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A Problem-Oriented Approach

Third Edition

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Tracing the Evolution of International Law Through Two Problems

I. THE CHAD-LIBYA WAR OVER THE AOUZOU STRIP

In the middle of the Sahara desert lies a narrow area of barren land known as the Aouzou Strip. Sparsely inhabited by a few thousand members of the nomadic Toubou people, the Strip sits on the border between Libya and Chad. The Strip's dimensions are defined not by nature but by humans: the Strip represents the core area of disagreement between the claims of Libya as to the location of its southern border and the claims of Chad as to the location of its northern border. The Strip has virtually no economic potential to either Chad or Libya, either on its surface or below; nor has either state seen the Strip as having any military or strategic value, given its isolation from population centers and its inhospitable climate. Yet since the independence of Libya from Italian colonial rule in 1951 and of Chad from French colonial rule in 1960, the two states have fiercely contested — including through recourse to armed force — the location of their common border and thus title to the Strip.

The essence of Chad's claim to the territory is that the border was fixed by a treaty — but not a treaty between Libya and Chad. Rather, Chad has asserted that the 1955 Treaty of Friendship and Good Neighbourliness between Libya and France included a formal acceptance by Libya of France's claims to the borders of its colonial possessions in Africa. These borders had themselves been the subject of earlier agreements not between France and Libya, but between France and the previous colonial powers in the area — namely, Italy and Britain. Chad claimed that the 1955 Treaty that recognized the validity of these previous colonial agreements still bound Libya. Libya, for its part, asserted title not only to the Strip but to significant amounts of territory south of it, based on a variety of assertions, including the invalidity of the 1955 Treaty that France allegedly coerced Libya's king into signing; the lack of any recognition in that treaty of the Chad-Libya border in particular; the allegiance to Libya of various inhabitants of the region;

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and the prior title to the territory held by the Ottoman Empire and Italy, the predecessor colonial powers to Libya.

Libya asserted its claims in a variety of ways. In the early 1970s, Libya supported a rebellion by inhabitants of northern Chad against the central government; after the central government lost control of the Strip, the local leaders allowed Libyan military personnel into the area, following which Libya set up a de facto administration of the region. Diplomatic negotiations throughout the 1970s, mediated by the Organization of African Unity (OAU), failed to reach a solution. In 1980, as Chad's civil war intensified, Libya invaded large areas of Chad outside the Strip, captured the capital, N'Djamena, and ousted the official (although very weak) government in favor of its pro-Libyan rival; Libya and the new government even discussed the merger of the two states. The invasion was strongly condemned by the OAU and France. In 1982, after the OAU threatened to cancel its summit scheduled to take place in Tripoli, Libya agreed to pull its troops out of much of the country.

In 1983, with Libya still occupying much of northern Chad (including the Strip) and arming rebels, the Chad government appealed to the UN Security Council to demand Libya's withdrawal. The Soviet Union vetoed a UN resolution calling for the withdrawal. Chad succeeded in ousting the Libyan military from northern Chad — except for the Strip — in a lightning action in August 1987. After two more years of OAU-sponsored mediation and negotiation, the two states agreed in August 1989 to settle the border dispute by political means within one year or, if they failed to do so, to submit it for determination to the International Court of Justice (ICJ), the judicial organ of the United Nations, in The Hague. In late August and early September 1990, after the failure of negotiations, the two states asked the Court to determine their mutual border in accordance with principles of international law.

A. The Law of Nations in Its Traditional Incarnation

The dispute between Chad and Libya concerns international law, and not only political interactions, in two key senses. First, the parties themselves invoked legal arguments to assert their title to the disputed territory; and, second, they agreed, after much discussion and fighting, that they would allow a judicial body to resolve their dispute solely by recourse to legal rules. Throughout the pages that follow, the reader will see numerous problems in which the various actors — not always states — use legal arguments to make claims, justify their own actions, and acknowledge obligations. A decision by those parties to entrust the final resolution of their dispute to an international court is, however, relatively rare in the field of international law. Such regularized resort to tribunals for the settlement of international disputes represents an aspiration of many of the founders and modern practitioners of international law, but it is by no means the only way in which the law can prove decisive or influential to an outcome. We offer this case merely to demonstrate the role of law in the resolution of disputes without suggesting that the mechanism of a court decision is the only possible, or even the most common, arena for decision making.

The Aouzou Strip problem also provides an example of an international legal disagreement in its most traditional sense: the principal actors are states; the resource under dispute is territory; the legal instruments on which the two sides rely are quite formal — namely, treaties; the doctrinal arguments of the parties about the formal requisites of title to territory reflect (although they do not exclusively rely upon) concepts dating back to the conquest of much of the world by European states 500 years ago. This sort

of dispute could easily have arisen 100 or 200 years ago (with colonial powers replacing the states of today as parties).

To gain a sense of how international law developed to address these interstate disputes, one must have some grasp of its history. Legal historians differ significantly, however, in arriving at an appropriate starting point for such history. From their earliest days, organized political communities have entered into agreements to regulate interactions they might have. For instance, in the thirteenth century B.C., the Egyptian pharaoh Rameses II entered into a Treaty of Peace, Alliance, and Extradition with a neighboring king; Asian kingdoms routinely engaged in similar practices. Ancient entities settled some disputes through accords, though recourse to war was the more common enterprise. Most historians of international law nonetheless focus on Europe as the birthplace of international law as we know it today; as indicated in the following excerpt, they regard the law's key formative years as the time of the decline of the Holy Roman Empire and the birth of new states in Europe.

Werner Levi, *Contemporary International Law*

6-13 (2d ed. 1991)

Mainly as a result of new economic forces, the Holy Roman Empire broke down, which brought about the collapse of the at least nominally centralized order of Europe and foreshadowed the need for a different legal system. . . .

As new centers of independent power arose, laws regulating their coexistence and relations were needed, although until the age of absolutism had passed, these laws had to refer to the person of the rulers more than to political entities. Gradually, the relationships of subordination and superordination under the universalist reign of one emperor and pope were replaced by a system of coordination among sovereign rulers. The feudalistic entities with their relatively uncertain borders gave way to states based upon sharply defined territory. . . . The preeminent role of territory in international law began. . . .

Once the multitude of specific limited jurisdictions . . . was replaced by the principle of territoriality with one sovereign ruler as the basis of the state, a number of legal consequences followed. One was the absolute power and exclusive jurisdiction of one ruler in his or her territory. The second was the prohibition of interference by other monarchs in a state's internal affairs. The third was the rise of immunity. The fourth was the gradual elaboration of equality among states in diplomatic practice and of the principles regulating this practice. . . .

Many of the principles and norms developed during this time, especially those fortifying sovereignty, are still accepted today, with states replacing rulers as subjects of the law. But initially, the law was not applicable to peoples and territories outside Western society (except the United States when it became independent). . . . Rules legitimizing imperialism and its means . . . endured well into the twentieth century, until most colonies became independent.

Early Writers on International Law

During these first centuries in the development of international law, legal and political writers . . . collected existing norms and suggested new ones. And they provided the theoretical and philosophical foundations, justifications, and guidelines for the international legal system, always keeping in mind the interests of their countries.

In increasing measure, treaties, especially multilateral treaties, implemented and eventually surpassed in volume custom as a source of international norms. The growing importance and numbers of treaties also meant a simplification of their conclusion, the routinization of what used to be prestige matters, and, most important to the new and Communist states today, a greater effectiveness of the rule that states cannot be bound against their will or that they should participate in the making of rules binding them.

The material covered by treaties was greatly augmented, reflecting both the growing volume of interaction among states and the multiplication of state interests. Agreements were reached on rules of state conduct. Communications, trade and commerce, financial matters, scientific and health subjects, and humanitarian concerns surpassed politics in volume, not importance, as topics of international conferences, thereby inaugurating a trend that continues in the contemporary era. Treaties establishing international organizations, mainly in the "noncontroversial" field of communications, made their appearance.

Grotius's natural law approach can be seen in the following passages from his treatise on war and peace.

Hugo Grotius, *De Jure Belli ac Pacis Libri Tres, book 1*

9, 12-13, 15 (Francis Kelsey trans. 1925) (1625)

1. . . . That body of law . . . which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement, few have touched upon. Up to the present time no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished. . . .

3. Such a work is all the more necessary because in our day, as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. On the lips of men quite generally is the saying of Euphemus, which Thucydides quotes, that in the case of a king or imperial city nothing is unjust which is expedient. Of like implication is the statement that for those whom fortune favours might makes right, and that the administration of a state cannot be carried on without injustice.

Furthermore, the controversies which arise between peoples or kings generally have Mars as their arbiter. That war is irreconcilable with all law is a view held not alone by the ignorant populace; expressions are often let slip by well-informed and thoughtful men which lend countenance to such a view. Nothing is more common than the assertion of antagonism between law and arms. . . .

8. [M]aintenance of the social order . . . which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it, the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.

9. From this signification of the word law there has flowed another and more extended meaning. . . . [I]t is meet for the nature of man, within the limitations of human intelligence, to follow the direction of a well-tempered judgement, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse.

Whatever is clearly at variance with such judgement is understood to be contrary also to the law of nature, that is, to the nature of man. . . .

17. [J]ust as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the law of nations. . . .

The geographical ambit of international law and its approach to the diversity of actors in the international system during its formative centuries remains a subject of great importance. Levi's more Eurocentric vision is echoed in the first edition of the leading English-language treatise on international law.

Lassa Oppenheim, *International Law, vol. 1, Peace*

30-31, 34, 218-219, 266-267 (1905)

§26. . . . There is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about the beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilisation and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States.

§27. Thus the membership of the Family of Nations has of late necessarily been increased and the range of dominion of the Law of Nations has extended beyond its original limits. . . . [T]here are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member. . . .

