Peacemaking, Power-sharing and International Law

Imperfect Peace

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• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

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First published in Great Britain 2019

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Wählisch, Martin, 1982-, author.

Title: Peacemaking, power-sharing and international law : imperfect peace / Martin Wählisch.

Description: Chicago : Hart Publishing, 2019. | Includes bibliographical references and index.

Identifiers: LCCN 2019021082 (print) | LCCN 2019021934 (ebook) | ISBN 9781509914234 (EPub) | ISBN 9781509914258 (hardback)

Subjects: LCSH: Pacific settlement of international disputes. | Mediation, International. | International human rights. | Humanitarian law. | Peace. | BISAC: LAW / International. | POLITICAL SCIENCE / Peace.

Classification: LCC KZ6045 (ebook) | LCC KZ6045 .W34 2019 (print) | DDC 341.5/2—dc23

LC record available at https://lccn.loc.gov/2019021082

ISBN: HB: 978-1-50991-425-8
ePDF: 978-1-50991-422-7
ePub: 978-1-50991-423-4

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

III. Methodology and Scope

A. Methodology

Randall Lesaffer noted in his critique of Christine Bell's book *On the Law of Peace* that it 'does not offer a detailed and profound study of the substance of the laws of conflict resolution and constitutional formation', beyond creating an 'analytical framework'.[102] Bell has chosen 'not to go into the substance of the law of peace-making, but remains at the level of their external characteristics'.[103] This study aims to fill this gap.

The analysis looks at regional and international human rights obligations, evaluating the fragmented universality of international human rights law.[104] Ruti Teitel observed that courts, tribunals, other international bodies, and political actors draw from the various elements of international law, 'in assessing the rights and wrongs of conflict; determining whether and how to intervene; and imposing accountability and responsibility on both state and non-state actors'.[105] However, while it is tempting to see humanitarian law, international criminal law and human rights law in sum as *humanity's law*, this approach should not lead to a blurring of each element. At close sight, human rights have distinct features: they are often the reason for conflict and their solution; and they are significant indicators for post-war change. Whereas humanitarian law is temporally limited to the period of armed conflict and international criminal law is reactive to international crimes, human rights are intended to prevail in all those phases connecting *jus ad bellum*, *in bello* and *post bellum*. Their fulfilment is the ultimate objective of peace.

As there are different perspectives on issues in international law, this book applies a multi-dimensional institutional approach. As Tai-Heng Cheng argues in his analysis *When International Law Works*, international law is contingent on the respective standpoint of the decision-maker towards an international problem.[106] The methodology and arguments vary depending on whether international law is regarded from within an international court, an international law commission or governmental state entity.[107] The legal opinions of these contrasting perspectives can differ drastically or display elements of universality.

[102] Randall Lesaffer, 'Book Review: Christine Bell, On the Law of Peace: Peace Agreements and the Lex Pacificatoria' (2011) 24 *Leiden Journal of International Law* 522.

[103] ibid.

[104] Upendra Baxi, 'Voices of Suffering, Fragmented Universality, and the Future of Human Rights' in Burns H Weston and Stephen P Marks (eds), *The Future of International Human Rights* (Ardsley, NY, Transnational Publishers, 1999) 172.

[105] Teitel, above n 46, 4.

[106] Tai-Heng Cheng, *When International Law Works: Realistic Idealism After 9/11 and the Global Recession* (Oxford, Oxford University Press, 2012) 8.

[107] On the different perspectives of courts and science in international law, see also Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Oxford University Press, 2003) 339, 442, and Robert E Keeton, *Judging* (St Paul, Minn, West Publishing Co, 1990) 15–17.

