2 International law and the identification of an interim government to lead post-conflict reconstruction

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Introduction

The term post-conflict reconstruction is a reference to 'the mechanics of achieving a stable, reconstituted, and sustainable society after conflict'. Typical reconstruction initiatives include reform of infrastructure, physical construction, and particular projects, such as a programme of disarmament, demobilisation, and reintegration (DDR). Due to an absence of domestic control and resources, such reconstruction initiatives often depend on the provision of military, financial, administrative, and technical support from international actors. In addition, such initiatives are frequently undertaken before there has been a chance for the population of a state to express its preference as to which actors should govern. A key reason for this is that while a comprehensive process for popular involvement in the selection of a government – such as a national election – requires time-consuming preparations, the effectiveness of many reconstruction initiatives are time sensitive. A delay in the implementation of a programme of transitional justice, for instance, could have significant implications for the process of reconciliation amongst a community. This heightens the importance of the actors that undertake the role of interim government.

In certain instances, international actors can be in a position to significantly influence which domestic actors are identified as the interim government in the initial stages of a reconstruction process. Consider that, in recent times, international actors have been decisive in determining the identity of the domestic actors who led the reconstruction processes that have unfolded in Haiti, Liberia,

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2 On the best practice for timing and sequencing of reconstruction initiatives, compare R Paris, At War’s End: Building Peace After Civil Conflict (CUP 2004) 188; R Penzo, Democratic Peacebuilding: Aiding Afghanistan and other Fragile States (OUP 2011) 247-248; on the role of international law in post-conflict electoral processes, see M Saul, 'Creating Popular Governments in Post-Conflict
Sierra Leone, Afghanistan, and Iraq. Without the support of an array of international actors, the interim governments in these situations would not have been in a position to exert sufficient control over the territory to be able to implement a programme of reconstruction. The approach the international actors take in determining which actors to treat as the government can clearly have major implications for the success of a reconstruction process. As such, there is an onus on the international actors to take a responsible approach. According to the best practice literature, a responsible approach includes the prioritisation of local participation in the process of identifying the interim government and in the government’s membership, but in a manner that takes full account of the demands of the context. This chapter proceeds on the basis that a responsible approach could also be expected to include adherence to international law.

There is no international legal framework that has been created specifically for the regulation of the identification of an interim government by international actors interested in supporting the reconstruction of a state following conflict. This does not mean that international law is without relevance. There are a number of international legal norms, including sovereignty, self-determination, and governmental status, that one might expect to have a bearing on the options available to international actors.

This chapter has two main aims. The first is to draw attention to the scope for international law to influence the approach that international actors take to the identification of an interim government to lead post-conflict reconstruction. It does this by identifying the requirements of the relevant international law and considering the extent to which this is likely to restrain the discretion of international actors when determining who to support. The second aim is to develop a clearer understanding of the appropriateness of the international law from the perspective on the policy debate for best practice for international engagement. It does this by considering how international law relates to key best practice principles and examining the significance of the current condition of international law for the internationally enabled reconstruction process that unfolded in Afghanistan from 2001 onwards.

A key argument is that international law in this area largely overlaps with the best practice postulate of local ownership and that the current condition of the law can be connected to a number of positive aspects of practice in this area but, potentially more problematically, the current law leaves open scope for the best interests of the population to be overlooked in the identification of an interim government. It is further contended that the underdeveloped nature of the law related to the identification of an interim government makes it important to consider how international law regulates post-conflict reconstruction more generally.

Before turning attention to the nature of the international legal framework, it is useful, as a reference point for the subsequent analysis, to consider in more detail what the best practice policy literature suggests about how interim post-conflict governments should be identified and what this indicates about a potential role for international law.

The best practice policy for identifying interim governments

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. This has often been discussed under the heading of local ownership. The use of the term of ‘local ownership’ can be queried in a number of respects, including that for neither the post-conflict or general aid setting (where the concept has its origins) is ownership meant in a literal sense, but rather a figurative sense of ownership of processes and outcomes of reconstruction. Moreover, the term ‘local’ is generally used to distinguish not local level from national level, but all domestic actors (including individuals and collectives at the local, regional, and national levels) from international actors. The prominence of the term can perhaps be linked to the idea that whereas terms such as involvement or participation leave open the possibility that the role found for popular input could be small or large, use of the term ‘ownership’ conveys a less variable, more substantive, notion of popular engagement—enough involvement for the decisions to actually be owned. Consequently, using the language of ‘local ownership’ can be seen as a strategy to help distance a reconstruction process from one of external imposition, even if, in reality, the local ownership aspect might transpire to only be small.


6 Chesterton (n 5) 4.

7 Chesterton (n 5).

8 Chesterton (n 5) 9.

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 (e.g. through governmental consultations with groups of individuals). It can also be indirect (e.g. through the means of a free media). The present focus is on the best practice in relation to the identification of an interim government.

