

FROM DARFUR TO SINAI TO KASHMIR: ETHNO-RELIGIOUS CONFLICTS AND LEGALIZATION

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This Article analyzes peace agreements in regions with a history of ethno-religious conflicts to determine if there are correlations between the form and substance of the agreements and their successful implementation. For purposes of comparison, I examine several agreements between India and Pakistan, the historic agreement between Israel and Egypt, and the Darfur Peace Agreement, as exemplars of similar conflict situations where a study of agreement design has salience. I endeavour to apply the legalization theory articulated by Kenneth Abbott, et al., to test the explanatory power of the obligation-precision-delegation matrix. [FN1] The Kashmir dispute has raged on for over five decades and has consumed thousands of lives making the region one of the most dangerous conflict zones in the modern world. [FN2] The terrible price, both in terms of human lives and defense expenditures, has not made much of an impact in pushing the parties towards finding a peaceful solution. [FN3] This *404 indifference to cost is not unique--several other dyads that are deeply sundered by ethnic and religious divisions share the same disregard for human suffering with the same devastating consequences. [FN4] The fragility of peace in these conflict zones and the fluctuation of rhetoric depending on the regime in power have meant that hope for a peaceful settlement is slim, [FN5] which might explain the shortage of significant attention to the analysis of such peace negotiations and agreements by legal scholars. The closed and secret nature of the negotiations and the low involvement of the legal community in them have contributed to this state of affairs. One consequence of such indifference has been the repetition of the same features in agreements despite evidence of failure. The scholarly community has to analyze the agreements to unearth avenues that can maximize the probability of better outcomes if the situation is to improve. [FN6] Scholarly attention to the design and structure of agreements between these parties can help us to understand whether there is a correlation between the choice of form and substance and their successful implementation. [FN7] Legal scholars have deferred for too long to the view that politics, rather than *405 law, is the answer to these disputes. This deference is fundamentally flawed and an examination of the agreements using legalization theory may help to bridge the gap between law and politics. It will cast light on the role of law in solving disputes characterized by ethno-religious hatreds, and will demonstrate that contract-like forms are preferable for agreement design. I analyze agreements between India and Pakistan, Israel and Egypt, and the Darfur Peace Agreement, to demonstrate that agreements that are high on the precision-obligation-delegation matrix enjoy higher degrees of success than those that are low on this matrix when concluded in dispute scenarios involving ethno-religious conflicts. I conclude by arguing that India and Pakistan should aim for hard legalization to solve the Kashmir dispute, and that they must learn from the painful experience of the Darfur Peace Agreement and include non-state actors as signatories to any agreement.

I. Legalization Theory

Legalization theory argues that states choose to legalize their agreements when the issue is one of commitment or coordination with the objective being to benefit from cooperative action. [FN8] According to this view, there is a cost-benefit analysis that states engage in when deciding whether or not to legalize, with the choice depending on legalization's ability to deliver outcomes that are more beneficial than non-legalization. [FN9] Some of these benefits include the ability of legalization to supply credibility to commitments, to lower ex post transaction costs, and to supply monitoring mechanisms. [FN10] Kenneth Abbott and Duncan Snidal posit that harder legalization makes state commitments more credible by creating precise agreements which contain obligations of a higher order. [FN11] They argue that transaction costs ex ante are higher with hard legalization because of the difficulty of negotiation and *406 obtaining agreement on these sorts of agreements. [FN12] It is likely that, as the levels of obligation and precision increase, the more difficult it will be for states to bind themselves because of the fear of being in breach of these obligations and the minimizing of wiggle room to make excuses. [FN13] This increased cost ab initio may be offset by lowered costs after agreement has been reached, because the existence of precise obligations makes enforcement easier and because many hard legalized agreements create tribunals for interpretation and enforcement. [FN14] Monitoring costs are thus reduced and may justify the expenditure of resources ab initio. [FN15] Abbott and Snidal also point to sovereignty costs (by which they mean incursions on state sovereignty in the

subject area) as being a factor that can militate against hard legalization. “They hypothesize that a combination of high uncertainty and low sovereignty costs will lead to institutions with lower precision coupled with higher obligation and moderate delegation. High sovereignty costs and lower uncertainty are likely to produce greater precision and obligation with less delegation.” [FN16]

The relative power relationship between states is also a factor in determining the extent to which legalization occurs. More powerful states have little or no incentives to legalize when dealing with less powerful states as they may be able to obtain outcomes that they want without resorting to legalization. Kahler argues that the power asymmetry argument is “heavily qualified” by the fact that the strongest advocates for legalization are the United States and Europe, two of the strongest international actors. [FN17] Abbott and Snidal suggest that there is a preference for softer forms of legalization when powerful states are involved, upon the understanding that there will be long term advantages in the form of lowered transaction costs. [FN18] *407 Kahler suggests that asymmetries may extend beyond those involving mere power (there may be asymmetries in terms of legal skills) that explain the unwillingness of some states, particularly developing ones, to legalize agreements. [FN19]

II. Case Studies

A. India-Pakistan

India and Pakistan attained independence in August of 1947, Pakistan celebrating its freedom on the 14th while India observing its birth as a nation on the 15th. Statehood on communal lines following British colonialism was the result of an acrimonious process of partitioning pre-independent India into Muslim Pakistan, and predominantly Hindu India. [FN20] This redrawing of the maps saw one of the biggest human relocations in history as people uprooted and moved from villages and towns that they had called home for generations. [FN21] Such a birth was *408 not conducive to a peaceful co-existence. [FN22] From the beginning there was rancor over the princely state of Kashmir, which had not acceded to India or Pakistan as of August 15, 1947. [FN23] Strenuous efforts were underway on both sides to get Kashmir to join either, and the situation was complicated by the fact that the king of Kashmir was a Hindu while the majority of his subjects were Muslims. [FN24] The king seemed to prefer independence, as he neither wanted to be part of an Islamic country by joining Pakistan, nor did he want to cede power by joining secular India. Ultimately, on October 26, 1947 the king, seeing that he had very little choice, signed the Instrument of Accession and Kashmir became a part of India. [FN25] Paragraph 4 of the Instrument of Accession clearly states that “I hereby declare that I accede to the Dominion of India” [FN26] The Schedule, which enumerates legislative powers, states that *409 the Dominion legislature (India) shall have the power to make laws with regard to military and defense matters. [FN27] In addition, India also has the power to make law with regard to external relations. [FN28] This accession was hotly contested by Pakistan and a limited war broke out between the two countries just a few months after independence in 1948. [FN29] The festering conflict over this act of accession has resulted in three wars and several skirmishes. [FN30] Kashmir has become the central feature of the relationship between the two countries, and movement on other contested issues is very difficult without addressing this matter. [FN31]

1. Agreements Between the Parties. This section analyzes the agreements between the parties in terms of structure and design. The first agreement of significance is the 1960 Indus River Waters Treaty. Given the hurried nature of the partition of pre-independent India and the spread of the resources, it was inevitable that fights would break out over arbitrarily carved boundaries. Most pregnant with potential for such a fight was the river Indus, much more than a body of water for most Indians. With the partition of the Indus Basin, and the breadbasket state of Punjab, Pakistani Punjab was dependant on irrigation facilities that were located in India. When the dispute threatened to escalate, the World Bank stepped in to facilitate negotiations. [FN32] After about a decade of *410 negotiation, Pakistan President Ayub Khan and Indian Prime Minister Jawaharlal Nehru signed the Treaty at Karachi in 1960. [FN33]

Throughout the process the World Bank was strongly engaged in the negotiations frequently advancing the talks

by placing proposals and even raising funds to overcome objections. [FN34] The World Bank was even a signatory to the treaty. [FN35] Giving up the idea that a shared utilization plan would be the best option from a resource-allocation standpoint [FN36] because the political hostilities did not allow for it, [FN37] the treaty devised an elaborate method of sharing the waters of the Indus, and allocated the water from the eastern rivers [FN38] to India and those from the western rivers to Pakistan. [FN39] It also allowed India to utilize water from the *411 western rivers for some agricultural uses, and stipulated the storage capacities of the various reservoirs. [FN40] Under article VIII of the Treaty, the Permanent Indus Commission was constituted and each country established an office of the Commissioner for Indus Waters. [FN41] The Permanent Indus Commission is made up of these two commissioners and they are charged with the task of operationalizing the Treaty and facilitating cooperation. [FN42] Each Commissioner is the representative of his or her government for all matters arising out of the Treaty and are required to meet periodically. [FN43] Amazingly, over eighty-six such meetings have taken place between the two sides. [FN44] *412 The Commissioners have the opportunity to tour the rivers every five years. [FN45] The Treaty also requires them to host ad hoc tours of sites promptly in case of request by the Commissioner from the other country. [FN46] Apart from monitoring, these provisions serve as informational safeguards and go a long way in defusing tensions that stem largely from suspicion. By creating provisions that seek to enhance transparency, the Treaty limits prisoners' dilemma problems and serves to increase the likelihood of cooperative outcomes. Kraska writes that the agreement establishes constituencies

by broadening the numbers and types of participants throughout the basin, including governments and non-governmental organizations. The negotiations tend to include an array of scientific, technical, environmental, ecological, legal, administrative, economic, and military interests. The involvement of all of these interests has a progressive effect, helping to build an integrated approach to civil government and foreign relations. [FN47]

Perhaps crucial to the success of the Treaty has been the inclusion of detailed provisions pertaining to dispute resolution. In the first instance, “differences” are to be settled by the Commission by agreement. [FN48] In the event that this mechanism does not resolve the problem, the commissioners can individually refer the matter to a “neutral expert.” [FN49] The “neutral expert,” a highly qualified *413 engineer, is to be appointed by the World Bank during the transition period, and thereafter jointly by the two governments. [FN50] As per Annexure F, the neutral expert is competent to determine the amount of water that Pakistan is entitled to from the Ravi and the Sutlej; [FN51] the boundary basin for the Indus, Chenab, and the Jhelum; [FN52] whether or not any use of water or storage in addition to that provided in the Treaty is carried out by India on the Western Rivers; [FN53] questions relating to obligations with respect to, and maintenance of drains; [FN54] various questions pertaining to the appropriateness of water use; [FN55] questions pertaining to financial compensation upon the agreement of both commissioners; [FN56] and determination of costs. [FN57]

If the subject matter is not within article IX (2)(a), [FN58] or if the neutral expert believes that the difference is a “dispute,” then the treaty provides three options. First, the commission shall report the dispute to the two governments with the reasoned views of each commissioner. [FN59] Secondly, *414 upon receipt of this report, or after determining that the report has been unduly delayed, each government can try to settle the dispute by agreement with the help of a mediator. [FN60] Thirdly, the governments can arbitrate the dispute. [FN61] The decision of the neutral expert is binding on all parties and any arbitral tribunal established under the treaty. [FN62]

In the event that the “difference” becomes a “dispute,” either party can institute arbitration. [FN63] The court of arbitration is to be comprised of seven arbitrators: two appointed by each of the parties, and three umpires--a highly qualified engineer, an international law expert, and a person qualified to be the chairman of the court. [FN64] The annexure provides detailed provisions on the appointment process and requires the establishment of a standing panel *415 of arbitrators. [FN65] Each arbitrator is to have one vote, with the chairman having the deciding vote in the event of a tie. [FN66]

Article IX was the subject of difference resolved by the neutral expert in early 2007. In January 2005, upon the request of Pakistan, which objected to India's building of the Baglihar Dam on the Chenab River, a neutral expert

had to be appointed under the Treaty. [FN67] Raymond Lafitte, a professor at the Swiss Federal Institute of Technology in Lausanne, was appointed by the World Bank to make a decision on the differences between the two governments. [FN68] He declared his final verdict on February 12, 2007, partially upholding some objections of Pakistan while limiting some flow control capabilities of the dam design. However, he overruled Pakistani objections on height and gated control of the spillway, finding that these conformed to engineering specifications.

The Indus Treaty is high on obligation, high on precision, [FN69] and high on delegation. Under the Abbott-Snidal model, this is an example of hard legalization. The Treaty has continued to survive despite the three wars that were fought between the two countries and has proved to be effective for the purpose for which it was adopted. One author writes that

[t]here was intense pressure from hardliners in India for New *416 Delhi to abrogate the Indus Waters Treaty, which would be seen by Pakistan as a threat to cut off water at some point in the future. Many in India went even further, arguing not only that the meeting should be skipped, but that India should abrogate the treaty altogether. Instead, India conducted the commission meetings because it wanted to “show the world that it is behaving responsibly. [FN70]

The second agreement that is the subject of analysis is the Rann of Kutch Agreement that was signed between the two nations in 1965. [FN71] This was the result of the threat of escalating military hostilities over a territorial dispute pertaining to the Rann of Kutch. [FN72] Under British coaxing, the two countries agreed to a cease-fire and to submit the dispute to arbitration. [FN73] The terms of the agreement provided that the parties would undertake “to implement the findings of the tribunal in full as quickly as possible,” and that the tribunal should remain intact until its findings had been implemented. [FN74] The agreement allowed each party to nominate a member of the tribunal, with its chairman to *417 be appointed by the Secretary General of the United Nations. [FN75] After the Tribunal rendered its award, the parties jointly demarcated the boundary, and the Tribunal was dissolved on September 22, 1969. [FN76] The entire process was concluded in about four years, and it was marked by a spirit of cooperation. [FN77] Copeland writes that “[n]either side questioned the authority of the Tribunal, and both sides worked together to implement the decision,” and that one of the reasons for the success of the arbitration was that the issues were well defined. [FN78] This agreement, under the Abbott-Snidal model, would be an example of hard legalization with a high level of obligation, high level of precision, and high level of delegation. It is perhaps no coincidence that this is one of the most successful agreements between the two nations. It is also significant that the agreement was signed on the Pakistani side by a military leader rather than a politician, supporting arguments pertaining to correlation between regime and legalization, and the need to enlist the key compliance community-- here, the Pakistani army.