Martti Koskenniemi said provocatively that international law 'is what international lawyers do and how they think'.[108] He noted that 'legal practice enables the simultaneous justification and critique of particular normative outcomes'.[109] Koskenniemi concluded that international lawyers have 'corresponding roles', ranging between those of an adviser, judge, arbitrator, diplomat or academic: 'Each exists in and is reinforced by the different legal practices of international lawyering'.[110] Consequently, the 'routine of international law is most immediately shaped by these roles'.[111] This study tests this approach, understanding that all perspectives eventually contribute to an objective common sense of the law (*Objektivität des Rechts*).[112] Complementary to previous research, this study particularly focuses on interpretations by international human rights courts and human rights monitoring bodies.[113]

B. Case Studies

As two comparable cases, Bosnia and Herzegovina and Lebanon demonstrate the impasses of peacemaking. Despite formally signed peace accords, both countries are struggling with stepping out of the shadows of their violent past. They represent different types of power-sharing: whereas the constitutional system in Bosnia and Herzegovina is based on a quota for the former war-waging ethnic groups, Lebanon's political structures remain ingrained in sectarianism.[114]

Historically, Bosnia and Herzegovina and Lebanon share a similar path. Ethnic groups and sects used to manage their own internal and external affairs independently through immemorial custom and feudal ties forming the basis of social order.[115] In the fifteenth century, power-sharing was institutionalised by the Ottoman Empire, which conquered the Balkans and the Middle East. With their arrival followed a system of ethnic and sectarian segregation arranged in what is

[108] Martti Koskenniemi, *The Politics of International Law* (Oxford, Hart Publishing, 2011) 284.
[109] ibid, 293.
[110] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, Lakimiesliiton Kustannus Finnish Lawyers' Publishing Company, 1989) 492.
[111] ibid.
[112] Matthew Kramer, *Objectivity and the Rule of Law* (Cambridge, Cambridge University Press, 2007) 60.
[113] For a summary of previous research, see Ch 2.
[114] For an overview on Bosnia and Herzegovina, see above n 17. For an introduction on Lebanon, see Myriam Catusse and Karam Karam, 'Back to Parties?: Partisan Logics and Transformations of Politics in the Arab World' in Myriam Catusse and Karam Karam (eds), *Returning to Political Parties?: Partisan Logic and Political Transformations in the Arab World* (Sin el Fil, The Lebanese Center for Policy Studies, 2010) 19.
[115] Kamal S Salibi, *The Modern History of Lebanon* (Delmar New York, Caravan Books, 1965) xxvii. See also Peter F Sugar, *Southeastern Europe Under Ottoman Rule: 1354–1804* (Seattle, University of Washington Press, 1977) 3.

known as the *millet* system.[116] As the Lebanese historian Fawwaz Traboulsi explains, this structure established 'a two-tier hierarchy between a higher community, made up of Muslims, and a lower "protected" community, made of the "people of the book", such as Christians and Jews'.[117] Certain non-Muslim minorities (*dhimmi*) were granted special status under the Sharia law, to excuse them from specific religious duties within the Islamic Ottoman Empire, but treating them as equal regarding property, contracts and other obligations.[118] *Millets* organised their religious, culture and social life independently, and established their own schools, churches and hospitals. Being permitted to maintain separate personal status law courts for Christian Canon law and Jewish Halakha law, they were allowed to rule themselves with only minor interference from the Ottoman Empire.

In the late nineteenth century, in an attempt to modernise the Ottoman Empire along European lines by abolishing sectarian and ethnic divisions, the Balkans and parts of the Middle East were transformed into autonomous political and administrative provinces (*mutassarrifiya*). This reform gave distinct sects and ethnic groups exclusive spheres of influence. As part of a series of reforms aimed to satisfy European demands for the protection of Christian communities and secular statehood, non-Muslims and Muslims were declared equal before the law regardless of their religion. Appointments in the public sector were restricted on a sectarian basis. As Ussama Makdisi historically reconstructed:

> European and Ottoman officials engaged in a contest to win the loyalty of the local inhabitants – the French by claiming to protect the Maronites, the British, the Druze, and the Ottomans by proclaiming the sultan's benevolence toward all his religiously equal subjects.[119]

