1 INTRODUCTION

Since the end of the Cold War, Africa has become the testing ground for Western conflict-resolution experiments intended to forestall deadly conflict, secure peace, and build democracy in stratified societies. Power-sharing agreements have been the preferred conflict-resolution device, and no other model has been tested more than transitional political power sharing.[1] Yet, until recently, few scholars and policy makers have authentically scrutinized the effectiveness of such arrangements; this is remarkable given that contemporary studies reveal momentous faults in the practice of power sharing, as evidenced by their orderly failure. This book represents the first substantive legal study to augment and complement this nascent intellectual heritage.

This volume contemplates the role of law in informing, shaping, and regulating peace agreements, with a specific focus on transitional political power sharing intended to end violent intrastate conflict or coups d'état when democratically constituted governments (DCGs) are forced to share power with African warlords, rebels, or junta.[2] In

[1] The terms *power sharing*, *political power sharing*, *transitional political power sharing*, and *power-sharing arrangements* are used interchangeably. For purposes of this volume, *power sharing* is broadly defined to mean transitional political power sharing between contesting groups (warlords, rebels, and junta) and democratically constituted governments for a fixed and impermanent period of time, until elections take place. Power-sharing accords provisions seek to outline and codify into law decision-making mandates that apportion political power and authority. Although military and economic power sharing are important, this study will primarily focus on political power sharing birthed during violent armed conflict, not on those forms of power sharing that have been solely written into legislation or constitutions during peacetime.

[2] The terms *African warlords*, *rebels*, and *junta*; *pirates de la loi*; and *bandits of the law* are used interchangeably. Africa has the highest incidence of coup attempts in the world – 169 coups between 1950 and 2010 – nearly 52% of which were successful, amounting to approximately 37% of the world total during this period. Jonathan M. Powell & Clayton L. Thyne, *Global instances of coups from 1950 to 2010: A new dataset*, 48 Journal of Peace Research 255 (2011).

Africa, subregional, regional, and international law purports to regulate and mitigate deadly conflict and protect the rule of law, human rights, and democracy. Despite Africa's diverse legal landscape, domestic law systems purport to conserve law and order by protecting civil liberties and representative government through civil and criminal justice mechanisms backed by the coercive authority of the state. Taken together, all four tiers of law – domestic, subregional, regional, and international – are intended to create predictability and order peace prescriptions.

While the role of law in shaping and regulating transitional political power-sharing arrangements is the book's primary focus, it is less concerned with the debatably perfunctory, speculative, and circular question of whether or how law plays a role in creating peace out of internal conflict. This is largely because law must already exist and occupy the field of peacemaking to assess whether and how it may play a role in establishing peace. Hence this study aims to answer the more germane question, what role does law indicate for itself to play in informing, shaping, and regulating transitional political power-sharing agreements?

This book addresses this question through the prism of three West African case studies: Liberia, Sierra Leone, and Guinea-Bissau. In all three cases, DCGs were forced to share power formally with warlords, rebels, or junta seeking violently to unseat them. The book challenges traditional conflict-resolution orthodoxy by examining the legality and sociopolitical efficacy of transitional political power sharing between DCGs and so-called bandits of the law, particularly those responsible for directing and/or committing human atrocities. In this regard, it assesses the human rights dimensions of power sharing and their future implications. It postulates that domestic, regional, and international law, doctrine, norms, and jurisprudence in Africa have generated an identifiable *law of power sharing* that apprises and orders peacemaking and contemporaneously instructs the emergence of any *lex pacificatoria*.[3] Only after examining those rules that law has already prescribed for peacemaking can any law of power sharing emerge to confront and answer pressing questions prompted by power sharing. When warlords, rebels, and junta use violence to coerce democratically

[3] Christine Bell, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LE PACIFICATORIA 5 (2008).

constituted governments to share power, does power sharing become a euphemism for "guns for jobs"? Which legal rules, if any, govern peace agreements in internal conflicts?[4] Specifically, which rules regulate power sharing? Are the aims of peace, justice, rule by law, and democracy attainable,[5] let alone compatible, with coerced political transitions in which *pirates de la loi* coerce DCGs or legitimate governments to share power?[6]

Consider this scenario: a rebel group,[7] through brutal force, coerces a democratically constituted government into a power-sharing arrangement that not only refashions the constitution of order but confers on

[4] The terms *rule*, *rules*, *rule of law*, *law*, and *laws* are used interchangeably.