The third agreement for analysis is the Tashkent Declaration, signed by the two countries in the immediate aftermath of the second war between them in 1965. [FN79] Under *418 the brokerage of the Soviet Union, Indian Prime Minister Lal Bahadur Shastri and the Pakistani President, Muhammad Ayub Khan, met for the Tashkent Conference from January 4th through the 10th, with the Soviet Premier, Kosygin, playing the role of a mediator and facilitating the signing of the document that met with some criticism in India. [FN80] Under this agreement, the two countries agree to make “all efforts to establish good relations . . . in accordance with the United Nations Charter” and “reaffirm their obligation . . . not to have recourse to force and to settle their disputes through peaceful means.” [FN81] Both sides agreed to withdraw their troops to positions held prior to the commencement of the hostilities, and in a foreshadowing of the Simla Agreement, “agree[d] to follow the principle of non-interference in their affairs” [FN82] and “discourage the use of any propaganda against each other.” [FN83] The language of the declaration was mainly general and vague, containing such promises as one to take “measures towards the restoration of economic and trade relations, communications, as well as cultural exchanges between the two countries.” [FN84] Some of the few provisions containing action pertained to the repatriation of *419 prisoners of war, [FN85] and the resuming of diplomatic relations. [FN86]

This agreement is medium to high on obligation (committing the parties to renounce violent methods to solve disputes), [FN87] low on precision (as it does not provide much content for the obligations and does not spell out the

consequences of violation), and low-to-nonexistent on delegation. Under the Abbott-Snidal model it is an example of low legalization. It is hard to understand the reasons for the contrast between the Tashkent Agreement and the Rann of Kutch Agreement given that they are proximate in terms of time. The former is characterized by soft legalization (or no legalization) whereas the latter is an exemplar of successful hard legalization. One can only speculate whether this is because the parties did not intend that their obligations be binding or because they did not appreciate the effect of legalization on ensuring compliance.

The fourth accord of significance is the oft-quoted Simla Agreement of July 2, 1972. [FN88] It was signed by Prime Minister Indira Gandhi of India and President Zulfikar Ali Bhutto of Pakistan in the immediate aftermath of the war between the two nations resulting in the creation of the new nation of Bangladesh. [FN89] The first paragraph of the agreement states that

[t]he Government of India and the Government of Pakistan are resolved that the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of a friendly and harmonious relationship and the establishment of durable peace in the subcontinent, so that both countries may henceforth devote their resources and energies *420 to the pressing task of advancing the welfare of their peoples. [FN90] In order to give effect to this hortative statement of intent, the two parties commit to applying “the principles and purposes of the Charter of the United Nations” in their relations. [FN91] They also declare that they will “settle their differences by peaceful means through bilateral negotiations or by any other peaceful means” and that “both shall prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations” [FN92] Under the agreement the two countries recognized that “the pre-requisite for reconciliation, good neighborliness and durable peace between them is a commitment by both the countries to peaceful co-existence, respect for each other’s territorial integrity and sovereignty and non-interference in each other’s internal affairs, on the basis of equality and mutual benefit” [FN93] They also agreed to “refrain from the threat or use of force against the territorial integrity or political independence of each other.” [FN94] Recognizing the state of hysteria that existed on both sides of the border, the two governments committed to “take all steps within their power to prevent hostile propaganda directed against each other. Both countries will encourage the dissemination of such information as would promote the development of friendly relations between them.” [FN95] This is a key clause as it comes in the background of hysterical and one-sided media coverage in both countries and the tendency to demonize each other. With regard to immediate normalization of relations following the war, the agreement committed both sides to “resume communications, postal, telegraphic, sea, land including border posts, and air links including overflights, . . . to promote travel facilities . . . [to resume] trade and co-operation in economic and other agreed fields,” and to promote exchanges in science and culture. [FN96]

*421 With regard to de-escalating tensions along the border, both sides agreed to withdraw troops and maintain the cease-fire line as the border. [FN97] Both sides also committed to periodic meetings to ensure that the peace process continued. [FN98] The Simla Accord continues to have rhetorical value to this day and even pronouncements by militant Islamic groups based in Pakistan bear this out. [FN99]

An examination of the Simla Accord using the legalization lens reveals that it is medium or high on obligation: committing the states to peace to “prevent the organization, assistance or encouragement of any acts detrimental to the maintenance of peaceful and harmonious relations,” [FN100] and so forth. It is relatively low on precision because it does not stipulate in detail how these objectives are to be achieved, and the consequences of violation of the obligations assumed. It is low to non-existent on delegation as the agreement is silent on implementing agencies, enforcement, monitoring, and interpretation. Under the Abbott and Snidal model, the Simla Accord is an example of *422 low legalization. This may signal the fact that the parties did not intend to undertake serious obligations and saw the accord only as a stopgap. This could certainly be true in the case of Pakistan as it had suffered enormously in the 1971 war, having lost East Pakistan entirely, and having endured the ignominy of Indian forces deep into its territory in the west. Pakistan had clear incentives to avoid hard legalization as it would be negotiating from an inferior bargaining position and would not want to undertake obligations that it would find hard to get out of. Given

the shrewdness of Zulfikar Bhutto, this conclusion is inescapable. It remains something of a mystery as to why India gave up the enormous bargaining advantage that it possessed by virtue of its victory in the 1971 war to embody the accord in a legally binding agreement that was structured as an exemplar of hard legalization. Given the precarious nature of democracy in Pakistan, it should have had every reason to reduce the agreement to hard legalization in order to have the assurance that the Pakistani army would consider it binding. If the obligations enshrined in the Simla Agreement had been supported by high levels of precision and delegation, the chances of its success would have been significantly enhanced. In contrast to the Rann of Kutch Agreement, which was hard legalization, the Simla Accord is regarded as a failure insofar as it has failed to resolve the differences between the parties, although it is no small fact that there has been no full-scale war since its conclusion. [FN101] It may also be a limited success in terms of establishing bilateralism as the dominant approach to solving disputes between the states.

In 1988, India and Pakistan entered into an agreement to prohibit the attacking of each other's nuclear installations. [FN102] According to the agreement, “[e]ach party *423 shall refrain from undertaking, encouraging or participating in, directly or indirectly, any action aimed at causing the destruction of, or damage to, any nuclear installation or facility in the other country.” [FN103] For the purposes of the agreement, it appears that no distinction was made between civilian and military nuclear facilities. The operative term states that nuclear installation or facility “includes nuclear power and research reactors, fuel fabrication, uranium enrichment, isotopes separation and reprocessing facilities as well as any other installations with fresh or irradiated nuclear fuel and materials in any form and establishments storing significant quantities of radio-active materials.” [FN104] The agreement requires each side to notify the other about the precise locations of their respective nuclear facilities. [FN105] The agreement is high on obligation, reasonably high on precision, and low on delegation. It appears to be couched in the language of hard legalization and compliance is difficult to measure in the absence of a full-blown war following the agreement.

In 1992, India and Pakistan entered into an agreement that provided for “the complete prohibition of chemical weapons.” [FN106] The agreement included a commitment to *424 abjure from developing, possessing or using chemical weapons, as well as to refrain from assisting, encouraging or inducing, in any way, anyone to engage in the development, production, acquisition, stockpiling or use of chemical weapons. [FN107] At the time of the signing of the agreement, both parties declared that they did not possess stockpiles of chemical weapons. This agreement is high on obligation, low on precision, and low on delegation.

The political climate on the Indian side was unpredictably altered by the pro-Hindu Bharatiya Janata Party (BJP) in March 1998. Given its pre-election bluster and historical antipathy towards Muslims, the BJP was expected to be tough on Pakistan. Early indications were that war would be a distinct possibility. Within months of assuming office, the government conducted four nuclear tests in 1998. [FN108] The international community was taken by surprise and it was assumed that Pakistan would have to respond. Tit-for-tat tests followed shortly thereafter. Sanctions were imposed on both countries. Faced with the horrors of a nuclear war in one of the most populous regions of the world, international attention was finally turned on getting the two countries to resume dialogue. In February 1999, Pakistani Prime Minister Nawaz Sharif and Indian Prime Minister Atal Behari Vajpayee resolved to negotiate, and in a highly symbolic move Mr. Vajpayee traveled to Lahore by bus. The two sides issued a joint communiqué, known as the Lahore Declaration. [FN109] The agreement kindled *425 hopes of a final resolution to the vexed Kashmir issue and there was much optimism that a breakthrough was imminent. Under the agreement, each side

shall intensify their efforts to resolve all issues, including the issue of Jammu and Kashmir; shall refrain from intervention and interference in each other's internal affairs; shall intensify their composite and integrated dialogue process for an early and positive outcome of the agreed bilateral agenda; shall take immediate steps for reducing the risk of accidental or unauthorized use of nuclear weapons and discuss concepts and doctrines with a view to elaborating measures for confidence building in the nuclear and conventional fields, aimed at prevention of conflict; reaffirm their commitment to the goals and objectives of SAARC and to concert their efforts towards the realisation of the SAARC vision for the year 2000 and

beyond with a view to promoting the welfare of the peoples of South Asia and to improve their quality of life through accelerated economic growth, social progress and cultural development; reaffirm their condemnation of terrorism in all its forms and manifestations and their determination to combat this menace; shall promote and protect all human rights and fundamental freedoms. [FN110]

Clearly, the Lahore Declaration contains some lofty objectives, but the language is worded in such generalities *426 that it is impossible to enforce. Under the Abbott-Snidal model it would be high on obligation, low on precision, and low-to-non-existent on delegation. Although the agreement frequently uses the word “shall,” the absence of any content and precision, coupled with the complete absence of enforcement and monitoring mechanisms militates against it being much of an agreement. This was destined to be its downfall. Just a few months later, Pakistani-backed insurgents, under the charge of the military establishment, without apparent political backing, launched a campaign in Indian Kashmir requiring military action by India to evict them. When matters seemed to be escalating with the possibility of Indian reprisals beyond Kargil, President Clinton pressured the Pakistani Prime Minister to withdraw. The military establishment appeared to be beyond the control of the elected representatives and the humiliating withdrawal from Kargil culminated in a coup orchestrated by General Pervez Musharraf.

Considered to be the architect of the military actions in Kargil, Mr. Musharaff was regarded with distaste in India and the peace process regressed. When it became apparent that Mr. Musharaff was here to stay, India reassessed its stance towards the military regime and invited him for a summit in Agra. There was a renewed expectation that this summit would be a furtherance of the thaw that had been initiated by the Lahore Declaration, but it ended in recriminations and the Indian side felt that they had been used by a canny Mr. Musharaff to bolster his credibility in Pakistan and to grandstand on the global stage. There are no published drafts of the agreement or credible explanations for the failed negotiations and it is hard to pin blame precisely. According to some, “Pakistan's insistence on the ‘settlement’ of the Jammu & Kashmir issue, as a pre-condition for the normalisation of relations” was the breaking point. [FN111]

*427 In the immediate aftermath of the 9/11 attacks on the World Trade Center, Kashmiri separatists attacked the state legislature in Srinagar in Indian Kashmir killing thirty-eight people. Perhaps emboldened by this, militants associated with Lashkar-e-Taiba assaulted the Indian Parliament and killed fourteen people on December 13th. India alleged that Pakistan was responsible for both attacks and there was talk in India of bombing terrorist camps in Pakistan. Alarmed at the prospect of war and its impact on its operations in Afghanistan, the U.S. induced both sides to return to the negotiating table. India agreed to stop its military deployment along the border, and Pakistan pledged to destroy terrorist camps inside its territory. As far as this author is aware, these agreements have not been reduced to writing and there does not appear to be any mechanism to ensure compliance. The Congress Party's return to power in 2004 has not had much of an impact on the peace process and negotiations are in limbo.

2. Impact of Legalization. The history of negotiations between the two countries reveals the pervasive lack of trust. [FN112] This reveals several opportunities for legalization to work. The twin attributes of precision and delegation can reduce distrust by providing relevant information ex ante and a mechanism for verification ex post. Precision minimizes the potential for opportunistic interpretations and increases the cost of such conduct. Delegation minimizes the need for reliance on the other party's integrity alone by vesting monitoring and enforcement in a third party. The salutary effect of this can be seen in the *428 workings of the Indus Waters Treaty, most recently in the Baglihar dispute. When India informed Pakistan of its intention to construct a dam in Baglihar, it was met immediately with objections that reached a crescendo when the project was commenced in 1999. Despite the two countries being in a heightened state of military deployment since 1998, the existence of the Indus Waters Treaty, and its highly legalized scheme prevented the dispute from being a part of the cocktail of reasons for going to war. The existence of a mechanism for resolving the dispute meant that it did not have to be added to the list of irresolvable disputes. Had the treaty not been high on all three attributes of legalization--say, if it had been low on delegation--the parties would have to have added it to their fight. Legalization created a separation of the dam dispute from the other cankers and allowed the parties to debate it within the processual framework of the treaty. The existence of the Indus River Commission presented the first forum for dispute resolution and indeed, this was where the parties negotiated for over three years. When Pakistan was on the verge of requesting the World Bank to

appoint a neutral expert under the treaty in 2003, India responded with an offer for bilateral negotiations that kept the parties within a processual framework for another two years. When the neutral expert was finally appointed in 2005, it committed the parties to provisions of the treaty to await a determination by the neutral expert. Without the pressure valve being released at various junctures by the treaty's process, the "difference" between the two countries could possibly have escalated into another dispute that created more distrust and hardened positions.

