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Introduction

No corner of the globe is exempt from the scourge of conflict. Every year, hundreds of thousands of civilians die as a consequence of armed conflict, and millions more are displaced. These conflicts are brutal, durable, and global. Oftentimes, they are characterized by genocide, as in Bosnia, Darfur, Iraq (ISIS), Myanmar, and Rwanda, or widespread atrocity crimes, as in the Central African Republic, the Democratic Republic of Congo, Libya, Syria, and Yemen. As is often said, it is easy to start an armed conflict, but excruciatingly difficult to end one. In any given year, there are nearly four dozen active armed conflicts around the globe. While some of these conflicts may transpire over a relatively short time (3–5 years), others remain active for a decade or more, and still others are "frozen" for decades on end, continuing to contribute to instability and insecurity.

In all but the rarest circumstances these conflicts are ended not through outright victory, but through a series of negotiations. These negotiations often relate to ceasefires, peace talks, and postconflict constitutions. Not all of these negotiations, however, yield a durable peace. Many negotiations fail to bring about an end to a conflict, and nearly half of those conflicts "resolved" through negotiations subsequently fail and slip back into armed conflict.

A number of factors contribute to the durability of a negotiated peace. One of the primary factors is the manner in which the parties to the conflict mitigate conflict drivers. In order to successfully mitigate conflict drivers, the parties must address a number of puzzles, such as whether and how to share and/or reestablish a state's monopoly of force, reallocate the ownership and management of natural resources, modify the state structure, or provide for a path toward external self-determination. Successfully resolving these puzzles requires the parties to navigate a number of conundrums and make choices and design mechanisms that are appropriate to the particular context of the conflict, and that are most likely to lead to a durable peace.

Few state and nonstate actor representatives at the negotiation table have much experience with negotiation ceasefires, peace agreements, or postconflict

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constitutions. This is the natural consequence of the fact that many of them are state or nonstate armed actors, and are more comfortable in the field, so to speak, than around a negotiating table. While there is frequently a great deal of intellectual capital that these actors are able to assemble on their delegations, there is seldom a depth of expertise in negotiating ceasefires, peace agreements, or constitutions for the simple reason that these types of negotiations do not occur frequently in any one state. As such, a surprising number of negotiation delegations have been led by brilliant bankers, cardiologists, commercial lawyers, dentists, historians, industrial engineers, professors of literature, and even elementary school teachers.

The purpose of this book is to help these inadvertent negotiators build better and more durable peace agreements through a rigorous examination of how other parties have resolved these puzzles and associated conundrums. The book takes a clear-eyed approach to the good, bad, and ugly of peace agreements. The book is also designed to be easily accessible to those studying conflict resolution as a path to becoming future peacebuilders, as well as those fortunate enough to be called upon to assist with mediating ceasefires and peace negotiations, or facilitating the drafting of postconflict constitutions.

The book does not propose a state-of-the-art strategy for negotiation, or posit an innovative theory for conceptualizing how to get to yes or to checkmate, nor does it recount insightful behind-the-scenes moments in key negotiations. There is a plethora of well-written and easily accessible books that already accomplish those objectives. This book is designed to help parties, practitioners, and academics work their way through the multitude of decision points they face in a negotiation, and then to draft legal text that encapsulates that agreement in a way that will promote the durability of the agreement or constitution; hence the title, "Lawyering Peace."

During the course of a peace process, the parties face a wide variety of puzzles, and any comprehensive examination of those puzzles would be a multivolume undertaking. This book seeks to add value by addressing five key puzzles relating to security, power-sharing, natural resources, self-determination, and governance. These five puzzles represent particularly fraught aspects of negotiation and reflect complex issues that are difficult to resolve in a manner that generates agreement from both parties. These puzzles often require difficult tradeoffs and, if not dealt with deftly, they stand in the way of a durable peace. Other equally perplexing puzzles meriting examination include transitional justice and accountability, refugees and internally displaced persons, human and minority rights, and transitional administrations, among others.

The five puzzles are each examined in a separate chapter. Each chapter first discusses the nature of the puzzle facing the parties. Next, the chapter provides a conceptual and legal primer for understanding the subject matter of the puzzle, in particular the relevant norms, rules, procedures, and processes the parties may rely upon to assist with resolving the puzzle. Then the chapter explores a number of instances of key state practice to analyze and highlight how parties involved in a

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peace process have sought to manage the conundrums they faced when seeking to solve the puzzle.