A key reason the approach taken to popular involvement in 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. Popular involvement in matters of governance 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. An increase in legitimacy helps with effectiveness because it generates positive engagement on behalf of the target population, rather than resistance. As such, one might think to simply prioritise popular engagement as the route towards a useful approach to the identification of an interim government in a post-conflict situation. However, involvement of the population in a process to identify a government through elections or consultations can be time-consuming. To this end, it might be more helpful to have a less population-intensive process in certain situations, as a means of identifying the government more rapidly, and thereby enabling important, time-sensitive decisions on the reconstruction to be made. Moreover, post-conflict periods often involve circumstances — such as political flux, lack of security, and a general lack of capacity — which are not conducive to popular governance. In particular, mechanisms for popular involvement in the identification of a government 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 on the identity of an interim government 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 to avoid negative side-effects.

Post-conflict contexts can vary in a variety of ways, including the level of social differentiation amongst a community (e.g. 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 taken to identifying an interim government to the context are significant in terms of the likely relevance of international law. There is a risk that international legal specifications could hinder contextual sensitivity. Hence, the possibility arises that it could be preferable (for the overall legitimacy and effectiveness of a reconstruction process) for the international actors that are faced with the question of determining which domestic actors to afford authority in the aftermath of war, through the provision of extensive resources, to be permitted to determine the approach without any international legal restraint. However, it is also important to recognise that the international actors are not without self-interest in the matter. The prominence of international organisations such as the United Nations in the practice of post-conflict reconstruction might offer some reassurance that the international authority will be exercised in good faith in the best interests of the population. However, the nature of the power structures within international organisations, such as the limited membership of the main executive organ of the United Nations, the Security Council, is a good reason why the collective foundations of international organisations should not lead them to be assumed to be purely benevolent actors. International actors

13 Donais (n 5) 20-21.
16 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 M Barnett and C Zurcher, 'The Peacebuilding Conundrum: How External Statebuilding Reinforces Weak Statehood?', in R Paris and TD Sisk (eds), The Dilemmas of Stabilisation: Confronting the Contradictions of Postwar Peace Operations (Routledge 2009) 23, 31-33.
17 See G H Fox, Humanitarian Occupation (OUP 2008) 307-308, arguing that on the basis of its collective identity the role of the UN Security Council in assisting states following conflict should be assessed on different standards (e.g. past practice and level of international support) than those applicable to states acting alone (e.g. respect for self-determination).
18 See J L Cohen, Globalisation and Sovereignty (CUP 2012) 262; B R Roth, Sovereign Equality and Moral Disengagement (OUP 2011) 13-16, Donais (n 5) 21-22.
might seek to support the domestic actors that are most likely to be compliant with their desire for how the reconstruction should proceed rather than for achieving what is in the best interests of the population. It is also possible that the international actors might simply stop at what they deem is a sufficient compromise, without taking additional steps that could achieve a more satisfactory solution. Both of these outcomes could clearly be damaging for the legitimacy and effectiveness of a reconstruction process. This helps to explain why it is important to be interested in the scope for the approach taken to the identification of an interim government to be regulated through international law.

An international legal framework for the identification of an interim government post conflict 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 the process. In turn, the possibility of sanction could serve as a motivator for a reasonable approach, whilst also operating as a source of reassurance for the affected population that the actors in authority have been selected in a reasonable manner. However, it is evident that — even starting from the position of a clearly defined category of post-conflict situations in mind — it will be difficult to craft an appropriate international legal framework for the process. Two of the key considerations that should underpin its design are far from complementary. A move to strengthen accountability, be it through more detailed provisions or more coercive supervisory arrangements, will be likely to constrain the discretion of international actors to allow for the particular circumstances of the target situation to be accommodated. The rest of 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 the extant international law in the sections that follow.

The International Legal Framework

An international legal framework created specifically for the identification of an interim post-conflict government is not unimaginable. It could specify criteria that the actors must satisfy, such as: elected; served in office before; nationals of the state. To date, no specific framework has been created, but this does not entail that there is no relevant international law.

The Laws of Sovereignty and Self-Determination: A Question of Consent

The issue of who governs a state is at the core of two fundamental international legal concepts: state sovereignty and the right of all peoples to self-determination. These legal concepts essentially reserve it for the state and the people of the state to determine which actors will determine the affairs of the state. However, the norms do not provide absolute international legal shields for the territory and politics of states. It is possible for internationally facilitated post-conflict reconstruction to occur in a manner that is consistent with these international legal concepts, but this is connected to the provision of a valid consensual basis for the international involvement. Thinking about what is required for valid consent can help to bring into focus the extent to which the discretion of international actors to determine which actors (domestic or international) will lead a reconstruction process is regulated by international law.