[5] Law comprises a multitude of rules, norms, doctrine, and jurisprudence often referred to as the *rule of law* in international law discourse.

[6] Although the Vienna Convention on the Law of Treaties (VCLT) is not binding on the peace agreements under review in this study, the definition of coercion in the VCLT is instructive, given that there is not a generally recognized definition of the term in the laws of Liberia, Sierra Leone, and Guinea-Bissau – core subjects of this inquiry – nor in the laws that govern internal conflicts. According to the VCLT, the word *coerced* is derived from the word *coercion*, which is defined as the threat or use of force or other pressure to gain control over another against his or her will or interest. Under the VCLT, treaties may be voided if their acceptance was gained by coercion against a state that wished to void the treaty. See Vienna Convention on the Law of Treaties, May 22, 1969, arts. 51–52, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331, repr. in 8 I.L.M. 679 (1969) [hereinafter VCLT]. Although treaties cannot, per se, be concluded with rebel groups and junta, the governing principles of those arrangements inform the forgoing analysis, given the scope of the international community's involvement in helping to broker the Accra, Lomé, and Abuja peace agreements in Liberia, Sierra Leone, and Guinea-Bissau, respectively. See *infra* note 15.

[7] For purposes of this study, the term *rebels* means irregular persons or military forces operating irregularly who take part in armed rebellion (e.g., insurgency, military coup, or junta) against a constituted authority (i.e., a government). Here the term *warlord*

> "refers to the leader of an armed band, possibly numbering up to several thousand fighters, who can hold territory locally and, at the same time, act financially and politically in the international system without interference from the state in which he is based. In crisis zones around the world, where civil war and humanitarian disasters accompany the struggles of societies in transition, the warlord is the key actor. He confronts national governments, plunders their resources, moves and exterminates uncooperative populations, interdicts international relief and development, and derails peace processes. With only a few exceptions, the modern warlord lives successfully beyond the reach and jurisdiction of civil society. His ability to seek refuge in the crisis zone and the lack of international commitment to take effective action together ensure his survival."

John Mackinlay, *Defining warlords*, in BUILDING STABILITY IN AFRICA: CHALLENGES IN THE NEW MILLENNIUM (2000). For more on this issue, see Mark Duffield, *Post-modern conflict, aid policy and humanitarian conditionality*, DFID Discussion Paper (London: Department for International Development, 1997).

rebels' key government positions, unconditional amnesty, and other perks and privileges. Although the incumbent government would like to punish or hold the rebels accountable rather than negotiate with them, it shares power out of political necessity and expediency because it lacks the muscle to defeat the rebels on the battlefield and the status or legitimacy to mobilize international military assistance to impose its politico-military prerogatives. The failure to negotiate a cessation of hostility and to share power may result in prolonged conflict, anarchy, and the eventual toppling of the government. Variations on this scenario have been commonplace in Africa for decades,[8] and in the significant majority of cases, power sharing has neither ended violent conflict nor produced sustainable peace. In the three cases under review, power sharing prolonged existing conflict and/or exacerbated new conflict. One critical reason for this dilemma is that peace agreements do not seek to address the primary causes of deadly conflict; consequently, power sharing unrealistically seeks to appease the distrust, fears, material whims, and political appetites of charlatans, pundits, and warlords, not to institutionalize the rule of law and democratize decision making among citizenry.