§29. The Law of Nations as a law between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family. . . .

§169. The territory of a State may consist of one piece of the surface of the globe only, such as that of Switzerland, [or it] may also be dismembered and consist of several pieces, such as that of Great Britain. All States with colonies have a "dismembered territory." . . . Colonies rank as territory of the motherland, although they may enjoy complete self-government and therefore be called Colonial States. . . .

confrontation of the Asian and European states "took place on a footing of equality and the ensuing commercial and political transactions, far from being in a legal vacuum, were governed by the law of nations as adjusted to local inter-state custom." The East Indies constituted the meeting ground of the Dutch, English, French and other European East India companies, on the one hand, and Asian sovereigns on the other. The more these contacts became intensified, the more they affected each other's practices with a common framework of diplomatic exchanges and treaty making.

Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*

40 Harv. Intl. L.J. 1, 22, 25, 29, 30, 49, 69, 79, 80 (1999)

. . . [A] central feature of positivism was the distinction it made between civilized and uncivilized states. The naturalist notion that a single, universally applicable law governed a naturally constituted society of nations was completely repudiated by jurists of the mid-nineteenth century. Instead, nineteenth-century writers such as Wheaton claimed that international law was the exclusive province of civilized societies. . . .

. . . [T]he distinction between the civilized and uncivilized was a fundamental tenet of positivist epistemology and thus profoundly shaped the concepts constituting the positivist framework. The racialization of positivist law followed inevitably from these premises — as demonstrated, for example, by the argument that law was the creation of unique, civilized, and social institutions and that only states possessing such institutions could be members of "international society." . . .

The concept of society enabled positivists to develop a number of strategies for explaining further why the non-European world was excluded from international law. One such strategy consisted of asserting that no law existed in certain non-European, barbaric regions. . . . A second strategy used to distinguish the civilized from the uncivilized consisted of asserting the fact that while certain societies may have had their own systems of law these were of such an alien character that no proper legal relations could develop between European and non-European states. . . .

The problem of the legal personality of non-European peoples could be most simply resolved by the actual act of colonization, which effectively extinguished this personality. Once colonization took place, the colonizing power assumed sovereignty over the non-European territory, and any European state carrying on business with that territory would deal with the colonial power. In this way, legal relations would once again take place between two European powers. . . .

Sovereignty manifested itself quite differently in the non-European world than in the European world. First, since the non-European world was not "sovereign," virtually no legal restrictions were imposed on the actions of European states with respect to non-European peoples. European states could engage in massive violence, invariably justified as necessary to pacify the natives and followed by the project of reshaping those societies in accordance with their particular vision of the world. Sovereignty was therefore aligned with existing European ideas of social order, political organization, progress, and development. . . . [Second,] lacking sovereignty, non-European states exercised no rights recognizable by international law over their own territory. Any legal restrictions on the actions of European states towards non-European states resulted from contentions among European states regarding the same territory, not from the rights of the non-European states. This is evident in the partition of Africa, which was determined in accordance with the needs of the major European states. . . .

. . . [T]he nineteenth century offers us an example of a much broader theme: the importance of the existence of the "other" for the progress and development of the discipline itself. Seen from this perspective, the nineteenth century is both distinctive and conventional. Its method, focus, and techniques are in many ways unique. But in another respect, the nineteenth century is simply one example of the nexus between international law and the civilizing mission. The same mission was implemented by the vocabulary of naturalism in sixteenth-century international law. Furthermore, the succeeding paradigm of pragmatism, which developed in the inter-war period, was similarly preoccupied with furthering the civilizing mission even as it condemned nineteenth-century positivism for being formalist and colonial. Thus, the only thing unique about the nineteenth century is that it explicitly adopted the civilizing mission and reflected these goals in its very vocabulary. The more alarming and likely possibility is that the civilizing mission is inherent in one form or another in the principal concepts and categories that govern our existence: ideas of modernity, progress, development, emancipation, and rights. The enormous task of identifying these biases and ridding the discipline of them continues, as does the related task of constructing an international law that fulfils its promise of advancing the cause of justice.

International law by the nineteenth century had developed an entire doctrine to justify acquisition of territory by colonial powers. That law recognized, for instance, that European states could acquire so-called empty land or *terra nullius*, or land not already under the control of another state — based on its purported discovery by Europeans, notwithstanding its prior discovery, so to speak, by indigenous peoples who may have been living on the territory for thousands of years. It also justified the colonial presence by placing great weight on treaties of cession whereby indigenous peoples signed over control of their land to colonial powers, despite the coerced nature of many of these agreements. Colonial powers could divide their possessions as they saw fit, a process that reached its apogee in the Congress of Berlin in 1884-1885, when the European imperial powers drew up legal spheres of influence for most of Africa, and continued with numerous bilateral agreements setting individual frontiers, such as those cited by Chad and Libya in the Aouzou Strip controversy.

In the case of territorial disputes between colonial powers not resolved by treaty, arbitral tribunals recognized by the end of the century that effective control over the territory — in terms of constant, peaceful, and acknowledged use — more than the original form of acquisition, was the key to title. Sometimes the law would accept title over hinterlands adjacent to those under clear control. Again, however, the views of the local populations played little if any role. The centrality of these colonial treaty arrangements, notwithstanding their historical context, ultimately proved decisive to the ICJ in adjudicating the boundary dispute.

B. Resolution of the Chad-Libya Conflict

On February 3, 1994, three and a half years after Chad and Libya submitted the case, the ICJ ruled 16-1 (the sole dissenter was the judge that Libya was allowed to appoint under the Court's rules) that the Aouzou Strip in its entirety, as well as all lands south of it claimed by Libya, belonged to Chad. The Court first examined the text and context of the 1955 Treaty and concluded that, contrary to Libya's assertions, it "was aimed at settling

all the frontier questions, and not just some of them." It then closely examined the various colonial agreements incorporated into the 1955 Treaty; these included agreements between Britain and France from 1898, 1899, and 1919, and between France and Italy from 1900 and 1902. The Court relied extensively on and even reprinted, a French colonial map from 1899 (see next page) that showed the border agreed to by France and Britain that year, although the Court ultimately concluded that France and Britain adopted a slightly different line (more favorable to Chad) in their 1919 agreement. The line from the 1919 France-Britain agreement, combined with the line resulting from the France-Italy agreements, determined the border, as Chad had claimed. The Court continued:

Case Concerning the Territorial Dispute (Libya/Chad)

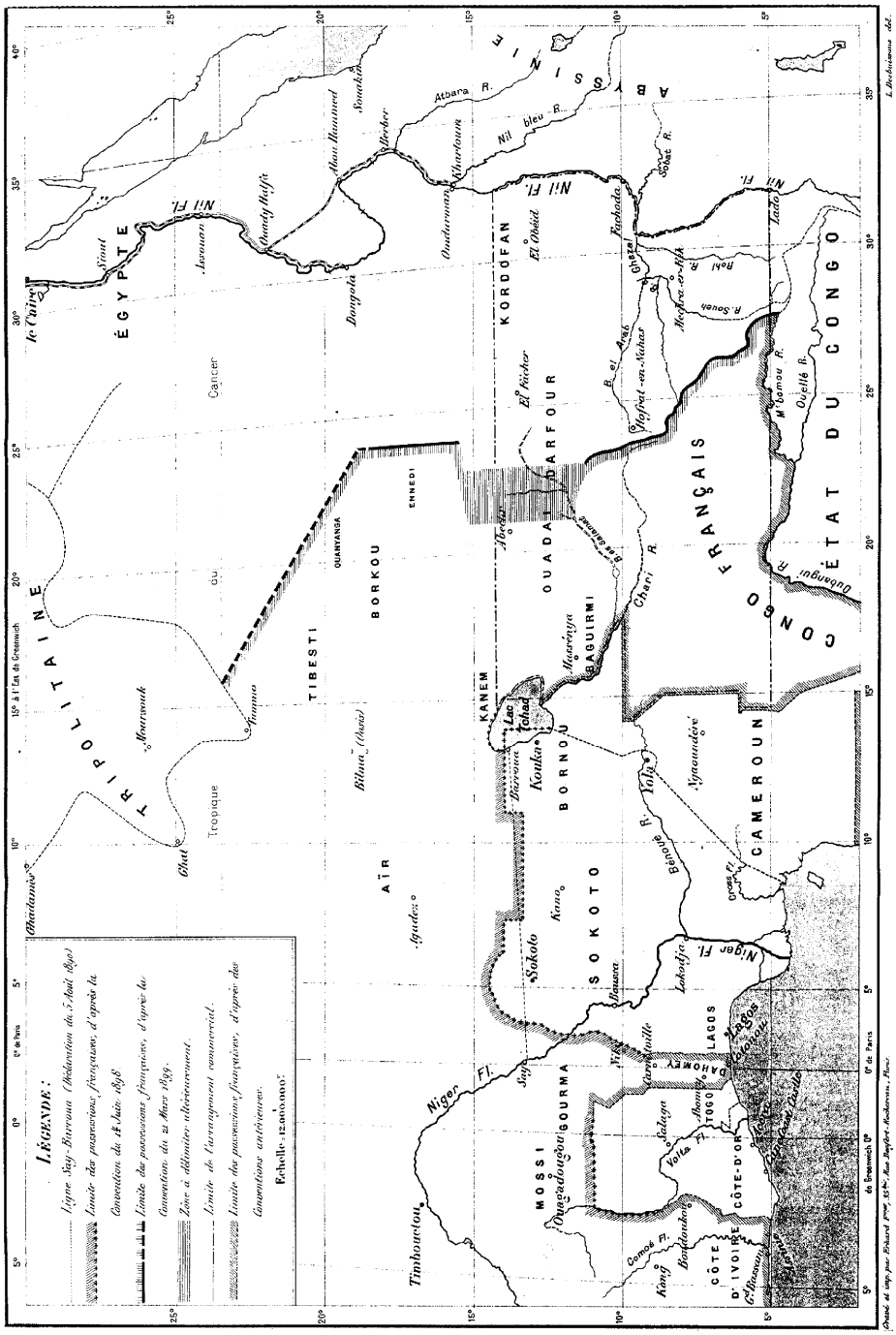
1994 I.C.J. 6 (Feb. 3)

66. Having concluded that a frontier resulted from the 1955 Treaty, and having established where that frontier lay, the Court is in a position to consider the subsequent attitudes of the Parties to the question of frontiers. No subsequent agreement, either between France and Libya, or between Chad and Libya, has called in question the frontier in this region deriving from the 1955 Treaty. On the contrary, if one considers treaties subsequent to the entry into force of the 1955 Treaty, there is support for the proposition that after 1955, the existence of a determined frontier was accepted and acted upon by the Parties. The Treaty between Libya and Chad of 2 March 1966 . . . deals with frontier questions. Articles 1 and 2 mention "the frontier" between the two countries, with no suggestion of there being any uncertainty about it. . . . If a serious dispute had indeed existed regarding frontiers, eleven years after the conclusion of the 1955 Treaty, one would expect it to have been reflected in the 1966 Treaty. . . .

