Illegal Peace in Africa

An Inquiry into the Legality of Power Sharing with Warlords, Rebels, and Junta

Jeremy I. Levitt

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African states have become testing grounds for Western conflict-resolution experiments, particularly power-sharing agreements, supposedly intended to end deadly conflict, secure peace, and build democracy in divided societies. This volume examines the legal and political efficacy of transitional political power sharing between democratically constituted governments and the African warlords, rebels, or junta that seek to violently unseat them. What role does law indicate for itself to play in informing, shaping, and regulating peace agreements? This book addresses this question and others through the prism of three West African case studies: Liberia, Sierra Leone, and Guinea-Bissau. It applies the neo-Kadeshean model of analysis and offers a framework for a law on power sharing. In a field dominated by political scientists, and drawing from ancient and contemporary international law, this book represents the first substantive legal critique of the law, practice, and politics of power sharing.

Professor Jeremy I. Levitt is Distinguished Professor of International Law, Associate Dean for International Programs, and Director of the Center for International Law and Justice at Florida A&M University College of Law in Orlando. He is an international lawyer and political scientist with extensive experience working with governments, international institutions, and nongovernmental organizations in fragile states and conflict zones. In 2008–2009, Professor Levitt served as the Head of the International Technical Advisory Committee for the Truth and Reconciliation Commission of Liberia. He has authored two books and edited four and has published numerous articles and book chapters in periodicals and books from varied disciplines. In 2009, he coedited a highly regarded text with Matthew C. Whitaker titled *Hurricane Katrina: America's Unnatural Disaster*, and in 2008, he edited a groundbreaking volume titled *Africa: Mapping New Boundaries in International Law*. The last book he authored is titled *The Evolution of Deadly Conflict in Liberia: From "Paternaltarianism" to State Collapse* (2005). He earned his doctorate of philosophy in politics and international studies from the University of Cambridge, his Juris Doctor from the University of Wisconsin–Madison, and his bachelor of arts degree from Arizona State University.

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Jeremy I. Levitt
Florida A&M University College of Law

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The price of apathy towards public affairs is to be ruled by evil men.

–Plato

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The life of the human rights jurist can be akin to that of a nomad – sometimes unrestricted and other times tumultuous – where significant time is spent crossing oceans to face adversity in foreign terrain. Time spent in these vital pursuits is not possible without collateral consequence. I humbly thank my wife and children for their adoring love and support and for sharing me with my pursuits.

I dedicate this book to them and to the tens of millions of victims of unlawful power sharing in Africa and beyond – souls forced not only to endure the indignities of deadly conflict but also to live under the rule of evil charlatans, warlords, rebels, and military junta responsible for committing atrocities against them.

The seeds for the book were planted while I served as a legal aide to the Constitutional Assembly of the Republic of South Africa during the country's constitution-making process. I was in many ways enamored by the complex issues engendered by coalition government, reconciliation, and amnesty. These seeds germinated while I was a doctoral student in politics and international studies at Cambridge University and blossomed while I served as special assistant to Mamphela Ramphele, managing director for human and social development at the World Bank Group. This book is the product of several years of research, advocacy, and lawyering in zones of peace and war in Africa. I owe an enormous debt of gratitude to the many war victims who opened their hearts and homes to me along the way. Their inspirational fortitude in the wake of gross neglect and injustice inspired me to author this polemical book, hoping that it would illuminate the manifold ways in which unlawful political power sharing tortures the souls and law subject to it.

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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.

de Vattel argued that the essential criterion of statehood was that nations exist "free and independent of one another" and govern by their own authority and law,[28] Egypt and Hatti, among other states, were hegemonic states governed by law.[29]

Scholars and policy makers rarely acknowledge and attribute the logic, substance, and structure of modern statecraft and international law to Egyptian civilization or treatycraft to the Treaty of Kadesh. Notwithstanding, as Georg Schwarzenberger noted, when comparing the (1) "substantive contents of their normative rules and principles," (2) "characteristics of their normative infrastructure," and (3) "distinctive character of their areas at the time," it is difficult to conclude otherwise.[30] Schwarzenberger further argued that "by all three tests the 14th century B.C. diarchy between Egypt and Hatti comes nearest to contemporary international law and relations" as "six of the seven fundamental principles on contemporary international customary law are . . . codified in the Kadesh Peace Treaty," including sovereignty, recognition, consent, good faith, responsibility, and self-defense.[31]

Nonetheless, the Treaty of Kadesh includes fifteen broad peacemaking principles, seven of which continue to serve as the foundation of modern international law, peace treaties, and agreements, including (1) recognition of and respect for preexisting agreements and rules;[32] (2) cessation of hostilities or cease-fire;[33] (3) prohibition on invasion, plunder, and occupation;[34] (4) mutual assistance and defense against

[28] See Emmerich de Vattel, LE DROIT DES GENS (1758), vol. 1, Introduction, Book I, chapter I, §4; Crawford, *infra* note 71, at 7–8.

[29] See Rostovtseff, *supra* note 24, at 41. See also Aristide Theodorides, *The concept of law in Ancient Egypt*, in J. R. Harris (ed.) THE LEGACY OF EGYPT (2nd ed.) (1971).

[30] Georg Schwarzenberger, *Complexities of distinction between old and new international law: Empirical question marks*, in R. S. Pathak & R. P. Dhokalia (eds.) INTERNATIONAL LAW IN TRANSITION: ESSAYS IN MEMORY OF JUDGE NAGENDRA SINGH (1992), at 25.

[31] *Id.* Freedom of the seas is the only principle not addressed in the treaty, likely because the Battle of Kadesh was land warfare over contested land boundaries, so maritime-related issues were not relevant.

[32] Egyptian Treaty, in 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.

[33] *Id.*, at 200.

[34] *Id.*

external and internal threats (particularly coups d'état);[35] (5) denial of entry and deportation of fugitives and immigrants;[36] (6) extradition of fugitives;[37] and (7) humane treatment of persons, particularly immigrants and fugitives after deportation or extradition.[38] The Kadesh Treaty neatly fuses principles of law, politics, diplomacy, and religious consequentialism. Its recognition of the supremacy of law, codification and recognition of preexisting laws and agreements as a basis for regulating and shaping the treaty itself as well as future peace agreements, inclusion of a treaty-based right of intervention to preserve legitimate political authority, and illumination of human rights protections (i.e., codification of humane treatment and the protection of criminals and fugitives, immigrants, and their families from official or state abuse) constitute the ancient intellectual pillars that underwrite the NKM. Paradoxically, these are the same pillars that anchor the law of power sharing discussed in Chapter 10.

Remarkably, the elucidation of human rights and justice precepts in ancient Egyptian law normatively and philosophically precede the Treaty of Kadesh by approximately seven centuries and millennia, respectively. Human rights and justice principles are firmly elaborated in what I refer to as the Egyptian Bill of Rights (2000 B.C.) and the psychocultural and legal philosophy of MAAT.[39] The Kadesh Treaty drew its humane logic from this ancient bill of rights, which is fortuitously titled "All Men [are] Created Equal in Opportunity."[40] Adopted by Pharaonic decree during an era when "social justice and the rights of the common man were emphasized," the Egyptian Bill of Rights focuses on prayer, peace, good deeds, and social justice. Specifically, it centered on the four "good deeds" or people's rights defined by Amon, or God, and emphasized the importance of combating inequality as a

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] The Egyptian Bill of Rights is the earliest known human rights–based text and was originated during the Middle Kingdom period (between 2055 and 1650 B.C.), and MAAT is the oldest known psychocultural and legal philosophy dating back to at least the Old Kingdom era (between 2686 and 2181 B.C.).
[40] Egyptian Bill of Rights, in Wilson, *supra* note 23, at 8.

means of freeing oneself from bondage or evil. Broadly construed, the four human rights principles are as follows:

1. I made the four winds that every man might breathe thereof like his fellow in his time.
2. I made the great inundation that the poor man might have rights therein like the great man.
3. I made every man like his fellow. I did not command that they do evil, (but) it was their hearts which violated what I said.
4. I made their hearts to cease from forgetting the West, in order that divine offerings might be given to the gods of the nomes.[41]

When taken together, the Egyptian Bill of Rights appears to advance the notion that all men breathe God's air and are thus created equal; that poor men are equal to or should have the same rights as rich men; that God made all men equal, and hence social inequity is a manifestation of man's disobediences of God's equality command; and that as an extension of the preceding equalitarian principles, the afterlife, which was previously the prerogative of kings alone, is extended to all good or worthy men without royal sanction. In this sense, the bill's preoccupation with the fair and equitable treatment of the individual, and its special concentration on poor and vulnerable persons and social justice generally, further explain the ancient lineage, character, and humane precepts that underwrite the NKM.

From at least the Protodynastic Period (between 3200 and 2100 B.C.) onward, traditional Kemetic or ancient Egyptian culture was ordered by the abstract psychocultural philosophy of MAAT, literally meaning "truth, justice, righteousness, balance, harmony, correct behavior, reciprocity, and divinely ordained cosmic order."[42] It may reasonably be argued that MAAT was the first holistic transnational justice theory. It represented "the status quo of the Egyptian way of life – that distinguished the Egyptians from their barbaric neighbors."[43] During this period, Egypt "was the center of the universe, and the

[41] *Id.*, at 8–9. The "nomes" were Egyptian provinces.
[42] Bell, *supra* note 23, at 99.
[43] *Id.*

Egyptians were god's chosen people – the only true humans" or civilized persons capable of constructing civilized society.[44]

In consonance with the spirit, logic, and structure of the Kadesh Treaty, the Egyptian Bill of Rights, and MAAT, contemporary international law, doctrine, norms, and jurisprudence in Africa similarly favor a rule-based and substantive conception of human rights that, at least theoretically, places a higher premium on law over politics. The NKM draws normative continuity from the synergistic comparability between ancient and contemporary international law and the interwoven and complementary rules embodied in the modern African human rights protective regime.[45] The bedrock of this regime is the law of the African region, including domestic, subregional, regional, and international rules as well as the practice of international institutions such as the ACHPR, ECOWAS, AU, and United Nations (UN). The NKM is anchored in the aforementioned four tiers of law and provides contemporary brick mortar to the principles enshrined in the Treaty of Kadesh, Egyptian Bill of Rights, and MAAT precepts, while cementing them in a new foundation. Consequently, the NKM necessitates a tedious and systematic legal audit of law applicable to transitional power sharing to expose any legal and sociopolitical defects in the practice. It also underscores the important and obligatory character of law in making peace – a legal trait that has its genesis in over four millennia of peacemaking practice.

The NKM rests on an antediluvian internal legal logic rooted in human experience and state behavior that I refer to as *historical experientialism*, which seeks to protect society by employing law fashioned through historical experience – too often, war and peace – to constrain the political edicts of politicians and principalities. This experience is based on the intrinsic moral authority of historical judgments that have informed and framed law's evolution. Under the NKM, law's superior

[44] *Id.* In ancient Egypt, the king was a living god born of a mortal woman and endowed with spiritual authority to rule the earth as the intermediary between humanity and the gods, who "expressed their will through his words and deeds." *Id.* The king's primary purpose was to facilitate MAAT: truth, justice, righteousness, balance, harmony, correct behavior, reciprocity, and divinely ordained cosmic order. MAAT formed the basis of civilized society.

[45] This encompasses human rights; humanitarian, refugee, and international criminal law norms; and norms concerning internally displaced persons and democracy.

claim to authority is not only based on morally correct judgment forged through millennia of state practice, or what I deem the *historical morality of law*, but also on its compliance with "criteria of legality that are also moral."[46] As the distinguished economist Arthur Lewis has noted, "law is not without moral influence, it sets a standard for both the public and politicians, and in moments of crises can be enforced upon reluctant politicians."[47] Similarly, Dyzenhaus observed that "the intrinsic moral authority of judgments that are implemented through law comes not from their content, but from the fact that they are implemented through law."[48] The historical morality of law stipulates that there must be law, that law is derived from historical experiences, and that law must be made publicly known and be lawfully administered by government.

Henceforth, the NKM is concerned with both the substantive and procedural aims of legal rules and is encouraged by Lon Fuller's *internal morality of law* model, which is based on a procedural type of natural law "in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be."[49] Snubbing law's relevance in peacemaking undermines the purpose for its creation or historical experientialism and abandons the aged logic and experience that underwrite such law and the normative juridical safety net it fashions to effectuate conflict resolution and justice. It also ignores the regulatory role it is intended to play in edifying and shaping peace prescriptions. In this sense, the historical morality of law is not a rogue construct imposed on the power of law but rather an essential prerequisite of such power and the "good law" it seeks to effectuate, thereby serving as a nerve center of the NKM.

Consequently, the NKM supports the "enterprise of subjecting human conduct to the governance of rules."[50] It necessitates that every society have known rules that are respected by "those charged with

[46] David Dyzenhaus, *The compulsion of legality*, in Victor V. Ramraj (ed.) EMERGENCIES AND THE LIMITS OF LEGALITY (2008), at 35.
[47] W. Arthur Lewis, POLITICS IN WEST AFRICA (1965), at 83.
[48] Dynenhaus, *supra* note 46, at 35.
[49] Lon L. Fuller, THE MORALITY OF LAW (1964), at 97.
[50] *Id.*, at 106.

their administration," especially governments and peace brokers.[51] It also challenges the traditional and exclusive occupation of conflict resolution, peacemaking, and democracy discourse by political scientists. Rather, the NKM argues for the supremacy of law and legal reasoning, which are intended to inhibit the influence of groups of discretionary power by providing normative guidance originated from historical experientialism. This is imperative because of the inherent expectation in it that law (e.g., doctrine, norms, and jurisprudence) be advanced by historical experientialism and the sources and application of law designed to inform and order conflict management processes. In this context, the NKM maintains that the lawfulness of any power-sharing strategy must be measured by the net of legality cast on it by peace brokers.

B. THE FOCUS AND STRUCTURE OF THIS VOLUME

This book examines the legal and political efficacy of power sharing in the Accra Agreement in Liberia (2003),[52] the Lomé Agreement in Sierra Leone (1999),[53] and the Abuja Agreement in Guinea-Bissau (1998).[54] By employing the NKM, it scrutinizes how little weight law

[51] *Id.*, at 157. As Fuller notes, "acting by known rules is a precondition for any meaningful appraisal of the justice of law. 'A lawless unlimited power' expressing itself solely in unpredictable and patternless interventions in human affairs could be said to be unjust only in the sense that it does not act by known rule. It would be hard to call it unjust in any more specific sense until one discovered what hidden principle, if any, guided its interventions. It is the virtue of a legal order conscientiously constructed and administered that it exposes to public scrutiny the rules by which it acts." *Id.*, at 158.

[52] Agreement on Ceasefire and Cessation of Hostilities between the Government of the Republic of Liberia and Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, Accra, Ghana, June 17, 2003, available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_ceasefire_06172003.pdf [hereinafter Agreement on Ceasefire].

[53] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Lomé, Togo, July 7, 1999, available at http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Agreement].

[54] Agreement between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, Abuja, Nigeria, November 1, 1998. The Abuja Agreement also comprises two supplemental agreements, including a cease-fire agreement signed in Praia on August 26, 1998, and the Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, July 26, 1998; Annex to the

was accorded in these agreements and challenges the well-settled practice of sharing power that contravenes law. Power sharing, as opposed, for example, to amnesty, is the primary subject. A burgeoning literature addresses the legality and effectiveness of amnesty in peace agreements when human rights violations and war crimes have been committed,[55] but the author is not familiar with a single comprehensive work that questions the legal utility of power sharing – making this study original in concept and scope. An examination into the legality of power sharing is imperative given that, unlike the issue of amnesty, it engenders more complex legal questions that have not been sufficiently scrutinized by international jurists. This inquiry is also critical given that power sharing seems to be the preferred approach to resolving internal armed conflict in deeply divided societies and because it is more expansive and has a greater impact on sustainable peace than amnesty arrangements, which tend to be conceptually and practically more narrow but integral to sharing power. In other words, amnesty may be given without power sharing, but sharing power without amnesty is atypical,[56] meaning that it is usually a lesser included component of power-sharing deals. Amnesty applies to certain individuals and/or groups, whereas power sharing directly affects the entire population of a state as it reconstructs, reconstitutes, or reorders the blueprint of government or governance framework and its future disposition.[57] It

Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, July 26, 1998; and Cease-fire Agreement and Its Appendices between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, August 25–26, 1998. Taken together, all these agreements compose the Abuja Agreement. As already noted, this study will center on states emerging from civil conflict and focus on the issue of power sharing between democratically constituted governments and the warlords, rebels, and junta that seek to violently unseat them and are responsible for committing or directing human atrocities. See Chapter 3 for background information about the circumstances and histories that led to these accords.

55 See *infra* Chapter 3 note 11. See generally Sarah Williams, *Amnesties in international law: The experience of the Special Court for Sierra Leone*, 5 Human Rights Law Review 271 (2005).

56 This assertion concerns amnesty under local or domestic law, not international law.

57 Power-sharing arrangements typically have long-term and systemic consequences. They determine who will have a seat at the table of power, in what capacity, and for how long. Although amnesties are seemingly permanent and have serious psychological effects on victims of war, they are nonetheless specific to the individual, whereas, again, power sharing directly affects the entire population of a state, including perpetrators who receive amnesty and their victims. A rebel awarded amnesty can leave the state immediately

establishes the foundation and framework for governance and forces war victims and others to live under the rule of democracy violators, war criminals, and other abusers.

This type of coerced peace raises vital questions about the governance, rule of law, and developmental challenges faced by war-torn states. The logic behind power sharing assumes that *pirates de la loi* will end armed conflict and act as good citizens once they are coroneted and legitimated with de jure authority and weighty positions. It presupposes that warlords can become democrats once they are sanctioned with state authority. In this sense, power sharing with warlords and rebels sets a troubling precedent as it sends a dangerous message to would-be insurrectionists that violence is a legitimate means of effectuating change and obtaining political power. Although power sharing may aid in transitions from armed conflict, ample evidence shows that it too often may "thwart the consolidation of peace and democracy."[58] For these reasons, the subject of power sharing merits distinct analysis, particularly concerning its impact on the rule of law and sociopolitical order of postconflict societies and given that it is the chosen tool of conflict resolution of the West and UN to forestall high-intensity internal armed conflict. To ignore the important regulatory role law is supposed to play in shaping peace agreements and other postconflict political outcomes is tantamount to making it the sole victim in a tragic comedy titled "Illegal Peace," where its predefined role in shaping and ordering peace agreements is categorically denied.

This book argues that when democratically constituted regimes are forced to choose between negotiating peace and being violently dislodged from power, lawful peace agreements that comport with the rule of law should prevail over extralegal arrangements born out of political necessity and expediency. It also maintains that peace

(e.g., the speedy departure of Sam "Mosquito" Bockarie, Sierra Leone's notorious senior Revolutionary United Front (RUF) rebel commander, from Sierra Leone to Liberia after the institution of the Lomé Agreement); power sharing, however, is enduring. For more information on Bockarie's speedy departure from Sierra Leone, see United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Sierra Leone humanitarian situation report*, December 6–19, 1999, at http://reliefweb.int/node/59510.

[58] Donald Rothchild & Philip G. Roeder, *Dilemmas of state-building in divided societies*, in Donald Rothchild & Philip G. Roeder (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS (2005), at 12.

agreements that are apprised by and comply with prevailing rules – creating legal peace – have less adverse impacts on people's rights and a state's constitution of order and are more viable over the long term than those that do not.[59] It follows that when negotiating peace, contesting parties and peace brokers should consider not only political variables but also legal ones, as law is intended to constrain the political aspirations of decision makers and ensure the lawfulness of peace deals. This means that rules governing the legality of peace agreements should be adhered to, particularly when the beneficiaries of power sharing undemocratically and unlawfully acquire power and commit human atrocities in the process. As Ratner noted, atrocities are "those violations of human rights and humanitarian law involving severe assault on the human person, both corporeal and spiritual – what Agnes Heller has called 'genuinely heinous crimes' that are 'manifestations of evil.'"[60] It follows that those who are responsible for thwarting democracy and committing human atrocities should not only be prosecuted but also barred from public service or from sharing power.

The logic underpinning this position raises several difficult questions for governments under siege: who is responsible for forestalling internal disorder and repression and for ensuring postconflict justice? Is it immoral for a government to allow deadly conflict to continue until legal peace is reached? It also raises questions about when, if ever, leaders should accept illegal peace: should individual responsibility for repression be excused for the perceived collective good? Should power sharing and amnesty take precedence over retributive justice? Should the political prerogatives of warlords and rebels supersede the fundamental civil, political, and human rights of their victims? These are pertinent questions that should be delicately deliberated on by all relevant stakeholders, not inadvertently answered by political elites through makeshift peace processes.

[59] A *legal peace* is one that is made in accordance with or sanctioned by lawful law or law that is lawfully derived (e.g., from a democratic constitution), whereas *illegal peace* occurs when political edicts or mandates prescribe unlawfully derived rules more weight than lawfully derived ones. The terms *illegal peace*, *unlawful law*, and *unlawful peace* are used interchangeably throughout the text.

[60] Steven Ratner, *New democracies, old atrocities: An inquiry in international law*, 87 Georgetown Law Journal 712 (1999).

There is an internal tension in peace deals that seek to share power with *pirates de la loi*, on one hand, and safeguard the human rights and democracy entitlements of citizens and war victims, on the other. As Crocker and Hampson rightly note,

> the need to establish power-sharing structures that accommodate rival factions and interests may well clash with the need to root out the perpetrators of human rights abuses. Similarly, the need to reform state and enemy security institutions may be at odds with the practical requirement of bringing those groups who have a monopoly on the instruments of coercion into the peace process. Without peace there can be no justice. Without justice, democratic institutions, and the rule of law, the peace itself will not last.[61]

Hence there is no single or simple answer to this dilemma or the aforementioned questions, and the study is burdened by the lack of constructive examples of lawful and successful power sharing that have brought about sustained transitions to peace and democratic order after high-intensity armed conflict or the overthrow of DCGs. Although a negotiated peace may be the only means available to embattled governments, especially when the international system of peace and security envisioned in the UN Charter is undermined by UN Security Council inaction or neglect, quick-fix or patchwork approaches to resolving deep-seated sociopolitical conflict rarely create long-term peace.[62]

One key reason for the lack of sustainable outcomes is that power sharing with warlords, rebels, and junta defeats the logic and objective of peace building by providing a de jure platform for the institutionalization of their predatory behavior into the body politic. Power sharing

[61] Chester Crocker & Fen Osler Hampson, *Making peace settlements work*, 104 Foreign Policy 68 (1996).

[62] See generally Vaughan Lowe, Adam Roberts, Jennifer Welsh, & Dominik Zaum (eds.) The United National Security Council and War: The Evolution of Thought and Practice since 1945 (2008); Ray Murphy, UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice (2007); Jane Boulden (ed.) Dealing with Conflict in Africa: The United Nations and Regional Organizations (2003). See also Jeremy Levitt, *UN peacekeeping: A sheep in wolves' clothing? Review of* UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice *by Ray Murphy, Cambridge: Cambridge University Press, 2007*, 17 International Peacekeeping Journal 108 (2010).

also gifts them with the cloak of state authority to prey on the resources of the state and its citizens – a situation that sows the seeds for future conflict, as demonstrated in Liberia, Sierra Leone and Guinea-Bissau. Extralegal strategies for peace born out of political necessity and expediency also ignore the traumatic impact of conflict on civil society (particularly women and children) and the organic political order,[63] and they are also antithetical to the creation of any law-based political culture. Finally, as Rothchild and Roeder note, once power-sharing political elites "turn to the task of consolidating the institutions and rules of governance, these same power-sharing institutions are likely to prove unstable, to create incentives to escalate future ethnic conflicts to more destructive levels, including violence, and to place obstacles in the path of consolidating full democracy."[64]

Transitional political arrangements that do not consider the broader sociopolitical and legal impact of power-sharing and amnesty arrangements on civil society, regime transition, and durable peace create a type of weak peace that is unlikely to succeed.[65] As Ratner noted, the "linkage between democracy and accountability is not merely about a relationship between the past and the future, but one that immediately implicates the present and the status of the transition."[66] Internal and external actors' patchwork prescriptions for halting Africa's civil wars – regardless of social costs – are debatably indicative of the inherent contradiction and geopolitical bias in international responses to conflict on

[63] See UN Security Council Resolution 1820, adopted by the Security Council at its 5916th meeting, June 19, S/RES/1820 (2008). http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement See also, ICRC, Women in War Section, at http://www.icrc.org/Eng/women (last visited May 29, 2010). Ann Jones, *A war on women*, Los Angeles Times (February 17, 2008). UN Security Council, Report of the Secretary-General on Women, Peace and Security, October 16, S/2002/1154 (2002). See generally *Republic of Liberia Truth and Reconciliation Commission*, Consolidated Final Report, vol. 2 (June 30, 2009); and see generally A Witness to Truth: The Truth and Reconciliation Commission of Sierra Leone, vols. 1–2. See also Human Rights Watch: Africa, available at http://www.hrw.org/doc/?t=africa.

[64] Donald Rothchild & Philip G. Roeder (eds.) Sustainable Peace: Power and Democracy after Civil Wars (2005), at 13.

[65] *Weak peace* may be defined as a peace that is born out of political necessity and expediency, where decision makers make peace without the consent or sanction of civil society as a whole and do not adequately consider the social, political, and legal implications of an agreement on long-term peace, stability, and societal cohesion.

[66] Ratner, *supra* note 60, at 719.

the continent.[67] Because acceptance of weak peace is often the only option for embattled African governments, the relevance, utility, and value of the UN Charter–based system of peace and security must be interrogated.

This study probes whether any coerced peace that unlawfully empowers and rewards *pirates de la loi* rather than punishes or in some way sanctions them is justified if it serves the greater good of peace. The NKM submits that by failing to hold warlords, rebels, and junta accountable, decision makers undermine the most important element of any sustained transition to peace: respect for and adherence to the rule of law.[68] As the chapters that follow assert, ignoring the preeminence of law in transitional peace agreements can set a dangerous and negative precedent.[69] Transitional political processes derived from coercion often institutionalize unlawful law, policy, and practice into peace arrangements, along with the skewed notion that might is right in domestic and international relations. Such arrangements appear to confirm the belief of *pirates de la loi* that coercing legitimate governments into lucrative deals with impunity is a lawful means of attaining political power, effectively forcing DCGs to haggle away sovereign authority through power sharing as well as barter away the rights of war victims by denying them any form of legal redress in the postconflict environment. This type of weak and illegal peace creates a nexus of circular causation between warlordism and state disorder, with deadly conflict and injustice as permanent features and raises a vital normative question: if, through power sharing, the wants of warlords are permitted to take precedence over the fundamental human rights and democracy entitlements of their victims for the public good of peace,

[67] Jeremy Levitt, *Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone*, 12 Temple International and Comparative Law Journal 333 (1998).

[68] See generally Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (2nd ed.) (2003); Diane Orentlicher, *Swapping amnesty for peace and the duty to prosecute human rights crimes*, 3 ILSA Journal of International and Comparative Law 713 (1997); Robert Quinn, *Will the rule of law end? Challenging grants of amnesty for the human rights violations of a prior regime: Chile's new model*, 62 Fordham Law Review 905 (1994).

[69] Orentlicher, *supra* note 68.

does this form of power sharing corrupt or safeguard the rule of law and constitutionality?[70]

This book is divided into eleven chapters that contemplate the aforementioned questions and issues in detail. Chapter 1 introduces the scope and nature of the study. Chapter 2 examines the utility and relevance of law in peacemaking. Chapter 3 assesses the major arguments for and against power sharing. Chapter 4 discusses why Liberia, Sierra Leone, and Guinea-Bissau were selected as case studies and details the political circumstances and conflicts that birthed the Accra, Lomé, and Abuja peace agreements.[71] Chapter 5 examines the accords' power-sharing provisions. Chapters 6–8 employ the NKM to evaluate the legality and political utility of the agreements' power-sharing provisions under domestic, subregional, and international law. Though similar themes are unveiled in Chapters 6–8, they are presented separately to allow for more nuanced analysis, given that this is the first substantive legal analysis on the subject. Chapter 9 discusses the postconflict power-sharing environments of Liberia, Sierra Leone, and Guinea-Bissau, and Chapter 10 assesses the normative connection between law and peace, summarizes findings, and offers the contours of and framework for the development of a law of power sharing. Chapter 11 highlights major findings and offers concluding thoughts.

[70] Under international law, *democracy* may be broadly defined as "the right of all citizens to participate in the political life of their societies" because the "will of the people is to be the basis of the authority of government." James Crawford, *Democracy and international law*, 64 British Year Book International Law 113, 113–114 (1993).

[71] The Accra, Lomè, and Abuja agreements in Liberia, Sierra Leone, and Guinea-Bissau, respectively, were selected as case studies because the states are located in the same region (West Africa); share a similar colonial heritage; have similar economies; subscribe to the same law at the subregional, regional, and international levels; have like populations, topography, and development indicators; and were affected by internal conflict at roughly the same periods of time. Most important, all three states birthed unlawful peace agreements that have not brought about sustainable peace or development, and all three accords were derived from violent political conflict in which democratically constituted regimes were forced to share power with warlords, rebels, and/or junta. For more comparability analyses, see Chapters 4 and 5.

2 LEGALIZING PEACE

A. THE UTILITY OF LAW IN PEACEMAKING

What is the utility of law in peacemaking? Martin Luther King Jr. rightly stated that "law and order exist for the purpose of establishing justice, and when they fail in this purpose they become dangerously structured dams that block the flow of social progress."[1] King's observation is as true in Africa today as it was in Birmingham, Alabama, in 1963. It follows that in its purest form, law should be objective and connote broad conceptions of fairness, predictability, equality, and justice. As Fallon aptly argues, law should protect people against anarchy and the arbitrary exercise of governmental power, "allow[ing] people to plan their affairs with reasonable confidence" so that "they in advance know the legal consequences of their actions."[2]

As already noted, the regulatory aspects of law are what make it useful in peacemaking – law has a critical regulatory role to play in peacemaking and conflict resolution,[3] particularly during peace negotiations, when, owing to political necessity and expediency, politicians place a premium on power over principal and principality over law. In the same way that law and order are requisite elements of justice, "lasting peace requires justice."[4] Law provides a framework or blueprint

[1] Martin Luther King Jr., letter from Birmingham Jail, April 16, 1963.

[2] Richard H. Fallon Jr., "*The rule of law" as a concept in constitutional discourse*, 97 Columbia Law Review 7, 8 (1997).

[3] See generally Jeremy I. Levitt, *Conflict prevention, management and resolution in Africa – regional strategy for the prevention of displacement and protection of displaced persons: The cases of the OAU, ECOWAS, SADC and IGAD*, 11 Duke Journal of Comparative and International Law 1 (2001).

[4] *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.

for peacemaking that constrains the political ambitions and shenanigans of embattled politicians and *pirates de la loi*, respectively. The framework is designed to curtail the influence of groups of discretionary power by providing normative guidance derived from normative experience. This is an important point, given the traditional occupation or monopolization of peacemaking, conflict resolution, and democracy discourse by political scientists, and it is critical because of the expectation that rules, norms, and doctrine be advanced by such experiences. This is precisely why Luis Moreno-Ocampo commented that "it is essential . . . to ensure that any conflict resolution initiative [peace deal] be compatible with the Rome Statute, so that peace and justice work effectively together."[5] His comments are applicable not only to international criminal law but also to its predecessors: international human rights law (IHRL), international humanitarian law (IHL), and emerging democracy norms. Ideally, law ensures the lawfulness of peace deals, especially when the benefactors of such deals acquire power undemocratically and, in the process, commit human atrocities. In practice, the selective application or lack of consideration of the relevance of law by peace negotiators, peace brokers, and moral guarantors is one of Africa's principal dilemmas – one that has spawned not only unlawful practice that some interpret as doctrine but also, more problematically, ghastly outcomes. As this book reveals, this is why markedly more transitional peace agreements with political power-sharing components fail than succeed. One reason for this grim reality is that the international community continues to use a naive, one-size-fits-all approach to conflict resolution by treating all parties at conflict, especially "bandits of the law," identically – as lawful and legitimate actors with valid interests and concerns worthy of unbiased international mediation.

Although political variables are important, they should not take precedence over superior and more authoritative law when structuring peace deals. On the contrary, rules are designed to shape, mold, and constrain political variables and outcomes by providing structure and direction, respectively, to the political aspirations of decision makers. This is especially important when state action through, for

[5] *Id.*

example, power sharing curbs fundamental rights and blocks democracy and the flow of retributive and restorative justice. For this reason, it is difficult to contest Aristotle's assertion that law should be "reason unaffected by desire," not desire unaffected by reason.[6] Is it reasonable to bequeath political power to warlords, rebels, and junta that unlawfully and violently usurp power and commit egregious human rights and humanitarian law violations in the process? This question is imperative when peacemakers desire to arbitrarily accord power-sharing deals with the weight of superlaw, trumping domestic law (e.g., national constitutions), regional law (e.g., African Union (AU) and Economic Community of West African States (ECOWAS) constitutive law), and international law (e.g., international human rights conventions), even though such deals lack legal authority, do not qualify as law, and have no existence or basis in it. These types of legally arbitrary deals represent the purest form of political marmalade – jelly like political edicts masquerading as law. It is this bold disregard for the rule of law by peace brokers, negotiators, and makers and a conviction in its regulatory role that led the author to adopt a substantive human rights–based conception of law, that is, the neo-Kadeshean model (NKM).

Africa's fifty-three states subscribe to a diverse array of sociopolitical and legal systems, making it highly improbable that there could be a solitary approach to rights-based questions at the national level. Notwithstanding, the NKM is distinct because it identifies, systematizes, and synthesizes law norms using a layered approach. It draws its foundational logic and impulse from MAAT; its governing rationale from the Kadesh Treaty and Egyptian Bill of Rights; and normative continuity from the African Charter on Human and Peoples' Rights (Banjul Charter) and related law, doctrine, and jurisprudence. In this regard, the NKM concurs with Matua's argument that "a historical understanding of the struggle for human dignity should locate the impetus of a universal conception of human rights in those societies *subjected* to European tyranny and imperialism."[7] The Banjul

[6] Aristotle, POLITICS, Book 3, chapter 16 (350 B.C.).

[7] Makau Matua, *Savages, victims, and saviors: The metaphor of human rights*, 42 Harvard International Law Journal 205 (2001).

Charter is Africa's first and only instrument wholly concerned with human rights and is, in principle, the most widely recognized and accepted regional human rights treaty in Africa and the world.[8] It provided for the establishment of the African Commission on Human and Peoples' Rights (ACHPR), which has an interpretative mandate to determine the charter's meaning and application as well as make quasi-judicial determinations.[9] It follows that over the past two decades, the ACHPR has fashioned authoritative jurisprudence and doctrine that has influenced and shaped international human rights law and practice inside and outside Africa.[10]

Hence, as previously observed, the NKM draws analytic direction from the decisions, resolutions, and declarations of the ACHPR as well as the law and practice of African subregional and regional institutions, regional customary law, state practice, and jurisprudence from domestic and regional courts in the continent. Taken together, Africa's evolving human rights landscape has generated an innovative human rights tradition that, for example, does not consider a state of emergency as a valid legal basis on which to deviate from the conventional legal system[11] or civil war as a legitimate basis on which to

[8] Jeremy I. Levitt, *African Charter on Human and Peoples' Rights*, in Jeremy Levitt (ed.) Africa: Selected Documents on Political, Conflict and Security, Humanitarian and Judicial Issues (2003), at 351.

[9] Articles 30–61, African [Banjul] Charter on Human and People's Rights, in *id.*, at 360–367.

[10] Jurisprudence denotes the case law of a court (as in the jurisprudence of the Special Court for Sierra Leone) or the theory of a law (such as the African Charter on Human and Peoples' Rights) or a branch thereof (as in international human rights law and jurisprudence). It is in the latter tradition of jurisprudence that the African Commission on Human and Peoples' Rights has made signal contributions to the meaning and application of human rights law. For a comprehensive list of the decisions of the African Commission on Human and Peoples' Rights, see the University of Minnesota Human Rights Library, http://www1.umn.edu/humanrts/africa/comcases/allcases.html.

[11] In the *Media Rights Agenda and Constitutional Rights Project* case, the commission determined that "in contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. . . . Even more important, a limitation may never have as a consequence that the right itself becomes illusory." *Media Rights Agenda, Constitutional Rights Project Case*, Media Rights Agenda and Constitutional Rights Project/Nigeria, Comm. No. 105/93, 128/94, 130/94, 152/96, Twelfth Annual Activity Report 1998–1999, para. 67, 70, Assembly of Heads of State and Government, Thirty-fifth Ordinary Session, July 12–14, 1999, Algiers, Algeria.

derogate, abrogate, or permit violations of rights guaranteed in the Banjul Charter.[12] Furthermore, it considers the suspension of constitutionally guaranteed civil and political rights unconstitutional and violent seizures of power as unlawful and incompatible, respectively, with the charter.[13] These authoritative determinations do not loom fictitiously or in isolation because the state parties to the Banjul Charter accept them, and the AU, ECOWAS, and Southern African Development Community (SADC) have, in one form or another, codified them into law. The codification of African human rights and democracy norms validates or justifies the NKM.

Law's utility in peacemaking is solely dependent on how it is valued, respected, protected, and adhered to by decision makers, peace negotiators, peace brokers, and moral guarantors.[14] Hence, because the African human rights protective regime prescribes authoritative rules that regulate peace deals, as the forgoing analysis reveals, the failure to acknowledge them, let alone observe them, during peace negotiations adversely affected the character of the Accra peace agreement and was a central factor in the failure of the Lomé and Abuja agreements, among others. The utility of law in this context is that it exists

[12] In the *Chad Massive Violations* case, the commission decided that even in the extreme situation of a civil war, the Banjul Charter does not allow state parties to derogate from their treaty obligations; hence states cannot derogate from Charter obligations during internal armed conflict. Communication No. 74/92, *Commission Nationale des Droits de l'Hommeet des Liberties v. Chad* (1994–1995) (ACHPR 1994–19995) (Ninth Annual Activity Report) (*Chad Massive Violations* case).

[13] In the *Gambian Coup* case, the commission found that the violent military coup of November 11, 1994, deprived the "Gambian people" of their right to self-determination guaranteed by Article 20(1) of the Banjul Charter. It also found that the military government's suspension of a country's bill of rights in chapter 3 of the constitution violated articles 1 and 2 of the Banjul Charter, arguing that the "suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter." See Communications 147/95, 149/96 (joined), *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) (Thirteenth Annual Activity Report) (*Gambian Coup* case), cited in Frans Viljoen, INTERNATIONAL HUMAN RIGHT IN AFRICA (2008), at 242, 245.

[14] The term *moral guarantors* typically refers to those states and regional and international institutions (e.g., Nigeria, the United States, Britain, the UN, the AU, and ECOWAS) that play a principal role in brokering peace agreements, often as formal signatories to them with the formal designation of "moral guarantor." In the case of Liberia, Sierra Leone, and Guinea-Bissau, these states and institutions played pivotal roles in shaping, enforcing, and morally guaranteeing the Accra, Lomé, and Abuja accords.

to constrain the political aspirations of those who place a premium on politics over law and desire over reason as defined by law.

B. LEGAL ORDER VERSUS LEGAL REALISM IN AFRICA

In an ideal world, law connotes some semblance of "institutions and structures: well-functioning and respected courts, judicial review, fair and adequate codes, well-trained lawyers" – and perhaps law even symbolizes respect for basic civil and political rights.[15] As Justice Joseph Story noted in the renowned case *La Jeune Eugenie* (1822), there are certain things essential to every law:

1. A law must be possible.
2. It must be of some utility.
3. It must be just, that is, conformable to the order and nature of things and to the constitution of man.
4. It must be sufficiently known.
5. It must be attended with proper sanctions.[16]

It follows that the rule of law should be possible, useful, just, and publicly known so that its makers, implementers, and subjects can transparently live under it. Here Story's essential qualities of law are not new or foreign to Africa. Although most African states, such as Botswana, Ethiopia, Egypt, Ghana, Kenya, Liberia, Rwanda, Nigeria, Senegal, Sierra Leone, and South Africa, have well-established constitutional and rights-based legal traditions[17] and legal systems including competent codes, laws, lawyers, judges, and courts, some do not. It is for this reason that a significant amount of academic literature on the law and politics of Africa – prose resistant to recognizing Africa's

[15] Jane Stromseth, David Wippman & Rosa Brooks, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS (2006), at 56.

[16] Circuit Court, D. Massachusetts, *United States v. La Jeune Eugenie*, May Term, 1822 (2 Mason 409, 26 F. Cas. 832, No. 15,551.). See also Fallon, *supra* note 2, at 3.

[17] See generally Christof Heyns (ed.) HUMAN RIGHTS LAW IN AFRICA, 2 vols. (2004). The two-volume set is a solid source for human rights–related law and regional and domestic law in Africa. See also ABA Rule of Law Initiative, Africa, http://apps.americanbar.org/rol/africa/.

diverse and rich legal landscape and the juridical equality of states doctrine – challenges the very existence and/or efficacy of the rule of law on the continent. The charge follows that there is an insurmountable gap between legal rhetoric and legal authority in Africa that is amplified by those who question the extent to which that law has moral legitimacy and authority from the African masses.

This brand of uniform structural thinking arguably derives from three central and countervailing perspectives that I refer to as the *dark*, *anarchical*, and *primeval* suppositions.[18] The first stems from the infamous Dark Continent paradigm, which is steeped in colonial nostalgia and racism and characterizes Africa as an unexplored "country" or frontier land for colonial pursuits. This archetype questions whether there is a rule of law in Africa; whether Africans are capable of making rules; and in those states that have some semblance of law, whether the continent has coherent legal systems capable of ordering society. The second perspective derives from the less notorious but more insidious anarchical continent theory, which is firmly entrenched in geopolitical bias and the bigoted proposition that Africans are incapable of living peacefully in rule-based societies. It thereby subscribes to the view that Africa is destined to be a continent where disorder or anarchy is the primary rule of law. The idea continues that this seemingly primordial

[18] Several works engage and expose such small-minded theory; see generally Anthony Angie, *The evolution of international law: Colonial and postcolonial realities*, 27 Third World Quarterly (2006), at 742, 745; Henry J. Richardson III, The Origins of African-American Interests in International Law (2008); Basil Davidson, The Black Man's Burden: Africa and the Curse of the Nation-State (1992); Janet Abu-Lughod, Before European Hegemony: The World System a.d. 1250–1350 (1989); Srinivas Aravamudan, Tropicopolitans: Colonialism and Agency, 1688–1804 (1999); David Armitage (ed.) Theories of Empire, 1450–1800 (1998); David K. Fieldhouse, The West and the Third World: Trade, Colonialism, Dependence, and Development (1999); Graham D. Goodlad, British Foreign and Imperial Policy, 1865–1919 (1999); H. L. Wesseling, Imperialism and Colonialism: Essays on the History of European Expansion (1997); Felix Ekechi, *The Consolidation of Colonial Rule, 1885–1914*, in Toyin Falola (ed.) Colonial Africa 1885–1939 (2002); E. W. Blyden, West Africa before Europe (1905); E. W. Blyden, The Origin and Purpose of African Colonization: A Discourse Delivered at the 66th Anniversary of the American Colonization Society, Washington, D.C., January 14, 1883 (1883); Basil Davidson, African Civilization Revisited: From Antiquity to Modern Times (1991); Elliott P. Skinner, African Americans and U.S. Policy toward Africa: In Defense of Black Nationality, 1850–1924 (1992).

inclination toward chaos is what systematizes normative lawlessness. The third and final paradigm stops short of a blanket denial of the ability of Africans to make and follow rules and does not outright challenge the existence of functional law in Africa (i.e., dark and anarchical presumptions); rather, it is rooted in the monoracialist presumption that African states lack institutionalized legal orders founded on established constitutional traditions. This perspective, which the author refers to as the primeval continent supposition, is based on a dense assumption that there is a single dominant standard for what constitutes a viable constitutional tradition and that the rule of law has no utility and legitimacy when rendered ineffective by armed conflict and civil strife or by the authoritarian rulers who trample it.

Despite these perceptions, the legal authority of any constitutional order, whether strong or weak, is not determined by civil conflict, dependent on established legal tradition, or ill affected by bad leaders who dismiss its utility altogether. On the contrary, the authority of law must first be measured by the moral legitimacy and standing accorded to it by citizens and, second, by external actors. Few would argue that peace negotiators and peacemakers possess the authority to ignore, devalue, or render impotent controlling rules or constitutionally based protections as a result of a state's alleged unsavory constitutional tradition or history, but rather, quite the opposite: protecting fundamental and constitutionally guaranteed rights – and complementary rights enshrined in international law – becomes more important during times of armed conflict and civil strife than during peace. Law's meaning and legitimacy among citizens climaxes when they are confronted with protracted chaos. It follows that to deny the rule of law standing during peace negotiations undermines its value and relevance in the postconflict order as well as when new episodes of conflict emerge. In this sense, the flouting of law has multifarious and multigenerational impacts.

Primeval conceptions of law in Africa make its denial palatable during peace negotiations. Major enablers in this plot are those scholars who ignore Africa's contributions in originating domestic and international law, despite it having the oldest legal tradition in the world.[19]

[19] Jeremy Levitt (ed.) AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW (2008), at 1–9; See generally, T.O. Elias, *Africa and the Development of International Law*

Such conceptions continue to prevail irrespective of the fact that in the modern era, African states and their institutions have fashioned distinct rules, norms, and doctrine in international law, particularly in the areas of human rights, women's rights, international criminal law, transitional justice, democracy, constitutionalism, peacekeeping, conflict management, refugees, and internally displaced persons.[20] Such understandings remain prevalent despite that African states function as independent transnational actors with variegated political, economic, and legal relationships around the world. Though it is true that Africa has its lion's share of conflict-, development-, and rule of law–related problems, the dark, anarchical, and primeval continent hypotheses inaccurately cast it as a singular homogenous continent comprising shell states devoid of legal culture and tradition and, consequently, paint it with an ineffectual and lawless brush.[21] On the contrary, its fifty-four nations have diverse legal systems that function to varying degrees of effectiveness,[22] from very good to poor. The NKM serendipitously exposes the latent hyperbole in such racialist theory.

The primary subjects of this study, Sierra Leone, Liberia, and Guinea-Bissau, have established constitutional traditions with a checkered history dating back to 1787, 1822, and 1879, respectively. They have, to different degrees of effectiveness, constitutionally based political orders, modern laws, and functioning legal systems (inclusive of

(1972); and Makau W. Matua, *Why Redraw the Map of Africa*, 16 Michigan Journal of International Law 1113 (1995).See also Jeremy Levitt, *The African origins of international law*, (forthcoming).

[20] *Id.* See also African Human Rights Law Reports, Center for Human Rights, 2000–2006.

[21] Although it is beyond the scope of this book to examine the intricacies of national law systems in Africa, it should be noted that African states have not only national courts but also specialized courts or tribunals focusing on the gamut of commercial law, family law, human rights law, and other issues. See generally Frans Viljoen, INTERNATIONAL HUMAN RIGHT IN AFRICA (2008); Muna Ndulo, John Hatchard & Peter Slinn (eds.) COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE (2004); Christof Heyns (ed.) HUMAN RIGHTS LAW IN AFRICA, 2 vols. (2004); and Kwesi Prempeh, *Marbury in Africa: Judicial review and the challenge of constitutionalism in contemporary Africa*, 80 Tulane Law Review 1239 (2006).

[22] Africa is not dissimilar to other regions in that national legal systems are highly efficient in some countries and hindered by a lack of resources, infrastructure, functioning courts, judicial autonomy, contemporary codes, competent investigators, well-trained lawyers, and qualified judges in others.

well-settled jurisprudence) that unfortunately have been eroded by protracted conflict, civil strife, regime change, and corruption. The political and economic factors or conditions that prevent a rich constitutional tradition from developing reveal precisely why its hot pursuit in peacemaking and peace agreements is necessary.

The failure to recognize the substantive and regulatory role of law in peacemaking has created weak and short-lived peace agreements that have generated additional conflict,[23] structured lawlessness, and corrupted the rule of law. Notwithstanding, this failure has not eroded the essential character and moral standing of it. If consistency in practice, enforcement, and, for example, access to courts and the protection of fundamental freedoms are indicators for demonstrating the existence of a civilized or established constitutional tradition and democracy, by comparison, the United States cannot claim to have had either until the end of de jure racial segregation in 1965 (i.e., during Africa's decolonization era).

In the same way that the United States has more well-established legal tradition than most countries in the Americas, some African states have stronger legal traditions than others. A number of them have greater legal foundations in the colonial legal tradition, for example, in the common law (e.g., Ghana, Kenya, and Nigeria), civil law (e.g., Egypt, Guinea, and Senegal), mixed common law, and civil law systems (e.g., Ethiopia, Namibia, and South Africa), whereas others have more pronounced and developed African customary law systems (e.g., Tanzania and Congo-Kinshasa). Notwithstanding, most African states, such as Liberia, Sierra Leone, and Guinea-Bissau, have a tradition of mixed-law systems that formally recognize Western-orientated conventional law and customary law–traditional authority structures. In fact, most African states have mixed systems in which conventional and

[23] Although the following authors do not attribute the unlawful nature of peace agreements as the raison d'être for their failure, they nonetheless conclude that power sharing too often stimulates rather than abates violence in Africa. Philip G. Roeder & Donald Rothchild (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WAR (2005); René Lemarchand, *Consociationalism and power-sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo*, 106 African Affairs 1, 2, 4, 20 (2006); Denis M. Tull & Andreas Mehler, *The hidden costs of power-sharing: Reproducing insurgent violence in Africa*, 104 African Affairs 375 (2005). See also Ian S. Spears, *Africa: The limits of power-sharing*, 13 Journal of Democracy 123, 125 (2002).

traditional systems operate vertically and horizontally. Among other reasons, this is largely because the majority of Africans live in rural areas under customary law systems, which, despite the rise in African constitutionalism, are often the only structures available and that contemplate African culture, function in remote areas and during times of peace and armed conflict. African customary law exists alongside conventional law but, over time, has shown its durability as primary law when conventional systems are not accessible or as default law when they fail.

Although in some states, underdevelopment, authoritarianism, and armed conflict have impeded the development of stable legal orders and the flow of justice, even in the most extreme cases of state breakdown, some semblance of the rule of law on the continent, whether customary, conventional, or regional, survives. Despite the prevailing political conditions in any state, law, not politics, must serve as the measuring stick of legality and legitimacy; otherwise, as the cases under review show, anarchy will become the legal order of the day.

C. LAW VERSUS POLITICS IN WAR

Should law trump politics when negotiating an end to deadly conflict? Stated differently, should peace negotiators and peacemakers place a higher premium on law or legality than politics or political deals aimed at ending deadly conflict? These critically important questions are precipitated by power sharing. The author contends that one possible answer lies deep in the logic underpinning the Treaty of Kadesh (1280 B.C.) and the Peace of Westphalia (A.D. 1648),[24] which, in similar ways, appear to have answered these questions in the affirmative nearly four millennia and four centuries years ago, respectively. At its most fundamental level, the juridical nature of the modern nation-state inherently prescribes the predominance of law over politics, especially during armed conflict, despite that at times, state practice challenges

[24] The Peace of Westphalia commonly refers to the two peace treaties (Osnabrük on May 15, 1648, and Münster on October 24, 1648) that ended the Thirty Years' War (1618–1648) in the Holy Roman Empire.

this assumption. The Peace of Westphalia – the conventional marker for the birth of the modern state system – established a system of rules including juridical sovereignty in the wake of the Thirty Years' War among European nations. As Crawford aptly notes, "the effect of the Peace of Westphalia was to consolidate the existing States and principalities (including those whose existence or autonomy it recognized or established) at the expense of Empire."[25] From this background, the Peace of Westphalia birthed modern international law to regulate and constrain the apex of international politics: interstate war. Consequently, the law of armed conflict developed as a companion regime to the doctrine of state sovereignty to constrict state behavior during war and regulate the conduct of hostilities. The criminalization of war in modern international law arguably dates back to the 1815 Congress of Vienna, which formally declared Napoleon Bonaparte to be an international outlaw for invading France in abrogation of the 1814 Treaty of Paris.[26] Green notes that after his eventual surrender, Napoleon "was handed over to the British who exiled him to St. Helena, a decision made on political not legal grounds, but reflecting the view that his resort to war in breach of the treaty was criminal."[27] The Congress of Vienna was certainly influenced by the institution of the Hague Law of 1809 and 1907 and consequently influenced the 1919 Treaty of Versailles, which recommended that William II of Hohenzollern, former emperor of Germany, be publicly arraigned for the supreme offences against international morality and the sanctity of treaties, that is, unlawful war making. The Allied and associated powers formerly deemed Hohenzollern's actions to be a crime against humanity and the freedom of peoples.[28] These treaties underwrote the London Charter establishing the Nuremburg Tribunal in 1945, which criminalized the war of aggression. Broadly construed, IHL and ICL form essential but

[25] James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed.) (2006), at 10.

[26] United Nations War Crimes Commission (UNWCC), History of the United Nations War Crimes Commission, London, HMSO, 1948, at 242n1(c). The Great Powers, including Austria, France, Prussia, and Russia, declared Napoleon an "Enemy and Perturbator of the World" and "incurred liability to public vengeance." *Id.*

[27] Leslie Green, THE CONTEMPORARY LAW OF ARMED CONFLICT (2nd ed.) (2000), at 3.

[28] *Id.*, at 240. Article 227, Treaty of Versailles, 1919.

distinct parts of the human rights protective regime and, during armed conflict, have primary jurisdiction and authority over other law, trumping political dictates and decrees. Law's supremacy over politics during armed conflict is incontestable, and when there is a conflict between them and IHRL, ICL, and IHL speak definitively, political considerations should yield – meaning that at a minimum, peace brokers and peace agreements should adhere to and not disregard prevailing rules, especially those that prohibit the overhaul of constitutional systems and subvert fundamental human rights to accommodate power sharing.

Law also has an important mediatory function that transcends regulation. Law formally counterbalances and influences four critical factors that affect the sustainability of transitional political power sharing in the wake of deadly conflict, including the political disposition of the state; variegated claims of *pirates de la loi* and democratically constituted governments; civil society perspectives and activism; and the disposition of third-party stakeholders. These political factors too often converge when law is not accorded its rightful place in mediating and regulating peace processes. As Chandra Sriram and Marie-Joëlle Zahar aptly note,

> [S]uch factors converge to create situations not only unfavorable to the success of power-sharing arrangements, but in which such arrangements create new risks. These include the creation of new grievances and perverse incentives, the risk of importing conflictual behavior into weak state institutions which are unable to manage them, and alternatively include new participants in governance who lack the background and capacity to function properly, or who may be sidelined by embedded political and bureaucratic practices. These risks, and their consequences, often result in a situation where the short-term reliance on power-sharing runs at odds with the long-term objective of creating robust, sustainable, non-violent states.[29]

Here law and its enabling structures are designed to safeguard fundamental rights, provide a framework for adjudicating new grievances

[29] Chandra Sriram & Maria-Joëlle Zahar, *The perils of power-sharing: Africa and beyond*, 44 African Spectrum 11, 13 (2009).

and conflictual behavior, obviate impunity, limit outrageous and unjust incentives, strengthen weak institutions through the rule of law, arbitrate eligibility–competency requirements for government service, and ensure democratic practices to avoid the disenfranchisement of persons and groups from political processes. In the absence of the counterbalancing effect of law, power sharing may accelerate state collapse. Additionally, under any definition or species of so-called transitional justice,[30] power sharing inhibits a society's will to confront a "legacy of large-scale abuses" as well as "ensure accountability, serve justice and achieve reconciliation."[31]

Although political scientists have proposed various models of power sharing (e.g., variances of consociationalism) to mitigate conflict, and some legal scholars have offered different emergency power models (e.g., extralegal measures and business as usual models) to justify law's relevance, or lack thereof, during public emergencies,[32] the NKM and law of power sharing are needed to inform and shape peace prescriptions during complex emergencies, including armed conflict, given their preoccupation with fundamental rights, the rule of law, and democracy.

[30] Bell argues that the "difficulty of locating transitional justice as a subfield of either justice or transition is a product of the mutual projects of decolonization, resistance and colonization between law and other disciplines." Christine Bell, *Transitional justice, interdisciplinarity and the state of the "field" or "non-field,"* 3 International Journal of Transitional Justice (2009), at 22.

[31] *Id.*, at 9. See also *Report of the secretary-general on the rule of law and transitional justice in conflict and post conflict societies*, UN Doc. S/2004/616 (August 3, 2004).

[32] Christine Bell, On the Law of Peace: Peace Agreements and the Le Pacificatoria (2008).

3 THE QUESTION OF POWER SHARING

A. POWER SHARING AND THE RULE OF LAW

One foundational and unanswered question about power sharing in deeply divided societies is whether an unlawful and/or bad agreement that stops armed conflict is better than no agreement at all. This question, perhaps, raises a more fundamental one: who should benefit the most from power sharing, ordinary citizens, politicians, or *pirates de la loi*? This query raises yet another important question examined in the chapters that follow: can a government lawfully share power unlawfully or power share if it is prohibited from doing so under national, regional, and international law?

In legal discourse, particularly in the field of international law, the study of power sharing is so rare that one is hard-pressed to locate the term in dictionaries and encyclopedias on international and comparative law.[1] Though the term was most notably branded in the wake of the short-lived peace settlement in Northern Ireland in 1972, the concept and practice of power sharing as a method or tool of conflict resolution is much older. Its genesis can be traced to peacemaking practices in the ancient world[2] and, in modern times, to the pioneering work of the St. Lucia–born Nobel Prize–winning economist and pan-Africanist W. Arthur Lewis. Lewis's commentary on democratic pluralism and coalition governments set the analytical stage for modern power-sharing discourse.

[1] E.g., see James R. Fox (ed.) DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW (3rd ed.) (2003); John P. Grant & J. Craig Barker (eds.) ENCYCLOPEAEDIC DICTIONARY OF INTERNATIONAL LAW (2nd ed.) (2004).

[2] See discussion on the Treaty of Kadesh in Chapter 1.