Governments that have been violently and/or successfully challenged from within[9] but are still recognized as the de jure representative of the state are faced with the quandary of how best to negotiate peace, maintain security, survive politically, and manage future uncertainty.[10] They are forced to make strategic choices that often create normative friction between what is legal, on one hand, and what they believe

[8] See generally Peter Wallensteen & Margareta Sollenberg, *Armed conflicts, conflict termination and peace agreements, 1989–1996*, 34 Journal of Peace Resolution 339 (1997). See also A. K. Jarstad & D. Nilsson, *From words to deeds: The implementation of power-sharing pacts in peace accords*, 25 Conflict Management and Peace Science 206 (2008); Bumba Mukherjee, *Why political power-sharing agreements lead to enduring peaceful resolutions of some civil wars, but not others?* 50 International Studies Quarterly 479 (2006); Barbara F. Walter, *Designing transitions from civil war: Demobilization, democratization, and commitments to peace*, 24 International Security 127 (1999).

[9] The internal challenge may come in the form of, among other things, a civilian-led or military coup or armed insurgency that acquires de facto control of a state but stops short of a coup d'état.

[10] This assertion does not take for granted the fact that governments and rebels are often not interested in making peace but rather, politically and economically, thrive on state chaos and violent conflict. See generally Mats Berdal & David M. Malone (eds.) GREED AND GRIEVANCE: ECONOMIC AGENDAS IN CIVIL WARS (2000).

is politically necessary and expedient, on the other. To date, political scientists, who serve as the primary proponents of power sharing and ignore the rule and role of law in political transitions, have dominated the debate and discourse on power sharing,[11] which, unfortunately, has slipped under the radar of international jurists. For example, in her seminal work on the stability of negotiated settlements to intrastate wars, Caroline Hartzell includes three subsections on the "rules regarding the use of coercive force," "rules regarding the distribution of political power," and "rules structuring distributive policy," but makes no attempt to consider the extent to which law governs peace negotiations and agreements.[12] Timothy Sisk's influential work on power sharing and international mediation also fails to consider the rule and/or role of law in peace negotiations or peace deals that include power-sharing components.[13]

This book builds on an article I published in 2006[14] and was largely inspired by the persistent and flagrant disregard of law in the scholarly literature on conflict resolution, peacemaking and peace building broadly construed, and particularly by discourse on power sharing. It was also enthused by so-called peace studies and conflict-resolution experts, peace negotiators, peace brokers, and other decision makers who too often discount law's relevance altogether – especially those individuals, states, and international institutions responsible for negotiating, sanctioning, and/or "guaranteeing" the Accra (Liberia), Lomé (Sierra Leone), and Abuja (Guinea-Bissau) peace agreements.[15] All

[11] In fact, the author is not familiar with a single work on power sharing from a notable political scientist that contemplates, let alone substantively considers, the role of law on the practice.

[12] Caroline Hartzell, *Explaining the stability of negotiated settlements to intrastate wars*, 43 Journal of Conflict Resolution 3, 7–12 (1999).

[13] See generally Timothy D. Sisk, POWERSHARING AND INTERNATIONAL MEDIATION IN ETHNIC CONFLICTS (1996).

[14] Jeremy I. Levitt, *Illegal peace? An inquiry into the legality of power-sharing with warlords and rebels in Africa*, 27 Michigan Journal of International Law 495 (2006).

[15] The Accra, Lomé, and Abuja accords are domestic agreements (between actors within a state) rather than international treaties because their jurisdictional powers, even if illegitimately derived, are based on principles of territoriality and nationality, and under international law, states and rebel groups can only make agreements from powers and authorities they possess, which, in these cases, are wholly domestic in nature. Moreover, under the VCLT, "a 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single

three accords prescribe unlawful power sharing irrespective of its long-term impact on their states' sociopolitical and legal orders, thereby raising an important question:[16] to what extent, if any, does and should the rule of law influence or shape the character of peace negotiations, agreements, and political transitions?