Often, a number of instances of state practice illustrate how challenging puzzles were successfully navigated. Other instances of state practice represent mixed outcomes, where certain objectives may have been achieved, but others were not. Still other instances of state practice provide illustrations of unsuccessful attempts to solve the puzzles presented. These, too, provide rich insights into potential obstacles to achieving durable peace, from which future negotiators can benefit.

Each chapter's umbrella topic encompasses a variety of related subtopics. To maximize the value of the analysis, each chapter undertakes a detailed exploration of one of those subtopics. The lessons learned from the negotiation and design of provisions formulated to facilitate a resolution of that particular puzzle are addressed such in a way as to be broadly applicable to the other related subtopics addressed during the peace process.

During the peace process, including during peace negotiations, the parties confront a variety of security-related topics, including peace enforcement; ceasefires; peacekeeping; disarmament, demobilizations, and reintegration; security sector reform; and the restoration of a state's monopoly of force. Chapter 1, "Security," explores the puzzle of whether and how to create a state-held monopoly of force in a way that ensures a durable peace. The monopoly of force relates to the state's exclusive right and ability to control and oversee the legitimate use of violence within its borders.

Chapter 1 begins with a review of the foundational principles of sovereignty, political independence, and territorial integrity and their relationship to sharing and/or reestablishing a monopoly of force. It also reviews the international framework for the authorization of the use of force embedded in the UN Charter. Then, the chapter reviews the peace processes related to conflicts in Angola, Bosnia, Burundi, Kosovo, Mozambique, Papua New Guinea/Bougainville, Rwanda, Sierra Leone, Sudan/South Sudan, and Sudan/Darfur in order to underscore the complicated tradeoffs parties face sharing and/or reestablishing the monopoly of force, including, when sharing force with the international community, questions of: the consent of the state, and often the consent of the nonstate parties; the nature and configuration of the international forces, including the command structure of the international forces; and the mandate of those forces.

The chapter also analyzes cases during which the state seeks to integrate nonstate armed actors into the national forces, when parties are faced with the questions of how best to provide for the disarmament, demobilization, and reintegration of nonstate forces, coupled with security sector reform for the national forces. It additionally examines the questions that arise when the state seeks to restore limited control over the monopoly of force by permitting nonstate actors to maintain their forces and command structure under the umbrella command of the national forces, including to what extent to promote some degree of integration among special units

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of the state and nonstate forces, as well as a timeline for the eventual integration of forces.

To craft a durable peace, parties to peace negotiations often also spend considerable time and effort crafting power-sharing arrangements that balance the pull of some parties for greater diffusion and devolution of political power with the pull of other parties to maintain a degree of political centralization, both for the sake of efficiency and effectiveness, and to preserve their prior political privileges. Chapter 2, "Power-Sharing," explores the puzzle of whether and how to create a vertical power-sharing arrangement that leads to a durable peace.

Chapter 2 begins with a review of the conceptual and legal primer for understanding the nature of various state structures (unified, modified unitary, federal, or confederal); the allocation of executive and legislative powers between the national government and its substate entities; and political, administrative, and fiscal decentralization. It then reviews the peace processes related to conflicts in Bosnia and Herzegovina, Colombia, Indonesia/Aceh, Iraq, Macedonia, Nepal, the Philippines/Mindanao, South Africa, Sudan, and Yemen to understand how parties have grappled with the thorny set of power-sharing conundrums, including the choice of state structure; the allocation of legislative and executive powers among the levels of government; the degree of political, administrative, and/or fiscal decision-making authority to be devolved; and the timeline for implementing any agreed plan for decentralization.

Access to natural resources and the allocation of revenue generated by resource exploitation is at the core of many conflicts and plays an important role in many others. Such natural resource conflicts are twice as likely to revert to conflict in the first five years after the signing of a peace agreement. Chapter 3, "Natural Resources," explores the puzzle of whether and how to address natural resource ownership, management, and revenue allocation in a manner that promotes durable peace. Efforts to solve the puzzle of whether and how to address natural resource ownership, management, and revenue allocation in a manner that promotes durable peace are complicated by the fact that natural resources can be both a driver of the conflict and a key factor in promoting a durable peace.