24 The two key considerations identified here — context sensitivity and accountability — can perhaps be read as subsets of one of the six conditions that Larry May identifies 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]evolution is the condition that calls upon all those who participated in devastation during war to rebuild as a means to achieve a just peace’. L May, *Jus Post Bellum, Gratius, and Mentesiexis*, in C Stahn, J S Easterday and J Iverson (eds), *Jus Post Bellum* (OUP 2014) 15, 17. As such, the relevance of context sensitivity and accountability for May’s condition of rebuilding should not be too readily assumed.
Consent is an accepted means to preclude the wrongdoing of external intervention in the affairs of a state. It has been suggested that wrongfulness is precluded by consent because it represents the target state agreeing to suspend the operation of the rules on responsibility in international law. It has also been suggested that wrongfulness does not arise when there is consent, because the absence of consent is central to the definition of wrongful intervention. The latter approach is more in line with the long-standing idea that it is an inherent feature of sovereignty as an international legal concept that the exercise of sovereign rights can be contracted out. On this reasoning, when a state consents to external actors to undertake military activities on its territory, or to external actors to exercise aspects of governance, it is not accepting a breach of its sovereignty. Rather, the consent provides a basis for activity of the external actor to be treated as an act of the sovereign. Similar logic applies in relation to the right of the people of a state to self-determination. Thus, provided there is a valid consensual basis and the terms of the consent are respected, it is possible for even extensive international engagement in post-conflict situations to be projected as respectful of the sovereignty of the target state and the right of its people to self-determination. This provides a basis to suppose that if international actors want to comply with the requirements of sovereignty and self-determination - the government that leads the initial stages of a reconstruction process will be the actors that can provide valid consent; as although domestic actors might consent to external actors exercising authority, it is more likely, given what is at stake, that they will limit consent to international involvement in support of their own governance. This line of reasoning helps to bring into focus the law on governmental status in international law as key to determining the limits on discretion of international actors, in terms of being able to influence the identity of an interim government in a post-conflict setting. To the extent that the law on governmental status is rigid - dependent on satisfying certain criteria, for instance - this will reduce the scope for international actors to offer support to whichever set of domestic actors they think are best suited to the role. If international actors offer support to domestic actors who do not qualify for governmental status in international law, they will not be able to provide valid consent and the international involvement can constitute a violation of sovereignty and self-determination.

**The international law on governmental status**

In the normal run of things, the underdeveloped nature of the international law on governmental status will not be an issue in international affairs, as it will be clear who is the head of state. The International Court of Justice (ICJ) has noted, 'according to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in its international relations (see for example the Vienna Convention on the Law of Treaties, Art. 7, para. 2 (a))'.

However, the aftermath of war can create conditions in which the answer might be less obvious.

The traditional position in international law, when there are doubts about which set of actors constitute the government of a state, is for governmental status to be accorded on the basis of effective control (understood as the ability to maintain public order on the territory). The 'effective control' test is a relative test, 'effective enough'. This means that provided a government has a modicum of independent effective control of the post-conflict state, there is a basis for it to retain or claim the credentials to be treated as the agent of the state and its people over any competing claims. Hence, in some situations following war, it will be possible for uncertainty about governmental status to be decided through recourse to the traditional position in international law.

Still, on other occasions, there is likely to be a complete lack of independent governmental control. This could entail that there will be no actor with governmental status and hence capacity to extend valid consent to international involvement. However, practice indicates that it is possible for the basis for governmental status to be detached from control of territory.

28 Case of the SS 'Wimbledon', PCIJ Series A No 1, 1923, p 25.
29 On respect for the terms of consent, see Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment, ICJ Reports) [2005] 168 at para 52; on the limits of what a state can consent to, in terms of international involvement on its territory, which would seem to stretch to the point at which all autonomy is transferred and statehood is lost, see B R Roth, 'The Illegality of Pro-Democratic Invasion Pacts', in G H Fox and B R Roth (eds), Democratic Governance in International Law (CUP 2006) 328, 350; for further discussion of the post-conflict context as a potential limit on the scope for valid consent, see M Saul, Populare Governance of Post-Conflict Reconstruction: The Role of International Law (CUP 2014) 77-78.
30 On the scope for new law to regulate the legitimate basis for international intervention following conflict, see Bell (n 19) 188-189.
31 See A Orford, International Authority and the Responsibility to Protect (CUP 2011) 193.
The strongest explanation for the continuation or generation of governmental status in post-conflict situations is the extent of legal recognition from other states. Legal recognition acknowledges the fact that a group of actors within a state has governmental status for the purpose of international law. An important reason for legal recognition is that it can determine the way the government is treated within the domestic legal order of the recognising state. At the international level, recognition by other states of a group of actors within a state as enjoying governmental status is traditionally treated as declaratory, rather than constitutive, of governmental status. That is, the basis for the status remains the ability to control the territory. However, even with the declaratory view, legal recognition by other states still serves as evidence of status. Consequently, legal recognition can help to bolster the claim of a government with only a smattering of control of the territory. Or, to all intents and purposes, establish the status of a government that has never enjoyed independent effective control. It can also operate in the opposite direction to block the status of an entity that has some degree of effective control over the territory.

While the continued relevance of international recognition for questions of governmental status might be queried on the basis that some states have a policy not to offer explicit recognition of governments, it is important to stress that such states have still been willing to use recognition where it suits their interests. Moreover, the significance of adopting a policy of not offering explicit recognition is further mitigated by the fact that, in terms of an indicator of governmental status, the occurrence of international relations has been accepted as serving a similar role.