This book is the first to address the aforementioned questions; present a conceptual framework for examining the legality of power sharing between DCGs and the warlords, rebels, and junta who seek violently to unseat them; and originate a law of power sharing that illuminates a legal framework intended to apprise and order peace processes and transitional peace agreements.[17] As such, its primary aim is to contemplate and situate the legality and political efficacy of transitional political power sharing on the radar of scholars and policy makers, knowing that the book's aims, theoretical approach, findings, and conclusion will be improved on by other analysts.

This book is interpretive, normative, and polemical. It questions the dominant logic that transitional political power sharing is lawful and legitimate and that it unequivocally serves the public good. Rather,

instrument or in two or more related instruments and whatever its particular designation." See VCLT, *supra* note 6, Article 2. Moreover, despite their internal character, the accords cannot be considered or recognized as treaties under international law because they were not registered with the UN Secretariat in accordance with Article 102 of the UN Charter. The registration of a treaty or international agreement does not imply a judgment by the Secretariat on the nature of the instrument, the status of a party, or any similar question; it is the understanding of the Secretariat that registration does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status that it would not otherwise have. Finally, the agreements under review are not international treaties because they are not concluded between states; however, as instruments of law with transnational dimensions, they are nonetheless governed by international law principles, as are the states that birthed them. *Id.*

16 Other important examples of power sharing used to mitigate civil strife and/or armed conflict in need of constructive analysis include, among others, Angola, Burundi, Côte d'Ivoire, Columbia, Ethiopia, Kenya, Fiji, Lebanon, Nepal, Rwanda, Somalia, Sudan, and Zimbabwe.

17 Given the proliferation of internal challenges to democratically constituted authority in Africa, this book is limited to the study of transitional power sharing between democratically constituted governments and the warlords, rebel groups, and junta that seek to violently unseat them. It does not consider the legality of power sharing between undemocratically constituted regimes and rebels because the arguably normative statuses of the rights to democracy and internal self-determination, particularly in Africa, engender different legal questions.

the book postulates that power sharing deals that ignore controlling rules are unlawful, illegitimate, and often unviable and generally do not serve the good of the public. This does not mean that an exclusive recourse to law or legalism is more practicable than a resort to politics or politicism or that unlawful agreements cannot be effective; rather, it reveals that it is more difficult to create sustainable peace if its literal foundations are birthed in unlawfulness or illegality that conflicts with the moral imperatives of law: fundamental human rights and representative government. It is this belief in the essential and regulatory role of law that led me to reject minimalist conceptions of it and adopt a substantive and interpretive theory of the utility of law in peacemaking. A substantive conception of law argues, as Cicero noted, that "the people's good is the highest law,"[18] injustice is incompatible with "true rule of law,"[19] and the dignity of the person should be protected against the unsavory edicts of politicians and principalities. This essential formulation of law underpins the book's methodology, which I refer to as the *neo-Kadeshean model* (NKM), and anchors its central syllogism: transitional political power sharing is subject to law; law is derived from and embedded within historical experientialism;[20] and therefore transitional political power-sharing agreements that ignore and/or fail to comport with pre-existing and predominant rules are unlawful and too often unsustainable over the long term.

A. THE NEO-KADESHEAN MODEL

The NKM of analysis complements the central syllogism and postulates that law (principles, norms, doctrine, and jurisprudence) rather

[18] Cicero, DE LEGIBUS (106–43 B.C.).

[19] Jane Stromseth, David Wippman, & Rosa Brooks, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006), at 71.