Chapter 3 begins with a review of key conceptual approaches for allocating the ownership, management, and associated revenue of natural resources, and the various legal norms, rules, processes, and procedures used to design and implement natural resource arrangements. It also reviews a number of international legal obligations relating to natural resources, including the consideration of the interests of local and indigenous populations, as well as the international Kimberley Process for the regulation of the diamond trade. The chapter then reviews the peace processes related to conflicts in Papua New Guinea and Bougainville, Indonesia and Aceh, Iraq and Kurdistan, the Philippines and Mindanao, Sierra Leone, Sudan and South Sudan, Sudan and Darfur, and Yemen to understand if and when parties broach the subject of natural resources in the peace process, and how they then decide upon matters such as ownership, management, and revenue allocation.

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Self-determination and sovereignty-based conflicts are widespread throughout the globe, and are particularly durable and deadly. These conflicts may be resolved through military victory, through some form of enhanced internal self-determination, or through a path to external self-determination. Chapter 4, "Self-Determination," explores the puzzle of whether and how to provide for external self-determination as a means for ensuring a durable peace.

Chapter 4 begins with a review of the conceptual and legal framework governing self-determination, including an examination of the long-standing concepts of sovereignty, territorial integrity, and political independence, as well as the emergence and development of the now well-established principle of self-determination. It then differentiates and describes internal self-determination, a principle that guarantees a people the right to determine their own future, and external self-determination, which entails a path for a substate entity becoming independent from a parent state. Then, the chapter reviews the peace processes related to conflicts in Bosnia, Indonesia/East Timor, Israel/Palestine, Kosovo, Northern Ireland, Papua New Guinea/Bougainville, Serbia/Montenegro, Sudan/South Sudan, and Western Sahara in order to understand how the parties seek to most effectively share sovereignty in the interim; build sustainable institutions; determine final status; phase in the assumption of sovereignty; condition the assumption of this newfound sovereignty; and, if necessary, to constrain the exercise of sovereignty of the new state.

Lastly, establishing a comprehensive legal framework for postconflict governance is one of those tasks where there is seldom the time or capacity for parties to reach a full and complete agreement during a negotiation. Although decisions relating to postconflict governance are critical issues for discussion within peace negotiations, parties often are not able to determine each detail of the system for postconflict governance. Instead, parties often agree to a preliminary set of principles coupled with a general governing framework. They then set forth an agreed process for negotiating, designing, and implementing a national dialogue, the drafting or amending of a constitution, and elections. Chapter 5, "Governance," explores the puzzle of whether and how to address constitutional modification during peace negotiations in a manner that promotes a durable peace.

Chapter 5 begins with a review of the political, legal, and social nature of constitutions, and the related legal obligations to ensure that any process for modifying a constitution is inclusive and participatory. It then reviews the peace processes related to conflicts in Bosnia and Herzegovina, Colombia, East Timor, Guatemala, Iraq, Kosovo, Macedonia, Nepal, Northern Ireland, Somalia, South Africa, Syria, and Yemen to explore whether and how to address constitutional modification during the peace process; the timing of determining and executing a postconflict constitution-drafting process; whether to draft an interim constitution; whether to accomplish constitutional reform through amendments or drafting a full constitution; how to approve and finalize constitutional modifications; and whether and how to incorporate issues of human rights.

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In the face of seemingly intractable conflicts, state and nonstate parties are time and again able to reach a negotiated compromise that leads to a durable peace. At other times, unfortunately, the process is rushed or misconceived and the peace is short-lived or never reached. From these successful and unsuccessful peacebuilding endeavors, the Conclusion synthesizes a number of lessons learned with regard to how to solve the various puzzles and associated conundrums faced by parties seeking to design resilient peace agreements and establish a durable peace.

The Appendix contains a brief summary of each of the key peace agreements discussed in this book. For each peace agreement, the entry sets forth the conflict drivers, including the nature of atrocity crimes, if any, the nature of the peace process, the core elements of the peace agreement, and the current status of implementation. The Appendix is designed to provide a brief snapshot of the conflicts referenced in this book in order for the reader to have the necessary context to readily move through the substance of the chapters.