68. The Court now turns to the attitudes of the Parties, subsequent to the 1955 Treaty, on occasions when matters pertinent to the frontiers came up before international fora. Libya achieved its independence nearly nine years before Chad; during that period, France submitted reports on this territory to the United Nations General Assembly. The report for 1955 . . . shows the area of Chad's territory as 1,284,000 square kilometres, which expressly includes [the Aouzou Strip]. . . . Moreover United Nations publications from 1960 onward continued to state the area of Chad as 1,284,000 square kilometres. . . . Libya did not challenge the territorial dimensions of Chad as set out by France.

69. As for Chad, it has consistently adopted the position that it does have a boundary with Libya, and that the territory of Chad includes the "Aouzou strip". . . . In 1977 Chad submitted a complaint to the Organization of African Unity regarding the occupation by Libya of the Aouzou strip. The OAU established an *ad hoc* committee to resolve the dispute. . . . Chad's complaint was kept before it for 12 years prior to the referral of the matter to this Court. . . .

70. In 1971, Chad complained in a statement to the United Nations General Assembly that Libya was interfering in its internal and external affairs. In 1977 it complained that the Aouzou strip had been under Libyan occupation since 1973. At the General Assembly's thirty-third session, in 1978, Chad complained to the Assembly of "the occupation by Libya of Aouzou, an integral part of our territory." In 1977 and 1978, and in each year from 1982 to 1987, Chad protested to the General Assembly about the encroachment which it alleged that Libya had made into its territory.


LÉGENDE :
Ligne Say-Barroua (Délimitation du 5 Août 1898)
Limite des possessions françaises, d'après la Convention du 14 Juin 1898
Limite des possessions françaises, d'après la Convention du 21 Mars 1899
Zone à délimiter ultérieurement.
Limite de l'envahissement commercial.
Limite des possessions françaises, d'après des Conventions antérieures.
Échelle 1:20.000.000e
ÉGYPTE
TRIPOLITAINE
Le Caire
Nil Fl.
Assouan
Oued Halfa
Abou Hamed
Souakim
Berber
Atbara R.
Nil bleu R.
Khartoum
Ouadi Medani
Dongola
Ouadai
Fachoda
Gobat R.
Lado
KORDOFAN
El Obéid
Ghazal
Bahr R.
R. Sueh
Meshra-er-Rek
Lac Tchad
Bir Gaouaoui
Kouka
Mogoreya
BAGUIRMI
Chari R.
Ouadai
DARFOUR
El Fasher
R. el Arab
Meshra-el-Mahat
Mbamou R.
Ouellé R.
Oubangui R.
CONGO FRANÇAIS
ÉTAT DU CONGO
Tropique du Cancer
Ghat
Mourzouk
Fezzan
TIBESTI
BORKOU
QUANTANGA
ENNEDI
KANEM
Bilma (Oasis)
AÏR
Agadez
Tombouctou
Niger Fl.
Say
Sokoto
Kano
SOKOTO
BORNOU
Benoué R.
Yola
Ngaoundéré
CAMEROUN
Cross Fl.
Lokodja
Niger Fl.
Nupe
Lagos
LAGOS
Magos
Porto Novo
DAHOMEY
TOGO
Ouagadougou
GOURMA
MOSSI
Volta Fl.
Salagha
Kumasi
CÔTE-D'OR
Comoé Fl.
Bondoukou
Kong
CÔTE D'IVOIRE
Cap Palmas
Cap Lahou
Cap Apollonia
Cap Nouvelle Zélande
Cap Blanc
Cap Vert
Cap Bojador
Cap Blanco
Cap Bon
Cap Spartivento
Cap Ras Tarfa
Cap Ras Hadid
Cap Ras Ajdir
Cap Ras Tajoura
Cap Ras Tarhuna
Cap Ras Ajdabia

71. . . . The Permanent Representative of Chad requested the President of the Security Council to convene a meeting as a matter of urgency to consider the extremely serious situation then prevailing. Chad repeated its complaints to the Security Council in 1983, 1985 and 1986. . . . All of these instances indicate the consistency of Chad's conduct in relation to the location of its boundary. . . .

72. [Although the 1955 Treaty allows either party to terminate it after 20 years,] the Treaty must, in the view of the Court, be taken to have determined a permanent frontier. There is nothing in the 1955 Treaty to indicate that the boundary agreed was to be provisional or temporary; on the contrary it bears all the hallmarks of finality. The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court. . . .

73. A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised, the boundary remains. This is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent, but when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed. . . .

75. It will be evident from the preceding discussion that the dispute before the Court, whether described as a territorial dispute or a boundary dispute, is conclusively determined by a Treaty to which Libya is an original party and Chad a party in succession to France. The Court's conclusion that the Treaty contains an agreed boundary renders it unnecessary to consider the history of the "Borderlands" claimed by Libya on the basis of title inherited from the indigenous people, the Senoussi Order, the Ottoman Empire and Italy. . . .

76. Likewise, the effectiveness of occupation of the relevant areas in the past, and the question whether it was constant, peaceful and acknowledged, are not matters for determination in this case. . . . The concept of *terra nullius* and the nature of . . . Ottoman or French administration are likewise not germane to the issue. For the same reason, the concepts of spheres of influence and of the hinterland doctrine do not come within the ambit of the Court's enquiry in this case. . . . The 1955 Treaty completely determined the boundary between Libya and Chad.

Within weeks of the ICJ's decision, Libya and Chad agreed to abide by it; in April 1994, they reached an agreement on the practicalities of the Libyan withdrawal, removal of mines, and demarcation of the border. They called for the United Nations to send a team of monitors to observe the withdrawal. In May, the UN Security Council established the United Nations Aouzou Strip Observer Group for this purpose. The team consisted of 15 military and civilian observers and cost the United Nations just over $67,000. On May 30, in accordance with the withdrawal schedule previously agreed upon, Libya completed its withdrawal, and the United Nations certified the result. Both governments consider the matter of the Strip's territorial sovereignty closed, though there is some evidence that Libya has continued to support a Chadian rebel movement in the Strip.

Notes and Questions

1. Why do you suppose that Libya and Chad considered the Aouzou Strip of such importance as to justify the use of armed force? Who would benefit from title over the Strip?

2. Why do you think the Court does not consider the historical circumstances surrounding the colonial agreements to which it refers? What are the differences among the ways that Oppenheim, Anand, and Anghie view the relationships between the European powers and local populations in Africa?

3. If there had been no treaties between the colonial powers on the location of the border, what factors should the Court have considered in arriving at its outcome? Would these factors be different from those a similar court would have examined a hundred years ago?

4. Why do you think the losing party — Libya — complied so readily with the ICJ's decision?

5. Do the facts and outcome represent a victory for the rule of law in international relations or simply a political loss for Libya?

C. International Law Moves into the Twentieth Century

The twentieth century brought about sea changes in the entire field of international law. As a historical matter, most originate in the gradual global transformation that began with World War I, as the populations of European states — and of some of their colonies — decimated themselves in bloody combat over control of small pieces of land. As a result of that war, at least three constitutive changes in the international legal order began. First, European states began to accept that unlimited recourse to war for the settlement of disputes was counterproductive to their national interests and that armed conflict should be regulated through some legal arrangements. (The states of Europe and Latin America had already agreed, at key international conferences in The Hague in 1899 and 1907, that the *methods* by which wars were conducted should also be limited, leading to the development of the modern law of war.) By 1928, European and American governments had agreed upon the Treaty Providing for the Renunciation of War as an Instrument of National Policy, the so-called Kellogg-Briand Pact.

Second, in the territorial shakeup that ended World War I, European and U.S. leaders concluded that some ethnic groups in Europe that lacked their own state were entitled to determine their own political future. As a result, the victorious World War I Allies carved new states out of the defeated Central Powers based in significant part on the principle of national self-determination, which was included in several of American President Woodrow Wilson's Fourteen Points (announced in January 1918 as the U.S. goals in the war). In addition, European leaders agreed on a network of treaties and other arrangements aimed at protecting ethnic minority groups within both new and newly enlarged states. This concern with self-determination and minority rights remained, however, quite circumscribed, most significantly in that the European states did not recognize their application to any of their colonies nor to minorities within the Allied states.