A key factor explaining legal recognition of struggling governments has been their democratic credentials — particularly origin of authority in free and fair elections. This can be seen as a reflection of the value that is placed in democracy at the international level. However, it remains the case that international recognition is not limited by any criteria for democracy. This is evidenced by the fact that non-democratic governments continue to be recognised. In addition, it has been the case that a fledgling government will secure recognition merely through the promise to hold elections in the future. Indeed, although some groups of states have at times attempted to co-ordinate governmental recognition policy, no general criteria for situations where there is no effective control has yet to emerge. There is also no clear guide as to the minimum level of acts of recognition that will establish governmental status. The result is that it is possible for states to disagree on which actors within a state enjoy governmental status, but the persuasiveness of the claim to governmental status is undoubtedly increased the more widespread the legal recognition.

Ultimately, then, the scope for international actors to determine which domestic actors should be treated as the interim government is limited by the need for the actors chosen to gain sufficient support from other international actors, so that the consent from the interim government will be sufficient to preclude the wrongfulness of the international involvement. This can be expected to be more demanding in some situations than others, depending on the circumstances surrounding the involvement. However, the lack of clarity around how much recognition would be sufficient entails that, in most cases, it will be possible for the supporting actors to make an argument that there is a sufficient level of consensus.
international law at stake (which could entail compliance regardless of implications for the target situation).

**An appropriate legal framework for post-conflict settings?**

From the perspective of the call for popular involvement in the governance of post-conflict reconstruction, the present condition of international law on sovereignty and self-determination has the potential to be seen as appropriate. This is in the sense that it directs international actors to work with a domestic government rather than impose external governance, which is consistent with best practice recommendations discussed above. However, the lack of substantive criteria for determining governmental status is also significant. This means that the interest international actors have in ensuring that a programme of reconstruction is consistent with the laws of sovereignty and self-determination does not have to entail a significant restriction on their discretion to determine which domestic actors to support as the government. Any restraint that does exist will be as a result of what is necessary to generate broader international recognition of the favoured domestic actors as the government. This can be expected to be more demanding in some situations than others, depending on the circumstances surrounding the involvement. However, the absence of substantive criteria for governmental status means that there need never be a situation in which it is fundamentally not possible to find a set of domestic actors with the authority to invite international involvement in the immediate aftermath of war. It also means that there is scope for international actors to avoid having to support an incumbent domestic government that is deemed unsuitable. The law can thus be seen to be consistent with the call for the approach taken to matters of popular involvement in post-conflict governance to be tailored to suit the demands of a situation.

However, from the perspective of accountability for the approach taken to popular involvement in governance, there are grounds for being less enthusiastic about the law’s appropriateness. The present condition of the law means that it is possible for internationally enabled post-conflict reconstruction to proceed in a manner that is formally consistent with sovereignty and self-determination. Nevertheless, the absence of substantive criteria for governmental status (and with it the capacity to consent to international engagement) entails no guarantee that the government that is supported will have any substantive claim to represent the will of the people. Drawing on the discussion of best practice for the effectiveness of

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53 See also N Bhuta, ‘New Modes and Orders: The Difficulties of a Just Post Bellum of Constitutional Transformation’ (2010) 60 University of Toronto Law Journal 799, 850, highlighting the suitability of the underexplored condition of the law of self-determination for post-conflict constitution making, in the sense that it allows both the participants and the contents to be determined in the light of the demands of the context.


55 Such a dynamic arguably played out in Haiti in 2004; Saul (n 3).

56 For possible arguments that might be made to challenge the validity of consent on this basis, drawing on the debate about the validity of consent to intervention during civil war, see Saul (n 29) 77–78.
The practice of identifying interim governments: lessons from Afghanistan

Over the last 20 years, there have been a host of examples of large-scale international involvement in post-conflict reconstruction. The dominant model for this involvement has been assistance models, as well as between trusteeship and partnership, on the basis that formal authority remains with domestic actors but governance is dependent on international actors. Key instances are found in the recent past of Haiti (in 1994 and then in 2004), Sierra Leone, Liberia, Afghanistan, and Iraq. In each of these instances, the international involvement has operated on a valid consensual basis. The interim government has invited the international actors who then provide it with the resources to lead the reconstruction of the state.