[20] In this sense, historical experientialism philosophically connotes that law's internal logic is derived from historical experiences of either people, states, or institutions, which in turn generates knowledge of its central purpose (e.g., the adoption of the Genocide Convention on December 9, 1948, by the UN General Assembly was a consequence of the Holocaust perpetrated by Nazi Germany during World War II). Consequently, it is important to understand the historical rationale for rule existence or history of law to ascertain the probable impacts of ignoring them.

than political considerations must dictate the substance and form of peace agreements and that accords that are not shaped by law are less likely to succeed. It employs a law-centered approach but is not a retreat to legalism or legal formalism. It recognizes the bias interplay between law and politics in peacemaking and is rooted in the conception that symmetry and synergy exist between them, while acknowledging that in a contest between the two, law is designed to win, particularly during states of emergency and times of armed conflict.[21] The NKM contends that "international justice, national justice, the search for truth, and peace negotiations can and must work together; they are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution."[22] It seeks to analyze and filter law, doctrine, norms, jurisprudence, and state practice to distill law's purpose. This is why the NKM is best suited to provide a deductive approach for assessing the legality of power sharing in deeply divided societies emerging from deadly conflict as well as to unearth and advance a law of power sharing that offers a lawful and sustainable framework for sharing power.

The NKM derives its historical foundation, logic, and structure from the Treaty of Kadesh (1280 B.C.). The Kadesh Treaty's normative lineage derives from the Kemetic philosophy of MAAT (2300 B.C.) and ancient law such as the Egyptian Bill of Rights (2000 B.C.).[23] Hence, drawing from an era when Egypt was the crown jewel

[21] The terms *noninternational armed conflict*, *armed conflict*, *deadly conflict*, *civil war*, and *war* are used interchangeably.

[22] *Building a Future on Peace and Justice*, address by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Nuremburg, June 25, 2007, available at http://www.peace-justice-conference.info/download/speech%20moreno.pdf

[23] "Kemet" is the original name for Ancient Egypt. For more information on the Kemetic philosophy of MAAT, see generally Lanny Bell, *Conflict and reconciliation in the ancient Middle East: The clash of Egyptian and Hittite chariots in Syria and the world's first peace treaty between "superpowers,"* in Kurt A. Raaflaub (ed.) WAR AND PEACE IN THE ANCIENT WORLD (2007). See also Asa G. Hilliard III, Larry William, & Nia Damali (eds.) THE TEACHINGS OF PTAHHOTEP (1987). In its original catenation in Egyptian hieroglyphics, the *Teachings of Ptahhotep*, which includes MAAT, is estimated to have been written in 2300 B.C. and is hence the oldest complete book in the world. John A. Wilson (trans.) *Treaty between the Hittites and Egypt*, in James B. Pritchard (ed.) ANCIENT NEAR EASTERN TEXTS: RELATING TO THE OLD TESTAMENT (3rd ed. with suppl.) (1969), at 199; John A. Wilson (trans.) *All men are created equal in opportunity*, in James B. Pritchard (ed.) ANCIENT NEAR EASTERN TEXTS: RELATING TO THE OLD TESTAMENT (3rd ed. with suppl.) (1969), at 8. I refer to the "All Men Are Created Equal in Opportunity" decree as the "Egyptian Bill of Rights."

of black Africa, the NKM originates from three ancient sources of international law that continue to the present including international conventions as illustrated by the Treaty of Kadesh, international custom as exemplified by MAAT, and general principles of law as enumerated in the Egyptian Bill of Rights. The NKM's modern epitome is rooted in the law of the African Union (AU), Economic Community of West African States (ECOWAS), African Charter on Human and Peoples' Rights (ACHPR), and corollary laws and principles. Because this is the first legal and interdisciplinary work to derive its theoretical foundation from the Kadesh Treaty and Kemetic law it is important to broadly detail the historical circumstances and rules that birthed and underwrote the NKM.