Third, after World War I, the independent states agreed upon a fundamental institutional arrangement not only to address questions of war and peace and human rights but to develop legal norms in other areas, such as labor, health, and communications. This organization, the League of Nations, was created by the Versailles Treaty ending World War I. The League transcended prior forms of international cooperation by representing

a true international organization, with decision-making bodies and a large, permanent Secretariat. Along with its specialized bodies, such as the International Telecommunication Union and the International Labour Office, the League studied and promoted international cooperation on numerous issues of transnational interest. The result was a shift in the way much international law was made, as the League took the lead in preparing multilateral treaties on many subjects, encouraged states to reach bilateral agreements, and drafted many nontreaty instruments that came to be influential among states. In addition, the world's first standing global court — the Permanent Court of International Justice — began to decide a handful of cases, leading some to believe that the future for the peaceful settlement of disputes through international law and adjudication was bright indeed.

In fact, the prospects for legal arrangements to regulate international affairs were soon overshadowed by the sequential aggression of the fascist states — Japan, Italy, and Germany — in China, Ethiopia, and central Europe. The League's members showed no political will to enforce by economic sanctions or military force the various legal commitments states had undertaken in the areas of recourse to force or protection of minorities, and America's absence from the League due to the U.S. Senate's rejection of the Versailles Treaty only worsened matters. Much of the apparent progress of international law proved to be illusory during the dark years of the 1930s. The cataclysm that followed — 50 million dead, Germany's deliberate effort to exterminate European Jews and others, the obliteration of cities by both sides, the use of nuclear weapons, and the continued subjugation of colonial peoples — left little room for optimism about the possibility for the role, let alone the rule, of law in international relations.

Yet in the end, World War II proved the catalyst for the acceleration of the major trends that began before it started, as well as for the participation of new actors in the international legal process. Thus, states oversaw the change in substantive law with respect to the two core issues that had proved significant before the war — the use of force and human rights. (The role of new actors is discussed after the next problem in this chapter.) With respect to the first issue, governments agreed in the UN Charter to ban the use of force against the territorial integrity or political independence of states except in two situations — when a state was responding in self-defense and when the United Nations itself authorized force against a state. Wars hardly ceased as a result of the UN Charter, but states did begin to refrain from the sort of aggression against neighboring states, followed by annexation, that had characterized earlier years. The limits of the ban on the use of force, however, quickly became clear as powerful governments, principally the United States and the USSR, resorted to more subtle tactics to extend their spheres of influence, such as fomenting civil wars and carrying out covert actions against uncooperative political leaders abroad.

World War II and events after it also brought renewed attention to the issue of self-determination and human rights. Because the war exacted such a large human and financial toll on the European powers, their grip on colonial possessions significantly weakened. By the late 1940s, two of the largest — British India and the Dutch East Indies — had achieved independence (in the former case through civil disobedience; in the latter through armed conflict) as India, Pakistan, and Indonesia. Most of the rest of Africa and Asia followed suit within a dozen years, usually without significant violence. The independence of these new states vastly changed the legal landscape, as they came to have a significant role in the development of international norms. Their perspectives, molded by centuries of colonial domination, exerted a major influence on the process of law making and its outcomes.

With respect to human rights, the human tragedy of World War II led governments, both those of older states and those emerging from colonial rule, to devote significant resources to the creation of a corpus of law aimed at protecting individuals from their own governments. In December 1948, the UN General Assembly proclaimed the Universal Declaration of Human Rights, which sets out a wide variety of civil and political rights as well as various economic, social, and cultural rights. While the Universal Declaration was not a treaty and was not intended to be legally binding, many states consider it an authoritative interpretation of the Charter, setting forth in considerable detail the "human rights and fundamental freedoms" that UN members agreed in the Charter to promote and observe. States prepared and signed onto treaties covering genocide, civil and political rights, economic rights, racial discrimination, women's rights, apartheid, torture, and children's rights. Clearly, some states took this process, and human rights generally, more seriously than others; indeed, for most of the period after World War II, most governments merely paid lip service to the concept of human rights as a way of influencing or currying favor with others. Nevertheless, the growth of the human rights movement fundamentally challenged the notion that states were free to do what they wanted within their own borders.

In another important development related to human rights, the trials of German and Japanese political and military leaders after World War II helped solidify the notion of individual duties under international law. Many defendants argued that, because they were following superiors' orders, their activities were "acts of state," and they were therefore immune under international law. Instead, at Nuremberg, Tokyo, and in other postwar trials, thousands of individuals were tried and convicted, and hundreds were executed, dramatically demonstrating, as the Nuremberg Tribunal stated, that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." A number of the human rights treaties, including the 1948 Genocide Convention, make individuals, rather than just states, responsible for violations. In the 1990s, the UN Security Council established ad hoc tribunals with jurisdiction to try individuals for genocide, crimes against humanity, and war crimes. In July 1998, a treaty to establish an International Criminal Court (ICC) was concluded in Rome. The Rome treaty provides that the Court has jurisdiction over "the most serious crimes of concern to the international community as a whole," including those same three offenses.

New attitudes about the use of force and human rights were, in fact, only the beginning of the story of how government attitudes changed after the war, for beyond new outlooks on the core ingredients for a stable world order, the participants in defining that order were themselves increasing in number and taking on new roles. As we appraise these other developments in international law of the last 60 years, consider the following modern dispute of a type that has become more and more common in international relations.

II. THE *RAINBOW WARRIOR* AFFAIR

In 1978, the international non-governmental organization (NGO) Greenpeace purchased a converted research trawler, which it named the *Rainbow Warrior*. Over the next several years, Greenpeace used the *Rainbow Warrior* to publicize its protests against

commercial whaling practices, the dumping of nuclear waste in the oceans, and offshore oil and gas operations. In July 1985, Greenpeace sent the *Rainbow Warrior* to the South Pacific to support New Zealand's decision to close its ports to ships carrying nuclear weapons. The vessel was then scheduled to proceed to France's nearby Mururoa Atoll to protest upcoming French underground nuclear testing in the atoll. On July 10, 1985, while the *Rainbow Warrior* was docked in Auckland Harbor, New Zealand, members of the French Directorate General of External Security (DGSE) placed a bomb aboard the vessel; the ensuing explosion resulted in the sinking and total destruction of the ship and the death of Fernando Pereira, a Dutch crew member.

Although most members of the French team quickly fled New Zealand, two agents — Major Alain Mafart and Captain Dominique Prieur — were arrested and charged with murder and arson under New Zealand law. While France initially denied any role in the bombing, in September 1985, France's Prime Minister admitted DGSE's involvement in the attack. At the same time, the French Defense Minister resigned, and the head of the DGSE was fired. In November, Mafart and Prieur pleaded guilty to charges of manslaughter and wilful damage to a ship by means of explosives and were each sentenced to ten years' imprisonment. The French Defense Minister informed the agents that the government would work for their release. At the same time, New Zealand informed France that it would seek compensation for damages caused by France's illegal actions. New Zealand also insisted that France compensate Greenpeace and Pereira's family.

July 10, 1985: The Greenpeace Flagship *Rainbow Warrior* in Auckland Harbor after bombing by French secret service agents.
SOURCE: Greenpeace NZ © Greenpeace

Thereafter, France placed considerable pressure on New Zealand to release the two agents. France argued that the agents had been obeying superior orders and that, because France was prepared to assume responsibility, the agents should not be individually liable. New Zealand replied that neither New Zealand law nor international law excuse criminal acts on the grounds that they were committed pursuant to official orders. New Zealand was also reluctant to release the agents to France because French law did not authorize the serving out of a New Zealand sentence in France, and because the agents' acts were not illegal under French law, which provides that when a "homicide, wounding or striking [was] ordered by law or lawfully ordered authority, no felony or misdemeanor has been committed."

In early 1986, France began to restrict certain New Zealand exports to France and French territories. France also began to link the *Rainbow Warrior* dispute to the question of future access to the European Community of New Zealand exports, including butter, which is vital to the New Zealand economy. In response, New Zealand filed a formal complaint with the Organization for Economic Co-Operation and Development (OECD), an international organization promoting dialogue and open markets among wealthy states, and initiated nonbinding consultation procedures under the General Agreement on Tariffs and Trade (GATT), a multilateral treaty governing international trade. In the meantime, bilateral negotiations continued.

Notes and Questions

1. On the merits, how do you think the various disputes between France and New Zealand should have been resolved? How would you have predicted, in 1986, that they would be resolved?

2. As a matter of process, how do you think the disputes between France and New Zealand should be resolved? How would you have predicted they would be resolved?

On June 19, 1986, France and New Zealand agreed to submit all issues between them arising out of this episode to UN Secretary-General Javier Perez de Cuellar (of Peru) for a binding ruling. Once this agreement was reached, New Zealand withdrew its GATT and OECD complaints. Both sides submitted written statements to Perez de Cuellar, who, on July 6, issued the following decision:

Ruling Pertaining to the Differences between France and New Zealand Arising from the *Rainbow Warrior* Affair

19 UN Rep. Intl. Arb. Awards 199 (1986)

The issues that I need to consider are limited in number. I set out below my ruling on them which takes account of all the information available to me. My ruling is as follows:

1. Apology

New Zealand seeks an apology. France is prepared to give one. My ruling is that the Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to international law, on the "*Rainbow Warrior*" by French service agents which took place on 10 July 1985.

2. Compensation

New Zealand seeks compensation for the wrong done to it and France is ready to pay some compensation. The two sides, however, are some distance apart on quantum. New Zealand has said that the figure should not be less than US Dollars 9 million, France that it should not be more than US Dollars 4 million. My ruling is that the French Government should pay the sum of US Dollars 7 million to the Government of New Zealand as compensation for all the damage it has suffered.

3. The Two French Service Agents

It is on this issue that the two Governments plainly had the greatest difficulty in their attempts to negotiate a solution to the whole issue on a bilateral basis before they took the decision to refer the matter to me.