The fact that international actors strive to operate on the basis of a valid consensual basis provides support for the idea that they place value on operating in accordance with the noted international law. This idea is further reinforced by the emphasis that has been placed in key documents related to the international involvement on consistency of the engagement with sovereignty. Given the level of influence that the international actors are able to have over a post-conflict interim government that they keep in authority, this is quite a thin claim in empirical terms. Yet, it would arguably be even more subject to question if there was no valid consensual basis, as this provides a basis for formal consistency with the legal concepts and, with it, a basis to project local ownership. Strikingly, this interest in operating consistently with sovereignty and self-determination and thereby only supporting a government that enjoys governmental status appears to have done little to hinder the discretion of the international actors when deciding who to support as the interim government. Consider, for instance, the range in the nature of the processes that have underpinned the identification of interim governments across the noted situations. In Haiti 1994, a recently elected government was supported. In Haiti 2004, the elected government was encouraged to step down and was replaced by an (in part) internationally selected government. In Sierra Leone, a recently elected government was supported. In Liberia, a government constructed of the participants in the conflict was supported. In Afghanistan, a government selected by prominent Afghan nationals at an internationally backed conference was supported. The variety in approaches can lead one to query the extent to which a concern to comply with the law of sovereignty and self-determination has actually had any bearing on the practice of identifying an interim government. It is through a closer examination of how the practice in Afghanistan relates to the current international law that a clearer idea of the relevance and appropriateness of the current condition of the law on governmental status can be gained. This example is particularly interesting as the extensive level of international support for the external intervention made it one in which constraints of international law might simply be overlooked, but also made it one where there might be most need for constraint on international discretion as a means of protecting the best interests of the population.

The Afghanistan context: identifying an interim government

In the period prior to the Al-Qaeda terrorist attacks in the United States on 11 September 2001, the Taliban had allowed territory that it controlled to be used by Al-Qaeda. The subsequent failure of the Taliban to comply with the requests of the United States to hand over Al-Qaeda members operating in Afghanistan's territory led to the launch of a US-led military operation, Operation Enduring Freedom, on 7 October 2001. This was intended to address the use of Afghanistan as a terrorist base and to prevent and deter further attacks on the United States. The legality of this use of force generated debate amongst scholars of international law, as the issue of whether the doctrine of self-defence, upon which the United States claimed to be acting, could be invoked in response to terrorist attacks has
always been controversial.64 Yet, in this instance, the military operation 'received massive support and the action was almost universally accepted [amongst international actors] as self-defence'.65 The military action of the United States and coalition forces paved the way for militia of the Northern Alliance to move on Kabul, and the Taliban's control of the capital was overthrown by the Northern Alliance on 13 November 2001.66 The subsequent collapse of Taliban rule across the country provided the context in which the question of who would now govern Afghanistan and lead the reconstruction process was to be addressed.

In this respect, one option would have been to work with the government that had preceded the Taliban, which was headed by Rabbani. This set of actors had the strongest claim to governmental status as a matter of international law. This claim rested on its continued international recognition as the government of the state, but also it was in the process of regaining control of most of the major cities in Afghanistan (through its association with the Northern Alliance).67 However, Rabbani's government had little claim to have been selected by the population. It had also little basis to claim to be representative of the various ethnic groups in Afghanistan.68 This helps to explain why the international actors opted to facilitate the creation of a new Afghan government, one that it was hoped would be a 'broad-based, multi-ethnic, politically balanced, freely-chosen Afghan administration representative of their aspirations and at peace with its neighbours'.69

In the event, representatives of four groups – the two chief groupings were the Northern Alliance (including Rabbani's government) and the Rome group (supporters of the former king), the two less consequential delegations were the Peshawar group (émigré leaders resident in Pakistan) and the Cyprus group (pro-Iranian faction)70 – were invited by the Special Representative of the UN Secretary-General (Lakhdar Brahimi) to a guest house in Bonn in December 2001 to work out the arrangements for the governance of Afghanistan.

The agreement of the representatives of the four groups to come to Bonn had required careful diplomatic efforts from Brahimi and the various interested states (particularly Afghanistan's neighbours, Russia and the United States, 'the 6 + 3').71 Although the negotiations at Bonn proceeded in a closed room without the interested states (under the chairmanship of Brahimi), representatives of most of the interested states continued to exert influence in the background.72 The result of the negotiations was the Bonn Agreement: a basic framework for both the short-term and the more long-term governance of Afghanistan.73 The Bonn Agreement made provision for the establishment of an Interim Authority (consisting of an Interim administration, a Special Independent Commission for the Convening of an Emergency Loya Jirga, and a Supreme Court), and for an Emergency Loya Jirga to be convened within six months. The purpose of the latter would be to 'decide on a Transitional Authority, including a broad-based transitional administration, to lead Afghanistan until such time as a fully representative government can be elected through free and fair elections to be held no later than two years from the date of the convening of the Emergency Loya Jirga of the establishment of the Interim Authority'.74

The suitability of the provision made in the Bonn Agreement for the identification of subsequent governments within such short time frames might be queried, as it put at risk the coherence of the early stages of the reconstruction process by opening up the possibility that general political authority would pass between actors with different views on how the reconstruction should proceed.75 However, it can be explained through reference to the membership of the interim administration. Aside from the Chair (Karzai, a moderate Pashtun),76 this was heavily