Although Lijphart's famed model of consociational democracy in the Netherlands and works on the politics of accommodation and democratic pluralism are often referred to as the archetype of modern scholarship on power sharing,[3] Lewis's 1965 work on consensus democracy in West Africa, titled *Politics in West Africa*, apparently underwrote Lijphart's foundational analysis.[4] Lewis's model of pluralist democracy proposes a combination of three critical components: proportional representation (minority representation guaranteed), coalition government (constitutionally guaranteed), and federalism or provincial devolution. Lijphart's model of consociational democracy consists of four elements that mirror Lewis's, including grand coalition, proportionality, segmental autonomy or federalism, and mutual veto. In one of his early works on democracy in plural societies, Lijphart ephemerally acknowledged that the "Lewis Model" of consensus or coalition democracy offered the "most interesting, specific, and detailed proposal of this kind."[5] As one analyst noted, "it is hardly known that Lijphart's universal modeling has its roots in economist Lewis's crystallization of policy proposals for West Africa in the thorny process of post independent nation building."[6]

This observation is important for two central reasons. First, it signals that the complex nature of power sharing may necessitate multidisciplinary inquiry and application. Lewis's model of plural democracy was certainly fashioned by his training as an economist, and Lijphart's subsequent consociational democracy framework seemingly reshaped it through the lens of political science. By the same token, this study is conceived from the author's background as an international jurist, a political scientist and Africanist. Second, the preceding reflection is significant not only because of Lewis's largely unacknowledged foundational influence on power-sharing discourse in, for example, the

[3] Arend Lijphart, THE POLITICS OF ACCOMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS (1968). See also Arend Lijphart, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977), and Arend Lijphart, *Cultural diversity and theories of political integration*, 4 Canadian Journal of Political Science 1–14 (1971).

[4] See generally W. Arthur Lewis, POLITICS IN WEST AFRICA (1965).

[5] Arend Lijphart, THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS (1968).

[6] Yoichi Mine, *The political element in the works of W. Arthur Lewis: The 1954 Lewis model and African development*, XLIV-3 Developing Economies (2006), at 329–355.

pioneering works of Lijphart, Eric Nordlinger, and Donald Horowitz on consociationalism, power sharing, and regime type, respectively,[7] but also because of what their scholarship neglects. These foundational studies largely ignored Lewis's preoccupation with the rule of law and constitutionalism in his consensus democracy paradigm.[8] Lewis unapologetically argued that any "free coalition respects the rule of law," raising questions about the viability of coalitions that do not.[9] His recognition of the importance of law in the design and construction of consensus democracy and/or coalition government was futuristic and may provide a missing link in the discourse and practice of political power sharing. Notwithstanding, it certainly provides interdisciplinary backing for the neo-Kadeshean model (NKM) and enlightens the law of power-sharing framework.

The phenomenon of omitting law-based analysis in the prose on power sharing may in part be due to pedagogical and disciplinary rigidness; however, it might also be because "the prescription for power-sharing institutions originated from close study of societies that were ethnically homogenous – notably Austria and the Netherlands – and had not experienced ethnic civil war in recent history."[10] As such, with the possible exception of Lewis's early work on consensus democracy in Africa, power-sharing prescriptions in the scholarly literature were and largely are not shaped or influenced by the chaotic exigencies of deadly conflict or the need to protect human rights and constitutional democracy. Accordingly, and with few exceptions, scholars have failed to link theory with law and policy–relevant outcomes; rather, they focus on the complexity of actually negotiating and implementing power-sharing agreements during or immediately after armed conflict.

At the time of writing this book, one is hard-pressed to find research from any discipline that examines or even considers the role of law in edifying, fashioning, and administering power-sharing deals, let alone

[7] Lijphart, *supra* note 5; Eric Nordlinger, CONFLICT REGULATION IN DIVIDED SOCIETIES (1972); Donald Horowitz, ETHNIC GROUPS IN CONFLICT (1985).

[8] Lewis, *supra* note 4, at 77, 81, 83, 84, 88.

[9] *Id.*, at 81.

[10] Donald Rothchild & Philip G. Roeder, *Power-sharing as an impediment to peace and democracy*, in Donald Rothchild & Philip G. Roeder (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS (2005), at 29.

the lawfulness of peace agreements, and the author is not familiar with any comprehensive work that addresses the legality of power sharing. Significant literature does exist, however, on the legality of amnesty provisions in peace agreements or, stated differently, the degree to which international law requires states to prosecute perpetrators of international crimes.[11] This chapter and those that follow draw direction and analytic content from this literature because, as previously noted, amnesty is often a prerequisite for peace agreements that include power sharing.[12] Consequently, the rationale that underwrites arguments for and against amnesty inform the question of power sharing.

Notwithstanding, the quandary of power sharing lies deep in the fissure between law and politics, truth and justice, and the political guarantees "needed to initiate the transition" as well as the law that regulates and shapes any transition and the "performance necessary to consolidate peace and democracy."[13] The subject of whether to share power in Africa has been treated as a political question aimed at appeasing war contestants to stop conflict and reconstitute order and

[11] See generally Louise Mallinder, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITION: BRIDGING THE PEACE AND JUSTICE DIVIDE (2008); Faustin Z. Ntoubandi, AMNESTY FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW (2007); Ben Chigara, AMNESTY IN INTERNATIONAL LAW: LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS (2002); Roman Boed, *The effect of a domestic amnesty on the ability of foreign states to prosecute alleged perpetrators of serious human rights violations*, 33 Cornell International Law Journal 297 (2000); John Dugard, *Dealing with crimes of a past regime: Is amnesty still an option?* 12 Leiden Journal of International Law 1001 (1999); Richard Goldstone, *Past human rights violations: Truth commissions and amnesties or prosecutions*, 51 Northern Ireland Law Quarterly 164 (2000); Neil Kritz, *Coming to terms with atrocities: A review of accountability mechanisms for mass violations of human rights*, 59 Law and Contemporary Problems 127 (1996); Diane Orentlicher, *Swapping amnesty for peace and the duty to prosecute human rights crimes*, 3 ILSA Journal of International and Comparative Law 713 (1997); Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (2nd ed.) (2003); Robert Quinn, *Will the rule of law end? Challenging grants of amnesty for the human rights violations of a prior regime: Chile's new model*, 62 Fordham Law Review 905 (1994). Michael Scharf, *The letter of the law: The scope of the international legal obligation to prosecute human rights crimes*, 41 Law and Contemporary Problems 41 (1996).

[12] The methodological approach in this section was informed by Diba Majzub, *Peace or justice? Amnesties and the International Criminal Court*, 3 Melbourne Journal of International Law 247 (2002).

[13] Donald Rothchild & Philip G. Roeder, *Dilemmas of state-building in divided societies*, in Donald Rothchild & Philip G. Roeder (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS (2005), at 13.

political authority amid violence and chaos. As previously mentioned, discourse on the utility of power sharing has largely been advanced by political scientists, who generally believe that sharing power is a political enterprise that largely engenders political issues.[14] In addition, decision makers frequently view peace negotiations and processes through political rather than legal lenses; thus the outcomes of such negotiations are often unlawful, flawed, or unviable. This does not mean that law offers a more viable model for resolving protracted conflict and refashioning order in conflict-ridden states; nevertheless, solutions informed and guided by law, particularly those drawing on pro-democracy norms and human rights law, seem more sustainable.[15] The failure to recognize the important regulatory function of law, particularly human rights and humanitarian law, in peace negotiations and settlements may explain why so many have failed, as war criminals and

[14] E.g., see generally Caroline Hartzell & Matthew Hoddie, *Institutionalizing peace: Power sharing and post–Civil War conflict management*, 47 American Journal of Political Science 318 (2004); Caroline Hartzell, Matthew Hoddie & Donald Rothchild, *Stabilizing the peace after civil war: An investigation of some key variables*, 55 International Organizations. 183 (2001); Peter Wallensteen & Margareta Sollenberg, *Armed conflicts, conflict termination and peace agreements, 1989–1996*, 34 Journal of Peace Resolution 339 (1997).; Timothy D. Sisk, POWERSHARING AND INTERNATIONAL MEDIATION IN ETHNIC CONFLICTS (1996). Barbara Walter, *Designing transitions from civil war*, 24 International Security 127 (1999).

[15] E.g., the Economic Community of West African States (ECOWAS), a small but prominent subregional organization in West Africa composed of fifteen states, levied sanctions against Togo to ensure a return to constitutional rule after what was termed a military coup, in which the army unlawfully installed Faure Eyadéma, son of President Gnassingbé Eyadéma, after his father's death. ECOWAS law forbids unconstitutional seizures of power. The Constitution of Togo requires that the speaker of the parliament assume power in the event of the death of the president, not his eldest heir. In what has been called Africa's democratic test case, immense pressure to restore the constitutional rule of law and order from ECOWAS and the African Union was effective in reversing the coup. *Preventing constitutional crisis in ECOWAS after Togo*, Ghanaian Chronicle (Accra) (March 15, 2008), available at http://allafrica.com/stories/printable/200503150071.html; ECOWAS, *Faure Gnassingbe steps down, ECOWAS lifts sanctions*, press release (February 26, 2005), available at http://www.ecowas.int/; *Togo's interim leader steps down*, BBC News (February 26, 2005), available at http://news.bbc.co.uk/2/hi/africa/4299731.stm; *Nigeria holds firm on Togo "Coup,"* BBC News (February 17, 2005), available at http://news.bbc.co.uk/1/hi/world/africa/4267395.stm; *Annan calls on Togolese to respect own constitution in appointing presidential successor*, UN News Service (February 7, 2005); *Coup in Togo after president dies*, Wikinews (February 6, 2010), available at http://en.wikinews.org/wiki/Coup_in_Togo_after_President_dies; and see generally Jeremy I. Levitt, *Pro-democratic intervention in Africa*, 25 Wisconsin Journal of International Law 110 (2006).

other violators were unlawfully legitimated and empowered to infect the state apparatus with their violent inclinations and predatory behavior, to the chagrin of disillusioned victims.[16] This, again, is why the question of whether to share power should be as much a legal question as a political one.

The cases of Liberia, Sierra Leone, and Guinea-Bissau expose the tension between law and politics and, through the NKM, test the book's central thesis that law has an intentional and essential role to play in informing and regulating peacemaking, particularly transitional political arrangements. These cases also echo a rendition of a question originally posed by another analyst: in what ways does power sharing facilitate and obstruct the rule of law and transition toward sustainable democracy?[17] To that end, the next section examines arguments for and against power sharing.

B. ARGUMENTS FOR POWER SHARING

On its face, power sharing is an effective way to give parties at conflict, whether *pirates de la loi* or state officials, a stake in government. It structures vital guarantees for warring parties to encourage them to ratify and implement peace agreements and allays security concerns while building trust to ensure implementation. Though social scientists have developed diverse and variegated power-sharing models and approaches,[18] all of them seek to end deadly conflict by giving war

[16] E.g., as the forgoing analysis will demonstrate, the Lomé Agreement (1999), which ended eight years of civil war in Sierra Leone, arguably failed because it lacked internal legitimacy as it ignored controlling domestic, regional, and international rules that prohibited amnesty and power sharing with warlords and rebels responsible for committing mass human atrocities. See Chapter 4 for more information. On the failure of power sharing generally, see René Lemarchand, *Consociationalism and power-sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo*, 106 African Affairs 1, 2, 4, 20 (2006).

[17] Anna K. Jarstad, *Power-sharing: Former enemies in joint government*, in Anna K. Jarstad & Timothy D. Sisk (eds.) FROM WAR TO DEMOCRACY: DILEMMAS OF PEACE-BUILDING (2008), at 105.

[18] See generally Brendan O'Leary, *Debating consociational politics: Normative and consociational arguments*, in Sidney Noel (ed.) FROM POWER-SHARING TO DEMOCRACY (2005); Suzanne Werner, *The precarious nature of peace: Resolving the issue, enforcing the settlement, and renegotiating the terms*, 43 American Journal of Political Science 912 (1999); Arend

contestants political legitimacy and decision-making authority in government, with the hope that they will stop fighting and take a vested interest in the democratic vitality of the state. It follows that transitional political power sharing helps to secure the trust of conflicted parties that their security and survival are assured "in law." Hartzell and Hoddie assert that power-sharing institutions "define how decisions are to be made within a divided society and the distribution of decision-making rights within a state [and] have been a central element of recent peace settlements negotiated in Bosnia, the Philippines, and Northern Ireland."[19] They argue that the "more extensive the power-sharing," the more likely that peace will endure, as sharing power promotes "moderate and cooperative behavior among contending groups by fostering a positive-sum perception of political interactions."[20] Advocates of power sharing contend that by neutralizing violent conflict and opening the political process (i.e., by creating a venue for parties at conflict and other societal groups to participate in governance), power sharing serves a public good and makes an essential contribution to any transition to lasting peace.[21] Some may attribute the so-called successes in Ethiopia (1994), Fiji (1999), Burundi (2003), Liberia (2003), Sudan (2005), and Côte d'Ivoire (2007) to this brand of political power sharing.[22] In essence, proponents of power sharing

Lijphart, *Power-sharing, ethnic agnosticism, and political pragmatism*, 21 Transformation 94 (1993); Michael Leifer, *Power-sharing and peacemaking in Cambodia*, 12 SAIS Review 139 (1992); Daniel Elazar (ed.) CONSTITUTIONAL DESIGN AND POWER-SHARING IN THE POST MODERN EPOCH (1991); Donald Horowitz, ETHNIC GROUPS IN CONFLICT (1985); Arend Lijphart, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977); Walter, *supra* note 14.

19 Hartzell et al., *supra* note 14, at 318.

20 *Id.*, at 18, 321.

21 *Id.*, at 330. E.g., in the short term, power sharing arguably worked in Liberia in 1997 if Charles Taylor's successful presidential bid can be considered a victory of power sharing. If regime change through deadly conflict is acceptable, sharing power succeeded again as a short-term measure to halt armed conflict between the Taylor government and Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, allowing for a political transition leading to the October 11, 2005, elections. Nevertheless, it is too early to claim that power sharing has worked in Liberia because it certainly did not remedy or address the root causes of conflict in Liberia. See generally Jeremy I. Levitt, THE EVOLUTION OF DEADLY CONFLICT IN LIBERIA: FROM "PATERNALTARIANISM" TO STATE COLLAPSE (2005), at 26.

22 Andreas Mehler, *Peace and power-sharing in Africa: A not so obvious relationship*, 108 African Affairs 453, 462 (2009); Brij V. Lal, *Constitutional engineering in post-coup Fiji*, in Andrew Reynolds (ed.) THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL

argue that it provides warring parties with a form of vested contractual guarantee that protects them from discriminatory and/or retaliatory actions or policies that may undermine their claims.

It follows that power sharing is necessary in states embroiled in war and is often the only way to forestall conflict, build trust among contesting groups, restore the rule of law, strengthen societal support for government, and create the political space for democratic elections and transitions. As Sisk notes, the "principal assumption underlining power-sharing theory is the belief that appropriate political engineering can help construct a democratic political system capable of withstanding the centrifugal tendencies that tear deeply divided societies apart."[23] Without power sharing – it is argued – warlords, rebels, and junta may have no incentive to negotiate peace and will return to the battlefield for fear of political, economic, and social disenfranchisement. Furthermore, Hartzell and Hoddie claim that power sharing provides "a sense of security to former combatants facing the immediate prospect of working together peacefully after a serious conflict such as civil war."[24] It is also believed that transitional power sharing creates the political consensus necessary to solidify regimes weakened by armed conflict. In this regard, some scholars argue, weak governments share power to stop unwinnable wars. Donald Rothchild and Philip Roeder assert that "where there are no democratic alternatives on the table, power-sharing is indisputably preferable to continued conflict or authoritarianism."[25] Such perspectives support the popular notion that peace without power sharing may not be realistic or attainable.

DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY (2002). *The Fiji Constitution Review Commission, Parliament of Fiji, The Fiji Islands: Towards a United Future*, Parliamentary Paper No. 34 (1996) (located in the library of the Lauterpacht Center for Research in International Law, Cambridge, United Kingdom); The Implementation Modalities of the Protocol Agreement between the Government of the Sudan (GOS) and the Sudan People's Liberation Movement/Sudan People's Liberation Army (SPLM/SPLA) on Implementation Modalities of the Protocols and the Agreements on Power Sharing, Naivasha, Kenya, December 31, 2004, available at http://www.usip.org/files/file/resources/collections/peace_agreements/implementation_coversheet.pdf.

[23] Sisk, *supra* note 14, at 77.

[24] Matthew Hoddie & Caroline Hartzell, *Power-sharing in peace settlements: Initiating the transition from civil war*, in Philip G. Roeder & Donald Rothchild (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WAR (2005), at 103.

[25] Donald Rothchild & Philip G. Roeder (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS (2005), at 50.

C. ARGUMENTS AGAINST POWER SHARING

The most fundamental and authoritative arguments against power sharing are, in accord with the NKM, found in domestic, subregional, regional, and international law and policy. Warlords, rebels, junta, and other abusers who have overthrown democratically constituted governments not only trample on the democratic entitlement of citizens but also interfere with their rights to internal self-determination. In addition, those who sponsor or direct atrocities and violently capture state power for economic rewards, political power, or any other reasons are responsible for committing domestic and international crimes. It follows that peace agreements, irrespective of their consociational and amnesty inclinations, should not empower such individuals to rule over their victims or wreak further havoc with the legitimacy of state authority.[26] The argument against power sharing rejects the popular assumption inherent in the practice that warlords and rebels are intent on becoming practicing democrats and further asserts that power sharing sends a signal to other would-be rebels that violence is a viable way to obtain political power.

Tull and Mehler affirm this assertion by attributing the spread of insurgent violence by *pirates de la loi* to external factors, including "unsteady support for democracy from Western donors and the dramatically enhanced international standing" accorded to armed movements in the post–Cold War era.[27] They argue that the interplay between these factors has "induced" would-be leaders to capture state power violently rather than through democratic means, generating critical demonstration effects throughout the continent, namely, an incentive structure to pursue the insurgent path to power. They conclude that despite the effectiveness of any peace deal, "power-sharing agreements may contribute to the reproduction of insurgent violence."[28]

[26] A growing practice in Africa is to bar warlords and rebel groups from holding public office, i.e., lawfully participating in transitional governments or elections in the post-conflict environment.

[27] See generally Denis M. Tull & Andreas Mehler, *The hidden costs of power-sharing: Reproducing insurgent violence in Africa*, 104 African Affairs (2004), at 375.

[28] *Id.*

Hence, just as the failure to prosecute persons responsible for committed international crimes may encourage further atrocities and, correspondingly, vigilantism, power sharing with "bandits of the law" in deeply scarred and divided societies may generate rebellion, random and violent reactions from civil society, or militant opposition from aggrieved persons. Power sharing in postwar contexts connotes something far more difficult than sharing power with political opponents; it perhaps unrealistically necessitates a societal psychology of forgiveness and, with it, the ability of citizens to live and work peacefully with their abusers and enemies. It provides no incentive for civil society stakeholders to build political coalitions needed for any transition to authentic democracy or to become political stakeholders in the post-conflict environment. As two analysts have noted, this is problematic because "negotiations characterized by high civil society involvement have resulted in sustained peace."[29]

Similar to the cases of Liberia, Sierra Leone, and Guinea-Bissau, power sharing may generate "feelings of distrust towards the new government and the political system, and encourage cynicism towards the rule of law."[30] The hurdle of legitimacy, particularly as it relates to which factions will acquire authority over key government portfolios (foreign affairs, defense, intelligence, internal security, finance, justice, and natural resources), often undermines peaceful political transitions. As Spears notes, "in civil war contexts, power sharing is equated with making a deal with the devil, and thus such deals, even when they are forged, are unlikely to last. Power-sharing agreements, then, fail where they are most needed."[31] Nowhere was this more apparent than in the Lomé Agreement, which awarded Corporal Foday Sankoh, the reviled and brutal leader of the Revolutionary United Front (RUF), the positions of vice president and chairman of the Board of the Commission for the Management of Strategic Resources, National Reconstruction, and Development.[32] The agreement also bequeathed the

[29] Anthony Wanis-St. John and Darren Kew, *Civil society and peace negotiations: Confronting exclusion*, 13 International Negotiation (2008), at 27.
[30] Majzub, *supra* note 12, at 251.
[31] Ian S. Spears, *Africa: The limits of power-sharing*, 13 Journal of Democracy (2002), at 123, 127.
[32] Lomé Agreement.

RUF with key cabinet posts and the ministries of finance, foreign affairs, and justice.[33]

As the forgoing analysis will show, power sharing under Lomé largely failed because it offered an artificial and unstable way to constitute government in a violently divided society – artificial power sharing does not resolve conflict or obviate deep-seated cleavages but rather disguises the more iniquitous intentions of contestants.[34] As Wippman notes in his essay on ethnic power sharing, sharing power often proves "inefficient, unstable, and short-lived" and "may interfere with the ability of the population of the state as a whole to determine its form of government and political affiliations."[35] In addition, political power sharing becomes untenable when incumbent government officials and warlords and rebels lack the technical skills to govern or are incapable of "operating in competitive politics or complex bureaucracies, or where the state apparatus is successfully resistant to the incorporation of armed groups."[36]

The structural impact of power sharing can be quite severe. It not only refashions the constitution of order or constitutional blueprints in states and codifies the "institutional basis for future strategic interactions,"[37] but also directly shapes the character of successive regimes, making durable peace less likely in deeply divided societies. When illegal peace is conceived, unlawfulness is embedded into the transitional body politic through power sharing and, by extension, is also woven into the transitional sociopolitical and legal cultures. This is particularly true if the rule of law is ignored and, with it, the ability of citizens and war victims to seek remedies and participate in selecting the new regime. In fact, rebel groups and civil society organizations excluded from peace processes are more likely to organize or resort to violence, respectively, to influence peace processes or military outcomes. Power sharing may also stifle the development

[33] *Id.* See also Spears, *supra* note 31, at 123.
[34] *Id.*
[35] David Wippman, *Practical and legal constraints on internal powersharing*, in David Wippman (ed.) INTERNATIONAL LAW AND ETHNIC CONFLICT (1998), at 212–213.
[36] Chandra Sriram & Marie-Joëlle Zahar, *The perils of power-sharing: Africa and beyond*, 44 African Spectrum 11, 18 (2009).
[37] Donald Rothchild & Philip G. Roeder (eds.) SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS (2005), at 50.

of opposition or "moderate political parties," triggering the "issue of inclusion versus exclusion" and thereby activating what Jarstad refers to as the "horizontal dilemma of power-sharing."[38] In addition, power sharing deals that exclude low-level rebels and/or secondary combatant groups provide them with a justification to employ violence to leverage primary stakeholders for positions and rewards in the post-conflict environment. In this sense, power sharing can serve as a structural enabler or accelerator of popular discontent, inflaming ethnic and political fissures and eventually leading to the resumption of civil strife or armed conflict. This is precisely what occurred in, for example, Rwanda (1993), Burundi (1994), Guinea-Bissau (1994–1998), Sierra Leone (1997, 1999), and Liberia (1996, 1999). In almost every case, there was a reescalation of conflict within months of the institution of power sharing, and not one of these agreements lasted more than three years.

Power sharing becomes even more problematic when it relates to security. Although disarmament and demobilization initiatives are vital to peace and security, the more difficult question concerns the loyalties of ex-combatants. Sharing power with *pirates de la loi*, especially in the security sector, is dangerous when there are divided loyalties among ex-combatants who serve as the backbone of the new military and who greatly affect its culture. This scenario becomes more problematic when power-sharing and military integration initiatives are initiated between military junta and loyalist forces of the incumbent government that was toppled by the junta. As is often the case in Africa, combatants are typically loyal to personalities, not principalities; hence power sharing opens the door for warlords to manipulate, mobilize, and leverage old loyalties for political ends. This in part explains why, "since 1945, only one-third of negotiated settlements of so-called 'identity civil wars' – i.e., ethnic conflicts – have resulted in lasting peace."[39] From this background, power sharing with *pirates de la loi* may be

[38] Jarstad, *supra* note 17, at 124.

[39] Chester Crocker & Fen Osler Hampson, *Making peace settlements work*, 104 Foreign Policy 55 (1996). See also Roy Licklider, *The consequences of negotiated settlements in civil wars, 1945–1993*, 89 American Political Science Review 681, 686 (1995).

not only unlawful but, as the following chapters illustrate, politically untenable.

D. CONCLUSION

Scholars of conflict management generally believe that sharing political power with *pirates de la loi* creates predictability and peace, whereas democratic theorists argue that power sharing promotes democracy, which leads to peace. As Jarstad notes, "the lack of integration of the two discourses on power-sharing has led to a neglect of a deeper understanding of potential dilemmas for simultaneous and long-term democratization and peace-building."[40] She rightly argues that power sharing in conflict-ridden states necessitates choices between promotions of peace and democracy and argues that four mechanisms of power sharing shape the likelihood of peace: inclusion of warring parties, intragroup contestation, international dependence, and the leveling of power relations. At the same time, power sharing can negatively affect democratization in at least four ways: by exclusion of moderate elites, by lack of popular support, by external intervention preventing local ownership of the political process, and by freezing ethnic division by group representation.[41] Although Jarstad's critique is among the most insightful on the topic, like many conflict management scholars, it is weakened by her failure to consider or recognize the important role that law indicates for itself to play in informing and regulating power-sharing arrangements. The rule of law is a type of universal currency, and adherence to it is a precondition of lawfulness and a likely requirement for authentic peace, democracy, justice, reparation, and reconciliation. Its devaluation in peacemaking is antithetical to building genuine democracies in which the rule of law is authoritative. Additionally, law can counterbalance the temporal and spatial dilemma in power sharing organically caused by shifts in power relations between contesting groups during negotiations. It can help anchor deals birthed out of expediency and necessity by

[40] Jarstad, *supra* note 17, at 106.
[41] *Id.*, at 107.

safeguarding fundamental rights – whether of the warlord, rebel, or democrat – decreasing the risk of spoilers or desertion from the agreement. To understand and scrutinize power sharing in Liberia, Sierra Leone, and Guinea-Bissau, it is important to examine the circumstances that produced it. Chapter 4 briefly examines the conflicts that birthed the Accra, Lomé, and Abuja peace accords.

4 THE CONFLICTS IN LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU

A. WHY LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU?

The contemporary histories of Liberia, Sierra Leone, and Guinea-Bissau are strikingly similar.[1] All three West African nations have suffered from armed conflict, acute political instability, underdevelopment, and coups. They have also been the subject of external military intervention by the Economic Community of West African States (ECOWAS), and their governments have been forced to share power with warlords, rebels, or mutineers during the same period. Their contemporary experiences are so similar that each illuminates the other. Liberia and Sierra Leone border one another, and Guinea-Bissau is situated northwest of Sierra Leone, the two countries separated only by Guinea. All three states are small in size – an estimated thirty-eight thousand square miles for Liberia, twenty-eight thousand for Sierra Leone, and fourteen thousand for Guinea-Bissau. They share a similar forest belt environment, climatic conditions, and natural fauna. Liberia has a human population of approximately 3.4 million, Sierra Leone 6 million, and Guinea-Bissau 1.5 million.[2]

Great Britain established Freetown in Sierra Leone in 1787, and the United States and private interests founded Monrovia in Liberia in 1822.[3] Both states are the product of colonial resettlement schemes

[1] Although the discussion that follows seeks to provide a substantive overview of the history and circumstances that led to the Accra, Lomé, and Abuja agreements, it is not intended to serve as a comprehensive historiography of conflict in Liberia, Sierra Leone, and Guinea-Bissau.

[2] Liberia, CIA World Fact Book, available at https://www.cia.gov/library/publications/the-world-factbook/geos/li.html.

[3] See also See generally Jeremy I. Levitt, THE EVOLUTION OF DEADLY CONFLICT IN LIBERIA: FROM "PATERNALTARIANISM" TO STATE COLLAPSE (2005), chapter 2;

by which, initially, free blacks in the United States and Great Britain and its territories were sent back to West Africa to solve the perceived problem of their free existence in slavocratic societies under U.S. and British control.[4] Emigrants from the United States and the Caribbean supplanted these initial populations, as did other blacks who were "liberated" on the high seas by the U.S. and British navies after they outlawed the transatlantic slave trade in the early nineteenth century.[5]

Guinea-Bissau was birthed out of far different circumstances. Portuguese slave traders and colonists in the Cape Verde islands forcibly began colonizing what came to be called Portuguese Guinea in the mid-fifteenth century. Portuguese Guinea, later named Guinea-Bissau, became the center of Portugal's infamous slave trade. It was first an administrative unit of Portugal's Cape Verde island possessions and, in 1879, became an independent colony. Although the Portuguese governed Portuguese Guinea with an iron fist, their offspring, Cape Verdean and Bissauan mulattos, eventually inherited and dominated Guinea-Bissau's political establishment. A few years after becoming an overseas province of Portugal in 1951, a fierce militarized independence movement was launched that eventually forced Portugal to grant Guinea-Bissau independence in 1974. Guinea-Bissau is the only African nation to attain independence through armed force.

Notwithstanding, Liberia, Sierra Leone, and Guinea-Bissau evolved on similar political, economic, and social paths. Although the bloodlines and ethnic compositions of the populations of all three states were entirely West African,[6] the slave trade and enslavement

Christopher Clapham, LIBERIA AND SIERRA LEONE: AN ESSAY IN COMPARATIVE POLITICS (1976).

[4] The predominant view at the time was that free blacks were "idle and useless and too often vicious and mischievous" and consequently needed to be relocated outside of the United States. Nevertheless, slave rebellions and the pivotal role free blacks played in organizing them seem to have been the central rationale behind recolonization. Id, at 26.

[5] Great Britain and the United States abolished the human trade in 1807 and 1808, respectively. The two states dumped those blacks captured at sea in their respective colonial stations in Sierra Leone and Liberia. In the United States, many black emigrants were also manumitted on the condition that they "immigrate" to Africa; Great Britain coerced many blacks in the Caribbean to immigrate to Sierra Leone.

[6] See generally Cheikh Anta Diop, PRECOLONIAL BLACK AFRICA: A COMPARATIVE STUDY OF THE POLITICAL SOCIAL SYSTEMS OF EUROPE AND BLACK AFRICA FROM ANTIQUITY TO THE FORMATION OF MODERN STATES (1987); Philip Curtin, THE ATLANTIC SLAVE TRADE: A CENSUS (1969).

inculcated a Western orientation into the black settlers and inhabitants of Monrovia, Freetown, and Bissau. The New World emigrants became the ruling elite and were known as Americo-Liberians in Liberia, Creoles in Sierra Leone, and Lançados in Guinea-Bissau. This may in part explain why all three states had, and to some degree still have, similar political cultures and developmental paths. Clapham notes that Liberia and Sierra Leone

> share the peculiar legacy of Creoledom, and the late nineteenth-century expansion from the coastal settlements into a hinterland itself divided between numerous ethnic groups; they have analogous administrative hierarchies, and distributions of educational and professional skills; and they have similar economies, based principally on the export of primary materials – especially minerals – by foreign-managed corporations, and only relying to a secondary extent on indigenously-produced cash crops.[7]

This legacy of Creoledom equally applies to Guinea-Bissau, which boasted one of the largest Creole settlements in West Africa. In this regard, it is clear that Liberia, Sierra Leone, and Guinea-Bissau share common topography; natural environments; historical influences; ethnic populations; and political, economic, and social structures.[8]

As previously noted, today Liberia, Sierra Leone, and Guinea-Bissau have as much in common as they did in the past. Unfortunately, their troubled legacies of conflict and underdevelopment are perhaps the most striking similarity. Since the early 1990s, all three states have suffered from intermittent armed conflict, abrupt regime changes, and state collapse. Despite their best efforts, they have not been able to institutionalize a "rights conception of democracy," where, as

[7] Clapham, *supra* note 3, at 1–2. One novel distinction between Liberia, on one hand, and Sierra Leone and Guinea-Bissau, on the other, is that the United States adopted a racist policy of indifference toward Liberia and had little political and economic interest in the state, which forced Liberia to survive and exist on its own. Conversely, Sierra Leone and Guinea-Bissau were colonies of Great Britain and Portugal, respectively, governed and maintained by colonial administrations and secured by British and Portuguese naval bases. In this context, while the political cultures and development paths of all three states are similar, they are also distinct – a subject that goes beyond the scope of this book.

[8] Precolonial African history reveals that the historical development of each state was heavily affected by the rise and fall of the great empires of Ghana, Mali, and Songhai.

Crawford notes, "it is not enough that the government of the day has been elected, in the comparatively recent past, at a general election. Democracy implies a range of rights to participate in public life, effective freedom of speech, [and] the opportunity to organize political parties and other groups."[9] Neither has the international community held these states accountable to a rights-based standard of democracy or one in which representing the rights of people is genuinely expected. In all three states, authoritarianism and conflict have stifled the development of a viable democratic political culture. Liberia was immersed in deadly civil conflict between 1989 and 1997 and between 1999 and 2003.[10] Sierra Leone was embroiled in war between 1991 and 1996 and between 1999 and 2002.[11] Guinea-Bissau was fraught with political conflict between 1994 and 1998 and has been marred by intermittent armed conflicts and coups since 1998.[12] During these periods, all three states were destabilized by armed rebellion. Liberia and Sierra Leone were captured by warlordism, coups and coup attempts, and prolonged and brutally savage insurgencies, and Guinea-Bissau was beset by military coups and international drug cartels. All three states suffered from democratic elections without democratic transitions, poor economic growth, extremely high unemployment, acute poverty, rampant corruption, and perpetual insecurity.

To make matters worse, since the 1990s, the character of conflict in Liberia and Sierra Leone quickly devolved into a type of warlord politics, where clandestine economic networks and systems competed

[9] James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed.) (2006), at 116.

[10] Levitt, *supra* note 3, chapter 7.

[11] See Alfred B. Zack Williams, *Child soldiers in the civil war in Sierra Leone*, 28 Review of African Political Economy 73 (2001); Alfred B. Zack Williams, *Kamajors, "Sobel" and the militariat: Civil society & the return of the military in Sierra Leonean politics*, 24 Review of African Political Economy 373 (1997); Alfred B. Zack Williams, *The political economy of civil war in Sierra Leone*, 20 Third World Quarterly 143 (1999).

[12] Adekeye Adebajo, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU (2002); Joshua B. Forrest, GUINEA-BISSAU: POWER, CONFLICT, AND RENEWAL IN A WEST AFRICAN NATION (1992); Joshua B. Forrest, LINEAGES OF STATE FRAGILITY: RURAL CIVIL SOCIETY IN GUINEA-BISSAU (2003); Simon Massey, *Multi-party mediation in Guinea-Bissau*, in Oliver Furley & Roy May (eds.) ENDING AFRICA'S WARS: PROGRESSING TO PEACE (2006); and Norrie MazQuees, *A community of illusion? Portugal, the CPLP and peacemaking in Guinea-Bissau*, 10 International Peacekeeping 2 (2003).

for state power and "political authority and command over resources [that] come mainly through the decisions of specific individuals who act to serve their private interests, largely without regard for formal government institutions, rules, and processes."[13] Political insecurity in these states prevents those individuals who resist the prerogatives of warlords and their cohorts from relying on any central authority or institutions to impose order and preserve the rule of law; safeguard basic civil, political, and human rights; and arbitrate and resolve conflict. In these situations, those who resist the "politics of the belly" are forced to rely on their own power,[14] tactical advantage, and alliances to ensure security and prosperity.[15] Although Guinea-Bissau has not been engulfed in deadly conflict, since the late 1980s, the government of Guinea-Bissau also devolved from an elitist party-centralist Afro-Marxist regime into a prebendal militaristic regime with violent political transitions, particularly coups d'état, as a core feature.[16] Political instability has also created an enabling environment for Columbian drug cartels to turn Bissau into a key "transit hub for the cocaine trade out of Latin America and into Europe,"[17] which has debatably made Bissau Africa's first narco state and contributed to political instability in the country and region.

If, as in Liberia, Sierra Leone, and Guinea-Bissau, governments and government leaders lack the power to thwart rebellion, they are forced to enter into peace agreements that require, among other things, power sharing, or they risk being toppled, killed, or exiled. These states are among the best examples, then, of states that hurriedly entered into

[13] William Reno, WARLORD POLITICS AND AFRICAN STATES (1998), at ix.

[14] See generally Jean-François Bayart, THE STATE IN AFRICA: THE POLITICS OF THE BELLY (1993).

[15] *Id.*, at x.

[16] Richard A. Joseph, *Class, state, and prebendal politics in Nigeria*, in Peter Lewis (ed.) AFRICA: DILEMMAS OF DEVELOPMENT AND CHANGE (1998), at 54. Prebendal militaristic politics refers to "patterns of political behavior which reflect as their justifying principle that the offices of the existing state" are competed for by political elites, particularly senior military officers, and "utilized for the personal benefit of office holders [or capturers] as well as that of their reference or support group." *Id.*

[17] Ed Vulliamy, *How a tiny West African country became the world's first narco state*, The Observer (March 9, 2008), available at http://www.google.com/search?source=ig&hl=en&rlz=1R2HPNN_enSE328&q=guinea+bissau+narco+state&aq=f&oq=&aqi=.

peace agreements out of political necessity and expediency, involving extensive political power sharing with *pirates de la loi,* without regard for the rule of law. Whether or not such agreements succeed is secondary to the question of their legality. To say otherwise is to argue that the utility of law is measured by the extent to which positive outcomes derive from its contravention. It follows that if law's utility is dependent on the success of unlawful political edicts, then it has no independent value or meaningful purpose.

From this background, it is evident that the Accra, Lomé, and Abuja peace agreements were born out of analogous historical phenomena and political circumstances in like times and similar environments. Though this book is informed by various peace arrangements inside and outside Africa, it focuses on the Accra, Lomé, and Abuja accords because they, circumstantially, temporally, spatially, and geographically, complement one another and because comparative analysis is best suited to exposing political behavior and normative legal developments over short periods of time.

B. CONFLICT AND STATE COLLAPSE

The conflicts that conceived the Accra, Lomé, and Abuja accords are complex and multifaceted. They have been the subject of numerous studies, and it is beyond the scope of this book to analyze them in detail.[18] It is, however, important to broadly contextualize the circumstances that produced the agreements to determine their lawfulness.

[18] For more information, please see generally Levitt, *supra* note 3; see also International Crisis Group, *Sierra Leone: The state of security and governance*, 67 African Report (2003); Human Rights Watch, Human Rights Overview: Liberia, available at http://hrw.org/english/docs/2004/01/21/liberi6977.htm; David Keen, CONFLICT AND COLLUSION IN SIERRA LEONE (2005). J. Peter Pham, LIBERIA: PORTRAIT OF A FAILED STATE (2004); International Crisis Group, *Tackling Liberia: The eye of the regional storm*, 62 African Report (2003); Tunde Zack Williams, supra note 11; Adebajo, *supra* note 12; Forrest, *supra* note 12; Massey, *supra* note 12; MazQuees, *supra* note 12; Human Rights Watch, SIERRA LEONE, SOWING TERROR: ATROCITIES AGAINST CIVILIANS IN SIERRA LEONE (1998); Tunde Zack Williams, *Civil society & the return of the military in Sierra Leonean politics*, *supra* note 11; and Joshua B. Forrest, GUINEA-BISSAU: POWER, CONFLICT AND RENEWAL IN A WEST AFRICAN NATION (1992).

The Accra and Lomé peace accords were born out of thirteen and eighteen years of unfettered deadly conflict and state collapse, respectively. The Abuja Agreement derives from nearly eighteen years of political tension and intermittent low-intensity armed conflict. As was previously noted, deadly civil conflict reaped havoc in Liberia between 1989 and 1997 and between 1999 and 2003. Brutal war enmeshed Sierra Leone between 1991 and 1996 and between 1999 and 2002. Political conflict engulfed Guinea-Bissau between 1994 and 1998, and since then, the state has been plagued with successive coups and civil strife. The conflicts that beset Liberia and Sierra Leone were among the most violent, cruel, and bloody internal conflicts of the twentieth century.[19] During the previously noted periods, armed conflict in Liberia and Sierra Leone resulted in approximately two hundred thousand and seventy-five thousand war-related fatalities, respectively.[20] Although there have been significantly fewer fatalities in Guinea-Bissau, it has suffered from more coups in the past twenty years than Liberia and Sierra Leone combined, and consequent regional instability has contributed to Guinea-Bissau emerging as a narco state. Although the seeds of conflict in all three states are traceable to historical circumstances,[21] the conflicts that generated the Accra, Lomé, and Abuja accords are products of complex local, domestic, regional, and international phenomena. The discussion that follows briefly highlights these occurrences.

A group of indigenous military elements, led by Master Sergeant Samuel K. Doe of the Krahn ethnic group, permanently altered the

[19] Levitt, *supra* note 3, at 206–44; Human Rights Watch, SIERRA LEONE, SOWING TERROR, *supra* note 18.

[20] Jeremy Levitt, *Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone*, 12 Temple International and Comparative Law Journal 342 (1998). Human Rights Watch, SIERRA LEONE, SOWING TERROR, *supra* note 18.

[21] See generally Adekeye Adebajo, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU (2002); Joshua B. Forrest, GUINEA-BISSAU: POWER, CONFLICT, AND RENEWAL IN A WEST AFRICAN NATION (1992); Joshua B. Forrest, LINEAGES OF STATE FRAGILITY: RURAL CIVIL SOCIETY IN GUINEA-BISSAU (2003); Massey, *supra* note 156; Norrie MazQuees, *A community of illusion? Portugal, the CPLP and peacemaking in Guinea-Bissau*, 10 International Peacekeeping (2003). David Keen, CONFLICT AND COLLUSION IN SIERRA LEONE (2005). Jeremy Levitt, THE EVOLUTION OF DEADLY CONFLICT IN LIBERIA: From Paternaltarianism to State Collapse (2005).

Liberian political order in 1980 when it removed the True Whig Party, which had largely dominated the state's political and economic order since its independence in 1847, from power in a violent coup d'état.[22] The coup was triggered by a government-mandated price increase on rice, Liberia's staple food, and the arrest and imprisonment of protestors following massive demonstration. However, these were only triggers that released a political leviathan – a continuum of interdependent conflict histories woven into the political fabric of Liberia's sociopolitical order – that had lain dormant for almost fifty years.[23] Doe's forces executed Liberian president William R. Tolbert and twenty-seven key government officials, particularly those of Americo-Liberian cultural origin.[24] Doe and his advisors established the People's Redemption Council, which served as the government's new controlling body.[25]

Doe instituted a brutal form of military rule and politicized ethnicity in such a manner that it became inculcated into every facet of Liberian society.[26] His Krahn ethnic group quickly dominated Liberia's political, economic, and military sectors, leading to tension and, eventually, to low-intensity conflict with other ethnic groups, in particular, the Mano and Gio groups.[27] Doe barred all political opposition and rigged the 1985 elections.[28] As the political situation worsened, so did the quality of life for most Liberians. Increased civil society discontent and protest led to widespread human rights abuses, corruption, and the use of the security services to silence all detractors.[29]

On December 24, 1989, after several attempts to topple Doe failed, a small band of rebels led by Charles Taylor, Doe's former director-general of the General Services Agency, invaded Liberia from Côte d'Ivoire.[30] The rebellion marked the beginning of what was to become the Liberian Civil War. Taylor's group, the National Patriotic Front

[22] *Liberia*, Africa Research Bulletin (April 1–30, 1980), at 5645.
[23] Levitt, *supra* note 3, at 196–197.
[24] *Id.*
[25] *Id.*
[26] *Id.*, at 197–202.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

of Liberia (NPFL), which Libya supported, sought to oust Doe from power and, within five months, seized control of 90 percent of the country.[31]

The invasion evolved into a popular insurgency composed of a multiethnic coalition of anti-Doe elements, but as it became bloodier and more destructive, Liberians disavowed it and its leader, Charles Taylor. Liberian security forces suffered enormous losses on the battlefield, which led Doe, who was facing certain defeat, to make several unsuccessful appeals to the people of Liberia, to the United Nations (UN), and to the U.S. government for military assistance.[32] Finally, he appealed to ECOWAS to introduce a peacekeeping force into Liberia to "forestall increasing terror and tension" (i.e., to restore his decrepit government to power).[33] At its summit meeting in May 1990, ECOWAS established a Standing Mediation Committee (SMC) comprising Nigeria, Ghana, Gambia, Mali, and Togo to mediate a cessation of conflict between Doe's government and the NPFL. After rejecting an ECOWAS proposal for a provisional government in Freetown in mid-July 1990, the SMC met in Banjul in early August to discuss a peace plan "crafted largely by Liberia's civil society groups" to establish the ECOWAS Cease-fire Monitoring Group (ECOMOG), "with a mandate to supervise a cease-fire and, following Doe's resignation, to establish an interim government and organize elections in twelve months" in which "none of the factional leaders would be able to join the interim government."[34]

Under the auspices of ECOWAS-ECOMOG, Nigeria, Ghana, Guinea, Sierra Leone, and Gambia initially deployed about two thousand peacekeepers to a country in dire need of six thousand peace enforcers. Consequently, ECOMOG was ill prepared to effectuate its mandate and protect itself against NPFL attacks upon landing in the country. Shortly thereafter, ECOWAS deployed three thousand

[31] *Id.*

[32] Levitt, *supra* note 20, at 243.

[33] Letter addressed by President Samuel K. Doe to the chairman and members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee (July 14, 1990), in M. Weller (ed.) REGIONAL PEACE-KEEPING AND INTERNATIONAL ENFORCEMENT: THE LIBERIAN CRISIS (1994), at 60–61 [hereinafter THE LIBERIAN CRISIS].

[34] Adebajo, *supra* note 21, at 51–52.

additional troops and expanded its mandate to include robust peace enforcement. ECOWAS proceeded to establish an Interim Government of National Unity (IGNU), led by Amos Sawyer, a longtime activist and intellectual. Although Taylor rejected the IGNU, he attended the next ECOWAS summit in Bamako, Mali, where, in his role as ECOWAS chairman, Blaise Compaoré, president of Burkina Faso, "reportedly convinced him to sign a peace agreement."[35] The agreement called for a cease-fire, cessation of arms purchases, a buffer zone, election of an interim government, and the disarmament of factions. In an attempt to ensure that the NPFL complied with the Bamako peace plan, in mid-February 1991, the warring factions (NPFL and Independent National Patriotic Front of Liberia (INPFL)) and IGNU signed yet another agreement in Lomé, Togo, to implement it with limited effect.[36] It appears that a stalemate developed between the NPFL and IGNU: the former pressed for the institution of a new interim government before disarming, and the latter demanded the opposite – a reoccurring incongruity that plagued future peace processes.

The historical circumstances that led to conflict in Liberia mirror the factors that caused violent conflict and state collapse in Sierra Leone. In bitterly contested elections in March 1967, the All Peoples Congress (APC) won the election, and Siaka Stevens, leader of the APC and mayor of Freetown, was declared the new prime minister.[37] Shortly thereafter, Brigadier David Lansana, commander of the Republic of Sierra Leone Military Forces (RSLMF), placed Stevens under house arrest, apparently because he believed the election should await formal approval of traditional leaders in parliament.[38] Over the course of a few weeks, two more military coups took place,[39] the last of which is referred to as the Sergeants' Revolt. Stevens eventually assumed the office of prime minister in April 1968, in accordance with the state's constitution;[40] however, these events, among others,

[35] *Id.*, at 53.
[36] *Id.*
[37] Ibrahim Abdullah, *Bush path to destruction: The origin and character of the Revolutionary United Front/Sierra Leone*, 36 Journal of Modern African Studies 203, 206 (1998).
[38] Williams, *The political economy of civil war in Sierra Leone*, *supra* note 11, at 144.
[39] *Id.*
[40] A. M. Lavalie, *Government and opposition in Sierra Leone, 1968–78*, in A. Jones & P. K. Mitchell (eds.) SIERRA LEONE STUDIES AT BIRMINGHAM (1985), at 77–106.

compelled him to rule dictatorially and crush all political opposition. Stevens instituted measures to preserve APC supremacy, including an amendment to the 1978 constitution, and banned all political parties except his own, marking the advent of one-party rule.[41]

In October 1985, Stevens's chosen successor, Major General Joseph Saidu Momoh, was elected president in a one-party referendum.[42] Although Momoh made politically insignificant overtures in support of multiparty politics, he sought to rule with an iron fist, curbing political opposition and public dissent.[43] In March 1991, the elitist, exclusionary and wildly corrupt character of APC rule, and the ascendency of Taylor's NPFL as a formidable extraterritorial fighting force, among other factors, contributed to spawning the Revolutionary United Front (RUF), a small rebel group from Sierra Leone trained and recruited in Liberia and Libya led by Foday Sankoh, a former corporal in the RSLMF.[44] RUF fighters were supplanted by NPLF soldiers and mercenaries from Burkina Faso. The exact purpose of the RUF was not known, but after attacking several villages in eastern Sierra Leone along the border with Liberia, the group quickly became notorious for brutal violence.[45] After successfully defeating RSLMF forces on the battlefield numerous times, the RUF acquired a reputation as a savagely efficient guerilla fighting force and cashed in on its success by seizing control of several diamond mines in the resource-rich Kono district.[46] Foreign military assistance from Nigeria and Guinea provided limited reprieve to the government of Sierra Leone; by mid-November 1991, the RUF exclusively controlled diamond mines in the southern and

[41] Abdullah, *supra* note 37, at 206.

[42] Williams, *The political economy of civil war in Sierra Leone*, *supra* note 11, at 145.

[43] *Id.*, at 146.

[44] Williams, *The political economy of civil war in Sierra Leone, supra* note 11, at 147–149; *Sierra Leone: UN held hostage*, Africa Research Bulletin (May 1–31, 2000), at 13982; The Secretary-General, *Report of the secretary-general to the Security Council on the situation in Sierra Leone*, 1, U.N. Doc. S/1995/975 (November 21, 1995). Sankoh was an uneducated and disgruntled former army corporal that was dishonorably discharged and imprisoned for seven years for attempting to overthrow the Stevens regime. Keen, supra note 18 at 37.

[45] *Sierra Leone: The captain in his bunker*, Africa Confidential (February 3, 1995), at 1; Williams, *Child soldiers in the Civil War in Sierra Leone*, *supra* note 11, at 73–82.

[46] *Sierra Leone: RUF attacks precede peace talks*, Africa Research Bulletin (March 1–31, 1996), at 12202; *Coup bid tarnishes diamonds' luster*, African Analysis (October 6, 1995).

eastern parts of the country as well as significantly more territory than the government.

On April 29, 1992, separate and apart from the RUF campaign against Momoh and the APC, Captain Valentine Strasser and a group of junior military officers led a successful coup against Momoh's government, sending him into exile in Guinea.[47] It appears that Strasser seized on wide discontent in the RSLMF concerning salary arrears, a lack of equipment, military funding, and consequently, a general discontent with losing major battles to the RUF. Strasser and his cohorts established the National Provisional Ruling Council (NPRC) as the ruling authority in Sierra Leone.[48] Immediately challenged by the RUF, the NPRC was unable to assert effective control over all of Sierra Leone. Conversely, within three years, or by mid-1995, the RUF controlled most of Sierra Leone, except for Freetown,[49] and its barbarous treatment of Sierra Leoneans made it enormously unpopular.[50] The NPRC then hired Executive Outcomes (EO), a South African mercenary company – in exchange for mining concessions – to quash the RUF's unpopular insurgency and assist the government in reestablishing effective control of the state.[51]

The lack of popularity of the NPRC, Strasser's attempt to lower the constitutionally mandated age for candidacy for the presidency (from forty-five to thirty years) so that he could run for elections in March 1996, and growing international scrutiny severely weakened his regime. Soon after Executive Outcomes withdrew from Sierra Leone the same year, the NPRC lost control over the bulk of its territory, eventually

[47] It appears that unpaid salaries and low morale were key causes of the coup. *Sierra Leone: UN held hostage*, *supra* note 44, at 13982; *Sierra Leone: Strasser in exile*, Africa Research Bulletin (May 1–31, 1996), at 12278.

[48] *Report of the secretary-general*, *supra* note 44, at 1.

[49] *Id.*

[50] The RUF's brutalization of Sierra Leoneans is best evidenced in its 1997 apology to the nation, in which it stated,

> In the process of cleaning the system, however, we have wronged the great majority of our countrymen. We have sinned both in the sight of our Sierra Leonean brothers and sisters for all the terror and the mayhem we unleashed on you in our bid to make Sierra Leone a country that all Sierra Leoneans would be proud of.

Revolutionary United Front's apology to the nation, SLBS radio broadcast (June 18, 1997), available at http://www.sierra-leone.org/AFRC-RUF/RUF-061897.html.

[51] *Sierra Leone: No soldier saviors*, Africa Confidential (October 6, 1995), at 5.

leading to Strasser's forcible removal from power by senior NPRC officers, led by Captain Julius Maada Bio, in mid-January 1996. His departure led the way toward presidential and parliamentary elections. In April 1996, Ahmad Tejan Kabbah, a longtime UN diplomat and leader of the Sierra Leone People's Party (SLPP), won the presidential election and most parliamentary seats.[52] He defeated John Karefa Smart, leader of the United National People's Party, by harnessing 59 percent of the popular vote (Smart received 41%). After the election, on March 29, 1996, the junta peacefully handed over power to Kabbah. Kabbah speedily established pro-government civil defense militias to provide a security buffer against RUF and RSMFL forces. The Kamajors (traditional hunter militias) composed the majority of the civil defense forces. Nevertheless, Kabbah's victory was short-lived.

Despite various attempts at creating peace with the RUF, including the Abidjan peace process, which was supported by governments inside and outside Africa as well as by ECOWAS, the Organization of African Unity (OAU), the UN, and the Commonwealth (the latter three serving as the accords' moral guarantors) and was seemingly endorsed by a large number of Sierra Leoneans, peace failed. After eight months of intermittent negotiations and a consensus on nearly all negotiation points, the Abidjan process broke down when Kabbah and Sankoh refused to agree on two central points: the withdrawal of all foreign troops (i.e., EO) and power sharing with the RUF. Kabbah rejected Sankoh's demands to be appointed vice president and to allocate the RUF several cabinet positions as part of the Abidjan Agreement.[53] Consequently, the RUF refused to honor its cease-fire commitments by releasing women and children it had kidnapped during the war, halting attacks on civilians, and refraining from illegally mining diamonds. After engaging in several clashes with the Kamajors and SLA forces over control of strategic and mineral-rich areas, the Kabbah government hired EO to lead a joint EO–SLA–Kamajor assault against the RUF stronghold in Bo, which ultimately led to its destruction and the

[52] *Sierra Leone: Falling out parade*, Africa Confidential (March 29, 1996), at 4.

[53] Julius Mutwol, PEACE AGREEMENT AND CIVIL WARS IN AFRICA: INSURGENT MOTIVATIONS, STATE RESPONSES, AND THIRD-PARTY PEACEMAKING IN LIBERIA, RWANDA, AND SIERRA LEONE (2009), at 236.

RUF's signing of the Abidjan Agreement on November 30, 1996.[54] Although EO's intervention repelled RUF advances, its engagement in Sierra Leone was, in part owing to international pressure, short-lived.

After five and a half years of war, nearly twenty thousand deaths, massive refugee flows, internal displacement, and the total destruction of the country's menial infrastructure, the Abidjan Agreement failed to secure peace and provide adequate reprieve to Sierra Leoneans. Furthermore, it did not establish a viable integration mechanism for the Kamajors and other militia or address how to resolve implementation-related disputes. Finally, after Sankoh was arrested in Lagos, Nigeria, for purchasing weapons in March 1997, the Abidjan Agreement permanently unraveled.

To the great consternation of the international community, and within ten months of Sankoh's arrest, Kabbah was ousted from power. On May 25, 1997, junior soldiers led by Major Johnny Paul Koroma and backed by the RUF launched a successful coup d'état of Kabbah's government, forcing him to flee to Guinea. The coup and junta, which referred to itself as the Armed Forces Revolutionary Council (AFRC), were universally condemned by the international community.[55] Similar to Doe, before fleeing the country, Kabbah also requested that Nigeria and ECOWAS intervene to forestall the conflict and restore constitutional order to the country.[56] They affirmatively responded to Kabbah's requests.

Guinea-Bissau's legacy of conflict and state collapse parallels, in some respects, unrest in Liberia and Sierra Leone. The small nation has suffered from intermittent political unrest since the assassination of former president Amilcar Cabral in 1973 and the subsequent bloodless coup d'état of his successor and brother, Luis, in 1980 by former prime minister João Bernardo Vieira. The coup caused the African Party for the Independence of Guinea and Cape Verde (PAIGC) to splinter

[54] The Abidjan Agreement included, among others, six major components, including a cessation of hostilities, disarmament and demobilization, power sharing, withdrawal of the EO, de facto amnesty for RUF combatants, and registration of the RUF as a political party.

[55] Levitt, *supra* note 20, at 207.

[56] ICISS, THE RESPONSIBILITY TO PROTECT, bibliography, *infra* note 560, at 105.

after the PAIGC in Cape Verde broke away in protest over Cabral's ouster from power. Vieira maintained himself in power first as head of a military government and later as the self-anointed civilian head of state following the adoption of the country's constitution in 1984. After Vieira lifted the ban on political parties in 1991, Guinea-Bissau held its first multiparty elections in 1994. Vieira ran as the PAIGC's candidate, and his central opponent, Kumba Yala, represented the Social Renewal Party (PRS). On September 29, 1994, Vieira won a run-off election against Yala, securing over 52 percent of the vote and becoming the country's first democratically elected president in a multiparty election, in what was universally accepted as a free and fair contest.[57]

Vieira's presidency was challenged by several domestic and international forces. Not only did the PRS leadership mount fierce political opposition to him after the election but he was also forced to contend with border issues with Senegal, precipitated by the activities of the Democratic Forces of Casamance (MFDC), a long-standing armed separatist movement in southern Senegal, and to mediate peace between the MFDC and the government of Senegal. Tensions between the two countries subsided after Bissau and France forged closer economic relations, to the bewilderment of Senegal and Portugal.

On June 7, 1998, the democratically elected government of President Bernardo Nino Vieira was overthrown by a mutiny of high-ranking officers of the armed forces of Guinea-Bissau, led by army chief of staff Brigadier General Ansoumane Mane.[58] The coup attempt triggered armed conflict between forces loyal to Vieira and those backing Mane. The mutiny was initiated after President Vieira fired Mane the previous day for not investigating claims that his officers were

[57] See generally Adebajo, *supra* note 12; Joshua B. Forrest, GUINEA-BISSAU: POWER, CONFLICT, AND RENEWAL IN A WEST AFRICAN NATION, *supra* note 12; Joshua B. Forrest, LINEAGES OF STATE FRAGILITY, *supra* note 162; Massey, *supra* note 12; and Norrie MazQuees, *A community of illusion? Portugal, the CPLP and peacemaking in Guinea-Bissau*, 10 International Peacekeeping 2 (2003).