3. Participation from Key Actors. Every agreement is only applicable to the parties that are signatories to it. If the agreement leaves out key actors, the fact that it exhibits all the dimensions of hard legalization will have very little effect. The Indus Waters Treaty's success is in no small measure because of its success in co-opting the key constituencies--the political actors, engineers, and the World Bank. By making all three sections a key part of the working of the treaty, it minimizes the opportunity for dissonance. Legalization is particularly well-suited to increasing the range of actors that can be co-opted because of its salutary effect on the flow of information. This becomes even more pertinent in polities that are *429 characterized by a high degree of centralization like Pakistan. The nitty-gritty of agreements that are low on legalization is typically known only to a handful of elite political actors. While actors that are hostile to the agreement are likely to be well mobilized, regardless of the details, the informational offshoots of a process of hard legalization have the potential to facilitate the mobilization of actors that are favorably inclined to the agreement. Such actors include peace activists, political parties, religious organizations, businesses, and even the legal community. [FN113] Political parties have not had much success historically in Pakistan's foreign policy debates. It is likely that legalization, at best, provides them with information that can be used to lobby more powerful constituencies like the intelligence services, religious leaders, and the army. [FN114] In the Indian context, legalization serves to build consensus and buy-ins from fractious political parties which frequently act as if they have no long-term policies apart from one-upmanship. Legalization's institutional processes offer venues to air opinions freely, and the level of dissonance can serve to signal India's level of commitment to the agreement, and the potential risks with regard to compliance depending upon the party in power. Hard legalization can also be useful in countries like India because of the range of political ideologies on view. India's Parliament has representation from the communists, the socialists, Hindu-nationalists, Muslim League, various regionalists, casteists, and moderates. Various coalitions have been in power in recent years and legalization can serve to constrain Parliament in case it is more war-prone than the executive branch and vice-versa.

4. Lessons from the India-Pakistan Experience. The *430 foregoing analysis appears to show that legalized agreements have had a higher degree of success than non-legalized ones. The three agreements that have been successful (Rann of Kutch, Indus Waters, Chemical Weapons) all exhibit hard legalization under the Abbott-Snidal framework. Future work on agreement design would benefit from legalized agreements that exhibit high levels of obligation, precision, and delegation. The evidence of conduct between India and Pakistan also shows that what Abbott and Snidal would characterize as soft legalization is not regarded either as law or as a constraining influence by both states. Military action has not been prevented by the Simla and Lahore Agreements, and both sides disregard them with impunity when it suits them. This is in distinct contrast to those agreements that are characterized by hard legalization being observed as legal and binding, despite the onset of military conflict. The conclusion seems powerful that India and Pakistan do not place much value in non-legal agreements in terms of compliance and do not believe that they are bound by obligations contained in such agreements.

The functionalist argument that soft law is advantageous because of lower contracting costs--by which is meant the expenditure in terms of drafting time, negotiation, ratification, etc.--may have to be modified in the context of high-conflict states. Abbott and Snidal argue that hard legalization is more costly because states are more careful in "negotiating and drafting legal agreements, since the costs of violation are higher." [FN115] The argument with regard to hard law being more costly than soft law is only true on one front--ratification. All the other costs are incurred in the case of "soft law" too. Experts will still be consulted; differences between competing interests must still be resolved; negotiation is still just as contentious--as proponents of various interests argue just as vigorously--exemplified so powerfully in the Agra summit discussed hereinbefore. A modified functionalist thesis is presented by Raustiala who argues that the risk of opportunistic conduct *431 may be the causal variable that "suggests that pledges will be observed only when the risk of opportunism is low and uncertainty high." [FN116] In the case of

high-conflict states the trust deficit creates conducive conditions for opportunistic conduct and suggests that hard legalization may be preferable.

Hard legalization would also appear to be supported on the basis of liberal theory which suggests that credibility is factored into the choice of soft law versus hard law. Aliter, when credibility is dependant on legislative approval, states are more likely to prefer hard law unless the state possesses other mechanisms to ensure and enhance credibility. [FN117] Raustiala writes that in “more technocratic and arcane areas, the available empirical evidence suggests that the prevalence of pledges roughly, if inconsistently, rises as uncertainty rises--as functional theory predicts.” [FN118] He provides examples to support both the functionalist claim that uncertainty influences the form of international agreement and the liberal claim that pledges are “most common in areas of low domestic salience.” [FN119] Given that Pakistan is not a democratic society and is subject to capricious regime change, it would be in India's interest to enhance the credibility of Pakistan's commitments by insisting on hard legalization. This would ensure that it has the ability to read signals conveyed by the key constituencies as a result of the debate stirred up by the high levels of obligation, precision, and delegation so as to hone its own negotiating strategy after gauging seriousness on the other side, and to ensure that successor governments do not have the ability to unravel soft law commitments on the plea that they are not binding.

Insisting on hard legalization will also focus attention on obligation--a dimension of legalization that the Abbott-Snidal thesis does not elaborate upon. Their theory would not suggest an answer to the question as to whether obligations can be legitimately entered into by a military *432 dictator who seizes power in a coup. If the answer is in the negative, hard legalization will not help India very much as long as President Musharaff leads Pakistan. It may be possible to mitigate the democratic deficit by other processes that legalization triggers--for example, parliamentary deliberation and debate--to the extent that Pakistan's current constitutional structure allows it. In any event, hard legalization is preferable even on this view because it has informational advantages over non-legalization or soft legalization, as there is no room for participation by parties other than the nominees of the illegitimate power holder, and there is no way in which the other side can gauge the reaction of the legitimate players.

B. Darfur

Darfur, a region in the western part of Sudan, is home to about 6 million people. [FN120] The root of the conflict in Darfur appears to be the creation of two rebel groups, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), which took form in 2001 and 2002 in opposition to the government in Khartoum. While initially content to stage attacks on government facilities, the weak-kneed response from Khartoum apparently emboldened the rebels into launching more daring raids on military targets. [FN121] In an apparent reaction to these attacks and the fact that its military included significant numbers of Darfuris who were reluctant to take arms against their own brethren, the Khartoum regime seems to have struck upon the devious ploy of creating an army of the willing to fight the rebels. [FN122] Calculated to benefit from historical divisions among the tribes, this resulted in the creation of the “Janjaweed,” meaning “armed bandit or outlaw on a horse or camel,” essentially *433 tribesmen who had enlisted to kill Darfuris. [FN123] The violence appears to be directed at the non-Arab population although they share a common religion, Islam, with the Arab population of Sudan. [FN124] While the precise source for the ethnic hatred is unclear, it has been suggested that the tensions are owed to the scarcity of land and grazing rights. [FN125]

So began the world's “greatest humanitarian crisis.” [FN126] In the words of the U.N. Humanitarian Coordinator for Sudan, Mukesh Kapila: ““The only difference between Rwanda and Darfur now is the numbers involved [This] is more than just a conflict, it is an organized attempt to do away with a group of people.”” Heralding the terrible carnage that was to follow, he said: “[T]he pattern of organised attacks on civilians and villages, abductions, killings and organised rapes by militias was getting worse by the day . . . and could deteriorate even further. One can see how the situation might develop without prompt [action] . . . all the warning signs are there.”” [FN127] The United Nations is struggling to cope with the sheer scale of the tragedy: approximately two

million people in camps in Darfur and another 200,000 people inside Chad along the Darfur border. [FN128] There are hundreds of thousands of *434 persons who are unaccounted for--it is unknown whether they are dead, hiding, staying with relatives or friends, or not on the books of the United Nations. [FN129] The Coalition for International Justice (CIJ), the organization appointed by the State Department and the U.S. Agency for International Development (US AID) found that more than 200,000 people have died in the violence in Darfur, a figure that obviously undercounts significantly. [FN130] Most Darfuris believe that about 90 percent of all African villages have now been destroyed.

Despite the nature of the killings and the length of time it has been going on, the international community has shown a marked reluctance to call it genocide. The reluctance starts with the United Nations. On July 30, 2004, the U.N. Security Council adopted Resolution 1556, [FN131] *435 calling upon Khartoum to fulfill commitments it made to disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates. [FN132] The Security Council resolution also called on Khartoum to allow humanitarian access to Darfur. [FN133] It placed an embargo on the sale or supply of material and training to non-governmental entities and individuals in Darfur. [FN134] The resolution endorsed the African Union deployment of monitors and a protection force to Darfur. [FN135] It requested the Secretary-General to report on Khartoum progress in 30 days and held out the possibility of further actions, including sanctions, against Khartoum in the event of non-compliance. [FN136] The U.N. Commission of Inquiry (COI) report on Darfur issued in January 2005 was of the opinion that there was "insufficient evidence of genocidal intent" on the part of the NIF. [FN137] The COI Report notes that "[h]undreds of incidents have been reported involving the killing of civilians, massacres, summary executions, rape and other forms of sexual violence, torture, abduction, looting of property and livestock, as well as deliberate destruction and torching of villages." [FN138] It did find evidence of state complicity and involvement in the killings, however, and asked for all violations of international law in Darfur to be referred to the International Criminal Court *436 (ICC). [FN139] This was accepted by the U.N. Security Council, which passed a resolution on March 31. [FN140] The COI Report concluded that there was no "specific intent" necessary for "genocide." [FN141] A European Union report found that there was "widespread, silent and slow killing going on, and village burning on a fairly large scale," yet refused to call it genocide. [FN142]

The Darfur Peace Agreement (DPA) was signed in May 2006, between the Government of the Sudan (GoS) and the Sudan Liberation Movement/Army (SLM/A)--Minawi faction, in Abuja, Nigeria. [FN143] The agreement was the result of intense negotiations and appeared to be on the verge of collapse at various times with a breakthrough being achieved only due to sustained pressure from the U.S. and other interested parties. [FN144] Despite this, the SLA faction of Abdel Wahid Mohamed Nur (SLA/AW) and the Justice and Equality Movement (JEM) have refused to sign the *437 agreement. [FN145] Abdel Wahid's discontent with the DPA pertains to the lack of more direct SLA participation in the implementation of security arrangements, provisions for political representation, and a victim's compensation fund. [FN146] The JEM's grievances are that the agreement does not address the political imbalances that were the source of the conflict. When faced with the prospect of two years of negotiations being futile, the African Union's mediators tried to end the stalemate by allowing separate bilateral power-sharing talks between the government and Abdel Wahid's faction. With the familiar old ploy of divide and conquer, the government hoped that the fear of being marginalized would lead the faction to sign up, but Abdel Wahid got cold feet at the last moment. [FN147]

The DPA, in its preamble, states that the parties "condemning all acts of violence against civilians and violations of human rights, and stressing full and unconditional acceptance of their obligations under International Humanitarian Law, international human rights law, and relevant U.N. Security Council Resolutions" resolved to enter into the agreement to "be a significant step towards a just, peaceful and lasting political solution to the conflict in Darfur." [FN148] In its chapter on General Principles for Power Sharing, the DPA provides for citizenship as the basis for civil and political rights and *438 obligations, [FN149] for the peaceful devolution of power through democratic means, [FN150] separation of powers, [FN151] rule of law, [FN152] free and fair elections, [FN153] a federal system of government, [FN154] the creation of a constitutional court, [FN155] and greater representation for women. [FN156]

Recognizing that the violence has its roots in the disenchantment of the Darfuris, the DPA states that “[a]ffirmative action shall be taken in favor of Darfurians in order to enhance inclusivity in public services.” [FN157] Despite the fact that the perceived sense of injustice felt by the Darfuris was the source of the conflict, this provision is high on obligation, low on precision, and has no delegation attribute under the legalization framework. It is unclear as to how affirmative action policies will be crafted, at what levels, to what extent, and what remedy exists for claims by private individuals.

The agreement provides protections against illegal arrest and detention, [FN158] a presumption of innocent until proven guilty, [FN159] right to be informed of reasons for arrest, [FN160] right to legal representation, [FN161] right to legal aid if the person cannot afford a lawyer, [FN162] fair trial, [FN163] and *439 attainder. [FN164] The DPA also provides for the right to life and liberty, [FN165] freedom from torture, [FN166] freedom from cruel and unusual punishment, [FN167] a right to privacy, [FN168] right to vote in elections, [FN169] right to acquire property, [FN170] right to freedom of religion, [FN171] and freedom of speech and expression. [FN172] While these human rights look impressive on paper, and are high on obligation and precision, it is unclear as to what sort of delegation is contemplated. There is no provision that expressly guarantees a right to access the courts to make a claim for violation of any of these rights. As far as this author can tell, there is no provision granting special jurisdiction to a court to hear matters pertaining to these rights in a manner that is different from ordinary claims under other statutes. It is also unclear as to what kinds of remedies any court that is seized of matters relating to these rights can grant. The DPA does not seem to make any judgments by courts under these rights binding on the government. The only provision that gives any guidance is paragraph 41: “There shall be no derogation of the above rights and freedoms except as provided for in the Constitution [into which this Agreement shall be incorporated]. The Human Rights Commission provided for in the INC, which shall enjoy full independence, shall monitor the application of the rights and freedoms provided for herein.” [FN173]

In order to facilitate the establishment of a federal structure and separation of powers, the DPA establishes a Transitional Darfur Regional Authority (TDRA) for the *440 interim period. [FN174] It is to have widespread authority for “facilitating the return of refugees and internally displaced persons, coordinating the restoration of security, and promoting peace and reconciliation throughout Darfur.” [FN175] The permanent status of Darfur is to be determined by a referendum within twelve months after the elections in Darfur and no later than 2010. [FN176] Paragraph 57 provides two options for determination by the referendum: “(a) The creation of a Darfur Region composed of the three states; (b) Retention of the status quo of three states.” [FN177] The DPA provides representation at the senior level to members of the SLM and the JEM including: one senior assistant to the president, one cabinet minister in addition to the existing three, and two state ministers in addition to the existing three; [FN178] the chairmanship of one Parliamentary Committee; [FN179] as well as twelve National Assembly seats; [FN180] and one commission chairmanship. These provisions are high on obligation, precision, and delegation. The last attribute is particularly important for the conduct of the referendum and the express provision for international monitors is a welcome sign. [FN181] The DPA also provides for increased representation of Darfuris in the judiciary, [FN182] the *441 civil service, [FN183] national organizations and institutions, [FN184] the armed services, [FN185] and educational institutions. [FN186] Educational opportunities for Darfuris were to be addressed on a priority basis with interim measures. [FN187] The preceding provisions are high on obligation and medium on precision, but very low on delegation. Yet, at their core, these provisions are most likely to continue the feeling of disenfranchisement amongst the average Darfuri, and a higher level of delegation would have been preferable. The Senior Assistant to the President will also be Chairperson of the TDRA, is to be appointed by the President, and will be the fourth highest ranking member of the government. [FN188] The Senior Assistant, apart from being responsible for the implementation of the agreement, also has several other powers, including appointments. [FN189] This provision is high on all three attributes of legalization. With regard to the *442 demarcation of the border, the DPA requires the parties to retreat to pre-January 1, 1956 positions, and creates a technical ad hoc team to monitor compliance--obligation, precision, and delegation in action. [FN190]

