UNDP as being influenced by international human rights law in the way it has developed and implemented policy. In particular, that it has sought to re-imagine local law in ways that enable it to be read as consistent with international human rights law. Waldorf’s concern is that this re-imagining removes the distinctive nature of legal empowerment projects and, in so doing, reduces its value for a post-conflict society. One might think that this is due to international human rights law having impetus of a similar strength to that of international criminal law and its surrounding actors, but other chapters in the book, such as Sharp’s, demonstrate that, in certain circumstances at least, international human rights law does not exert the same influence on policy makers. One route towards reducing the tension between customary justice and international human rights law could be for the UN Human Rights Committee to take more account of the particular demands of post-conflict settings when offering general assessments. As Waldorf notes, however, such assessments have tended to focus on customary justice in the abstract.

In sum, the chapters of the book support the view that international law relates to the policy of post-conflict reconstruction in different ways. Specifically, it can both complement and complicate. The way the law relates to policy can vary according to the area of reconstruction, the law at stake, and the broader context, with much depending on the interests and preference of the actors with authority. The dynamic nature of the way international law relates to policy can complicate any attempt to change areas of international law to better reflect post-conflict realities. Nonetheless, it is to the potential for more to be made of the role of international law in relation to the policy of post-conflict reconstruction that attention is now turned.


How can international law be harnessed more effectively towards the interests of achieving a sustainable peace through reconstruction after conflict?

Practice demonstrates that establishing a sustainable peace, including through internationally enabled reconstruction initiatives, can be a long process, involving the negotiation of context-specific, sensitive political issues amongst both local and accountability stakeholders. In such a setting, there is both an imperative for accountability through international law, to both respond to and help to deter abuses of authority, but also an imperative for deregulation to allow the demands of the situation to be accommodated. These diverging considerations have shaped much of the debate that surrounds the question of the creation of a new body of law to regulate peace-building practices, including reconstruction, following conflict.

While the idea of a legal blueprint for reconstruction has generally been dismissed, Orend’s analysis has provided the basis for suggestion that a new Geneva Convention focused on post-conflict processes could be necessary to realise the ambitions of jus post bellum. Osterdahl and E van Zanden have suggested that ‘[w]hen 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’. Others have placed more weight on some of the potential difficulties. Bhuta, for instance, has pointed out that ‘[a]n overly prescriptive, rule-based ideal of jus post bellum might not be functional in the context of the central dilemmas of creating new political orders’. This is a sentiment shared by Bell, who has also stressed the difficulties that would be encountered in gaining political will for any new law creation amongst states, in determining its content and in specifying the temporal range for its application.

The list of further research issues highlighted in the recently published Jus Post Bellum volume, along with other initiatives, such as the ongoing work of the UN Human Rights Council on the challenges of the realisation of human rights in

27 Bell (n 9) 196–197; see also C Bell, ‘Peace settlements and international law: from lex pacifactiva to jus post bellum’, University of Edinburgh School of Law Research Paper Series No 2012/16, 52–56.
post-conflict situations, highlights that the question of in what manner and to what extent it is reasonable to contemplate further regulation with regard to the post-conflict period as a whole remains a live one. By helping to show the ways in which existing international law interacts with policy making on post-conflict reconstruction, the chapters of this volume can be drawn on to develop knowledge relevant to this debate. Yet rather than providing a clear basis for identifying areas where more or less regulation should be developed, a key contribution of the chapters is that they strengthen the understanding of the complexities that would be needed to be navigated to develop a more satisfying balance between the twin concerns of accountability and contextual flexibility. In this sense, the book can be seen as a call for further reflection on what already exists and how it might be further enhanced.

The chapters of this book can also be drawn upon to provide indicators of steps that can be taken to help improve the relevance of international law in post-conflict settings without the need for the creation of new legal instruments. Three possibilities in particular might usefully be given further attention: interpretation, procedures, and perspective.

**Interpretation**

A theme that runs through many of the chapters of the book is that relevant international law can remain uncertain in different ways (e.g. in Saul’s chapter on governmental status; Jones’ chapter on international criminal justice; and Sweeney’s chapter on restitution and displacement). In some instances, uncertainty in the law can have benefits (e.g. allowing contextual considerations to be accommodated in policy). This links in with Bell’s argument in favour of “uncertain legal formulations as able to articulate the importance of normative concepts such as accountability or even democratic participation, while also recognising that in practice such concepts can only come into being by agreement between people and groups of people who hold widely differing views as to what they entail”. But it is also possible that in some instances it would be useful for the law to be made more certain, such as where there is a particular risk of policy being developed in the interests of the small group of actors with authority rather than the interests of the affected population. Such a risk has the potential to be particularly high in situations where the government has little basis to claim to be an embodiment of the will people and where international actors sustain authority, or where international actors are in fact acting as the government. The concentrated nature of authority in these sorts of situations is of a different nature to the potentially more participatory and discursive form that authority can take in the peace settlement context, in which the argument in favour of negotiated justice is at its strongest.