[58] *Manes' men: An army mutiny has quickly become a security problem for the neighbouring states*, Africa Confidential (June 26, 1998), at 3. Mane played a key role in the 1980 overthrow of the regime of Luis Cabral that brought Vieira to power.

smuggling arms to the Casamance rebels in southern Senegal.[59] The mutineers also opposed government plans to reduce the military by 50 percent from its 1996 strength of twenty thousand.[60] Mane formed an "interim military council" that he named the Junta Militar Para a Consolidação da Democacia, Paz e Justiça and "called for a new set of free and transparent elections."[61] Consequently, similar to the situation in Sierra Leone, the rebellion was universally condemned – the Community of Portuguese Speaking Countries (CPLP), ECOWAS, the UN, the OAU, and the European Union considered the mutiny illegal and "demanded a return to constitutional government."[62] Despite that the bulk of his military, except for the Presidential Guard, deserted him and aligned with Mane, Vieira was not unseated from power, nor did he flee the country. His government nonetheless struggled to stay in effective control of the state.[63] To quell the mutiny, Vieira requested external intervention from Senegal and Guinea.

As the next section will illustrate, violent challenges to the governments of Doe, Kabbah, and Vieira and ensuing conflict eventually led to peace enforcement operations by ECOWAS member states and the organization itself through its ECOMOG in Liberia in 1990, Sierra Leone in 1997, and Guinea-Bissau in 1998.

[59] *Id.* Brigadier General Ansumane Mane was suspended in February 1998 after military officers had been arrested in Senegal for trafficking arms to the MFDC. Mane, born in Gambia, was a guerilla fighter who fought against Portuguese rule in Guinea-Bissau from 1961 to 1974. Although Mane was not directly connected to the trafficking, he was suspended for dereliction of duty because the impounded weapons were taken from military depots of the Bissauan army. The weapons cache, discovered on February 11 only seventeen kilometers from Bissau, allegedly came from a depot of which Mane was in charge, prompting Vieira to hold him responsible. The Guinea-Bissau government denied supporting the MFDC but stated that it was possible that its soldiers were trafficking the weapons unbeknownst to it. Mane denied involvement in the trafficking, a claim that appears to have been somewhat legitimized by Portuguese Renascenta radio, which stated that it had access to an unpublished Guinea-Bissau parliamentary report that cleared Mane and implicated Vieira. See *Army COS suspended*, Africa Research Bulletin (February 1–28, 1998); see also *Senegal sends troops to Bissau*, Panafrican News Agency Daily Newswire (June 12, 1998); Michael Pereira, *A report on the conflict in Guinea-Bissau*, 21 CVN (March 15, 1999); *Arms-trafficking report*, Africa Research Bulletin (August 1–31, 1998).

[60] *Id.*

[61] Massey, *supra* note 12, at 84.

[62] *Id.*, at 85.

[63] *Id.*

C. INTERVENTION AND PEACEMAKING

The ECOWAS intervened in Liberia in August 1990 and succeeded in halting Taylor's advance on Monrovia.[64] Prince Yormie Johnson – who had been a rebel commander in Taylor's NPFL but broke away because of internal power struggles between the two – created the excessively violent infamous INPFL. On September 9, 1990, Johnson's forces kidnapped Doe, who was attending a meeting at the ECOWAS headquarters in Monrovia, and later savagely killed him.[65] Doe's murder created a political vacuum that generated further instability.

With the assistance of ECOWAS, the OAU, and other institutions, an Interim Government of National Unity (IGNU) was formed in the Gambia in October 1990, and Dr. Amos C. Sawyer became Liberia's new head of state.[66] Because Taylor was fixated on becoming president, he refused to work with IGNU and escalated the war,[67] which generated deep cleavages in Liberian society, and by 1992, several new warring factions emerged that had to be incorporated into IGNU. Between 1992 and 1997, after several years of cease-fires and peace accords and three transitional governments, Taylor remained an impediment to peace and refused to negotiate with IGNU and ECOWAS in good faith; given the poor prospect of a military solution with ECOMOG on the ground, he finally agreed to the formation of a five-person transitional government in September 1996.[68] On July 19, 1997, Liberia held special elections. Charles Taylor and his National Patriotic Party (NPP) emerged victorious, with 75 percent of the vote. Liberians apparently voted for Taylor because they feared he would reignite the war if he lost,[69] resulting in the first nationwide conflict-prevention and resolution measure taken by an electorate.

[64] The ECOWAS Cease-fire Monitoring Group (ECOMOG) operation in Liberia lasted eight years.

[65] Levitt, *supra* note 3, at 208.

[66] *Id.*

[67] *Id.*, at 208–209.

[68] The leaders of the main warring factions, Charles Taylor, Alhaji Kromah, George Boley, and Roosevelt Johnson, selected Ruth Perry as chairperson of the transitional government's State Council – the first woman to be head of state in Africa. *Liberia State Council chairwoman Ruth Perry*, Africa Research Bulletin (September 1–30, 1996), at 12395.

[69] Levitt, *supra* note 3, at 210.

In the years following Taylor's accession to power, the political and economic situation in Liberia continued to decline.[70] Liberians remained as poor and disenfranchised as they had been during the war. Taylor used violence to control opposition groups, silence media criticism, and thwart internal NPP challenges to his authority.[71] Endemic corruption, high unemployment, illiteracy, and a lack of government investment in basic infrastructure, including clean water, electricity, schools, hospitals, roads, and agricultural production, made Taylor's regime very unpopular. Moreover, his exploitation of Liberia's natural resources for personal gain and alleged support of the RUF's vicious insurgency in Sierra Leone greatly damaged his credibility.[72]

By December 1998, ECOWAS withdrew nearly all ECOMOG forces from Liberia, and in April 1999, Taylor was faced with a formidable armed insurrection from the northern border area of Guinea.[73] The rebels were largely composed of former factional elements from the Liberian Civil War.[74] By June 2003, rebel groups calling themselves the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) captured most of the state and successfully neutralized Liberian government forces.[75] During the fighting, the government of Liberia, LURD, and MODEL committed egregious atrocities against one another and the civilian population.[76] Despite multiple attempts by civil society, the UN, ECOWAS, and the OAU to establish long-term peace, security, law and order, and democracy in Liberia, and after

[70] *Endnote dateline: Liberia*, African Analysis (August 22, 1997).

[71] Levitt, *supra* note 3, at 212–213; *Liberia: Abductions and accusations*, Africa Research Bulletin (July 1–30, 1998), at 13190.

[72] See Levitt, *supra* note 3, at 215–216; *Liberia: Taylor land under siege*, Africa Confidential (February 19, 1999), at 6–7; *Liberia: Old habits die hard*, Africa Confidential (November 9, 2001), at 1–3.

[73] Levitt, *supra* note 3, at 216–217.

[74] Id., at 217–18, 223.

[75] UN sanctions against Liberia curbed Taylor's ability to obtain weapons and arm his fighters.

[76] Although there is voluminous information and data available about the various atrocities committed in Liberia from the UN and nongovernmental organizations such as Amnesty International, the International Crises Group, and Human Rights Watch, I base this assertion on firsthand information and accounts obtained while serving as head of the International Technical Advisory Committee of the Truth and Reconciliation Commission of Liberia from 2008 to 2009.

thirteen years and thirteen major peace agreements – most of which had power-sharing dimensions – Taylor's regime was on the verge of collapse.

To make matters worse, Taylor was plagued by other problems, including increasing international scrutiny over his support of the RUF in Sierra Leone, continued UN sanctions (arms embargos), and his inability to receive military support or purchase weapons from his closest ally, President Blaise Compaoré of Burkina Faso, or from his long-term supporter Muammar Qadhafi of Libya.[77] Taken together, these factors ultimately dealt his regime a death blow and forced it to negotiate peace with LURD and MODEL. On July 17, 2003, the government of Liberia, LURD, and MODEL signed a cease-fire agreement that they abrogated in the weeks that followed, resulting in a resumption of fighting that reached the streets of Monrovia.[78]

On August 11, 2003, under severe international pressure from the United States, Europe, and ECOWAS, President Taylor resigned office and went into exile in Nigeria.[79] His resignation provided the platform for ECOWAS to eventually deploy a thirty-six-hundred-person-strong peacekeeping mission in Liberia (ECOWAS Mission in Liberia, or ECOMIL). On August 18, the government of Liberia, LURD, and MODEL entered into the Accra Agreement, which provided for comprehensive power sharing and de facto amnesty and laid the framework for the establishment of the National Transitional Government of Liberia (NTGL).[80] On August 21, the warring parties

[77] Levitt, *supra* note 3, at 223.

[78] Agreement on Ceasefire and Cessation of Hostilities between the Government of the Republic of Liberia and Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, Accra, Ghana, June 17, 2003, available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_ceasefire_06172003.pdf [hereinafter Agreement on Ceasefire].

[79] Moses Blah, Taylor's vice president, assumed the presidency until the transitional government was instituted on October 14, 2003, in accordance with Article 20(b) of the Accra Agreement.

[80] Comprehensive Peace Agreement between the Government of Liberia (GOL), the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, Accra, Ghana, August 18, 2003, available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_08182003.pdf [hereinafter Accra Agreement]. Although Taylor fled the country one week before the signing of the Accra Agreement, he played a pivotal role in early negotiations concerning it and officials from his regime, foremost among them Moses Blah (Taylor's Vice-President and successor), sanctioned it. Consequently, for purposes

elected Gyude Bryant, a well-known businessman, as chair and Wesley Johnson as vice chair of the NTGL. On September 19, 2003, the UN Security Council adopted Resolution 1509, establishing the UN Mission in Liberia (UNMIL) to, among other things, support the implementation of the Accra Agreement by guaranteeing security and support for humanitarian relief and human rights activities, assisting in national security reform, training police, and building a new military.[81] The UNMIL eventually comprised a fifteen-thousand-person peacekeeping mission.

Unlike the situation in Liberia, where Doe's and Taylor's ousters from power were widely celebrated by nearly all facets of Liberian society and encouraged by the international community, Sierra Leoneans publicly protested against Kabbah's removal from power. And in contradistinction to the international response to the coup against Doe and forced resignation of Taylor, the coup in Sierra Leone was universally condemned by the UN and the broader international community, including the OAU,[82] which requested that ECOWAS employ force to reverse it.[83]

In response to Kabbah's request, on May 26, 1997, Nigeria (not ECOMOG) sent forces to Sierra Leone to forestall the conflict and restore constitutional order (i.e., return Kabbah to power).[84] When they landed, Nigerian forces were met with strong resistance from the junta and RUF elements and were forced to retreat but in the weeks and months that followed, were later able to push back the rebels and secure sections of the country.[85] Likewise, in early August, pursuant to requests by member states of ECOWAS, General Sani Abacha,

of this study, I consider and refer to actions taken by Blah including the signing of the Accra Agreement as those taken by Taylor or the Taylor regime.

81 S.C. Res. 1509, U.N. Doc. S/RES/1509 (September 19, 2003).

82 *Sierra Leone: Nigerian troops take Freetown*, Africa Research Bulletin (February 1–28, 1998), at 12991A; *Sierra Leone: Nigerian intervention fails*, Africa Research Bulletin (June 1–30, 1997), at 12733. *Id.*

83 This marked the first time that a regional organization requested assistance from a subregional organization to end human suffering, restore constitutional order, and promote democracy in a member state. Moreover, it was also the first time a regional organization requested and arguably authorized another regional organization to employ force on its behalf.

84 Jeremy Levitt, *African interventionist states and international law*, in Oliver Furley & Roy May (eds.) AFRICAN INTERVENTIONIST STATES (2001), at 23.

85 Levitt, *supra* note 20, at 366.

former Nigerian head of state and ECOWAS chairman, appears to have issued an executive directive authorizing an economic blockade against Sierra Leone, to be enforced by ECOMOG.[86] On August 30, during the Twentieth Summit of ECOWAS in Abuja, ECOWAS officially mandated ECOMOG to enforce sanctions against the junta and restore law and order to the country.[87] On October 8, the UN Security Council supported these various efforts by adopting Resolution 1132, which deplored the coup and the junta's unwillingness to restore constitutional order and the "democratically elected Government."[88]

On February 5, 1998, "responding to an attack by junta forces on their position at Lungi, ECOMOG launched a military attack on the junta," which led to its removal from power and expulsion from Freetown on February 12.[89] By early March, "ECOMOG [had] established itself successfully across most of the country."[90] On March 10, 1998, Kabbah returned to the capital city, Freetown, to resume his position as president of Sierra Leone.[91] After restoring Kabbah to power, ECOMOG began a final push against the AFRC,[92] inclusive of about seven thousand troops from Nigeria, Ghana, Guinea, and Civilian Defense Forces CDF-Kamajor and loyalist SLA forces.[93] The RUF eagerly supported the junta in its fight.[94] ECOMOG reported in June 1998 that 80 percent of the country had been liberated.[95] However, Sierra Leoneans throughout the country fled to Freetown for medical attention after having been displaced and victimized by AFRC-RUF forces.[96]

Meanwhile, in late July 1998, Sankoh was extradited from Nigeria to Sierra Leone to be tried for crimes against humanity, despite the

[86] Levitt, supra note 84, at 23.
[87] *Id.*
[88] S.C. Res. 1132, pmbl., U.N. Doc. S/RES/1132 (October 8, 1997).
[89] The Secretary-General, *Fourth report of the secretary-general on the situation in Sierra Leone*, para. 6, U.N. Doc. S/1998/249 (March 18, 1998).
[90] *Id.*, para. 19.
[91] Levitt, *African interventionist states*, *supra* note 84, at 23.
[92] *Final push on rebels*, Africa Research Bulletin (April 1–31, 1998), at 13085; *Vicious retreat*, Africa Research Bulletin (May 1–31, 1998), at 13122. *Id.*
[93] *Id.*
[94] *Id.* The RUF received training and logistics support from Liberia and Burkina Faso and weaponry from Burkina Faso and Libya. *Rebel terror*, Africa Confidential (December 18, 1998), at 8.
[95] *Hundreds mutilated by rebels*, Africa Research Bulletin (June 1–30, 1998), at 13156.
[96] *Id.*

RUF's violent demands for his release.[97] On September 4, Sankoh appeared before the Court of Justice in Freetown and was charged with treason for attempting to overthrow Kabbah's government[98] by soliciting funds, military equipment, and logistics for the venture in Nigeria.[99] On October 23, Sankoh was sentenced to death for treason; he announced that he would appeal the conviction and requested the government to provide him with defense counsel.[100] The announcement provoked brutally violent reprisal killings by AFRC-RUF forces and robust counterattacks by ECOMOG.[101] By December 1998, AFRC-RUF rebels made significant military advances in their bid to take the capital.[102]

Although ECOMOG was temporarily successful in ousting the junta, it was not able to fully neutralize the RUF.[103] On January 6, 1999, the RUF attacked Freetown with the objective of overthrowing the Kabbah government a second time.[104] The ferocity of the attack surprised ECOMOG forces. After weeks of fighting and thousands of deaths, mostly civilian, ECOMOG repelled the group.[105] Between February and April, international stakeholders in the conflict, such as Nigeria, Ghana, Britain, and the United States, placed immense pressure on Kabbah to enter into peace negotiations with the RUF.[106] In mid-April, Sankoh, who, only six months earlier, had been sentenced to death for treason, was released from prison to convene with RUF leadership to contemplate a cease-fire with the Kabbah government, and to prepare for the Lomé negotiations, which began in May 1999.[107]

[97] *Foday Sankoh to stand trial*, Africa Research Bulletin (August 1–31, 1998), at 13228.
[98] *Foday Sankoh on trial*, Africa Research Bulletin (September 1–30, 1998), at 13263.
[99] *Id.*
[100] *Treason executions*, Africa Research Bulletin (October 1–31, 1998), at 13301. On November 9, former British agriculture minister Douglas Hogg offered to represent Sankoh in appealing his conviction and death sentence. *Sankoh appeals*, Africa Research Bulletin (November 1–30, 1998), at 13332.
[101] *Treason executions*, Africa Research Bulletin (October 1–31, 1998), at 13301.
[102] . . . *And close in on capital*, Africa Research Bulletin (December 1–31, 1998), at 13375.
[103] *Sierra Leone: Rebels hang on*, Africa Research Bulletin (July 1–31, 1998), at 13190.
[104] . . . *And close in on capital, supra* note 102, at 13375.
[105] *Sierra Leone: Hundreds flee Freetown as fighting flares*, Africa Research Bulletin (January 1–31, 1999), at 13387–13388.
[106] *Leaving for Lomé*, Africa Confidential (March 19, 1999), at 8.
[107] On May 17, 1999, Reverend Jesse Jackson assisted in brokering a cease-fire agreement between the GOS and RUF that laid the foundation for the Lomé Agreement. *Peace*

On July 7, at the behest of the ECOWAS, the UN, and the United States, and after months of peace talks and tense negotiations, the government of Sierra Leone and RUF entered into the Lomé Agreement,[108] which provided for, among other things, comprehensive power sharing through a government of national unity and general amnesty – causing most Sierra Leoneans to oppose it. The Lomé Agreement empowered ECOMOG to enforce its terms until a UN-sanctioned mission could replace it. The UN Security Council established the United Nations Mission in Sierra Leone (UNAMSIL) in 1999, with an initial force of six thousand troops.[109] Initially, the bulk of UNAMSIL troops were converted blue-helmet ECOMOG forces; later, contingents from outside Africa joined.[110] The UNAMSIL force eventually grew to seventeen thousand troops.

As previously noted, unlike the situation in Liberia and Sierra Leone, the military rebellion in Guinea-Bissau did not end in Vieira's violent removal from power. At his request, and pursuant to bilateral defense pacts, Senegal and Guinea immediately intervened to quell the mutiny, evacuate their nationals and those of other countries, and restore security and constitutional legality to the country.[111] By the end of June, intermittent fighting between Mane's mutineers and loyalist forces (i.e., Senegal and Guinea) resulted in the deaths of several hundred civilians and caused over 250,000 persons to be displaced.[112] After international mediators failed to negotiate an end to the conflict,[113] Vieira requested that ECOWAS deploy ECOMOG in the country, despite that Senegal and Guinea forces, which

conference proposals, Africa Research Bulletin (April 1–30, 1999), at 13520; *Forced to talk*, Africa Confidential (May 28, 1999), at 6.

108 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Lomé, Togo, July 7, 1999, available at http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Agreement].

109 *Sierra Leone: UN force deployed*, Africa Research Bulletin (December 1–31, 1999), at 13808; *Sierra Leone: "Very fragile" peace*, Africa Research Bulletin (January 1–31, 2000), at 13842.

110 *Sierra Leone: "Very fragile" peace*, *supra* note 109.

111 Senegal and Guinea immediately sent thirteen hundred and four hundred troops to the country, respectively. *Id.*

112 Levitt, *African interventionist states*, *supra* note 84, at 27.

113 Massey, *supra* note 12, at 88.

had their own motives, were already there.[114] During the Eighteenth Foreign Ministers' Conference on Security in Abidjan, Côte d'Ivoire, from June 30 to July 3, ECOWAS foreign ministers made tentative plans to intervene in Guinea-Bissau to restore law and order to the country.[115]

On July 26, 1998, Vieira and Mane agreed to a Memorandum of Understanding (MOU) designed to jump-start cease-fire negotiations. The MOU called on ECOMOG to provide security along the Guinea-Bissau–Senegal border, keep the warring parties apart, guarantee free access to humanitarian organizations attempting to provide humanitarian relief to the domestic population, and ensure that the conflict did not destabilize the subregion.[116] Nearly one month later, on August 25, 1998, Vieira and Mane agreed to a formal cease-fire in Praia, Cape Verde, that essentially memorialized the MOU. However, by mid-October, there was a resurgence of deadly conflict between the junta and loyalist forces, including Senegalese and Guinean contingents, which came within a few hundred yards of the presidential compound in Bissau, forcing tens of thousands of Bissauans to flee the city. By October 21, Mane's forces controlled nearly all the country outside Bissau, forcing Vieira to declare a cease-fire, opening the door for peace talks in Abuja on November 1, 1998, where officials signed the Abuja Agreement.[117] The agreement called for ECOMOG forces to replace Senegalese and Guinean contingents, political power sharing in the form of a government of national unity between the warring factions, and legislative and presidential elections.

On December 26, 1998, less than a week before ECOMOG was to be deployed in Guinea-Bissau, the UN Security Council adopted

[114] *ECOWAS puts out plan to end Bissau mutiny*, PANAFRICAN NEWS AGENCY (July 5, 1998), available at LEXIS (search "News, All (English, Full Text)" database for "ECOWAS puts out plan").

[115] Levitt, *African interventionist states*, *supra* note 84, at 27.

[116] Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta (July 26, 1998); Annex to the Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta (July 26, 1998). See also The Secretary-General, *Report of the secretary-general pursuant to Security Council Resolution 1216 relative to the situation in Guinea-Bissau*, para. 3(c), U.N. Doc. S/1999/294 (March 17, 1999).

[117] *Id.* 116.

Resolution 1216, which welcomed and approved of the ECOMOG mandate.[118] Between December 1998 and March 1999, in consonance with the July 1998 MOU, Benin, Gambia, Niger, and Togo deployed approximately six hundred ECOMOG troops in the country to,[119] among other things, "guarantee security along the Senegalese/Guinea-Bissau border, keep the warring parties apart and guarantee free access to humanitarian organizations."[120]

The fragile settlements achieved in Liberia, Sierra Leone, and Guinea-Bissau did not create enabling environments for durable peace, in large part because they proscribed, as the chapters that follow will demonstrate, unlawful and politically unsustainable power-sharing arrangements.

D. CONCLUSION

The circumstances that produced the armed conflicts in Liberia and Sierra Leone and the violent civil strife in Guinea-Bissau were complex and multifarious and involved a variety of local, subregional, regional, and international actors. The Accra, Lomé, and Abuja accords were born out of similar historical and political contexts, and experienced most if not all of the following: a legacy of high-intensity deadly conflict, violent civil disorder, authoritarian rule, violent regime transition, military coups of civilian authority, warlord politics, perpetual state breakdown, failed peace agreements, grave human atrocities, acute underdevelopment, UN inaction, and subregional intervention. Most important, each accord prescribed power sharing without resolving the root causes and underlining factors that birthed conflict and thus provided a structured atmosphere or ambience for conflict to regenerate. To understand the forgoing analysis, it is important to contextualize the accords' power-sharing dimensions.

[118] S.C. Res. 1216, paras. 3, 4, 6, U.N. Doc. S/RES/1216 (December 21, 1998).
[119] The Secretary-General, *supra* note 116, ¶ 11 (Mali had promised an additional 125 troops).
[120] S.C. Res. 1216, para. 3(c), 4, 6, U.N. Doc. S/RES/1216 (December 21, 1998).

5 THE ACCRA, LOMÉ, AND ABUJA ACCORDS

Chapter 5 broadly highlights the sum and substance of the Accra, Lomé, and Abuja accords, with a special emphasis on their power-sharing provisions.[1] It aims to provide context to subsequent chapters that contemplate their legality. The Accra and Lomé accords are composed of thirty-seven articles that are similar in structure and content and, in many ways, replicate the structure of the Treaty of Kadesh. The Abuja Agreement is shorter and less comprehensive than the other accords and only includes five articles, excluding a four-paragraph annex that elucidates a power-sharing framework intended to establish a government of national unity.[2] This is largely because discord in Guinea-Bissau did not result in widespread deadly conflict or atrocities. Consequently, there were fewer issues (e.g., cease-fires and transitional justice) to distract contesting parties from their primary concern: sharing power.

Although the Lomé Agreement (May 25, 1999) served as a template for the Accra Agreement (August 18, 2003), the latter is somewhat more comprehensive than the former and includes special provisions for an international stabilization force,[3] a process for troop

[1] It is beyond the scope of this book to examine all provisions in the accords. It should also be noted that the Accra, Lomé, and Abuja accords were not the first to include power-sharing components in Liberia, Sierra Leone, and Guinea-Bissau, respectively. For example, in Liberia, the Abuja Agreement (August 19, 1995), Akosombo Agreement (September 12, 1994), and Conotou Agreement (July 25, 1993) all included power-sharing components that eventually failed. The Abidjan Agreement (November 30, 1996) likewise included power-sharing dimensions.

[2] Abuja Agreement, *supra* note 54.

[3] Agreement on Ceasefire and Cessation of Hostilities between the Government of the Republic of Liberia and Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, Article 3, Accra, Ghana, June 17, 2003, available

disengagement,[4] the restructuring of the Liberian National Police, and the establishment of a governance reform commission.[5] Conversely, the Lomé Agreement had a greater orientation toward the well-being of victims of armed conflict than the Accra and Abuja agreements; it provided for a special victims' fund,[6] free basic education,[7] and affordable health care.[8] The Abuja Agreement (November 1, 1998) included several unique provisions on the total withdrawal of all foreign troops, the simultaneous deployment of Economic Community of West African States (ECOWAS) Cease-fire Monitoring Group (ECOMOG) peacekeepers,[9] the freezing of military positions,[10] a truce based on public recognition of democratic institutions,[11] a cessation of hostile propaganda,[12] and the "immediate" establishment of a government of national unity.[13] The Accra, Lomé, and Abuja accords can be divided into five substantive categories: cease-fire, military, human rights, implementation, and power sharing.

at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_ceasefire_06172003.pdf [hereinafter Agreement on Ceasefire].

4 *Disengagement of forces* means the "immediate breaking of tactical contact between opposing military forces of the GOL [government of Liberia], the LURD, and the MODEL, at places where they are in direct contact or within range of direct fire weapons." See Accra Agreement, *supra* note 3, Article 5(2).

5 *Id.*, Articles 10 and 16.

6 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), Article 29 Lomé, Togo, July 7, 1999, available at http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Agreement].

7 *Id.*, Article 31.

8 *Id.*

9 Agreement between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, Paragraph 2, Abuja, Nigeria, November 1, 1998. The Abuja Agreement also comprises two supplemental agreements, including a cease-fire agreement signed in Praia on August 26, 1998, and the Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, July 26, 1998; Annex to the Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, July 26, 1998; and Cease-fire Agreement and Its Appendices between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, August 25–26, 1998.

10 Article 1(b), Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, *supra* note 9.

11 *Id.*

12 Article 1(f), Memorandum of Understanding between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, *supra* note 9.

13 Paragraphs 2 and 4, Agreement between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, *supra* note 9.

A. CEASE-FIRE

All three agreements called for an immediate cease-fire,[14] an end to armed conflict between the warring parties,[15] and the establishment of a cease-fire monitoring group and joint monitoring committees[16] as well as sanctioned ECOWAS-ECOMOG to enforce their terms,[17] which reveals the vital role the organization has played in regional enforcement operations. Drawing from prior experiences, ECOWAS heavily influenced the enforcement dimensions of the cease-fire arrangement in Liberia. The Accra Agreement included a unique component. On the basis of its peacekeeping experiences in Sierra Leone, Guinea, and Guinea-Bissau, ECOWAS also ensured that the Accra Agreement provided for "a zone of separation between the belligerent forces" or "safe corridor . . . for the delivery of humanitarian assistance and free movement of persons."[18]

B. MILITARY

The Accra and Lomé accords have comprehensive military components, including the disbandment of irregular forces;[19] disarmament, demobilization, and reintegration schemes;[20] the restructuring and creation of new national armies and security services composed of former members of warring factions;[21] provisions for the security, safety, and freedom of movement of peacekeeping forces;[22] and the

[14] Accra Agreement, *supra* note 3, Article 2; Lomé Agreement, *supra* note 53, Article 1; and Cease-fire Agreement in Guinea-Bissau, *supra* note 54, Article 1.

[15] Accra Agreement, *supra* note 3, Articles 2 and 3; Lomé Agreement, *supra* note 6, Article 2; Cease-fire Agreement in Guinea-Bissau, *supra* note 9, Article 1.

[16] Accra Agreement, *supra* note 3, Article 3; Lomé Agreement, *supra* note 6, Article 2; Cease-fire Agreement in Guinea-Bissau, *supra* note 9, Article 1.

[17] Accra Agreement, *supra* note 3, Articles 3 and 4; Lomé Agreement, *supra* note 6, Article 3; Cease-fire Agreement in Guinea-Bissau, *supra* note 9, Article 1.

[18] Accra Agreement, *supra* note 3, Article 3(1); Cease-fire Agreement in Guinea-Bissau, *supra* note 9, Article 1.

[19] *Id.*, Articles 6–8; Lomé Agreement, *supra* note 6, Articles 13–20.

[20] Lomé Agreement, *supra* note 6, Articles 13–20.

[21] *Id.*

[22] Accra Agreement, *supra* note 3, Article 4; Lomé Agreement, *supra* note 6, Articles 13–15.

establishment of joint monitoring commissions.[23] The military components of the Abuja Agreement and supplemental memorandum of understanding are far less significant than the Accra and Lomé agreements. Though the accord and its supplemental annexes and appendixes require a freezing of military positions, no increases in armament or military personnel, a cessation of hostilities, withdrawal of forces, the immediate opening of humanitarian corridors, and deployment of an ECOMOG interpositional force, they do not address disarmament, demobilization, and reintegration issues or any issues concerning the restructuring of the Bissauan military. This is largely because unlike in the conflicts in Liberia and Sierra Leone, the Guinea-Bissau military was the central protagonist and contestant for state power; in Sierra Leone, the junta were entangled with and militarily dependent on the Revolutionary United Front (RUF). The junta in Guinea-Bissau were independent and firmly in control of state power; hence they could not disarm or demobilize because doing so would have left the country defenseless, and there were no opposing forces with which to integrate.

While the Accra and Lomé agreements envisaged the United Nations (UN) succeeding ECOMOG after the security situation in both states stabilized,[24] the Abuja Agreement was silent on the issue of succession. In addition, a distinct feature of the Lomé and Accra agreements was their provision on the withdrawal of "foreign forces"; however, the Lomé and Abuja accords went a step further by calling for the withdrawal of mercenaries of "any guise," whether domestic or foreign, and for the "total withdrawal" of all foreign troops, respectively.[25] Provision for withdrawal of foreign forces would have been advisable in the Accra Agreement, given the menacing role of RUF mercenaries in escalating the Liberian Civil War and the NPFL in fueling deadly conflict in Sierra Leone.[26]

[23] Accra Agreement, *supra* note 3, Article 3; Lomé Agreement, *supra* note 6, Article 2.
[24] Accra Agreement, *supra* note 3, Article 4; Lomé Agreement, *supra* note 6, Articles 13–15.
[25] Lomé Agreement, *supra* note 6, Articles 18; Abuja Agreement, *supra* note 9, Article 2.
[26] Lomé Agreement, *supra* note 6, Article 18.

C. HUMAN RIGHTS

The Accra and Lomé agreements required warring factions to respect, protect, and guarantee fundamental human rights of citizens in accordance with prevailing national law and broader human rights principles contained in UN, African Union (AU), and ECOWAS law.[27] At a minimum, the accords defined basic civil and political rights to include "the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression, and association, and the right to take part in the *governance* of one's country."[28] Consequently, the accords' power-sharing and amnesty provisions seem to have conflicted with their appeal for the protection of the aforementioned rights. The agreement called for the immediate and unconditional release of prisoners of war and abductees and the voluntary repatriation and reintegration of refugees and internally displaced persons.[29] The Abuja accord is largely silent on human rights issues because Guinea-Bissau was not beset by intense deadly conflict, and Bissauans were not victims of egregious human rights violations on a mass scale. It did, however, mandate the establishment of a peacekeeping force to guarantee security along the Guinea-Bissau–Senegalese border and "free access to humanitarian organizations and agencies to reach the affected population."[30]

The Accra and Lomé agreements explicitly required all warring parties to respect international humanitarian law, especially the prohibition against the recruitment and enlistment of child soldiers,[31] and provided for "safe and unhindered access by all humanitarian agencies

[27] See Accra Agreement, *supra* note 3, Article 12; Lomé Agreement, *supra* note 6, Article 24.

[28] Accra Agreement, *supra* note 3, Article 12(1)(b); Lomé Agreement, *supra* note 6, Article 14(2); emphasis added.

[29] Accra Agreement, *supra* note 3, Articles 9–11, 14, 15, 30, 31; Lomé Agreement, *supra* note 6, Articles 21–23. The Lomé Agreement specifically recognizes the right of asylum of Sierra Leoneans, whereas the Accra Agreement does not.

[30] Abuja Agreement, *supra* note 9, Article 3.

[31] Lomé Agreement, *supra* note 3, Article 30. The Accra and Lomé accords differ in that the former does not make explicit reference to child combatants.

to vulnerable groups throughout the country."[32] Both accords provided for the establishment of national human rights and truth and reconciliation commissions and recognized the importance of robust postconflict rehabilitation and reconstruction schemes.[33] They also recognized the special needs of women affected by war, particularly the Lomé Agreement.[34] In contrast, the Abuja Agreement did not provide for the creation of any new human rights entities or mechanisms and wholly ignored women's issues.

The Lomé Agreement obligated the government of Sierra Leone to design and implement a special programmatic fund for the rehabilitation of war victims[35] and created a Commission for the Consolidation of Peace (CCP) "to implement a post-conflict program that ensures reconciliation and the welfare of all parties to the conflict, especially war victims."[36] The CCP was mandated to supervise and monitor the parties' implementation of and compliance with the Lomé Agreement as it concerned the promotion of national reconciliation and the consolidation of peace.[37] Similarly, the Accra Agreement established the Governance and Reform Commission (GRC) to promote the principles of good governance that would ideally help guarantee respect for human rights.[38] These commissions were established to help foster the protection of human rights and democracy but have had minimal impact for innumerable reasons, including official corruption, structural and technical inefficiencies, and untimeliness. On the issue of tardiness, the human rights- and governance-related commissions

[32] Accra Agreement, *supra* note 3, Article 14(1)(a); Lomé Agreement, *supra* note 135, Article 27(2). The Accra Agreement also created an Independent National Human Rights Commission, which was empowered to monitor compliance with human rights guaranteed in the peace accord and to strengthen and promote human rights throughout the country. Accra Agreement, *supra* note 3, Article 12.

[33] Accra Agreement, *supra* note 3, Articles 12, 13, 29; Lomé Agreement, *supra* note 6, Articles 24, 25, 28.

[34] See Accra Agreement, *supra* note 52, Article 31; Lomé Agreement, *supra* note 53, Article 38.

[35] See Lomé Agreement, *supra* note 6, Article 38.

[36] The CCP comprised two representatives of civil society and one representative from each of the three warring parties. *Id.*, Article 6.

[37] *Id.*

[38] See Accra Agreement, *supra* note 3, Article 16. There is a more detailed discussion of the GRC in the section on governance that follows.

were not instituted when they were needed most: during transitional peace periods when power sharing was most apparent rather than after democratic elections. As previously noted, the Abuja Agreement did not provide for the creation of any human rights or good governance mechanisms.

Additionally, the Lomé Agreement provided for the creation of a Council of Elders and Religious Leaders, which was supposedly sanctioned to function in a quasi-judicial capacity and as a conflict mediator when there was "any conflicting difference of interpretation . . . of any Article" of the "Agreement or its protocols."[39] The agreement also overzealously provided for other laudable but unattainable goals such as free compulsory basic education and affordable primary health care to all Sierra Leoneans.[40] In contrast, the Accra and Abuja agreements did not make any reference to education and health care or the role of traditional leaders in their respective peace processes. Though it appears that the accords, particularly Lomé, sought to provide significant human rights protections, all failed to address, let alone establish, any form of civil or criminal remedy to war victims.

D. IMPLEMENTATION

The Accra and Lomé agreements required multifaceted and comprehensive implementation schemes to ensure that they were implemented in good faith. To this end, the Accra Agreement established a Joint Monitoring Committee (JMC),[41] the International

[39] Lomé Agreement, *supra* note 6, Article 8. Under this provision, all decisions of the council were binding and public and appealable to the supreme court.

[40] See *id.*, Article 31.

[41] The JMC was established under the June 17, 2003, cease-fire agreement between the government of Liberia, LURD, and MODEL. It was empowered to supervise and monitor the terms of the cease-fire agreement and thereafter sanctioned under Article 3(5) of the Accra Agreement to resolve disputes concerning its implementation, investigate alleged violations of the agreement, and recommend remedial action for confirmed cease-fire violations. The JMC was chaired by ECOWAS and included equal representation from the warring parties as well as representatives from the UN, the AU, and the ICGL. The JMC provided ECOWAS regular reports on its findings. Cease-fire Agreement, *supra* note 52.

Implementation Committee (IMC),[42] and the International Contact Group on Liberia (ICGL),[43] and the Lomé Agreement set up a Joint Implementation Committee (JIC) for Sierra Leone.[44] The Abuja Agreement did not require a robust implementation scheme largely because the military was in de facto control and had a monopoly on the instruments of violence. Though the Accra and Lomé accords established various monitoring committees, all three agreements sought political support and economic assistance from states and, to various degrees, solicited subregional (e.g., ECOWAS), regional (e.g., AU), and international (e.g., UN) institutions to assist in implementation and serve as moral guarantors.[45] The Accra and Lomé agreements were supposed to have been registered and published for public consumption,[46] and they entered into force immediately on signing by the relevant parties.[47] Although the Abuja Agreement did not address the issue of publication or public disclosure, it did enter into force on ratification.

[42] The IMC shared a monitoring role with the JMC and was charged with "ensuring effective and faithful implementation of the Peace Agreement" as well as approving the recommendations of the JMC. IMC members included representatives from ECOWAS, the UN, the AU, the European Union, and the ICGL. Accra Agreement, *supra* note 203, Article 3(5)(b).

[43] The ICGL was established on September 17, 2002, "as part of a new political strategy to address the continuing conflict situation [in Liberia]." The group included representatives of the UN, the European Union, the AU, ECOWAS, the United States, the United Kingdom, France, Senegal, Nigeria, and Morocco. Liberia: New Contact Group, New UN Representative, United Nations Integrated Regional Info. Network (IRIN), September 18, 2002, available at http://www.irinnews.org/printreport.aspx?reportid=34616/.

[44] The JIC consisted of members of the CCP, the Committee of Seven on Sierra Leone, the Moral Guarantors as prescribed in Article 34 of the Lomé Agreement, and other international supporters. It was "responsible for reviewing and assessing the state of implementation of the Agreement" and for making "recommendations deemed necessary to ensure effective implementation" of the accord. Lomé Agreement, *supra* note 53, Article 32.

[45] Accra Agreement, *supra* note 3, Article 33; Lomé Agreement, *supra* note 6, Articles 32–35; Annex II Additional Protocol to the Abuja Agreement, *supra* note 54, Article 4.

[46] Accra Agreement, *supra* note 3, Article 32(3); Lomé Agreement, *supra* note 6, Article 36.

[47] Accra Agreement, *supra* note 3, Article 37; Lomé Agreement, *supra* note 6, Article 37.

E. POWER SHARING

This section details and analyzes the power-sharing provisions in the Accra, Lomé, and Abuja accords. Because the agreements addressed a wide spectrum of power-sharing issues, the analysis is divided into three major sections: legal basis and authority of the agreements, governance, and economically related commissions.

As noted in Chapter 1, while political scientists and diplomats have dominated the debate and practice of power sharing, the standard approach to dealing with states embroiled in internal deadly conflict is to grant unconditional amnesty and share political power among the warring factions.[48] In these situations, again, amnesty is usually an essential prerequisite but a lesser-included component of power sharing.[49] As previously noted, however, power sharing is all-encompassing, being broader than amnesty and more pertinent to

[48] Conflict-resolution approaches of this type do not adequately consider the long-term implications of power sharing when there are successful insurgencies, rebellions, and coups against lawfully constituted governments.

[49] The Accra and Lomé accords include de facto and de jure amnesty provisions under Articles 34 and 9, respectively. The Abuja Agreement does not make any specific reference to amnesty largely because the military coup that birthed it did not trigger significant armed conflict, greatly reducing the need for amnesty for international human rights law and international humanitarian law violations. The Accra Agreement stops short of explicitly granting amnesty but rather empowers the NTGL, which included warlords and rebels who committed or directed atrocities, to consider a recommendation for "general amnesty to all persons and parties" who were "engaged or involved in military activities during the Liberian civil conflict that is the subject of the Agreement." See Accra Agreement, *supra* note 3, Article 34. The Lomé Agreement included an independent provision that obligated the government of Sierra Leone to take "legal steps to grant Corporal Foday Sankoh absolute and free pardon." *Id.*, Article 9(1). It also granted "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement." *Id.*, Article 9(2). Finally, the agreement states that "for the cause of national reconciliation," the Sierra Leone government must ensure that "no official or judicial action is taken against any member of the RUG/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organizations, since March 1991, up to the signing of the present Agreement." *Id.*, Article 9(3). Article 9 also required the government to take legislative and other measures to guarantee the immunity of the warring parties and ensure the "full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality." *Id.*, Article 9(3). Under the law of Sierra Leone, a pardon may only be granted to persons who have been convicted of crimes; hence the Lomé Agreement either knowingly or unknowingly misuses the terms *pardon* and *reprieve* rather than *amnesty*.

long-term peace because it establishes the framework for governance, which determines the future disposition of states and their potential for sustainable peace. Hence, given their weighty impact on society, it is important to understand the legal basis, if any, for the accords' power-sharing provisions.

1. Legal Basis and Authority of the Agreements

The Accra, Lomé, and Abuja accords did not offer any legal basis or authority to legitimize their power-sharing provisions, let alone the accords themselves; rather, they prescribed extralegal rules and processes for sharing power that abrogated constitutionally based superior rules.[50] The legitimizing authority for power sharing seems to have rested solely in the accords themselves. For example, under Article 35(1)(a) of the Accra Agreement, the formation of the National Transitional Government of Liberia (NTGL) had its origins in paragraph 8(i) of the June 17, 2003, cease-fire agreement between the government of Liberia, the Liberians United for Reconciliation and Democracy (LURD), and the Movement for Democracy in Liberia (MODEL).[51] The cease-fire agreement required that the peace accord (i.e., the Accra Agreement) provide for the "formation of a transitional government, which will not include the current President in accordance with his June 4, 2003, declaration [to resign] in Accra, made at the inauguration of the 'ECOWAS Peace Talks.'"[52] Furthermore, without referencing any legal basis or authority, Article 35 of the Accra Agreement stated that the "parties agree on the need for an extra-Constitutional arrangement that will facilitate its [NTGL] formation and take into

[50] The parliament of Sierra Leone adopted the Lomé Peace Agreement (Ratification) Act on July 15, 1999, nearly eight weeks after the coming into force of the Lomé Agreement, to provide a retroactive veil of legality over the extralegal accord. Nevertheless, the act remained unlawful because it substantially conflicted with and abrogated Sierra Leone's constitution and rights therein granted – a fact that casts further doubt on the lawfulness of the agreement but that also clashes with legislative procedure and protocol. Under Sierra Leonean law, a parliamentary act must precede rather than proceed state action that is the subject of legislation.

[51] Accra Agreement, *supra* note 3, Article 35. See also Agreement on Cease-fire, *supra* note 52, Article 8(i).

[52] AccraAgreement , *supra* note 3, Article 8(i).

account the establishment and proper functioning of the entire transitional arrangement."[53] Article 35 implemented the extraconstitutional arrangement by suspending

> provisions of the present Constitution of the Republic of Liberia, the Statutes and all other Liberian laws, which relate to the establishment, composition and powers of the Executive, the Legislative and Judicial branches of the Government;[54] and . . .
>
> . . . for the avoidance of doubt, relevant provisions of the Constitutions, statutes and other laws of Liberia which are inconsistent with the provisions of this Agreement.[55]

The Accra Agreement also declared that all other provisions of the 1986 Constitution of the Republic of Liberia that were not suspended would remain in force[56] and that all suspended rules (e.g., constitution, statutes, and other laws) under the agreement would be "restored with the inauguration of the elected Government by January 2006."[57] In this sense, the suspension of the constitution of order under the Accra Agreement was both temporary and permanent – though the 1986 constitution remained relevant and in force, at least in part, the new legal and political order the agreement established was irreversible. Moreover, the accord's explicit suspension of the constitution, statutes, and other laws inconsistent with it, including those protecting fundamental rights such as the right to bring a claim challenging the legality of the agreement or to choose political representatives through an electoral process, were, even if transitory, irreversible and therefore permanent.

The legal authority for power sharing under the Lomé Agreement is more ambiguous than in the Accra Agreement. Article 10 of the Lomé Agreement mandated that

> no constitutional or any other legal provision prevents the implementation of the present Agreement, the Government of Sierra Leone shall take the necessary steps to establish a Constitutional

[53] Accra Agreement, *supra* note 3, Article 35(1)(a).
[54] *Id.*, Article 35(1)(b).
[55] *Id.*, Article 35(1)(c).
[56] *Id.*, Article 35(1)(d).
[57] *Id.*, Article 35(1)(e).

> Review Committee to review the provisions of the present Constitution, and where deemed appropriate recommend revisions and amendments, in accordance with Part V, Section 108 of the Constitution of 1991.[58]

In this sense, the Lomé Agreement was accorded superior legal authority over the Sierra Leonean Constitution, yet paradoxically and simultaneously, the agreement unwittingly recognized its superior standing and sought to procedurally abide by its terms when "recommending revisions and amendments" to the constitution.[59] In addition, Article 10 is the only provision in the Lomé Agreement to specifically consider the relation of domestic rules to the implementation of the power-sharing provisions in the agreement.[60]

The only possible legally valid source of authority for the Lomé Agreement in domestic law was the post-Lomé retroactive adoption of the Lomé Peace Agreement (Ratification) Act of 1999 by the parliament of Sierra Leone several weeks after the Lomé Agreement came into force.[61] Needless to say, this attempt at ex post facto authentication and authorization was unlawful under Sierra Leonean law because legislation must precede, not proceed, extralegal government action – meaning that Sierra Leonean law does not provide for retroactive legislative authentication of government action generally, and certainly not acts otherwise unlawfully taken. Moreover, the Ratification Act presented several temporal and spatial problems that challenge its standing as a legitimate and binding act of parliament.[62]

As previously stated, unlike the bold character of Article 35 of the Accra Agreement and the ambiguous nature of Article 10 of the Lomé Agreement, the Abuja Agreement did not provide or attempt to offer any inkling of a legal basis or authority for its existence. In this sense, its legal standing is more dubious than the Accra and Lomé accords because it derives solely from an extraconstitutional political edict largely imposed by military junta. On the international level, UN

[58] Lomé Agreement, *supra* note 6, Article 10.
[59] *Id.*
[60] *Id.*
[61] The Lomé Peace Agreement (Ratification) Act, July 15, 1999 (commencing on July 22, 1999).
[62] The legal problems associated with the act are discussed in Chapter 6.

Security Council resolutions welcomed all three accords but did not expressly sanction or endorse their power-sharing aims.[63]

2. Governance

The power-sharing provisions in the Accra and Lomé agreements contrast in an essential way. The Accra Agreement provided for "hard" power sharing: a robust, comprehensive, and all-encompassing form of unlawful political power sharing that explicitly purged the government of all former principal state officials in the executive, legislative, and judicial branches of government. The Accra Agreement invented highly illicit power sharing that suspended the constitution of order and the rule of law and established a new, albeit transitional, government apparatus composed of representatives of the warring parties, political parties, and civil society groups, while implicitly granting them amnesty. The Abuja Agreement instituted a type of "moderate" power sharing: an inelastic form of political power sharing that illegally restructured the balance of political power by evenly distributing government authority among the warring parties. The Abuja Agreement's extraconstitutional distribution of power ceded 50 percent of key government ministries and secretariats as well as the legislature to the junta in what was deemed a "Government of National Unity." This form of power sharing differs from the form instituted by the Accra Agreement because the constitutional order, legislature, and high court were not disbanded. The Lomé Agreement established a form of "soft" power

[63] In fact, it can be argued that the UN did not sanction the Lomé Agreement; rather, the special representative of the UN secretary-general attached a reservation to the agreement stating that it interpreted Article 9, concerning unconditional amnesty, as not applying to "international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." Michael Fleshman, *Sierra Leone: Peacekeeping under fire*, Africa Recovery (July 2000), at 8, available at http://www.un.org/ecosocdev/geninfo/afrec/subjindx/142peack.htm. Hence, since the UN formally determined that amnesty did not apply to international crimes under international law, how can it justify placing alleged war criminals in positions of authority? There is also the corollary issue of whether the UN Security Council possesses the legal authority to sanction agreements that violate customary international law or preemptory *jus cogens* norms. Specifically, does the UN Security Council have the legal authority to sanction power-sharing deals that override fundamental human rights and a people's right of internal self-determination or that deprive citizens of their democratic entitlement, retributive justice, and reparation? This is a fertile area of research in need of deep exploration.

sharing: a delicate form of incorporative political power sharing that illegitimately required the government of Sierra Leone to modify or expand its cabinet by appointing RUF leaders to senior- and junior-level cabinet positions with the hope of establishing a government of national unity.[64] The Lomé Agreement did not require robust changes at the top levels of government, legislature, or judiciary as the senior government officials at every level of government largely remained intact.

The Accra Agreement provided for the establishment of a transitional government, which replaced the governing structure of the old regime in entirety, temporarily refashioning the state's political blueprint or constitution of order.[65] Accra mandated the NTGL to "ensure scrupulous implementation" of the accord, including execution of the June 17, 2003, cease-fire agreement;[66] to oversee, coordinate, and implement the "political and rehabilitation programs" agreed on in the agreement;[67] to promote national reconciliation to restore peace and stability to the state and its population;[68] and to assist in the preparation of the October 2005 elections.[69] Under the Accra Agreement, the NTGL replaced Taylor's regime and established three central branches of government:

1. a seventy-six-member National Transitional Legislative Assembly (NTLA), which took the place of the Liberian legislature (government of Liberia: twelve seats; LURD: twelve seats; MODEL: twelve seats; political parties: eighteen seats; civil society and special interest groups: fifteen seats; counties: fifteen seats)[70]
2. an executive headed by a transitional chairman and vice chairman and cabinet, which included twenty-two ministries and twenty-two public corporations divided among the warring factions, political parties, and civil society[71]

[64] Lomé Agreement, *supra* note 6, Articles 3–5.
[65] Accra Agreement, *supra* note 3, Article 21.
[66] *Id.*, Articles 22(1) and 22(2)(a).
[67] *Id.*, Article 22(2)(b).
[68] *Id.*, Article 22(2)(c).
[69] *Id.*, Article 22(2)(d).
[70] *Id.*, Article 24.
[71] *Id.*, Articles 25 and 26. For a detailed account of the functional ministries, public corporations, and specific positions allocated to the warring parties, see Allocation of Cabinet Positions, Public Corporations and Autonomous Agencies/Commission under the

3. a judiciary that remained structurally intact, although Article 27 of the Accra Agreement dismissed the entire supreme court[72]

As already noted, the Accra Agreement also created the GRC to be a "vehicle of the principles of good governance in Liberia."[73] The GRC was mandated to review and, as necessary, modify programs on the promotion of good governance;[74] develop public-sector management reforms;[75] "ensure transparency and accountability in governance in all government institutions and activities, including acting as the Public Ombudsman";[76] "ensure subsidiarity in governance through decentralization";[77] ensure that all appointments are geographically balanced and well qualified;[78] help create a private- and public-friendly investor climate;[79] and report to the NTLA on progress made in the practice of good governance in the state.[80] Hence hard power sharing under the Accra Agreement unwittingly dismantled and arguably shattered the apparatus of the state while attempting to invent a new one through power sharing.

Similarly, as noted previously, the Abuja Agreement sought to establish a "Government of National Unity," which resulted in the Bissauan government surrendering half its government ministries and ministerial-level cabinet positions to the junta, including the ministries of defense and freedom fighters for the country, internal administration, economy and finance, and social welfare and the secretariats of state for the treasury, commerce, industry, tourism, arts and crafts, social communication, and parliamentary affairs. The deal restructured the balance of state power without restructuring the body politic.

NTGL, Annex 4 of the Comprehensive Peace Agreement between the Government of Liberia (GOL), the Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL) and the Political Parties, Accra, Ghana, August 18, 2003, available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_ceasefire_06172003.pdf.

72 Accra Agreement, *supra* note 3, Article 27(2).
73 *Id.*, Article 16(1).
74 *Id.*, Article 16(2)(a).
75 *Id.*, Article 16(2)(b).
76 *Id.*, Article 16(2)(c).
77 *Id.*, Article 16(2)(d).
78 *Id.*, Article 16(2)(e).
79 *Id.*, Article 16(2)(f).
80 *Id.*, Article 16(2)(g).

The Lomé Agreement called for a "Broad-based Government of National Unity," which maintained rather than refashioned the existing constitution of order and its key actors by simply incorporating RUF leaders into a slightly enlarged cabinet. The government of Sierra Leone agreed to appoint RUF members to one senior cabinet position, such as minister of finance, foreign affairs, or justice, and to three other cabinet posts. It also consented to giving the RUF four deputy minister positions.[81] This arrangement did not seriously affect the structure of the body politic, although like the power sharing under the Accra Agreement, it raised several legal, moral, and legitimacy-based questions.[82]

One rationale for the trichotomy between hard, moderate, and soft power sharing in the Accra, Lomé, and Abuja agreements is that the government of Charles Taylor of Liberia, although democratically elected, was considered despotic, a force for evil, and a destabilizing presence in the region – a lawfully constituted government that debatably functioned unlawfully. The government of Tejan Kabbah of Sierra Leone, however, was widely considered good, democratic, and committed to peace, justice, and rule of law. João Bernardo Vieira, who was elected in a close runoff with 52 percent of the vote, becoming the country's first democratically elected president in a multiparty election, was considered acceptable, democratic, and committed to development. In addition, the Kabbah and Vieira governments also benefited from having ECOMOG or West African forces present during and after peace negotiations. Hence their governments debatably had greater authority, security, and thus negotiating strength with rebels and junta than Taylor's regime. In addition, LURD and MODEL were widely perceived as having more legitimacy than, for example, the brutal RUF because they fought an unpopular regime headed by a former warlord and did not have a notorious reputation for malevolence or for brutalizing and butchering civilians.

[81] Lomé Agreement, *supra* note 6, Article 5.

[82] Telephone interview with James Jonah, former Sierra Leone ambassador to the United Nations (June 5, 2005).

Despite this trichotomy, the objective of all three accords was to divide or apportion political power among the warring factions and junta with the hope of serving the public good by fostering peace, security, and stability. Nonetheless, the agreements shared power in dissimilar ways, triggering different legal issues. The variegated impacts and implications of such power sharing raise questions about the extent to which political power sharing with *pirates de la loi* necessitates a new toolkit or model distinguishable from the predominate brand employed in ethnic or minority rights–based conflicts. As previously noted, the Accra Agreement went as far as to dismiss "all cabinet Ministers, Deputy and Assistant Ministers, heads of autonomous agencies, commissions, heads of public corporations and State-owned enterprises of the current" government of Liberia.[83] It also dismissed all members of the Liberian legislature and supreme court, replacing the former with the NTLA while empowering the NTGL to appoint new judges.[84] In essence, the Accra Agreement purged the entire senior bureaucratic class of government. Conversely, the Lomé Agreement provided for a "broad-based government of national unity through cabinet appointments" in a "moderately expanded cabinet,"[85] and the Abuja Agreement established a "Government of National Unity" in which key positions were equally divided between the government and junta. Still, all three agreements permitted *pirates de la loi* to transform into political parties or partisan leaders and compete for and hold public office. These types of warlord-friendly agreements are standard fare in collapsed states where violent coercion and international ambivalence infuse peace prescriptions. In this sense, and to differing degrees, the accords provided a legal platform for warlords, junta, and their cohorts to acquire political power through illegal peace.

The phenomenon of power sharing in Liberia, Sierra Leone, and Guinea-Bissau existed not only in the political domain but also in the economic realm. The next section briefly highlights the economic components of the accords.

[83] Accra Agreement, *supra* note 3, Article 21(3).
[84] *Id.*, Article 27(2).
[85] Lomé Agreement, *supra* note 6, Articles 5(1) and 5(3).

3. Economically Related Commissions

The Accra and Lomé agreements established the Contract and Monopolies Commission (CMC) and the Commission for the Management of Strategic Resources, National Reconstruction, and Development (CMRRD), respectively. These commissions are crucial to governance because strategic natural resources form the backbone of the economies of Liberia and Sierra Leone. Factional vying over national resources featured prominently in the civil wars and peace negotiations that produced the accords. The Abuja Agreement did not establish any economic commissions as it primarily focused on power sharing and governance-related issues. One reason for this dichotomy is because the economy of Guinea-Bissau is not fuelled by mineral resources (e.g., diamonds or timber), but rather farming, fishing, and the harvesting of nuts. While its mineral resource capacity is largely unexplored, violent conflict in Guinea-Bissau is generally rooted in ethno-political rivalry over control of the body politic given its monopoly on national resources and ability to generate illicit revenue.

The Accra Agreement created the CMC to oversee the contracting activities of the NTGL to ensure that the government operated in a transparent, nonmonopolistic fashion[86] and dealt with all public financial and budgetary obligations according to Liberian law and universally accepted norms of practice. The CMC was charged with monitoring corruption of public officials and publishing "all tenders in the media and on its own website to ensure . . . competition and transparency"[87] as well as "a record of all commercial entities that participated and succeeded in reviewing contracts."[88] The institution of sound macroeconomic policy that would contribute to sustainable development and resource mobilization with international organizations was also an important duty of the CMC.[89] It was composed of five members whom the transitional chairman appointed and the

[86] Accra Agreement, *supra* note 3, Article 17(1).
[87] *Id.*, Article 17(2)(b)(c).
[88] *Id.*, Article 17(2)(c).
[89] *Id.*, Article 17(2)(d)(e).

NTLA confirmed.[90] The CMC's primary function appears to have been to ratify executive deals not monitor them.

The Lomé Agreement established the CMRRD as an autonomous entity to ensure that the government exercised full control over the "exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone."[91] It sanctioned the CMRRD to secure and monitor legitimate utilization of the state's precious resources, which it deemed of "strategic importance for national security,"[92] and gave the entity numerous duties; foremost among these were security,[93] licensing,[94] contracting,[95] public redistribution of all proceeds of all transactions of gold and diamonds,[96] and public disclosure of all records concerning its transactions.[97] Ironically, Article 7(12) of the agreement determined that RUF leader Foday Sankoh should chair CMRRD's board. The CMRRD comprised nine other members, including two representatives of government, two representatives from the political party apparatus of the RUF, three representatives of civil society, and two representatives from other political parties appointed by the Sierra Leonean Parliament.[98] What is perhaps most surprising about the agreement's approach to managing natural resources was the willingness of the government and RUF to support an "amendment to the Constitution to make the exploitation of gold and diamonds the legitimate domain of the people of Sierra Leone,"[99] what ever that means.