The DPA's security provisions are contained in Chapter III. Paragraph 214 commits the parties to “[u]ndertake

to refrain from acts such as mobilization, recruitment or initiatives that are likely to jeopardize the peace process including offensive military actions, movements, deployment of forces and engaging in hostile propaganda campaigns as a reaffirmation of commitment to create and maintain a conducive atmosphere.” [FN191] Importantly, it requires the parties to “[u]ndertake measures to neutralize and disarm the Janjaweed/armed militias in line with U.N. resolutions 1556 and 1564” [FN192] The DPA is rather weak on enforcement [FN193] of this undertaking, content to requiring the parties to “[p]ut in place proper mechanisms for the demobilization, rehabilitation and social reintegration of former combatants returning to civilian life.” [FN194] The DPA does, however, list a slew of “prohibited activities” in order to strengthen the ceasefire and promote peace. [FN195] It also *443 charges the African Union Mission in Sudan (AMIS) with responsibility for monitoring and verification of compliance. [FN196] AMIS’s responsibilities include inspection and certification of assembly areas for rebel fighters; [FN197] establishment and enforcement of buffer zones [FN198] from which the parties are excluded around IDP camps and main humanitarian corridors; [FN199] building community policing mechanisms; [FN200] establishing separate police counters for reporting crimes committed against women; [FN201] establishment of a plan for nomadic migration; [FN202] and separation of the parties’ areas of control. A Ceasefire Commission is to be established under the chairmanship of the AMIS commander, [FN203] with the E.U. and the U.S. as observers. [FN204] The DPA recognizes the utility of non-legal sanctions like naming and shaming in two places in connection with the monitoring of ceasefire: Paragraph 247, and Paragraph 250, which mandates the Joint Commission to “take decisive action in relation to ceasefire violations . . . [by] [p]ublicising the violation and the name of the Party *444 that committed the violation.” [FN205] This is in addition to prosecution and other procedures. [FN206] The DPA contemplates securing compliance by non-parties to the agreement through “non-military means.” [FN207]

The agreement is rather broad on what constitutes breach: Paragraph 299 provides that “[a]ny breach of the rules relating to the disengagement, redeployment and limited arms control processes presented in this Chapter shall be a violation of the ceasefire.” [FN208] With regard to disarming the Janjaweed the DPA seems to leave the entire responsibility to the GoS. [FN209] It asks the government to neutralize the Janjaweed, and provides some guidance as to how this is to be done. [FN210] It allows the GoS to undertake “[e]nforcement operations in selected localities with the intent of apprehending and disarming,” to “[c]onfiscat[e] . . . heavy and long-range weapons systems, crew-operated weapons and motor vehicles,” to prosecute and punish criminals, and to take any other actions contained in the *445 plan with the consent of the Ceasefire Commission. [FN211] In an attempt to aid verification, the DPA empowers the AMIS to inspect locations where the parties are required to hold their weapons. [FN212] The DPA also assigns responsibility for policing to the GoS and AMIS, depending on who controls the zones. [FN213] The preceding security provisions are high on obligation and precision, but medium on delegation because the AMIS is not assigned any capacity to do anything in the event of breach. Without a strong pro-active and offensive capability, the delegation function is rather useless in a security context.

Realizing that no amount of military planning will provide a conclusive solution, the DPA contains provisions pertaining to the reintegration and rehabilitation of former combatants. It requires the creation of a Reintegration Plan [FN214] and the convening of the Darfur-Darfur Dialogue and Consultation (DDDC), which is intended to be a meeting of all the relevant stakeholders. [FN215] The objective of this conference is to address the political causes for the conflict and to find a way to bring about a lasting peace, *446 firstly by publicizing the DPA. [FN216] This lofty objective is somewhat tainted by the fact that the DDDC is merely an “advisory and facilitation mechanism,” and is only given the power to “make recommendations and observations to the national and Darfur authorities, including community leaders.” [FN217] These provisions exhibit high levels of obligation, but low levels of precision and delegation.

In the event that there is disagreement concerning the interpretation of the DPA, paragraph 508 provides that “[t]he Parties agree to settle any disagreement or dispute arising under this Agreement by peaceful means. The Parties further agree that in the event of a dispute concerning the interpretation or application of this Agreement, they shall refer the matter to the A.U. Commission.” [FN218] This is a key provision and a higher level of delegation would have seen a provision like that in the Indus Waters Treaty providing for binding arbitration, perhaps under the aegis of the African Union. By stopping short of such a provision, the DPA runs the risk of being

violated with impunity, as the parties know that there is no enforcement machinery and consequent sanction for breach. The DPA also provides an innovative feature to ensure that the agreement does not remain purely on paper: an independent Darfur Assessment and Evaluation Commission (DAEC), with the objective of promoting “the full and timely implementation” of the agreement. [FN219] The DAEC is to be comprised of three representatives from the GoS including the advisor to the President on matters relating to Darfur, three representatives from the SLM/A and the JEM, one designated representative from the African Union, five representatives from the observer states and organizations, and a maximum of three additional representatives from such other states, or regional or international bodies, as shall be agreed by the Parties. [FN220] *447 The DEAC is charged with the responsibility to monitor implementation of the agreement on an ongoing basis, to assess difficulties and redress them, to “consult and coordinate” with other relevant agencies, maintain close ties with the Parties to facilitate their full compliance, and to liaise with other regional and international organizations. [FN221]

On the economic front, one of the most contentious wealth sharing provisions in the DPA is related to “compensation.” Article 10 of the Declaration of Principles, agreed by the parties on July 6, 2005, states: “Steps shall be taken to compensate the people of Darfur and address grievances for lives lost, assets destroyed or stolen, and suffering caused.” [FN222] The main sticking point appeared to be the distinction between reconstruction funding and compensation for individual losses; the government’s position was that reconstruction funding was compensation, while the separatists wanted that to be separate. [FN223] As part of the economic package, the DPA set up the Darfur Reconstruction and Development Fund to allow persons affected by the conflict to rebuild their lives. The fund requires commitments from the government to provide \$300 million at start up and \$200 million in 2007. Given the enormity of the financial needs and the limited resources possessed by Khartoum, a donors conference is to be convened by the international community.

In the immediate aftermath of the DPA, there were worries that the Janjaweed would act as spoilers. These worries came true on May 8th, with Janjaweed militia attacking villages near Buram, in South Darfur. A week thereafter, on May 15th, the Janjaweed killed eleven civilians in attacks against villages around Kutum, North Darfur, and burned villages around Donkey Dereisa, south of Nyala in South Darfur. A couple of days later, the Janjaweed fired at an A.U. patrol. The U.N. and the A.U. held the Janjaweed responsible for the deaths of at least 60 people during that week alone. There were also claims from *448 the SLA/MM faction that the government was acting in breach of the agreement by attacking its positions at Dar es-Salaam in North Darfur on May 21st in concert with the Janjaweed. Concerned with the claims, counterclaims, and the rising death toll, the U.N. Security Council declared an intention to impose sanctions against those who “violate[] or attempt[] to block the implementation of the Darfur Peace Agreement” [FN224]

Analysis of the DPA shows that the main weaknesses pertain to the third limb of the legalization troika--delegation. There is a marked reluctance by the parties to assume accountability and this is a debilitating flaw for an agreement that is so rich in detail. The difficult process of achieving agreement on so many details runs the serious risk of being undone because of a weak delegation thread that runs through the paragraphs. Coevally, no agreement, regardless of the extent of legalization, can succeed unless all the relevant parties are signatories. In the immediate analysis, it is this fact that has contributed to the DPA’s failure rather than any of the missing attributes of legalization.

C. Israel-Egypt Peace Agreement

The agreement was signed in 1979 by President Sadat and Prime Minister Begin under the active encouragement of President Carter in Washington, D.C. The preamble recites that the parties are “[c]onvinced of the urgent necessity of the establishment of a just, comprehensive and lasting peace in the Middle East” [FN225] They agreed to terminate the war between them, and Israel agreed to withdraw its troops and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine, allowing Egypt to exercise sovereign power over the Sinai. [FN226] The parties agreed to establish their permanent boundary in accordance with an agreed-to map, *449 leaving aside the position of the Gaza Strip. [FN227] Both sides agreed to respect the

inviolability of each other's territorial sovereignty. [FN228] The parties emphasized the applicability of the UN Charter and other principles of international law and committed to resolve disputes between them in a peaceful manner. [FN229] Given the familiar accusations of proxy wars, article III, paragraph 2 commits the parties to

ensure that acts or threats of belligerency, hostility, or violence do not originate from and are not committed from within its territory, or by any forces subject to its control or by any other forces stationed on its territory, against the population, citizens or property of the other Party. Each Party also undertakes to refrain from organizing, instigating, inciting, assisting or participating in acts or threats of belligerency, hostility, subversion or violence against the other Party, anywhere, and undertakes to ensure that perpetrators of such acts are brought to justice. [FN230] The preceding provisions are high on obligation, low to medium on precision, and non-existent on delegation.

Recognizing that distrust can undermine the agreement, the two sides agreed to the stationing of United Nations personnel in agreed-upon areas with the understanding that neither party was to request their withdrawal. [FN231] Under the agreement, these personnel were *450 not to be removed unless the removal was to be approved by the U.N. Security Council. [FN232] This provided the delegation element, at least in relation to the high obligation to ensure that there are no acts of military aggression. Given that this was the most important obligation under the agreement, it was perhaps sufficient to provide for delegation with regard to that obligation.

In order to promote trust and facilitate implementation, the agreement also provided for the creation of a joint commission. [FN233] This commission is to meet at least once every month and is responsible for coordination, problem resolution, assisting the U.N. forces, organizing the demarcation of the international boundary, supervising the handover of installations in the Sinai to Egypt, making arrangements for the return of the bodies of fallen soldiers, organizing the setting up of entry points and their operation, and the discussion of other matters placed before it by the parties. [FN234] This joint commission is an example of medium delegation--while it provides for some precise responsibilities, the absence of any teeth means that it cannot be considered an exemplar of high delegation.

A slightly higher example of hard legalization (in its delegation aspect) is the conferment of responsibility upon the United States to conduct aerial surveillance during the withdrawal operations. [FN235] This immediately provides a neutral verification and enforcement machinery and strengthens the relevant obligations.

The trust issue surfaces again in article VI when the parties are obligated to fulfill their obligations under the treaty in good faith, an extremely important provision given the fact that the principle of good faith comes with a certain circumjacent of legal principles that can be enforced. [FN236] The parties are also required to abjure from entering into *451 other treaty obligations that may run counter to this agreement. [FN237] Article V gave Israeli ships and cargoes destined for Israel the right of unimpeded passage through the Suez Canal in a non-discriminatory manner. [FN238] These provisions are high on obligation, but are low on precision and delegation.

No treaty is free from interpretative difficulties, and if it does not provide a mechanism for resolving disputes, it runs the risk of being overtaken by events. The agreement recognizes this and provides a two-fold dispute resolution mechanism. In the first instance, disputes are to be resolved by negotiations. [FN239] If that fails, the parties are to attempt to resolve their disputes by conciliation or by submitting them to arbitration. [FN240] With regard to financial claims, a claims commission is to be established. [FN241] These provisions exhibit marked contrasts to the Simla Agreement and the DPA, and it is no surprise that there has been a higher degree of success here with the agreement being high on delegation.

The protocol attached to the Treaty fleshes out some of the commitments. It provides a time frame of three years from the date of the agreement for Israel to complete the withdrawal of its forces, with interim withdrawal to be completed in nine months. [FN242] Recognizing the complexity of *452 the withdrawal process and the potential for miscommunication and possible recriminations, the protocol provides for the creation of a joint commission [FN243] to supervise and coordinate the withdrawal. [FN244] After the completion of the work of the joint

commission and its dissolution, “a liaison system is intended to provide an effective method to assess progress in the implementation of obligations . . . [and] to prevent situations resulting from errors or misinterpretation on the part of either Party.” [FN245] *453 The protocol also establishes a detailed aerial and naval military regime that divides up the area into zones and delineates allowed activity by both sides to their respective zones. [FN246] This protocol exhibits high obligation, precision, and delegation, and once again demonstrates the virtues of legalization in the context of high-conflict states where trust is at a premium.

To be sure, no international dispute can be resolved purely by military solutions. Economic and political initiatives are just as necessary if a lasting peace is to be achieved. The Israel-Egypt Agreement recognizes that fact and in Annex III, a protocol concerning relations of the parties was signed. Under this protocol, both sides agreed to establish diplomatic relations after the completion of the interim withdrawal. [FN247] The parties agreed to remove discriminatory trade barriers and committed to commencing negotiations within six months toward concluding a trade and commerce agreement. [FN248] The protocol also obligated the parties to promote cultural exchanges, [FN249] allow the movement of people across borders, [FN250] allow access to religious sites, [FN251] negotiate a civil aviation agreement, [FN252] and normal postal and communications links. [FN253] Article 5 of Annex III contains a statement of intent to foster good neighborly relations, to abstain from hostile propaganda against each other, and to recognize that there is a “mutuality of interest in good neighbourly relations.” [FN254] These provisions, as is probably to be expected of such commitments, are high on obligation but low on precision and delegation.