This was a moment where feudal and factional rivalries transformed into sectarian feuds.[120]

Both regions remained under foreign influence. Following the Treaty of Berlin in 1878, Bosnia and Herzegovina was annexed to the Austro-Hungarian Empire.[121] Lebanon became a part of the French Mandate within the League of

[116] On the Ottoman Empire and the function of provincial administration, see Halil Inalcik, *The Ottoman Empire: The Classical Age, 1300–1600* (London: Phoenix Press, 1973) 104. For a detailed overview about later developments, see Ussama Makdisi, 'After 1860: Debating Religion, Reform, and Nationalism in the Ottoman Empire' (2002) 34 *International Journal of Middle East Studies* 601.

[117] Fawwaz Traboulsi, *A History of Modern Lebanon* (London, Pluto Press, 2007) 3–4.

[118] Mohamed Berween, 'Non-Muslims in the Islamic State: Majority Rule and Minority Rights' (2006) 10 *International Journal of Human Rights* 95. See also Najwa Al-Qattan, 'Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination' (1999) 31 *International Journal of Middle East Studies* 429.

[119] Ussama Makdisi, 'Corrupting the Sublime Sultanate: The Revolt of Tanyus Shahin in Nineteenth-Century Ottoman Lebanon' (2000) 42.1 *Comparative Studies in Society and History* 180.

[120] Marie-Joelle Zahar, 'Power Sharing in Lebanon: Foreign Protectors, Domestic Peace, and Democratic Failure' in Donald Rotschild and Philip Roeder (eds), *Sustainable Peace: Power and Democracy after Civil Wars* (Ithaca, Cornell University Press, 2005) 221.

[121] Robin Okey, *Taming Balkan Nationalism: The Habsburg 'Civilizing' Mission in Bosnia, 1878–1914* (Oxford, Oxford University Press, 2007) 1.

Nations system in 1922 after World War I. At the end of the twentieth century, Bosnia and Herzegovina as well as Lebanon modified their constitutional order on the basis of peace accords that ended armed conflict but also impacted on human rights.

Above all, both cases offer intriguing legal considerations from different institutional perspectives. While ethnic power-sharing provisions in the constitution of Bosnia and Herzegovina have been examined by the ECtHR, Lebanon's confessional system has been of concern in the UN human rights bodies.

C. Structure and Scope

As a prelude, the first part of this study lays the theoretical foundations of the analysis, dissecting the thinking of prior commentators about power-sharing, peace agreements and post-conflict constitutional designs. Chapter 2 explores the spectrum of institutional options, for which legal considerations are accordingly complex. The chapter maps legal challenges and explains why a case-study-driven, context-specific analysis is needed to define universal principles of legal limitations for peacemaking.

Chapter 3 focuses on Bosnia and Herzegovina and its ethnic constitutional setting introduced by the Dayton Peace Accords. This chapter reviews the ECtHR decision *Sejdić and Finci v Bosnia and Herzegovina* (2009) and related case law.[122] The chapter concludes with general lessons learnt for the burden of proof in discrimination cases and rules for post-conflict state transitions.

Chapter 4 scrutinises Lebanon's system of political confessionalism. This chapter explores arguments and concerns raised in UN human rights monitoring bodies about discriminatory aspects of the Lebanese consensus democracy. The chapter examines possible justifications of human rights constraints by states, whereby particular attention is paid to temporal limits as an aspect of proportionality.

The final chapter of the book provides a reflection on the overall quest for absolute limitations and their consequences for peacemaking. Returning to the challenges of post-conflict state transition, power-sharing and international law, this concluding chapter assesses the function between law and peace from an academic and practitioner perspective. The chapter closes with an agenda for future research. The final remarks shed light on the opportunities which imperfect peace provides, bridging the divide between normative limits of international law and realism in peacemaking.

[122] See above n 2.