The French Government seeks the immediate return of the two officers. It underlines that their imprisonment in New Zealand is not justified, taking into account in particular the fact that they acted under military orders and that France is ready to give an apology and to pay compensation to New Zealand for the damage suffered.

The New Zealand position is that the sinking of the "*Rainbow Warrior*" involved not only a breach of international law, but also the commission of a serious crime in New Zealand for which the two officers received a lengthy sentence from a New Zealand court. The New Zealand side states that their release to freedom would undermine the integrity of the New Zealand judicial system. In the course of bilateral negotiations with France, New Zealand was ready to explore possibilities for the prisoners serving their sentences outside New Zealand.

But it has been, and remains, essential to the New Zealand position that there should be no release to freedom, that any transfer should be to custody, and that there should be a means of verifying that.

The French response to that is that there is no basis either in international law or in French law on which the two could serve out any portion of their New Zealand sentence in France,* and that they could not be subjected to new criminal proceedings after a transfer into French hands.

On this point, if I am to fulfil my mandate adequately, I must find a solution in respect of the two officers which both respects and reconciles these conflicting positions.

My ruling is as follows:

(a) The Government of New Zealand should transfer Major Alain Mafart and Captain Dominique Prieur to the French military authorities. Immediately thereafter, Major Mafart and Captain Prieur should be transferred to a French military facility on an isolated island outside of Europe for a period of three years.

(b) They should be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They should be isolated during their assignment on the island from persons other than military or associated personnel and immediate family and friends. . . . These conditions should be strictly complied with and appropriate action should be taken under the rules governing military discipline to enforce them.

(c) The French Government should every three months convey to the New Zealand Government and to the Secretary-General of the United Nations, through diplomatic channels, full reports on the situation of Major Mafart and Captain Prieur in terms of the

*In fact, many states have entered into treaties that permit the return of foreign convicts to their home state to serve out their sentence. — Eds.

two preceding paragraphs in order to allow the New Zealand Government to be sure that they are being implemented.

(d) If the New Zealand Government so requests, a visit to the French military facility in question may be made, by mutual agreement by the two Governments, by an agreed third party.

(e) I have sought information on French military facilities outside Europe. On the basis of that information, I believe that the transfer of Major Mafart and Captain Prieur to the French military facility on the isolated island of Hao in French Polynesia would best facilitate the enforcement of the conditions which I have laid down in paragraphs (a) to (d) above. My ruling is that that should be their destination immediately after their transfer.

4. Trade Issues

The New Zealand Government has taken the position that trade issues have been imported into the affair as a result of French action, either taken or in prospect. The French Government denies that, but it has indicated that it is willing to give some undertakings relating to trade, as sought by the New Zealand Government. I therefore rule that France should:

(a) Not oppose continuing imports of New Zealand butter into the United Kingdom in 1987 and 1988 at levels proposed by the Commission of the European Communities . . . ;

and

(b) Not take measures that might impair the implementation of the agreement between New Zealand and the European Economic Community on Trade in Mutton, Lamb and Goatmeat which entered into force on 20 October 1980. . . .

5. Arbitration

The New Zealand Government has argued that a mechanism should exist to ensure that any differences that may arise about the implementation of the agreements concluded as a result of my ruling can be referred for binding decision to an arbitral tribunal. The Government of France is not averse to that. My ruling is that an agreement to that effect should be concluded and provide that any dispute concerning the interpretation or application of the other agreements, which it has not been possible to resolve through the diplomatic channel, shall, at the request of either of the two Governments, be submitted to an arbitral tribunal. . . . The decisions of the tribunal . . . shall be binding on the two Governments.

6. The two Governments should conclude and bring into force as soon as possible binding agreements incorporating all of the above rulings. These agreements should provide that the undertaking relating to an apology, the payment of compensation and the transfer of Major Mafart and Captain Prieur should be implemented at the latest on 25 July 1986.

Three days later, France and New Zealand concluded agreements incorporating the substance of the Secretary-General's ruling. One agreement provided that Mafart and Prieur were to be "transferred to a French military facility on the island of Hao for a period of not less than three years. They will be prohibited from leaving the island for any reason, except with the mutual consent of the two governments." Major Mafart and Captain Prieur were transferred to French custody on the island of Hao on July 23, 1986. In

addition, France reached a settlement with the family of Fernando Pereira that included a formal apology and payment of compensation totaling 2.3 million francs. France admitted that it was legally liable to Greenpeace, but these parties were unable to agree on appropriate compensation. After Greenpeace threatened to sue France in a New Zealand court, the parties agreed to submit the matter to binding international arbitration. After full briefing and argument, an ad hoc international arbitral tribunal consisting of a former New Zealand judge and two distinguished law professors awarded Greenpeace $5 million for the loss of the *Rainbow Warrior* and an additional $1.2 million "for aggravated damages," plus expenses, interest, and legal fees. Greenpeace representatives hailed the decision and stated that the precedent "will hold state security and intelligence agencies to account in the future."

On its face, the processes and outcome of the *Rainbow Warrior* affair seem to demonstrate international law's relevance, flexibility, and efficacy in the resolution of international disputes. Two states used independent third-party dispute resolution that upheld the norm against the use of force, one of the core principles of international law. In addition, a powerful state paid compensation to the family of a foreign national whose human rights had been violated and accepted legal responsibility for the damage its actions caused an international NGO.

But the *Rainbow Warrior* affair can also be understood as a much more nuanced and ambiguous tale about the relevance and effectiveness of international law. In fact, France and New Zealand had previously agreed to most of the Secretary-General's rulings during secret negotiations in Switzerland. However, given the high political visibility of this dispute, neither state was willing to take the domestic political risks associated with a compromise reached through bilateral negotiations. Both governments believed that a compromise agreement would be politically insulated if it had the imprimatur of an independent and neutral third party. The Secretary-General's prestige and authority made it easier for each government to persuade domestic constituencies to accept those elements of the compromise that were contrary to their interests.

Moreover, neither of the French agents spent three years on Hao Island. On December 11, 1987, the French government was advised that Mafart's medical condition required "an emergency return to a hospital in mainland France." The following day, France sought New Zealand's permission to evacuate Mafart and, at the same time, stressed that the only available means of transport was by military aircraft leaving Hao the next morning. New Zealand sought to have one of its doctors examine Mafart; France refused but offered to have a doctor designated by New Zealand examine Mafart as soon as he arrived in France. On December 14, without New Zealand's consent, Mafart was flown to Paris and given medical treatment. The same day, New Zealand delivered a note to France stating that it "regards this action as a serious breach of both the letter and the spirit of the obligations undertaken pursuant to the [Secretary-General's ruling]." The New Zealand doctor who examined Mafart in Paris later that day reported that, although he needed medical treatment unavailable on Hao, "it is . . . highly arguable whether an emergency evacuation as opposed to a planned urgent evacuation was necessary." Mafart never returned to Hao. France insisted that, for medical reasons, he was to remain in France.

On May 3, 1988, France advised New Zealand that Prieur was pregnant and in need of special medical attention unavailable on Hao. This time, France agreed that a New Zealand doctor could travel to Hao to examine Prieur. But on the following day, before the New Zealand doctor could arrive in Hao, France advised New Zealand that Prieur's father was dying of cancer in Paris and that she was needed at his bedside. On May 5, three days before French presidential elections, France informed New Zealand that "[t]he

French Government considers it impossible, for obvious humanitarian reasons, to keep Mrs. Prieur on Hao while her father is dying in Paris. [She] will therefore immediately depart for Paris." Prieur arrived in Paris on May 6 without New Zealand's consent. Four days later, New Zealand sent a note to the French Foreign Ministry to "protest these actions in the strongest possible terms." Calling the actions "a further serious violation of the legal obligations under the Agreement," it offered to allow medical treatment for both agents in Tahiti (the capital of French Polynesia) or to send the dispute to arbitration under the terms of the Secretary-General's decision.

Prieur's father died on May 16. France argued that Prieur could not be sent back to Hao as long as her pregnancy continued; after her child was born, France asserted that she could not be sent back to Hao with a baby. After negotiations over the return of the agents proved inconclusive, New Zealand requested the establishment of an arbitral tribunal as provided in paragraph 5 of the Secretary-General's ruling. The panel, chaired by a former president and judge of the ICJ, ruled in favor of New Zealand. In the case of Major Mafart, the tribunal unanimously declared that France had breached its obligations to New Zealand by failing to order his return to Hao, although a majority held that his initial removal was not wrongful. In the case of Captain Prieur, the tribunal unanimously held that France committed a breach by not endeavoring in good faith to obtain New Zealand's consent to her removal from Hao, by subsequently removing her from Hao, and by failing to return her to Hao. A majority held, however, that as the three-year period that Mafart and Prieur were to serve on Hao had now passed, France's obligations were at an end, and accordingly the tribunal declined to order the agents' return. The tribunal unanimously declared "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand." Finally, although New Zealand had expressly rejected the award of monetary damages, the tribunal "recommended" that the two governments create a fund to promote close and friendly relations between the citizens of the two states and that the French government make an initial contribution of $2 million to the fund. Almost immediately after this award was issued, France contributed $2 million to a fund to promote friendly bilateral relations.

The *Rainbow Warrior* affair can also be understood to be part of a larger struggle by many states and NGOs against French nuclear testing in the South Pacific. While France's first nuclear tests were in the French Sahara in 1960, France shifted its testing site to the Mururoa Atoll after Algeria achieved independence. This decision and subsequent nuclear tests prompted a series of legal and political disputes between France and the region's states. Concern over French nuclear testing was also a major factor in the adoption of the South Pacific Nuclear Free Zone (SPNFZ) Treaty in 1985. The treaty establishes a nuclear free zone; states party to the treaty undertake not to possess or permit in their territory the testing of nuclear devices. This treaty was open only to members of the South Pacific Forum (SPF), a regional organization consisting of 15 South Pacific states. Thus, France was not a party to the treaty, and French testing continued until 1992, when France and other nuclear powers announced a moratorium on nuclear testing.