The Kadesh Treaty is the world's oldest known peace treaty and was consummated between King Ramses II (also known as Ramses Meri-Amon) of Egypt and King Hattusili III of Hatti (i.e., land of the Hittites), after nearly a decade of intermittent war. These ancient states were among the most powerful in the thirteenth century B.C.[24] The treaty symbolizes the breadth of African and Mediterranean intellectual traditions and is written in masterful Egyptian and Hittite prose, in which positivist structure organically incorporates naturalist logic to regulate interstate behavior and relations, with the primary aim of making just peace. Otherwise stated, the treaty's foundational logic and organizing supposition are eloquently woven with positivist and naturalist precepts nearly four millennia before their modern articulation by pioneering jurists such as Alberico Gentili and Hugo Grotius.[25]

[24] In 4000 B.C., Egypt was the predominant global power and was eventually joined by Babylon (approximately 1,500 years later). Egypt and Babylon were highly advanced in statecraft and diplomacy. Even under modern international law standards, they would qualify as states or satisfy the elements of statehood, particularly those enumerated in the 1933 Montevideo Convention on the Rights and Duties of States. By 1800 B.C., several "independent states arose" and shifted the balance of power, including the Hittite Empire in Asia Minor, the Cretan maritime power in the Mediterranean, and the powerful states of "Mitanni on the upper course of the Euphrates, Assyria," and Elam, which represented a new "system of states." Michael I. Rostovtseff, *International relations in the ancient world*, in Edmund A. Walsh (ed.) THE HISTORY AND NATURE OF INTERNATIONAL RELATIONS (1922), at 41.

[25] See Alberico Gentili, DE IURE LIBRI TRES (2 vols., text and trans. John Rolfe) (1933); Hamilton Vreeland, HUGO GROTIOUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW (1917).

Similar to modern peace treaties and agreements, the Treaty of Kadesh was shaped by four circumstances: (1) a military stalemate (between the Egyptians and Hittites); (2) troop attrition and exhaustion (nearly seventy thousand forces fought in the Battle of Kadesh); (3) recognition of the lawfulness, legitimacy, and applicability of preexisting law, peace treaties and other agreements between the two states;[26] and (4) external threats to Egyptian and Hittite hegemony. During this period, Hatti was challenged by hostile nations from Assyria and Mesopotamia, and Egyptian hegemony was being threatened by Libyan aggression.

Under any definition of statehood – whether ancient or modern – Egypt and Hatti were sovereigns. They had a permanent population, well-defined – albeit expanding – territorial boundaries, entrenched hereditarily based governance structures, robust militaries, vibrant economies, and highly effective and wide-ranging foreign affairs apparatuses. Egypt and Hatti possessed these sovereign characteristics several millennia before the birth of Europe's modern nation-state in 1648 or the Westphalian conception of state sovereignty. Furthermore, the Pharaonic conception of Egyptian statecraft seemingly exceeds the qualifications for determining a state as a person of international law as articulated in the 1933 Montevideo Convention on the Rights and Duties of States.[27] Hence, nearly four thousand years before Emmerich

[26] There were preexisting treaty agreements between Egypt and Hatti that were renewed in the Treaty of Kadesh. The Egyptian text specifically indicates that two Hatti kings/princes, Subbiluliuma (grandfather of Hattusili III) and Muwatallis II (brother of Hattusili III), entered into "regular" treaties with Egypt prior to the Kadesh Treaty. The peace and cooperation treaty between Ramses II and Muwatallis II, the Great Prince of Hatti and brother of Hattusili, immediately preceded the Kadesh Treaty. S. Langdon & Alan H. Gardiner, *The Treaty of Alliance between Hattusili, King of the Hittites, and the Pharaoh Ramesses II of Egypt*, 6 Journal of Egyptian Archaeology 179, 189 (1920). It should be noted that the archeological and linguistic literature on the Battle of Kadesh and Kadesh Treaty does not conclusively indicate whether Muwatallis was the father or brother of Hattusili; however, the historical record seems to indicate the former.

[27] According to the convention, a state as a person of international law should possess the following qualifications: (1) a permanent population, (2) a defined territory, (3) government, and (4) the capacity to enter into relations with the other states. Convention on the Rights and Duties of States, December 26, 1933, 165 L.N.T.S. 19 (1933), entered into force December 26, 1934. Not only did Egypt possess these attributes of statehood but it also had a robust and highly mechanized military and system of organized religion.