65 Gray notes that there was no explicit UNSC chapter VII authorisation for the operation, but that SC Res 1373 (28 September 2001), issued shortly afterwards, 'implicitly recognised the right to use force in self-defence against terrorist action', and that there is a lack of clarity about whether Operation Enduring Freedom (OEF) is now operating on the basis of consent of the government or an independent – and long lasting – right of self-defence (G Gray, International Law and the Use of Force (OUP 2000) 629-650). The International Security Assistance Force (ISAF) was created in 2002 (on a separate basis from OEF) to assist the transitional government with establishing security for reconstruction; see A Suhkre, When Men Is Less: The International Project In Afghanistan (Hurst 2011) 73.
66 For a detailed account of the downfall of the Taliban, see Maloy (n 62) 258-298; on the nature of the external military involvement tasked with the pursuit of the Taliban and Al-Qaeda (OEF), see Suhkre (n 65) 37: 'OEF was designed to have a very light footprint, based on a combination of US airpower and Afghan militiamen with a small contingent of US ground forces. In late 2001, the advance party consisted of Special operations Forces and around a thousand Marines.'
68 Brahimi, Briefing to the Security Council, 13 November 2001 (http://www.un.org/news/dh/latest/afghan/brahimi-sc-briefing.htm); after being briefed by Brahimi, the Security Council passed a resolution the next day welcoming 'the intention of the Special Representative to convene an urgent meeting of the various Afghan processes at an appropriate venue' and supporting the idea of an Afghan-led administration (SC Res 1378 (14 November 2001), preamble); see also Maloy (n 62) 269.
69 See Ch Michelsen Institute (lead agency), Copenhagen Development Consulting and the German Association of Development Consultants, Humanisation and Reconstruction Assistance to Afghanistan 2001-2005: From Denmark, Finland, the Netherlands, Sweden and the United Kingdom: A Joint Evaluation Summary (2003) 40; and Pozzulo (n 2) 171, noting concerns about whether the timetable left enough time to convince traditional leaders of the value of democracy.
dominated by the Northern Alliance, which represented a collection of minority groups within Afghanistan. In addition, the creation of the interim administration stemmed from the wishes of the elites (carefully influenced by international facilitators operating in the sidelines) who participated in the negotiations, rather than a broader popular initiative. Consequently, the interim administration struggled in its claim to be representative of the population of Afghanistan. In this context, the inclusion in the Bonn Agreement of the requirements and timelines for popular involvement in identification of subsequent governments can be seen as a means of winning domestic support for the interim administration by indicating that its rule would only be temporary and a necessary path on the route to a popularly endorsed government. Such reasoning can also help to explain the willingness of international actors to endorse the Interim administration as the government. Other factors are also significant in this respect, such as the urgency with which it was perceived by key international actors such as the United States that a new Afghan government needed to be identified, and the complications that could arise from attempting to conduct broader consultations with the population in the immediate aftermath of the conflict. Such factors render the Bonn package an understandable approach to the identification of a government to lead the reconstruction.

The role of international law in the identification of an interim government

Facets of the practice surrounding the Bonn Agreement, such as the decision not to continue backing Rabbani’s government and the strong international involvement in the process for finding an alternative government, might lead one to query whether this was a situation in which international law was important for international actors. However, there were repeated assertions from the UN Security Council that it was committed to the ‘sovereignty, independence, territorial integrity and national unity of Afghanistan’, and the Council, when endorsing the Bonn Agreement, also stressed ‘the inalienable right of the Afghan people themselves freely to determine their own political future’. A particular reason for the international actors to have valued formal consistency with the legal concepts

of sovereignty and self-determination in the Afghanistan context is the centrality of the idea that international involvement would need to proceed on the basis of a light footprint to be most effective. Inconsistency with the international legal concepts of sovereignty and self-determination would have complicated the projection of the message that Afghans administered the reconstruction.

To achieve the formal consistency of the reconstruction process with sovereignty and self-determination required two things: first, that there be a valid source of consent for the Bonn Agreement otherwise, it would have appeared from an international legal perspective as imposed – and second, that the governing entity created at Bonn could also enjoy full governmental status as a matter of international law so that it could go on to provide valid consent to further international involvement in reconstruction beyond the terms of the Bonn Agreement. Acknowledgement of the importance of valid consent for interested international actors draws attention to the significance of the present condition of the law on governmental status.

The nature of the circumstances in which consent was being sought – the aftermath of a military intervention that had removed the incumbent government, the Taliban, from authority – is a reason to suspect that it would be difficult to find a domestic actor with the status to provide valid consent to continued and further international engagement to help rebuild the state. However, as has been argued above, international recognition can help to sustain a claim to governmental status despite an absence of territorial control. As such, it was possible for governmental status and consequently a source of valid consent to exist in this context. This is a reference to the fact that Rabbani’s government was represented at Bonn and consented to the outcome (the official transfer of power was implemented on 22 December through Rabbani signing a document at the inauguration of Karzai). The present condition of the law on governmental status also meant that there was little reason to doubt that the entity agreed to at Bonn, the interim administration, would enjoy full governmental status as a matter of international law, although the initial approach to the provision of assistance to the interim administration is of interest in this respect.