In June 1995, France announced that it would break this moratorium and conduct a final series of eight nuclear tests in the South Pacific. After France resumed testing in October 1995, the SPF suspended official links with France, and the European Parliament condemned the testing; the UN General Assembly urged the immediate cessation of the tests, and Greenpeace and other NGOs strongly protested the tests. France announced that it would conduct only six tests and that it would then shut down its testing site in the South Pacific. Finally, on March 25, 1996, France signed three SPNFZ

Treaty protocols that were open to nuclear powers, including a protocol that prohibits nuclear testing in the South Pacific. New Zealand proclaimed that "France's signature [brought] an end to French nuclear testing in the South Pacific for all time." The SPF Chairman stated that these signings "mark the end of a tense and uncertain period when the region was a testing ground, and in certain respects a battleground, for nuclear testing by the nuclear powers."

Notes and Questions

1. Why did France agree to submit its disputes with New Zealand and Greenpeace to binding, third-party dispute resolution? What was the basis of the Secretary-General's ruling? Was the ruling something other than a form of political theater? What was the basis of the rulings by the various arbitral tribunals? Why did France agree to compensate Pereira's family and Greenpeace?

2. Who won here? Does the *Rainbow Warrior* affair represent a victory for the rule of law in international relations? Can you identify specific points in this incident where international law made a difference?

A. New Actors, New Issues, New Processes

The *Rainbow Warrior* affair illustrates some of the ways that the traditional understanding of international law reflected in the Chad-Libya dispute — as a body of rules binding upon states in their relations — has been supplemented by a new international legal process characterized by new actors, issues, and modalities of prescription and enforcement. Notably, this new international law has not replaced traditional international law; indeed, the "contemporary" *Rainbow Warrior* affair preceded the ICJ decision in the "traditional" dispute between Chad and Libya by nearly a decade. Rather, as we shall see throughout this book, international law is a complex and constantly evolving field; in some areas, traditional norms continue to operate relatively untouched by new norms and processes; in other areas there are deep tensions between the old and the new norms; and in yet other areas new legal principles have emerged and occupy the field. A few of the most notable features of contemporary international law are outlined below.

1. International Institutions

The institutionalization of international law that began in significant part with the League of Nations accelerated in the postwar era. The three bodies that considered disputes arising out of the *Rainbow Warrior* affair — the United Nations, the GATT, and the OECD — represent three of the most important types of international bodies that states create. The United Nations, formed when 51 states signed the UN Charter in 1945, is the paradigmatic example of a multilateral body formed to address a diverse set of issues. Like other international organizations, the United Nations acts through a number of organs. The UN Security Council has primary responsibility for maintaining international peace and security and was intended to oversee a charter-based collective security system. But Cold War rivalries quickly undermined this system, and the United Nations enjoyed only mixed success in efforts to maintain international peace and security. While the Security Council acted more assertively in the aftermath of the Cold War, it soon found

2

Making Law in a Decentralized System

The status of international law as "law" is often contested. In part, skepticism concerning international law stems from the way in which it is made, interpreted, and enforced. The international system lacks a central legislature to enact legislation; there is no executive to apply or enforce the law that is made; and there is no centralized judiciary to interpret the law and adjudicate disputes. Nonetheless, international lawyers, diplomats, government policy makers, representatives of international organizations, non-governmental actors, and others routinely invoke international law to justify, insist upon, or limit particular courses of action; individuals frequently rely on international law to assert claims in national and international fora; and international and domestic tribunals regularly apply international law to decide disputes. In short, as international lawyers frequently point out, international law is made, applied, interpreted, and (sometimes) enforced through a variety of processes that will be explored throughout this volume.

This chapter introduces the primary ways in which international law is made. Article 38 of the Statute of the International Court of Justice, which forms part of the United Nations Charter, provides the traditional starting point. It describes the law that the International Court of Justice (ICJ), the UN's principal judicial organ, should apply to resolve disputes:

Statute of the International Court of Justice, Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38, though helpful, is only a starting point in two important respects. First, it suggests that courts and other decision makers simply find existing international law in one of several predefined "sources" and then apply it as appropriate to a given dispute. This reflects an unduly static and impoverished description of international law, which can also be understood in many other ways. Some scholars, for example, see international law as a process of decision making, a form of communication, or a mask for political power, among other things. These and various other approaches to international law are considered more fully in other chapters of this book.

Second, although treaties and custom, which are listed first in Article 38, remain the principal means by which international law is made, they are increasingly supplemented by alternative forms of law, which stem from the law-making and standard-setting activities of international organizations, regional bodies, multinational enterprises, and nongovernmental organizations. The role of these actors in law making will become increasingly apparent as you study subsequent chapters. In particular, the law-making function of international organizations is considered in Chapters 3, 11, and 12.

The order of the sources of law listed in Article 38 does not reflect a formal hierarchy but is nonetheless suggestive. Article 38 is a directive to the judges on the ICJ. For a court faced with a legal dispute, treaties may be a preferred form of law for several reasons. First, despite issues of interpretation, their content is relatively easy to determine. Second, treaties in most cases reflect the formal consent of the states that ratified them to be bound by their terms. Third, treaties may be a more familiar source of law to national policy makers and their constituents than other sources of international law, and decisions based on a treaty may therefore find greater acceptance by those to whom the decisions are addressed.

Nonetheless, treaties may also have disadvantages in relation to other forms of law. In some situations, for example, a state's assertion of jurisdiction over acts or persons abroad, custom may prove to have broader applicability than a treaty. Customary international law evolves from state practice. It does not require the formal negotiation and express consent associated with treaties. A rule of customary international law binds all states that have not objected to the rule while it is in the process of formation. Despite the proliferation of treaties in recent years, custom continues to govern many issues that are not regulated by treaty; on other issues, custom and treaties may to a large extent coincide.

In some situations, the informality of so-called soft law may prove preferable to utilization of a treaty or custom. "Soft law" may be loosely defined as declared norms of conduct understood as legally nonbinding by those accepting the norms. Soft law instruments assume innumerable forms, ranging from declarations of international organizations, to industry codes of conduct, to experts' reports. Soft law instruments, though not enforceable by legal sanction, are often framed in legal language and in many respects may exhibit an authority comparable to that of treaties or custom. Soft law is not mentioned in Article 38 of the ICJ's Statute, which derives from a similar provision in the 1929 Statute of the Permanent Court of International Justice. But soft law instruments have proliferated in recent years and must be considered a vital part of the international law-making process.

In other instances, issues may arise that cannot be resolved by application of either treaty or custom. There are gaps in the coverage of these forms of international law, which courts and other decision makers sometimes attempt to fill by reliance on general principles common to most national legal systems. Thus, decision makers sometimes borrow from national legal systems principles such as *res judicata* or estoppel to resolve international disputes.

This chapter examines treaties, custom, soft law, and general principles in turn, although, as the following materials make clear, different sources of international law are often interrelated and simultaneously applicable to a given situation. Judicial decisions and the teachings of publicists, mentioned in Article 38 as "subsidiary means for the determination of rules of law," are not considered separately, but their role should become evident as you examine them in connection with the other forms of law described above.

I. CREATING AND USING TREATIES: THE CYPRUS CONFLICT

In recent years, bilateral and multilateral treaties have multiplied at an almost exponential pace. The United Nations Treaty Series, which includes all treaties deposited with the UN Secretary-General, now fills more than 2,200 volumes, with 100 or more new volumes published every year. The series contains over 158,000 treaties and related instruments, covering almost every conceivable subject. Most treaties are bilateral, but many involve dozens of states. Increasingly, treaties are being used to codify existing international law and to develop new law. Treaties also serve as the constitutive instruments of international organizations, such as the United Nations and the European Union, which often engage in their own law-making activities. The complexity and diversity of contemporary treaties, their multiple forms, and the different approaches to their conclusion and implementation will become increasingly evident as you consider the role of treaties in connection with different problems presented throughout this volume.

Like contracts in municipal legal systems, treaties create rights and obligations for the parties to them. In many cases, treaties specify particular quid pro quo arrangements relating to narrow or specific interests of the parties, such as a treaty allocating fishing rights in a particular area or one defining the terms by which individuals accused of crimes may be extradited from one country to another. In other cases, treaties may take on some of the characteristics of general legislation by establishing broad rules to govern state conduct in areas such as human rights, trade, or the environment. The formation and vicissitudes of the modern state of Cyprus illustrate some of the legal issues that may arise in connection with treaties and their interrelation with other legal and political issues. Many of those related issues — including sovereignty, self-determination, statehood, recognition, and use of force — will be explored in greater detail in later chapters. As you read the following materials, consider the role of consent in treaty formation; the legal effect of differences in the bargaining power of the parties; the extent to which international public policy does or should preclude certain kinds of treaty arrangements; how ambiguities in a treaty should be resolved; the grounds available for invalidating or terminating treaties; the means open to a dissatisfied party to a treaty to seek renegotiation or modification of a treaty's terms; and the mechanisms available for dealing with disputes over treaty obligations.

A. The Problem

Throughout most of its history, Cyprus has been occupied, in whole or in part, by one or another foreign power. In 1878, Turkey transferred administrative control of the island to Great Britain in return for a British commitment to assist Turkey in its defense against

Russia. When Turkey sided with Germany at the start of World War I, Britain declared the 1878 agreement void and claimed legal title to Cyprus. Turkey and Greece accepted British sovereignty over the island in 1923 under the terms of the Treaty of Lausanne. Two years later Cyprus became a British Crown colony. It retained that status until independence in August 1960. At that time, the Cypriot population was approximately 80 percent Greek Cypriot and 18 percent Turkish Cypriot, with various other minorities making up the remainder.