There is no doubt that the agreement is a success. As recently as 2004, Israel and Egypt concluded a historic *454 trade agreement with the U.S. [FN255] This might not have been possible but for the peace agreement in 1979. It is certainly true that President Sadat paid a terrible price for his courage. [FN256]

CONCLUSION

There is a marked distinction on the dimensions of obligation, precision, and delegation between agreements that are successful and those that are not. Given the close proximity of some of the events that have given rise to both kinds of agreements, it is hard to escape the conclusion that there is a correlation between hard legalization, on all its dimensions, and the success of agreements between high- conflict states. This is owed primarily to the trust deficit that exists between these states and the potential for highly legalized agreements to apportion the costs of breach ex ante. The rationale is similar to that advanced for the need for long and detailed contracts between parties who either have no history of successful contracting, or who have a history of conflict and disagreement. While non-contract agreements might work perfectly adequately between parties operating within the embrace of trust, strong contract language is almost always preferable for parties operating under the shadow of suspicion. In the context of high conflict of states, the empirical analysis reveals that the existence of a third-party guarantor almost always has a positive correlation to success. The Indus Waters Treaty and the Israel-Egypt Treaty are both exemplars of this feature. States characterized by ethno-religious conflicts should embrace lessons from this fact and aim to structure agreements such that they are high on obligation, precision, *455 and delegation if they intend to enter into successful agreements. It is also clear that agreements that exhibit all three elements in high degrees will fail unless all relevant parties are signatories to the agreement. This painful reality must guide countries like India, which obdurately refuse to include the various separatist elements in Kashmir in peace talks. It is rather late in the day to worry that their inclusion will confer them with legitimacy--they are already legitimate in the eyes of their constituents and at least Pakistan; and not much is achieved by India's obduracy as long as these movements possess the ability to wreak havoc. The successful role played by the World Bank should also embolden countries like India to jettison the knee-jerk post-colonial distrust of third-party mediation. The presence of a third-party will strengthen delegation, and given its centrality in ensuring success, it is a feature of legalization that must receive greater attention in the structuring of agreements between high-conflict states.

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[FN1]. See generally Kenneth Abbott et al., *The Concept of Legalization*, 54 *Int'l Org.* 401 (2000).

[FN2]. See generally Manjeet S. Pardesi & Sumit Ganguly, *The Rise of India and the India-Pakistan Conflict*, Fletcher F. World Aff., Winter 2007, at 131.

[FN3]. See Nazir Kamal & Amit Gupta, Sandia Nat'l Labs. Coop. Monitoring Ctr., *Prospects of Conventional Arms Control in South Asia* 9 (1998), <http://www.cmc.sandia.gov/cmc-papers/sand98-05055.pdf>.

[FN4]. Some scholars characterize these conflicts as “intranational” disputes. See Univ. of Md. Ctr. for Int'l Dev. & Conflict Mgmt., *Peace and Conflict 2003: A Global Survey of Armed Conflicts, Self Determination Movements, and Democracy* (2003), <http://www.cidcm.umd.edu/inscr/PC03.pdf>.

[FN5]. See generally Sumathi Subbiah, *Security Council Mediation and the Kashmir Dispute: Reflections on Its Failures and Possibilities for Renewal*, 27 *B.C. Int'l & Comp. L. Rev.* 173 (2004).

[FN6]. Orde Kittrie suggests that this lack of examination is not unique to the case of India and Pakistan. Orde F. Kittrie, *More Process Than Peace: Legitimacy, Compliance, and the Oslo Accords*, 101 *Mich. L. Rev.* 1661, 1662 (2003). According to Kittrie there has been an absence of sufficient examination and analysis even of more high profile conflicts such as the one between Israel and Palestine by legal scholars. He writes that “the legal literature contains virtually no discussion of what in the contents of a bilateral peace agreement's text can maximize the likelihood that the parties will comply with the peace agreement's terms.” *Id.*

[FN7]. See Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 *Am. J. Int'l L.* 373 (“Some 50 percent of civil wars have terminated in peace agreements since 1990, more than in the previous two centuries combined, when only one in five resulted in negotiated settlement. Numerically, these settlements amount to over three hundred peace agreements in some forty jurisdictions.”).

[FN8]. See Miles Kahler, *The Causes and Consequences of Legalization*, 54 *Int'l Org.* 661, 663 (2000).

[FN9]. See *id.*

[FN10]. See *id.*

[FN11]. See *id.* (discussing points raised by Abbott and Snidal).

[FN12]. See *id.*

[FN13]. See *id.*

[FN14]. See *id.*

[FN15]. See *id.*

[FN16]. *Id.* at 665.

[FN17]. *Id.* at 666.

[FN18]. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int'l Org.* 421, 448 (2000).

[FN19]. Kahler, *supra* note 8, at 666. One exception is the example of “[s]mall European states [which] are strong proponents of legalization, not only because they wish to constrain the behavior of their more powerful neighbors, but also because they possess legal resources out of proportion to their other capabilities.” *Id.*

[FN20]. The partition followed the Independence Act which permitted the leaders of the 565 semi-independent princely states owned by the British to choose independence (not a viable option) or accession to either India or Pakistan. See Anthony Wanis St. John, *The Mediating Role in the Kashmir Dispute Between India and Pakistan*, Fletcher F. *World Aff.*, Winter/Spring 1997, at 173, 175.

[FN21]. Several accounts put the number of displaced people at over 12 million. See, e.g., Urvashi Butalia, *The Other Side of Silence: Voices from the Partition of India 3* (Duke Univ. Press 2000) (1998).

The departure of barbers, weavers, tailors, goldsmiths, and others en masse to Pakistan, crippled certain aspects of life particularly in Delhi. In Pakistan, the departure of account clerks, bankers, lawyers and teachers dealt a similar blow As a new country, Pakistan had no instant arrangements to print its currency: the mint was in India.... So, for about a year, Pakistani currency ... was printed in India, as was much government material and stationary Pakistani officers (for currency) were trained in India for several weeks and India loaned accountants to Pakistan to help out with accounting work.

Id. at 68-69.

[FN22]. See generally Jeffrey Weiss, *India and Pakistan - A Cautionary Tale for Israel and Palestine*, 18 *Conn. J. Int'l L.* 455 (2003).

[FN23]. See Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 *Am. U. Int'l L. Rev.* 153, 158 (2003).

[FN24]. See St. John, *supra* note 20, at 174-75; see also Brian Farrell, *The Role of International Law in the Kashmir Conflict*, 21 *Penn. St. Int'l L. Rev.* 293 (2003); Heymann, *supra* note 23, at 160.

[FN25]. See St. John, *supra* note 20, at 174-75. “As a condition for receiving Indian military reinforcements to repel an invasion of Pathun tribal raiders, Hari Singh signed a letter of accession to India on October 26, 1947.” *Id.* This instrument was worked out under the provisions of the Government of India Act of 1935, an Act of the British Parliament, which served as the Indian Constitution at the time by virtue of the Indian Independence Act of 1947. The relevant provision providing for accessions stated that “[a]n Indian State shall be deemed to have acceded to the dominion if the Governor General of India has signified the acceptance of an instrument of accession executed by the ruler thereof.” Ministry of Home Affairs, Government of India, <http://mha.nic.in/acc.htm> (last visited Apr. 23, 2007). Maharaja Hari Singh of Kashmir executed the Instrument of Accession and the Governor General accepted the Instrument. This Act was acknowledged by the U.S. in the United Nations Security Council in 1948 by U.S. representative Warren Austin, who stated that “the external sovereignty of Jammu and Kashmir is no longer under the Maharaja. With the accession of Jammu and Kashmir with India, this sovereignty went over to India and is exercised by India.” Consulate General of India, *Legality of the Accession of Kashmir*, http://www.indiaconsulate.org.br/comercial/p_ nao_ residentes/LegalityoftheAccessionofKashmir.htm (last visited May 25, 2007).

[FN26]. Instrument of Accession of Jammu and Kashmir State, Oct. 26, 1947, available at <http://mha.nic.in/accdoc.htm>. The agreement shows that a set of sovereign powers was retained by the Maharaja.

[FN27]. *Id.* sched., pt. A.

[FN28]. *Id.* sched., pt. B.

[FN29]. See *St. John*, *supra* note 20, at 174-75.

[FN30]. See *id.*

[FN31]. Kashmir seems to be the “core” issue for Pakistan in a way that it is not for India. Pakistani politicians have repeatedly stated that other issues cannot be addressed without solving the Kashmir dispute whereas the Indian approach has been to de-link Kashmir from other issues, where it believes that progress is possible. See Kamal & Gupta, *supra* note 3, at 13. The authors cite a public survey in Pakistan showing that almost 80 percent of the Pakistani respondents would not accept the status quo in Kashmir, *id.*, illustrating that the Kashmir issue is a part of the public consciousness in that country in a way that it is not in India.

[FN32]. World Bank's successful intervention can be credited to its ability to divorce the dispute from other disputes between the countries. See Letter from Eugene Black, World Bank President, to Khwaja Nazimuddin, Prime Minister of Pakistan (Nov. 8, 1951) (on file with author) [hereinafter Letter] (“The problem of development and use of the Indus basin water resources should be solved on a functional and not a political plane, without relation to past negotiations and past claims and independently of political issues.”).

[FN33]. Indus Waters Treaty, India-Pak.-Int'l Bank for Reconstr. & Dev., Sept. 19, 1960, 419 U.N.T.S. 126 [hereinafter Indus Treaty]. The preamble states:

The Government of India and the Government of Pakistan, being equally desirous of attaining the most complete and satisfactory utilisation of the waters of the Indus system of rivers and recognising the need, therefore, of fixing and delimiting, in a spirit of goodwill and friendship, the rights and obligations of each in relation to the other concerning the use of these waters and of making provision for the settlement, in a cooperative spirit ...

Id. pmb.

[FN34]. The World Bank assembled a consortium of donors that pledged \$900 million. See Kenneth M. Kauffman, *The Indian Economy: Some Recent History and Near Term Prospects*, 7 *Asian Surv.* 405, 414-15 (1967).

[FN35]. See Indus Treaty, *supra* note 33.

[FN36]. See Letter, *supra* note 32 (“The water resources of the Indus basin should be cooperatively developed and used in such manner as most effectively to promote the economic development of the Indus basin viewed as a unit.”).

[FN37]. But see Indus Treaty, *supra* note 33, art. VII, ¶ 1 (“The two Parties recognize that they have a common interest in the optimum development of the Rivers, and, to that end, they declare their intention to co-operate, by mutual agreement, to the fullest possible extent.”).

[FN38]. See *id.* art. I, ¶ 5 (“The term ‘Eastern Rivers’ means The Sutlej, The Beas and The Ravi taken together.”); *id.* art. II, ¶ 1 (“All the waters of the Eastern Rivers shall be available for the unrestricted use of India, except as otherwise expressly provided in this Article.”).

[FN39]. See *id.* art. I, ¶ 6 (“The term ‘Western Rivers’ means The Indus, The Jhelum and The Chenab taken together.”); *id.* art. III, ¶ 1 (“Pakistan shall receive for unrestricted use all those waters of the Western Rivers which India is under obligation to let flow under the provisions of Paragraph (2).”).

[FN40]. See *id.* art. III, ¶ 2 (“India shall be under an obligation to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters, except for the following uses, restricted (except as provided in item (c) (ii) of Paragraph 5 of Annexure C) in the case of each of the rivers, The Indus, The Jhelum and The Chenab, to the drainage basin thereof: (a) Domestic Use; (b) Non-Consumptive Use; (c) Agricultural Use, as set out in Annexure C; and (d) Generation of hydro-electric power, as set out in Annexure D.”).

[FN41]. *Id.* art. VIII, ¶ 1 (“India and Pakistan shall each create a permanent post of Commissioner for Indus Waters, and shall appoint to this post, as often a vacancy occurs, a person who should ordinarily be a high-ranking engineer competent in the field of hydrology and water-use. Unless either Government should decide to take up any particular question directly with the other Government, each Commissioner will be the representative of his Government for all matters arising out of this Treaty, and will serve as the regular channel of communication on all matters relating to the implementation of the Treaty, and, in particular, with respect to (a) the furnishing or exchange of information or data provided for in the Treaty, and (b) the giving of any notice or response to any notice provided for in the Treaty.”).

[FN42]. See *id.* art. VIII, ¶ 4 (“The purpose and functions of the Commission shall be to establish and maintain co-operative arrangements for the implementation of this Treaty, to promote co-operation between the Parties in the development of the waters of the Rivers and, in particular, (a) to study and report to the two Governments on any problem relating to the development of the waters of the Rivers which may be jointly referred to the Commission by the two Governments: in the event that a reference is made by one Government alone, the Commissioner of the other Government shall obtain the authorization of his Government before he proceeds to act on the reference; (b) to make every effort to settle promptly, in accordance with the provisions of article IX (1), any question arising thereunder”).

[FN43]. *Id.* art. VIII, ¶ 5 (“The Commission shall meet regularly at least once a year, alternately in India and Pakistan. This regular annual meeting shall be held in November or in such other month as may be agreed upon between the Commissioners. The Commission shall also meet when requested by either Commissioner.”).

[FN44]. Press Release, Ministry of Water Resources, Rectification of Indus Waters Treaty (July 23, 2002), available at <http://pib.nic.in/archieve/lreng/lyr2002/rjul2002/23072002/r230720029.html> (last visited June 1, 2007).

[FN45]. Indus Treaty, *supra* note 33, art. VIII, ¶ 4(c) (“[T]o undertake, once in every five years, a general tour of inspection of the Rivers for ascertaining the facts connected with various developments and works on the Rivers”).

[FN46]. *Id.* art. VIII, ¶ 4(d) (“[T]o undertake promptly, at the request of either Commissioner, a tour of inspection of such works or sites on the Rivers as may be considered necessary by him for ascertaining the facts connected with those works or sites”).

[FN47]. James Kraska, Sustainable Development is Security: The Role of Transboundary River Agreements as a Confidence Building Measure (CBM) in South Asia, 28 *Yale J. Int'l L.* 465, 498-99 (2003).

[FN48]. See Indus Treaty, *supra* note 33, art. IX, ¶ 1 (“Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavour to resolve the question by agreement.”).

[FN49]. *Id.* art. IX, ¶ 2.

[FN50]. Id. annex. F, pt. 2, ¶ 4. “The Bank shall be notified of every appointment, except when the Bank is itself the appointing authority.” Id.

[FN51]. Id. annex. F, pt. 1, ¶ 1(1).

[FN52]. Id. annex. F, pt. 1, ¶ 1(2).

[FN53]. Id. annex. F, pt. 1, ¶ 1(3).

[FN54]. Id. annex. F, pt. 1, ¶ 1(4).

[FN55]. Id. annex. F, pt. 1, ¶¶ 1(5)-(23).