The period of governance by the interim administration included significant reconstruction events, such as the establishment of the Afghan Assistance Coordination Authority and its issuance of the draft National Development Framework. This governance was facilitated by an international military presence and wider technical and financial support. Yet the international community has been criticised for not providing more assistance. Despite calls from Karzai, it would not be until Security Council Resolution 1510 was passed in

recognition of ‘the right of the people of Afghanistan to freely determine their own political future in accordance with the principles of Islam, democracy, pluralism and social justice’.  

77 Dobbins (n 67) 96: 16 of 29 department posts were allocated to the Northern Alliance; see also Suhrke (n 65) 164.
78 Dobbins (n 67) 95.
79 Dobbins (n 67) 90.
80 See Thier (n 4) 47; also Maley (n 62) 269, noting that there was a meeting of civil society in the sidelines.
81 See also Ponzio (n 2) 176: ‘few of my [general population] interviewees claimed that the negotiators in Bonn were fully representative of Afghans, [but] almost all deemed the political process, initiated under the supervision of the United Nations, as legitimate and welcomed it enthusiastically’.
82 Suhrke (n 65) 164.
83 See also Chesterman (n 73) 6.
84 See, e.g., SC Res 1578 (14 November 2001); Suhrke (n 65) 27.
85 SC Res 1583 (6 December 2001); the preamble to the Bonn Agreement also reaffirmed respect for the independence, national sovereignty and territorial integrity of Afghanistan and included
October 2003 that the ISAF (with a chapter VII mandate) was extended to cover the whole of the country.\textsuperscript{91} Moreover, despite pledges from a number of states to operate as lead nations in the reconstruction of the security sector at the first major donor conference on Afghanistan in Tokyo in January 2002,\textsuperscript{92} little effort was made to undertake what was promised.\textsuperscript{93} Instead, the initial focus of external assistance was along more humanitarian lines, ‘delivering relief supplies, sending children back to school, agricultural projects and the like’.\textsuperscript{94} The apparent reluctance of the international community to fully support the interim administration to lead the reconstruction might be interpreted as indicative of doubts about its competence to validly consent to international involvement, perhaps as a consequence of its lack of control of the territory.\textsuperscript{95} However, a review of debates at the Security Council provides little evidence to suggest a limit on the international legal competence of the interim administration.\textsuperscript{96} Instead, the clearest ground for the initial absence of fuller support in the early stages of the reconstruction process is a lack of political will. The explanation for this includes a number of factors, such as concerns about the stability of the political process,\textsuperscript{97} a lack of actual capacity for governance on behalf of the interim administration,\textsuperscript{98} a desire not to become too entrenched,\textsuperscript{99} and a concern to maintain the light footprint.\textsuperscript{100}

The unprincipled approach to governmental status in international law also had significance for the course of the negotiations at Bonn. In particular, it helped to ensure that the negotiations on the nature of the governance arrangement could be based on the wishes of the participants, rather than circumscribed to what would be necessary to generate governmental status. This flexibility was an important part of keeping the process on track and thereby keeping the domestic groups within a political process.\textsuperscript{101} Moreover, the present condition of the law can be seen as relevant with regard to Rabbani’s approach to the negotiations at Bonn. There was some obstructive activity undertaken by Rabbani, such as the blocking of names proposed for the new administration.\textsuperscript{102} One might attribute this to the fact that governmental status still remained with his government. Nevertheless, the nature of the international law of governmental status meant that Rabbani’s position in this respect was dependent on continued international recognition, which, if he was overly obstructive, had the potential to be withdrawn. This supports the view that it was more the actuality of a degree of factual control, rather than governmental status for the purposes of international law, which gave Rabbani leverage to exert influence over the negotiations.\textsuperscript{103}

Events in Afghanistan also draw attention to some drawbacks of the present condition of the law on governmental status. One of these is the lack of incentive it creates for efforts at popular involvement in the selection of an interim government. This was particularly noticeable because of the high level of international support for involvement early on (as a result of its being undertaken in response to the events of 11 September 2001 in the United States), which meant that regardless of how an interim government was selected, it was likely to receive a significant level of international recognition as the government of the state. Another drawback of the present condition of governmental status in international law is that it provides no reassurance to a population that the government will not simply be replaced if it does not adhere to the wishes of the international actors. This was particularly noticeable in Afghanistan, where the recent history of government – the Taliban was denied governmental status so as to permit Rabbani to continue with this role, but then upon the removal of Taliban, Rabbani was no longer favoured – provided little to counter the view that the new interim government was at risk of being replaced on the whim of international preferences. However, these drawbacks are more peripheral to the reconstruction process than the advantages that have been highlighted in connection with the unprincipled approach, such as facilitation of the Bonn negotiations.