[90] *Id.*, Article 17(3)(a).
[91] See Lomé Agreement, *supra* note 6, Article 7(1). The Lomé Agreement seemed to implement a policy of quasi-nationalization, given that it forbade the sale and export of gold and diamonds unless sanctioned by the commission and rendered null and void all existing concessions. *Id.*, Article 7(2).
[92] *Id.*, Article 7(1).
[93] *Id.*, Article 7(4).
[94] *Id.*, Article 7(3).
[95] *Id.*, Article 7(5).
[96] *Id.*, Article 7(6).
[97] *Id.*, Article 7(10).
[98] *Id.*, Article 7(12).
[99] *Id.*, Article 7(14). According to the agreement, profits from gold, diamonds, and other natural resources should be used for the educational, health, and infrastructural development of Sierra Leoneans and the "compensation of incapacitated war victims." *Id.*

F. CONCLUSION

For analytical purposes, the power-sharing provisions in the Accra, Lomé, and Abuja accords were divided into five broad categories, including cease-fire, military, human rights, implementation, and power sharing. The accords employed different forms of power sharing – hard, moderate, and soft – all of which were extraconstitutional in nature. They purported to establish frameworks for the protection of human rights and democracy and the eventual normalization of the rule of law. The agreements were designed with the ideal of creating a modicum of peace to allow for transitional governance, reconstitution of the rule of law, and reestablishment of the body politic and an instrument of order to create peace, control strategic resources, and maximize revenues for development. To varying and different degrees, the Accra, Lomé, and Abuja agreements suspended, altered, or simply ignored the constitution of order and rule of law and, by extension, transgressed fundamental rights by awkwardly providing implicit and explicit amnesty and key positions in government to *pirates de la loi*. Consequently, the accords irreversibly deformed their local sociopolitical orders, raising critical questions about their legality and political viability. The next chapter examines the legality of these power-sharing exchanges euphemistically referred to as "guns for jobs."

6 THE DOMESTIC LEGALITY OF POWER SHARING

The preambles of the Accra, Lomé, and Abuja agreements include all of the bells-and-whistles language of democracy. They make the people the subject of their concern, along with the accompanying mixed basket of peace, security, stability, human rights, justice, rule of law, development, democracy, and good governance.[1] An examination of the power-sharing provisions that underlie the preambles, however, raises critical questions about their legality, morality, and sincerity.[2] This chapter and the ones that follow expose the schizophrenic or stark dichotomy between the accords' luminous preambles and ominous articles.

The most effective way to assess the legality of power sharing is to assess its lawfulness against preexisting constitutional rules that supposedly govern, regulate, and control state action. These rules include, among others, government powers as determined by domestic laws, including organic constitutions, national legislation, and court rulings. The analysis that follows examines the extent to which the Accra,

[1] Agreement on Ceasefire and Cessation of Hostilities between the Government of the Republic of Liberia and Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia, Accra, Ghana, prmbl, June 17, 2003, available at http://www.usip.org/files/file/resources/collections/peace_agreements/liberia_ceasefire_06172003.pdf [hereinafter Agreement on Ceasefire]; Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), prmbl, Lomé, Togo, July 7, 1999, available at http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Agreement]; Agreement between the Government of Guinea-Bissau and the Self Proclaimed Military Junta, prmbl, Abuja, Nigeria, November 1, 1998.

[2] The following analysis is primarily concerned with legal rather than moral or political questions raised by power sharing; however, moral dimensions are inseparable from legal ones and are undoubtedly examined within the ambit of the civil rights, human rights, and governance analyses.

Lomé, and Abuja agreements comported with such rules by employing the neo-Kadeshean approach, which incorporates, albeit minimally, textualist interpretive and original intent doctrines. It principally relies on the constitutions of Liberia, Sierra Leone, and Guinea-Bissau and related peace agreements and secondarily on legislation, jurisprudence and scholarly writings.

Because the constitutions of Liberia, Sierra Leone, and Guinea-Bissau are applicable to the Accra, Lomé, and Abuja accords, respectively, and are similar in structure and content, the analysis that follows is divided into four sections: state authority, fundamental rights, executive and legislative powers, and judiciary. This chapter employs the literalist aspects of the neo-Kadeshean model (NKM) more rigidly than Chapters 7 and 8, as constitutional jurisprudence on the central issues underlying political power sharing is virtually nonexistent in these states.[3] Moreover, it is not clear that any such jurisprudence would be applicable to modern armed conflict and coups d'état in Liberia, Sierra Leone, and Guinea-Bissau; the political culture in these states dictates that the judicial branch too often serves as a proxy for executive prerogatives as opposed to being an independent arbiter of them. In this context, depending on the character of the regime in power, a state's political ethos may overhaul its legal and jurisprudential cultures. For example, in 1999, U.S. courts found that as a matter of law, Liberia's courts were unfair, in a state of disarray, and not constitutive of "a system of jurisprudence likely to secure an impartial administration of justice," particularly during the civil war.[4] Unfortunately, the Accra Agreement did not facilitate a greater appreciation for the rule of law. On the contrary, its extraconstitutional nature undermined the administration of justice by suspending portions of the constitution and dismissing the supreme court.

[3] The extent to which, if any, the constitutional jurisprudence of Liberia, Sierra Leone, and Guinea-Bissau endows the executive branch powers to suspend and make extraconstitutional rules during times of civil war remains largely unexplored and is in need of research. There is no evidence to support the conclusion that the constitutions of Liberia, Sierra Leone, and Guinea-Bissau extended such powers to executive branches of government.

[4] *Bridgway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999); *Bridgway Corp. v. Citibank*, 201 F.3d 134 (2d Cir. 2000).

The Accra and Lomé accords abrogated no less than thirty provisions in the constitutions of Liberia and Sierra Leone, and the Abuja Agreement violated numerous articles in the Bissauan Constitution. The hard power sharing provided for in the Accra Agreement is significantly more violative of domestic law than the soft and moderate power sharing in the Lomé and Abuja agreements, respectively. Nonetheless, all three accords trampled on superior domestic rules. For these reasons, and given that this is the first study of the legality of political power sharing and peace agreements, a comprehensive examination of their lawfulness under domestic law is essential.

The 1986 constitution of the Republic of Liberia contains eight chapters and ninety-seven articles and replaced the Liberian Constitution of 1847.[5] It is modeled on the Constitution of the United States. The 1991 constitution of Sierra Leone contains fourteen chapters and 191 articles and replaced the 1978 constitution of Sierra Leone.[6] It is based on the common law of the United Kingdom. The 1996 constitution of the Republic of Guinea-Bissau includes seven chapters and 133 articles and replaced the 1984 constitution of Guinea-Bissau. It draws on the civil law of Portugal and the common law and constitutional law practices of other West African nations.

A. STATE AUTHORITY

The constitutions of Liberia, Sierra Leone, and Guinea-Bissau are, by their own terms, intended to establish a framework of good governance that guarantees security, freedom, democracy, and justice. The preamble of the Liberian Constitution establishes a system of government "for the purpose of *promoting unity, peace, stability, equality, justice and human rights* under the law."[7] According to its constitution, Sierra Leone was established on the "principles of Freedom, Democracy and Justice,"[8] and the "security, peace, and welfare of the people

[5] Constitution of the Republic of Liberia, 1986, prmbl.
[6] Constitution of Sierra Leone, 1991, prmbl.
[7] Constitution of the Republic of Liberia, 1986, prmbl; emphasis added.
[8] Constitution of Sierra Leone, 1991, Article 5(1).

of Sierra Leone shall be [is] the primary purpose and responsibility of Government."[9] The Bissauan Constitution states that "national sovereignty" is "*vested in the people*" who "exercise political power either directly or through democratically elected agents of power."[10] It further notes that Guinea-Bissau is a "free and democratic society" preoccupied with "social justice" and governed "*by legality, by right, and by the enjoyment of fundamental liberties*" and "imbued with *humanism* . . . reflected in *rights and liberties guaranteed to citizens*."[11]

The constitutions of all three states represent the supreme law of the land. The constitutions of Liberia, Sierra Leone, and Guinea-Bissau sit atop the hierarchy of domestic law, trumping any and all domestic rules, including domestic peace agreements. Article 2 of the Liberian Constitution states that "this Constitution is the *supreme and fundamental law* of Liberia and its provisions shall have *binding* force and effect on all authorities and persons throughout the Republic."[12] The Sierra Leonean Constitution similarly declares that "sovereignty belongs to the people of Sierra Leone from whom Government through this Constitution *derives all its powers, authority and legitimacy*."[13] The Bissauan Constitution states that the "State is *subordinate to the Constitution* and is based on *democratic legality*"[14] and that it is "a constitutionally instituted democracy, founded on national unity and *effective popular participation in the performance, control, and direction* of public affairs."[15] Additionally, all three constitutions may only be modified, amended, or suspended by following the expressed provisions and procedures enshrined within them.[16] Constitutions represent the apex of domestic law and predominate any and all conflicting rules, doctrine, norms, edicts, and pacts, including extraconstitutional peace arrangements. Article 2 of the Liberian Constitution states that "any laws, treaties,

[9] *Id.*, Article 5(2)(b).
[10] Constitution of Guinea-Bissau, 1996, Article 2; emphasis added.
[11] Constitution of the Republic of Guinea-Bissau, 1996, prmbl; emphasis added.
[12] Constitution of the Republic of Liberia, 1986, Article 2; emphasis added.
[13] Constitution of Sierra Leone, 1991, Article 5(2)(a); emphasis added.
[14] Constitution of Guinea-Bissau, 1996 Article 8(1).
[15] Constitution of Guinea-Bissau, 1996 Article 3.
[16] Constitution of the Republic of Liberia, 1986, Article 2; Constitution of Sierra Leone, 1991, Article 171(15); Constitution of Guinea-Bissau, Articles 127–131.

statutes, decrees, customs and regulations found to be inconsistent with it shall, to the extent of the inconsistency, be *void* and of no *legal effect*."[17] In similar fashion, the Sierra Leonean Constitution provides that it "shall be the *supreme* law of Sierra Leone and any other law found to be inconsistent with any provision of [the] Constitution shall, to the extent of the inconsistency, be *void* and of *no effect*."[18] The Bissauan Constitution states that the "validity of laws and other acts of the State and of local power *depend on their conformance* with the Constitution"[19] and that no proposal for revision may formally be considered or acted on "during a state of siege or emergency."[20] In addition, the Bissauan Constitution provides that no proposal or revision shall affect, among others, its unitary structure; lay statutes; *rights, freedoms, and guarantees of the citizens*; universal suffrage, political and expressive pluralism and the right to democratic opposition; and the independents of the courts.[21] From this background, in all three states, national constitutions are supreme; hence, it is abundantly clear that as legally binding agreements that purport to form a part of national law, the Accra, Lomé, and Abuja accords must comport with constitutional law. And any law, treaty, agreement, statute, or custom that is inconsistent with them and/or that seeks to revise, suspend, or amend fundamental rights is unlawful and void. To argue otherwise is to argue into nothingness – a black hole of unsubstantiated authority where the rule of law looms fictitiously.

Despite that the constitutions of Liberia, Sierra Leone, and Guinea-Bissau predominate and sit atop the hierarchy of national law, the Accra, Lomé, and Abuja agreements serendipitously contravened them. For example, as noted earlier, the Accra Agreement called for an "extra-Constitutional arrangement" that included the suspension of the Liberian Constitution, statutes, and all other Liberian laws that concern government, explicitly annulling any Liberian law, including

[17] Constitution of the Republic of Liberia, 1986, Article 2; emphasis added.
[18] Constitution of Sierra Leone, 1991, Article 171(15); emphasis added.
[19] Constitution of Guinea-Bissau, 1996 Article 8(2); emphasis added.
[20] Constitution of Guinea-Bissau, 1996 Article 131.
[21] Constitution of Guinea-Bissau, 1996 Article 130(a),(b),(e),(g),(h),(j).

the constitution, that conflicted with the agreement.[22] Similarly, the Lomé Agreement required the government of Sierra Leone to

1. remove any legal impediments that may prevent the Revolutionary United Front (RUF)-SL from holding cabinet and other positions[23]
2. "take administrative actions to implement the commitments" in the agreement and "in the case of enabling legislation . . . draft and submit to Parliament within thirty days" of the coming into force of the agreement the "relevant bills for their enactment into law"[24]
3. execute the "appropriate legal steps" to grant "absolute and free pardon" to Foday Sankoh and all combatants and collaborators for any action in pursuit of their objectives[25]
4. ensure that "no constitutional or any other legal provision prevents the implementation" of the agreement[26]

The Lomé Agreement also established a Constitutional Review Committee to review the constitution and, "where deemed appropriate, recommend revisions and amendments in accordance with . . . the Constitution."[27] In essence, the Lomé Agreement, an ad hoc political pact between warring contestants that had no lawful legal standing, mysteriously derived the legal and political authority to override the constitution and reconstitute the executive and legislative branches of government. Despite its extraconstitutional reconstitution of order and authority, the Abuja Agreement did not explicitly seek to suspend or annul the Bissauan Constitution or address any constitutional, procedural, or implementation-related issues; it simply ignored them.

Thus the extent to which the political elites and institutions that negotiated, sanctioned, and morally guaranteed the Accra, Lomé, and Abuja accords sought to circumvent domestic law, albeit unwittingly and unlawfully, serves as the best evidence of their recognition of its superior standing.

[22] Accra Agreement, *supra* note 1, Article 35.
[23] Lomé Agreement, *supra* note 1, Article 5(5).
[24] *Id.*, Article 7(13).
[25] *Id.*, Article 9(1).
[26] *Id.*, Article 10.
[27] *Id.*, Article 10.

B. FUNDAMENTAL RIGHTS

The Liberian Constitution requires the government of the republic, at the most fundamental element of state governance, to strengthen and unify the people of Liberia into one body politic and enact laws that promote and encourage all Liberians to participate in government.[28] Moreover, the government is obligated to "preserve, protect and promote positive Liberian culture,"[29] including a democratic political culture that encompasses traditional values, with a view to creating a viable civic culture. The Sierra Leonean Constitution declares that as a fundamental principle of state policy, "the participation of the people in the governance of the State shall be ensured in accordance with the provisions of [its] Constitution."[30] The Bissauan Constitution proclaims that state sovereignty and the exercise of political power are vested in its people and that the state is subordinate to the constitution, which is based on democratic legality.[31] Hence unmitigated constitutional supremacy and the right to internal self-determination are core tenets of all three constitutions.

The constitutions of Liberia, Sierra Leone, and Guinea-Bissau protect the fundamental rights and freedoms of the individual, including, among other rights, the rights to life, liberty, security of the person, enjoyment of property, privilege, to *vote*, and equal protection before the law.[32] The Liberian Constitution also guarantees the public the right to "be informed about the government and its functionaries."[33] The Sierra Leonean Constitution requires the state to "enforce the rule of law and ensure the efficient functioning of Government services."[34] The Bissauan Constitution mandates that "no one shall be submitted to torture or to cruel, inhumane or degrading treatment"[35] and

[28] Accra Agreement, *supra* note 1, Article 5(a).
[29] *Id.*, Article 5(b).
[30] Constitution of Sierra Leone, 1991, Article 5(c).
[31] Constitution of Guinea-Bissau, 1996 Articles 2 and 8.
[32] Constitution of the Republic of Liberia, 1986, Articles 20(a), 11(b), 11(c); Constitution of Sierra Leone, 1991, Articles 6(4) and 15(a–d); Constitution of Guinea-Bissau, 1996, Articles 24–58.
[33] Constitution of the Republic of Liberia, 1986, Article 15(c).
[34] Constitution of Sierra Leone, 1991, Article 6(4).
[35] Constitution of Guinea-Bissau, 1996, Article 37(2).

guarantees individual and collective rights; economic, social, and cultural rights; a right of peoples to self-determination; and informational rights and prohibits the economic and social exploitation of Bissauans.[36] In addition, the Bissauan Constitution acknowledges the equivalency of fundamental constitutional rights and those guaranteed under international law.[37] Notwithstanding, all three accords prevented Liberians, Sierra Leoneans, and Bissauans from meaningfully participating in the negotiations that produced the power-sharing accords – agreements that altered the constitution of order and trampled on fundamental rights in contravention of nonderogable constitutional rights and international law.[38]

The Liberian Constitution guarantees that if any person or association believes any of its rights guaranteed under the "Constitution or any legislation or directives [to be] constitutionally contravened [by the government], that person or association may invoke the privilege and benefit of court direction, order of writ, including a judgment of unconstitutionality."[39] The Sierra Leonean Constitution permits any person who believes that his or her fundamental human rights have been violated by the government to bring a claim directly before the supreme court for redress.[40] Similarly, the Bissauan Constitution guarantees all citizens the "right of access to judicial bodies to seek redress for violations of their constitutionally recognized rights and the law."[41] Additionally, the right of access to a judicial remedy or "judicial protection . . . cannot be denied on economic grounds."[42] The constitutions of all three states explicitly provide for a right of redress for official acts or omissions that result in a violation of fundamental rights, freedoms, or guarantees or another harmful act,[43] and they all include a variation of the following language, which provides that any person

[36] Constitution of Guinea-Bissau, 1996, Articles 11–13, 17, 18.
[37] Constitution of Guinea-Bissau, 1996, Article 29.
[38] Albeit inadequate, more civil society groups participated in the negotiation of the Accra Agreement than in the Lomé and Abuja accords.
[39] Any claims brought against government originate in the claims court and, on appeal, are considered by the supreme court. Constitution of the Republic of Liberia, 1986, Article 26.
[40] Constitution of Sierra Leone, 1991, Article 28.
[41] Constitution of Guinea-Bissau, 1996, Article 32 and 35.
[42] *Id.*
[43] Constitution of Guinea Bissau, 1996, Article 33.

who is "injured by an act of Government or any person acting under its authority, whether in property, contract, tort or otherwise, shall have the right to bring suit for appropriate redress."[44] Notwithstanding, the accords did not provide or consider providing any venue of redress for disgruntled citizens intent with challenging the accords' terms.

The power-sharing provisions in the Accra, Lomé, and Abuja agreements violated the most fundamental principles of state policy enshrined in their respective constitutions, namely, those granting people the right to participate in government and foster a democratic political culture. The processes that produced the accords were not democratic or transparent; there were no national referendums or other procedures by which people could vote for or otherwise select their leaders. There were only private negotiations between warlords and incumbent political elites facilitated by regional and international institutions. With the exception of a small number of civil society institutions, the masses of Liberians, Sierra Leoneans, and Bissauans were not invited to participate in peace negotiations through, for example, a national referendum or other national consensus-building measure. The nonprofit organizations that partook in the peace processes in Liberia and Sierra Leone represented a scant minority. Consequently, all three political systems were overhauled by dubious legal processes that forced citizens to live under the rule of warlords and charlatans. Again, the modus operandi that produced the agreements did not provide Liberians, Sierra Leoneans, and Bissauans with the opportunity to realize their most fundamental political rights: the rights to a remedy, due process, and internal self-determination (i.e., the right to choose the form of government under which they will live and the persons who will represent them). In addition, the accords violated the constitutional rights of citizens to be informed about the workings of government,[45] which is particularly troubling given that their governments contracted away this right in the "public good."[46]

[44] Constitution of Sierra Leone, 1991, Article 28.

[45] It is important to reemphasize the point that the Accra, Lomé, and Abuja accords were negotiated outside of Liberia, Sierra Leone, and Guinea-Bissau, respectively, and hence prevented their populations from being informed about, or participating in, the affairs of government.

[46] Such behavior would appear to have given Sierra Leoneans a basis on which to bring an action against the government. Constitution of Sierra Leone, 1991, Article 127(1).

Another problematic aspect of the Accra, Lomé, and Abuja accords was their failure to, in accordance with the laws of Liberia, Sierra Leone, and Guinea-Bissau, provide any mechanism for considering or adjudicating individual civil and criminal claims arising from their respective armed conflicts and coups or for challenging the constitutionality of the agreements and their infringement of fundamental rights.[47] The Accra and Lomé accords did, however, make provision for politically toothless truth and reconciliation commissions to provide a venue for victims and perpetrators to "share their experiences" or "tell their stories," which was supposed to provide "a clear picture of the past to facilitate *genuine* healing and reconciliation."[48]

Finally, the constitutional and criminal laws of Liberia, Sierra Leone, and Guinea-Bissau are unmistakably clear about the duty of the state to prosecute persons suspected of committing murder, treason, and crimes against the state[49] as well as the limited powers of the president to pardon such crimes.[50] Yet the Accra and Lomé accords did not consider the issue of criminal liability outside the context of amnesty.[51] The Abuja Agreement did not consider the issue of criminal responsibility seemingly because the coup that precipitated it did not trigger widespread armed conflict, thereby providing implicit amnesty to the

[47] See Constitution of the Republic of Liberia, 1986, Article 26; Constitution of Sierra Leone, 1991, Article 28. In the wake of the failure of the Lomé Agreement to make viable peace, the government of Sierra Leone and the UN jointly created the Special Court for Sierra Leone "to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996." About the Special Court for Sierra Leone, see http://www.sc-sl.org/.

[48] Accra Agreement, *supra* note 203, Article 8; Lomé Agreement, *supra* note 135, Article 25(1). The Act Establishing the Truth and Reconciliation Commission of Liberia did provide for a balanced approach to reconciliation, justice, and reparation as a part of its core mandate.

[49] Like most national constitutive instruments, the constitutions of Liberia, Sierra Leone, and Guinea-Bissau do not include detailed penal law. While all three nations have comprehensive penal codes, their constitutions do expressly forbid treason or crimes against the security of state and explicitly or tacitly recognize the applicability of international human rights and humanitarian law. Act Adopting a New Penal Law and Repealing Sections 31.3 & 32.1 of the Criminal Procedure Law, July 19, 1976 (Liberia); Treason and State Offences Act 1963, Act No. 10 of 1963 (Sierra Leone).

[50] The term *heinous crime* refers to crimes against the state and the individual that amount to capital offenses.

[51] See Accra Agreement, *supra* note 1, Article 34; Lomé Agreement, *supra* note 1, Article 9.

junta for treason and human rights violations. Though it is not necessary to recount the innumerable atrocities committed by the warring factions in Liberia and Sierra Leone (such crimes have been extensively documented),[52] it is important to highlight how power sharing with warlords, rebels, and junta responsible for committing atrocities contravenes domestic rules.[53]

Setting aside the horrific crimes committed by the warring parties in Liberia, Sierra Leone, and Guinea-Bissau against individuals and groups of persons during their respective civil wars and coups, the various categories of crimes they committed against the state (including treason, making war against the state, armed insurrection, advocating armed insurrection, paramilitary activities, sabotage, and espionage) are also daunting. More alarming, perhaps, are the implicit and explicit amnesties all three accords awarded to rebels. For example, the Accra Agreement mandated the Liberian government to share power with the Liberians United for Reconciliation and Democracy, the Movement for Democracy in Liberia, and other groups, thereby implicitly granting de facto amnesty while simultaneously avoiding the grant of explicit amnesty, as was the case in the failed 1993 Cotonou Agreement. The Liberian government's irresoluteness on the issue of transitional justice has formalized the amnesty, despite that the Act Establishing the Truth and Reconciliation Commission of Liberia prohibited granting reprieve to persons responsible for committing serious violations of international human rights law and international humanitarian law. As previously noted, the Lomé Agreement recklessly awarded amnesty to all members of all warring factions, and the Abuja Agreement did not contemplate the issue of amnesty, essentially awarding it through acquiescence.

[52] Republic of Liberia Truth and Reconciliation Commission, *Consolidated Final Report*, vol. 2 (June 30, 2009); *A Witness to Truth: The Truth and Reconciliation Commission of Sierra Leone*, vols. 1–2; see also Human Rights Watch: Africa, http://www.hrw.org/doc/?t=africa; Amnesty International: Africa, http://web.amnesty.org/library/eng-2af/news; International Crisis Group: Africa, http://www.crisisgroup.org/home/index.cfm?id=1098&l=1; U.S. Department of State: Country Reports, http://www.state.gov/g/drl/hr/c1470.htm.

[53] This chapter will not address the legality of national amnesties under international law. For more on this issue, see *supra* Chapter 2 note 68.

Nevertheless, the constitutional and criminal law of Liberia, Sierra Leone, and Guinea-Bissau does not explicitly empower the executive or legislative branch of government to share power, let alone award amnesty, especially for crimes of an international character that do not form a part of domestic penal law but necessitate investigation, prosecution, and punishment (e.g., war crimes, crimes against humanity, genocide, and torture). This observation raises two important questions. First, under what authority can a government award amnesty for crimes that do not form part of its domestic penal law? And, second, under what authority may a government pardon perpetrators of egregious domestic crimes such as murder and rape if such crimes took place during armed conflict and abrogated fundamental human rights and humanitarian law? According to the constitutions of all three states, executive pardon powers only apply to individuals who are prosecuted and convicted of crimes.[54] Hence pardoning or awarding amnesty in advance of prosecutions or convictions, again, exceeds the powers enumerated to each government in its organic constitution. The following section discusses these and other issues concerning the legality of the executive- and legislature-related power-sharing provisions of the Accra, Lomé, and Abuja agreements.

C. EXECUTIVE AND LEGISLATIVE POWERS

The constitutions of Liberia, Sierra Leone, and Guinea-Bissau confer on the executive, legislative, and judicial branches of government immense but limited powers. The constitutional provisions relating to power sharing concern, among other functions, the presidential powers to appoint cabinet ministers, ambassadors, justices, and military and police officials; conduct foreign affairs; and grant reprieves and

[54] See Constitution of the Republic of Liberia, 1986, Article 59; Constitution of Sierra Leone, 1991, Article 63(1); Constitution of Guinea-Bissau, 1996, Article 67(t). The Bissauan Constitution does empower the National Popular Assembly to grant amnesty; however, it appears to be applicable only to international as opposed to domestic crimes. *Id.*, Article 8(1)(m). The Bissauan Constitution's explicit recognition and incorporation of international human rights and express prohibition on torture and cruel, inhumane, or degrading treatment supports the notion that any constitutionally based amnesty is limited to noninternational crimes. *Id.*, Articles 29(2) and 37(2).

pardons.[55] They also extend the legislature with power to give advice and consent to presidential appointments and make laws for the execution of government and the judiciary with the authority to serve as the final arbiter on constitutional issues. The analysis that follows is shaped by the degree of power sharing (i.e., hard, moderate, and soft power sharing) provided for in the Accra, Abuja, and Lomé accords.

The hard power-sharing provisions in the Accra Agreement created the National Transitional Government of Liberia (NTGL) extra-constitutionally or unlawfully, entirely usurping executive, legislative, and judicial powers and authority enumerated in the Liberian Constitution.[56] Although the constitution empowers the Liberian president in the conduct of "foreign affairs" to "conclude treaties, conventions and similar international agreements with the concurrence of a majority of each of the House and Legislature,"[57] the Accra Agreement is a domestic agreement, not a treaty.[58] This remains true irrespective of the international status of the accord's moral guarantors. Moreover, Moses Blah, Taylor's presidential successor, did not have the legal authority to enter into any agreement that would violate Liberia's entire constitutional framework by disbanding and reconstituting in whole or in part the executive, legislative, and judicial branches of government.[59] Any refashioning of Liberia's political order, particularly within the context of civil conflict, required legislative sanction because the legislature is the only body empowered to "provide for the security of the Republic" and "make other laws" for the execution of

[55] See Constitution of the Republic of Liberia, 1986, Articles 54–59; Constitution of Sierra Leone, 1991, Articles 40 and 53–70; Constitution of Guinea-Bissau, 1996, Articles 68–70.

[56] See Accra Agreement, *supra* note 52, Articles 24–27, 35. There do not, however, appear to be any constitutional limitations on the power of the president to establish special commissions.

[57] Constitution of the Republic of Liberia, 1986, Article 57.

[58] An important question, however, remains unresolved by this approach: can a rebel group that has significant outside military support and consequently acquires de facto control of the state or unquestionable military superiority on the battlefield prior to peace negotiations acquire sufficient legal personality to reclassify the armed conflict from intrastate to interstate, making the agreement a bona fide treaty?

[59] See Accra Agreement, *supra* note 52, Articles 21–27. One interesting observation here is that though the constitutionally mandated line of presidential succession was followed, after Taylor's resignation, all constitutional prohibitions against power sharing were patently ignored.

all powers vested by the constitution in the government of Liberia.[60] No such legislative mandate was given or adopted.

As described earlier, the Liberian Constitution vests all judicial power in the supreme court, and its judgments are considered "final and binding and . . . not . . . the subject of appeal or review by any other branch of Government."[61] It also mandates that the Liberian legislature cannot make any law or create any exceptions that would deprive the supreme court of any of its powers.[62] In addition, the justices of the supreme court and subordinate courts remain on the bench indefinitely and may be removed from office only "upon impeachment and conviction by the Legislature based on proved misconduct, gross breach of duty, inability to perform the functions of their office, or conviction in a court of law for treason, bribery or other infamous crimes."[63] Nevertheless, the Accra Agreement terminated the supreme court, a more than suspicious action given that the court is the only body with the authority to entertain a claim against the government concerning the constitutionality of its actions. Additionally, the constitution states that the president must appoint justices of the supreme court with the consent of the senate, yet under the Accra Agreement, all judicial appointments were "made by the Chairman of the NTGL and approved by the NTLA,"[64] not a democratically elected president. In this regard, the NTGL and NTLA unlawfully usurped constitutional authority only accorded to a lawfully constituted senate or legislature elected by the people, not to a transitional legislative body birthed through an ad hoc negotiation leading to an ad hoc political arrangement.

Finally, the Accra Agreement's establishment of a new executive (NTGL) composed of the warring factions violated the process and procedure for senior government appointees in the Liberian Constitution. According to the constitution, the president nominates and, "with the consent of the Senate," appoints cabinet-level and other senior

[60] Constitution of the Republic of Liberia, 1986, Article 34.
[61] *Id.*, Article 65.
[62] *Id.*, Article 66.
[63] *Id.*, Article 71.
[64] Accra Agreement, *supra* note 52, Article 27(3).

government positions.[65] The agreement wholly disregarded this constitutionally mandated process by simply dividing the executive branch among a combination of warlords, businesspersons, and political elites representing various constituencies, including Taylor's defunct government. There is also a question of whether the formation of the NTGL created a unique type of one-party state, given that its proponents were political elites from the warring factions and that it rejected the constitution's democratic formula for forming government and the tripartite system prescribed in it. Thus the formation of the NTGL arguably offended Article 77 of the Liberian Constitution, which states that "laws, regulations, decrees or measures which might have the effect of creating a one-party state [e.g., NTGL] shall be declared unconstitutional."[66] The agreement's power-sharing approach blatantly offended the spirit and substance of domestic Liberian law, especially the constitutional principle that the "essence of democracy is free competition."[67] In addition, the agreement's formation of the NTLA to "replace, within the transitional period, the entire Legislature of the Republic" was legally absurd, considering that the seventy-six-member body was not elected by the Liberian people in accordance with the constitution[68] – thereby subverting the people's constitutional right to participate in government and select their own political representatives.[69] Ironically, in January 2011, in a claim over the legality of certain determinations made by the Liberian Truth and Reconciliation Commission, the Liberian Supreme Court determined that the Accra Agreement was simply a "document" that was "extra-constitutional."[70] Perhaps, in 2003, the Court would have made a similar determination about the legality of the Accra Agreement had it not been disbanded by it.

[65] *Id.*, Articles 24–27 and 35.
[66] Constitution of the Republic of Liberia, 1986, Article 77.
[67] *Id.*, Article 77.
[68] See Accra Agreement, *supra* note 52, Article 24.
[69] See Constitution of the Republic of Liberia, 1986, Articles 45 and 48.
[70] *Archie Williams v. Christiana Tah, in her capacity as Minister of Justice & Attorney-General, The Independent National Human Rights Commission (INHCR), represented by its Chairman, R. LeRoy Urey, and the Government of Liberia (GOL), by and thru the Minister of Justice, represented by its Minister*, Petition for Declaratory Judgment, Supreme Court of the Republic of Liberia, January 21, 2011.

The Lomé Agreement's soft power sharing seemingly offends domestic law to a lesser extent than the Accra Agreement's hard power sharing because it did not require the complete overhaul of the state's political apparatus but merely power sharing within the executive branch of government.[71] The Sierra Leonean Constitution mandates that the "President is the guardian of the Constitution and guarantor of national independence"[72] and is responsible for "all constitutional matters concerning legislation" and "the execution of *treaties*, *agreements* or conventions in the name of Sierra Leone."[73] Although most common law systems limit presidential powers of ratification in the realm of foreign affairs, the Sierra Leonean Constitution seemingly gives the president broad treaty-making powers, including the authority to conclude domestic peace agreements with rebels who have captured the state.[74] This does not, however, mean that Kabbah had the authority to share power and grant amnesty, nor does it signal that power sharing and amnesty under the Lomé accord were lawful. The Sierra Leonean Constitution requires that "any" treaty, agreement, or convention that relates to "any matter within the legislative competence of Parliament or that in any way alters the law of Sierra Leone" be subject to ratification through an enactment or supporting resolution of the parliament.[75] As the preceding discussion demonstrates, and following argument will further reveal, the Lomé Agreement related to matters within the competence of parliament and did indeed modify the law of Sierra Leone. After its entry into force, the president and the parliament speedily introduced legislation (i.e., the Lomé Agreement itself) to ratify the agreement to legitimize the "alteration of the law of Sierra Leone" and give maximum effect to the accord.[76] Meaning that parliament simply submitted a copy of the Lomé Agreement as legislation without any amendments or supplemental commentary, which it serendipitously called the Lomé Peace (Ratification) Act. The legal

[71] Notwithstanding, the Accra Agreement does not appear to limit the power of the president to set up commissions.
[72] Constitution of Sierra Leone, 1991, Article 40(3).
[73] *Id.*, Articles 40(4)(a),(d); emphasis added.
[74] See *id.*, Article 40. See also Louise Doswald-Beck, *The legal validity of military intervention by invitation of the government*, 56 British Y.B. International Law 189 (1985).
[75] Constitution of Sierra Leone, 1991, Article 4.
[76] Lomé Peace Agreement (Ratification) Act, *supra* note 135.

problems engendered by the Ratification Act's attempt to legitimatize the agreement are highlighted subsequently.

The appointment of Foday Sankoh as vice president and of other RUF warlords to senior-level government positions raises several legal and moral questions. The law-related questions are both substantive and procedural and concern the way in which the Kabbah government shared power with the RUF. The moral questions relate to the notion of sharing power with warlords and rebels who have committed and directed atrocities.[77]

The Sierra Leonean Constitution gives the president executive power to appoint ministers, deputy ministers, and other senior-level public officers; the constitution, however, contains substantive limitations to these powers that bear directly on the Lomé Agreement. The agreement literally appointed Sankoh vice president and made him "answerable only to the President of Sierra Leone,"[78] without considering that, to qualify as vice president according to the constitution, "a person shall be designated a candidate for the office of Vice-President by a Presidential candidate *before a Presidential election*."[79] Moreover, under the constitution, no persons are to be considered as candidates for vice president unless they meet certain qualifications, namely, they must be citizens of Sierra Leone, members of a political party, at least forty years of age, and qualified to be elected as a member of parliament.[80] At the time of his appointment, Sankoh was not a member of any political party; it is also questionable whether he met two of the four criteria for membership in the parliament. He was not "an elector whose name [was] on a register of electors under the Franchise and Electoral Registration Act, 1961, or any Act of Parliament amending or replacing that Act,"[81] and it is not clear that Sankoh was fully literate or "able to speak and to read the English Language with a degree of proficiency sufficient to enable him to take an active part in

[77] The moral dimension is discussed in the regional and international law sections of the article.
[78] Lomé Agreement, *supra* note 53, Article 5(2).
[79] Constitution of Sierra Leone, 1991, Article 54(2)(a); emphasis added.
[80] *Id.*, Article 41(a–d).
[81] See *id.*, Articles 75(b) and 75(d).

the proceedings of Parliament."[82] Furthermore, the constitution states that no person is qualified to be a member of parliament if "under any law in force in Sierra Leone he is adjudged to be a *lunatic* or otherwise declared to be of unsound mind."[83] Because it was not possible formally to determine Sankoh's mental state during the civil war, given the brutal scourge of ritualistic killing, rape, torture, and cannibalism that he directed and participated in,[84] one can only surmise that given the opportunity, any competent authority would have adjudged him to be a lunatic or of unsound mind. For these reasons, the power-sharing provisions in the Lomé Agreement appeared to be unlawful, as was its selection of Sankoh as vice president.

The logic employed in this analysis is equally applicable to all the senior and junior cabinet-level positions the agreement awarded to the RUF.[85] Although the constitution does not explicitly require parliamentary approval for vice presidential appointments, it does require that "all" minister and deputy minister appointments be "approved by Parliament."[86] While the Sierra Leonean Parliament adopted the Lomé Peace Agreement (Ratification) Act (Lomé Act) ex post facto,[87] which internally sanctified the entire agreement as law, it could not lawfully serve as a legal device to authorize ministerial appointments because Kabbah did not formally select appointees until after its adoption. Moreover, the Sierra Leonean Constitution mandates that separate parliamentary approval is necessary for each "person" appointed;[88] hence the agreement's attempt at a one-for-all christening unlawfully abrogated it.

Finally, the legality of the Lomé Act is also in question. First, the act does not amend, repeal, or alter the provisions of the constitution

[82] *Id.*

[83] *Id.*, Article 76(1)(c); emphasis added.

[84] Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission Report, vol. 3(A), chapter 4, *Nature of the Conflict*.

[85] See Lomé Agreement, *supra* note 121, Article 5(3).

[86] Constitution of Sierra Leone, 1991, Article 56(2)(c).

[87] This means that the Lomé Agreement was adopted before it was "authorized" by parliament, in violation of Article 108(8) of the constitution, which states that "any suspension, alteration, or repeal of this Constitution other than on the authority of Parliament shall be deemed to be an act of Treason." *Id.*, Article 108(8).

[88] *Id.*

in express terms, as Article 108 of the constitution requires,[89] let alone provide any guidance on how to resolve numerous hierarchical conflicts of law arising from the existence of the Lomé Agreement as a superior body of law to the constitution. Second, despite that parliament can modify the Sierra Leonean Constitution, any bill or act seeking to alter certain rights-based provisions of the constitution[90] "shall not be submitted to the President for his assent and shall not become law unless the Bill, after it has been passed by Parliament and in the form in which it was so passed, has, in accordance with the provisions of any law in that behalf, been submitted to and been approved at a referendum."[91]

Hence the Lomé Agreement was not approved through a referendum; thus it became law unlawfully. It revoked fundamental human rights enshrined in Chapter III (provisions 16–39) of the constitution and directly conflicts with Article 56.[92] The act violated the fundamental human rights and freedoms of the individuals whom the constitution sought to protect by politically empowering and granting amnesty to *pirates de la loi*. For example, the act sanctioned the power-sharing provisions in the Lomé Agreement that stifled the rights of Sierra Leoneans to "participate in and defend all democratic processes and practices" by undemocratically placing RUF officials in sensitive government positions in contravention of the constitution.[93] Furthermore, the act provided the cover of state authority to persons who committed atrocities and other crimes offending nearly every human right enshrined in the constitution. These rights include, among others, the right to life, liberty, security of the person, enjoyment of property, and

[89] Article 108(7) states that "no Act of Parliament shall be deemed to amend, add to or repeal or in any way alter any of the provisions of the Constitution unless it does so in express terms." See *id.*, Article 108(7).

[90] These provisions include all of Chapter III of the Sierra Leonean Constitution, titled "The Recognition and Protection of Fundamental Human Rights and Freedoms of the Individual," and sections 46, 56, 72, 73, 74(2), 74(3), 84(2), 85, 87, 105, 110–119, 120, 121–124, 128, 129, 131–133, 135, 136, 137, 140, 151, 156, and 167.

[91] *Id.*, Article 108(3).

[92] Article 56 requires that no person shall be appointed a minister or deputy minister if he or she is "not qualified to be elected as a Member of Parliament" and his or her "nomination is [not] approved by Parliament." *Id.*, Article 56.

[93] See *id.*, Article 13(i).

protection of law;[94] the right not be "held in slavery" (which encompasses child soldiers and sexual slaves); and the right to be free from torture.[95] It also infringed the constitution by curtailing the rights of victims of the Sierra Leone Civil War to challenge the legality of the Lomé Agreement and its ratifying act, seek penal justice, and pursue civil remedies, in contravention of provision 28 of the constitution, which states,

> If any person alleges that any of the provisions of section 16–27 (inclusive) has been, [or] is being contravened in relation to him by any person . . . then without prejudice to any other action with respect to the same matter which is lawfully available, that person, (or that other person), may apply by motion to the Supreme Court for redress.[96]

The Lomé Agreement did not make allowance for the assertion of Provision 28 rights or any other that would allow Sierra Leoneans to challenge the legality of the accord. In addition, the Lomé Agreement and Lomé Act abrogated the rights of Sierra Leoneans to make a claim against the government in accordance with section 133 of the constitution, which provides that "where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose" and that Parliament shall ensure the "provision for the exercise of jurisdiction under this section."[97] In this respect, the agreement and act unlawfully shielded government and those persons who bear the greatest responsibility for the Sierra Leone Civil War from accountability and any other form of legal sanction,[98] and the Sierra Leonean legislature utterly contravened its duty to ensure that a jurisdictional basis and structure existed for citizens to make claims against the government.

Finally, according to Article 106 of the constitution, "a Bill shall not become law unless it has been duly passed and signed in

[94] See *id.*, Articles 15 and 16.
[95] See *id.*, Articles 19 and 20.
[96] See *id.*, Article 21.
[97] See *id.*, Article 133.
[98] The Special Court for Sierra Leone was established in June 2002, approximately three years after the adoption of the act.

accordance with [the] Constitution"[99] – which did not occur with respect to the Lomé Agreement. Consequently, according to the constitution, the Lomé Act should have preceded the agreement, not proceeded it. As the forgoing analysis shows, because the government and parliament exceeded their powers by violating the constitution and constitutionally mandated procedures for entering into the Lomé Agreement and Ratification Act, respectively, they acted unlawfully.

The Abuja Agreement's moderate power sharing was less violative of domestic law than the Accra Agreement's hard power sharing and was more offensive than power sharing in the Lomé Agreement. The Abuja Agreement did not require the complete overhaul of its body politic and judiciary, as did the Accra Agreement, or, like Sierra Leone, the simple expansion of its cabinet. Its moderate approach mandated extensive power sharing in the executive branch of government and the Council of State, which is the "political organ of consultation of the President of the Republic."[100]

The constitution of Guinea-Bissau states that the "President of the Republic is the Head of State, symbol of unity, guarantor of national independence," and defender of the constitution as well as the "Supreme Commander of the Armed Forces."[101] It extends very broad powers to the president, including, among others, the power to ratify international treaties, appoint and dismiss the prime minister and other members of government proposed by the prime minister (with the consent of the National Assembly), create and eliminate ministries and secretariats of State, and declare war and make peace with formal approval of the National Assembly.[102] Last, although it is unusual for common law–based systems such as those in Liberia and

[99] *Id.*, Articles 106(1) and 106(2).

[100] Constitution of the Republic of Guinea-Bissau, 1996, Article 73. In this sense, the Abuja Agreement awarded Mane's junta 50% of the ministries as well as enormous influence in selecting members of the Council of State, consisting of the president, president of the National Assembly, prime minister, president of the Supreme Court of Justice, a representative of each of the political parties in the National Assembly, and five citizens selected by the president. For example, to politically placate Mane, Vieira appointed Francisco José Fadul, a longtime political advisor to Mane and chief representative on the Executive Joint Commission (established to implement and monitor the Abuja peace process), as prime minister of the transitional Government of National Unity.

[101] Constitution of the Republic of Guinea-Bissau, 1996, Article 62(1).

[102] Constitution of the Republic of Guinea-Bissau, 1996, Article 68(b)(e),(g),(i),(j),(u).

Sierra Leone to confer expansive powers on presidents to ratify foreign affairs–related treaties, in many civil law–based systems like Guinea-Bissau, it is not. Under the Bissauan Constitution, the president has the power to ratify international treaties (with the "authorization" of the National Popular Assembly (NPR)) and to "declare" war and "make" peace.[103] Notwithstanding, the constitution of Guinea-Bissau does not grant the president exclusive and/or expressed power to enter into domestic peace agreements with or without the consent of the NPR; hence, given the innumerable rules illicitly engendered by the Abuja Agreement, Vieira did not possess the legal authority to share power or extend amnesty, making such actions wholly unlawful. In the monist tradition of domestication, Article 29 of the Bissauan Constitution seems to automatically domesticate and place international human rights law on superior or equal footing with national law.[104] It states that fundamental constitutional rights "do not negate" applicable international rules and that constitutional law and procedures "have to be interpreted in harmony with the Universal Declaration on Human Rights."[105] Consequently, sharing power with bandits of the law responsible for committing international atrocities would appear to abrogate the Bissauan Constitution. Despite these limitations, the Bissauan Constitution does grant the president the power to dismiss the government – the supreme executive and administrative body of the republic inclusive of the prime minister, the ministers, and the secretaries of state – when confronted with a "serious political crisis that puts in jeopardy the normal operation of the institutions of the government."[106] This may only take place after conferring with the Council of State and the National Assembly. Still, in the present context, the powers to dismiss and appoint are significantly different then sharing power through a written agreement and must be distinguished, particularly in the absence of explicit approval from the National Assembly.

Additionally, the Bissauan Constitution mandates and empowers the National Assembly, the country's "supreme legislative body and

[103] Constitution of the Republic of Guinea-Bissau, 1996, Article 68(e),(u).
[104] Constitution of the Republic of Guinea-Bissau, 1996, Article 9.
[105] Heyns, *supra* note 92, at 1172, 1175.
[106] Constitution of the Republic of Guinea-Bissau, 1996, Article 104(2).

political overseer," to pronounce on "fundamental issues of internal and external politics of the state," make laws and regulate and sanction the "Program of Government," and approve peace treaties seemingly inclusive of peace agreements.[107] It also accords the National Assembly with exclusive authority to authorize the president to "declare war and *make peace*" without distinguishing between interstate and intrastate armed conflict; ratify decree and law approved by government; grant amnesty, which confirms its considerable authority to pronounce on internal political issues; and evaluate the acts of government to ensure compliance with the constitution and laws of Guinea-Bissau.[108] In addition, the separation of power between the National Assembly and government are so distinct that, unlike in most civil law–based systems, representatives of the assembly are forbidden to be members of government.[109]

From this background, for any peace agreement to be lawful under the constitution of Guinea-Bissau, the NPR must have not only authorized Vieira to make peace and enter into the Abuja Agreement, but also specifically declared the extent to which power would be shared given its exclusive authority to legislate over the "organization of the central and local administration."[110] To the author's knowledge, neither Vieira nor Mane sought or obtained formal approval for or legislative ratification of the Abuja Agreement from the NPR. The lawful ratification of the Abuja Agreement appears to have necessitated a constitutional amendment, especially given its impact on the sacrosanct rights to political pluralism, suffrage, and justice for victims. Notwithstanding, the Bissauan Constitution prohibits any constitutional revision by the NPR, which may normally revise the constitution by a vote of two-thirds majority of the body if such revisions affect suffrage, political pluralism, and the rights, freedoms, and guarantees of

[107] Constitution of the Republic of Guinea-Bissau, 1996, Articles 76, 85(c),(d),(h). The National Assembly has not only the authority to approve the plan of government but also the exclusive competence to legislate over the organization of defense, any state of siege or state of emergency, rights, freedoms, and guarantees. *Id.*, Article 86(c),(h),(j).

[108] Constitution of the Republic of Guinea-Bissau, 1996, Article 85(j),(l),(n),(o).

[109] Constitution of the Republic of Guinea-Bissau, 1996, Article 85.

[110] Constitution of the Republic of Guinea-Bissau, 1996, Article 87(a). Furthermore, Article 96(2) states that the government must conduct the general policy of the country in accordance with its program or plan of government, approved by the National Assembly.

citizens[111] – meaning that had the NPR approved of the Abuja Agreement, such action would still have been unlawful to the extent that it forced Vieira's democratically constituted government to share power extraconstitutionally and granted amnesty without reparation. In this context, power sharing annulled the will of the Bissauan electorate and their right of self-determination as well as the rights of victims of armed conflict and displacement to seek a judicial remedy.

Like most constitutions, the Bissauan Constitution prohibits coups given that its principal aim is to ensure democratic constitutionality, law and order, self-determination, and fundamental rights. Similar to other neoliberal democratic constitutions, it also explicitly bars any member of its armed forces, the Revolutionary Armed Forces of the People (FARP), from "carrying out any political activity."[112] Consequently, to the extent that members of the armed forces are supposed to be nonpartisan, subject to civilian authority, and apolitical, not only was it unlawful for General Ansumane Mane, army chief of staff, to overthrow Vieira's government, but more problematic, as leader of the coup and junta, he was constitutionally prohibited from being a party to and politically benefiting from the Abuja Agreement, calling into question the legality of the accord itself. This unconstitutional action had significant legal and political ramifications that were entirely ignored by Vieira, Mane, the Economic Community of West African States, and the Community of Portuguese Speaking Countries.

D. CONCLUSION

From this background, it is clear that the Accra, Lomé, and Abuja agreements were unlawfully constituted and illegally instituted. Considering that there was no domestic legal authority that sanctioned their entry into force, what authority underwrote their creation, and how

[111] Constitution of the Republic of Guinea-Bissau, 1996, Article 130(e),(g),(h).

[112] The constitution mandates FARP to "defend democratic legality"; "guarantee and maintain internal security and public order" and "the rights of citizens"; obey civilian governmental authority, "under terms of the Constitution and law"; and prevent crimes against the security of the state such as coup. Constitution of the Republic of Guinea-Bissau, 1996, Articles 20(1–4) and 21(1–3).

did domestic and international decision makers justify their unlawful existence?

The only legal measure available to the governments of Liberia, Sierra Leone, and Guinea-Bissau that could provide some semblance of validity to the accords would be the explicit invocation of public emergency powers under their organic constitutions. However, the Accra, Lomé, and Abuja accords do not explicitly reference or invoke emergency powers, nor is there any evidence that emergency powers were relied on as a basis for the agreements. Furthermore, under international law, governments "must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers" for any such acts to be lawful, which, as already revealed, never occurred.[113] Had the governments of Liberia, Sierra Leone, or Guinea-Bissau relied on emergency powers rationale, the accords would still have been unlawful given that under sections 87, 29, and 30–31 of the Liberian, Sierra Leonean, and Bissauan constitutions, respectively, emergency powers do not include the power to suspend, modify, or abrogate constitutions[114] "nor diminish the essential content of rights."[115]

If, during a public emergency, the presidents of Liberia, Sierra Leone, and Guinea-Bissau lacked the constitutional authority to suspend and modify constitutional rights, how could the power-sharing

[113] UN Hum. Rts. Comm'n, General Comment 29: States of Emergency (Article 4), para. 4, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001).

[114] According to Article 87, the "emergency powers do not include the power to suspend or abrogate the Constitution, dissolve the Legislature, or suspend or dismiss the Judiciary; and no constitutional amendments shall be promulgated during a state of emergency." Constitution of the Republic of Liberia, 1986, Article 87(a). Section 29 of the Sierra Leonean Constitution extends vast authority to the president to "amend any law, suspend the operation of any law, and apply any law with or without modification" during public emergencies to secure peace, order, and good government, as long as any such "amendment, suspension or modification shall not apply to the Constitution." Constitution of Sierra Leone, 1991, Article 29(5)(d). Article 131 of the Constitution of Guinea-Bissau prohibits any "proposal or project" for revisions of the constitution during a state of siege or emergency, and Articles 30 and 31 state that any declaration of a state of emergency may only result in the partial suspension of fundamental rights and liberties, as long as the limitation is necessary to safeguard other rights or constitutionally protected interests and does not erode the essential content of rights. Constitution of the Republic of Guinea-Bissau, 1996, Articles 131, 30(2)(3), 31(3).

[115] Constitution of the Republic of Guinea-Bissau, 1996, Article 30(3).

provisions in the agreements be lawful even under the most liberal interpretation of presidential powers under their respective constitutions? Finally, this raises the question, discussed more thoroughly in the book's conclusion, about whether any legal or political remedies exist under the Lomé, Accra, and Abuja accords to redress the consequences of illegal peace.[116] For now, the book turns to the legality of these agreements under regional and subregional treaty law and practice.

[116] E.g., under Article 28 of the Sierra Leonean Constitution, if any person alleges that his or her fundamental human rights and freedoms of the individual have been violated, he or she may apply by motion to the supreme court for redress; the amnesty provision in the Lomé Agreement, however, stifles this right. Hence both the government and parliament created laws that interfere with the protective provisions in the constitution. See Constitution of Sierra Leone, 1991, Article 28(1).

7 THE REGIONAL LEGALITY OF POWER SHARING

Liberia, Sierra Leone, and Guinea-Bissau are member states of the African Union (AU) and the Economic Community of West African States (ECOWAS) and parties to nearly all of their major human rights and peace and security conventions.[1] As founding members of the AU and ECOWAS,[2] these states are legally bound by regional and subregional law (constitutive acts, rules, norms, doctrine, procedures, practice, and jurisprudence), which serves as a modern anchor of the neo-Kadeshean model (NKM) and forms an integral part of the wider corpus of international law.[3] Consequently, the lawfulness of the Accra, Lomé, and Abuja agreements must be measured against such law.

Power sharing under these agreements violated human rights, democracy, and governance norms enshrined in AU and ECOWAS law as well as regional custom. For example, power sharing under these agreements sanctioned impunity through amnesty, whether de jure or de facto, for genocide, war crimes, and crimes against humanity as well as unconstitutional seizures of power of democratically elected governments.[4] This chapter employs the NKM approach by

[1] In fact, all three states have been major proponents of instituting a human rights framework at the regional level.

[2] The African Union is Africa's foremost political organization; see http://www.africa-union.org/root/au/index/index.htm. The Economic Community of West African States is West Africa's predominant subregional organization and is composed of sixteen West African nation-states; see http://www.ecowas.int/.

[3] For analytical and structural purposes, the analysis of the applicability of international rules is divided into two chapters. The present chapter focuses on regional and subregional law, and Chapter 8 is preoccupied with UN law and general international law, while recognizing that they form an integral part of one another.

[4] See generally Jeremy I. Levitt, *The African Union Peace and Security Council, United Nations Security Council and the use of force: The case of Darfur, Sudan*, in Neils Blokker & Nico Schrijver (eds.) THE UNITED NATIONS SECURITY COUNCIL AND THE USE OF

examining the legality of the agreements under AU and ECOWAS law (see Table 7.1) because such law forms the basis for inquiry into the legality of power sharing.[5]

In contrast to the vital role the AU and ECOWAS have played in negotiating and keeping peace in Liberia, Sierra Leone, and Guinea-Bissau, their willingness to support power-sharing schemes that coerce lawfully constituted governments to share power with bandits of the law responsible for committing human atrocities patently contravenes their guiding principles, laws, doctrines, norms, and purported practices. Consequently, the actual practice of the AU and ECOWAS is a mixed bag ranging from hearty adherence to and enforcement of pro-democratic and human rights norms (e.g., their protection of democracy in Mauritania, São Tomé Príncipe, and Togo)[6] to their bold abrogation precipitated by political necessity and expediency (e.g., the

FORCE (2005); Jeremy I. Levitt, *Conflict prevention, management and resolution in Africa – regional strategy for the prevention of displacement and protection of displaced persons: The cases of the OAU, ECOWAS, SADC and IGAD*, 11 Duke Journal of Comparative and International Law 1 (2001); Jeremy Levitt, *African interventionist states and international law*, in Oliver Furley & Roy May (eds.) AFRICAN INTERVENTIONIST STATES (2001), Jeremy Levitt, *Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone*, 12 Temple International and Comparative Law Journal 333 (1998); Jeremy I. Levitt, *The Peace and Security Council of the African Union*, 13 Journal of Transnational & Contemporary Legal Problems 109 (2003).

[5] The human rights–related customary regional law of the AU and ECOWAS has been codified into nearly all of the related statutes in Table 7.1 and is largely derived from state practice in the African region since the end of the Cold War. It is also informed by UN law (e.g., the UN Charter, the Universal Declaration on Human Rights, the Genocide Convention, the Torture Convention, and the International Covenant on Civil and Political Rights) and customary international law. Africa's new democracy and governance norms (which derived from state practice in the early 1990s) have also been codified into treaty law (e.g., the pro-democratic intervention provision in Article 25 of the ECOWAS Conflict Protocol).

[6] Kwadwo Boateng Mensah, *Preventing constitutional crisis in ECOWAS after Togo*, All Africa (March 15, 2005), available at http://allafrica.com/stories/200503150071.html; *Faure Gnassingbe steps down, ECOWAS lifts sanctions*, ECOWAS press release (February 26, 2005), available at http://www.ecowas.int/; *Sao Tome and Principe: Coup leaders hand power back to civilian president*, Integrated Regional Information Network (IRIN) (July 23, 2003), available at http://www.irinnews.org/report.asp?ReportID=35580&SelectRegion=West_Africa&SelectCountry=SAO_TOME_AND_PRINCIPE; *Sao Tome coup condemned*, BBC News (July 17, 2003), available at http://news.bbc.co.uk/2/hi/africa/3073631.stm; Council on Foreign Relation, *More than humanitarianism: A strategic U.S. approach toward Africa*, Independent Task Force Report No. 56 90 (2006).

Table 7.1. *Relevant Statutes*

African Union (AU)
1. Charter of the Organization of African Unity (OAU) (May 1963)
2. African [Banjul] Charter on Human and People's Rights (June 1981)
3. Grand Bay Mauritius Declaration and Plan of Action of the Organization of African Unity (Grand Bay Declaration) (April 1999)
4. Draft Kampala Document for a Proposed Conference on Security, Stability, Development, and Cooperation in Africa (CSSDCA) (May 1991)
5. Constitutive Act of the African Union (June 2000)
6. New Partnership for African Development (NEPAD) (October 2001)
7. Protocol Relating to the Establishment of the Peace and Security Council of the African Union (AUPSC Protocol) (July 2002)
8. Protocol on Amendments to the Constitutive Act of the African Union (July 2003)
9. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (July 2003)
Economic Community of West African States (ECOWAS)
1. Revised Treaty of the Economic Community of West African States (July 1993)
2. Framework Establishing the Economic Community of West African States Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping, and Security (October 1998)
3. Protocol Establishing the ECOWAS Mechanism for Conflict Prevention, Management and Resolution, Peace-keeping, and Security (ECOWAS Conflict Protocol) (December 1999)
4. Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management and Resolution, Peace-keeping, and Security (ECOWAS Democracy Protocol) (December 2001)

granting of de facto and actual amnesty and power sharing in Liberia, Sierra Leone, and Guinea-Bissau, for the perceived public good).