O’Donoghue’s chapter on the accountability of international organisations that administer post-conflict territory is useful for showing the potential and need for the interpretation of international law to respond to the post-conflict context. International organisations as territorial administrators lack a connection to the constituent people in a post-conflict state and are outside the jurisdiction of potentially relevant international courts. In such circumstances, O’Donoghue argues due diligence in the sense of, amongst other things, “the imperative to assess harm and risk, obligations to notify and consult, prevention and protection, a duty to investigate as well as reparations or restitution when harm occurs”, can assume particular importance as a means of reducing the scope for a harmful impact of the policies undertaken. While in many instances due diligence components of international obligations remain underdeveloped, O’Donoghue’s chapter stands as a call for development in a manner that is sensitive to the demands of post-conflict settings. As the obligations of international organisations that administer territories after conflict are only rarely the subject of international judicial attention, the chapter calls for the organisations to take this on, both to take notice of the obligations but also to give them meaning for the post-conflict setting. In this respect, there could be a role for the *jus post bellum* conceptualisation of the role of international law after conflict, both as a basis for calling for interpretative action to make the law more certain and for guiding its implementation.

**Procedures**

Another theme that can be traced throughout the book is the prominence of procedures. Consider, for instance, Swaine’s account of the role of national action plans as “a means to bureaucratize the [WPS] resolutions, translating their aspirational aims and ambitious goals into specific, measurable and practical (at times strategic) action points fit for administrative consumption”; or the attention given by Turner and Houghton to the importance of the identity of the actors that are

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29 An expert report on the best practices and main challenges in the promotion and protection of human rights in post-disaster and post-conflict situations is due to be delivered to the Council in March 2015, UN Doc A/HRC/RES/22/16 (10 April 2013).

30 On the importance of ‘legal humility’ in the consideration of the role of law in transitional societies, see K McEvoy, ‘Letting Go of Legalism’, in K McEvoy and L McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart 2008) 15, 29; see also Braithwaite (n 19) 274, 286.

31 Bell (n 9) 205.

32 See Saul, *Popular Governance of Post-Conflict Reconstruction* (CUP 2014) for arguing that both the substance and the compliance mechanisms of the international legal framework for popular governance after conflict are light touch in nature, and the appropriateness of this approach to legal regulation is heavily dependent on the priorities of actors that are vested with political authority.

33 On the ‘uncertain world of negotiated justice’, see Bell (n 9) 206.

34 See also Sharp’s chapter arguing that “the duty to respect and to ensure human rights must include, at a minimum, a duty of due diligence to analyse and understand patterns of abuses that took place or continue to take place in a specific context”.

35 On *jus post bellum* as an interpretative framework, see J Galen, ‘*Jus Post Bellum*: An Interpretive Framework’, in C Stahn, J S Easterday and J Iverson (eds), *Jus Post Bellum* (CUP 2014) 50; Bell (n 9) 205.
involved in the constitution-making process. The prominence of procedure can be seen as a reflection of the importance of context for the implementation of reconstruction policy, which counsels against substantive blueprints, as well as the fact that the way decisions are taken, generating a sense of ownership or not, can impact on its meaning for a society.66 This is a reason for possibilities that exist in international law for the development of contextually relevant procedures to be explored further.67