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Security

INTRODUCTION

The need to restore security and rebuild the security infrastructure in a postconflict state is of paramount importance for ensuring a durable peace. Nearly all recent conflicts (thirty of thirty-three) were intrastate conflicts with nonstate armed actors eroding the monopoly of force held by the state.[1] As such, over 75 percent of the post-1989 peace agreements contain detailed provisions relating to the restoration of security, and in particular the reestablishment of a state's monopoly of force. In those agreements that did not contain security provisions, the issue of security was usually addressed in supplementary agreements.[2]

During the peace process, including during peace negotiations, a variety of security-related topics are confronted, among them: peace enforcement; ceasefires; peacekeeping; disarmament, demobilization, and reintegration (DDR); security sector reform (SSR); peacebuilding; and the restoration of a state's monopoly of force.[3]

As noted in the Introduction, each chapter undertakes a detailed exploration of one dimension of a broader set of issues needing resolution to achieve a durable peace. Under the umbrella of restoring postconflict security, this chapter focuses on the conundrums related to reestablishing a monopoly of force. The lessons learned from the negotiation and design of provisions formulated to facilitate the reestablishment of a state's monopoly of force are broadly applicable to the other security-related topics addressed during peace negotiations.

In brief, the monopoly of force relates to the state's exclusive right and ability to control and oversee the legitimate use of violence within its borders. Prior to the negotiation of a peace agreement, a state often shares its monopoly of force with international actors, such as United Nations peacekeepers, to facilitate bringing an end to the conflict. A state may then continue to share this monopoly of force with the same or different international actors during the initial stages of peace

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agreement implementation. This sharing of a monopoly of force by the state may be initiated by the state, or may to a degree be forced upon the state. The sharing of a monopoly of force will be addressed first in this chapter, followed by a discussion of peace agreement provisions designed to facilitate the reestablishment of a state's monopoly of force.

When properly negotiated and implemented, monopoly of force provisions can be key to ensuring a durable peace. A recent study examining peace agreements at the end of the twentieth century found that states were able to avoid a breakdown in the agreement and return to conflict in 87 percent of the cases where they had fully implemented the provisions relating to the reestablishment of a state's monopoly of force.[4]

This chapter addresses a number of challenges related to reestablishing the monopoly of force that parties face during peace negotiations and the broader peace process. First, this chapter discusses the puzzle of whether and how to create a state-held monopoly of force in a manner that ensures a durable peace. Next, it provides a conceptual and legal primer for understanding the principle of sovereignty, as well as the international framework for the authorization of the use of force centered around the United Nations Charter. Then, the chapter explores a number of instances of key state practice to analyze and highlight how parties involved in peace negotiations have sought to manage the conundrums they faced in solving the puzzle of reestablishing the monopoly of force.

THE PUZZLE: WHETHER AND HOW TO CREATE A STATE-HELD MONOPOLY OF FORCE IN A WAY THAT ENSURES A DURABLE PEACE

Prominent political theorists have espoused the idea of a monopoly of force as a key determinant of statehood. Max Weber famously defined states as "the form of human community that (successfully) lays claim to the monopoly of legitimate physical violence within a particular territory."[5] In doing so, Weber drew on a rich tradition of social contract theorists. In the *Leviathan*, Thomas Hobbes theorizes that a commonwealth must join together under the authority of a sovereign who is empowered "to do whatsoever he shall think necessary to be done, both beforehand, for the preserving of Peace and Security, by prevention of discord at home and Hostility from abroad."[6] For these political theorists, it is the common power of the sovereign that allows individuals to exist securely in a shared social condition, which in turn grants the sovereign a monopoly on the legitimate use of force.

This theoretical basis has informed much of the modern literature on the practice of peacebuilding, which generally views a monopoly of force by the state as the ideal to be pursued during peace negotiations.[7] With a monopoly of force by the central government, the state exercises control over its armed forces, police forces, and other security institutions without rival groups competing for control of such institutions. Even though a federal state may set up a system in which certain provinces maintain

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their own police forces or state units of a national guard, it is government entities rather than rival factions that control these forces.

Creating a monopoly of force for the state can be quite difficult, particularly in the aftermath of intrastate conflict. While the government or mediators may envision the creation or restoration of a state's monopoly of force, the nonstate armed actors are unlikely to readily or immediately agree.