[FN56]. Id. annex. F, pt. 1, ¶ 2.

[FN57]. Id. annex. F, pt. 1, ¶ 3.

[FN58]. If the two commissioners cannot agree that it is a matter covered by Part I of Annexure F, then the Neutral Expert shall, after hearing both Parties, decide whether or not it so falls. Should he decide that the difference so falls, he shall proceed to render a decision on the merits; should he decide otherwise, he shall inform the Commission that, in his opinion, the difference should be treated as a dispute.

Id. annex. F, pt. 2, ¶ 7. If it is partly a dispute, the expert has the option of deciding the part which he or she is competent to decide, or can inform the Commission that the entire matter should be treated as a dispute. Id.

[FN59]. See id. art. IX, ¶ 3 (“As soon as a dispute to be settled in accordance with this and the succeeding paragraphs of this Article has arisen, the Commission shall, at the request of either Commissioner, report the fact to the two Governments, as early as practicable, stating in its report the points on which the Commission is in agreement and the issues in dispute, the views of each Commissioner on these issues and his reasons therefor.”).

[FN60]. See id. art. IX, ¶ 4 (“Either Government may, following receipt of the report referred to in Paragraph [3], or if it comes to the conclusion that this report is being unduly delayed in the Commission, invite the other Government to resolve the dispute by agreement. In doing so it shall state the names of its negotiators and their readiness to meet with the negotiators to be appointed by the other Government at a time and place to be indicated by the other Government. To assist in these negotiations, the two Governments may agree to enlist the services or one of more mediators acceptable to them.”).

[FN61]. See id. art. IX, ¶ 5 (“A Court of Arbitration shall be established to resolve the dispute in the manner provided by Annexure G (a) upon agreement between the Parties to do so; or (b) at the request of either Party, if, after negotiations have begun pursuant to Paragraph (4), in its opinion the dispute is not likely to be resolved by negotiation or mediation; or (c) at the request of either Party, if, after the expiry of one month following receipt by the other Government of the invitation referred to in Paragraph (4), that Party comes to the conclusion that the other Government is unduly delaying the negotiations.”).

[FN62]. See id. annex. F, pt. 2, ¶ 11 (“The decision of the Neutral Expert on all matters within his competence shall be final and binding, in respect of the particular matter on which the decision is made, upon the Parties and upon any Court of Arbitration established under the provisions of article IX (5).”).

[FN63]. See id. annex. G, ¶ 2 (“The arbitration proceeding may be instituted (a) by the two Parties entering into a special agreement (compromis) specifying the issues in dispute, the composition of the Court and instructions to the

Court concerning its procedures and any other matters agreed upon between the Parties; or (b) at the request of either Party to the other in accordance with the provisions of article IX (5)(b) or (c). Such request shall contain a statement setting forth the nature of the dispute or claim to be submitted to arbitration, the nature of the relief sought and the names of the arbitrators appointed under Paragraph 6 by the Party instituting the proceeding.”).

[FN64]. See *id.* annex. G, ¶ 4.

[FN65]. *Id.* annex. G, ¶¶ 5-10.

[FN66]. See *id.* annex. G, ¶ 16.

[FN67]. See Ramaswamy R. Iyer, Baglihar: The Points at Issue, *Hindu*, Oct. 19, 2005, <http://www.hindu.com/2005/10/19/stories/2005101905471100.htm> (“[T]he specific points of difference over Baglihar relate to (a) the design of the Project; (b) the extent of pondage; and (c) the placement of the spillway gates and the water intake.”).

[FN68]. See Dale Lautenbach, World Bank Names Neutral Expert on Baglihar, World Bank News Release No: 2005/463/SAR (May 10, 2005), available at <http://www.worldbank.org/sar> (search “2005/463/SAR”; then follow “South Asia-World Bank Names Neutral Expert on Baglihar” hyperlink).

[FN69]. One example of the precision includes article VI, which makes extensive use of a detailed verification regime, under which both states are required to regularly exchange “daily gauge and discharge data relating to the flow of the rivers,” daily reservoir extractions or releases, and daily withdrawals and escapages from all canals. These data may be requested by the other party as frequently as on a daily basis, if available. See *Indus Treaty*, *supra* note 33, art. IV.

[FN70]. Kraska, *supra* note 47, at 493-94.

[FN71]. *Rann of Kutch Arbitration (India v. Pak.)*, 7 I.L.M. 633 (1968) [hereinafter *Rann of Kutch Agreement*].

[FN72]. See J. Gillis Wetter, *The Rann of Kutch Arbitration*, 65 *Am. J. Int'l L.* 346, 346 (1971). India and Pakistan both claimed the Rann as part of their territory. The preamble to the agreement states:

WHEREAS both the Governments of India and Pakistan have agreed to a cease-fire and to restoration of the status quo as at 1 January, 1965, in the area of the Gujarat/West Pakistan border, in the confidence that this will also contribute to a reduction of the present tension along the entire Indo-Pakistan border; WHEREAS it is necessary that after the status quo has been established in the aforesaid Gujarat-West Pakistan border area, arrangements should be made for determination and demarcation of the border in that area

Rann of Kutch Agreement, *supra* note 71, pmbl.

[FN73]. See *Rann of Kutch Agreement*, *supra* note 71, art. 1-2 (“Article 1: There shall be an immediate cease-fire with effect from 0030 hours GMT, on 1 July, 1965. Article 2: On the cease-fire: (i) All troops on both sides will immediately begin to withdraw; (ii) This process will be completed within seven days”).

[FN74]. See *id.* art. 3(iv) (“The decision of the Tribunal referred to in (iii) above shall be binding on both Governments, and shall not be questioned on any ground whatsoever. Both Governments undertake to implement the Findings of the Tribunal in full as quickly as possible and shall refer to the Tribunal for decision of any difficulties which may arise between them in the implementation of these findings. For that purpose the Tribunal shall remain in being until its findings have been implemented in full.”).

[FN75]. See *id.* art. 3(iii) (“[T]here will be constituted, within four months of the cease-fire, a Tribunal consisting of three persons, one of whom would be a national of either India or Pakistan. One member shall be nominated by each Government and the third member, who will be the Chairman, shall be jointly selected by the two Governments. In the event of the two Governments failing to agree on the selection of the Chairman within three months of the cease-fire they shall request the Secretary-General of the United Nations to nominate the Chairman.”).

[FN76]. Carla S. Copeland, *The Use of Arbitration to Settle Territorial Disputes*, 67 *Fordham L. Rev.* 3073, 3078 n.49 (1999).

[FN77]. See *id.*

[FN78]. *Id.* at 3080.

[I]mportant to the success of the arbitration was that the dispute over the Rann did not represent a major political dispute between the two countries. The Rann had little economic or strategic value and was sparsely populated. Thus, although large-scale fighting preceded the arbitration proceedings, the dispute was more symbolic than substantive.

Id. at 3081.

[FN79]. Tashkent Declaration, India-Pak., Jan. 10, 1966, 560 *U.N.T.S.* 39, available at <http://www.ipcs.org/INDO-PAK-13-Docu.pdf>. The preamble recites:

The Prime Minister of India and the President of Pakistan, having met at Tashkent and having discussed the existing relations between India and Pakistan, hereby declare their firm resolve to restore normal and peaceful relations between their countries and to promote understanding and friendly relations between their peoples. They consider the attainment of these objectives of vital importance for the welfare of the 600 million people of India and Pakistan.

Id. pmbl.

[FN80]. See *id.* art. IX (“The Prime Minister of India and the President of Pakistan recorded their feelings of deep appreciation and gratitude to the leaders of the Soviet Union, the Soviet Government and personally to the Chairman of the Council of Ministers of the U.S.S.R. for their constructive, friendly and noble part in bringing about the present meeting which has resulted in mutually satisfactory results. They also express to the Government and friendly people of Uzbekistan their sincere thankfulness for their overwhelming reception and generous hospitality.”).

[FN81]. *Id.* art. I.

[FN82]. *Id.* art. III.

[FN83]. *Id.* art. IV (“[B]oth sides will discourage any propaganda directed against the other country, and will encourage propaganda which promotes the development of friendly relations between the two countries.”).

[FN84]. *Id.*

[FN85]. See *id.* art. VII (“The Prime Minister of India and the President of Pakistan have agreed that they will give instructions to their respective authorities to carry out the repatriation of the prisoners of war.”).

[FN86]. See *id.* art. VIII.

[FN87]. See *id.* art. II (“The Prime Minister of India and the President of Pakistan have agreed that all armed

personnel of the two countries shall be withdrawn not later than 24 February, 1966, to the positions they held prior to 5 August, 1965, and both sides all observe the cease-fire terms on the cease-fire line.”).

[FN88]. Agreement on Bilateral Relations, India-Pak., July 2, 1972, 858 U.N.T.S. 71, available at <http://www.indianembassy.org/policy/Kashmir/shimla.htm> [hereinafter Simla Agreement].

[FN89]. See *id.*

[FN90]. *Id.* ¶ 1.

[FN91]. *Id.* ¶ 1(i).

[FN92]. *Id.* ¶ 1(ii).

[FN93]. *Id.* ¶ 1(iii).

[FN94]. *Id.* ¶ 1(iv).

[FN95]. *Id.* ¶ 2.

[FN96]. *Id.* ¶ 3.

[FN97]. *Id.* ¶ 4(ii) (“In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from threat or the use of force in violation of this line.”). This is an important part of the agreement and the Line of Control has grown into something approximating a permanent border over time. *Id.*; see also Michael Fathers, Play Nice, *Time Asia*, Feb. 5, 2001, at 18 (noting that the Simla Agreement established the Line of Control as the informal border between India and Pakistan); Charles Sanctuary, Contentious Line of Control, *BBC News*, Jan. 4, 2002, http://news.bbc.co.uk/1/hi/world/south_asia/377916.stm (confirming that the Line of Control basically matches the frontline at the end of the 1947 war). The Line of Control became the flash point for many cross-border incursions and a constant build of troops. See Int’l Crisis Group, *Kashmir: Confrontation and Miscalculation*, Asia Report No. 35, July 11, 2002, at 9, available at http://www.crisisweb.org/projects/asia/afghanistan_southasia/reports/A400696_11072002.pdf [hereinafter Int’l Crisis Group] (describing the nuclear use policies of India and Pakistan in the Indo-Pak conflict); see also *id.* at 1 (detailing the history of the Line of Control).

[FN98]. See Simla Agreement, *supra* note 88, ¶ 6.

[FN99]. See, for example, the statement by the chief of the Pakistani religious organization Jamiat Ulema-e-Islam, Maulana Fazal-ur Rehman, noting that “Kashmir is a big issue but both the countries have the Simla Agreement as a guiding principle to solve their disputes bilaterally.” *Rediff India Abroad*, Simla Accord Still Relevant: Jamait Chief, July 17, 2003, <http://www.rediff.com/news/2003/jul/17pak.htm>.

[FN100]. Simla Agreement, *supra* note 88, ¶ 1(ii).

[FN101]. One author argues that the agreement is actually a stumbling block. See, Farrell, *supra* note 24, at 315 (“Because of its strict requirement of bilateralism, the Agreement has been viewed as a roadblock preventing any real progress.”).

[FN102]. The preamble of the agreement declares that

[t]he Government of the Islamic Republic of Pakistan and the Government of the Republic of India, herein after referred to as the Contracting Parties, reaffirming their commitment to durable peace and the development of friendly and harmonious bilateral relations; conscious of the role of confidence building measures in promoting such bilateral relations based on mutual trust and goodwill

Agreement on the Prohibition of Attack Against Nuclear Installations and Facilities, India-Pak., Dec. 31, 1988, http://indianembassy.org/South_Asia/Pakistan/Prohibition_Attack_Nuclear_Dec_31_1988.html [hereinafter Agreement on Nuclear Installations].

[FN103]. Id. ¶ 1(i). It was signed by Humayun Khan, Foreign Secretary of Pakistan, and K.P.S. Menon, Foreign Secretary of India. See id.

[FN104]. Id. ¶ 1(ii).

[FN105]. Id. ¶ 2 (“Each Contracting Party shall inform the other on 1st January of each calendar year of the latitude and longitude of its nuclear installations and facilities and whenever there is any change.”).

[FN106]. Joint Declaration on the Complete Prohibition of Chemical Weapons, India-Pak., Aug. 19, 1992, available at http://www.indianembassy.org/South_Asia/Pakistan/Joint_Declaration_C_W_August_19_1992.html [hereinafter Joint Declaration on Chemical Weapons]. The preamble recites:

The Government of the Islamic Republic of Pakistan and the Government of the Republic of India, reaffirming their commitment to durable peace and the development of friendly and harmonious relations; conscious of the role of confidence building measures in promoting such bilateral relations based on mutual trust and goodwill; recognizing that disarmament agreements constitute an important confidence building measure; reaffirming their respective unilateral declarations of non-possession of chemical weapons; convinced that a complete and effective prohibition of chemical weapons will contribute to the security of all States; reaffirming their respective commitment to the Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

Id. pmbl.

[FN107]. Id. ¶ 1.

[FN108]. For an archive of related stories, see Global Beat: South Asian Nuclear Crisis, <http://www.bu.edu/globalbeat/pubs/india.html> (last visited Mar. 30, 2007).

[FN109]. The preamble to the Lahore Declaration states that

[t]he Prime Ministers of the Republic of India and the Islamic Republic of Pakistan:

Sharing a vision of peace and stability between their countries, and of progress and prosperity for their peoples;

Convinced that durable peace and development of harmonious relations and friendly cooperation will serve the vital interests of the peoples of the two countries, enabling them to devote their energies for a better future;

Recognising that the nuclear dimension of the security environment of the two countries adds to their responsibility for avoidance of conflict between the two countries;

Committed to the principles and purposes of the Charter of the United Nations, and the universally accepted principles of peaceful co-existence;

Reiterating the determination of both countries to implementing the Simla Agreement in letter and spirit;

Committed to the objective of universal nuclear disarmament and non-proliferation;

Convinced of the importance of mutually agreed confidence building measures for improving the security environment;

Recalling their agreement of 23rd September, 1998, that an environment of peace and security is in the supreme

national interest of both sides and that the resolution of all outstanding issues, including Jammu and Kashmir, is essential for this purpose

Lahore Declaration pmbL., India-Pak., Feb. 21, 1999, available at <http://www.usip.org/library/pa/ip/ip-lahore/9990221.html>.