The chapter by Buyse can be used to draw attention to the potential scope for and value in greater attention to matters of procedure in the application of international law in post-conflict settings. It deals with how administrative actors in Bosnia and Kosovo attempted to regulate the media sector. Buyse points to international law on freedom of expression that is relevant for the decision-making process, in particular, through the parameters it provides for determining restrictions. The chapter refers to key regulatory instruments that have been promulgated in these instances, which refer to and purport to be consistent with the ECHR on freedom expression (e.g., the broadcasting best practice code issued by the Independent Media Commission (IMC) in Bosnia in 1998). This code of best practice supports the idea that international law can be drawn upon to provide the basis for a framework for regulating post-conflict societies. But the way in which the list of restrictions extends well beyond that explicitly indicated in the ECHR provision on freedom of expression (Buyse describes how the IMC elaborated upon the ECHR in a manner ‘which read as a barely disguised didactic book for responsible media’) might be seen as a reason to question the usefulness of the guidance that is provided for the necessity and proportionality assessment that is required to underpin limitations on freedom of expression. In this respect, it is important to stress that the circumstances at stake were especially demanding ones, in which policy making on the media sector had to contend with the tension between the strive for democracy, on the one hand, which encouraged allowing an open media, and the need to prevent encouragement of violence, on the other hand, which would be a reason for restrictions. In such settings, there is reason to query whether a limitation clause, the parameters of which have been developed with a generally stable state in mind, provides sufficient basis for determining the balance of restrictions. In particular, there is a risk that the actors with decision-making authority will too readily favour whichever side of the balance suits their own interests. One way to help counter this would be for the decision-making process on the creation of the domestic regulatory framework to be opened up to different stakeholder groups. This is something that should be determined in the light of the context, but this does not mean that it would be inappropriate for opportunities for international law to be developed in a way that encourage participatory procedures to be taken.68 For instance, courts such as the ECtHR that are able to influence the way that the necessity and proportionality components of the limitation clause are understood, could read them in a manner that gives due to weight to participatory steps that are deemed appropriate for the context.69 In so doing, this could serve as a strong signal for procedural issues to be given particular attention in future post-conflict practice.

Perspectives

Several chapters in the book draw attention to the way in which international law connects to the perspective of policy makers. 40 McAluliffe argues that the prominence of international criminal law leads to a prioritisation of issues of transitional justice (but note Sweeney’s distinction between transitional justice as a ‘mission’ and as an observable phenomenon, characterised by non-ideal solutions). Jones argues that within transitional justice, the pull of international criminal law leads to a focus on criminal justice. 41 Sandvik and Lemaitre argue that governmental framing of a context as transitional opens it up to a different focus and a different body of international law. 42 Sharp’s chapter points towards the view that framing the matter as security leads to a downplaying of human rights. In addition, Waldorf’s chapter might be read as suggesting that when legal empowerment is dealt with through the UNDP, it is marked out as a development issue from which it follows that human rights must be incorporated. The centrality of perspective to a

38 A potential foundation for such a move is found in May’s account of jus post bellum, which highlights proportionality as one of the six key conditions. L. May, ‘Jus Post Bellum, Grotius, and Meloniessa’, in C. Blamini, S. Easterday and J. Heselius (eds), Jus Post Bellum (OUP 2014) 15, 16; L. May, ‘Jus Post Bellum Proportionality and the Fog of War’ (2013) 24 European Journal of International Law 315; Gallen (n 35) 77–79 arguing that proportionality should be adopted as part of an integrity based jus post bellum theoretical framework.

39 This would be in line with calls elsewhere for courts such as the ECtHR to take seriously the notion of procedural justice throughout its work. E. Brens and I. Lurysen, ‘Procedural Justice in Human Rights Adjudication: The European Court of Human Rights’ (2013) 35 Human Rights Quarterly 176; see also G. McCrodden and B. O’Leary, Courts and Constitutionalism: Human Rights versus Power-Sharing (OUP 2013) 148 calling for the processes of the ECtHR to be more participatory in relation to fundamental and contentious post-conflict issues, ‘[t]hey also minimally need accurate surveys of public opinion on professionally credible evaluations of what group members themselves regard as vital national, ethnic, religious, or linguistic concerns, as well as international and local security assessments by experts on civil war’.


41 McAluliffe (n 30).

number of the challenges associated with the role of international law in relation to the policy of post-conflict reconstruction is a reason for greater attention to be given to what it is that generates and sustains certain perspectives in post-conflict setting. Addressing these issues could allow for perspectives that connect to the roles of international law to be managed in a useful manner.

In this respect, reflecting on the book as a whole, it can seem that there is great significance in a particular subject matter having a telos, in the sense of being presented in a way that has a clear process and end point. Where this is the case, it seems that the issues raised will receive attention and resources and relevant international law will be addressed; but where the topic is more ongoing and of a cross-cutting nature, such as the general issue of rule of law reform or the position of women after conflict, there is a greater risk that it will be sidelined. This raises the question of what strategies might be developed to try to secure greater prominence for important issues that can become side tracked and how international law might be part of such a strategy — here the lessons from soft law approaches noted above could be particularly useful.

Ultimately, interest in the nature of perspectives, along with questions of interpretation, and procedures, should all form prominent parts of ongoing research related to how to harness existing international law, in a manner that contributes to realising the goals of international law whilst also furthering the effectiveness of post-conflict reconstruction as a route to sustainable peace.

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