For instance, in 2015, UN envoy Jamal Benomar sought a negotiated solution to the crisis in Yemen. The negotiations failed for a number of reasons, not the least of which was that none of the half a dozen heavily armed nonstate actors engaged in combat and competing for political power could conceive of granting any other party, especially not the government, a monopoly of force.[8] The UN security experts presented the UN envoy with a textbook draft security annex that set forth a traditional state-centric monopoly of force plan. Among other things, it required that the members of the Houthi militia either disarm or integrate into the national army.

Benomar responded by politely suggesting that they walk out to the front gates of the Movenpick hotel, where the envoy's team was housed, and present their plan to the Houthi militia forces, which only days before had routed the government forces, occupied the capital city, Sana'a, and were now manning security checkpoints throughout the capital, including the one in front of the Movenpick, to protect against attacks by Al Qaeda and other forces.

With the increasingly multidimensional nature of conflicts, a proliferation of nonstate armed actors is often involved in the negotiation process. Frequently, there are no clear "winners" when a conflict "ends," which makes it difficult for negotiators to identify a single party that all can agree should acquire a monopoly of force. In cases of extremely devastating civil wars, there may not even be a viable state remaining. In 2014, the Bertelsmann Transformation Index reported that only about half of countries in the midst of a postconflict transition had reestablished a full monopoly of force, with approximately 40 percent having succeeded in establishing only a partial monopoly of force, and the remaining 10 percent having no monopoly of force at all.[9]

To restore the conditions under which a state-held monopoly of force might be possible, states may decide to share force with international or regional actors. The most common source of support comes in the form of peacekeeping forces. These forces may arrive before and/or after a comprehensive peace agreement, but in each case the state will need to navigate whether and how to consent to their presence, agree a mandate for those forces, and share its claim to legitimate force until a durable peace is secured.

After sufficient conditions of peace are restored (often with international and/or regional support) and ongoing violence no longer poses an overt challenge to the state's monopoly of force, the state and nonstate actors can viably explore what form a future monopoly of force should take. Even if there is an evident choice for which

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group will claim the monopoly, there is frequently deep mistrust among the parties. This animosity makes "losing" parties less willing to relinquish their ability to use force. This is especially true of cases where the state's forces have committed atrocity crimes, decreasing the willingness of the nonstate armed actors to recognize the state's claim to legitimate violence. In general, since nonstate armed actors come into being specifically to challenge the state's monopoly of force, they are unlikely to readily concede a full return to a state monopoly of force.

Given the reluctance of the parties to agree to a rapid reestablishment of a state's monopoly force, parties often develop hybrid approaches that balance their interest in maintaining some interim level of armed forces with the state's interest in building integrated national-level forces for the long term. The conundrums discussed later in this chapter explore how the parties navigate these conflicting security interests revolving around the reestablishment of a state's monopoly of force.

CONCEPTUAL AND LEGAL PRIMER

The conceptual and legal primer for understanding negotiations relating to sharing and/or reestablishing a monopoly of force draws heavily from the principle of sovereignty, as well as the international framework for the authorization of the use of force centered around the UN Charter.

Sovereignty

From the perspective of a state, every peace negotiation is grounded in the precept that the state has absolute sovereign control over its territory and is entitled to operate independently of the influence of other states.[10] These foundational principles of sovereignty, political independence, and territorial integrity were recognized as early as the seventeenth century in the peace treaties of Westphalia,[11] and codified in the UN Charter.[12] These three principles are appropriately and jealously guarded by states, as is explored in greater depth in Chapter 4, on self-determination.

States consider that the principle of sovereignty grants them the exclusive right to use force within the territory of their state. As such, in all but the rarest cases a state must consent to the deployment of peacekeepers and international monitoring or assistance missions that operate on its territory. The requirement of consent permits a state to negotiate the timeline, rules of engagement, and/or standard operating procedures of a peacekeeping or observer mission. These provisions are often included within a status-of-forces agreement, or within a negotiated annex to a Security Council resolution, or a similar resolution by a regional body, authorizing the deployment of a force.[13] The host state's consent is revocable, however; thus states may, and occasionally do, terminate the sharing of their monopoly of force early.

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