1. The Evolution of the 1960 Accords*

In the years leading up to independence, Greek Cypriots seeking self-determination in the form of union with Greece ("*enosis*") waged a guerilla war against the British. The Turkish Cypriot minority, fearing domination by the Greek Cypriot majority, argued that Cyprus should be partitioned and that the Turkish portion of Cyprus should be permitted to merge with Turkey.

In the 1950s, the government of Greece began to espouse the Greek Cypriot claim for *enosis* and to urge its acceptance by the United Nations as an appropriate expression of self-determination for Cyprus. In turn, Turkey became increasingly active in support of the Turkish Cypriots. In 1959, following a series of preliminary contacts and proposals, the prime ministers of Greece and Turkey met in Zurich to determine the island's fate.

At this summit meeting, the two leaders agreed on the essentials of a final settlement, and initialed drafts of three agreements: a Basic Structure of the Republic of Cyprus, a Treaty of Guarantee Between the Republic of Cyprus and Greece, the United Kingdom, and Turkey, and a Treaty of Alliance Between the Republic of Cyprus, Greece, and Turkey. The Basic Structure agreement was designed to create a constitutional system that would establish an immutable internal balance of power between the two communities on Cyprus and thereby protect the rights of the Turkish Cypriot minority. The Treaties of Guarantee and Alliance were designed to protect that constitutional balance against internal and external threats.

No Cypriot representatives participated in the drafting of these agreements. Shortly after the agreements were initialed, however, representatives of the two Cypriot communities were invited to join representatives of Greece, Turkey, and Britain at a meeting in London held to finalize the Zurich settlement. With only minor modifications, the treaties were accepted by all parties. Dr. Fazil Kutchuk, the Turkish Cypriot representative, signed readily; Archbishop Mikhail Makarios, the Greek Cypriot representative, also signed, albeit reluctantly.

As a result of the London accords, Cyprus became an independent state. Its new constitution carefully balanced power between the two ethnic communities. Executive power was divided between a Greek Cypriot president and a Turkish Cypriot vice president, each with similar powers and a capacity to frustrate the actions of his counterpart. Power in the legislature was similarly divided. Although representatives of the Greek community received a substantial majority of the seats in the legislature, separate majorities of Greek and Turkish Cypriot legislators were required for legislation pertaining to elections, municipalities, and taxes. Moreover, the vice president was entitled to veto legislation in the areas of foreign affairs, defense, and security. The Supreme Constitutional Court reflected similar checks and balances: a neutral judge presided, assisted by one Greek Cypriot and one Turkish Cypriot. The civil service also had to reflect a rough balance (in this case a 70-30 ratio) between the two communities. All of the principal provisions of

*Much of the following background information is drawn from David Wippman, *International Law and Ethnic Conflict in Cyprus,* 31 Tex. Intl. L.J. 141 (1996).

this constitutional structure were incorporated into basic articles that could not be amended or repealed without the approval of all parties to the accords.

Under the Treaty of Guarantee, Cyprus agreed to ensure "respect for its Constitution" and to eschew any activity tending either to promote union with any other country or partition; in turn, Greece, Turkey, and the United Kingdom agreed to "recognize and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution." Article IV of the Treaty of Guarantee provided further that:

> In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. Insofar as common or concerted action may not prove possible, each of the three guaranteeing Powers reserve [sic] the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.

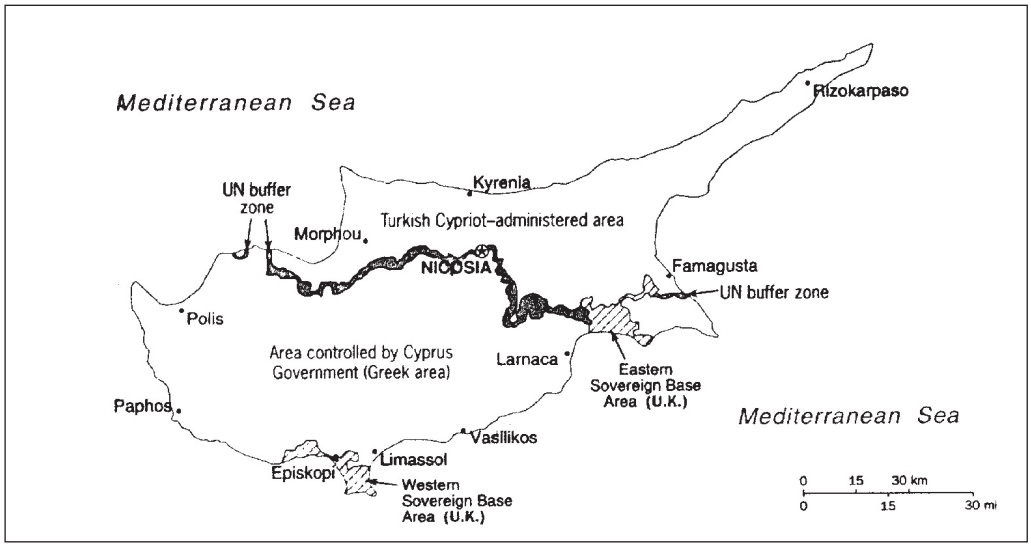
2. Turkish Intervention and Its Aftermath

The accords worked for over two years but then fell apart. Greek Cypriots, convinced that the constitution conferred disproportionate benefits on the Turkish population, objected to rigid application of the mandatory 70-30 ratio for filling civil service positions; Turkish Cypriots responded by blocking passage of important legislation, including extension of the income tax. Similar conflicts surfaced in other areas. The resulting governmental stalemate prompted President Makarios to propose substantial revisions to the constitution that would have diluted the ability of the Turkish community to block action by the majority. Civil disorder erupted shortly thereafter, just before Christmas 1963.

Invoking Article IV of the Treaty of Guarantee, Turkey staged warning flights over Greek Cypriot positions. Turkish members of the Cypriot government abandoned or were forced from their positions, thereby leaving Greek Cypriots in full control of the government. Both communities stockpiled arms from abroad, and paramilitary groups in each community organized into defensive enclaves. As the fighting threatened to spread, the three Guarantor Powers, with the consent of the government of Cyprus, deployed peacekeeping troops to calm the situation. In March 1964, the UN Security Council authorized the deployment of a UN peacekeeping force. Both sides claimed victory.

Violence erupted again briefly in late 1964, when Turkish planes attacked advancing Greek Cypriot forces, and then again in 1967. But the next major crisis did not occur until 1974, when the military government of Greece engineered a coup in Cyprus that temporarily replaced President Makarios with a staunchly pro-*enosis* leader. Days later, Turkey invaded Cyprus and quickly occupied the northern third of the island. The line of demarcation established then still holds.

Condemnation of the Turkish invasion (and the coup in Cyprus that prompted the invasion) was widespread and swift. Turkey again relied on the Treaty of Guarantee to justify its actions. Most states, concerned about further violence on Cyprus and the possibility of war between Greece and Turkey, urged a prompt restoration of the preexisting constitutional order. Accordingly, the UN Security Council demanded "an immediate end to foreign military intervention" in Cyprus, and called upon the three Guarantor Powers "to enter into negotiations without delay for the restoration of peace in the area and constitutional government. . . ." S.C. Res. 353 (1974).



Cyprus Divided
SOURCE: CIA World Factbook 2001

Negotiations have continued on and off ever since. Over time, the Turkish Cypriots established their own autonomous administration over northern Cyprus. In 1983, they proclaimed the territory under their control to be an independent state, the Turkish Republic of Northern Cyprus. Turkey immediately recognized the self-proclaimed republic, but no other state followed suit. The UN Security Council denounced the declaration and adopted a resolution declaring the purported secession illegal. Nonetheless, Turkish Cypriots, supported by Turkey, still control the northern third of Cyprus, while UN peacekeepers continue to patrol the line dividing the two communities.

B. Why Do States Enter into Treaties?

Treaties figure prominently in the history of Cyprus. British sovereignty over Cyprus was confirmed by the 1923 Treaty of Lausanne, and the 1960 accords leading to Cypriot independence established a constitution for the new state, conferred rights on the Guarantor Powers, and afforded the United Kingdom indefinite rights to maintain military bases on Cyprus. The parties to these treaties, as well as other states, spent substantial time and energy at the highest levels negotiating these treaties and later arguing over their validity and interpretation. Why? For lawyers, the answer might at first seem obvious. Treaties are by definition legally binding. States must enter into treaties, then, to obtain binding commitments from other states; such legally binding commitments may assist the parties in pursuing their interests for the same reasons that legally binding contracts assist private parties in pursuing their interests. But what does it mean to say that treaties are legally binding? And why should states prefer treaties to other forms of commitment, such as informal agreements among governments?

International lawyers recognize, of course, that the international legal system does not have enforcement mechanisms comparable to those of effective national legal systems. There is a significant and increasing number of international courts and arbitral

bodies but none with overarching general compulsory jurisdiction. There are various bodies with executive powers, such as the UN Security Council, but no international police force. As a result, states usually cannot count on outside actors to interpret agreements, decide on their validity, or enforce them in case of dispute. Yet international lawyers note, as Professor Louis Henkin famously observed, that "almost all nations observe . . . almost all of their [international] obligations almost all of the time." Louis Henkin, How Nations Behave 47 (1979). Some of the reasons why states often comply with their international legal obligations were identified in Chapter 1 and will be explored in subsequent chapters. But even if states often fulfill their treaty obligations, that still leaves open the question of why they enter into those obligations in the first place.