[FN110]. *Id.*

[FN111]. A.G. Noorani, *The Truth About Agra*, *Hindu*, July 29, 2005, at 7, <http://www.hinduonnet.com/fline/fl2215/stories/20050729002104400.htm>. According to an author on the Pakistani side,

Pakistani officials maintain that the Indians backtracked thrice on an agreed draft following pressure from some of their cabinet ministers opposed to the peace process. The Indians objected to the formulation of the proposed declaration which reportedly said that, "The settlement of the Kashmir issue would pave the way for normalisation of relations between the two countries."

Zahid Hussain, *A Bridge Too Far*, *Newsline*, Aug. 2001, at 2 <http://www.newsline.com.pk/NewsAug2001/coverstory1.htm>. The then Indian Prime Minister Vajpayee said that "During the talks, he [General Musharraf] took a stand that the violence that was taking place in Jammu and Kashmir could not be described as 'terrorism.' He continued to claim that the bloodshed in the State was nothing but the people's battle for freedom." According to him, it was this stand that resulted in the failure of the Agra Summit. *Musharraf to Blame for Summit Failure*, *Hindu*, Sept. 27, 2006, <http://www.hindu.com/2006/09/27/stories/2006092711440100.htm>.

[FN112]. "There has been trust deficit in our relations with Pakistan. But we cannot stand still," Prime Minister Manmohan Singh said at a recent press conference. "I sincerely believe that our two countries have to find ways and means to get over the problems, that include terrorism," Singh said. *Indo-Pak Relations Suffering from 'Trust Deficit': PM*, *Times India*, Sept. 24, 2006, <http://timesofindia.indiatimes.com/articleshow/2022986.cms>.

[FN113]. See Kahler, *supra* note 8, at 667-68. Kahler also lists the judiciary and business entities as powerful constituencies in the context of legalization. In other cases, the risk of these revenue streams being threatened by legalization has had the opposite effect and the legal community has been the primary opponent of legalization. *Id.* One example of this is the stunted opposition of the English legal profession to the U.K.'s ratification of the United Nations Convention on Contracts for the International Sale of Goods in 1980. See Angelo Forte, *The United Nations Convention on Contracts for the International Sale of Goods: Reason and Unreason in the United Kingdom*, 26 *U. Balt. L. Rev.* 51 (1997).

[FN114]. See David L. Richards, *Perilous Proxy: Human Rights and the Presence of National Elections*, 80 *Soc. Sci. Q.* 648, 648-65 (1999).

[FN115]. Abbott & Snidal, *supra* note 18, at 434. They write that "[l]egal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements." *Id.*

[FN116]. Kal Raustiala, *Form and Substance in International Agreements*, 99 *Am. J. Int'l L.* 581, 593 (2005). "[T]he risk of opportunism may be central to the choice between legal and nonlegal agreement." *Id.* at 594.

[FN117]. See *id.* at 600.

[FN118]. *Id.*

[FN119]. *Id.* at 601.

[FN120]. See Bureau of Democracy, Human Rights & Labor and Bureau of Intelligence and Research, Documenting Atrocities in Darfur 2 (2004), [http:// www.state.gov/g/drl/rls/36028.htm](http://www.state.gov/g/drl/rls/36028.htm) [hereinafter Documenting Atrocities in Darfur].

[FN121]. See Int'l Comm'n of Inquiry, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, U.N. Doc. S/2005/60 (Jan. 23 2005), available at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf [hereinafter COI Report].

[FN122]. See *id.* at 23-25.

[FN123]. *Id.* at 24.

[FN124]. See Documenting Atrocities in Darfur, *supra* note 120.

[FN125]. See Shams Ghoneim, The Horror of Darfur, Iowa City Press-Citizen, Dec. 24, 2006.

[FN126]. A Daily Journal of Politics, New Republic, July 21, 2005, [http:// www.tnr.com/etc.mhtml?pid=2733](http://www.tnr.com/etc.mhtml?pid=2733).

[FN127]. Eric Reeves, We Have Learned Nothing from Rwanda, Sudanreeves.org, July 6, 2005, <http://www.sudanreeves.org/Sections-article508-p1.html> (quoting Mukesh Kapila); see also Documenting Atrocities in Darfur, *supra* note 120 (“The primary victims have been non-Arab residents of Darfur. Numerous credible reports corroborate the use of racial and ethnic epithets by both the Jingaweit and GOS military personnel; ‘Kill the slaves; Kill the slaves!’ and ‘We have orders to kill all the blacks’ are common. One refugee reported a militia member stating, ‘We kill all blacks and even kill our cattle when they have black calves.’ Numerous refugee accounts point to mass abductions, including persons driven away in GOS vehicles, but respondents usually do not know the abductees’ fate. A few respondents indicated personal knowledge of mass executions and gravesites.”). Reeves writes that Mr. Kapila was forced to resign under pressure from Khartoum. Eric Reeves, The “Two Darfurs”: Redefining a Crisis for Political Purposes, Sudanreeves.org, May 20, 2005, [http:// www.sudanreeves.org/Sections-article514-p1.html](http://www.sudanreeves.org/Sections-article514-p1.html).

[FN128]. See Eric Reeves, Genocide in Darfur-How the Horror Began, Sudan Tribune, Sept. 3, 2005, at 4, available at [http:// www.sudantribune.com/article.php3?id_article=1144](http://www.sudantribune.com/article.php3?id_article=1144); S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004); see also Office of Deputy Special Representative of the U.N. Secretary-General for Sudan, Darfur Humanitarian Profile No. 8, ¶ 16 (Nov. 1, 2004) (“The total conflict-affected population in Darfur is estimated at 2.27 million people, one third of the estimated pre-conflict population of 6.3 million. The total number of IDPs in Darfur is estimated at 1.65 million, while the number of affected residents accessed by humanitarian agencies is about 627,000.... The numbers are highest in West Darfur with a total of 833,036 affected people, which is half of the pre-conflict West Darfur population of 1.6 million. The West Darfur figure includes 652,509 IDPs. South Darfur has 761,030 conflict-affected people, including 595,594 IDPs. North Darfur, registering the lowest number of the three Darfur States, has an estimated 685,200 conflict affected people, of which 403,000 are IDPs.”); Colin L. Powell, United States Secretary of State, Testimony Before the Senate Foreign Relations Committee (Sept. 9, 2004), available at [http:// www.state.gov/secretary/former/powell/remarks/36042.htm](http://www.state.gov/secretary/former/powell/remarks/36042.htm).

[FN129]. See Reeves, *supra* note 128, at 2 (“Extant data suggest that between 350,000 and 400,000 have perished during the past 29 months.”).

[FN130]. *Id.* at 5. Reeves also writes that “as villagers have fled to camps for displaced persons and into eastern Chad, they have created extremely vulnerable populations in highly concentrated locations.” *Id.* at 4.

[FN131]. S.C. Res. 1556, supra note 128. The preamble of resolution 1556

[r]eiterat[es] [the Security Council's] grave concern at the ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians that are placing the lives of hundreds of thousands at risk, [c]ondemn[s] all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including indiscriminate attacks on civilians, rapes, forced displacements, and acts of violence especially those with an ethnic dimension, and expressing its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children, internally displaced persons, and refugees

Id. pmbl.

[FN132]. The resolution was drafted by the United States and co-sponsored by Britain, France, Germany, Chile, Spain and Romania. It was passed by a vote of 13-0, with China and Pakistan abstaining. Press Release, Security Council, Security Council Demands Sudan Disarm Militias in Darfur, U.N. Doc. SC/8160 (July 30, 2004).

[FN133]. See S.C. Res. 1556, supra note 128, ¶ 1.

[FN134]. See id. ¶ 7.

[FN135]. See id. ¶ 3.

[FN136]. See id. ¶ 6.

[FN137]. COI Report, supra note 121, at 3 (“[T]he Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur.”).

[FN138]. Id. at 59.

[FN139]. See id. at 5, 59-60.

[FN140]. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

[FN141]. COI Report, supra note 122, at 141. The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. The consequence of labeling conduct as genocide is that it triggers an obligation under article 1 to prevent and to punish it as a crime under international law. See id.

[FN142]. See Press Briefing, Pieter Feith, Pers. Representative of Javier Solana for Sudan/Deputy Director General of the Council General Secretariat, EU Action in Sudan/Darfur (Aug. 9, 2004); see also Sudan to Attend Peace Talks in Nigeria on Darfur: EU Finds No Evidence of Genocide in Darfur, Wash. Post, Aug. 9, 2004,

<http://www.genocidewatch.org/SudantoAttendPeaceTalksinNigeriaonDarfur>.

[FN143]. Darfur Peace Agreement, May 5, 2006, available at <http://allafrica.com/peaceafrica/resources/view/00010926.pdf> [hereinafter DPA].

[FN144]. See Glenn Kessler, Darfur Peace Accord A Battle of Its Own, Wash. Post, May 9, 2006, at A18 (“I’m disappointed in you. I expect people to keep their word,” Zoellick icily told Minnawi, according to observers. “I can be a very good friend, but I am a fearsome enemy.”).

[FN145]. See Int’l Crisis Group, Darfur’s Fragile Peace Agreement 1 (2006), <http://www.crisisgroup.org/home/index.cfm?id=4179&l=1>.

[FN146]. See id.

[FN147]. See id. at 1, 2.

Abdel Wahid gave as reasons for his decision: continued attacks on his forces, both on the ground and in negative propaganda; and the initiative taken by the SLA/MM and JEM to attend a high-level meeting in Tripoli on 6 January 2006 without consultation with his faction and then to form the Revolutionary Alliance of Western Sudan on 18 January 2006. Even an ephemeral and ill-advised initiative by the Slovenian presidency of the European Union (EU) to resolve the Darfur conflict played a role in undermining the shaky rebel unity. See ‘Important statement from the SLA negotiating team on the circumstances surrounding the decision by Abdel Wahid Mohamed Nur to cease the coordination and common vision’, dated 17 February 2006, posted on Sudaneseonline.com on 18 February 2006.

Id. at 2 n.7.

[FN148]. DPA, supra note 143, pmb1.

[FN149]. See id. art. 1, ¶ 2; see also id. art. 3, ¶ 24 (“The Parties reiterate their commitment to respect and promote human rights and fundamental freedoms as detailed below and in international human rights covenants ratified by the GoS.”).

[FN150]. See id. art. 1, ¶ 4.

[FN151]. See id. art. 1, ¶ 5.

[FN152]. See id. art. 1, ¶ 6.

[FN153]. See id. art. 1, ¶ 8.

[FN154]. See id. art. 1, ¶ 9.

[FN155]. See id. art. 1, ¶ 13.

[FN156]. See id. art. 1, ¶ 15.

[FN157]. Id. art. 2, ¶ 19.

[FN158]. See id. art. 3, ¶ 25.

[FN159]. See id. art. 3, ¶ 25(a).

[FN160]. See id. art. 3, ¶ 25(b).

[FN161]. See id.

[FN162]. See id.

[FN163]. See id. art. 3, ¶ 25(c).

[FN164]. See id. art. 3, ¶ 25(e).

[FN165]. See id. art. 3, ¶ 26.

[FN166]. See id. art. 3, ¶ 29.

[FN167]. See id.

[FN168]. See id. art. 3, ¶ 32.

[FN169]. See id. art. 3, ¶ 31.

[FN170]. See id. art. 3, ¶ 33.

[FN171]. See id. art. 3, ¶ 36; see also id. art 3, ¶ 39 (“Ethnic and cultural communities shall have the right to practise their beliefs, use their languages and develop their cultures within their customs.”).

[FN172]. See id. art. 3, ¶ 37 (“Every person shall have an unrestricted right to freedom of expression, reception and dissemination of information and publication”).

[FN173]. Id. art. 3, ¶ 41.

[FN174]. See id. art. 6, ¶ 48.

The TDRA ... shall serve as the principal instrument for the implementation of this Agreement and for enhancing coordination and cooperation among the three States of Darfur. The TDRA shall be a symbol of reconciliation and unity of the people of Darfur and their effort to build a future based on peace and good neighborliness.

Id. art. 6, ¶ 49.

[FN175]. Id. art. 6, ¶ 53.

[FN176]. See id. art. 6, ¶ 56.

[FN177]. Id. art. 6, ¶ 57.

[FN178]. See id. art. 8, ¶¶ 68-69(b).

[FN179]. See id. art. 8, ¶ 69(c).

[FN180]. See id. art. 8, ¶ 71.

[FN181]. See id. art. 6, ¶ 58 (“The National Elections Commission (NEC) shall organize and supervise the referendum on the status of Darfur. The National Elections Law shall specify the rules and procedure governing the referendum. The referendum shall be internationally monitored.”).

[FN182]. See id. art. 10, ¶ 73 (“Darfurians shall be adequately represented in the Constitutional Court, the National Supreme Court and other National Courts, as well as in the National Judicial Service Commission, by competent and qualified lawyers.”).

[FN183]. See id. art. 11, ¶ 75 (“In order to create a sense of national unity and belonging, Darfurians shall be fairly represented in the National Civil Service Commission.”); see also id. art. 11, ¶ 76 (“[A] Panel of Experts shall be established under the National Civil Service Commission to determine the level of representation of Darfurians in the NCS across all tiers ... (a) The Panel shall identify any area of imbalances that have undermined the representation of Darfurians in the NCS and make practical and action-oriented recommendations”).

[FN184]. See id. art. 13, ¶ 84.

[FN185]. See id. art. 12, ¶ 79 (“Darfurians shall be fairly represented at all levels [in the Sudan Armed Forces (SAF)], including in senior command positions”).

[FN186]. See id. art. 14, ¶ 85 (“Darfurians shall be fairly represented in the Management and Governing Councils of Public Universities and other educational institutions of higher learning in the National Capital and in Darfur, taking into account the requirements of qualification and competence.”).