One possible explanation for this dichotomous practice might be inaudible reliance on the principle of *rebus sic stantibus*, which, in extraordinary circumstances, can provide a lawful basis for states to terminate or suspend a treaty. Under the Vienna Convention on the

Law of Treaties (VCLT), states can breach a treaty if there is a "fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties," where "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."[7] The civil wars in Liberia, Sierra Leone, and Guinea-Bissau certainly caused unforeseen changes of circumstances that radically transformed the ability of the Taylor, Kabbah, and Vieira governments to maintain peace and security, protect human rights, and safeguard democracy. That said, the VCLT only appears to permit the temporary derogation of international responsibilities when there is an "outbreak of hostilities between states" or during interstate conflict.[8] It does not affirmatively regulate and consequently permit derogation of international responsibilities during intrastate conflict between, for example, a government and rebels or junta. Moreover, the VCLT does not permit any derogation from treaty provisions "relating to the protection of the human person contained in treaties of a humanitarian character," which would apply to nearly all of the human rights – and democracy-orientated treaties under examination in this chapter and the one that follows.[9] In this sense, the VCLT's conservative approach

[7] VCLT, *supra* note 6, Article 62(1).

[8] *Id.*, Article 73.

[9] *Id.*, Article 60(5). The same legal logic applies to and nullifies the "limited" derogation provisions in Article 4 of the International Covenant on Civil and Political Rights (ICCPR). Article 4(1) of the ICCPR states the following:

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

Article 4 of International Covenant on Civil and Political Rights (December 16, 1966), 999 U.N.T.S. 171 (hereinafter ICCPR). See also U.N. Economic & Social Council (ECOSOC), Sub-committee on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, U.N. Doc. E/Cn.4/1984/4 (1984). It should be noted that the ICCPR obligates states to immediately notify other states parties and the UN secretary-general as to the provisions it has derogated from and the reasons for such actions. The Taylor, Kabbah, and Vieira regimes made no such claim of derogation under the VCLT or the ICCPR.

complements the NKM's proclivity toward the adherence to preexisting rules during armed conflict.

In addition, neither the Taylor, Kabbah, nor Vieira regime claimed to invoke a right to terminate or withdraw from any treaties or agreements under which it was bound.[10] Furthermore, in all three cases, the fundamental change (i.e., civil war leading to the peace accords) was, arguably, in part, the result of the three governments not honoring their own democracy and human rights commitments.[11] Moreover, under the VCLT, by entering into the Accra, Lomé, and Abuja accords in violation of governing regional and international law norms, Liberia, Sierra Leone, and Guinea-Bissau materially breached vital democracy and human rights provisions "essential to the accomplishment of the object or purpose" of several treaties.[12] Again, these include the rights of citizens to freely choose their elected leaders and form of government as well as the rights of war victims to obtain effective remedies.

Another plausible justification for power sharing and amnesty under the Accra, Lomé, and Abuja agreements appears in the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ASR). The ILCASR states that a government may invoke a state of necessity as grounds for precluding the wrongfulness of an act not in conformity with an international obligation, so long as the government acts to safeguard an "essential interest of the State against a grave and imminent peril" and does not "seriously impair an essential interest of the state" toward which the obligation exists.[13] The ILC considers an essential interest of a state

[10] 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]. , Article 62(2). Although it is not absolutely clear whether a state must expressly make an invocation (e.g., in writing) or can achieve it by implication (e.g., taking action contrary to obligations), state practice favors the former approach.

[11] E.g., human rights reports of governmental and nongovernmental organizations cited in earlier sections as well as the indictments of former president Charles Taylor and senior officials in the Kabbah government (e.g., former vice minister of defense and internal affairs minister Samuel Hinga Norman) in the Special Court for Sierra Leone for war crimes and crimes against humanity speak volumes about the nefarious conduct of each government during its respective civil war.

[12] VCLT, *supra* note 10, Article 60(3)(b).

[13] Articles on Responsibility of States for Internationally Wrongful Acts, chapter V, Article 33(1)(a), U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (December 2001).

one that is "extremely grave" and "imminent," and the wrongful act must be the *only* way to ward off the grave and imminent peril and "preserv[e] the essential interest threatened."[14]

Certainly the violent insurgencies and/or revolts that forced the Taylor/Blah, Kabbah, and Vieira regimes to enter into power-sharing agreements were to some degree designed to safeguard the state from the violence of the Liberians United for Reconciliation and Democracy–Movement for Democracy in Liberia, the Revolutionary United Front, and junta, respectively, and thus served an essential interest. Nevertheless, a wrongful act cannot be precluded if the state claiming necessity – which Liberia, Sierra Leone, and Guinea-Bissau did not formally do – "provoked, either deliberately or by negligence, the occurrence of the state of necessity."[15] As discussed earlier, it is not far-fetched to argue that the governments of Liberia, Sierra Leone, and Guinea-Bissau bear some responsibility for inciting or accelerating the armed conflicts and coups that led to their states of necessity as a consequence of one or more of the following: misrule, rapid corruption, oppressive treatment of citizenry, and the inability to refrain from committing atrocities during armed conflict or regime change. This argument would seem to be more applicable to Liberia and Guinea-Bissau than to Sierra Leone. Moreover, under the ILCASR commentary, it is not clear whether the vital interests sacrificed (e.g., justice for amnesty and democracy for power sharing) are "obviously" less important than the aims of peace and security that power sharing more directly seeks to address.[16] In fact, the forgoing analysis signals that sacrificing justice, the rule of law, and democracy at the altar of the perceived public good creates a culture of impunity and is politically untenable over the long term. The ILCASR obviates any necessity claims by precluding the invocation of a state of necessity when a state commits a wrongful act that violates its international obligations, particularly acts specifically addressed by treaties and customary international law.[17] As the sections and chapters that follow reveal, power sharing under the

[14] Int'l L. Comm'n, Commentaries, para. 33, in ILC Ann. Rep. 2001, chapter IV.
[15] *Id.*, para. 34.
[16] *Id.*, para. 35.
[17] Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 13, Articles 33(2)(a–b).

agreements violated well-settled human rights, humanitarian, and pro-democratic norms in AU, ECOWAS, United Nations (UN), and customary international law, thereby "excluding the possibility of invoking the state of necessity with respect to that obligation," namely, a state's "essential" interest in, and responsibility to, protect human rights and democracy.[18]

In addition, member states of the AU and ECOWAS appear to have violated the international principle *pacta sunt servanda* as they have assisted in negotiating and sanctioning power-sharing deals that clearly and intentionally contravened the core human rights, democracy, and governance principles enshrined in AU and ECOWAS law.[19] Moreover, given that the Accra, Lomé, and Abuja accords are internal–domestic law, Liberia, Sierra Leone, and Guinea-Bissau debatably may not invoke or rely on any provisions in the agreements or the circumstances that produced them as a justification for their failure to abide by or perform in good faith treaty obligations under AU and ECOWAS law.[20] Hence, as James Crawford notes, "it is established that national law, no matter how democratically established, is not an excuse for failure to comply with international obligations."[21] In this context, the obligation not to negotiate or contract away fundamental human rights (e.g., the duty to punish and ensure access to justice, remedy, and reparation) and democratic entitlements (e.g., freely participate in government and choose leaders) through power sharing is essential. If this assertion is correct, then it goes without saying that unlawful internal law (e.g., a peace agreement) is devoid of authority in relation to a state's international legal obligations. In addition, the AU and ECOWAS are bound to comport with their own statutes; under international law, regional organizations may not take actions inconsistent with or beyond the scope of their constitutive instruments and related doctrine. Furthermore, as previously noted, member states of the AU

[18] *Id.*, Articles 33(2)(a–c).

[19] According to Article 26 of the VCLT, the international principle *pacta sunt servanda* states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." VCLT, *supra* note 10, Article 26.

[20] Article 27 of the VCLT states that a "party may not invoke the provision of its internal law as justification for its failure to perform a treaty." VCLT, *supra* note 10, Article 27.

[21] James Crawford, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed.) (2006), at 117.a

and ECOWAS, including the three states under study, also have a positive duty to abide by their constitutive instruments and corollary rules in good faith.[22]

Unless otherwise stated, all the statutes or agreements in Table 7.1 apply to Liberia, and all but four and six apply to Sierra Leone and Guinea-Bissau, respectively.[23] Whether or not the treaties and agreements in Table 7.1 were binding on these states when their respective accords entered into force is secondary to the fact that the fundamental democracy and human rights principles that underwrite them formed a part of regional and international custom before their codification into treaty law. Very few interpretive comments or sources, including *travaux préparatoires*, exist to illuminate the exact meaning and scope of AU and ECOWAS treaties; however, the determinations and practices of these institutions complement the NKM framework. Additionally my experiences working with and monitoring the law and practice of regional organizations in Africa reveal that a teleological–original intent interpretive logic predominates thinking in these institutions.[24] This approach is necessary because several of the applicable treaties are new and have yet to be interpreted by a judicial body or other mechanism.

A. AFRICAN UNION LAW AND PRACTICE

The AU human rights, democracy, and governance regimes have significantly evolved since the founding of the Organization of African Unity (OAU) in 1963.[25] Three major phenomena birthed and shaped

[22] See VCLT, *supra* note 10.

[23] Rules that were nonexistent and not applicable in Sierra Leone during this period were as follows: AU Constitutive Act, NEPAD, the AUPSC Protocol, Protocol on Amendments to the AU, and ECOWAS Democracy Protocol. Rules not binding on Guinea-Bissau included the AU Constitutive Act, NEPAD, AUPSC Protocol, Protocol on Amendments to the AU, ECOWAS Conflict Protocol, and ECOWAS Democracy Protocol.

[24] It has been the author's experience in Africa that the majority of legal officers in African multilateral institutions employ a literalist interpretive approach to their own treaties.

[25] Charter of the Organization of African Unity, reprinted in Jeremy Levitt (ed.) AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN AND JUDICIAL ISSUES (2003), at 51–52.

the OAU: Africa's struggle against colonization–imperialism, independence, and the Cold War.[26] The OAU began in 1963 as a highly state-centric organization with the primary purpose of promoting unity and cooperation among African states, while strictly adhering to the international principles of state sovereignty, territorial integrity, and noninterference in the internal affairs of states.[27] At the turn of the twenty-first century, the AU replaced the OAU and evolved from an institution principally concerned with states' rights and African unity to one preoccupied with human rights, democratization, peacemaking, and sustainable development. The AU's new human rights, democracy, and collective security framework seeks to constrain state behavior, particularly in the treatment of people, best evidencing its evolving commitment.

Today, AU law in the areas of human rights, democracy, and governance clearly delineates what role states should play in promoting and protecting fundamental human rights.[28] Yet the power-sharing provisions in the Accra, Lomé, and Abuja accords – arrangements made either directly or indirectly under AU auspices – ran afoul of the spirit and substance of AU law and practice. The Banjul Charter states that "every individual shall be equal before the law" and "entitled to equal protection before the law."[29] What does it mean to be equal before the law? The Banjul Charter guarantees every individual the right to have his or her "cause heard," including the "right to an appeal to competent national organs against acts violating . . . fundamental rights as recognized and guaranteed by conventions, laws, regulations and custom in force."[30] The power-sharing and amnesty provisions,[31] whether actual or implied, in the agreements under study transgressed these rules and rights because they denied equal protection to victims of the conflicts,

[26] *Id.*

[27] *Id.*

[28] See generally Rachel Murray, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AU (2004).

[29] African Charter on Human and Peoples' Rights, Article 3 (June 27, 1981), reprinted in Levitt, *supra* note 25, at 354 (hereinafter Banjul Charter). The Banjul Charter was adopted on June 27, 1981, and entered into force on October 21, 1986.

[30] *Id.*, Article 7.

[31] Whereas the Lomé accord provided for explicit amnesty, the Accra and Abuja agreements provided de facto amnesty.

particularly women and children,[32] by not providing them any venue to adjudicate their civil, criminal, political, gender, and human rights–related claims.

Moreover, the Banjul Charter assures the citizen the "unquestionable and inalienable right to self-determination"[33] and the "right to participate freely in the government of his [or her] country," directly or through freely chosen representatives in accordance with the law.[34] The Banjul Charter's strong emphasis on internal and external self-determination derives from the OAU's approach to human rights, which placed the "two issues of self-determination and apartheid/racial discrimination in southern Africa" at the core of the organization.[35] In this context, armed struggle was viewed as a legitimate basis of asserting the "right of self-determination of a colonial or oppressed people."[36] Thus, as John Dugard has noted, the OAU Charter was viewed as more than a constitutive act – it was a "charter of liberation."[37] Beginning in the 1970s, the OAU's notion of self-determination evolved

[32] The African Charter on the Rights and Welfare of the Child (ACRWC) will not be analyzed in this chapter. Briefly, it seeks to define and protect the rights of children in every facet of human existence from, for example, a right to a birth name and nationality to a right to education and health services. The African Charter also seeks to protect children from, among other things, economic exploitation, child abuse, torture, harmful social and cultural practices, and, most important for the purposes of this analysis, armed conflicts. Under Article 22 of the ACRWC, children are not to take part in direct hostilities, and governments are to refrain from recruiting them. African Charter on the Rights and Welfare of the Child, Article 22 (July 1990), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 402 (hereinafter ACRWC).

[33] Banjul Charter, *supra* note 29, Article 20. *Self-determination* may be defined as the right of a people to "determine their political status and shall pursue their economic and social development according to the policy they have freely chosen." *Id.* In the context of power sharing, it likewise means that all people have a right to freely determine and live under the type of government and leaders they choose, free from outside influence.

[34] Banjul Charter, *supra* note 29, Article 12.

[35] Murray, *supra* note 28, at 8. In the years that followed, these issues guided the organization's approach to human rights, which focused on the "protection of the state, not the individual," as the concept of human rights "went little beyond the notion of self-determination in the context of decolonization and apartheid." *Id.*, at 7–8.

[36] Ifeoma Enemo, *Self-determination as the fundamental basis of the concept of legitimate governance under the African Charter on Human and Peoples' Rights*, in E. K. Quashigah & O. C. Okafor (eds.) LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES (1999), at 417. See also Murray, *supra* note 28, at 10.

[37] John Dugard, *The organization of African unity and colonialism: An inquiry into the Pleas of Self-Defense as a Justification for the Use of Force in the Eradication of Colonialism*, 16 International and Comparative Law Quarterly 157, 158–159 (1967).

from one that was purely state centered and preoccupied with colonial rule to one that recognized, through the Banjul Charter, the expansion of the concept as a fundamental human right. By the turn of the twentieth century, the OAU viewed self-determination as an individual right inseparable from what Thomas Franck referred to as the democratic entitlement.[38] It is this democracy-based notion of internal self-determination that articulates a right to democracy that power-sharing arrangements trample on.

The Grand Bay Declaration built on the Banjul Charter by seeking to assist member states in instituting plans for implementing the Banjul Charter's human rights provisions. It acknowledged the importance of human rights as a "key tool for promoting collective security, durable peace and sustainable development" and the need to "constructively examine human rights issues in a spirit of justice, impartiality and non-selectivity, avoiding their use for political purposes [e.g., amnesty]."[39] The power-sharing provisions in the Accra, Lomé, and Abuja accords did not serve the interests of justice;[40] rather, they impinged on the right to self-determination of Liberians, Sierra Leoneans, and Bissauans by empowering warlords, rebels, and junta to rule over them without their consent and by denying them any venue to challenge the legality of the accords, their peace prescriptions, and/or adjudicate human rights claims.

In this sense and as noted in earlier chapters power sharing was a political compromise between the protection of human rights, democracy, and governance, on one hand, and the need for expedient peace and security as a public good, on the other. Thus, as a purely political tool, power sharing violated the spirit and substance of the Banjul Charter and Grand Bay Declaration. It also undermined the declaration's provisions on the perpetration of "acts of genocide, crimes

[38] Murray, *supra* note 28, at 16–17 and 22–23. See generally Thomas Franck, *The emerging right to democratic governance*, 86 American Journal of International Law 46 (1992).

[39] *Grand Bay Mauritius Declaration and Plan of Action of the Organization of African Unity* (April 1999), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 374 (hereinafter Grand Bay Declaration).

[40] The function of justice in this context "is to provide a foundation for dismantling institutions and discrediting leaders and their ideology that have promoted war crimes." Michael P. Scharf & Paul R. Williams, *The functions of justice and anti-justice in the peace-building process*, 35 Case Western Research Journal of International Law 161, 171 (2003).

against humanity and other war crimes," which called for African states to ensure that "these serious acts of violation be adequately dealt with," that is, punished.[41] Additionally, power sharing conflicted with the underlying logic of the Grand Bay Declaration, which affirmed the interdependence of the principles of democracy, good governance, and the rule of law and concluded that "unconstitutional changes in governments" often cause human rights violations.[42]

The human rights principles in the Banjul Charter and Grand Bay Declaration are reinforced by the Constitutive Act of the African Union and related amendments, which have, as one of their core objectives, the promotion and protection of "human and people's rights in accordance with the [Banjul Charter] and other relevant human rights instruments."[43] The act also seeks to promote and respect "democratic principles and institutions," "popular participation," "human rights," and the "rule of law and good governance"[44] and, similar to the Grand Bay Declaration, reject and condemn "unconstitutional changes in government."[45] And the OAU-AU reinforced its position on unconstitutional changes of government in July 2000 by adopting the Lomé Declaration for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration). The Lomé Declaration determined that an unconstitutional change of government takes place in four situations:

1. a military coup d'état against a democratically elected government
2. intervention by mercenaries to replace a democratically elected government

[41] Grand Bay Declaration, *supra* note 39.
[42] *Id.*, Article 8(16).
[43] Constitutive Act of the African Union, Article 4(h) (June 11, 1981), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 35; emphasis added. The AU Constitute act was adopted in June 2000, but did not come into force until May 26, 2001; hence, acts adopted prior to the latter date such as the Lomé Declaration were done so under the auspices of the OAU.
[44] *Id.*, Articles 3(h), 4(m).
[45] *Id.*, Article 4(p). The AU's prohibition on unconstitutional changes in government has its doctrinal genesis in the 1999 Algiers Declaration on Unconstitutional Changes of Government, the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government, and the 2002 OAU-AU Declaration on Principles Governing Democratic Elections in Africa.

3. replacement of a democratically elected government by armed dissident groups and rebel movements
4. the refusal by an incumbent government to relinquish power to the winning party after free, fair, and regular elections[46]

The OAU provided for a range of sanctions that could be levied against regimes that came to power extraconstitutionally short of military force; however, this, too, changed with the establishment of the AU. The Protocol on Amendments to the Constitutive Act expands and clarifies the powers of the AU to protect democratically constituted governments. Article 4 empowers the AU to employ military force in a member state "in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a *serious threat to legitimate order to restore peace and stability to the member state of the Union* upon the recommendation of the Peace and Security Council."[47] Not only does AU law reject unconstitutional changes in government but it places a duty on the AU to restore them to power and suspend from participation any governments that may "come to power through unconstitutional means."[48] This includes political transitions and arrangements precipitated by coups or other violent means, irrespective of whether such deals are endorsed by governments. How, then, can the AU justify its support of power sharing when democratically constituted governments are violently threatened or removed from power? According to the principles of the Constitutive Act, the AU and ECOWAS's formal endorsements of the Accra Agreement clearly violated AU law given that such rules were binding on the country and the Accra peace process before the accord was adopted.

Unlike the Accra Agreement, the Lomé and Abuja agreements were not bound by the provisions of the Constitutive Act because their entry

[46] Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, OAU Assembly of Heads of State and Government, 36th Sess., Doc. No. AHG/Decl.5 (XXXVI) (July 10–12, 2000).

[47] Article 4, Protocol on Amendments to the Constitutive Act of the African Union, adopted by the First Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia, on February 3, 2003, and by the Second Ordinary Session of the Assembly of the Union in Maputo, Mozambique, on July 11, 2003 (emphasis added).

[48] *Id.*, Article 30.

into force preceded the act. Nonetheless, they were subject to the provisions of the act's predecessor, the OAU Charter. The preamble of the state-centered charter considered human rights and the "cause of human progress" critical factors for peace and security. Moreover, OAU practice – particularly its human rights–based peace-observation missions in Chad in 1981 and Burundi in 1993, condemnation of the coup d'état against the Kabbah regime in Sierra Leone in 1997, and precedent-setting request that ECOWAS restore Kabbah to power – demonstrates that well-settled human rights law and an emerging practice of pro-democratic intervention were in existence when the Lomé and Abuja agreements entered into force. Hence it can be argued that all three accords offended well-established norms, doctrine, and law, in particular, human rights law and newly established pro-democracy and governance norms of the OAU and AU, respectively.[49]

The Peace and Security and Democracy and Political Governance initiatives of the New Partnership for Africa's Development (NEPAD) echo the human rights– and democracy-related principles in the conventions in Table 7.1 by acknowledging that development is impossible in the "absence of true democracy, respect for human rights, peace and good governance."[50] If this acknowledgment is true, how can extralegal power sharing of the kind found in the Accra, Lomé, and Abuja agreements be justified, given their bold contravention of established norms? Under the NEPAD, African states agree to "respect the global standards of democracy," allowing for fair democratic elections to "enable people to choose their leaders freely" and achieve "basic standards of good governance and democratic behavior."[51] Yet, whether working through regional institutions such as the AU or acting individually, the governments of Liberia, Sierra Leone, and Guinea-Bissau knowingly shared power in derogation of prevailing rules and global standards of democracy with the endorsement of the AU and ECOWAS. The

[49] See generally Jeremy I. Levitt, *Pro-democratic intervention in Africa*, 25 Wisconsin Journal of International Law 1 (2006).

[50] New Partnership for African Development, Strategy Document 17 (October 2001). The New Partnership for African Development is a program of action established by African leaders to renew the African continent through a series of initiatives in conflict mitigation, human rights, the rule of law, democracy and governance, security, macroeconomics, fiscal regulation, health, education, and human and social development.

[51] *Id.*

NEPAD framework was adopted and in force before the entry into force of the Accra Agreement; it did not exist when the Lomé and Abuja agreements were adopted. Nevertheless, NEPAD's core principles were enshrined in the Draft Kampala Document for a Proposed Conference on Security, Stability, Development, and Cooperation in Africa (CSSDCA) and accepted by nearly all African states, including Sierra Leone and Guinea-Bissau, prior to the Lomé and Abuja peace processes.[52] Hence the governments of Liberia, Sierra Leone, and Guinea-Bissau had an affirmative duty not to violate NEPAD's democracy principles (in the case of Liberia), transgress the spirit of the CSSDCA, or subvert democracy by sharing power unlawfully and undemocratically.

Finally, the AU Constitutive Act and amendments, AUPSC Protocol, and related rules represent the most current statement of AU law and policy on peace, security, democracy, and governance matters and is informed by the following AU principles, among others: "respect for the rule of law, fundamental human rights and freedoms, the sanctity of human life and international humanitarian law."[53] In fact, as previously noted, the AU Constitutive Act, Protocol on Amendments to the Constitutive Act (Protocol on Amendments), and AUPSC Protocol empower the AU to initiate and/or authorize military intervention in member states to halt or remedy grave circumstances, including war crimes, genocide, crimes against humanity, and serious threats to legitimate order.[54] It may also "institute sanctions whenever an unconstitutional change of Government takes place."[55] Hence, under AU

[52] Draft Kampala Document for a Proposed Conference on Security, Stability, Development, and Cooperation in Africa (CSSDCA), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 227.

[53] Article 4(c), Protocol Relating to the Establishment of the Peace and Security Council of the African Union (2002), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 167.

[54] Protocol on Amendments to the Constitutive Act of the African Union, Second Ordinary Session of the Assembly of the Union in Maputo, Mozambique, on July 11, 2003. A draft version of the protocol was originally adopted at the First Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia, on February 3, 2003.

[55] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 169; Constitutive Act of the African Union, Articles 4(e), 4(g), 4(h), 4(p), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 41–42.

law, doctrine, and practice, the notion of entering into or sanctioning unlawfully derived peace deals is antithetical to the Constitutive Act and human rights and democracy law and norms in the region. The AUPSC Protocol and Protocol on Amendments were adopted before the Accra Agreement came into force but after the Lomé and Abuja agreements and thus were not applicable to the latter. However, their core objectives, with the exception of military intervention, formed an integral part of the principles that underwrote the declaration establishing the OAU conflict mechanism.[56] Otherwise stated, these principles were firmly established in the African region by OAU law and practice prior to the conflicts in Liberia, Sierra Leone, and Guinea-Bissau.[57] Nevertheless, they ignore OAU-AU law by fashioning political deals adverse to democracy and long-term peace. Here, the AU, ECOWAS, and the Kabbah, Taylor/Blah, and Vieira governments collaborated in the enterprise of forging illegal peace, raising an important question: what is the normative value, if any, of comprehensive human rights and pro-democracy rules if they can be contracted away by self-interested political elites and regional decision makers? The next section examines the legality of the accords' power-sharing arrangements under ECOWAS law.

B. ECONOMIC COMMUNITY OF WEST AFRICAN STATES LAW AND PRACTICE

ECOWAS law does not establish an independent human rights regime, although it does provide for a unique collective security system concerned with preventing, managing, and resolving conflict; protecting fundamental human rights; and promoting democracy and good governance. According to the law, doctrine, and practice of the African

[56] Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict, reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 219. The OAU Conflict Mechanism was concerned with preventing, managing, and resolving civil wars, given their devastating impact on Africa's sociopolitical order and developmental landscape.

[57] See generally Levitt, *supra* note 4.

region, as a subregional organization, ECOWAS is politically and legally subordinate to the AU;[58] hence its member states are bound to adhere to the AU human rights protective regime as well as ECOWAS law norms. For example, the ECOWAS Revised Treaty of 1993 (Revised Treaty) states that ECOWAS will cooperate with the AU and requires member states to declare their adherence to the "recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."[59] As already noted, the Accra, Lomé, and Abuja agreements violate not only the Banjul Charter but also ECOWAS law. Under Article 58 of the Revised Treaty, ECOWAS seeks the maintenance of "peace, stability, security"; the "promotion and consolidation of a democratic system of governance"; and the "timely prevention and resolution of intra-state and inter-state conflicts" through public diplomacy and regional peacekeeping.[60] To manage the intermittent problem of civil war and state disorder in the region and effectuate Article 58, ECOWAS established a radical collective security mechanism aimed at protecting universal human rights and democracy. Explicit and implicit power sharing in the accords thus flouted the ECOWAS Revised Treaty's unambiguous recognition of democracy as an enforceable right and the protection of human rights as key to the development of the region. Accordingly, the illegal nature of the accords and their consequent impact on democratization and human rights must outweigh conjecture that they facilitate peace and security and serve a public good.

The ECOWAS Framework Establishing the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping, and Security (ECOWAS Framework) and the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping, and Security (ECOWAS Conflict Protocol), which are principally concerned with the "protection of fundamental human rights and

[58] This interpretation is implied in AU and ECOWAS law and expressed in African international organizational practice.

[59] Revised Treaty of the Economic Community of West African States, Articles 4(g), 83 (July 1993), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 68.

[60] *Id.*, at 68 and 95.

freedoms and the rules of international humanitarian law,"[61] combine to form the most progressive regional collective security framework in the world. The ECOWAS Framework and Conflict Protocol empowers ECOWAS through the ECOWAS Cease-fire Monitoring Group to undertake humanitarian intervention to enforce peace and preserve democratic institutions in internal and interstate conflict situations that "threaten to trigger a humanitarian disaster," "pose a serious threat to peace and security in the sub-region," or "erupt following the overthrow or attempted overthrow of a *democratically-elected* government."[62] Article 46 of the ECOWAS Framework is nearly identical to Article 25 of the ECOWAS Conflict Protocol, except that the latter explicitly states that intervention is lawful to halt a "massive violation of human rights and the rule of law," whereas the former mechanism merely implies such a right.[63] The inclusion of provisions in both instruments that permit unilateral military force to protect human rights and democracy is novel, making ECOWAS the only subregional organization to codify such rights.

The Accra Agreement was agreed on after the enactment of the ECOWAS Treaty Framework and Conflict Protocol; Liberia and ECOWAS were thus bound by their provisions. At a minimum, ECOWAS was under a duty not to sanction any arrangement that subverted human rights and democracy by sharing power with warlords and rebels responsible for committing atrocities. In this regard,

[61] Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Article 2(d) (December 1999), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 264. The Framework Establishing the Economic Community of West African States Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security is a binding mechanism that provides for interstate collaboration in the collective management of regional security and served as the framework for, and was eventually replaced by, the ECOWAS Conflict Protocol. Article 3 of the Conflict Protocol states that paragraph 46 of the ECOWAS Framework remains controlling when addressing internal and interstate conflicts.

[62] Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Article 46 (October 1999), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 289; emphasis added. Protocol Relating to the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Article 25 (December 1999), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 274 (emphasis added).

[63] *Id.*

ECOWAS appears to subscribe to a hypocritical policy in adopting pro-democracy and pro-democratic interventionist law, while at the same time transgressing such law by guaranteeing extraconstitutional power-sharing arrangements. The Lomé and Abuja agreements entered into force after the Revised Treaty and ECOWAS Framework were instituted but before the Conflict Protocol was adopted; hence, under the Framework, the governments of Sierra Leone and Guinea-Bissau and leadership in ECOWAS were under a similar duty not to endorse peace pacts that contracted away human rights protections and democratic entitlements to war victims and citizens.[64]

Finally, the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol) recognizes that for ECOWAS to be an effective peace broker, it must pay special attention to the inherent linkages between "internal crises, democracy and good governance, the rule of law, and human rights."[65] In this context, the ECOWAS Democracy Protocol requires ECOWAS member states to establish mechanisms that promote, protect, and enforce democracy and human rights as a matter of law and policy and obligates them to make democracy as, in Samuel Barnes's phrase, "an institutionalized process of decision making and societal learning, not a substantive formula for a regime."[66] The protocol also forbids all cruel, inhumane, and degrading treatment of civilians and combatants during times of war and peace.[67] It specifically endorses the notion of empowering the ECOWAS Community Court of Justice to adjudicate cases "relating to violations of human rights" after domestic remedies have been exhausted[68] and deems as essential the elimination of "all forms of discrimination and harmful and degrading practices

[64] See Framework Establishing the ECOWAS Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Article 46 (October 1999), in AFRICA: SELECTED DOCUMENTS, *supra* note 25, at 287.

[65] Protocol A/SP1/12/01 on Democracy and Good Governance, Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, prmbl, ECOWAS (December 21, 2001) (unpublished document on file with author).

[66] Samuel H. Barnes, *The contribution of democracy to rebuilding post conflict societies*, 95 American Journal of International Law 86, 89 (2001).

[67] Protocol A/SP1/12/01 on Democracy and Good Governance, *supra* note 65, Articles 22(2), 23, 33(1), 34, and 35(1).

[68] *Id.*, Article 39.

against women."[69] As previously noted, the protocol confirms that in West Africa, democracy is an entitlement to be respected, promoted, and preserved, by pro-democratic intervention, if necessary. In this context, it declares as a fundamental principle of democracy popular participation in decision making with no caveat for wartime exceptions. It also mandates that armed forces must be apolitical and under the command of a legally constituted civil political authority, and that no active or serving member of the armed forces of a member state may "seek to run for elective political office."[70] If the ECOWAS Democracy Protocol marks a formal shift in ECOWAS law and policy, how could ECOWAS lawfully and legitimately support power sharing between Vieira's and Mane's military juntas? Last, the protocol permits ECOWAS to levy sanctions against, withdraw support in international organizations for, and suspend any ECOWAS member state government that comes to power by undemocratic means or that commits massive human rights violations.[71] In this sense the Protocol empowers ECOWAS to levy long-term sanctions on regimes that come to power extraconstitutionally and violently suppress fundamental rights. It has already relied on the ECOWAS Democracy Protocol.

For example, ECOWAS helped restore law, order, and democracy to Guinea in 2010 after a senseless military coup in December 2008 that took place after the death of former head of state, Lansana Conte. In the wake of the coup, ECOWAS avidly condemned it, suspended Guinea from membership in the organization, and mobilized international condemnation of the military junta. Similarly, in February 2005, the AU and ECOWAS suspended Togo from membership and instituted a travel ban and arms embargo against Faure Gnassingbé's regime after it concocted an unconstitutional military-backed seizure of power after the death of Gnassingbé's father, Gnassingbé Eyadéma.[72] In July 2003, after a military coup in São Tomé Príncipe, ECOWAS, and, in particular, Nigerian president Obasanjo Olusegun, interceded on the grounds that the seizure of power was extraconstitutional and

[69] *Id.*, Article 40.
[70] *Id.*, Article 1(d)(e).
[71] *Id.*, Article 45(1)(2).
[72] *Togo: AU voices support for ECOWAS on Togo, suspends Togo AU participation*, All Africa (February 20, 2005), available at http://allafrica.com/stories/200502210475.html.

used coercive diplomacy to restore constitutional authority.[73] In this context, unconstitutional seizures of power by the military that contravened ECOWAS law occasioned robust action.

The Democracy Protocol came into force before the Accra Agreement was implemented but after the Lomé and Abuja accords were adopted. Thus the Liberian government was under a duty not to share power or consider amnesty, and ECOWAS should not have transgressed its own law and doctrine by endorsing or morally guaranteeing power sharing in the Accra Agreement. Notwithstanding, as the preceding analysis reveals, by 1998, hardened pro-democratic law, doctrine, and practice existed prior to the Lomé and Abuja accords to contest the legitimacy of power sharing under ECOWAS and OAU-AU rules. For these reasons, ECOWAS unlawfully and negligently sanctioned power sharing in all three agreements, which raises the question whether, in the future, the influence of the ECOWAS Democracy Protocol will sway the organization away from sanctioning power sharing as a tool of conflict resolution when DCGs have been toppled by *pirates de la loi*.

C. CONCLUSION

This chapter examined the legality of power sharing under regional and subregional law in the African region, with a specific focus on international human rights law and democracy norms. It vividly shows that power sharing with *pirates de la loi* is unlawful and does not necessarily serve the public good, despite being the preferred tool of embattled political elites, warlords, junta, and regional peacemakers to end high-intensity armed conflict. Though political necessity and expediency too often define power-sharing relationships between weak governments and bandits of the law in Africa, it is unclear why regional approaches to power sharing by the AU and ECOWAS offend their own law and practice to these ends. For example, although the AU and ECOWAS initially rejected violent and unlawful seizures

[73] *Lessons of Sao Tome coup according to Obasanjo,* All Africa (August 6, 2003), available at http://allafrica.com/stories/200308060923.html.

of power in Sierra Leone and Guinea-Bissau, they eventually brokered and endorsed unlawful power-sharing prescriptions. Similarly, though ECOWAS (and the AU) uncompromisingly rejected violent and unconstitutional changes of power in the Central African Republic (1996), Côte d'Ivoire (2002), Guinea (2009), Togo (2005), Niger (2010), and Côte d'Ivoire again (in 2010), it eventually sanctioned various types of conflict-management tools, including power sharing, in these states. Although both the AU and ECOWAS assigned to themselves the normative role of guardian of the rule of law, human rights, and democracy on the continent, they rely on imported conflict-resolution models, such as power sharing, that fundamentally ignore the rule of law, human rights, and self-determination. To its credit, ECOWAS suspended the membership of Guinea after the 2008 coup d'état, of Niger in the wake of the 2009 auto-coup, and of Côte d'Ivoire after botched elections in 2010.

The preceding discussion demonstrates that the Accra, Lomé, and Abuja agreements infringe AU and ECOWAS law and practice irrespective of the fact that they have advanced comprehensive peace and security regimes that codify existing regional custom (e.g., a right to humanitarian intervention) and fashion new treaty norms (e.g., a right to democracy and pro-democratic intervention).[74] By entering into the agreements, the governments of Liberia, Sierra Leone, and Guinea-Bissau failed to protect their citizens as well as promote settled international human rights and international humanitarian law, and democracy norms in the West African region. Consequently, these organizations operated in a lawless realm where the rule of law is forced to submit to unlawful and unviable political prescriptions that too often regenerate armed conflict. The next chapter examines the legality of the Accra, Lomé, and Abuja accords under international law, in particular, UN law and practice.

[74] See generally Levitt, *African interventionist states and international law*, *supra* note 4; Levitt, *Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone*, *supra* note 4.

8 THE INTERNATIONAL LEGALITY OF POWER SHARING

Liberia, Sierra Leone, and Guinea-Bissau are state parties to nearly all major international human rights law (IHRL)- and international humanitarian law (IHL)-related treaties. Liberia is a founding member of the United Nations (UN). Consequently, to assess the lawfulness of the Accra, Lomé, and Abuja agreements, they must be scrutinized against IHRL, IHL, international criminal law (ICL), customary international law, and other relevant rules, norms, doctrine, and jurisprudence applicable to their respective states at the time the accords were signed. These bodies of law form an integral part of the wider corpus of international law and underwrite the neo-Kadeshean model (NKM).

Similar to the preceding chapter, the power-sharing provisions in all three agreements contravened well-settled international law and diverged from emerging norms. This chapter examines the legality of the Accra, Lomé, and Abuja accords under international law using, as noted earlier, the NKM.

A. UNITED NATIONS LAW AND PRACTICE

As Chapter 7 has illustrated, at the regional level, the Accra, Lomé, and Abuja accords flouted IHRL, IHL, ICL, and settled democracy and governance norms. In this regard, not only have the governments of Liberia, Sierra Leone, and Guinea-Bissau failed to abide by regional law, but as moral guarantor of the agreements, the UN, like the African Union (AU) and the Economic Community of West African States (ECOWAS), violated its charter and related law and doctrine. The forgoing analysis will largely focus on UN human rights law, as well as IHL, ICL, and other customary international law norms that

complement them, including the UN Charter; the Universal Declaration of Human Rights (Declaration); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Geneva Convention law.

The preamble of the UN Charter states that "the peoples of the United Nations" are "determined to save succeeding generations from the scourge of war"; it "reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person," and seeks to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[1] Key objectives of the UN are the prevention and removal of threats to the peace, the suppression of acts of aggression and breaches to the peace, and, in consonance with the "principles of justice and international law," the settlement of "international disputes or situations which might lead to a breach of the peace."[2] The UN Charter also recognizes the "rights of self-determination of peoples" and the need to "strengthen universal peace" through the promotion and encouragement of respect for fundamental human rights and freedoms.[3] To these ends, UN member states pledge to unite their "strength to maintain international peace and security,"[4] which the UN Security Council has broadly construed to include the protection of human rights and democracy and the management of international and noninternational armed conflict.[5]

Similarly, the UN Charter's human rights companion, the Universal Declaration on Human Rights, states that the "peoples of the

[1] UN Charter prmbl, reprinted in Jeremy Levitt (ed.) AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN AND JUDICIAL ISSUES (2003), at 5.

[2] UN Charter, Article 1(1), reprinted in AFRICA: SELECTED DOCUMENTS, *supra* note 1, at 6.

[3] *Id.*

[4] *Id.*

[5] See generally Jeremy Levitt, *African interventionist states and international law*, in Oliver Furley & Roy May (eds.) AFRICAN INTERVENTIONIST STATES (2001), Jeremy Levitt, *Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone*, 12 Temple International and Comparative Law Journal 333 (1998).

United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person."[6] The Declaration stresses the pledge made by UN member states, including Liberia, Sierra Leone, and Guinea-Bissau, to promote "universal respect for and observance of human rights and fundamental freedoms";[7] to ensure that every person has the "right to an effective remedy by the competent national tribunals for acts violating their fundamental rights granted him by the constitution or by law";[8] and to ensure that the will of the people is the basis of the authority of government and that every person has the "right to take part in the government of his country, directly or through freely chosen representatives."[9] Michael Reisman considers the Declaration declaratory of customary international law,[10] particularly Article 21(3), which provides that "the will of the people shall be the basis of the authority of government."[11] The UN Human Rights Committee has explicitly interpreted the Declaration's explicit acknowledgment of a right of self-determination as an "essential condition for the effective guarantee and observance of individual human rights."[12] The AU, and its predecessor, the Organization of African Unity, formally adopted this position over a decade ago.

From this background, the Accra and Lomé agreements violated the spirit and substance of the UN Charter and Declaration. Power sharing in the accords undermined the justice components of the rule of law and impinged on fundamental human rights, particularly the dignity of the person, by sharing power and granting explicit or implicit amnesty. Similar to its transgression of AU law, power sharing also offended the right of internal self-determination of the domestic populations of Liberia, Sierra Leone, and Guinea-Bissau, that is, their

[6] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, prmbl, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (December 12, 1948).
[7] *Id.*
[8] *Id.*, Article 8.
[9] *Id.*, Article 21.
[10] W. Michael Reisman, *Sovereignty and human rights in contemporary international law*, 84 American Journal of International Law 866, 867 (1990).
[11] Universal Declaration of Human Rights, *supra* note 6, Article 21(3).
[12] U.N. Hum. Rts. Comm'n, General Comment 12: The Right of Self-Determination of Peoples (Article 1), para. 1, U.N. Doc. CCPR/C/21/Rev.1 (March 13, 1984).

right to choose their states' bases of authority, their forms of government, and representatives to act on their behalf. The accords also failed to provide judicial venues for citizens to seek effective remedies for IHRL, IHL, and ICL abuses. The Abuja Agreement, which did not contemplate amnesty, trampled on the basic governance entitlements enshrined in the UN Charter and Declaration and similarly forbade any judicial remedy as a consequence of the coup. For that reason, the accords failed to protect and promote universal respect for human rights, thereby sending the signal to future *pirates de la loi* that violence is an acceptable way to obtain political power and economic reward. It is clear that despite the existence of rules and doctrine to the contrary, the governments of Liberia, Sierra Leone, and Guinea-Bissau contracted for, and the UN, the AU, and ECOWAS morally guaranteed, coerced peace agreements in derogation of the UN Charter and Declaration.

The ICCPR recognizes that the "inherent dignity" and "equal and inalienable rights of all members of the human family [are] the foundation of freedom, justice, and peace in the world."[13] It asserts that the realization of full civil and political rights can be attained only through enabling environments where all facets of society may enjoy them, and it obliges states to "promote universal respect for, and observance of, human rights and freedoms."[14] By rewarding bandits of the law and perpetrators of IHRL and IHL with power sharing – in effect placing them on a higher footing than their victims – the Accra and

[13] International Covenant on Civil and Political Rights, preamble (December 16, 1966), 999 U.N.T.S. 171 (hereinafter ICCPR). The ICCPR was adopted on December 16, 1966 (entry into force on March 23, 1976), and does not directly apply to the Accra Agreement because Liberia did not ratify it until September 22, 2004, after the agreement came into force. However, it did sign the ICCPR on April 18, 1967, and thus had a responsibility under the Vienna Convention on the Law of Treaties to refrain from acts, whether power sharing or permissive amnesty, that would defeat its object and purpose. At a minimum, Liberia had a positive duty to respect the ICCPR's core principles. Sierra Leone acceded to the covenant on August 23, 1996, nearly three years before the Lomé Agreement entered into force; hence the accords power-sharing and amnesty provisions were unlawful under the protocol and contravened its guarantee of the right of the individual to submit claims before it for breaches to the covenant. Guinea-Bissau signed the ICCPR on September 12, 2000, after the Abuja Agreement was adopted, and hence, similar to Liberia, its core human rights obligations are enshrined in other treaty law, customary international law, and the ICESCR.

[14] *Id.*

Lomé agreements failed to value the dignity and equal rights of victims of armed conflict and coups. All three accords prevented war and coup victims from obtaining an "effective remedy" from "competent judicial, administrative or legislative authorities"[15] and thus generally impinged on the notion of respecting and observing human rights norms in the ICCPR and customary international law. Similarly, power sharing under the Abuja Agreement infringed rather than promoted respect for human rights and the self-determination of Bissauans by validating the unlawful actions and undemocratic power-sharing edicts of junta.

The ICCPR places a positive duty on states to conduct impartial human rights investigations and to bring perpetrators to justice, regardless of whether they are public (e.g., government officials in the Taylor and Kabbah regimes) or private persons (e.g., Revolutionary United Front (RUF) and Liberians United for Reconciliation and Democracy (LURD) members and mercenaries).[16] The failure to do so "could in and of itself give rise to a separate breach of the Covenant."[17] In addition, the ICCPR requires states to prevent a recurrence of breaches,[18] which, in the context of Liberia and Sierra Leone, would appear to include a duty not to empower perpetrators of atrocities with the authority (e.g., government positions) to commit further IHRL violations. Stated differently, the ICCPR seems to prohibit states from power sharing with and giving amnesty to serious human rights abusers.

The ICCPR requires state parties to effectively protect Covenant rights, particularly the individual right to an effective remedy, which requires governments to "make reparation" to war victims and those otherwise affected by unconstitutional seizures of power and IHRL violations.[19] In fact, it compels state parties to provide effective remedies for any violation of the provisions of the Covenant, especially

[15] *Id.*, Articles 2(3)(a–c).
[16] U.N. Hum. Rts. Comm'n, General Comment 31 (80): Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).
[17] *Id.*, para. 15.
[18] *Id.*, para. 17.
[19] *Id.*

those transgressions committed by government officials and rebels or junta acting in their territories.[20] The Human Rights Committee has determined that the provision of an effective remedy constitutes a non-derogable treaty obligation;[21] hence, without access to justice, remedy, and reparation "to those individuals whose Covenant rights have been violated," a state cannot discharge its obligation to provide a remedy under the ICCPR.[22] The failure to provide an effective remedy to human rights and war crimes victims as well as those stripped of their democratic entitlements, combined with policy determinations inherent in power sharing that force such persons to live under the rule of their abusers, seemingly violates Article 7 of the ICCPR. This article seeks to protect the dignity and the physical and *mental* integrity of the individual. In this sense, power sharing that forces victims to be ruled by perpetrators can be an unusually cruel way to make peace and serve the public good. It follows that the Kabbah, Taylor, and Vieira regimes violated the ICCPR by not ensuring that their respective agreements included effective remedies for victims of atrocities (e.g., torture or cruel, inhumane, or degrading treatment) and/or coups committed during their respective armed conflicts and episodes of instability.

Moreover, sharing power under the accords seems to conflict with the principles of democracy and self-determination in the ICCPR, and hence with the freedom of Liberians, Sierra Leoneans, and Bissauans to participate in the conduct of public affairs and determine their political futures,[23] rather than having them contracted away or determined by political fiat.[24] Wippman notes that while power sharing may be "politically desirable and operationally feasible," it should not be assumed that it is "necessarily compatible with international law or

[20] UN Hum. Rts. Comm'n, General Comment 29: States of Emergency (Article 4), para. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (August 31, 2001).

[21] *Id.*

[22] General Comment 31, *supra* note 16, at para. 16. The committee notes that proper reparation may include restitution, rehabilitation, public apologies, public memorials, guarantees of nonrepetition, changes in relevant laws and practices, and most important for this analysis, bringing the perpetrators to justice for human rights violations. *Id.*

[23] ICCPR, *supra* note 13, Article 25(a).

[24] *Id.*, Article 1.

the policies that underlie it."[25] For example, he notes that under contemporary international law, "self-determination has been transformed in large part into a democratic entitlement – that is, a right to representative government shared by all of the people residing within a given state."[26] The *law of power sharing* subscribes to this approach, which, as preceding chapters reveal, is sacrosanct in the African human rights system. General Comment 25 to the ICCPR recognizes that the right of every citizen to take direct part in the conduct of public affairs "lies at the core of democratic government based on the consent of the people" and must be protected.[27] Political power-sharing arrangements are incompatible with the ICCPR's "right of political participation" when citizens are denied meaningful participation in their creation and thus the "political life of the state."[28]

It thus follows that the political elites who brokered the Accra, Lomé, and Abuja accords seemingly violated the internal self-determination rights of the peoples of Liberia, Sierra Leone, and Guinea-Bissau by not seeking or obtaining en masse their participation and consent in negotiating and adopting, respectively, the accords' power-sharing components.[29] Still, the extent to which these accords violated the principle of self-determination, arguably a nonderogable norm, varied, for example, owing to the pervasive support among Liberians for the insurrection that eventually led to the resignation of Taylor and the disbandment of his regime.[30] Hence, in Liberia, though power sharing may have abrogated participatory rights, it was not widely unpopular. In contrast, Sierra Leoneans heatedly contested the coup and junta

[25] David Wippman, *Practical and legal constraints on internal powersharing*, in David Wippman (ed.) International Law and Ethnic Conflict (1998), at 227.

[26] *Id.*, at 228.

[27] U.N. Human Rights Committee, General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25), para. 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (December 7, 1996).

[28] Wippman, *supra* note 25, at 229.

[29] Sharing power under the Accra, Lomé, and Abuja agreements also breached the "right and opportunity of citizens to have access on general terms of equality to public service positions" because cabinet-level and other posts were undemocratically awarded to members of the warring parties or junta. ICCPR, *supra* note 13, Article 25.

[30] Conversely, it may be argued that the case for self-determination – to participate in regime change through power sharing – in this instance is weakened because Liberians democratically elected Taylor with 75% of the vote before he was forced into exile, and arguably, the notion of power sharing itself contravened his clear victory at the polls.

that displaced the Kabbah government as well as the Lomé Agreement. Public opinion in Guinea-Bissau seemed divided about Vieira's ouster from power, but power sharing with the junta was shunned. These dichotomies may explain why soft power sharing in the Lomé Agreement does not appear to offend the principle of self-determination to the same extent as hard and moderate power sharing under the Accra and Abuja agreements, respectively. Nevertheless, despite that power sharing in all three agreements trampled on basic rights, the ICCPR precludes states from derogating from fundamental rights such as the rights to political participation and self-determination.

Another troubling aspect of the agreements was the blatant failure of the governments of Liberia, Sierra Leone, and Guinea-Bissau to ensure that the accords provided all persons in their territories with equal protection before the law, which includes, in particular, the rights of victims of war – as a class – to seek judicial remedies for rights violations.[31] All Liberians, Sierra Leoneans, and Bissauans were entitled to protections enumerated in the ICCPR, which form an important part of customary international law, without distinction of any kind. In addition, the ICCPR rejects arrangements that grant amnesty to, and share power with, warlords, rebels, and junta because they disenfranchise war and democracy victims. As previously noted, not even during public emergencies or situations threatening the "life of the nation" may states parties to the ICCPR derogate from their obligations if such action would be "inconsistent with their other obligations under international law" (e.g., the ensuring of equal protection before the law).[32] Other obligations originate in treaty law and customary international law, including authoritative AU and ECOWAS rules as well as nonderogable human rights norms. In this context, at the time the agreements were signed, Blah (Taylor's successor), Kabbah, and Vieira had not formally declared a state of emergency, nor did Liberia or Sierra Leone assert a right of derogation from their varied obligations under the ICCPR.[33] Hence, to

[31] ICCPR, *supra* note 13, Article 26.
[32] *Id.*, Article 4(1).
[33] *Id.*

the extent that power sharing offends the human rights- and democracy and governance–related norms in the ICCPR, the Taylor/Blah, Kabbah, and Vieira regimes unlawfully entered into, and their institutional patrons (the AU, ECOWAS, and the UN) sanctioned, illegal peace deals in violation of the Covenant and customary international law.

Similar to the ICCPR, the rights and principles enshrined in the ICESCR are directly assaulted by power sharing with *pirates de la loi*. The Convention recognizes that the "inherent dignity" and "equal and alienable rights" of all people are the "foundation of freedom, justice and peace"; in this respect, all states are obligated to "promote universal respect for, and observance of, human rights and freedoms."[34] As previously noted, the power-sharing and amnesty provisions in the accords appear to encroach on the dignity of the individual by forcing Liberians, Sierra Leoneans, and Bissauans to exist, without any remedy, under the rule of bandits.[35] On this point, Article 5 of the ICESCR prohibits any state, group, or individual (Taylor/Blah, Kabbah, or Vieira or UN, AU, and ECOWAS officials) from engaging in any activity or act, such as power sharing, aimed at the destruction or limitation of any of the rights or freedoms in the Covenant.[36]

As previous sections demonstrate, similar to the Declaration and the ICCPR, the ICESCR states that all people have a right of self-determination and hence the right to "determine their political status."[37] States parties may only limit such rights to the extent domestic law allows, and only if such limitations are compatible with the

[34] International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), prmbl, 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (December 19, 1966), entered into force January 3, 1976 (hereinafter ICESCR). Liberia signed the ICESCR before the Accra Agreement and therefore had a positive duty to refrain from any acts that would defeat its object and purpose (see VCLT, *supra* note 6, Article 18), whereas Sierra Leone and Guinea-Bissau acceded to the covenant before the Lomé and Abuja peace processes began. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) was signed by Liberia on April 18, 1970, and ratified by it on September 22, 2004. Sierra Leone and Guinea-Bissau acceded to the treaty on August 23, 1996, and July 2, 1992, respectively

[35] See UN Human Rights Commission, General Comment No. 3: The Nature of States Parties' Obligations (Article 2, para. 1 of the Covenant), para. 5, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

[36] ICESCR, *supra* note 34, Article 5.

[37] *Id.*, Article 1.

"nature of the rights" in the ICESCR and "solely for the purpose of promoting the *general welfare in a democratic society*."[38] It follows that, consistent with findings in Chapter 6, no limitations on the right to freely choose the form of government, its representatives, and resultant rights comport with domestic law in Liberia, Sierra Leone, and Guinea-Bissau. Does sharing power unlawfully with warlords, rebels, and junta responsible for committing human atrocities promote the general welfare in a democratic society? Sharing power extraconstitutionally is itself problematic, but doing so without the explicit consent and participation of citizens interferes with their individual and collective rights to self-determination and the freedom to determine their own political status and future. Because Liberia, Sierra Leone, and Guinea-Bissau were parties to the ICESCR when the Accra, Lomé and Abuja agreements were adopted, both states were arguably duty-bound to implement, operationalize, or domesticate its principles and provisions. At a minimum, they were beholden not to interfere with or prohibit such rights by sharing power. In this sense, under the ICESCR, forced power sharing impinges on the inherent dignity and freedom of war victims, citizens, and others by embracing impunity and undemocratic rule by fiat. An unfortunate consequence of this troubling practice is the disparate impact it has on the world majority: women.

One of the most troubling aspects of power sharing is the stark gendered impact it has on women. Seventy percent of deaths in internal conflict are noncombatants – the majority being women and children. Maternal death is the highest lifetime risk of women in conflict-ridden and postconflict states. It is estimated that over five hundred thousand women have died of pregnancy or childbirth complications during armed conflict in Africa over the past decade – one-fifth of them young girls. Yet women, and women representing women's interests, are rarely included in peace negotiations. Women represent the global majority – meaning that they represent the group with the largest stake in peace and the smallest voice in shaping it. In addition, they infrequently benefit from agreements that restructure power as they rarely end up with positions in government, let alone influential positions.

[38] *Id.*, Article 4; emphasis added.

This is also highly problematic because at the most fundamental level, power sharing has a broad and disproportionate impact on the human rights and democracy entitlements of women given that impunity, whether through amnesty or inaction, curbs rights-based claims and reconstructs or reorders the framework of governance and its future disposition. In Liberia, Sierra Leone, and Guinea-Bissau, women were largely absent from the negotiations that birthed the Accra, Lomé, and Abuja agreements, despite, for example, the successful advocacy of the Liberian Women's Initiative and a small number of women's groups in Sierra Leone.[39] Notwithstanding, although women and women's groups actively participated in the Accra and Lomé peace processes, it is popular myth that they were key players in what were unfortunately male-dominated enterprises. The collective interests of women were virtually ignored in all three peace negotiations and processes, and as a result, women's issues were also largely ignored in the postconflict climate. Consequently, these agreements and others that do not sufficiently include or consider the welfare and interests of women directly contravene CEDAW.[40]

CEDAW mandates states parties to condemn discrimination against women in all forms and prescribes policy to ensure their equality with men in national constitutions, legislation, and other law.[41] This requirement applies to peace agreements because they form a part of domestic law and are often sanctioned by legislation. In this sense, CEDAW requires member states to legally protect the rights of women on an equal basis with men and ensure, through tribunals, courts, and other public institutions, that women are effectively protected from any act of discrimination.[42] This means that the disparate impact of power sharing – whether hard, moderate, or soft – on women must be carefully weighed during peace negotiations, and women must be afforded

[39] *Women, peace and security*, study submitted by the secretary-general pursuant to Security Council Resolution 1325 (2000), U.N. Publ. (2002), at 61–62.

[40] Liberia acceded to the convention on July 17, 1984, and Sierra Leone signed and ratified CEDAW on September 21, 1988, and November 11, 1988, respectively. Guinea-Bissau signed and ratified CEDAW on July 17, 1980, and August 23, 1985, respectively.

[41] Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, Article 2(a), 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (December 18, 1979), entered into force September 3, 1981 (hereinafter CEDAW).

[42] *Id.*, at Article 2(c).

judicial reprieve when such impacts are ignored. CEDAW also prohibits states from engaging in any act or practice that discriminates against women and specifically directs members to take all appropriate measures, including legislation, to amend or eradicate any existing law, regulations, customs, or practices that likewise discriminate.[43] Hence national legislatures – whether transitional or not – have a legal duty to reject agreements that discriminate against women, particularly when they are excluded from negotiations and issues specific to their welfare that are not adequately recognized. Public authorities and institutions, including besieged government officials and bandits of the law, that have acquired some measure of legal personality arguably have a duty to comply with CEDAW. Finally, these important rights and duties underwrite the most fundamental principles in CEDAW related to power sharing: the right of women to participate in the formulation and implementation of government policy, to hold public office, to perform government functions at all levels, and to represent their governments at the regional and international levels.[44]

The right of women to actively participate in peace processes was reaffirmed by the UN Security Council in Resolution 1325, which stresses the "importance of their equal participation and full involvement in all" peacemaking efforts, especially their role in "decision-making" with regard to conflict prevention and resolution.[45] The Security Council affirms the need to implement fully IHRL and IHL aimed at protecting women and girls during and after armed conflict.[46] The resolution recognizes that full participation of women in peace processes "can significantly contribute to the maintenance and promotion of international peace and security" and urged all member states to increase the numbers of women at all levels of decision making in national, regional, and international institutions, including in conflict-mitigation mechanisms.[47] The resolution also calls on all actors – whether state or nonstate actors – to adopt gender perspectives "when

[43] *Id.*, at Article 2(d),(f).
[44] *Id.*, at Articles 7(a),(b) and 8.
[45] Prmbl, UN Security Council Resolution 1325, adopted by the Security Council at its 4213th meeting on October 31, 2000.
[46] *Id.*
[47] *Id.*, Articles 1 and 2.

negotiating and implementing peace agreements" and to end impunity and protect women and girls from gender-based violence in armed conflict by prosecuting perpetrators.[48] Consequently, Resolution 1325 provides another veil of legality over principles in CEDAW that concern power sharing, namely, the right of women to participate in, make, and implement government policy and execute government functions at every level. However, unlike CEDAW, the resolution specifically applies to armed conflict and the rights of women to partake in every phase of peacemaking, including the design and operation of transitional power-sharing arrangements. Although it was not adopted until after the institution of the Lomé and Abuja agreements, the protective and participatory principles in Resolution 1325 should have influenced the character of the Accra peace process. Unfortunately, the UN and ECOWAS – both of which played an informative role in ending armed conflict in Liberia – did little to ensure that woman actively participated as decision makers during the Accra peace process or served as senior officials in the transitional government.