As such, although the circumstances in Afghanistan were considerably different from some of the other examples of post-conflict reconstruction noted above, the law on governmental status can also be argued to have been appropriate for the context. The present condition of the law arguably reinforced the policy interest of key international actors in having domestic actors lead the process. It also enabled the projection of a light footprint to be realised in adverse circumstances and facilitated the bringing together of the major factions in a political, rather than violent, process. Moreover, the absence of suitable domestic actors with a clear popular mandate for governance did not lead to the complete prioritisation of the interests of international actors over those of the situation. Nor did it lead to a lack of unity at the international level on the question of who should govern. Instead, international actors utilised the unprincipled condition of the law on governmental status to ensure a process for the identification of a government and an outcome which both had a claim to be suitable for the context.

\textbf{Conclusion}

In conclusion, although there is no specific international legal framework for the identification of an interim government after conflict, international actors are

\textsuperscript{91} Suhkri (n 65) 73–75; ISAF was initially a small British-led force, but NATO took over command of a growing multinational force in 2003.

\textsuperscript{92} Tokyo Conference (21–22 January 2002); for details of all donor conferences for Afghanistan up to December 2010, see R. Margesson ‘United Nations Assistance Mission in Afghanistan: Background and Policy Issues’, CRS Report for Congress (December 2010), 7–9.

\textsuperscript{93} Dobbins (n 67) 123.

\textsuperscript{94} Chesterman (n 73) 9.

\textsuperscript{95} See discussion in Saal (n 29) 77–78.

\textsuperscript{96} See, e.g., UN Doc S/PV.4497 (26 March 2002).

\textsuperscript{97} Chesterman (n 73) 5.

\textsuperscript{98} Dobbins (n 67) 126; Suhkri (n 65) 122–123; Chesterman (n 73) 7.

\textsuperscript{99} Dobbins (n 67) 125–6.

\textsuperscript{100} Suhkri (n 65) 30.

\textsuperscript{101} Chesterman (n 73) 6.

\textsuperscript{102} Dobbins (n 67) 92.

not bound by international law in determining which actors to support as the interim government to lead post-conflict reconstruction. The interim government must enjoy or be susceptible to generating sufficient international recognition of its governmental status as the representative of the state and its people. Without government status in international law, the international involvement that it invites and the reconstruction it leads will be in breach of international law. Here, the international law on sovereignty and self-determination can be seen to be consistent with the best practice postulate on local ownership, as it directs the international actors that remain committed to this law towards supporting a domestic government rather than imposing an external administration on the state.

However, the undeveloped nature of the law on governmental status entails that the extent to which international actors are limited in their discretion as to which actors can serve as the interim government is likely to be slim. As there is unlikely to be a government with significant control of the territory and international actors have the ability to provide this control, they are in a position to establish the government in an empirical sense. The lack of criteria for recognising an entity as a government of a state – as well as the lack of a clear idea of how much recognition is required – can, in turn, facilitate the practice of international actors in securing the international legal authority of their preferred domestic actors. This facet of the role of international law can be read in two ways. In one respect, it is consistent with best practice recommendations, as it entails scope for the approach taken to the identification of the interim government to be tailored to suit the context. The case study of Afghanistan has highlighted the benefits that can flow from this element of the law. From another perspective, though, the law might be seen as more problematic because it offers little motivation to take seriously the significance of the identity of the interim government.

In most instances, it can be hoped that the international actors will operate in a reasonable manner (in the sense of prioritising an approach that suits the context), and it has been argued that this was the case in Afghanistan. Still, the possibility remains for there to be reckless practice in relation to the identification of an interim government. Clearer specifications for the process of identification or the particular qualities individuals should possess could help in this respect, but would seem to run counter to the advantages that are gained from the open-ended nature of the present law. As such, it might be most sensible to call attention to the lack of a principled basis for governmental status in this area, as a basis for drawing attention to how international actors identify and support interim governments. At the same time, it will also be important to consider what restraints there are on the discretion of an interim government once it is placed in authority. The significance of the question of the identity of the interim government can be reduced to the extent that the subsequent discretion of post-conflict governments on matters of post-conflict reconstruction is regulated by international law. This latter issue is discussed in subsequent chapters of this book.

3 The exercise of governance authority by international organisations: The role of due diligence obligations after conflict

Aiofe O'Donoghue

International legal scholarship largely ignores due diligence; nonetheless it continues to create obligations. The *Alabama Arbitration*, the evolution of economic law, the development of international human rights law and aspects of international humanitarian law (IHL) all concern standards of due diligence. Critically, during times of transition, when international organisations (IGO) adopt roles normally associated with state authority, the necessity of understanding an institution's due diligence obligations becomes ever more vital. During post-conflict periods IGOS must be both proactive and reactive, taking upon themselves international human rights, humanitarian and economic law obligations. This chapter questions the utility of due diligence in post-conflict periods and considers IGOS' commitment to its inculcation into their activities.

While a settled definition remains absent, due diligence becomes operative upon the assumption of effective control over territory or populations coupled with the degree of predictability of harm alongside the importance of the interest to be protected. It includes 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. Particularly with regard to IGOS but also due


3 ILA Study Group on Due Diligence in International Law; <http://www.ila-hq.org/en/committees/study_groups.cfm?cid=1043>.