[FN187]. See id. art. 14, ¶ 88 (“[N]ot less than 15% of the annual intake of public universities and other institutions of higher learning in the National Capital, and not less than 50% in the case of such universities and institutions located in Darfur, shall be reserved for students from Darfur for a minimum period of ten years.”).

[FN188]. Id. art. 8, ¶ 65; see also id. art. 8, ¶ 66 (“The Senior Assistant shall have powers that will enable him/her influence national policies. To this end, he/she shall be a member of, inter alia, the National Council of Ministers, the National Security Council and the National Planning Council and shall participate in their deliberations and decision-making.”).

[FN189]. See id. art. 8, ¶ 66(e). Appointees included “the Heads of the Darfur Rehabilitation and Resettlement Commission, the Darfur Reconstruction and Development Fund, the Darfur Land Commission, the Darfur Security Arrangements Implementation Commission, the Darfur Peace and Reconciliation Council, [and] the Darfur Compensation Commission.” Id.

[FN190]. Id. art. 6, ¶ 61 (“Without prejudice to the provisions of the CPA relating to the North-South border and any international agreements in force between the Republic of the Sudan and neighbouring countries, the northern boundaries of Darfur shall return to the positions as at 1 January 1956. A technical ad hoc team shall be established to carry out demarcation accordingly.”).

[FN191]. Id. art. 22, ¶ 214(c).

[FN192]. Id. art. 22, ¶ 214(f).

[FN193]. See id. art. 23, ¶ 223 (“If the Parties are unable to resolve the dispute through consensus, the Chairperson of the Joint Commission shall consult with the international members of the Joint Commission and issue a final Ruling. The Parties shall be bound by the ruling.”).

[FN194]. Id. art. 22, ¶ 214(k); see also id. art. 22, ¶ 214(l) (stating that the Parties’ [u]ndertake that all the troops and forces under their command at all levels ensure observance, implementation and protection of the present Agreement”).

[FN195]. See id. art. 24, ¶ 226 (“(a) All attacks against the members and locations of another Party, including acts of sabotage, hostage-taking, detention, laying of mines and seizure of property and materiel belonging to another Party. (b) All attacks, harassment, abduction, intimidation and injury to civilians, including IDPs, humanitarian workers and other noncombatants, and any seizure of their equipment and property ... (l) Any recruitment into the military forces of a Party in Darfur. (m) Any recruitment or use of boys and girls under age 18 years by Parties. (n) All hostile propaganda and incitement to military action.”).

[FN196]. See id. art. 25, ¶ 229; see also id. art. 27, ¶¶ 291, 359-62.

[FN197]. See id. art. 27, ¶ 342.

[FN198]. See id. art. 27, ¶ 329 (“A Buffer Zone shall be an area in which the following rules apply: (a) There shall be no forces of any Party and no other armed groups and militia. (b) There shall be no military activities conducted by any Party or any armed group or militia. (c) There shall be no carrying of weapons by any person who is not a member of AMIS, except in accordance with the provisions for policing contained in this Agreement.”).

[FN199]. See id. art. 26, ¶ 268; see also id. art. 27, ¶ 323(c) (“In consultation with the Parties, the Chairperson of the Ceasefire Commission shall establish Buffer Zones in the areas of most severe conflict.”); id. art. 27, ¶ 323(d) (“AMIS shall monitor and patrol the Buffer Zones.”); id. art. 27, ¶ 328 (“In the interests of disengagement, confidence-building and enhanced security, the Chairperson of the Ceasefire Commission, in consultation with the Parties, shall establish Buffer Zones in the areas of most intense conflict. The boundaries of the Buffer Zones shall be indicated clearly on maps.”).

[FN200]. See id. art. 26, ¶¶ 272-73.

[FN201]. See id. art. 26, ¶ 278.

[FN202]. See id. art. 26, ¶ 288.

[FN203]. See id. art. 25, ¶ 240.

[FN204]. See id. art. 25, ¶ 241. Paragraph 247 is interesting: “The Chairperson of the Ceasefire Commission shall issue regular press statements on violations of the ceasefire, following investigations of the incidents, and shall post these statements on the websites of the AU and AMIS and give copies to the Parties.” Id. art. 25, ¶ 247. This is perhaps an attempt to name and shame the offenders--a recognition of the role of non-legal sanctions.

[FN205]. Id. art. 26, ¶ 250(a); see also id. art. 26, ¶ 256 (“The Chairperson shall issue regular public statements on ceasefire violations and progress towards implementing this Agreement and shall post these statements on the websites of the AU and AMIS and give copies to the Parties.”).

[FN206]. See id. art. 25, ¶ 250(b)-(d).

[FN207]. Id. art. 27, ¶ 334 (“Within their respective areas of control, the Parties shall endeavour through non-military means to ensure compliance with the ceasefire by other armed groups and militia that are not parties to this Agreement, including negotiations, mediation and traditional forms of conflict resolution; enlisting the support of traditional leaders and local authorities; and arms control methods, including registration of arms, storing of arms and restrictions on carrying of arms.”).

[FN208]. Id. art. 27, ¶ 299.

[FN209]. See id. art. 27, ¶ 314 (“The GoS shall present to the Ceasefire Commission a comprehensive plan for neutralising and disarming the Janjaweed/armed militia specifying actions to be taken during all phases of the Ceasefire.”); see also id. art. 27, ¶ 317 (“The GoS, with support from AMIS, shall take all other steps required to completely eliminate the threat posed by Janjaweed/armed militia to the civilian population and ensure compliance with the Ceasefire.”).

[FN210]. See id. art. 27, ¶ 338 (“The GoS shall neutralise the threat posed by the Janjaweed and armed militia in areas of GoS control. This shall include confining them and controlling their movement within strictly limited locations. Details of these activities shall be provided to AMIS.”); id. art. 27, ¶ 339 (“In coordination with AMIS and the Ceasefire Commission, the GoS shall take the necessary robust action against Janjaweed/armed militia according to the approved plan.”).

[FN211]. Id. art. 27, ¶ 367.

[FN212]. See id. art. 27, ¶¶ 370-71.

[FN213]. See id. art. 27, ¶ 322.

[FN214]. See id. art. 29, ¶ 439.

[FN215]. See id. art. 31, ¶ 458. The agenda for the DDCA is to include:

- (a) Measures for popularising and implementing this Agreement;
 - (b) Inter-communal and inter-tribal reconciliation;
 - (c) Safe return of refugees and IDPs;
 - (d) Land, water and natural resources, locations and regulation of nomadic migration routes;
 - (e) Human security and socio-economic issues;
 - (f) Small arms control and the interim regulation of community defence groups pending final disarmament;
 - (g) Ensuring that political differences are addressed through civil political processes and not through violence;
 - (h) The status and powers of Native Administration;
 - (i) Measures to preserve the multi-ethnic character of Darfur and
 - (i) [sic] Measures to address the special issues and concerns of women.
- Id. art. 31, ¶ 484.

[FN216]. See id. art. 31, ¶¶ 459-67; see also id. art. 31, ¶ 479 (“The first function of the DDDC shall be to popularise this Agreement and obtain support for it from all stakeholders in Darfur. This shall include discussing, understanding and disseminating the various component parts of this Agreement.”).

[FN217]. Id. art. 31, ¶¶ 469-70.

[FN218]. Id. art. 32, ¶ 508.

[FN219]. Id. art. 33, ¶ 511. The DAEC is to be formed within 3 months of the agreement. See id.

[FN220]. See id. art. 33, ¶ 512.

[FN221]. See id. art. 33, ¶ 515.

[FN222]. Id. art. 17, ¶ 101.

[FN223]. One of the reasons for the NCP's opposition to compensation was the concern that to allow compensation would be an acceptance that the government was responsible for the killings. See id. art. 17, ¶¶ 98-102.

[FN224]. S.C. Res. 1679, ¶ 1, U.N. Doc. S/RES/1679 (May 16, 2006).

[FN225]. Treaty of Peace, Egypt-Isr., pmb., Mar. 26, 1979, 1136 U.N.T.S. 115.

[FN226]. See id. art. I, ¶¶ 1-2; see also id. annex I, app. art. VIII (“Egypt will resume the exercise of its full sovereignty over evacuated parts of the Sinai upon Israeli withdrawal as provided for in article I of this Treaty.”).

[FN227]. Id. art. II (“The permanent boundary between Egypt and Israel in the recognized international boundary between Egypt and the former mandated territory of Palestine, as shown on the map at Annex II, without prejudice to the issue of the status of the Gaza Strip. The Parties recognize this boundary as inviolable.”).

[FN228]. See id.

[FN229]. See id. art. III, ¶ 1.

[FN230]. Id. art. III, ¶ 2.

[FN231]. See id. art. IV, ¶ 2.

United Nations forces will supervise the implementation of this Appendix and will employ their best efforts to prevent any violation of its terms When United Nations forces deploy in accordance with the provisions of Article [] II of this Appendix, they will perform the functions of verification in limited force zones in accordance with Article VI of Annex I, and will establish check points, reconnaissance patrols, and observation posts in the temporary buffer zones described in Article II above. Other functions of the United Nations forces which concern the interim buffer zone are described in Article V of this Appendix.

Id. Annex I, app. art. III, ¶¶ 2-3.

[FN232]. See id., art. IV, ¶ 2.

[FN233]. See id.

[FN234]. See id. Annex I, app. art. IV, ¶ 3(a)-(g).

[FN235]. See id. Annex I, app. art. VII, ¶ 1(a).

[FN236]. See id. art. VI, ¶ 2 (“The Parties undertake to fulfill in good faith their obligations under this Treaty,

without regard to action or inaction of any other party and independently of any instrument external to this Treaty.”).

[FN237]. See *id.* art. VI, ¶ 4. Paragraph 5 provides that “[s]ubject to Article 103 of the United Nations Charter, in the event of a conflict between the obligation of the Parties under the present Treaty and any of their other obligations, the obligations under this Treaty will be binding and implemented.” *Id.* art. VI, ¶ 5.

[FN238]. See *id.* art. V, ¶ 1.

[FN239]. See *id.* art. VII, ¶ 1 (“Disputes arising out of the application or interpretation of this Treaty shall be resolved by negotiations.”).

[FN240]. See *id.* art. VII, ¶ 2 (“Any such disputes which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.”).

[FN241]. See *id.* art. VIII.

[FN242]. See *id.* Annex I, app. art. I, ¶¶ 1, 3. There is an extremely detailed process for withdrawal outlined in Appendix to Annex I, Organization of Movements in the Sinai:

Both parties agree on the following principles for the sequences of military movements.

a. Notwithstanding the provisions of article IX, paragraph 2, of this Treaty, until Israeli armed forces complete withdrawal from the current J and M lines established by the Egyptian-Israeli Agreement of September 1975, hereinafter referred to as the 1975 Agreement, up to the interim withdrawal line, all military arrangements existing under that Agreement will remain in effect, except those military arrangements otherwise provided for in this Appendix.

b. As Israeli armed forces withdraw, United Nations forces will immediately enter the evacuated areas to establish interim and temporary buffer zones as shown on Maps 2 and 3, respectively, for the purpose of maintaining a separation of forces. United Nations forces' deployment will precede the movement of any other personnel into these areas.

c. Within a period of seven days after Israeli armed forces have evacuated any area located in Zone A, units of Egyptian armed forces shall deploy in accordance with the provisions of article II of this Appendix.

d. Within a period of seven days after Israeli armed forces have evacuated any area located in Zones A or B, Egyptian border units shall deploy in accordance with the provisions of article II of this Appendix, and will function in accordance with the provisions of article II of Annex I.

e. Egyptian civil police will enter evacuated areas immediately after the United Nations forces to perform normal police functions.

f. Egyptian naval units shall deploy in the Gulf of Suez in accordance with the provisions of article II of this Appendix.

g. Except those movements mentioned above, deployments of Egyptian armed forces and the activities covered in Annex I will be effected in the evacuated areas when Israeli armed forces have completed their withdrawal behind the interim withdrawal line.

Id. Annex I, app. art I, ¶ 2.

[FN243]. See *id.* Annex I, app. art. IV, ¶ 2 (“The Joint Commission will be composed of representatives of each Party headed by senior officers. This Commission shall invite a representative of the United Nations when discussing subjects concerning the United Nations, or when either Party requests United Nations presence. Decisions of the Joint Commission will be reached by agreement of Egypt and Israel.”).

[FN244]. See *id.* Annex I, art. I, ¶ 4.

[FN245]. *Id.* Annex I, art. VII, ¶ 1. Paragraph 3 provides that “[a] direct telephone link between the two offices will

be set up and also direct telephone lines with the United Nations command will be maintained by both offices.” Id. Annex I, art. VII, ¶ 3.

[FN246]. See id. arts. II-IV.

[FN247]. See id. art. I, ¶ 3.

[FN248]. See id. Annex III, art. 2.

[FN249]. See id. Annex III, art. 3.

[FN250]. See id. Annex III, art. 4.

[FN251]. See id. Annex III, art. 4, ¶ 2.

[FN252]. See id. Annex III, art. 6, ¶ 4.

[FN253]. See id. Annex III, art. 6, ¶ 6.

[FN254]. Id. Annex III, art. 5, ¶ 1.

[FN255]. Press Release, U.S., Egypt & Israel to Launch Historic Trade Partnership, USTR Zoellick to Participate in Signing in Cairo (Dec. 10, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/December/United_States,_Egypt_Israel_to_Launch_Historic_Trade_Partnership_USTR_Zoellick_to_Participate_in_Signing_in_Cairo.html. Mr. Zoellick said: ““This is the most important economic agreement between Egypt and Israel in two decades.... It is a concrete, practical result of President Bush's plan to promote closer U.S. trade ties with the Middle East so as to strengthen development, openness, and peaceful economic links between Israel and its neighbors.”” Id. One source estimates that 35,000 jobs will be created. Jim Phipps et al., *Middle Eastern Law*, 40 *Int'l Law* 597, 602 (2004).

[FN256]. President Sadat was isolated in the Arab world and was assassinated in 1981.