The orderly exclusion of women and women's issues in peace agreements – during negotiations and in the postconflict transitional political apparatus – is a global human rights problem and detrimentally affects the longevity of peace because the opinions, welfare, and interests of the majority are not represented:

> Women are under-represented in formal peace negotiations, whether as local participants representing warring factions, or as representatives of international authorities overseeing or mediating deliberations and institutions invited to the negotiating table. In addition, central issues of concern to women, including their participation in post-conflict political, social, civil, economic and judicial structures, do not always reach the negotiating table, in part because of the exclusion of women from the formal peace negotiations. Women not only call for issues specific to themselves but raise issues that affect society as a whole, such as land reform, access to loans and capacity-building. All actors committed to equality and

[48] *Id.*, Articles 8, 10, and 11. The UN Security Council also requested the UN secretary-general to conduct a study on the "impact of armed conflict on women and girls and the role of women in peace-building and the gender dimensions of peace processes and conflict resolution." *Id.*, Article 16.

> non-discrimination – whether male or female – should have the responsibility and capacity to ensure that peace agreements incorporate gender equality issues.[49]

Therefore the UN, the AU, and ECOWAS should not sanction or legitimize political power-sharing agreements that prevent women from being full stakeholders in their creation and implementation. The governments of Liberia, Sierra Leone, and Guinea-Bissau; the UN; and other peace brokers and peace guarantors failed to consider the gendered impact of power sharing on women by ensuring that they had decision-making seats at all tables of power during and after peace negotiations. They also failed to guarantee that women were placed in positions of authority in their respective transitional regimes and provided with judicial venues to pursue legal remedies in flagrant contravention of CEDAW and, in the case of Liberia, UN Security Council Resolution 1325 as well. Because in Africa a right to justice, internal self-determination, and democracy exists, power sharing in the context of women's rights woefully flouts them. Furthermore, impunity through explicit (e.g., Sierra Leone) or implicit (e.g., Liberia and Guinea-Bissau) amnesty is too often a feature of power-sharing arrangements that also discriminates against women and disproportionally subverts retributive justice.

The justice component of human rights is paramount because women disproportionally suffer sexual violence, displacement, and other forms of violence during armed conflict as well as bearing the brunt of family responsibilities. Access to courts is a problem in many countries; however, in the postconflict environment, when it is most needed, women are the most disadvantaged. Yet there are typically no judicial or retributive mechanisms available to them in transitional and postconflict environments. As already noted, the failure of the Accra, Lomé, and Abuja accords to include, let alone contemplate, women's justice affirmatively disenfranchised them. What is more, the consequential interplay between making peace during armed conflict, postconflict justice, and development processes deserves special attention as the bulk of donor aid for postconflict transitions is controlled and

[49] *Women, peace and security*, study submitted by the secretary-general pursuant to Security Council Resolution 1325 (2000), U.N. Publ. (2002), Para. 191 at 61.

directed by men. This means that not only are women denied a seat at the table of power during peace negotiations and transitions but their developmental and reparatory needs, such as health, nutrition, literacy, psychological services, security, and justice, will not be addressed, let alone made equal with those of men in the postconflict order. As such, power sharing systemically ignores the rights and needs of women in peace processes, resulting in their disenfranchisement in the postconflict order – an outcome that only societies with an engrained pathology of violence against women can tolerate.

From this background, there is a systematic practice in the structure and operation of power sharing generally, and specifically in the Accra, Lomé, and Abuja agreements, that boldly discriminates against and impinges on the fundamental human rights and democratic entitlements of women enshrined in CEDAW and Resolution 1325.

B. OTHER INTERNATIONAL LAW AND PRACTICE

Whereas preceding sections primarily contemplated IHRL, the Accra, Lomé, and Abuja agreements were birthed in armed conflict and were therefore governed, first and foremost, by IHL and evolving ICL norms. IHL and ICL inform the legal and practical dimensions of power sharing as much, if not more than, IHRL. They regulate the conduct and character of hostilities in noninternational or internal armed conflict and should significantly influence the shape and character of transitional peace arrangements and postconflict outcomes.[50] IHL and ICL place specific responsibilities on states and *pirates de la loi* during and after armed conflict that directly affect fundamental rights, duties, and obligations that, again, should frame peace agreements.

[50] The most important sources of IHL applicable to noninternational armed conflict are the Geneva Conventions of 1948 (I–IV) and Protocol II Additional to the Geneva Conventions of 1977 (Protocol II). The 1998 Rome Statute establishing the ICC is arguably the most authoritative source of ICL. Liberia ratified Protocol II on June 30, 1988, and Sierra Leone and Guinea-Bissau followed on October 21, 1986. Liberia signed the Rome Statute on July 17, 1988, and ratified it on September 22, 2004. Sierra Leone signed the ICC Statute on October 17, 1998, and ratified it on September 15, 2000. Guinea-Bissau is not a party to the Rome Statute.

Nowhere in peacemaking is the normative tension between rights and responsibilities more pronounced than over the issue of power sharing.

Although it has been traditionally held that the law of armed conflict does not apply in noninternational armed conflict, international criminal tribunals have repeatedly rejected this view, particularly the tribunals for the former Yugoslavia, Rwanda, and Sierra Leone. Today, no credible jurist or court would argue otherwise, given the plentitude of law, doctrine, and jurisprudence confirming IHL's applicability to noninternational armed conflict.[51] Although Common Article 3 to the Geneva Conventions and Protocol II delineate different standards or circumstances for determining when armed conflict actually exists for purposes of triggering IHL protections and duties, essential principles emerge from them that bear on the accords.[52] Geneva Convention law

[51] See generally Jeane-Marie Henkaerts & Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 2 vols., ICRC Study, Rule 158 (2009).

[52] IHL does not provide adequate guidance on how to determine when armed conflict actually begins and thus when IHL is applicable to noninternational armed conflict. This creates legal ambiguities because, as already noted, situations of internal armed violence short of armed conflict only engender IHRL and ICL, whereas situations of armed conflict are governed by IHRL, IHL, and ICL. With respect to IHL, the Geneva Conventions of 1948 (I–IV) and Protocol II provide different standards for determining when armed conflict exists and, consequently, when the conventions are applicable. According to the Inter-American Commission on Human Rights (IACHR) in the *Abella* case, which is one of few authoritative interpretations that indicate when Common Article 3 is applicable to armed violence, armed conflict is "low intensity and open armed confrontations between relatively organized armed forces or groups that take place in the territory of a state." IACHR Report No. 55/97, case No. II.137, October 30, 1997, para. 152. For purposes of Common Article 3, armed conflict applies to all parties at conflict and involves "armed civil strife between government armed forces and organized armed insurgents" and "governs situations where two or more armed factions" battle "without the intervention of government forces where, for example, an established government has dissolved or is too weak to intervene." Leslie Green, THE CONTEMPORARY LAW OF ARMED CONFLICT (2nd ed.) (2000), at 59–60. According to the IACHR, the International Committee on the Red Cross Commentary on the Geneva Convention law and customary IHL, for conflict to qualify as armed conflict under Common Article 3, there need not be large-scale war, nor do armed groups need to control segments of national territory. Conversely, Protocol II is far more conservative and requires that armed conflict be (1) violently intense or at a high level, (2) between armed forces of a state and dissident armed forces or other armed groups, and (3) conducted under responsible command of armed groups that exercise control over enough territory to carry out sustained and concerted military operations, not excluding hit-and-run-type operations. It does not apply to armed conflict between organized armed groups, but only when one of the warring factions is represented by government forces. If armed violence in a state does not satisfy the high threshold in Protocol II,

provides absolute protection from attack for all persons *hors de combat*, civilians and noncombatants, and mandates that such persons be treated humanely at all times. In this context, at a minimum, Common Article 3 and Protocol II expressly forbid such acts as cruelty, murder, torture, and unfair trial, among other acts, during armed conflict or a state of insurgency short of civil war if the belligerency of the insurgents is recognized.[53] These types of acts were certainly committed in Liberia and Sierra Leone, where the LURD–Movement for Democracy in Liberia and RUF, respectively, were in de facto control of large amounts of territory and established well-settled belligerent communities. Arguably, the high levels of violence and killing (nearly two thousand deaths) that occurred during and as a result of the coup d'état in Guinea-Bissau similarly qualify.

As previously noted, IHL and related doctrine is principally concerned with the conduct of hostilities; it also occupies the field of peacemaking and power sharing by prescribing norms of behavior that are designed to regulate and influence the character of peace agreements because they are forged during armed conflict. For example, Protocol II requires that all persons be treated humanely, raising the question whether forcing war victims to live under the rule of warlords, rebels, or junta responsible for committing high crimes against them forms a unique outrage on personal dignity that is both humiliating and degrading. In addition, transitional political power sharing under the Accra, Lomé, and Abuja agreements violated customary humanitarian law, including the basic legal norm that breaches of IHL in noninternational armed conflict obligate insurgent groups and the state (i.e., the incumbent government) to provide remedies and make reparation to victims of war.[54] These obligations may involve

it cannot be classified as armed conflict under the protocol. Under this scenario, IHL may still apply if armed violence satisfies the broad threshold for armed conflict under Common Article 3.

53 Green, *supra* note 51, at 59–60.

54 See, e.g., PCIJ Judgment No. 13, Case Concerning the Factory at Chorzów, at PCIJ, Series A, No. 17 (September 13, 1928); ICCPR, *supra* note 13, Article 2(3); UN Human Rights Committee, General Comment No. 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 (2003), at 186; and Jeremy I. Levitt, *African Court on*

ensuring access to justice, for example, to challenge the legality of peace agreements and amnesty, bring civil claims for tortious acts during war, or prosecute rights violators. Such duties may also necessitate certain forms of reparation, including restitution, compensation, and satisfaction.[55] The failure to treat victims with dignity, compassion, and fairness and the general unwillingness to address their needs in the Accra, Lomé, and Abuja agreements amounted to serial abuses of power. These abuses of power were perpetrated by state officials who contracted away, through power sharing, basic human rights protections such as the ability to judicially challenge the legality of the accords, seek reparative relief, and pursue ICL claims against political elites and rebels for their unsavory conduct during and after armed conflict.[56]

Consequently, as previously noted, the flamboyant disregard of IHRL, IHL, and ICL in framing the Accra, Lomé, and Abuja agreements not only undermined their effectiveness and standing as lawful and legitimate peace deals but also deprived them of the normative legitimacy needed to create sustainable peace. How can peace agreements born out of deadly conflict be legitimate if they blatantly ignore and trample on the fundamental rights of citizens and victims?[57]

The UN Security Council, UN General Assembly, and UN Commission on Human Rights (replaced by the UN Human Rights Council in 2006) have adopted numerous resolutions confirming the obligation to investigate and prosecute persons suspected of committing war crimes and crimes against humanity in noninternational armed conflict. The Security Council took up several resolutions in the wake of armed conflict in Afghanistan, Burundi, the Democratic Republic

Human and People's Rights, in Jeremy Levitt (ed.) AFRICA: SELECTED DOCUMENTS ON POLITICAL, CONFLICT AND SECURITY, HUMANITARIAN AND JUDICIAL ISSUES (2003), Article 7(1)(a), at 355. The customary law right to a remedy is also enumerated in Articles 10 and 25 of the European Convention on Human Rights as well as in Article 13 of the American Convention on Human Rights.

55 Henkaerts & Doswald-Beck, *supra* note 51, at 545–549.

56 Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolutions adopted on the reports of the Third Committee, 40/34, 96th plenary meeting (November 29, 1985).

57 Henkaerts & Doswald-Beck, *supra* note 50, at 607–608.

of the Congo, Kosovo, and Rwanda, and the UN Commission on Human Rights likewise acted in Burundi, Chechnya, Rwanda, Sierra Leone, and the former Yugoslavia. In addition, amnesties for war crimes in internal conflicts have been patently rejected by both bodies and African states, courts, and regional institutions.[58] When taken together, in the same way that amnesty unlawfully precludes the duty to investigate and prosecute suspected war criminals or those guilty of committing human atrocities, power sharing with war criminals and rights violators empowers and legitimizes them. It forces war victims to succumb to the reign of perpetrators – a perverse rule by law of evil men rather than a rule of law by freely chosen representatives that reinforces impunity.

Although it is debatable whether state and international organizational practice had crystalized into a rule definitively prohibiting amnesty for war crimes, genocide, and crimes against humanity at the time the Accra, Lomé, and Abuja agreements entered into force, as already noted, ample evidence exists to support this conclusion. Certainly the duty to investigate and prosecute such crimes predates the accords, begging the question how persons known and suspected of having committed grave crimes could morally and lawfully share power under the legal and political auspices of the UN and regional institutions. The cases of Liberia and Sierra Leone serve as reminders of this dilemma. Because the UN and ECOWAS had the wherewithal to explicitly reject amnesty and passive reprieve in the Lomé and Accra agreements, respectively, on the basis that international law prohibits

[58] *Id.*, at Rule 159. See also *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004–15-AR72(E) and SCSL-2004–16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, March 13, 2004); *Mengistu and Others* case, Special Prosecutor's Office, Transitional Government of Ethiopia, S.P.O Investigation File No. 401/85, reply submitted in response to the objection filed by counsels for defendants (May 23, 1995); UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 22–24; UN Security Council, Res. 1315 (August 14, 2000), prmbl; UN Secretary-General, Report of the on the protection of civilians in armed conflict, UN Doc. S/2001/331 (March 30, 2001), at § 10; 2000 Draft Basic Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law; and Egypt, Declarations made upon signature of the ICC Statute (December 26, 2000), at para. 5.

impunity for war crimes, how could they legitimately endorse power-sharing deals with the same warlords, rebels, and junta who they determined ineligible for amnesty? It follows that if the rule of law provides a legitimate basis to prohibit or reject amnesty, it would also prohibit elevating suspected war criminals and coupists from assuming positions of state authority atop their victims.

IHRL and IHL normatively form the foundation of ICL and have been codified and criminalized by, among other things, the establishment and practice of the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Sierra Leone Special Court (SLSC), which serve as strong evidence of the weighty regulatory role IHRL, IHL, and ICL play during and after armed conflict. Consequently, by their very nature, contemporary IHRL and IHL are intended to edify and govern peace deals birthed in conflict, particularly power sharing, given its broad impact on fundamental rights. Moreover, the regulatory role of ICL during and subsequent to armed conflict in Africa is evidenced by the fact that two of the four major international criminal courts were established in Africa (ICTR and SCSL) and at the time of writing this book all of the cases pending before the ICC concern African states and actors. Hence understanding the applicability of IHL and ICL to the Accra and Lomé accords specifically, and, to a lesser extent, the Abuja Agreement, is critical to further comprehending the dichotomous and precarious legal authority that underwrote the accords.

It is important to reiterate that IHL and IHRL are distinct and that the former is only applicable in situations of armed conflict, whereas IHRL applies at all times. Unlike IHRL, IHL does not provide for any derogation because it is designed to regulate emergency situations, especially armed conflict – meaning that IHL always operates during war and was applicable to armed conflict in Liberia, Sierra Leone, and Guinea-Bissau. IHL applies to state actors and non-state actors alike, while it is traditionally held that human rights law is limited to the actions of a state or its agents. Notwithstanding, ICL criminalizes certain categories of violations of IHL and IHRL. From this background, and given that Liberia and Sierra Leone experienced extreme levels

of deadly conflict and Guinea-Bissau plunged into chaotic civil strife, IHRL, IHL, and ICL should have played a substantial role in shaping and ensuring the lawfulness of the Accra and Lomé accords and a defining role in the Abuja Agreement.

Since about 1994, the criminalization of conduct during noninternational armed conflict has become normative. The Rwanda Tribunal's statute conferred jurisdiction to prosecute crimes of genocide, crimes against humanity, and violations of Common Article 3. The Statute of the Special Court for Sierra Leone went a step further by criminalizing violations of Protocol II, other serious violations of humanitarian law, such as attacking UN personnel and conscripting and enlisting children in armed conflict, and violations of Sierra Leone law.[59] Presently, the ICC is hearing cases related to four civil wars in the Democratic Republic of the Congo, the Central African Republic, Uganda, and Sudan. All four investigations were opened during active armed conflict and will proceed irrespective of the character of peace that will emerge, whether or not it is inclusive of power sharing. In November 2009, the ICC opened its fifth investigation into the situation in Kenya following massive postelection violence the same year. On June 27, 2011, the ICC indicted Libyan leader Muammar Qadhafi, his son Seif al-Islam, and Libyan intelligence chief Abdullah Sanoussi for alleged war crimes, making Libya the sixth active investigation and its leaders the fifth lot to be indicted by the ICC during armed conflict. Drawing inspiration from the Special Court for Sierra Leone and first four ICC cases, among others, in 2009, the Truth and Reconciliation Commission of Liberia recommended the establishment of an Extraordinary Criminal Court for Liberia (ECCL) to prosecute high- and mid-level violators of Liberia's successive civil wars. The draft structure for the ECCL was heavily influenced by Geneva Convention law (e.g., Common Article 3 and Protocol II) as well as by the Rome Statute. Consequently, the role of IHL and ICL in regulating armed conflict as well as its authority to substantively instruct peace is well settled, despite its systematic denial by rebels, incumbent governments, peace negotiators, and moral guarantors.

[59] The war crimes courts in Bosnia, Cambodia, and Lebanon serve as other examples.

C. CONCLUSION

This chapter has examined the legality of power sharing under international law with a specific focus on IHRL, IHL, ICL, and democracy norms. It clearly reveals that power sharing with *pirates de la loi* is unlawful and bad policy because it doesn't serve the public good, despite being the preferred instrument of conflict resolution by embattled political elites, warlords, junta, and regional and international institutions. Although it is well known that fledging governments often share power out of political necessity and expediency, it is unclear why power sharing dominates international approaches to internal conflicts. Why have international institutions like the UN so gleefully endorsed peace agreements that infringe on fundamental IHRL, IHL, and democracy norms but silmutaneously purport to be at the vanguard of the rule of law?

The preceding discussion demonstrates that the Accra, Lomé, and Abuja agreements offended IHRL, IHL, and ICL and related democracy and governance norms. The intersection between human rights, democracy, and the rule of law in the UN Charter, the Declaration, the ICCPR, ICESCR, CEDAW, and customary international law is critical, as "one common catalyst for democracy is the rule of law – independent and effective judicial systems that can force officials to act within their legal authority" and not exceed it, irrespective of prevailing circumstances.[60] Sharing power extraconstitutionally alone is problematic, but doing so with those persons responsible for committing war crimes and for undermining democracy undercuts the core human rights, democracy, and governance norms that form the bedrock of the international system – norms that reject impunity for heinous crimes and mandate their investigation, prosecution, and punishment. This includes rules that obligate states to promote respect for the rule of law, justice, good governance, women's rights, and self-determination. By entering into the Accra, Lomé, and Abuja accords, the governments of Liberia, Sierra Leone, and Guinea-Bissau contracted away and bequeathed sovereign functions to nonstate actors

[60] Samuel H. Barnes, *The contribution of democracy to rebuilding post conflict societies*, 95 American Journal of International Law 86, 89 (2001).

as well the basic human rights and governance entitlements of their citizens guaranteed under domestic and international law. To make matters worse, as already stated, the UN, AU, and ECOWAS sanctioned and thereby legitimized these otherwise unlawful peace agreements, in breach of the spirit and substance of their own constitutive agreements, treaties, and rules. The UN, however, is the most culpable in this respect, given its superior political standing, uncontestable legal mandate and obligation to maintain international peace and security, and tall rhetoric about safeguarding and promoting human rights and democracy in Africa.

The fragile settlements achieved in Liberia, Sierra Leone, and Guinea-Bissau, with their hearty brew of power sharing and explicit and implied amnesty, have not brought about lasting peace, and as preceding chapters have shown, regional and international peacekeeping only served as a stopgap measure. As the next chapter highlights, the absence of and general ambivalence toward the rule of law in these accords continue to breathe life into their irresolute companions: conflict and violence.

9 POSTSCRIPT: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU

Since the end of the Cold War, power sharing has become the West's preferred tool of conflict management and resolution in Africa, where there is a military stalemate between democratically constituted governments and *pirates de la loi* who seek to violently unseat them. However, because deadly conflict in Africa is no longer easily traced to the vestiges of colonialism, neocolonialism, superpower rivalry, or even global competition over Africa's natural resources, stopping internal wars has not spurred authentic global interest, in part because resource extraction agreements are often more lucrative and profitable during armed conflict, when the state is unable to shift from the battlefront to regulate them. Consequently, hard power sharing has become the most expedient and inexpensive choice on the menu of policy options for donor state governments in the West and Far East. This is largely because it is either the most inexpensive conflict-resolution scheme or because it is the one best suited to provide a modicum of peace to appease the common interests of political elites, *pirates de la loi*, and foreign corporations without interrupting the profit pipeline. One tragic consequence of superpower disinterest and big power nonalignment in helping to lawfully resolve deadly conflict in Africa is the recognition and integration of warlords, rebels, and junta into peace processes as legitimate stakeholders with legal entitlements. Despite its pitiful track record, unlawful transitional power sharing between democratically constituted governments (DCGs) and *pirates de la loi* continues unabated.

Eight years after the adoption of the Accra Agreement in 2003, six years after Liberia's first post-Accra election in 2005, and three years after the conclusion of the Liberian Truth and Reconciliation Commission (2009), sociopolitical tensions, insecurity, and pending elections

in the country have made it a potential political powder keg – only hinged together by a waning United Nations (UN) Mission in Liberia (UNMIL). Similarly, twelve years after the adoption of the Lomé Agreement in 1999, nine years after the last resurgence of armed conflict between the government–Economic Community of West African States (ECOWAS) Cease-fire Monitoring Group (ECOMOG) and the Armed Forces Revolutionary Council (AFRC)–Revolutionary United Front (RUF), nine years after the establishment of the Special Court for Sierra Leone (2002), seven years after the conclusion of the Sierra Leone Truth and Reconciliation and Commission (2004), and four years after its second highly contested and controversial "free and fair" election (2007),[1] the political situation and security environment in Sierra Leone remain extremely fragile. Finally, twelve years after the adoption of the Abuja Agreement in 1998, two years after the double assassinations of the president and army chief of staff, and two years after seven national elections (four presidential and three legislative), Guinea-Bissau has suffered more coups d'état and political killings than any other country in the world. This has led to perpetual instability, civil strife, and a proliferation of organized crime and drug trafficking by international drug cartels. Its political apparatus perpetually teeters on collapse, and it now sits at the precipice of being Africa's first narco state.

The analysis that follows will comprehensively assess the efficacy of the Accra, Lomé, and Abuja accords by examining the state of affairs in Liberia, Sierra Leone, and Guinea-Bissau after the signing of the agreements. Such assessment is vital to understanding the specific factors that caused the power-sharing accords to fail.

A. POST-ACCRA: PEACE AND INSTABILITY

Between 1990 and 2003, Liberia experienced two high-intensity deadly armed conflicts and allegedly supported another in Sierra Leone.

[1] Sierra Leone's first post–Lomé Agreement election took place in April 2002; incumbent president Ahmed Tijan Kabbah of the SLPP won the election. Its second resulted in a heated runoff election in September 2007, between SLPP leader Solomon Berewa and opposition party leader Ernest Bai Koroma of the All People's Congress, who won by a very slim margin.

During the Liberian Civil War (1990–1997), approximately 250,000 people were killed, and hundreds of thousands were forced to become refugees and internally displaced persons (IDPs). Thousands more perished during the Liberians United for Reconciliation and Democracy (LURD)–Movement for Democracy in Liberia (MODEL) insurrections (1999–2003). Liberia presents a difficult and uncomfortable example of the failure of power sharing not simply because the Accra Agreement was wholly unlawful but also because in the thirteen years that preceded it, Liberia entered into thirteen major peace agreements, half of which had power-sharing dimensions and all of which failed. The two agreements that immediately came before the Accra Agreement, Abuja I (August 19, 1995) and Abuja II (August 17, 1996),[2] reinforced the unlawful transitional power sharing concluded in the 1993 Cotonou Agreement that led to democratic elections, a landslide victory for Charles Taylor and renewed civil war, which was precipitated by the withdrawal of ECOMOG forces from Liberia in December 1998 giving way to the LURD and MODEL insurrection in April 1999. Such factors are also responsible for Taylor's controversial and short-lived presidency. Ultimately, however, if success is measured by long-term peace and democratization rather than by democratic elections, the Cotonou and Abuja accords failed. In this sense, illegal power sharing in the Accra Agreement normatively rested on unlawful power sharing in the Cotonou and Abuja accords. Similar to these agreements, the effectiveness and normative value of the Accra Agreement were curtailed by the grossly unlawful power sharing and de facto amnesty it provided. Ultimately, the true test of Liberia's post-Accra climate will take place when UNMIL fully withdraws from the country.

[2] The Abuja agreements (in Liberia) confirmed and reinforced transitional power sharing and amnesty in the Cotonou Agreement, which was by far the most comprehensive agreement at the time (Cotonou reaffirmed power sharing and amnesty in the Yamoussoukro accords), reached between Liberia's Interim Government of National Unity (IGNU), National Patriotic Front of Liberia (NPFL), and United Liberation Movement of Liberia for Democracy (ULIMO) in Benin on July 25, 1993. The Akosombo accord, concluded in Ghana in September 1994, sought to reaffirm the Cotonou Agreement. ECOWAS sponsored seven major peace agreements prior to Cotonou, including the Bamako Cease-fire of November 1990, the Banjul Joint Statement of December 1990, the February 1991 Lomé Agreement, and the Yamoussoukro I–IV Accords of June–October 1991.

Putting aside Taylor's unsavory character, his government was democratically elected and constituted with 75 percent of the popular vote. And although Taylor was a bad leader who ruled undemocratically, domestic and international law does not provide for extralegal means to oust a regime that governs poorly unless it is so unduly repressive to justify internal self-determination or some form of humanitarian intervention.[3] Although there is some debate about the extent to which Taylor's democratically elected government was oppressive, no group formally invoked a right to self-determination, and but for the mayhem triggered by the LURD-MODEL insurrections, there was arguably no valid legal basis for humanitarian intervention or Taylor's forced removal from power. Consequently, it may be reasonably argued that LURD's and MODEL's attempts to oust Taylor were not only unlawful but contrary to democratization. Consequently, the power-sharing deal cemented in Accra, along with the UN's and ECOWAS's endorsements of them, remains disturbing.

Since Taylor's resignation from power on August 11, 2003, Liberia has not experienced violent armed conflict or major interstate disputes with neighboring states. Yet the absence of armed conflict is not the key indicator of a successful transition to peace, security, and democracy, particularly when, as is the case in Liberia, the prospect of deadly conflict seethes beneath a forged surface propped up by thousands of UN peacekeepers. Although democratic elections may be a key indicator of authentic democracy, other factors must be present for Liberia to evolve beyond its legacy of deadly conflict. Foremost among them is a normative shift in the country's political culture from cronyism and patronage-based elitism to political pluralism as well as universal respect for the rule of law, particularly among political elites. Additionally, Liberia cannot evolve into a genuine rule-based democracy unless it aggressively addresses the conditions that allow *pirates de la loi* to operate, namely, endemic poverty, chronic illiteracy, contempt for the rule of law, rapid corruption, and a

[3] See generally Jeremy Levitt, *Humanitarian intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone*, 12 Temple International and Comparative Law Journal 333 (1998).

general lack of infrastructure (e.g., electricity, water, refuse disposal, health care, and law enforcement).

When these conditions are taken together with Liberia's tradition of impunity and reluctance to prosecute or otherwise hold warlords and rebels accountable – many of whom are senators, congresspersons, and high-level government officials – and to robustly address the needs of war victims through reparatory mechanisms, renewed conflict may be inevitable. For example, a study by the Monrovia-based Liberian Transitional Justice Working Group on attitudes about criminal justice for past atrocities found that 59 percent of Liberians "believe that faction leaders and commanders alleged to have ordered or committed widespread human rights abuses should be prosecuted in formal legal proceedings."[4] By 2008, I estimate that about 90 percent of the war victims interviewed by the Liberian Truth and Reconciliation Commission (LTRC) believed that those who directed or participated in the commission of war crimes should be prosecuted and not be permitted to hold public office. The failure to investigate and prosecute these individuals locally, combined with forced power sharing, has sowed the seeds of discontent into Liberia's new sociopolitical order and simultaneously, yet unwittingly, reinforced the belief of former warlords and rebels, inside and outside government, that they are above the law. For example, while serving as head of the International Technical Advisory Committee of LTRC from 2008 to 2009, one of my responsibilities was to assist in overseeing investigations of high-level perpetrators. Consequently, I was routinely threatened by former Liberian warlords serving in the legislative branch and other rebels who feared being named or held responsible for committing human rights violations and war crimes. If warlords and rebels do not believe that they will be held accountable for committing atrocities and waging unjust and brutal wars to unseat democratically constituted regimes, the case of Liberia demonstrates that the conflict cycle will likely repeat itself.

Unlike the cases of Sierra Leone and Guinea-Bissau, Liberia has not slid back into civil war in large part because of the forced

[4] Human Rights Watch, *Liberia at a crossroads: Human rights challenges for the new government* (September 30, 2005), at 18 (citing Rosner Research Inc., *National consensus on dealing with war crimes report* 11 (2004).

resignation, detainment, and prosecution of Charles Taylor outside the country; war fatigue among Liberian youth; supposed exclusion of LURD/MODEL leadership from political processes; democratic elections; and the presence of thousands of UN peacekeepers. In the wake of Charles Taylor's resignation from the presidency on August 11, 2003, and the institution of the Accra Agreement seven days later, Vice President Moses Blah assumed power until the National Transitional Government of Liberia (NTGL) took over on October 24, 2003. Gyude Bryant, a well-known businessman, was selected by the warring parties to serve as chairman of the NTGL and head of state. Although Bryant had no political experience, the NTGL spent considerable time trying to secure and stabilize the country, mobilize international development assistance, create conditions for development, and manage future uncertainties, including the modalities of Taylor's arrest and prosecution.

In early November, Bryant was immediately confronted with opposition by the Transitional Legislative Assembly (TLA) and armed factions, who accused him of unilaterally making high-level ministerial appointments; hence the TLA refused to approve further appointments until Bryant operated under the consultative terms of the Accra Agreement. To make matter worse, the agreement mandated the dismissal of every member of the supreme court. Consequently, Bryant was empowered to nominate a new chief justice and associate justices of the court.[5] As such, it became highly unlikely that any challenge to the legality of the Accra Agreement would be entertained by a supreme court selected under its auspices. To do so would be tantamount to the new court conceding to the possibility of the illegality of its composition.

During the same period, the Bryant government was dealing with another important legal matter. On November 25, 2003, Nigerian president Olusegun Obasanjo announced that he would extradite Taylor to Liberia to face war crimes charges, if requested. In early December, this proclamation was followed by the International Police Agency (Interpol) issuing a red notice for Taylor's arrest after he was indicted for war

[5] *Tussle over appointment*, Africa Research Bulletin (November 1–30, 2003), at 15521.

crimes by the Special Court for Sierra Leone.[6] Taylor's pending extradition and prosecution stripped away the perceived veil of protection that anchored Taylor loyalists in the Armed Forces of Liberia (AFL), triggering violent responses from the unruly group. Thus, between December 7 and 10, 2003, Taylor's defunct AFL forces went on a mutinous rampage during a UN-sponsored disarmament campaign, terrorizing civilians, shooting weapons in the air, looting businesses and homes, setting up roadblocks, and carjacking civilians in Monrovia. The ex-fighters clashed with UN peacekeepers, resulting in nine deaths, eight of which were former combatants and one civilian. They were frustrated by the pace of disarmament and the UN's inability to finance its "guns for cash" program.[7] To make matters worse, LURD initially refused to disarm until power sharing under Accra was fully instituted. Consequently, thousands of ex-fighters remained in possession of light and heavy weaponry (rocket launchers), making the NTGL a paper tiger totally reliant on UNMIL to enforce peace, security, and the rule of law.

While the United Nations Security Council (UNSC) renewed its arms embargo, ban on diamond exports, and trade-in logs, the illicit trade in these continued. In early January 2004, LURD and MODEL demanded the resignation of Bryant, who they believed was blocking implementation of the power-sharing deal. At the same time, LURD was acrimoniously immersed in an internal leadership struggle that risked undermining its commitment to the peace process.[8] As relations between the various factions incrementally improved, the UN launched an enormous voluntary repatriation program aimed at over 340,000 Liberians spread out across West Africa.[9] Notwithstanding, UNMIL did not believe that factional leaders were being forthright about the number of weapons in their possession,[10] many of which were rumored to be hidden in the event that conflict resumed. As was the case in the December 2003 mutiny, there is always the risk that disgruntled ex-fighters will retrieve hidden weapons for criminal or other violent purposes, such as rebellion, given their desperate financial situation.

[6] *Disarmament on hold*, Africa Research Bulletin (December 1–31, 2003), at 15574.
[7] *Id.*
[8] *Commitment to peace*, Africa Research Bulletin (January 1–31, 2004), at 15607.
[9] *Monrovia riots*, Africa Research Bulletin (October 1–31, 2003), at 15961, 15962.
[10] *Id.*

For example, on October 29, 2004, armed mobs rioted in the Red Light and Paynesville districts and other areas of the city in what seems to have been religious conflict between Muslims and Christians.[11] Four people were killed in the violence, and another three were crushed to death by a UN armored vehicle attempting to disperse the crowd. In response to the killings, Bryant instituted a twenty-four-hour curfew that was sternly enforced by UNMIL.

By early November 2004, all of Liberia's major warring factions disarmed, demobilized, and disbanded their forces, marking a major shift in the post-Accra environment. At this juncture, all Liberian combatants understood that violence or mutinous action would be met with stiff resistance from UNMIL forces and with targeted sanctions from the UNSC; hence factional leaders and groups focused their attention on the national elections to take place the following year. Similarly, external actors who had served as facilitators and enablers of conflict in Liberia quietly dissipated.[12] After the government of Liberia and UNMIL asserted control over rebel groups and established a secure environment, Bryant shifted his attention to grappling with endemic government corruption, whereby, in September 2005, Liberia permitted the international community to audit and supervise its budget and expenditures.

On October 11, 2005, out of a field of twenty-two candidates, who included former warlords and wealthy lawyers, Ellen Johnson-Sirleaf, a former UN and World Bank official, and George Oppong Weah, former famed striker for AC Milan, were declared runoff candidates in the country's first authentic democratic election.[13] On November 8, 2005, after a hotly contested runoff election, Johnson-Sirleaf's Unity Party won the race with 59.4 percent of the vote, defeating Weah's Congress for Democratic Change (CDC), which only received 40.6 percent.[14] Johnson-Sirleaf became Africa's first democratically elected female

[11] *Id.*

[12] E.g., on December 1, 2005, the UN Security Council instituted targeted sanctions by freezing the assets of, and issuing a travel restriction on, international gunrunners Victor Bout over past arms sales to Liberia, Syrian-born accountant Richard Ammar Chichakli of Texas, and Ukrainian-born businessman Valeriy Naydo.

[13] *Landmark polls*, Africa Research Bulletin (October 1–3, 2005), at 16389–16391.

[14] *First woman president*, Africa Research Bulletin (November 1–30, 2005), at 16415–16417.

president. The CDC, which secured far fewer votes in the November election, was stunned by the results, and hundreds of CDC supporters violently protested in the streets of Monrovia, requiring UNMIL to disperse them. Weah's CDC challenged the election result in the supreme court but later withdrew legal proceedings and conceded defeat. Johnson-Sirleaf was inaugurated as president on January 16, 2006.[15]

After assuming power, Johnson-Sirleaf was confronted with myriad issues, including the selection of a competent and loyal cabinet and ministers. She speedily fired top officials appointed by the NTGL, particularly those in the finance ministry, and made a series of controversial appointments to key posts, especially in the army and justice ministries.[16] On February 20, 2006, she also inaugurated the LTRC, whose members and constitutive instrument were selected and adopted, respectively, during the transitional period.[17] The LTRC was mandated, among other things, to investigate and determine responsibility for war crimes, crimes against humanity, human rights violations, and economic crimes between 1979 and 2003 as well as to make compulsory recommendations to the government to ensure long-term peace, justice, and democracy. The LTRC formally began operating in late June 2006.

On March 17, 2006, Liberia requested that Nigeria extradite former president Charles Taylor to the country so that he could be prosecuted in Sierra Leone for his alleged role in Sierra Leone's armed conflict. However, on March 28, 2006, before Taylor was extradited to Liberia, he escaped from Nigerian custody and attempted to flee to Cameroon. He was later arrested in northern Nigeria, extradited to Liberia, and thereafter sent to Sierra Leone to face charges before the Special Court for Sierra Leone (SCSL). In early April, he appeared in court and was charged with eleven counts of war crimes, crimes against humanity,

[15] *Weah backs down*, Africa Research Bulletin (December 1–31, 2005), at 16470.

[16] *Honeymoon over*, Africa Research Bulletin (February 1–28, 2006), at 16533, 16534.

[17] As head of the International Technical Advisory Committee (ITAC), I was accorded the same standing and rank as TRC commissioners and associate justices of the Supreme Court of Liberia. I was the only foreigner and member of the LTRC appointed by President Johnson-Sirleaf after being nominated for the position by the UN high commissioner for human rights in 2008. Gyude Bryant selected all nine TRC commissioners.

and the forced conscription and enlistment of child soldiers. Taylor was later transferred into Dutch custody, and the SCSL conducted its trial in the Netherlands.[18] The extradition and prosecution of Taylor placed immense pressure on Johnson-Sirleaf and her government and, for a period of time, exponentially increased the security situation in the country given that all of Taylor's former National Patriotic Front of Liberia and AFL loyalists roamed free, raising the question whether the fragile peace in the country could withstand another mutinous affair.

In early May 2006, a Save the Children report accused UN peacekeepers, aid workers, and teachers of systematically abusing children by having sex with Liberian girls (as young as eight) in exchange for money, food, and gifts. Such conduct not only adversely affected the livelihood of Liberian girls but also threatened the viability of UNMIL, donor development efforts, and the Johnson-Sirleaf government.[19] To make matters worse, on May 21, tens of thousands of children marched in Monrovia against hunger and poverty, hoping to mobilize the government and donor community to assist them. This came at a time when Johnson-Sirleaf's government was under pressure for not adequately responding to allegations made in December 2005 that the Firestone Rubber Company employed child labor and maintained slavelike working conditions. The government and UNMIL promised to conduct an extensive investigation into the issue, to no avail. In addition, violence against women and girls during and after Liberia's various episodes of armed conflict in part led Johnson-Sirleaf to mandate the hiring of more women into the police force and army. Consequently, in mid-June 2006, the UNSC lifted the exclusive ban on weapons sales to Liberia so that it could begin to train and arm new recruits. Additionally, in January 2007, for the first time in UN history, India sent an all-female contingent of several hundred UN peacekeepers to Liberia to protect Johnson-Sirleaf and secure key infrastructure.[20]

[18] *Charles Taylor deported*, Africa Research Bulletin (March 1–31, 2006), at 16586. On June 1, 2006, Holland adopted a law permitting it to imprison Taylor if he was convicted by the SCSL.

[19] *Sex abuse investigation*, Africa Research Bulletin (May 1–31, 2006), at 16655.

[20] *Id.*

Throughout 2007 and 2008, Liberia did not have any major incidents of violence, except for a late-April multiday strike at the Firestone Rubber plantation that turned violent and left six hundred people wounded after police clashed with workers who were aggressively protesting workplace conditions.[21] And in July 2007, the government of Liberia detained and charged five persons, including George Koukou, a former speaker of the House of Representatives, and former general Charles Julu, for treason in an alleged coup plot.[22] Amid allegations of bribery of the lead prosecutor and due process errors, both men were eventually released for a lack of evidence.[23] Although there have been rumors of coup plots since Johnson-Sirleaf took office, the presence of UNMIL along with truth and reconciliation (LTRC) investigations and hearings appropriately quieted any violent opposition. Since 2008, the threat of a resurgence of violence has inaudibly simmered, and more apparent issues, such as anticorruption, have become the predominant concern of government.

On March 22, 2007, as part of the government's pledge to stem the rippling effects of corruption in the country, the deputy minister and an assistant minister in the Ministry of Lands, Mines, and Energy were fired for purportedly granting bogus mining licenses.[24] Allegations of corruption, incompetence, and political infighting have caused Johnson-Sirleaf to reshuffle her cabinet several times. On May 16, 2008, Gyude Bryant, former head of the NTGL, and three other Liberians, including Edwin Snowe, former speaker of the House of Representatives, were indicted for allegedly embezzling $1 million from the Liberia Petroleum Refining Company.[25] Bryant was also charged with economic sabotage. On December 7, 2007, he was arrested for

[21] *Id.*

[22] *Coup scare*, Africa Research Bulletin (July 1–31, 2007), at 17164. Koukou is a former senator from Nimba County and was the speaker of the National Transitional Legislative Assembly from March 17, 2005, to January 2006. Charles Julu was a controversial former AFL general and former head of Samuel Doe's Presidential Guard, who led a coup attempt in the 1990s.

[23] *Id.*

[24] *Fifteenth progress report of the secretary-general on the United Nations Mission in Liberia*, S/2007/479 (August 8, 2007).

[25] *Letter dated 12 June 2008 from the chairman of the Security Council Committee established pursuant to resolution 1521 (2003) concerning Liberia addressed to the president of the Security Council*, S/2008/371 (June 12, 2008).

violating the terms of his bail while on trial for embezzlement but was acquitted in May 2009 by the same supreme court he had appointed six years earlier. These cases represent a sample of the anticorruption efforts in Liberia; however, according to the UN,

> despite some progress made in strengthening oversight mechanisms, the Liberian public widely considered the failure of the Government to obtain convictions in high-profile corruption cases against the former Chairman of the National Transitional Government of Liberia, Charles Gyude Bryant, and the former Speaker of the House of Representatives, Edwin Snowe, as a setback for its anti-corruption efforts.[26]

Although its anticorruption successes have been marginal, other pressing issues, such as violent land disputes and student protests, also preoccupied the government in 2007–2008. Moreover, in early June 2007, Taylor boycotted SCSL proceedings against him – which, at the time of this writing, are still ongoing – only to later cooperate with the tribunal. Mirthfully, in October 2008, Taylor's son Charles "Chuckie" Taylor Jr. was found guilty of torture by a U.S. federal court in Miami after being detained in 2006 at the Miami International Airport for passport fraud. He was sentenced to ninety-seven years in prison, making him the first U.S. citizen to be prosecuted for committing torture abroad. The LTRC also determined that Charles and Chuckie were responsible for committing war crimes, crimes against humanity, and human rights violations during the country's civil war and recommended that they, along with dozens of others, be prosecuted before an extraordinary criminal court for committing domestic and international crimes against Liberians.

While the LTRC's recommendations in this context were not controversial, on July 6, 2009, it inappropriately and corruptly recommended that Johnson-Sirleaf and dozens of other notable Liberians be barred from public service for thirty years without having first determined that they were responsible for committing war crimes and human rights violations in accordance with LTRC doctrine, practice

[26] *Nineteenth progress report of the secretary-general on the United Nations Mission in Liberia*, S/2009/411 (August 10, 2009), at 11.

and procedure.[27] The LTRC's unlawful sanctioning of Johnson-Sirleaf generated enormous controversy in the country and placed immense pressure on her not to run for reelection. It also provided well-known warlords, such as Prince Johnson, whom the LTRC lawfully determined to be responsible for committing international human rights law and international humanitarian law violations against Liberians (and who was also supposed to be barred from running for office), with the political gall to consider running against Johnson-Sirleaf for the presidency. Yet Johnson-Sirleaf's failure to implement the LTRC's recommendations on the prosecution of warlords and rebels or establish a national palava hut reconciliation mechanism (i.e., nationalizing the traditional conflict resolution system) has measurably undermined long-term peace, security, respect for the rule of law, and democracy in Liberia.

In 2009–2010, not only did these highly divisive issues and cabinet reshuffles significantly affect peace, security, stability, and the rule of law in the country, but Liberia's lack of infrastructure also attracted international drug cartels and other unsavory persons.[28] Although communal violence has been low, except for ethnoreligious conflict in Lofa County, responsible for killing four and wounding dozens in late February 2010, in the same way that deadly conflict reignited only months after ECOMOG withdrew in December 1998, Liberia's real test will come as UNMIL withdraws in 2012–2013 and the predatory elements empowered by power sharing and amnesty in the Accra

[27] President Johnson-Sirleaf testified before the LTRC in February 2009 and admitted to mistakenly providing nominal financial support (twenty-five thousand dollars) to Taylor's NPFL in 1990. While her support of Taylor raises legitimate questions, a small group of LTRC commissioners unilaterally amended the final LTRC report by adding language that recommended barring Johnson-Sirleaf from serving in public office for thirty years. This action was wholly unlawful and not taken with the approval of two-thirds vote of the LTRC or with my knowledge as head of the ITAC.

[28] *Liberia sends seven to U.S. on cocaine-smuggling charges*, BBC News Africa (June 2, 2010), available at http://www.bbc.co.uk/news/10212671; *Authorities disband Colombian-Liberian drug cartel*, Colombia Reports (June 7, 2010), available at http://colombiareports.com/colombia-news/news/10136-authorities-disband-colombian-liberian-drug cartel.html; *Liberia in record cocaine seizure*, BBC News (February 1, 2008), available at http://news.bbc.co.uk/2/hi/africa/7222809.stm; *Cocaine trafficking in western Africa: Situation report*, United Nations Office of Drugs and Crime (UNDOC) (October 2007); *Transnational organized crime in the West African region*, UN Office of Drugs and Crime (UNDOC) (2005).

Agreement – which Johnson-Sirleaf's regime refuses to prosecute – clamor for control of the state. In this sense, although Liberia has yet to devolve into armed conflict, like Sierra Leone and Guinea-Bissau, underdevelopment and corruption levels are consistent with its pre–civil war environment and, when combined with a formal culture of impunity, raise serious concerns.

In conclusion, though it appears that the Accra Agreement was successful in helping Liberia transition into a sustainable democracy, its fortitude cannot be authentically measured until it can govern itself in the absence of UN peace enforcers. And the extent to which the illegal peace fashioned by the Accra Agreement created an artificial sociopolitical environment remains unclear. It is clear, however, that years after its adoption, the political and security environment established under the Accra Agreement is suspect. This is largely because the accord encroached on the rule of law and carelessly ignored historical experientialism – the historical morality of law that provides the ethical rationale for rule existence – binding rules that the Accra Agreement seems to have recklessly surrendered at the altar of political expediency and necessity.

B. POST-LOMÉ: CONFLICT AND JUSTICE

Since 1991, armed conflict in Sierra Leone has been responsible for approximately fifty thousand deaths (mostly civilians), 2.7 million internally displaced persons, five hundred thousand refugees, and the total destruction of the country's infrastructure. The Lomé Agreement was significantly undermined by the tragic compromises and circumstances that unfolded in the wake of its predecessor, the Abidjan Agreement. The Abidjan Agreement largely failed because, as already noted, Kabbah and Sankoh could not agree on two critical points: power sharing and the withdrawal of Executive Outcomes from the country. It was also undercut by the ECOWAS, the Organization of African Unity (OAU), the UN, the European Union (EU), and Commonwealth's lack of politico-military resolve to support the robust repulsion of RUF attacks after Sankoh's detention in Nigeria and subsequent extradition to Sierra Leone. His consequent trial and

conviction for treason served as a trigger that, taken together with the aforementioned factors, not only caused the disintegration of the Abidjan Agreement but also unwittingly and normatively sabotaged the subsequent agreement reached in Lomé.

In early January 1999, after weeks of intense fighting between ECOMOG and the Civilian Defense Forces (CDF), on one hand, and the RUF and AFRC, on the other, RUF-AFRC forces penetrated eastern and central Freetown, leading to brutally savage conflict resulting in approximately fifty-five hundred civilian deaths. Although ECOMOG and the CDF controlled the western section of the city, the RUF-AFRC's infiltration severely weakened the belief among international stakeholders that a military resolution to the conflict was possible. This apprehension led to a disturbing multilateral strategy that essentially forced Kabbah to restart negotiations with the RUF – an unfortunate shift in policy that was assertively supported by the United States.

Between February and March 1999, these institutions, in particular, the United States (during the Clinton administration), led by Reverend Jesse Jackson, acting as the special envoy for the promotion of democracy in Africa, placed immense pressure on the Kabbah government to have face-to-face talks with Sankoh, who was released from detention in April to meet with RUF leadership in Lomé, Togo.[29] Sankoh remained in Lomé from April onward. Regional leaders believed that a new round of peace negotiations that included him would provide a check on an increasingly unruly RUF. Sankoh's release from prison and participation in negotiations ultimately sowed seeds of ruin into the Lomé peace process and agreement. Not only was his release enormously unpopular among Sierra Leoneans but it presupposed a flawed logic inherent in transitional power sharing that warlords and rebels can be converted into peace-loving democrats willing to act in good faith and adhere to the rule of law. Moreover, Sankoh's release from prison amounted to a pardon for treason from the same government he sought to overthrow, and the amnesty he received under the Lomé Agreement (under Sierra Leonean law) similarly absolved him from liability for directing and committing barbarous crimes against Sierra

[29] Interview with Reverend Jesse Jackson, January 13, 2008. See also Adebayo, *supra* note 156, at 98.

Leoneans. In this context, Sankoh's involvement in the Lomé peace process undermined public confidence in the resultant agreement and, not unlike the circumstances that followed the Abidjan Agreement, provided him with another opportunity to institutionalize his predatory behavior with impunity. On the basis of these concessions, Sankoh reasonably believed that he was above the law, and his unwillingness to abide by the terms of Lomé deepened the monumental distrust between him and Kabbah, making authentic power sharing virtually impossible. Consequently, only ten months after its implementation, the Lomé Agreement died a tragic but predictable death.

In November 1999, the UN deployed six thousand additional peacekeepers to Sierra Leone to support the Lomé Agreement,[30] backed by twenty-five hundred Nigerian ECOMOG forces.[31] During the same period, the AFRC and RUF leadership quarreled over recognition, resulting in the former disassociating itself from the RUF.[32] Soon after, low-intensity armed conflict broke out between AFRC and RUF forces in northern Sierra Leone, threatening an already waning peace agreement.[33] In addition, Sankoh sought to use his position as chairman of the Commission for the Management of Strategic Resources, National Reconstruction, and Development (CMRRD) to control and illegally mine diamonds, while simultaneously claiming to combat the illegal trade. Unfortunately, the RUF was supposedly trading diamonds for weapons with Charles Taylor and other interlocutors in Liberia, which it used to attack AFRC forces in Bafodia in April 2000.[34]

The April attack seems to have been triggered by several factors, including the Parliament of Sierra Leone's controversial six-month extension of his presidential term in March 2000;[35] the Sierra Leonean

[30] *6,000-strong force*, Africa Research Bulletin (September 1–30, 1999), at 13700.

[31] *UN force deployed*, Africa Research Bulletin (December 1–31, 1999), at 13808.

[32] *Relations cool*, African Research Bulletin (November 1–30, 1999), at 13771. AFRC leader Johnny Paul Koroma believed that Sankoh intentionally sidelined the AFRC during the Lomé peace negotiations, and according to *Africa Research Bulletin*, disagreed with the RUF's continued abrogation of the cease-fire, particularly with respect to disarming and demobilizing combatants. *Id.*

[33] *Id.*

[34] *Sankoh rearms*, Africa Research Bulletin (April 1–30, 2000), at 13948.

[35] Constitution of Sierra Leone, 1991, Article 85(2). Article 85(2) permits the Sierra Leonean Parliament to extend the term of the presidency for six months at any one

Legislature's adoption of the Act Establishing the Truth and Reconciliation Commission of Sierra Leone; RUF assaults on and kidnapping of UN peacekeeping forces; and Sankoh's refusal to allow the UN to deploy in areas under RUF control.[36] What is more, after confirming intelligence that Sankoh sought to reignite the war, and given his rejection of a seven-point plan to allow civilians and UNAMSIL unhindered access to the country, the UNSC increased UNAMSIL forces from six thousand to eleven thousand.[37] Once the ECOMOG operation in Sierra Leone ceased in April 2000, and amid growing tensions between the government and RUF, the rebel group immediately went on the offensive, attacking villages and assaulting hundreds of UNAMSIL personnel, holding hundreds of them hostage.[38] It also seized UNAMSIL arms, equipment, and ammunition. In early May, after the RUF killed civilian protestors in front of Sankoh's house and generally wrought havoc in Freetown, the UN mustered the political and military will to repel the group and restore some semblance of law and order in and around Freetown.[39] Sankoh disappeared after the shootings,[40] and SLA forces confiscated a number of documents in his residence indicating that he was planning a coup. The documents also revealed a complex network of illicit local and foreign business relationships he forged while serving as chairman of the CMRRD.[41]

In mid-May, the UN accused the government of Burkina Faso of smuggling arms to Sankoh, which, along with RUF attacks against civilians and UN personnel, led to Sankoh's capture by SLA forces and civilians on May 17, 2000.[42] The UN arrested Sankoh and other

time when there is a public emergency. The extension was hotly contested by the RUF. *Kabbah stretches things to the legal limit*, Africa Analysis (August 11, 2000), at 3.

36 *Truth and reconciliation?* Africa Research Bulletin (February 1–29, 2000), at 13879; *UN force held back – arms stolen*, Africa Research Bulletin (February 1–29, 2000), at 13879; *RUF still refuses to abandon weapons*, Africa Analysis (February 25, 2000), at 3.

37 *Bockarie recruits*, Africa Research Bulletin (April 1–30, 2000), at 13948; *Sankoh rearms*, Africa Research Bulletin (April 1–30, 2000), at 13948.

38 *UN held hostage*, Africa Research Bulletin (May 1–31, 2000), at 13979.

39 *Id.*

40 *Exposed: Sankoh's diamond gravy-train*, Africa Analysis, (May 19, 2000), at 1.

41 *Id.*

42 *UN held hostage*, Africa Research Bulletin (May 1–31, 2000), at 13981; *Missiles for rebels "flown in by British firm,"* Africa Research Bulletin (May 1–31, 2000), at 13988; *Burkina denies*, Africa Research Bulletin (April 1–30, 2000), at 13948.

senior RUF members and forbade the group from participating in government, in effect, voiding the power-sharing arrangement established by the Lomé Agreement.[43] Soon after, senior RUF government officials were relieved of their positions,[44] marking an abrupt end to the Lomé Agreement. In June, the UN force was bolstered by 3,000 additional ECOMOG troops (increasing the UN force to 16,500), who were needed to assist the SLA in retaking the Kono diamond fields, making UNASMIL the second largest UN peacekeeping force in UN history.[45]

In late August 2000, the situation in Sierra Leone drastically changed after a series of events unfolded. Sankoh appointed Brigadier General Issa Sesay (Sesay) to be interim chairman of the RUF, and immediately thereafter, three hundred RUF rebels surrendered, giving the UN a false sense of progress.[46] At the same time, the new SLA and Sierra Leone Regiment, which comprised defunct AFRC and ex-SLA fighters, were at odds over the unprofessional conduct of the latter. As a result, the ex-SLA faction known as the West Side Boys formed a new group called Sierra Leone Guerrilla (SLG) and disavowed loyalty to the Kabbah government.[47] However, the major shift in the politico-military environment changed when members of the West Side Boys captured a dozen British soldiers, triggering British Special Forces raids on the SLG,[48] an increased U.K. military presence in the country, and internal fighting between Sesay and RUF strongman Dennis "Superman" Mingo for control of the group.[49]

In the years that followed, fighting between government forces, the RUF, and rogue AFRC contingents continued unabated, resulting in several additional cease-fire agreements.[50] The government of Guinea also launched several attacks against RUF bases in Sierra Leone to

[43] *Sierra Leone II*, Africa Confidential (June 9, 2000), at 3; *Sierra Leone: The cost of Kabbah*, Africa Confidential (March 9, 2001), at 6.
[44] *Id.*
[45] *A warlike kind of peace in Sierra Leone*, Africa Analysis (June 16, 2000), at 3.
[46] *Dubious future*, Africa Research Bulletin (August 1–31, 2000), at 14091.
[47] *UN shock at cracks in Sierra Leone military*, Africa Analysis (June 30, 2000), at 3.
[48] *West Side Boys captures*, Africa Research Bulletin (September 1–30, 2000), at 14013.
[49] *RUF power tussle*, Africa Research Bulletin (October 1–31, 2000), at 14158.
[50] *Id.* See also *Sierra Leone: New ceasefire agreement*, Africa Research Bulletin (May 1–31, 2001), at 14417.

halt RUF assaults against Liberian dissidents in the country. By May 2001, the UN and the government of Sierra Leone made significant headway in neutralizing the RUF and stabilizing the country, and the Kamajors and RUF began a major disarmament, demobilization, and reintegration campaign under the auspices of UNAMSIL. However, neither UNAMSIL nor the government of Sierra Leone was able to build demobilization camps or fund disarmament efforts fast enough to accommodate RUF-AFRC combatants.[51]

On January 18, 2002, President Kabbah, who was in his second six-month public emergency term, lifted the four-year state of emergency and declared the civil war officially over.[52] On May 14, 2002, he won a second five-year presidential term in what was universally recognized as a free and fair election.[53] Kabbah received 70.1 percent of the popular vote, while his closest rival, Ernest Bai Koroma of the All People's Congress Party (APC), obtained 22 percent of it. The RUF did not participate in the election given that Sankoh was not permitted to stand as a candidate. Other presidential hopefuls included Johnny Paul Koroma, leader of the 1997 coup and chair of the Peace and Liberation Party, John Karefa Smart of the United National People's Party, and Zainab Bangura of the Movement for Progress. Similar to Liberia, Sierra Leone's botched peace process did not attempt to curtail the intentions of rebels and coupists to stand for national election.

Over the next five years, Kabbah's regime was challenged by several potentially destabilizing phenomena, including an incremental UN withdrawal;[54] several assassination and coup attempts;[55] serious politico-military tensions with the Taylor regime in Liberia; a controversial truth and reconciliation process; SCSL trials, including the

[51] *Dispatches rival militia set to disarm in Sierra Leone*, Africa Analysis (May 21, 2001); *Leaders in the ruins*, Africa Confidential (June 29, 2001), at 1.

[52] Human Rights Watch, *Human Rights Watch World Report 2003 – Sierra Leone*, 14 January 2003, available at: http://www.unhcr.org/refworld/docid/3e2818740.html [accessed 16 September 2011]. See also *Sierra Leone: Sankoh in court*, Africa Research Bulletin (March 1–31, 2002), at 14791.

[53] *Kabbah consolidates election victory*, Africa Analysis (May 31, 2002), at 3. *Polling in peace*, Africa Confidential (May 17, 2002), at 8.

[54] *Future security fears in Sierra Leone*, Africa Analysis (July 31, 2002), at 3.

[55] See generally *Kabbah's coup plot fears*, Africa Analysis (October 18, 2002), at 3; *New fears over Kabbah coup*, Africa Analysis (February 21, 2003), at 3.

indictment of Taylor (while he was president) and Samuel Hinga Norman (Sierra Leone's wartime defense minister); and in September 2004, the assumption of primary responsibility over the security sector.[56]

Although Sierra Leone has not experienced any episodes of high-intensity armed conflict since late 2001 – in large part due to a significant UN presence, the forced resignation of Taylor in 2003, and the prosecution of its major warlords in the SCSL – the security situation in the country remains fragile. It marginally improved toward the end of Kabbah's second term in May 2007. In September 2007, APC leader Ernest Bai Koroma won a runoff election against Sierra Leone's People Party (SLPP) leader Solomon Berewa, former vice president and longtime SLPP bulwark, marking the first time that an opposition candidate won the presidency. Koroma won 54.6 percent of the vote, and Berewa garnered 45.4 percent. The APC also won a majority in parliament. Notwithstanding, the election results sparked five days of serious violence between APC and SLPP members.[57] The APC, which was the ruling party prior to the civil war (1968–1992), appears to have won the election because of the public perception that the Kabbah-Berewa government systematically mismanaged foreign aid and failed to: reduce poverty and illiteracy, curb corruption and massive unemployment, reduce national debt, and make progress in developing the basic infrastructure of the country. In addition, many Sierra Leoneans harbored discontent toward the SLPP for the amnesty and power-sharing concessions it made to the RUF, which, by 2007, had yielded nothing – not even sustainable peace in the country.

Since Koroma took office in November 2007, the political situation in the country has been delicate and uncertain. In the wake of the UNAMSIL's withdrawal and its replacement by the United Nations Integrated Peacebuilding Mission in Sierra Leone (UNIPSIL) in 2007, the presence of the SCSL and accompanying substructure has provided a false sense of safety and security. Rapid corruption,

[56] *UNAMSIL hands over*, Africa Research Bulletin (September 1–30, 2004), at 15925. From April 2004 onward, UNAMSIL withdrew from frontline activities, scaling down to eight thousand troops until its mandate ended on June 30, 2005.

[57] *Pivotal poll*, Africa Research Bulletin (August 1–31, 2007), at 17179.

tax increases on fuel and staple foods such as rice, inflation, botched mining agreements, drug trafficking, serial cabinet reshuffles, and the systemic failure to professionalize the police and restructure the SLA keep the country on edge.[58] Moreover, the government's inability to reconcile and/or implement the TRC's quasi-judicial recommendations, particularly concerning reparations for war victims, has severely undermined public confidence. Hence, Sierra Leone's ultimate peace and stability test will take place after UNIPSIL's mandate expires in 2012–2013.

Similar to the Accra peace process, one reason why the Lomé Agreement broke down was because it transgressed the rule of law and its internal logic carelessly disregarded its troublesome history of conflict and impunity or historical experientialism: again, the historical morality of law that provides the ethical rationale for rule existence. For example, human rights law has a raison d'être born from historical experientialism: to protect the fundamental rights and welfare of people against official abuse – rights that were sacrificed at the altar of political expediency and necessity in the Lomé peace process. Specifically, power sharing under Lomé was largely responsible for the resumption of armed conflict between the Kabbah government and RUF because it unlawfully institutionalized predatory personalities and culture, namely, those of Sankoh and the RUF, into the body politic, thereby undermining the fragile peace it purported to create. Power sharing sewed not only the rapacious behavior of Sankoh and his cohorts into government but also the belief that they were immune from law, as evidenced by the RUF's willful breach of the Abidjan Agreement and consequent award of power sharing under Lomé, which it similarly sabotaged. In addition, the unwillingness of the UN to provide immediate and unequivocal political and military support to Kabbah after his regime was overthrown in 1997, and the subsequent pressure it placed on him to release and share power with Sankoh, contributed to a self-fulfilling prophesy of corruption and carnage. Power sharing under Lomé triggered not only the resumption of armed conflict between the government and AFRC-RUF but also the murder and

[58] *Slow turnaround*, Africa Confidential (July 4, 2008); *A renewed army, an old-style police*, Africa Confidential (October 8, 2009).

kidnapping of hundreds of UNAMSIL forces and the eventual ruin of the agreement altogether. Perhaps, most revealing, was that the same subjects of power sharing (e.g., RUF, Sankoh, and Sesay) supported by ECOWAS, the OAU, the UN, the EU, the Commonwealth, the United States, and Britain, were later detained and indicted for war crimes by the UN-backed and Western financed SCSL. The RUF's failure to honor commitments under Lomé, its provocation of armed conflict, and the eventual prosecution of Sankoh and Sesay lend credence to the argument that unlawful power sharing with warlords, rebels, and junta responsible for committing war crimes and subverting democracy is morally hazardous and politically untenable. In this case, internationally fashioned and sanctioned power sharing, pardons, and amnesty facilitated rather than forestalled deadly conflict, thereby spreading an illicit gangrene on a gaping and infectious societal wound that was in dire need of prompt UN-sponsored amputation.

The winding down of the SCSL in 2012, the UNSC's September 2010 decision to lift all remaining sanctions against Sierra Leone, including an arms embargo and travel ban, and supposed termination of UNIPSIL, are and will simultaneously create a security vacuum and opportunity for rebels in hiding to emerge. Only time will tell whether this potentially combustible combination of factors, along with the ailing issues confronting the Koroma government, will bring about sustainable peace or another violent episode.

C. POST-ABUJA: COUPS AND UPRISINGS

Since 1997, Guinea-Bissau has authored more military coups and attempted coups than any other country in the world. It is also widely regarded as Africa's first narco state and a source of regional and international instability. Similar to the situations in Liberia and Sierra Leone, power sharing under the Abuja Agreement was short-lived; however, the Bissauan brand of failure was far more dreadful. The accord seems to have failed for four primary reasons: (1) it subscribed to a flawed logic inherent in transitional power sharing that, as state actors, military *junta* are more committed to peace than nonstate entities; (2) there was lethargy in restructuring the Bissauan military;

(3) the Bissauan political elite failed to fashion a military culture that respects civilian rule; and (4) the accords backers, the Community of Portuguese Speaking Countries (CPLP) and ECOWAS, irrationally believed that power sharing with military junta would lead to authentic democracy. On the contrary, power sharing under the Abuja Agreement seems to have reinforced the belief of would-be coup plotters in the Bissauan armed forces that violence was the most expedient way to effectuate change and acquire political power. Unlike the situation in Liberia and Sierra Leone, conflict in Guinea-Bissau was not fueled by diamonds or other natural resources but rather by ethnopolitical competition and access and control over Bissauan ports and territory for use by international drug cartels.[59]

Although the date for general elections was set for November 1999, and the transitional government of national unity established by the Abuja Agreement was fully functional, on May 8, 1999, only eleven months after the institution of the agreement, General Ansoumane Mane violently overthrew President João Bernardo Vieira a second time, forcing him to seek refuge in the Portuguese embassy in Bissau.[60] The coup summarily ended the accord's power-sharing deal and the fragile peace that followed. During the coup, key civilian and military officials were also detained by the junta. The coup seems to have been triggered by two factors: the arrival of a Guinean warship off the coast of Bissau, which Mane's rebels believed was delivering weapons to Vieira loyalists, including the presidential guard, and, to Mane's consternation, the refusal of six hundred members of the presidential guard to disarm in accordance with the Abuja Agreement.[61] Hence the president's ability to command the army and make policy was stifled by Mane and a military culture that did not respect civilian authority.

Vieira's ouster from power signaled deep-seated divisions in the body politic and military that continued to haunt Guinea-Bissau. Vieira

[59] See generally *Cocaine trafficking in West Africa: The threat to stability and development (with special reference to Guinea-Bissau)*, United Nations Office of Drugs and Crime (UNDOC) (December 2007); *Cocaine trafficking in Western Africa: Situation report*, United Nations Office of Drugs and Crime (UNDOC) (October 2007); *Transnational organized crime in the West African region*, United Nations Office of Drugs and Crime (UNDOC) (2005).

[60] *Coup ousts Vieira*, Africa Research Bulletin (June 21, 1999), at 13540.

[61] ECOWAS confirmed that the ship was delivering food and medicine to the presidential guard. *Coup ousts Vieira*, Africa Research Bulletin (June 21, 1999), at 13540.

was eventually given asylum in Portugal, and Mane willingly handed over power to Malam Bacai Sanha, Bissauan speaker of the house. Prime Minister Francisco Fadul was untouched by the coup, raising suspicion about his involvement in it.[62] On October 13, 1999, Attorney-General Amine Saad formally requested that Portugal extradite Vieira to Guinea-Bissau to be prosecuted for crimes against humanity for ordering the assassination of Portuguese journalist Jorge Quadros in Bissau in November 1993, extrajudicial killings in October 1985, and economic crimes.[63] Notwithstanding, Portugal did not entertain Saad's request.

On January 16, 2000, Koumba Yala, leader of the Social Renewal Party (PRS), defeated Sanha in a runoff election, garnering 72 percent of the popular vote and marking the first time that the African Party for the Independence of Guinea and Cape Verde (PAIGC) lost a presidential election since independence in 1974 and that a member of the Balante ethnic group won the presidency.[64] Despite being offered several high-level positions, including advisor to the president, Mane chose to remain army chief of staff, likely because it guaranteed him a monopoly on state violence. Despite Yala's overwhelming victory, his tenure as president was extremely tumultuous and marred by several failed coup attempts, continued border disputes with Senegal, and nationwide labor strikes. Just four months into his presidency, Yala was forced to contend with Senegalese military incursions aimed at killing the Movement of Democratic Forces in Casamance (MFDC)-Casamance rebels, leading to a border closing.[65] His presidency was also threatened by a mutiny led by former navy chief of staff Mohamed Sanha, after Yala dismissed him, but the standoff ended peacefully after Mane interceded on behalf of Yala.[66]

Shortly after Yala assumed office, he attempted to introduce legislation that would share power with the junta through a national security council on which they would enjoy the same privileges as ministers

[62] *Id.*, at 13541.
[63] *Extradite Vieira; welcome Cabral*, Africa Research Bulletin (November 1999).
[64] *Kumba Yala wins*, Africa Research Bulletin (January 2000).
[65] *Border re-opened*, Africa Research Bulletin (September 2000).
[66] *Court clears navy captain Sanha of corruption charges*, Panafrican News Agency Daily Newswire (September 23, 2000).

of state until the end of Yala's five-year term.[67] This measure was a preemptive attempt to include the military in government to legitimize it and ensure a smooth transition to civilian rule; however, the National Peoples Assembly (NPR) forcibly rejected the proposal.[68] Yala's inability to win over the NPR and assert control over the military severely weakened his government. Though Mane protected Yala from being overthrown by Sanha in May 2000, six months later, on November 22, 2000, he also unsuccessfully sought to oust Yala from power because he disapproved of various appointments Yala made in the army.[69] Mane maintained that Yala's appointments were "ethically based and risked destabili[z]ing the country."[70] Irrespective, Mane's attempted coup was not surprising given that Guinea-Bissau's army considers itself to be a supreme and autonomous political actor. Notwithstanding, it failed because Mane lacked support from other army leaders, and loyalist forces repelled him with little resistance.[71] The coup plotters and other Mane supporters were arrested in Bissau. Mane attempted to flee the country but was caught and killed after an alleged gunfight between Bissauan army loyalists and his bodyguards.[72] Mane's death was symbolic because it signaled the final death blow to the Abuja Agreement, raising a critical question: was power sharing with violent military junta responsible for subverting democracy, enabling human rights violations and international drug trafficking, and arguably fueling rebel movements in Senegal, a viable way to foster sustainable peace, security, and democracy?

After the coup attempt, Yala was confronted with myriad of significant challenges, including a coup plot in February 2001 by "civilians and soldiers" intended to assassinate him and trigger "ethnic-religious

[67] *National Security Council*, Africa Research Bulletin (March 2000).

[68] *Id.* See also *Bissau political parties reject junta plan*, Panafrican News Agency Daily Newswire (November 28, 1999).

[69] *Mane's takeover bid fails*, Africa Research Bulletin (November 2000).

[70] *Guinea Bissau arrests "plotters*," BBC News (November 26, 2000), available at http://news.bbc.co.uk/2/hi/africa/1042091.stm.

[71] *Id.*

[72] *Id.* See also *Rebel general shot dead, Guinea Bissau says*, New York Times (December 1, 2000), available at http://www.nytimes.com/2000/12/01/world/rebel-general-shot-dead-guinea-bissau-says.html.

war";[73] a coup attempt in December 2001 allegedly orchestrated by Almami Camara, deputy chief of staff;[74] and another coup plot in May 2002 by so-called dissidents supposedly trained and supported by the government of Gambia.[75] Fode Conte, a reserve army officer and accused May 2002 coup plotter, stated that he "feared Mandigos would be purged from the army so he planned to kill Yala and top senior officers of the Balanta's ethnic group."[76] Hence, within a fourteen-month period, Guinea-Bissau was destabilized by three attempted military coups by the very institution with which the Abuja Agreement mandated the government share power, and the only institution constitutionally mandated to preserve civilian rule.

In addition, in September 2001, Yala's political opposition accused him of being a charlatan who governed dictatorially, and he was also criticized for excessively reshuffling his cabinet, which led to the firing of key officials, including his attorney-general and three Supreme Court justices.[77] The firings triggered stiff opposition and a thirty-day strike by Guinea-Bissau's Bar Association, attorneys, and justices, essentially shutting down the country's judiciary.[78] To make matters worse, in October 2001, Yala fired 60 percent of the civil service in the customs, finance, and transport ministries in an attempt to stop the "massive embezzlement of funds."[79] These actions prompted leaders

[73] *Coup plot*, Africa Research Bulletin (February 2001), 14308.

[74] *Top officers arrested following attempted coup*, BBC Monitoring Africa (December 3, 2001).

[75] *Coup in Guinea Bissau frustrated*, Xinhua General News Service (June 12, 2002). See also *Gambia denies Kumba Yala's coup plot claims*, Panafrican News Agency Daily Newswire (June 18, 2002).

[76] *Id.*

[77] *Attorney general dismissed*, Africa News (September 8, 2001). See also *Attorney general dismissed*, Africa Research Bulletin (October 25, 2001). Shortly thereafter, Yala unilaterally appointed three new justices who had been summarily fired by Vieira in 1993. Yala took such action without consulting the Higher Council of Magistrates, as required by the 1999 constitution of Guinea-Bissau. He also threatened to fire (and eventually did) Prime Minister Faustino Imbali unless he could account for the disappearance of $15 million from the state treasury.

[78] *Guinea Bissau's judiciary paralysed by judges' strike*, Agence France-Presse (September 25, 2001).

[79] *UN Security Council expresses concern over Guinea Bissau*, Agence France-Presse (September 25, 2001).

in the NPR to hold an extraordinary session to consider a vote of no confidence on Yala and contemplate the legality of his decision to fire the justices.[80] It ultimately adopted a motion of no confidence that determined that the firings were unconstitutional.[81]

Yala continued to encounter heavy resistance in the NPR and military, and the situation worsened in January 2002, when he was confronted with several national strikes, foremost among them public school teachers, fourteen workers' unions, and national media employees demanding payment of unpaid salaries.[82] By the end of the year, on November 15, 2002, Yala followed through on earlier threats to dissolve parliament and thereafter dismissed Prime Minister Alamara Nhassé.[83] He replaced Nhassé with Mario Pires, a popular leader in the PRS. Yala stated that he had worked within the constitutional framework because the prevailing situation, in his view, was indicative of a political, financial, and economic crisis[84] and promised that early legislative elections would be organized "within 90 days."[85] These actions caused significant anxiety in the country and generated concern from UN secretary-general Kofi Annan, who informed the UNSC that the situation in Guinea-Bissau was "very worrying" and that "the Constitution has still not been promulgated and the incessant ministerial reshuffles have added to the growing instability."[86] Yala's actions made him unpopular with the NPR, judiciary, public servants, and civil society groups and raised concerns in the UN, ECOWAS, and the CPLP.

Not surprising, on September 14, 2003, Yala's government was overthrown by members of the Bissauan armed forces, led by Mane's

[80] *Coup rumors denied*, Africa Research Bulletin (October 1–31, 2001), at 14599.

[81] *Violations continue*, Africa Research Bulletin (November 1–30, 2001), at 14640. See also *Foreign minister dismissed*, Africa Research Bulletin (November 1–30, 2001), at 14621.

[82] *Strike shuts down state schools in Guinea Bissau*, Agence France-Presse (January 15, 2002); *Strike continues in Guinea Bissau*, Panafrican News Agency Daily Newswire (May 1, 2002); *Guinea Bissau: Staff of national media on strike over unpaid salaries*, BBC Monitoring International Reports (June 25, 2002).

[83] *Report of the secretary-general on developments in Guinea Bissau and on the activities of the United Nations peace-building support office in that country*, United Nations Security Council, S/2002/1367 (December 13, 2002).

[84] *Id.* Legislative elections were scheduled to take place on February 23, 2003, on April 20, 2003, and finally, in July 2003, but were supposedly postponed for security reasons and a lack of funding.

[85] *New prime minister*, Africa Research Bulletin (December 2002).

[86] *Anxiety grows over instability*, Africa Research Bulletin (December 2002).

replacement, army chief of staff General Verissimo Correia Seabra (Seabra), in what appears to have been an opportunistic and bloodless coup de grace to facilitate democratic elections.[87] Yala and Prime Minster Pires were detained and placed on house arrest. During his tenure as president, Yala replaced five prime ministers and dozens of ministers and secretaries of state, continually clashed with the judiciary and civil society groups, failed to ensure that civil servants and members of the armed forces were paid, and operated the country without its national assembly for over ten months,[88] not to mention that elections originally scheduled for October 12, 2002, did not take place. Although many Bissauans seemed ambivalent about the coup, it was widely condemned abroad. For example, Nigeria, Senegal, and ECOWAS demanded that Seabra restore constitutional order by reinstating Yala's government, to no avail.[89] On the contrary, Seabra established an ad hoc commission tasked with selecting a transitional government of national unity, and three days later, Yala formally resigned from office, adding "a veneer of constitutional legality to the fait accompli of his involuntary removal from office."[90]

The commission chose Henrique Perreira Rosa (Rosa), a prominent businessman with no formal political affiliation, to be interim president of the Government of National Unity, and Antonio Arthur Sanha, an old Yala cohort, to be prime minister. They officially took office on September 28, 2003, with the intent to govern until elections could be held the following year.[91] Prior to their swearing-in ceremony, Seabra's junta, referred to as the Military Committee for the Restoration of Constitutional and Democratic Order (MCRCDO), adopted the Political Transition Charter (Charter) with the approval of twenty-two political and civil society groups. The Charter partially suspended the constitution and created new political institutions, including a president of the transition republic, the transitional government, a military committee,

[87] *Kumba Yala deposed*, Africa Research Bulletin (September 1–30, 2003), 15439–15442.
[88] *Id.* See also *Yala's unlamented end*, Africa Confidential (September 26, 2003).
[89] *Id.*
[90] *Id.*, at 15441
[91] *Civilian leader to head interim administration*, UN Integrated Regional Networks (September 29, 2003). See also *Following Guinea-Bissau coup d'etat, transitional arrangements created aimed at elected government within 18 months Security Council told*, UNSC press release SC7883, 4384th Meeting (September 29, 2003).

and a fifty-six-member National Transition Council to serve in place of the NPR until new elections were held. It also adopted a road map for the return of constitutional rule, granted immunity to the coup plotters, barred Yala from contesting elections for five years, and allowed Seabra to remain chairman of the National Transition Council, a position that supervised the head of state and the national electoral commission, which included twenty-five junta members, twenty-three political party members, and eight civil society representatives.[92] Under the agreement, Interim President Rosa and his ministers were excluded from standing for the 2005 presidential election.[93] Seabra indicated that he had no interest in running for president, preferring his post as army chief of staff.[94]

The Charter schizophrenically established a bifurcated governmental order of illegality in which the unlawful political order established under the Abuja Agreement normatively birthed the illicit foundation of power sharing under the Charter, creating a double-layered illegality that was intended to nurture peace and law and order until the normalization of constitutional order or the rule of law. Needless to say, these unlawful binary political products did not produce viable political outcomes but rather worsened the situation. In March 2004, in the wake of legislative elections, a new government led by incoming prime minister Carlos Gomes Junior (PAIGC president) replaced the transitional government and council headed by Sanha, and the unlawful order created by the Charter expired.[95]

Not surprisingly, on October 6, 2004, Guinea-Bissau was rattled by yet another army mutiny that lasted two days, resulting in the murder of Seabra and Colonel Domingos de Barros, army head of human resources.[96] The mutiny appeared to be apolitical, and the mutineers seemingly sought salary arrears and nine months' back payment for serving as peacekeepers in UNMIL.[97] They also raised concerns about

[92] *Guinea-Bissau-presidential elections*, European Union Election Observation Mission Final Report (June 19, 2005).
[93] *Id.*
[94] *Parties disown interim leader*, Daily Champion (September 24, 2003).
[95] *New government*, Africa Research Bulletin (May 1–31, 2004), at 15750.
[96] *Army mutiny*, Africa Research Bulletin (October 1–31, 2004), at 15959.
[97] *Id.*

poor living conditions in military barracks and rampant corruption in the hierarchy of the armed forces.[98] Consequently, on October 28, Prime Minister Gomes Junior appointed Major General Tagme Na Wai as interim army chief of staff and mandated that he address the mutineers' concerns.[99]

The mutiny and its consequent killing of Seabra marked a significant shift in Bissauan politics because his absence created a significant political vacuum that allowed Vieira and Yala to reemerge as presidential contenders after the country's supreme court ruled on May 15, 2005, that they could participate in the June 19, 2005, presidential election.[100] Immediately after the ruling, Yala unilaterally declared himself president with immediate effect, claiming that he was forcibly and unlawfully removed from office, and proceeded to the presidential building with armed supporters.[101] His efforts were bolstered by hundreds of protestors who took to the streets of Bissau and attempted to descend on the presidential palace. Nevertheless, the presidential guard quieted the situation, and Rosa appealed to protestors to respect the democratic process. ECOWAS and CPLP leaders quickly condemned Yala's actions.[102]

On June 19, 2005, Bissauans went to the polls, and Sanha, Vieira, and Yala split the electorate, with Sanha receiving the most votes but not a majority.[103] Hence a runoff election took place on July 24, 2005, and Vieira won 52.35 percent of the vote, defeating Sanha, who garnered 47.65 percent. Sanha, winner of the first round of elections, and Prime Minister Gomes initially rejected the results[104] but later acceded after the CPLP interceded. Presidential elections ended the transitional period, extinguishing the Government of National Unity

98 *Id.*

99 *Id.*

100 *Guinea-Bissau: Vieira and Yala cleared to contest June presidential election*, IRIN News (May 11, 2005), available at http://www.irinnews.org/report.aspx?reportid=54350. See also *Seventeen candidates?* Africa Research Bulletin (April 1–30, 2004), at 16178.

101 *Kumba Yala declares himself president*, Africa Research Bulletin (May 1–31, 2004), at 16219–16220.

102 *Id.*

103 *Presidential election*, Africa Research Bulletin (June 1–30, 2005), at 16251.

104 *President Vieira wins*, Africa Research Bulletin (July 1–31, 2005), at 16282. See also *On edge*, Africa Confidential (August 5, 2005).

and the MCRCDO and, in effect, reclaimed constitutional order. What is more, it signaled the reemergence of Vieira as a national figure, which raises questions about the political efficacy of power sharing and amnesty under the Abuja Agreement, given that Mane's usurpation of power and subsequent behavior only delayed the will of Bissauans, netting nothing but Vieira's subsequent rise to power. His victory may demonstrate that supporting DCGs on the front end is preferable to power sharing, even if the fallout initially has deadly consequences, and that when combined, power sharing and impunity may regenerate political actors and behavior antithetical to peace and democracy.

In October 2005, less than two months after taking office, Vieira was sternly challenged by PAIGC legislatures in the NPR, who opposed him. Consequently, several PAIGC members defected from the party, causing Vieira to lose a majority in the NPR thus threatening the PAIGC's domination of the political apparatus. In an effort to regain control of Bissau's body politic, on November 2, Vieira dismissed Gomes and his PAIGC-orientated government under the pretext that "tense relations exist between sovereign organs."[105] He also deployed Bissau's black-clad ninjas, the Rapid Intervention Police, which had just returned from training in Angola.[106] The PAIGC argued that Vieira's actions were unconstitutional and unsuccessfully appealed to the supreme court.[107] In late October, Vieira sacked Junior and appointed Aristedes Gomes, a longtime ally, as prime minister. However, Vieira's government continued to be mired in crises, and in 2007, international drug cartels were playing an increasingly influential role in Bissauan politics.[108]

In March 2007, the PAIGC, PRS, and United Social Democratic Party entered into a "Pact of Stability" that created a coalition government and legislative majority sufficient enough to dominate government and replace Gomes, whom they considered arrogant and uncooperative.[109] On April 29, 2007, Gomes resigned after the NPR adopted a pact-engineered motion of impeachment, sending Vieira's

[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Need for a democratic state*, Africa Research Bulletin (July 1–31, 2008), at 17610.
[109] *Prime minister resigns*, Africa Research Bulletin (May 1–31, 2007), at 17001.

regime into a state of disarray. The stability pact nominated Martinho N'Dafa Cabi, PAIGC vice president, as Gomes's replacement and threatened to mobilize public demonstrations if Vieira did not appoint him to the position.[110] After conferring with opposition leaders, Vieira appointed Cabi as prime minister, signaling that organized democracy rather than violence may be more effective amid a weakened presidency.[111]

In March 2008, after consulting with the pact, Vieira postponed legislative elections until November 2008, and in April 2008, he worked with the NPR to adopt a constitutional amendment extending its term, which ended April 21, until after the November election. Notwithstanding, the country's supreme court ruled that the extension was unconstitutional.[112] In an attempt to consolidate military support, Vieira also granted amnesty to individuals in the military and civilians who committed serious crimes between 1980 and 2004. In July 2008, the PAIGC left the political "Pact of Stability" coalition government after Cabi fired several of its members from senior government positions.[113] Amid growing tension and deadlock in the NPR, on August 5, 2008, Vieira issued a decree that unilaterally dissolved the body, appointing a small group of lawmakers to govern the country until the November elections.[114] The decree essentially disbanded Cabi's government, leading Vieira to appoint Carlos Correia to be interim prime minister, triggering violent responses by senior army officers loyal to Cabi.

Accordingly, on August 6, 2008, naval chief of staff Rear Admiral José Américo Bubo Na Tchuto was arrested after attempting to recruit senior military officers to overthrow Vieira.[115] Na Tchuto appears to have plotted the coup in response to a Ministry of Justice investigation into the seizure of five hundred kilograms of cocaine from two

110 *Id.*
111 *Id.*
112 *Government dissolved*, Africa Research Bulletin (August 1–31, 2008), at 17635.
113 *Id.*
114 *Id.*
115 *Government dissolved*, Africa Research Bulletin (August 1–31, 2007), at 17635. See also *Guinea Bissau "foils coup plot*," BBC News (August 8, 2008), available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7550768.stm.

Venezuelan aircraft that landed at Bissau airport on July 17, 2008.[116] He also seems to have timed the coup plot to coincide with Vieira's dismissal of Cabi's government and the NPR and hoped to garner greater military support. The coup was foiled, and Na Tchuto, who was also suspected of assisting in the trafficking of cocaine from Latin America, was detained.[117] Na Tchuto later escaped from house arrest and was rearrested in Gambia.[118] The coup attempt signaled that despite democratic elections and the institution of a coalition government, Guinea-Bissau's legacy of military coups represented a systemic fault in its political and military culture, meaning that power sharing with the military would likely never lead to peace and democracy.

On November 16, 2008, Guinea-Bissau held legislative elections, and Vieira's PAIGC won a majority of seats,[119] followed by Yala's PRS,[120] in what was deemed a "free, fair and transparent" election.[121] The PAIGC victory restored Vieira's powerbase, giving him control over the NPR, and he reappointed PAIGC leader Carlos Junior Gomes as prime minister.[122] Notwithstanding, on November 23, 2008, two days after election results were announced, military officers led by marine sergeant Alexandre Tchama Yala, a nephew of Kumba Yala, staged an unsuccessful postelection military coup and tried to kill Vieira by attacking his home with machine guns and rocket-propelled grenades.[123] The failed coup left one presidential guard dead and

[116] *Guinea Bissau: A cocaine coup fails*, Africa Confidential (September 5, 2008), at 9.

[117] *Gambia arrests coup plotter*, Associated Press (August 22, 2008), available at http://www.gambianow.com/news/News/Gambia-News-Gambia-arrests-alleged-coup-plotter.html.

[118] *Guinea-Bissau coup plotter held*, BBC News (August 12, 2008), available at http://news.bbc.co.uk/2/hi/africa/7557266.stm.

[119] *Parliamentary polls*, Africa Research Bulletin (November 1–30, 2008), at 17635. See also *Guinea-Bissau: High hopes for new government*, IRIN News (November 21, 2008), available at http://www.irinnews.org/Report.aspx?ReportId=81614.

[120] *Id.*

[121] *Id.*

[122] *New prime minister*, Africa Research Bulletin (December 1–31, 2008), at 17777.

[123] *Pre-dawn attack*, Africa Research Bulletin (November 1–30, 2008), at 17756. See also Alberto Dabo, *Bissau coup suspect held in "neighboring country,"* Reuters (December 3, 2008), available at http://www.reuters.com/article/idUSL3731148.

another wounded[124] and was strongly condemned by ECOWAS and the African Union (AU).

In January 2009, the situation in Guinea-Bissau worsened when a segment of the presidential guard referred to as Aguentas – a four-hundred-man militia recruited as Vieira's personal bodyguard after the November coup attempt – allegedly sought to assassinate General Tagme Na Wai, army chief of staff, by shooting at his vehicle while it passed by the presidential palace.[125] Some believed that the shooting was simply accidental discharge, while others believed it was planned. Either way, Na Wai, a longtime rival of Vieira, was severely distressed by the incident and, with the consent of Vieira, disbanded the Aguentas.

On March 1, 2009, Na Wai was assassinated by a bomb concealed in the staircase of his office headquarters.[126] The Columbia styled killing triggered strong reactions from the military, many of whom believed that Vieira was responsible for it.[127] Consequently, several soldiers stormed Vieira's residence in the early hours of March 2 and shot, stabbed, and killed him as he attempted to flee.[128] The double assassinations sent shock waves throughout the country and international community and were universally condemned as not simply the political killings of a president and army chief of staff but rather as the assassination of Bissau's struggling democracy.[129] On March 3, 2009, Raimundo Pereira, speaker of the NPR, became the country's new interim president, quashing speculation that the assassinations were a part of an army coup plot and takeover.[130]

[124] *Id.* After the coup attempt, Alfred Malu, a former Guinea-Bissau security chief, and at least eight other soldiers were detained. Tchama Yala fled to Gambia and was later arrested in Senegal. Tchama Yala is a close associate of Na Tchuto; both are members of the Balante ethnic group.

[125] *Attack on chief of staff*, Africa Research Bulletin (January 1–31, 2009), at 17831.

[126] *President and army chief assassinated*, Africa Research Bulletin (March 1–31, 2009), at 17893–17886. See also Assimo Balde, *Renegade soldiers kill Guinea-Bissau president*, Associated Press (March 2, 2009), available at http://www.ethiomedia.com/aurora/9960.html; *Guinea Bissau: Soldiers kill President Vieira*, Agence France-Presse (March 3, 2009), available at http://allafrica.com/stories/200903030058.html.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

Vieira's death represented the last vestige of the Abuja Agreement that arguably set in motion or solidified the notion that military coups, not democracy, were the most expedient way to attain political power. Vieira, who came to power by force, ultimately died a violent death while in office. Giving credence to the old cliché: those who live by the sword die by it. In the wake of the assassinations, the military is alleged to have targeted several Vieira cohorts and other politicians through a campaign of beatings, kidnappings, and killings. Nevertheless, on July 26, 2009, Pereira and Gomes conducted peaceful runoff elections for the presidency, in which PAIGC leader Malam Bacaim Sanha and Kumba Yala, PRS founder and leader, were the frontrunners. Sanha, a former interim president and speaker of the NPR, won the election with 63.52 percent of the popular vote.[131]

On April 1, 2010, Guinea-Bissau experienced yet another setback when mutinous soldiers detained army chief General José Zamora Induta and Prime Minister Carlos Gomes.[132] Gomes was briefly placed under house arrest and threatened with death but was later released after massive demonstrations and international outrage.[133] Deputy army chief of staff General Antonio Indjai took over the army and appears to have collaborated in the abortive coup having threatened to kill Gomes if protestors did not cease and desist. Sanha, who defined the incident as a "problem between soldiers, which spilled over into civilian government," was able to calm the situation.[134] Government ministers condemned the military action, and Sanha refused to resign arguing that to do so would be tantamount to threatening democratic elections. Induta remained on house arrest, and to the trepidation of the international community, Sanha appointed Indjai as his replacement.

Finally, similar to the Accra and Lomé peace processes, one reason why the Abuja Agreement appears to have been unsuccessful is because ignored Guinea-Bissau's violent and lawless history in framing it or historical experientialism: the moral rationale for rule existence

131 *Malam Bacaim Sanha wins*, Africa Research Bulletin (August 1–31, 2009), at 18074.
132 *Premier and army chief held*, Africa Research Bulletin (April 1–30, 2010), at 18375.
133 *Id.*
134 *Id.*

was recklessly ignored and sacrificed at the altar of unintelligent political compulsion. Guinea-Bissau is perhaps the worst situated nation in which to introduce power sharing, particularly with the military. Since the institution of the Abuja Agreement eleven years ago, Guinea-Bissau has suffered perpetual coups and coup attempts and become an international transit point for global drug cartels. Flagrant poverty, rapid unemployment, $30 million in salary arrears, a $3 billion deficit, an unprofessional police and military, and an undemocratic civic culture have combined to make it one of the most unstable nations in the world. Moreover, its political and administrative infrastructure has been unable to carry out elections without violence, effectively control the political apparatus, or restructure and counterbalance the army. This has led to reoccurring political crises, the proliferation of criminal networks, and the real potential for high intensity civil conflict. Consequently, Guinea-Bissau could also be used by international terrorist networks operating in the Sahel-Maghreb in the same way it is being used by narco terrorists from Latin America. Consequently, the post-Abuja environment in the country remains unstable, and power sharing appears to have only exacerbated and institutionalized preexisting cleavages that persist to the present.

D. CONCLUSION

The postagreement environments in Liberia, Sierra Leone, and Guinea-Bissau demonstrate that transitional political power sharing between democratically constituted governments and *pirates de la loi* is not a viable method of conflict resolution or device to effectuate transitions to democracy. In these cases, it has served as an impediment to long-term peace, security, justice, and democracy because the Accra, Lomé, and Abuja agreements not only unlawfully suspended and/or violated predominant law but its inventers ignored past events or historical experientialism in designing them. As a result, the accords pervertedly empowered and amnestied bandits of the law and enfeebled war victims and citizens by curtailing their rights to obtain justice and effectuate democracy. Although power sharing may be a short-term measure intended to halt armed conflict, it certainly did not lay the

groundwork for enduring peace and democracy in the cases under study.

In Liberia, this is evidenced by that fact that the Accra Agreement effectively emulates the thirteen peace agreements that preceded it and, similar to them, largely foundered due to ineffectual power sharing, resulting in a resurgence of conflict. Whereas the Lomé Agreement was not preceded by thirteen accords, it was birthed or necessitated by the failure of the Abidjan Agreement. The failure of the Abidjan peace deal can be attributed to the defects in the character of the accord, to domestic and international pressure to negotiate and share power with and amnesty senior RUF officials, and the RUF-AFRC's violent nullification of it. The Lomé Agreement was unsuccessful for the same reasons, leading to a breakdown in the power-sharing arrangement and the resurrection of war. Unlike the circumstances that produced the Accra and Lomé accords, the Abuja Agreement was not precipitated by colossal deadly conflict or failed peace agreements but by arguably more insidious occurrences: military coups. The accord's power-sharing provisions cemented ethnopolitical rivalry and a culture of internal military adventurism into a winner-takes-all body politic prompting successive coups.

Although the accords may have created conditions for democratic elections, none of them have produced sustainable peace; one cannot yet fully assess the viability of the Accra Agreement until the UN withdraws from the country in 2012–2013. Notwithstanding, all three agreements have set the structural stage for regenerative conflict and the need for additional accords to douse them. This cyclical spectacle was triggered by power sharing and spawned by implicit and/or explicit amnesty that has not dissuaded violent and predatory behavior but rather exacerbated it. In addition, these accords raise concerns about the utility of providing *pirates de la loi* with discretionary power and access to wealth through power sharing, as demonstrated by Sankoh's attempt to illicitly mine diamonds to procure weapons while serving as chairman of the CMRRD and the Bissauan military's known involvement in international drug trafficking. Another inimical feature of power sharing overlooked in the Accra and Lomé agreements is the technical ability of bandits of the law to carry out their responsibilities and honor commitments. In both countries, rebel

groups lacked technicians with legal, administrative, and management expertise, thereby making it difficult for their largely uneducated leadership to effectively operate outside of the battle context, that is, inside government during peacetime.[135] In the case of Sierra Leone, it is unlikely that greater technical expertise would have tempered the RUF's apparent appetite for high-intensity violence, and practical understanding did not obviate the military leadership's thirst for power in Guinea-Bissau.

The conflict-ridden post accord histories of Sierra Leone and Guinea-Bissau are tragic, and endemic corruption, impunity, chronic poverty, and a false sense of security place Liberia at the precipice of civil conflict. All three countries share a postconflict legacy of failed power sharing, contested postconflict elections, ethnic conflict, and external intervention by ECOWAS. Moreover, in each case, warlords and junta were permitted to stand for elections, and high courts were to some extent used to ratify or nullify elections. Notwithstanding, all three accords birthed contested elections that prolonged transitional power sharing, and political elites routinely refused to accept defeat, making it difficult to end transitional arrangements and enable new political actors.

Additionally, Liberia and Sierra Leone arguably suffered from botched TRC processes and dichotomous transitional justice systems that led to the indictment and prosecution of some persons (e.g., Foday Sankoh and Charles Taylor before the Special Court of Sierra Leone) while allowing the bulk of high-, mid-, and low-level offenders to roam freely (e.g., Prince Y. Johnson in Liberia), whereas Guinea-Bissau's chosen method of retributive justice among political elites appears to be political assassination. These cases reveal that externally imposed power sharing is less likely to succeed when necessity and expediency are unconstrained by the rule of law and serve as controlling principles. What is abundantly clear in each country is that transitional political power sharing does not foster sustainable peace, security, rule of law,

[135] *Pirates de la loi* who do not have the expertise to navigate the law-filled and technocratic waters of power-sharing bureaucracies are seemingly more prone to corruption, abuses of power, and, ultimately, violence. This state of affairs is greatly exacerbated by perceptions, whether real or imagined, that incumbent government, third-party stakeholders, and/or peacekeepers seek to sabotage their participation.

or democracy. Hence, as a viable model of conflict resolution in Africa, power sharing has not been successful, and the author is not familiar with a single case in which it has been fruitful and lawful when consummated between democratically constituted regimes and *pirates de la loi*.

The circumstances that unfolded in the wake of the Accra, Lomé, and Abuja agreements support this narrative. In the few cases in which power sharing brought about minimal peace, it was usually backed up by a massive intervention force, raising the question whether transitional political power sharing can be effective in the absence of peace enforcers. This book reveals that when the international community, including subregional, regional, and global actors such as ECOWAS, the AU, and the UN, are unwilling to monitor and enforce peace agreements for the long term, would-be insurrectionists and coup plotters are less likely to honor their commitments. Consequently, stout military intervention, not power sharing, is largely responsible for short-term peace. In fact, it is not far-fetched to conclude that the character of the transitional regime (whether an incumbent government or transitional government of national unity) is largely irrelevant in the short term when vigorously backed by peace-keeping forces. It follows that transitional political power sharing in Liberia, Sierra Leone, and Guinea-Bissau did not contribute to sustainable or long-term peace because the amity it purported to create was artificial, unlawful, superimposed, and antithetical to the historical logic of prevailing rules that promote human rights and democracy.

10 NO LAW, NO PEACE

A. THE NECESSITY OF LAW IN POWER SHARING

Earlier chapters comprehensively examined how and why transitional political power sharing sabotaged the Accra, Lomé, and Abuja agreements. And though their failure can be attributed to various political, economic, social, and cultural faults, what concretely emerges from the study is that flouting law's claim to apprise and order peace agreements retards them. In the absence of any meaningful contemplation of the legal implications and ramifications of peace arrangements, sustainable peace, justice, and democracy will be held hostage by the evil and regenerative proclivities of *pirates de la loi*.

In the immediate postconflict environment, it is important to rebuild bureaucratic infrastructure and capacity so that it can provide the platform for the implementation of peace agreements and, more important, basic services (e.g., refuse collection, electricity, water and drivable roads) to citizens. However, as noted in earlier chapters, it is also vital that power-sharing governments embrace the rule of law, make rules publicly known, and lawfully administer them. When taken together, basic services and the rule of law are necessities that reassure citizens and legitimize the body politic, respectively. The critical role of law in postconflict power sharing was fortuitously recognized by two political scientists, who noted the following:

> Sustainability of the state may depend on a distinct element of legitimacy – the perception within a significant portion of the population that the state operates according to a clear set of rules and principles of fairness and transparency. This depends upon the presence of rule of law, whereby the rules of the road are set forth in a process

> which is previously defined, by individuals chosen according to an agreed process.[1]

While this observation is generally correct, Sriram and Zahar mistakenly and exclusively focus on the rule of law in the postconflict environment rather than during conflict in the preagreement climate – specifically, on its role in informing, fashioning, and regulating the character of peace agreements and power sharing. Law is essential to the success of transitional political power sharing, not simply because of historical experientialism but rather because it exposes power sharing deals for what they are, blunt and undemocratic conflict-resolution devices that ignore law while masquerading as it. In this regard, law's central role is to expose the anarchistic nature of power sharing to protect basic human rights and democracy.

It follows that through the lens of the neo-Kadeshean model (NKM), law is designed to order peacemaking policy – peace outcomes among warring parties to forestall the resumption of further conflict. Law's legal worth rests in its obedience to the principles of legality, whereas the political quality of politics lay in its compliance with political principles, which is why "power-sharing is only as efficient as the capacity of state institutions to enforce the rules and punish would-be transgressors."[2] This observation is arguably more relevant during peace negotiations, where the modalities of peace take on legal character. In this context, the three cases under study expose a cruel nexus of circular causation in the practice of power sharing, namely, that the weaker or more embattled the government, the more likely law will not play a role in framing or sustaining peace, and the less likely it is that power sharing will occur – a double whammy of sorts. Weak governments almost unvaryingly have frail institutions tasked with safeguarding the rule of law while simultaneously serving as operational custodians of it. Yet their feebleness inhibits the ability of actors to monitor and compel compliance with and enforce peace prescriptions. This lack of accommodative elasticity often immobilizes the institutional capacity to withstand the vicious tendencies and effects of bitter

[1] Chandra Sriram & Marie-Joëlle Zahar, *The perils of power-sharing: Africa and beyond*, 44 African Spectrum 11, 30 (2009).

[2] *Id.*, at 19.

contestants vying for control over peace negotiations and of the post-conflict order.

Consequently, law should not be discarded at the altar of political expediency and politics during peace negotiations, and peace negotiators and peace brokers should judiciously adhere to it when political edicts clash with law's ubiquitous occupation of the subject area. This is largely because, as the cases of Liberia, Sierra Leone, and Guinea-Bissau illuminate, it is unlawful and unreasonable to bequeath political power to *pirates de la loi* who illicitly and violently usurp it and, in the process, commit heinous crimes. Additionally, when peacemakers arbitrarily accord power-sharing deals with the weight of superlaw, trumping domestic, regional, and international law, despite that they have no foundation in law, such deals represent a form of political marmalade – jamlike political edicts impersonating law.

Implementing and policing peace through law is problematic and arguably secondary to finding technocrats among the rebel ranks to respect, employ, or harness it. Members of armed groups that are not already integrated into the body politic of a state or that lack government experience find it difficult "to function within the often complex maze of rules and institutions that make up contemporary power-sharing arrangements."[3] Consequently, they are unable to competently participate in legalistic peace negotiations and postconflict orders with adequate knowledge of how to identify, articulate, and integrate interests; measure the practicability of demands; and thus unilaterally undermine their own implementation commitments. Hence the failure to recognize – let alone propagate – law's multidimensional and regulatory role in the design and implementation stages undermines power sharing and cripples the preparedness of rebels to traverse through peaceful waters. Here emphasis on the rule of law during peace negotiations involving third-party stakeholders may allow rebel groups to plan for their informative role by identifying lawyers or technicians early in the peace process.

For example, the Revolutionary United Front's (RUF's) lack of technical legal expertise during the Lomé peace negotiations inhibited

[3] *Id.*

its ability to anticipate certain political outcomes and the maneuvering of government elites and technocrats. This is particularly why the RUF agreed to the appointment of Foday Sankoh to the rather toothless position of chairman of the board of the Commission for the Management of Strategic Resources, National Reconstruction, and Development (CMRRD), only to discover that it was a paper tiger. Sankoh was sorely surprised to learn that the CMRRD did not directly control Sierra Leone's mining industry and became more perturbed when the Kabbah government did not provide him with anticipated support in the form of offices, facilities, and a budget. It can be argued that in Liberia, the Liberians United for Reconciliation and Democracy and the Movement for Democracy in Liberia became largely irrelevant as power-sharing stakeholders because they lacked the technical expertise to effectively operate outside of the battle context and inside the transitional regime. Angola provides another good example of this phenomena as the National Union for the Total Independence of Angola lacked the technocratic muscle to participate in Angola's complex bureaucracy but nonetheless fought "for a larger share of political power during the negotiation phase only to fail to fill these positions during the accord's implementation."[4] From this vantage point, peace agreements that operate outside of law but purport to apportion legal interests render power-sharing deals unlawful and impracticable. Snubbing law's regulatory role disarms rebels in need of technical legal assistance, affecting their ability to participate in peace negotiations and honor their commitments, thereby increasing the likelihood that armed conflict will reignite.

B. MAKING LEGAL PEACE: LAW, POWER SHARING, AND INTERNATIONAL INSTITUTIONS

Before a discussion of any law of power sharing can take place, an important question must be iterated: what role, if any, does law indicate for itself to play in informing, shaping, and regulating political power

[4] Ian S. Spears, *Power-sharing and conflict resolution in Africa: A review of the case study literature*, 54 International Journal 525, 528 (1999).

sharing? This dire question is too often not addressed with a long view, given the analogous aims of embattled regimes and bandits of the law, on one hand, and third-party peace negotiators, peace guarantors, and peacekeepers–enforcers, on the other. This study reveals that law incontestably occupies the field of peacemaking and is intended to fashion and regulate the practice of power sharing. Peace agreements birthed out of political necessity and expediency, such as the Accra, Lomé, and Abuja agreements, focus primarily on short-term needs, such as a cessation of armed conflict, and humanitarian and security-related issues. The NKM bolsters power-sharing rules that take a long and holistic view of conflict resolution. Although power-sharing law incorporates conflict-termination and security-related issues, long-term peace, transitional justice, and democratic transition are key aims because they reinforce the longevity of state structures. As Sriram and Zahar note, "while it is clearly right that those negotiating power-sharing arrangements are concerned primarily with conflict mitigation and termination, not state-building, it is critical that they understand the potential unintended consequences of the short-term bargains they support for longer-term state structures."[5] Too often, such unintentional consequences are a deadly brew of short-sightedness, structured apathy toward the rule of law, and the subversion of democracy, which undermine public confidence in the postconflict political order as well as the peace agreements that impose them.

Civil society discontent with power-sharing arrangements can serve as a major spoiler of peace. For example, power sharing and amnesty under the Lomé Agreement invoked widespread discontent in Sierra Leone, which in part explains why the Kabbah government seemingly felt justified in incrementally defaulting on several of its power-sharing commitments with the RUF and jumped at the opportunity to establish the United Nations (UN)-backed Special Court of Sierra Leone to prosecute RUF leaders. In fact, societal dissatisfaction with Lomé's power-sharing arrangement helped rationalize the institutionalization of civil defense groups, including the Kamajors (traditional hunters), to safeguard Kabbah's government when the RUF reneged on its commitments and reignited armed conflict against it. Similarly,

[5] Sriram & Zahar, *supra* note 1, at 21.

it has been argued that illiberal power sharing in the Arusha accords in Rwanda triggered Hutu extremism and the ensuing genocide.[6] Though in each case, it may be challenging to pinpoint how adherence to the rule of law may have produced different outcomes – to the extent that law seeks to ensure predictability, fairness, justice, protection against arbitrary governmental power, and the ability to participate in government – it mitigates the likelihood that the interests of groups on the fringe (whether civil society as a whole or extremist groups) will be left out.

This study contends that peace, security, and democratization – unmitigated by indefinite third-party guarantors such as UN or Economic Community of West African States (ECOWAS) peacekeepers – are not sustainable unless the spinal foundation that underwrites them, law and other rules, forms the center of transitional political power-sharing agreements. Peace, security, and democratization are law-based phenomena that require and propagate rules, norms, and doctrine for their very survival – existences that have roots in the historical experientialism of law. Although some political scientists measure success by a state's ability to avoid armed conflict for five years after the institution of a peace agreement,[7] it should rather be measured by its capacity to maintain peace and security, uphold the rule of law, and facilitate democratic political transitions in the absence of peace enforcers.

When democratically constituted governments are forced to share power illegally, the resulting agreement has two fundamental and iniquitous consequences. On one hand, it rewards and pacifies *pirates de la loi* with political and economic power, amnesty, and other prizes, thereby institutionalizing impunity, illegality, and predatory behavior in government. On the other hand, it fabricates peace in the short term and, with it, a justification for the international community, particularly the UN, to contribute fewer resources to enforcing peace and securing

[6] Roland Paris, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT (2004), at 70–71; René Lemarchand, *Consociationalism and power-sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo*, 106 African Affairs 1, 4 (2007).

[7] Anna K. Jarstad, *Power-sharing: Former enemies in joint government*, in Anna K. Jarstad & Timothy D. Sisk (eds.) FROM WAR TO DEMOCRACY: DILEMMAS OF PEACE-BUILDING (2008), at 113.

law and order. Hence, in this context, the primary prizewinners of power sharing are warlords, political elites, the UN and international financial institutions. The former two groups reap the rewards of de jure authority and power, and the latter two are spared from making the vast expenditures needed to keep the peace while concurrently reaping profits from postconflict reconstruction and development lending. International decision makers typically select the most cost effective route to resolving conflict – speedy solutions – despite that both qualitative and quantitative studies demonstrate that "power-sharing governments retain the capacity for resorting to civil war."[8] Stated differently, governments are more apt to fragment and degenerate into armed conflict when quick-fix solutions take precedence over lawful ones.

The cases of Liberia, Sierra Leone, and Guinea-Bissau show that power sharing at the macro level benefits political elites, whether warlords or incumbent government officials, by reinforcing Africa's patrimonial political culture of governance from above, while leaving low-level combatants, civil society and traditional structures of authority (under which the majority of Africans live) at the periphery. This occurs largely because power-sharing agreements are often hastily derived because when a warlord "perceives greater advantages for himself or his group from aggression, he is likely to accept a second-preference solution [to victory] such as power sharing."[9] In this context, sharing power is a win-win alternative to unfettered war for political elites. Whether warlord or democrat, elites routinely choose power sharing over a continuance of war and its harsh impacts on civil society, death and/or defeat on the battlefield, and complete political and economic disenfranchisement at the hands of the prizewinner. The most significant factor driving the need to share power in the Accra, Lomé, and Abuja accords was not, as Sisk noted, an appreciation of a shared destiny or pragmatism;[10] rather, the most momentous issues were the

[8] Roy Licklider, *The consequences of negotiated settlements in civil wars, 1945–1993*, 89 American Political Science Review 681, 686 (1995). See also 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).

[9] Sisk, *supra* note 13, at 78.

[10] *Id.*

prospects of a worse outcome, that is, the desire of Charles Taylor and his cohorts to remain unscathed, alive, and wealthy[11] and the need of Kabbah, Vieira, and their followers to remain in political power.

Under international law, governments are responsible for resolving internal disorder, curtailing the repressive conduct of their officials, and facilitating postconflict justice. Hence, on one hand, it may be immoral and unlawful for a government to allow deadly conflict, with its multifarious impacts on civilians, to continue unabated until legal peace is reached. On the other hand, it may be immoral, irresponsible, and unlawful to share power and offer amnesty for the perceived collective good, given that coerced transitional political power sharing rarely works. Moreover, such action requires placing the political and economic prerogatives of warlords and rebels above the fundamental human rights and democracy entitlements of war victims and citizenry. The true-to-life tension between relieving the conditions that produce deadly conflict and unlawfully sharing power with those who are fundamentally responsible for generating instability and committing international crimes would be substantially curbed if the UN were to play a more proactive and productive role in conflict prevention, management, and resolution in Africa.

While the UN has a suspect record of making and keeping the peace in Africa (consider Rwanda in 1994, Congo-Kinshasa from 1999 to the present day, and Darfur, Sudan, from 2003 until present), it has occasionally authorized and/or taken enforcement measures under its Chapter VII powers to curb massive human rights and humanitarian law violations as well as threats to democratically elected governments.[12] Notwithstanding, it should play a more pivotal role in influencing lawful peace – an outcome that may have obviated

[11] In 2003, Charles Taylor resigned as president and sought asylum in Nigeria to avoid being overthrown and likely killed by rebels.

[12] *Report of the secretary-general to the United Nations Security Council on the causes of conflict and the promotion of durable peace and sustainable development in Africa*, paras. 35–45, U.N. Doc. A/52/871-S/1998/318 (April 13, 1998); Jeremy I. Levitt, *The African Union Peace and Security Council, United Nations Security Council and the use of force: The case of Darfur, Sudan*, in Neils Blokker & Nico Schrijver (eds.) THE UNITED NATIONS SECURITY COUNCIL AND THE USE OF FORCE (2005); Jeremy I. Levitt, *Humanitarian intervention in Africa: Africa's pathbreaking model*, 7 Global Dialogue (2005);; Jeremy Levitt, *African interventionist states and international law*, in Oliver Furley & Roy May (eds.) AFRICAN INTERVENTIONIST STATES (2001), at 23. Jeremy Levitt, *Humanitarian*

the apparent reoccurring need to dispatch peace enforcers in Liberia, Sierra Leone, and Guinea-Bissau. This requires a formal shift in UN practice from tall rhetoric to measurable policy outcomes. For example, in the wake of the 1997 coup d'état in Sierra Leone, former UN secretary-general Kofi Annan stated that the "success of Africa's third wave depends equally on respect for fundamental human rights" and democratic rule.[13] He made the case that

> Africa can no longer tolerate, and accept as *faits accomplis*, coups against elected government, and the illegal seizure of power by military cliques, who sometimes act for sectional interests, sometimes simply for their own. . . . Accordingly, let us dedicate ourselves to a new doctrine for African politics; where democracy has been usurped, let us do whatever is in our power to restore it to its rightful owners, the people.[14]

Annan's comments appear to have marked the beginning of a pendulum shift away from the UN's practice of silence and inaction on issues it traditionally considered internal or within the exclusive jurisdiction of states to a new doctrine that overrides state sovereignty to protect human rights and democracy.[15] For example, Annan publicly expressed concern over the extraconstitutional transfer of power in Togo in 2005, commenting that it had "not been done in full respect of the provisions of the Constitution."[16] He also appealed to the international community to "ostracize and isolate putschists" and stray away from passive verbal condemnations of illegal seizures of power.[17] Annan went as far as to encourage ECOWAS to "deal" with duly elected governments that, again, "violate constitutional norms and flout

intervention by regional actors in internal conflicts: The case of ECOWAS in Liberia and Sierra Leone, 12 Temple International and Comparative Law Journal 333 (1998).

13 Secretary-General, *Secretary-general calls for efforts to unleash African "third wave" based on democracy, human rights, and sustainable development*, U.N. Doc. SG/SM/6245/Rev.1 AFR/9/Rev.1 (June 2, 2002).

14 *Id.*

15 See generally Reisman, *supra* note 5639; The International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect (2001).

16 *Annan calls on Togolese to respect own constitution in appointing presidential successor*, UN News Service (February 7, 2005), available at http://www.un.org/apps/news/printnewsAr.asp?nid=13261.

17 *Id.*

basic principles of good governance," an attitude that represents a serious departure from the long-standing tradition of UN nonintervention in the internal affairs of states.[18] However, as already noted, it remains to be seen whether Annan's statements were simply hyperbolic declarations.

In the 2004 report of the secretary-general to the UN Security Council on the rule of law and transitional justice in conflict and post-conflict societies, Annan argued that peace, justice, democracy, and respect for the rights of victims and the accused acted as "mutually reinforcing imperatives."[19] Nevertheless, under his leadership, the UN sanctioned and guaranteed numerous unlawful power-sharing arrangements or transfers of power that violated national, regional, and international law, including the Accra, Lomé, and Abuja agreements. Ironically, while concentrating its efforts on the immediacy of the security needs of at-risk populations in places such as Liberia and Sierra Leone, the UN admits to generally failing to "address the grave injustices of war [and] the root causes of conflict,"[20] unwittingly admitting to undercutting justice and the rule of law.[21] Its 2004 report contended that the *rule of law* is a concept at the very heart of the organization's mission and endorsed a principle of governance in which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated. It further noted that law should be equally enforced, independently adjudicated, and consistent with international human rights norms and standards.

[18] *Message to the Summit of Heads of State and Government of the Economic Community of West African States*, delivered by Mr. Ahmedou Ould-Abdallah, special representative of the secretary-general and chief of UN Office for West Africa, Accra, Ghana (December 19, 2003).

[19] The Secretary-General, *Report of the secretary-general to the United Nations Security Council on the rule of law and transitional justice in conflict and post-conflict societie*s, paras. 1–2, U.N. Doc. S/2004/616 (August 23, 2004).

[20] See *id.*, at para. 4.

[21] *Id.*, at para. 6. The UN defines *justice* as an "ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century." *Id.*

The UN seems to argue that this notion of governance requires, as well, measures to ensure adherence to the principles of the supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[22] Although it has asserted that the concept of governance necessitates these principles, the UN did very little to safeguard them in the Accra, Lomé, and Abuja peace processes, which is precisely why a law of power sharing is imperative.

The apparent gap between UN rhetoric and action, particularly as it relates to UN peacemaking prescriptions in Africa, presents a strange contradiction. This rift does not simply present itself in the context of UN speechifying and inaction but also in the realm of UN action and counteraction. While pomposity is not a specialty of Ba Ki-Moon, Annan's successor and current UN secretary-general, he appears to have adopted a business-as-usual approach since taking office in 2006. This may explain why UN peacemaking approaches in Africa – especially as they relate to power sharing and the rule of law – are as schizophrenic today as they were two decades ago. For example, the Credentials Committee of the UN refused to accredit, recognize, and grant UN General Assembly representation to the so-called governments of Charles Taylor in Liberia (until he won elections in 1997) and Johnny Paul Koroma in Sierra Leone in 1997 (after he overthrew Kabbah's democratically elected regime), despite that Taylor and Koroma were in effective control of their states.[23] In contrast, even though Guinea-Bissau has been fractured by successive military coups, the UN Credentials Committee and UN General Assembly have never refused to accredit one of its military regimes. The Credentials Committee's decision not to credit insurrectionists in Liberia and Sierra

[22] *Id.*

[23] Matthew Griffin, *Accrediting democracies: Does the Credentials Committee of the United Nations promote democracy through its accreditation process, and should it?* 32 New York University Journal of International Law and Policy 725, 725, 726, 748 (2000). In fact, in 1990, the Credentials Committee accredited representatives of Samuel Doe's government, even though it had been ousted from power and Doe subsequently killed, and seven years later it also "accredited the delegation of the deposed, democratically-elected government of President Kabbah of Sierra Leone."

Leone seems to have rested primarily "upon whether the applicant government was democratic and whether the applicant government originally came to power by overthrowing a democratic government."[24] Ideally, it should have applied the same standard to Guinea-Bissau. Hence, whereas one body within the UN system took bold stances vis-à-vis the normative value of what Thomas Franck referred to as the "democratic entitlement,"[25] other UN institutions, such as the Office of the Secretary-General, the UN Security Council, and the UN General Assembly, did not. To complicate matters more, the former two endorsed the Accra, Lomé, and Abuja accords, thereby sanctioning unlawful power sharing and explicit and/or implicit amnesty with many of the same actors who had headed the de facto governments the Credentials Committee refused to accredit.[26] In yet another turnaround, the UN later formally backed the creation of the Special Court for Sierra Leone in August 2000, which was designed to prosecute the same individuals whose violent acquisitions of power were rejected by the Credentials Committee (e.g., Taylor in Liberia in 1997 and Koroma and Sankoh in Sierra Leone in 1997) but later sanctioned by the UN Security Council's endorsement of power sharing in the Lomé and Accra agreements.[27]

If the UN served as an example to states and other international institutions by consistently applying and complying with its own rules and doctrine, power sharing would not pose such a dilemma for embattled governments. If it honored its responsibility to maintain international peace and security in Africa,[28] democratically constituted

[24] *Id.*, at 725, 726. According to Griffin, the central consequence of not being accredited is the inability to participate in the business of the General Assembly. *Id.*, at 729.

[25] See generally Thomas Franck, *The emerging right to democratic governance*, 86 American Journal of International Law 46 (1992).

[26] As previously noted, the UN served as moral guarantor of the Accra, Lomé, and Abuja accords and endorsed them through the UN Security Council in, among other resolutions, Resolutions 1509, 1260, and 1216, respectively. These accords empowered Moses Blah (Taylor's vice president) to briefly remain in power in 2003 and positioned Foday Sankoh and Ansoumane Mane to thereafter violently challenge the Kabbah (1999) and Vieira (1998) regimes, respectively.

[27] Agreement between the United Nations and Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, Appendix II, U.N. Doc. S/2002/246 (January 16, 2002), available at http://www.sc-sl.org/scsl-agreement.html.

[28] S.C. Res. 1631, U.N. Doc. S/RES/1631 (October 17, 2005).

governments would not be forced to make peace and share power with *pirates de la loi*. In this context, UN inaction and psychosis have directly and significantly contributed to Africa's culture of impunity, illegal peace, and, consequently, instability. The UN's inability to comport with its own rules has arguably authored a troublesome nexus of circular causation between unlawful peace and deadly conflict.

Hence, one way for the UN, the African Union (AU), ECOWAS, and other regional institutions to play a more productive and active role in conflict resolution in Africa is to assess the legal environment for peace by taking stock of governing rules before designing or morally guaranteeing peace prescriptions to ensure that they are lawful. The NKM is rooted in the conception that law should inform and shape political outcomes when political prescriptions engender rules. For example, the African human rights system, which forms an essential part of international law, does not consider a state of emergency as a valid legal basis on which to deviate from the conventional legal system or constitution of order, including fundamental civil and human rights.[29] Neither does it consider civil war as a valid legal basis on which to derogate, violate, or permit violations of rights guaranteed in the Banjul Charter,[30] which may in and of itself speak to the illegality of power sharing. This is largely because the suspension of constitutionally guaranteed civil and political rights and unconstitutional and violent seizures of power are considered unlawful and incompatible, respectively, with the African Charter on Human and Peoples' Rights and the law and practice of African regional institutions.[31] It should also be noted that transitional political power sharing may offend international refugee law, particularly the principle of voluntary repatriation,

[29] *Media Rights Agenda, Constitutional Rights Project Case, Media Rights Agenda and Constitutional Rights Project/Nigeria*, Comm. No. 105/93, 128/94, 130/94, 152/96, Twelfth Annual Activity Report 1998–1999, paras. 67, 70, Assembly of Heads of State and Government, Thirty-fifth Ordinary Session, Algiers, Algeria (July 12–14, 1999).

[30] *Commission Nationale des Droits de l'Homme et des Liberties v. Chad* (1994–5), Communication No. 74/92 (ACHPR 1994–1995) (Ninth Annual Activity Report) (*Chad Massive Violations* case).

[31] See Communications No. 147/95, 149/96 (joined), *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000) (Thirteenth Annual Activity Report) (*Gambian Coup* case), cited in Frans Viljoen, INTERNATIONAL HUMAN RIGHT IN AFRICA (2008), at 242, 245.

which sits squarely in the realm of human rights.[32] In this context, power sharing impedes the rights of war victims and others displaced by armed conflict to return to their country for fear of persecution by the de jure warlords, rebels, and junta who forced them to flee. Taken together, these legal principles do not loom in isolation because the state parties to the Banjul Charter, the AU, ECOWAS, and Southern African Development Community (SADC), accept them as law. These principles underwrite the NKM and the consequent law of power sharing and provide a doctrinal basis for rejecting unlawful peace prescriptions between democratically constituted governments (DCGs) and bandits of the law.

Consequently, the international community, especially the UN, should no longer accept power sharing as the natural cost of the transition from civil war to nascent democracy in Africa; rather, it should respect the anti-power-sharing and anti-amnesty law, doctrine, norms, practice, and jurisprudence of African institutions such as the AU and ECOWAS, while simultaneously encouraging African states and institutions to embrace and enforce their own rules. Until decision makers stop viewing peace negotiations and processes solely through political lenses, the outcomes of such arbitrations will likely be unlawful and politically untenable. Additionally, as Spears notes, power sharing in Angola, Ethiopia, Rwanda, and Somalia rendered few positive results; arguing that "while power sharing or inclusion has been cited as a necessary direction which African leaders should follow, it remains relatively unproven as a means of conflict resolution. There are, in fact, relatively few examples of successful, formalized power-sharing in Africa which warrant its advocacy."[33] The forgoing study shows that a primary fault line of power sharing is that most agreements lack

[32] Jeremy I. Levitt, *Conflict prevention, management and resolution in Africa – regional strategy for the prevention of displacement and protection of displaced persons: The Cases of the OAU, ECOWAS, SADC and IGAD*, 11 Duke Journal of Comparative and International Law 1 (2001), at 251; see also OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, Ethiopia (September 10, 1969), Articles 2,5, 1000 U.N.T.S. 46, entered into force June 20, 1974.

[33] Ian S. Spears, *Understanding inclusive peace agreements in Africa: The problems of sharing power*, 21 Third World Quarterly 105, 106 (2000).

the moral and ethical underpinning that underwrites the existence of law itself: historical experientialism or the notion that law's historical experience is the principal source of knowledge about it. When parties give legal and political variables equal consideration in peace negotiations, peace outcomes become more durable because law orders political prerogatives and serves as a buffer against official abuse. This does not mean that law alone offers a flawless archetype for resolving protracted conflict, but it does mean that viable models of conflict resolution should be informed by and respect rules.[34] As decision makers in Liberia, Sierra Leone, and Guinea-Bissau have demonstrated, "without institutions to enforce the rule of law, political actors will ignore the public interest in favor of their private goals" of maintaining power, privilege, and wealth through power sharing, despite the broader societal consequences, including a resurgence of violent armed conflict or civil strife.[35]

In the absence of concerted UN Security Council action, governments must fashion peace in accordance with governing rules. They must, depending on the character of their political systems,[36] seek to follow constitutionally prescribed rules such as lawfully amending constitutions to give way for power-sharing deals and obtain approval from legislatures before entering into peace agreements that abrogate domestic constitutional law and other national and international rules protecting fundamental freedoms. This can be achieved by a greater reliance on comprehensive cease-fire arrangements that consider the gamut of military, human rights and implementation issues but stop short of power sharing until the security situation will permit legislative action or the mobilization of national consensus on the modalities of power sharing. Legislative approval or sanctioning is not difficult to acquire in most African states, particularly those emerging from conflict, given Africa's majoritarian and patrimonial political (spoils)

[34] *Id.*

[35] Samuel H. Barnes, *The contribution of democracy to rebuilding post conflict societies*, 95 American Journal of International Law 86, 92 (2001).

[36] Most African states have parliamentary-based legal systems, supposedly with checks and balances between the executive, legislative, and judicial branches of government.

systems that regularly rubber-stamp executive prerogatives.[37] As the next section will discuss, the key is to work within existing and lawfully constituted legal frameworks to effectuate change. In the event that legislative sanction is not possible, governments should employ constitutionally based emergency powers to take whatever lawful actions are available to make peace without infringing on fundamental rights. A state's constitutional framework and prevailing regional and international rules should serve as guideposts and allow the negotiation and implementation of peace deals to unfold in a staged process based on the rule of law.

Domestic political elites, warlords, and third-party peace negotiators and brokers must be committed to fashioning peace prescriptions that are governed by and through law. Otherwise, peace agreements may be forced into one of two unsavory positions that Dyzenhaus identified in the context of emergency situations:

> The "internal" realist position undermines law's claim to authority by creating a veneer of legality over what is really the exercise of power by the political elite, whereas the "external realist" position suggests that the sovereign's power is not ultimately constrained by law.[38]

In this sense, the internal realist approach attempts to make unlawful peace deals lawful by creating a patina of legality over them by, for example, ex post facto legislative action, to cloak the exercise of prohibited political action, whereas the external realist position claims that state power to make peace, especially in emergency situations, is not subject to legal control. In either case, the internal and external realist suppositions fail to contemplate a key supposition unearthed by this study: that political elites (not rebels) and sovereign powers desire peace deals forged within the limits of the law; that sovereign power is subject to legal constraint; and that law, doctrine, and practice

[37] The ex post facto adoption of the Lomé Peace Agreement (Ratification) Act, No. 3, July 18, 1999, by a defunct Sierra Leone legislature is a case in point.

[38] David Dyzenhaus, *The compulsion of legality*, in Victor V. Ramraj (ed.) EMERGENCIES AND THE LIMITS OF LEGALITY (2008), at 33.

regulating power sharing are unwittingly crystallizing into a category of law.

C. TOWARD A LAW OF POWER SHARING

The NKM essentially argues that law has a definitive role to play in informing, fashioning, and ordering peace and that a just rule of law serves a moral good because it is designed to constrain the political aspirations, arbitrary edicts, and decrees of malevolent charlatans, warlords, rebels, and military junta. It aims to ensure the rule of law, not the rule of men, which necessitates "not only a political struggle to subordinate politics to the rule of law, but also a political struggle within practice about how that is best done."[39] The NKM contends that the rule of law or legality serves the highest moral good when it constrains and subjects politics – making it lawful and predictable – by providing a legal charter – whether it be a statute, constitution, or treaty – that forms the basis of authority of those empowered to make law.[40] When political elites and bandits of the law "stray outside the limits of that authority [by unlawfully sharing power], they lack not only legal authority, but also any authority at all," irrespective of whether their judgments are morally correct or have illegal force.[41] Although such unlawful wandering is unlegalizable, the exigencies of situations or major crises may provide it with a veil of political legitimacy. Notwithstanding, by definition, such straying occupies extralegal space that suffocates political action because it lacks legal oxygen that only a legal warrant born of historical experientialism can provide.

The perhaps unintended consequence of transitional political power sharing is that it transforms the sociopolitical forces that make and enforce law while simultaneously deflating law's claim to authoritatively regulate peace, including the legal space occupied by power sharing. It therefore unwittingly and unlawfully makes a normative

[39] *Id.*, at 38–39. See generally T. Campbell, *Emergency strategies for prescriptive legal positivists: Anti-terrorist law and legal theory*, in Victor V. Ramraj (ed.) EMERGENCIES AND THE LIMITS OF LEGALITY (2008), at 201–228.

[40] Dyzenhaus, *supra* note 38, at 35.

[41] *Id.*, at 35. (emphasis added).

claim for unlawful peace, while the individuals and institutions that essentially debunk law through illegal peace are convinced that their moral judgments are correct, without acknowledging and understanding law's just claim to authority. Therefore, applying the NKM to the cases of Liberia, Sierra Leone, and Guinea-Bissau reveals that the extralegal character of the Accra, Lomé, and Abuja accords abrogated not only the regulatory aspects of law but also, regrettably, law's claim to authority as the arbiter of legality and, consequently, the compatibility of said agreements with international human rights law (IHRL). It follows that, consistent with the NKM, transitional political power sharing that grossly contravenes domestic, subregional, regional, and international law should be denied normative standing and entry into the legal order.

This study also shows that the principal negotiators, actors, and guarantors of the Accra, Lomé, and Abuja peace processes collectively birthed illegal peace agreements that robustly ruptured the aforementioned four tiers of law with variegated effects. As already noted, the failure to contemplate law's role in apprising, shaping, and administering the accords is in part why every power-sharing agreement that preceded the Accra, Lomé, and Abuja accords failed; the latter two accords summarily miscarried, resulting in the resumption of deadly conflict, and the situation in Liberia remains fragile, despite the presence of UN peacekeepers. The NKM's recognition of the supremacy of law, validity of preexisting law and agreements as a basis for regulating and shaping peace agreements, a right of intervention to preserve legitimate political authority, and illumination of human rights protections form the foundation of an emerging law of power sharing.

Chapters 6–9 comprehensively examined the legality and efficacy of transitional political power sharing under the Accra, Lomé, and Abuja agreements. These chapters showed conclusively that coercive power-sharing arrangements that force DCGs to share power with bandits of the law violate IHRL, IHL, and ICL; internal self-determination; and evolving democracy norms. However, law, doctrine, and practice occupying and regulating the field of peacemaking have significantly evolved on vital issues concerning peacemaking, especially power

sharing, since the Accra, Lomé and Abuja agreements were adopted. Debatably, this normative progression further constrains power sharing as a tool for conflict management in Africa and beyond.

For example, although it is not yet in force, the AU's African Charter on Democracy, Elections, and Governance (AU Democracy Charter) is indisputably the most progressive treaty on democracy and governance in the world.[42] It, more than any other instrument, codifies and guarantees rights wholly antithetical to the type of transitional political power sharing found in the Accra, Lomé, and Abuja agreements. The AU Democracy Charter repeatedly reinforces, codifies, and seeks to crystallize applicable law, norms, and doctrine illuminated in Chapters 6–9 and, when taken together with other legal developments, unequivocally renders power sharing between DCGs and bandits of the law unlawful. The charter aims to promote and enhance compliance with human rights, democracy, and the rule of law (e.g., supremacy of the constitution and constitutional order) in the political affairs of states.[43] It explicitly prohibits, rejects, and condemns unconstitutional changes of government and seeks to support and consolidate good governance and democratic culture through political pluralism, gender equality, and transparency.[44] As one analyst notes, the AU Democracy Charter also expands its definition of an extraconstitutional seizure of power to include "any amendment or revision of the constitution or legal instruments, which is an infringement of the principles of democratic change of government."[45] In addition, states parties to the charter are obliged to abide by several principles engendered by power sharing, including respect for human rights and democratic principles, access to and exercise of state power in accordance with national constitutions

[42] The AU Democracy Charter was signed and ratified by Sierra Leone on June 17, 2008, and February 17, 2009, respectively. It was similarly signed by Guinea-Bissau and Liberia on June 17, 2008, and June 18, 2008, respectively. At the time of writing, nine states had ratified the charter. Fifteen instruments of ratification are required for it to enter into force.

[43] African Charter on Democracy Elections and Governance, Article 2, adopted by the Eighth Ordinary Session of the AU Assembly in Addis Ababa, Ethiopia, on January 30, 2007.

[44] *Id.*

[45] AU Democracy Charter, *supra* note 43, at Article 23(5). See also Eki Yemisi Omorogbe, *A club of incumbents? The African Union and coups d'etat*, 44 Vanderbilt Journal of International Law (2011), at 6–7.

and the rule of law, gender equality, effective participation of citizens in democratic processes and in the governance of public affairs, and condemnation and rejection of impunity.[46] It also mandates that member states fight impunity and "ensure constitutional rule, particularly constitutional transfer of power."[47] As already discussed, the charter essentially codifies law, doctrine, and norms already in existence, particularly in ECOWAS law – which should have regulated the Accra, Lomé, and Abuja peace processes.

Notwithstanding, the AU Democracy Charter's potential signature contribution to international law and a law of power sharing is its explicit and unequivocal demand that states parties (1) "entrench the principle of the supremacy of the constitution in the political organization of the state"; (2) "ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be through referendum"; and (3) "protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society."[48] It relies on these principles for developing and sustaining a culture of democracy and peace that seeks to regulate and sanction through legislation and the rule of law "those who attempt to remove an elected government through unconstitutional means."[49] Furthermore, the AU Democracy Charter determines that coups against democratically constituted or elected government, the replacement of a DCG by armed dissidents or rebels, intervention by mercenaries to replace a DCG, or the refusal by an incumbent government to relinquish power after democratic elections all amount to "illegal means of accessing or maintaining power" and "constitute an unconstitutional change of government."[50] Certainly, under these criteria, the coerced resignation of Charles Taylor in Liberia and the coups that ousted Tejan Kabbah in Sierra Leone and Bernardo Vieira in Guinea-Bissau, as well as the political power-sharing agreements that followed, would have been unlawful under the charter.

[46] AU Democracy Charter, *supra* note 43, at Article 3.
[47] *Id.*, at Articles 4, 5, and 7.
[48] *Id.*, at Article 10.
[49] *Id.*, at Article 14.
[50] *Id.*, at Article 23.

By the same token, an overriding anti-power-sharing provision in the charter is the categorical prohibition against "any amendment or revision of the constitution or legal instruments [of a state], which is an infringement on the principles of democratic change of government."[51] It seems to implicitly and explicitly challenge and prohibit any suspension or unilateral amendment and revision of constitutions to permit power sharing or undemocratic changes in government irrespective of prevailing circumstances, including public emergencies and armed conflict. In addition, not only are coupists and others who threaten DCGs supposed to be sanctioned by the AU, but the AU Democracy Charter necessitates that perpetrators of illegal seizures of power be barred from holding "any position of responsibility in political institutions of their State" and from "participating in elections."[52] It also calls for their to be extradited and prosecuted before a competent court of the AU, while prohibiting state parties from giving them sanctuary.[53] Although, as of December 2011, the AU Democracy Charter has yet to enter into force, it has not stopped the AU Assembly from codifying a doctrine on unconstitutional changes of government. On February 2, 2010, the Fourteenth Ordinary Session of the Assembly of Heads of State and Government decided that when there are unconstitutional changes of government, "in addition to the suspension of the country concerned," the Assembly may institute the following measures: "nonparticipation of the perpetrators of the unconstitutional change in the election held to restore constitutional order; implementation of sanctions against any member state that is proved to have instigated or supported an unconstitutional change in another state; and implementation by the assembly of other sanctions, including punitive economic sanctions."[54] In addition the Assembly decided that when unconstitutional changes

[51] *Id.*

[52] *Id.*, at Article 25.

[53] *Id.*

[54] Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations, Assembly of the African Union, AU/Dec.269 (XIV), Doc. Assembly/AU/4(XVI), Fourteenth Ordinary Session, Addis Ababa, Ethiopia, January 31-February 2, 2011.

of government take place member states should refrain from recognizing *de facto* authorities, and it appealed to international bodies such as the UN and international financial institutions to refrain from accrediting such authorities and undermining the punitive measures taken by the AU against states where unlawful changes of government have occurred.[55] Hence, while this policy outcome is welcomed, it is not clear why the AU Assembly incontestably adopted additional policy measures to deal with unconstitutional seizures of power when AU member states have lagged in ratifying the AU Democracy Charter, which crystallizes analogous principles of law.

Notwithstanding, the AU Democracy Charter codifies existing law in the AU, including ACHPR doctrine and customary international rules, while at the same time prescribing new norms that criminalize, publicly sanction, and bar coup makers from holding positions of authority in government. From this background, the charter prescribes a new level of accountability on persons who seek to topple DCGs by arguably treating such behavior as if it were an international crime. It also complements the AU Constitutive Act and related law that permits the organization to sanction and use military force when there are unconstitutional seizures of power and threats to legitimate order. Finally, the Democracy Charter recognizes the vital role of women in promoting peace and democracy and requires that they fully and actively participate in decision-making processes and structures, especially in government. This would seem to mean that states parties must ensure that women play a substantial role in the negotiation and implementation of peace agreements, including power-sharing goals. The issue of gender equality, which is succinctly captured in the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, is of paramount importance in the promotion of any democratic culture but particularly in war-torn societies, of which women taken-on the bulk of the burden as war victims, homemakers, caretakers for children and the elderly, and wage laborers. Thus the regime on women's rights in Africa has significantly developed since the adoption of the

[55] Id. at AU/Dec.269 (XIV) Rev. 1.

Accra, Lomé, and Abuja agreements and is vital to any law of power sharing.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) was adopted on July 11, 2003, and entered into force on November 25, 2005.[56] The Women's Protocol reinforces and expands the Banjul Charter and Grand Bay Declaration as well as comprehensively addresses disparities engendered by power sharing. It is the first regional human rights treaty to exclusively focus on women's rights, particularly the elimination of discrimination against them.[57] It requires member states to actively mainstream gender equality in law, doctrine, and policy and to integrate gender perspectives in rules, policy decisions, and programs in all spheres of life, including, presumably, peace agreements.[58] The Women's Protocol mandates that states have a positive duty to safeguard the dignity of women as well as protect them from all forms of violence. This includes, among other duties, the duty to prevent and eliminate such violence by ensuring equal and effective access to justice and legal services, including legal aid, and to guarantee enforcement of equality rights and the investigation, prosecution, and punishment of perpetrators of violence.[59] Furthermore, it requires states, in addition to other things, to provide adequate budgetary resources to curb violence against women and establish mechanisms and accessible services for redress, rehabilitation, and reparation.[60] The Women's Protocol dictates that member states guarantee that women are equally represented in the judiciary and take "specific positive action" to promote equal participation in governance, including, as previously noted, equality in the distribution of positions in power-sharing deals.[61]

[56] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the Second Ordinary Session of the Assembly of the Union in Maputo on July 11, 2003.

[57] Liberia signed and ratified the Women's Protocol on December 16, 2003, and December 14, 2007, respectively. Sierra Leone signed it on December 9, 2003, and Guinea-Bissau signed and ratified the protocol on March 8, 2005, and June 19, 2008, respectively.

[58] Women's Protocol, *supra* note 56, at Article 2.

[59] *Id.*, at Articles 3, 4, 8, and 11.

[60] *Id.*, at Articles 4 and 25.

[61] *Id.*, at Article 9.

This duty falls on governments, insurgent groups, and, by extension, other actors actively participating in peace negotiations, including the UN, the AU, and ECOWAS. In fact, the Women's Protocol mandates states parties to take appropriate measures to ensure women's participation in the "structures and process of conflict prevention, management and resolution at the local, national, regional, continental and international levels" and in all "aspects of planning, formulation and implementation of post-conflict reconstruction and rehabilitation."[62] Though limited, in Liberia, civil society participation, particularly among women, in the negotiation and implementation of the Accra Agreement provided them with greater legitimacy than they had in the Lomé and Abuja peace processes, which had limited to virtually no participation by women's organizations, respectively. That said, citizens participation in Liberia and Sierra Leone was more participatory than technical. Some analysts attribute stronger civil society involvement in the Accra peace process to its apparent transition to democracy, arguing that

> the stark contrast in Liberia between the outcomes of the 1996 Abuja Accords and the 2003 Accra Agreement is telling in this regard. After early roles in the 1996 peace process, Liberian civil society groups were excluded and deals were made among the factional armies leading to the emergence of Charles Taylor as president the following year. Taylor's predatory government teetered for several years before collapsing in resumed civil war. The 2003 peace process, on the other hand, saw strong civil society participation, with the groups even signing the final agreement as witnesses. Credible elections followed, leading to the emergence of Ellen Johnson-Sirleaf as president, who has governed with broad civil society input and has begun moving Liberia forward. The two series of negotiations for Sierra Leone similarly illustrate this point.[63]

Antidotal evidence from this study and others suggests that peace processes are more sustainable when women actively participate in them. This may be because women are the greatest stakeholders in

[62] *Id.*, at Article 10.

[63] Anthony Wanis-St. John and Darren Kew, *Civil society and peace negotiations: Confronting exclusion*, 13 International Negotiation (2008), at 27., at 30.

peace, given that they are the numerical majority and, as previously noted, are affected the most by armed conflict. As such, the Women's Protocol explicitly addresses the global pathology of violence against women during times of peace and war and, in the field of conflict resolution and intervention, dictates that women actively participate in the design and implementation of peace arrangements. This essentially means that the male-centered and dominated peace processes that birthed the Accra, Lomé, and Abuja agreements would be prohibited under the law as it currently stands.

Since the adoption of the accords, democracy and women's rights are only two areas in which the law has significantly evolved. Also important have been developments in the international law of internal self-determination, impunity, remedy, and reparation. For instance, as previously referenced, in the 2000 *Gambian Coup* case, Sir Dawda Jawara, former head of state of the Republic of Gambia, challenged the legality of the military coup that unseated him in July 1994 before the ACHPR. He claimed, among other things, that the overthrow of his government, abolishment of the Bill of Rights and 1970 Gambian Constitution by military decree, and "ousting the competence of the courts to examine the validity of any such decree" amounted to a "blatant abuse of power."[64] This does not include other allegations of human rights abuses in the complaint from arbitrary detention to the banning of political parties and murder. The ACHPR held that the military coup was a "grave violation of the right of the Gambian people to freely choose their government" under Article 20(1) of the Banjul Charter, which explicitly states that self-determination is an inalienable right.[65] At this juncture, the commission seems to recognize an individual right of internal self-determination that is unique to the African region. It further noted that the rights and freedoms enshrined in the charter cannot be realized unless governments provide venues that allow individuals to seek redress when they are violated, particularly against acts violating fundamental rights. In addition, the ACHPR

[64] *Gambian Coup* case, *supra* note 31.

[65] *Id.* See also Articles 20 of the African [Banjul] Charter on Human and Peoples' Rights, in Jeremy Levitt (ed.) AFRICA: SELECTED DOCUMENTS ON CONSTITUTIVE, CONFLICT AND SECURITY, HUMANITARIAN AND JUDICIAL ISSUES (2003), at 357.

determined that "ousting the competence of ordinary courts to handle human rights cases, and ignoring court judgments" constituted a violation of Article 26 of the Banjul Charter, which mandates member states to "guarantee the independence of the Courts."[66]

The *Gambian Coup* case was followed by another ACHPR holding declaring that any amnesty, clemency, or pardon that blocks the ability of human rights victims to seek redress for human rights violations is unlawful. In the *Zimbabwe Human Rights NGO Forum v. Zimbabwe* case, the complainant argued that Clemency Order No. 1 of 2000, which granted pardon "to every person liable to criminal prosecution for any politically motivated crime committed between January and July 2000," was unlawful.[67] Although the Clemency Order was not applicable to persons who had committed "serious offences," such as murder, rape, robbery, indecent assault, statutory rape, theft, and possession of arms, the commission decided that "the granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy."[68] It reasoned that by enacting Decree No. 1, the government prevented victims from seeking redress to challenge the legality of the decree, vindicate rights, seek reparation, and ensure that perpetrators of atrocities were punished. Consequently, the ACHPR held that such behavior "encouraged impunity."[69] From this vantage point, and citing a multitude of sources, the commission seems to take the very conservative position that any form of amnesty for human rights violations – whether the violations are serious or not – may be inconsistent with the Banjul Charter. It follows that if the ACHPR has determined that clemency or amnesty for nonserious crimes is unlawful, it would also hold that power sharing with warlords, rebels, and junta responsible for committing heinous crimes would likewise be unlawful. In this sense, amnesty may result in a duality of illegality that compounds the ubiquitous impacts of power sharing.

[66] *Gambian Coup* case, *supra* note 31.

[67] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Comm. 245/2002, Twentieth Annual Activity Report, Annex, pp. 145–153. See also Dinah Shelton, REGIONAL PROTECTION OF HUMAN RIGHTS (2008), at 466–473.

[68] *Id.*

[69] *Id.*

The rights to internal self-determination and a remedy under international law were once again elaborated on in the *Ivorian Human Rights Movement* case. In this case, Mr. Ibrahim Doumbia, first vice president of the Ivorian Human Rights Movement, submitted a communication against Côte d'Ivoire to the ACHPR, alleging that (1) the constitution of Côte d'Ivoire was adopted by a minority of citizens during a constitutional referendum on July 23, 2000, and included discriminatory provisions that prohibited certain citizens from performing political functions on the basis of lineal origin[70] and that (2) constitutional provisions "granting immunities" to some persons, including members of the National Committee for Public Security (CNSP), the military organ that governed the country from December 24, 1999, through October 24, 2000, were discriminatory.[71] Although the ACHPR does not adequately address the issue of whether the constitution was adopted by a minority of citizens, it does concretely affirm the right of every individual to enjoy rights and freedoms without distinction of any sort, including race, ethnicity, national or social origin, "color, sex, language, religion, political or other opinion," fortune, birth, or any other status, and it upholds the right of every citizen to participate freely in government, which again, under the Banjul Charter and ACHPR doctrine, appears to equate to an individual right of self-determination.[72] On this point, the ACHPR determined that

> the right to participate in government or in the political process of one's country, including the right to vote and to stand for election, is a fundamental civil liberty and human right, and should be enjoyed by citizens without discrimination. The reason for this lies in the fact that, as historical experience has shown, governments derived

[70] Article 35 of the Ivorian Constitution states that "the President of the Republic . . . should be of Ivorian origin, born of a Father and Mother who themselves must be of Ivorian by birth." Article 65 requires that a candidate for president, speaker, or deputy speaker of the National Assembly "should be Ivorian by birth with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality."

[71] *Ivorian Human Rights Movement* case, 246/02: Movement ivorien des droits humanis, adopted at the Fifth Extraordinary Session of the African Commission on Human and Peoples' Rights, Banjul, Gambia, on July 21–29, 2008.

[72] *Id.* See also Articles 2 and 13, African [Banjul] Charter on Human and Peoples' Rights, in AFRICA: SELECTED DOCUMENTS, *supra* note 65, at 354–356.

> from the will of the people, expressed in free elections, are those that provide the soundest guarantee that basic human rights will be observed and protected.[73]

In this sense, the ACHPR indicates that the lineal origin requirement in the 2000 Ivorian Constitution is not reasonable, objective, or justifiable and hence discriminatory because it stripped away "already accrued rights of the individual."[74] Additionally, it determined that the lineal test amounted to an unnecessary abrogation of the right to participate in government in the Banjul Charter and held that the "right to vote and stand for election are rights attributable and exercised by the individual," not their racial classification, reinforcing the argument that a right to internal self-determination and democracy exists in Africa.[75] As a result, it would appear that any laws, edicts, or decrees, including power-sharing arrangements, that curb the basic rights of citizens to participate in government by choosing their form of government and the officials who represent them are unlawful, irrespective of prevailing or exigent circumstances. However, such unlawful action is compounded in the case of transitional political power sharing. Such arrangements politically disenfranchise entire populations, especially war victims and other citizens who are not affiliated with the incumbent regime or a warring faction, by unilaterally replacing governments chosen by them with bandits of the law.

Correspondingly, in the *Ivorian Human Rights Movement* case, the ACHPR determined that the granting of total immunity from prosecution that barred access to remedies to victims to "vindicate their rights" without instituting "adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek an effective remedy," was unlawful and encouraged impunity.[76] Therefore the commission held that Côte d'Ivoire "reneged on its obligation" to provide an effective remedy to victims under Articles 1 and 7(1) of the Banjul Charter by "granting amnesty to absolve [CNSP and

[73] *Ivorian Human Rights Movement* case, *supra* note 69.
[74] *Id.*
[75] *Id.*
[76] *Id.*

other] perpetrators of human rights violations from accountability."[77] In this sense, the ACHPR decided that amnesty laws are incompatible with a state's human rights obligations and consistent with prior determinations that states have a positive duty to prosecute individuals suspected of international crimes. The failure to prosecute may constitute a "violation of the victims' right to judicial protection and to have their cause heard"[78] and redressed and injury repaired.[79] According to the commission, not unlike power sharing, amnesty renders war victims and citizens helpless and deprived of justice. In Africa, the prohibition on amnesty has gained such legal gravitas over the past decade that the Special Court for Sierra Leone's ruling in the *Lomé* decision that the prosecution of international crimes "is a preemptory norm and has assumed the nature of an obligation *erga omes*" no longer appears outlandish.[80] These legal developments raise the following question: if the duty to prosecute has, at a minimum, become obligatory or customary in nature, is it lawful to politically empower through power sharing persons suspected of committing war crimes?

Finally, consistent with its determination in the *Gambian Coup* case, in February 2010, the ACHPR openly condemned the arguably popular military coup d'état of the controversial government of President Mamadou Tandja, who was seeking a third presidential term in abrogation of the 1999 constitution of Niger. The commission not only condemned the coup but reiterated its long-standing position that "*coups d'état* are, in essence, human rights violations, characterized

[77] *Id.*

[78] *Id.*

[79] The right to remedy and reparation for victims of IHRL and IHL has substantially evolved over the past decade. See generally Human Rights Committee, Seventy-second Session, Communication No. 839/1998: Sierra Leone (July 30, 2001), CCPR/C/72/D/839/1998 (Jurisprudence); resolution adopted by the UN General Assembly, 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (March 21, 2006); and UN Commission on Human Rights, Human Rights Res. 2005/35, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[80] *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, Special Court for Sierra Leone, SCSL-2004–15-AR72(E) and SCSL-2004–16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber, March 3, 2004) (*Lomé* decision).

by denial of civil and political rights as well as economic stagnation in the countries."[81] Here, even though the military may have sought to defend the rule of law by thwarting unconstitutional executive action, the seizure of power was still condemned by the ACHPR, the AU, and UN secretary-general Ban Ki-Moon.[82] The AU also suspended and levied sanctions against Niger.[83] In this context, it appears that unconstitutional seizures of power are considered unlawful, despite the well-intended motives of coupists – meaning that even benevolent coups, for example, to reestablish constitutional rule or forestall human suffering, may be prohibited. This observation lends credence to arguments contesting the legality of the forced expulsion of Taylor's democratically-elected but evil regime, arguably, validating the view that any right to internal self-determination is limited. The AU recently sought to confront this conundrum by adopting a "zero tolerance" approach to dealing with unconstitutional changes of government, particularly coups, as well as "violations of democratic standards," which it determined results in unlawful seizures of power.[84]

Domestic and regional courts in Africa are increasingly contemplating the legality of peace agreements, especially when they impede fundamental human rights. For example, in January 2011, the Liberian Supreme Court questioned the constitutional validity, lawmaking power and authority of the Accra Agreement, which it serendipitously referred to as a "document," as well as its authority to establish and designate persons to serve in the National Transitional Legislative Assembly which it also surprisingly stated was "extra-constitutional." The court noted that

> the legislative body that passed the Act was itself not a constitutionally functional body, but existed by virtue of a document, the Comprehensive Peace Agreement [Accra Agreement], and a process, a selection of persons by the warring parties and political

[81] Resolution on the Political Situation in Niger, ACHPR/Res162 (Ext.OS/VIII), Banjul, Gambia (May 3, 2010), available at http://www.achpr.org/english/resolutions/resolution162_en.htm.

[82] *U.N. chief Ban Ki-Moon condemns coup in Niger*, Reuters (February 2010), available at http://in.reuters.com/article/2010/02/19/idINIndia-46320520100219.

[83] *AU suspends Niger after military coup*, BBC News (February 20, 2010), available at http://news.bbc.co.uk/2/hi/africa/8525665.stm.

[84] AU/Dec.269 (XIV) Rev. 1., *supra* note 54.

> parties rather than elected legislatures by the people as prescribed by the Constitution, that was extra-constitutional.[85]

The Liberian Supreme Court also noted that though the Accra Agreement purported to "suspend certain provisions of the Constitution, the preservation of rights, including the right to appeal, [were] never suspended or in any way tampered with."[86] This decision provides concrete support for the book's central thesis that power sharing under these circumstances is ultra vires, or unlawful, and that law has a critical role to play in regulating the practice. Although the supreme courts of Sierra Leone and Guinea-Bissau have not pronounced on the legality of the Lomé and Abuja agreements, the Special Court for Sierra Leone, which was birthed in Sierra Leonean law and functions on the basis of complementarity with national courts, did invalidate the accord's amnesty provision.[87] Nevertheless, there have been several interesting developments in the past decade that may jurisprudentially refashion legal issues raised by power sharing. Foremost among these is the institution of the new AU Court of Justice and Human Rights and the ECOWAS Community Court of Justice, which provide supranational venues to review violations of human rights and adjudicate cases concerning the legality of power sharing under AU, ECOWAS, and international law. In this study, the NKM's tiered analytical approach unveiled a burgeoning normative framework on power sharing that, when taken together with the preceding analysis on emerging developments in the area, demonstrates patterns of law formation that I refer to as the *law of power sharing*.

As Lewis wisely indicated, writing or integrating the "coalition idea into the rules for forming a government in place of the present government" is vital for authentic transition to democracy and the

[85] *Archie Williams v. Christiana Tah, in her capacity as Minister of Justice & Attorney-General, The Independent National Human Rights Commission (INHCR), represented by its Chairman, R. LeRoy Urey, and the Government of Liberia (GOL), by and thru the Minister of Justice, represented by its Minister*, Petition for Declaratory Judgment, Supreme Court of the Republic of Liberia (January 21, 2011). The motives behind this case and politics surrounding the court's decision will be addressed in a work of the author on the Truth and Reconciliation Commission of the Republic of Liberia.

[86] *Id.* (emphasis added)

[87] *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara, supra* note 80.

protection of fundamental rights.[88] Lewis, however, could not predict that the coalition idea (e.g., power sharing or consociationalism) would not only be written into law at the local level but also inscribed into regional and international law aimed at regulating government and state behavior. The law of power sharing comprises three central rule categories, including principles, procedures, and law. The principles represent the underlining doctrine, logic, and assumptions that underwrite the law, whereas the procedures indicate a series of guidelines, actions, or steps to be taken for its operation. Power-sharing law comprises the substantive law, norms, doctrine, and jurisprudence that are designed to inform, shape, and regulate peace agreements, particularly those with power-sharing dimensions. My proposal for a law of power sharing is first and foremost guided by the ancient laws and principles that anchor the NKM, including formal recognition of the supremacy of law; codification of, and respect for, preexisting rules; the preservation of legitimate political authority, if necessary, by forceful means; and the protection of human rights after armed conflict. Its modern lineage and epitome derive from the African human rights system and corollary rules.

The central principles that underwrite the law of power sharing are assumptive and structural, not aspirational. They are derived from rules intended to guide peace negotiations and agreements, as follows:

- supremacy of law over politics
- equity before the law
- predictability in the law
- fairness in the application of law
- accountability to the law
- legal certainty
- avoidance of arbitrariness
- procedural and legal transparency

[88] W. Arthur Lewis, Politics in West Africa (1965), at 83.

- reliance on existing superior law and legal frameworks to inform, shape, and influence the character of negotiations as the minimum standard of acceptability and legitimacy
- executive power and authority are limited and subject to legal regulation during times of emergency or armed conflict
- prohibition on impunity
- human rights are inalienable and must be protected
- democracy as an enforceable right or entitlement of people and peoples
- African regional institutions such as the AU and ECOWAS must consistently obey their own rules
- mobilization of international support for rule-based approaches using affirmative inducements such as recognition, aid, trade, and support in reforming the security sector

The basic procedures that guide the law of power sharing are distilled from the NKM's layered analysis that is intended to guide peace negotiations and the implementation of peace agreements. These procedures should be followed by contestants, peace negotiators, peace brokers, and other third-party intermediaries:

- conduct legal audit and take stock of all governing rules before developing peace prescriptions or beginning peace negotiations
- protect human rights and democracy by not permitting military policies to become unhinged or detached from the broader legal and political purposes they purport to serve
- implement approaches and policy aligned with the local population and seek to build consensus around them
- utilize international precedent or doctrine from international bodies such as the pro–human rights and intervention policy and doctrine of the UN, AU, and ECOWAS as well as pro-democracy determinations of the UN Credentials Committee to influence negotiation processes and political outcomes
- remain steadfast in mediatory approaches by sending consistent messages to contesting parties

- ensure that peacemakers remain in control of negotiations and implementation processes and do not allow warlords to retain vetoes and rewards
- provide basic training to warlords and rebels in legal, legislative, and governance processes, including ethics and professional responsibility
- be mindful that timidity in the face of armed militias is not effective – especially when the clock is working in the militia's favor

The backbone of the law of power sharing is the substantive law, inclusive of rules, doctrine, norms, and jurisprudence, that this book reveals is intended to edify, fashion, and regulate peace agreements, especially political power sharing. This book confirms that the essential law encompasses rules that are both universal in application and specific to the African region. In this book, the NKM's tiered approach unveils the synergistic interplay between domestic, subregional, regional, and international law and concretely fuses together principles of law, particularly constitutional law, IHRL, IHL, and ICL, anticipated to order the contours of peace deals in Africa and beyond. Where there is normative friction or inconsistency between, for example, UN law and the law of regional institutions in Africa, historical experientialism reveals that over the past two decades, normative developments in the continent in the areas of peace, security, rule of law, and democratization have been more innovative and progressive. Such fundamental rules or norms – which are by no means perfect – have been largely unheeded by so-called peace actors, even though they offer a solid framework intended to legalize and enlighten peace arrangements. This book affirms that at a minimum, the law of power sharing imposes *opinio juris sive necessitatis* the following rules, standards, and obligations on states, international institutions, and non-state actors:

- Preexisting law, agreements, and treaties must be honored or *pacta sunt servanda*.
- Principles of the supremacy of law must be honored.
- States and regional and international institutions are obligated to respect, safeguard, and enforce IHRL, IHL, and ICL.
- Unconstitutional changes of government are illegal.

- Coups of democratically constituted regimes are unlawful.
- *Pirates de la loi* and coupists are barred from holding public office during and after transitional peace processes.
- It is unlawful to grant amnesty to persons suspected of, or responsible for, committing or directing international crimes.
- Nonrecognition of *de facto* authorities that come to power extraconstitutionally
- States, armed groups, and international institutions must ensure broad civil society participation in peace processes.
- States, armed groups, and international institutions must not infringe or support the infringement of principles requiring that all changes of government be democratic because amending constitutions necessitates broad consensus-building processes such as national referenda.
- States, armed groups, and international institutions must recognize that in Africa, internal self-determination is an individual and collective right that protects the rights of citizens to be informed about, freely participate in, and choose their form of government and leaders.
- States are obligated to ensure judicial protection and that legal venues exist for citizens to challenge the legality of peace agreements that encroach on fundamental rights.
- States must prevent, investigate, prosecute, and punish human rights violators and provide reparation to victims of war crimes and human rights violations; third-party states involved in brokering peace agreements also have a duty to ensure these rights.
- States must guarantee gender equality and the full participation of women in the negotiation and implementation of peace agreements, including power-sharing arrangements.
- States must ensure nondiscrimination or exclusion from peace agreements on the basis of a protected category such as gender, ethnicity, or political opinion.
- Third-party moral guarantors of peace agreements must first and foremost serve as legal guarantors of peace processes.
- Regional institutions, such as the AU and ECOWAS, may levy sanctions and use force to protect human rights and safeguard democratically constituted governments from unlawful seizures of power.

- International bodies must refrain from accrediting de facto authorities that come to power unlawfully as determined by subregional and regional organizations.

The law of power sharing is not intended to replace traditional conflict-resolution models but rather to fortify them by ensuring that law's predominance is known and not easily disrupted. The proposed principles, procedures, and laws that compose the law of power sharing are essentially, but not entirely, derived from the human rights protective regime. Hence, as previously alluded to, the reformulation or reapplication of such rules to unlawful power sharing may underwrite or form the basis of new claims before regional courts in Africa, especially considering the jurisprudential value of recent decisions by the African Commission on Human and Peoples' Rights. The crystallization of jurisprudence on power sharing is not far-fetched. The Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR) and the ECOWAS Supplementary Protocol Relating to the Community Court of Justice (Supplementary Protocol) will and do provide, respectively, viable venues for individuals and groups to adjudicate such claims. These protocols provide judicial protection to victims of human rights violations, broadly construed, arising from armed conflict, illegal seizures of power, and unlawful peace agreements.[89] Although the ACJHR is not yet in force, it offers promising characteristics that will jurisprudentially embolden Africa's human rights landscape. For its part, the ECOWAS Community Court of Justice (ECCJ), which has already begun to fashion distinct West African human rights jurisprudence, serves as the

[89] African Union Protocol on the Statute of the African Court of Justice and Human Rights, adopted in Sharm El-Sheikh, Egypt, July 1, 2008. At the time of writing this book, twenty-two countries had signed the protocol but only three had ratified it (Burkina Faso, Libya, and Mali). Sierra Leone signed the protocol on January 14, 2009; however, Liberia and Guinea-Bissau have yet to do so. Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9, 22, and 30 of the Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version, Twenty-eighth session of the Authority of Heads of State and Government, Accra, Ghana (January 19, 2005). Liberia, Sierra Leone, and Guinea-Bissau are state parties to the Supplementary Protocol. See also Solomon T. Ebobrah, *Critical issues in the human rights mandate of the ECOWAS court of justice*, 54 Journal of African Law (2010).

single most important judicial apparatus for persons seeking to challenge the legality of peace agreements.[90] And unlike the ACJHR, individuals and corporate bodies, including nongovernmental organizations, can access the ECCJ without the consent of state parties. If the ECCJ continues on its current path, it may soon entertain claims challenging the legality of transitional political power sharing, and peace agreements more generally, that will substantially inform the law of power sharing *ex propio motu*.

In this regard, international donors and multilateral organizations taking part in negotiating and brokering peace processes need to reevaluate antedated and unviable approaches to conflict resolution vis-à-vis the law of power sharing. They must become legal guarantors of peace agreements to ensure uniform adherence to the rule of law: one aimed at achieving sustainable peace, security, and democracy. States and multilateral institutions that sanction peace deals have a positive duty to protect human rights and democracy – a goal that is incompatible with endorsing unlawful arrangements. At the very least, if, owing to turbulent circumstances such as armed conflict, embattled governments are unable to protect human rights and democracy, political acts that abrogate constitutional boundaries and other rules should be temporary, inclusive and transparent, respect basic rights, and only take place with some form of mass consensus – through, for example, referendums.

[90] T. Anene-Maidoh, *Remarkable progress in the judicial activity of the ECOWAS court*, 1 Court Bulletin (2008), at 15 (quarterly publication of the ECOWAS Community Court of Justice).

11 CONCLUSION

How to construct a just and sustainable political order and share power in societies emerging from deadly conflict is one of the most arduous and complex issues confronting contemporary international law and politics in the twenty-first century. Napoleon Bonaparte asserted that if nations want peace, they "should avoid the pin-pricks that precede cannon shots."[1] This study indicates that unlawful power sharing too often serves as the pinpricks that trigger explosive and regenerative armed conflict, state collapse, and injustice. I argue that the failure to observe law's role in informing, fashioning, and governing armed conflict in Liberia, Sierra Leone, and Guinea-Bissau played a major role in the collapse of the Lomé and Abuja agreements and in the regeneration of conflict, and a structural logic of instability in the post Accra environment.

While modern conflict-resolution and power-sharing models are largely Eurocentric and derived from academic laboratories and states in the West, international law, statecraft, and peacecraft share an Afrocentric ancient heritage. In the same way that the international law of antiquity in Africa predominated law systems, over the past two decades, the practice of transitional political power sharing has been unwittingly Africanized – meaning that although African states have served as the primary subjects of Western conflict-resolution experiments, they are reflexively colonizing or subjugating them to the African condition. With each new conflict-resolution failure and accomplishment, African and Africa policy makers have become more discerning, which has led to the inclusion of law-based processes,

[1] Napoleon Bonaparte, http://www.brainyquote.com/quotes/quotes/n/napoleonbo107034.html.

such as international criminal tribunals and truth commissions, in peace agreements. Consequently, the continent that birthed peacecraft has unwittingly reclaimed it through law approaches etched during antiquity.

Power sharing has failed not only in African states but in other nations with a tradition of high-intensity armed conflict and military coups. Notwithstanding, the neo-Kadeshean model (NKM) demonstrates that the international law of antiquity encompassed indispensable peacemaking principles, including the recognition of the predominance of law and human rights, that are regrettably lacking or nonexistent in Western-orientated models of conflict resolution. Nowhere is law more deprived than in the practice of political power sharing, which is insupportable given its extensive use as a conflict-mitigation device.

Power sharing has become far more than a tool of conflict resolution. It is a graphic enterprise with the capacity to rebuild or ruin societies emerging from deadly conflict and/or coups. It is a fine art that is increasing in usage but also steadily declining in value because, as this study shows, it ignores the rule and role of law and the historical and ethical rationale for rule existence: historical experientialism. As the recent coups or extraconstitutional seizures of power in the Central African Republic (2008), Guinea (2008), Kenya (2008), Madagascar (2009), Mauritania (2009), Niger (2010), and Burkina Faso (2011) exhibit, and given the precarious record of power-sharing schemes in Africa,[2] the international community must embrace more artful or effective conflict-resolution models in deeply divided societies emerging from armed conflict. In this sense, the traditional orthodoxy of placing a higher premium on peace and conflict resolution than on human rights and justice should be considered an unacceptable "trade-off with the principle of rule of law that symbolizes a democratic system."[3] Peace and justice are not mutually exclusive goals;

[2] The Economic Community of West African States (ECOWAS) suspended the membership of Guinea after the 2008 coup d'état, Niger in the wake of an auto-coup in 2009, and Côte d'Ivoire after botched elections in 2010.

[3] Mimi Söderberg Kovacs, *When rebels change their stripes: Armed insurgents in post-war politics*, in Anna K. Jarstad & Timothy D. Sisk (eds.) FROM WAR TO DEMOCRACY: DILEMMAS OF PEACE-BUILDING (2008), at 143.

they are interdependent and complementary aims that function best when fused together by law.

This study reveals that power sharing is an art and science in which imagination must be tempered and informed by cognitive thinking. Africa is not an open canvas for imperial conflict-resolution designs. In every discipline, whether abstruse or simple, rules play a decisive role in defining the confines of possibility. In every realm of human endeavor, rules perform an indispensable service because they outline the contours of probability and acceptability. I will illustrate this point by comparing the fine arts, one of the oldest human endeavors, to law. From ancient antiquity until the early twentieth century, irrespective of his or her genre, the artisan was bound and governed by rules of art. Similar to art theorists, international logicians made rules that were published, codified, and adhered to by states and people. Academies taught art students how and what to paint and trained law students how and what to think and write. In the same way that artists applied their skill to the canvas, international jurists devised rules for states and people. However, similar to peacecraft, the art of making or managing peace, peacemaking, and its troublesome progeny, power sharing, it appears that artistic freedom and peacemaking autonomies became central ingredients in twentieth-century art and peace agreements, respectively. This trend has continued in the twenty-first century. Regrettably, today, artistes and peace sculptors are anarchistic because they make their own rules. In classical antiquity, scripts described rules of art and law, which influenced the treatises written by famed artisan Leon Battista Alberti and the eminent jurist Alberico Gentili in the fifteenth and sixteenth century, accordingly. At this moment in time, conflict-resolution theory that underpins contemporary power-sharing approaches seemingly has no foundation and constancy in law. Hence the book's primary question is essential to understanding the unartful and biased interplay between law and politics in making peace: what role does law indicate for itself to play in informing, shaping, and regulating transitional political power-sharing-based peace agreements? The simple answer is that in Africa and beyond, law reserves for itself a centrifugal role in apprising, ordering, and administering power-sharing arrangements at the domestic, regional, and international levels. I refer collectively to these principles, procedure, and law as the law of power sharing.

This book is an unpretentiously inventive and expectantly groundbreaking statuette intended to indict the guileful practice of power sharing. It offers new theory and praxis through the prism of traditional – even ancient – theory and canon. Six significant novelties emerge from the study, including (1) the exposition of the practice and accompanying theory of transitional political power sharing in Africa as unlawful and politically unviable, respectively; (2) the vital role that law indicates for itself to play in informing, fashioning, and ordering peacemaking, particularly transitional political power-sharing-based peace agreements; (3) the reinvention and reclamation of the international law of antiquity in contemporary international law and theory through the NKM; (4) the application and infusion of law-based interdisciplinary analyses to the theory and practice of conflict resolution, particularly political power sharing; (5) the identification and elevation of ancient and contemporary law, practice, doctrine, norms, and jurisprudence in Africa as a distinct and vital part of the wider corpus of modern international law; and (6) the origination of a straightforward and essential *law of power sharing* excavated by the NKM that orders and imposes rules of conduct and devices that regulate power sharing.

As the cases of Liberia, Sierra Leone, and Guinea-Bissau substantiate, political power sharing is the preferred instrument of conflict mitigation for northern-tier policy makers and unimaginative African leaders. As a remedial or preventive measure, power sharing may avert deadly conflict, but this study also affirms that it is an ineffective device when not informed by law. They also illustrate that power sharing is an unnecessarily risky tool of conflict resolution and incremental democratization because it relies on a logic of inclusiveness and interdependence devoid of historical experientialism and legal instruction and rests on the false assumption that violent rivals can harvest instantaneous trust that future commitments will be honored. The cases of Sierra Leone and Guinea-Bissau arguably reveal that quite the opposite is true. In these cases, power sharing was used by Sankoh and Mane as a transformative device to advance the aims of war through a type of peacefare, whereby they sought to win the transition so that they could control the peace and, ultimately, win the conflict. Unfortunately, the urgent balancing of power between contesting groups – rather than the rule of law – shaped the character

of negotiations and the scope of transitional political power sharing in all three accords. Spears contends that power sharing remains an appealing tool of conflict resolution among Western policy makers irrespective of whether the practice negligibly miscalculates the complexity of conflicts and the obstinacy of leaders. He argues that the "more intractable or violent a conflict appears to policy-makers, the more logical and desirable power-sharing seems to be," despite evidence that suggests that high-intensity armed conflict and military coups "offer the least hope for inclusive agreements."[4] Consequently, as Spears rightly concludes, "where power-sharing is needed most, it appears least likely to succeed," but, regrettably, he bases this conclusion on a purely political rationale.[5] The categorical denial of law's role in constraining unlawful peace prescriptions significantly perverted power-sharing outcomes in the Accra, Lomé, and Abuja peace processes.

I argue that transitional political power sharing is subject to law; law is derived from and embedded with historical experientialism; therefore transitional political power-sharing agreements that ignore and/or fail to comport with law are illegal and too often unsustainable over the long term. The book's central thesis defends the essential and intentional role that law indicates for itself to play in conflict resolution by protecting human rights, participatory governance, and other basic rights. Former United Nations secretary-general and pioneering peace advocate Dag Hammarskjöld stated that one should "never, 'for the sake of peace and quiet,' deny [one's] own experience or convictions."[6] Sharing power with warlords, rebels, and junta denies the evolutionary experience and intention of the human rights protective regime: to protect humanity from the violent whims of arbitrary power. As previously discussed, law's internal logic originates from and is defined by historical experiences, either those of people, states, or institutions, which in turn generate knowledge of its central purpose. When law's purpose is corrupted or disregarded by state action, rebellion is the

[4] Spears, *supra* note 744, at 530.
[5] *Id.*
[6] Dag Hammarskjöld, http://thinkexist.com/quotation/never–for_the_sake_of_peace_and_quiet-deny_your/188162.html.

natural consequence, generating a form of cyclical causation between illegality and disorder mired by temporary incidences of peace.

It is therefore vital that rules of law binding on peace processes be willfully respected and upheld by peace actors and brokers alike, and when they are not, groups of discretionary power are challenged and constrained by courts, commissions, and committees[7] and, if necessary, by civil society itself because peace is an illusory fantasy without the rule of law and justice. This study endeavors to confront one of the most neglected issues in international law and politics, with the intent of exposing the illicit operation of power sharing, illuminate its societal consequences, and endow and bolster peace with canon.

[7] The following institutions have heard and are hearing claims on issues closely related to human rights and power sharing: the African Court of Justice and Human Rights, the ECOWAS Community Court of Justice, the African Commission on Human and Peoples' Rights, and the various treaty-monitoring committees such as the United Nations Human Rights Committee.

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