Political scientists who adhere to realist theories of international relations largely discount treaties — and international law generally. In their view, the international system is anarchic, in the sense that no central authority exists over states with power to compel compliance with international rules. As a result, treaties and international law generally exert little influence over state behavior. Instead, states pursue their interests, with outcomes of state interactions determined by the relative power of the states involved. States will enter into a treaty when convenient, interpret a treaty as they wish, and break a treaty when changing interests render it inconvenient.

Many political scientists, especially those of the so-called institutionalist school, accept some of the premises of the realists but reach quite different conclusions. In general, institutionalists accept the realist claim that the international system is anarchic, but they argue that states nonetheless have powerful incentives for entering into treaties beyond the simple pursuit of interests through power. The institutionalists, drawing on economics and game theory, suggest that states often enter into treaties to achieve mutually beneficial outcomes, forsaking short-term efforts to maximize power in favor of pursuing long-term goals. As Professors Kenneth Abbott and Duncan Snidal put it, "rationalists . . . view international agreements as 'contracts' created to resolve problems of coordination, collaboration, or domestic politics. . . ." Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Intl. Org. 421, 424 (2000).

From this standpoint, one advantage of treaties is that they may enable states to make their commitments credible. Professor Charles Lipson offers the following account.

Charles Lipson, *Why Are Some International Agreements Informal?*

45 Intl. Org. 495, 508-512 (1991)

The decision to encode a bargain in treaty form is primarily a decision to highlight the importance of the agreement and, even more, to underscore the durability and significance of the underlying promises. . . . In the absence of international institutions that permit effective self-binding or offer external guarantees for promises, treaties use conventional forms to signify a seriousness of commitment. . . .

The effect of treaties, then, is to raise the political costs of noncompliance. . . . The more formal and public the agreement, the higher the reputational costs of noncompliance. . . . States deliberately choose to impose these costs on themselves in order to benefit from the counterpromises (or actions) of others. Given the inherent constraints of international institutions, these formal pledges are as close as states can come to precommitment — to a contractual exchange of promises. . . .

In a world of imperfect information, . . . reputation has value. . . . The threat of such loss [of reputational capital] promotes compliance, although it cannot guarantee it. Whether it succeeds depends on (1) the immediate gains from breaking an agreement, (2) the lost stream of future benefits and the rate of discount applied to that stream, and (3) the expected costs to reputation from specific violations.

. . .

The price of noncompliance takes several forms. First, there is loss of reputation as a reliable partner. . . . Second, the violation or perceived violation of a treaty may give rise to specific, costly retaliation, ranging from simple withdrawal of cooperation in one area to broader forms of noncooperation and specific sanctions. . . . Finally, treaty violations may recast national reputation in a still broader and more dramatic way, depicting a nation that is not only untrustworthy but is also a deceitful enemy, one that makes promises in order to deceive.

Professor Lipson's account identifies some of the ways in which treaties assist states in making credible commitments. As Kenneth Abbott and Duncan Snidal point out, treaties may also enhance the credibility of states by "constraining self-serving auto-interpretation" of commitments, "mobiliz[ing] legally oriented interest and advocacy groups, such as the organized bar," "expand[ing] the role of legal bureaucracies within foreign offices and other government agencies," and modifying domestic actors' "plans and actions in reliance on such commitments, increasing the audience costs of violations." In addition, treaties may "reduce[] the transaction costs of subsequent interactions among states" as they seek to apply and elaborate agreed rules and enforce commitments. Abbott & Snidal, *supra*, 427-428, 430.

Further, Abbott and Snidal note that treaties may also serve the interests of private actors, who may organize within and across states to pursue shared objectives and values through interstate agreements. Alternatively, treaties may serve the interests of government officials, who may support particular agreements "as a way of making credible commitments to influential private actors in return for electoral support." *Id.* at 453.

International lawyers and political scientists have developed a variety of other theories to explain why states enter into international agreements and why they prefer some types of agreements to others. The latter question is considered later in this chapter. In other chapters we consider alternative theories concerning the motivations of states and other actors for reaching international agreements in different issue areas, and their incentives for compliance with those agreements.

Notes and Questions

1. What might have motivated the parties to the 1960 Cyprus accords to enter into them? What alternatives might they have considered? Would public statements by each government concerning their intentions regarding the future of Cyprus have served just as well as a formal treaty?

2. Do you agree with Professor Lipson that treaties raise the political costs of noncompliance? What other advantages might treaties have over less formal interstate agreements?

C. Applying Treaty Law to the Cyprus Dispute

Over time, states and other actors have agreed upon norms to govern treaty formation, validity, interpretation, breach, and termination. Each of these issues is considered below in connection with one or another aspect of the Cyprus dispute.

1. Background on Treaty Law

Most of the international law norms applicable to treaties have been codified in the Vienna Convention on the Law of Treaties, which was adopted by states at an international conference in 1969. As of October 2009, 110 states are parties to the Convention. The Vienna Convention reflects two decades of study and deliberation by members of the International Law Commission, a body of independent experts operating under UN auspices. Many of the Vienna Convention's provisions restate or codify customary international law already in place prior to the treaty's adoption. As a result, many tribunals and states relied on the Vienna Convention as an accurate statement of the law even prior to the treaty's entry into force. Other Convention provisions reflect a deliberate effort to modify existing law or to create new law, a process referred to as progressive development.

The Vienna Convention's rules are now so widely accepted that even some provisions that might have constituted "progressive development" when the treaty was drafted have acquired the status of custom. The United States is not a party to the treaty, but the Executive Branch has described the Convention as "the authoritative guide to current treaty law and practice."

The Vienna Convention provides the following definition of a treaty:

Vienna Convention on the Law of Treaties

1155 U.N.T.S. 331 (1969)

Article 2
Use of Terms

1. For purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. . . .

Article 3
International Agreements Not
Within the Scope of the Present Convention

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (a) the legal force of such agreements. . . .

As suggested in Article 2 of the Convention, treaties take many forms and can be denominated by many different terms, including "agreement," "protocol," "concordat,"

"pact," "accord," and "charter." Treaties may be written or oral (although the Vienna Convention applies only to written treaties), bilateral or multilateral, for a fixed term or indefinite. The limitations on the scope of the Convention contained in Article 3 reflect the desire of the Convention's drafters to facilitate agreement on the rules applicable to the most common kinds of international agreements. The commentary to the International Law Commission's final draft of the Convention makes clear that the Vienna Convention rules may be relevant to international agreements involving parties other than states (e.g., insurgent groups, international organizations) and to oral agreements.

Multilateral treaties govern a rapidly growing range of issues, so to some extent, the treaty-making process constitutes an analogue to the legislative process in national legal systems. However, the treaty-making process is highly decentralized, and the actors involved vary enormously, depending upon the treaty. A treaty may be initiated by international organizations, individual states, or non-governmental organizations, acting individually or collectively. Sometimes a treaty may be preceded by a declaration or other form of soft law; sometimes treaties emerge from lengthy periods of study by international agencies such as the International Law Commission, with multiple expert reports and proposals and innumerable drafts of particular provisions; sometimes initial drafts of treaties are presented to interested states by an individual government, an international organization, or an NGO. Negotiations by states may take many years, sometimes culminating in an intensive burst of negotiations at an international conference; in other instances, negotiations may take a matter of months or weeks. Typically, only governments are formally parties to the negotiation of multilateral treaties, but NGOs increasingly play a major role in many treaty negotiations, and their representatives are sometimes added to the delegations representing individual states. At some point, the organization or state leading the negotiations will submit a text to the participating states for adoption, sometimes by consensus and sometimes by a process of voting on particular provisions or the text as a whole. Multilateral treaties often provide for signature subject to ratification or approval. States that sign a treaty accept the text as adopted and indicate their intent to be bound by the treaty, subject to completion of national law requirements for treaty ratification. Under Article 18 of the Vienna Convention, states that have signed but not yet ratified a treaty must not take any action to defeat the treaty's object and purpose. Treaties are usually open for signature until a specified date, though states can often become parties after the date for signature passes by a process of accession. Some treaties, especially human rights treaties, may remain open for signature indefinitely. Multilateral treaties often condition entry into force on signature or ratification by a specified minimum number of states.

Notes and Questions

1. States often enter into formal agreements that by their terms expressly disavow the creation of any legal obligations. The Final Act of the Conference on Security and Cooperation in Europe, signed in Helsinki in 1975, set out the terms of an agreement between the Eastern and Western blocs on a wide range of security and human rights issues. The Final Act was understood and intended to be politically but not legally binding. Agreements of this sort are considered more fully below.

States also frequently enter into informal and usually unwritten "gentlemen's agreements" to govern matters such as the nationality of the individual who heads a particular international agency or the regions to be represented in subsidiary bodies of international organizations. In 1999, for example, U.S. objections to the European

Union candidate for executive director of the International Monetary Fund were viewed by some states as a violation of such an agreement. What is the legal status of these "gentlemen's agreements"? Do they qualify as treaties under the Vienna Convention definition? Does the intention of the parties determine whether such agreements are legally binding? If so, how do you ascertain the intention of the parties?

Several states urged that the intent to create rights and obligations under international law be included in the Convention's definition of "treaty." The commentary to the final draft explained that "the Commission concluded that . . . the element of intention is embraced in the phrase 'governed by international law,' and it decided not to make any mention of the element of intention in the definition."

2. Can unilateral statements create binding international legal obligations equivalent to a treaty? In 1919, the Norwegian Minister of Foreign Affairs, speaking for his government, declared that Norway would not interfere with Danish plans concerning Greenland, an assurance sought by Denmark. The declaration was made in the course of negotiations over Greenland's status, which included a statement by Denmark that it would not press any claim to Spitzbergen, an archipelago claimed by Norway. In *The Legal Status of Eastern Greenland* (Nor. v. Den.), P.C.I.J. Rep. Series A/B, No. 53 (1933), the Permanent Court of International Justice (the predecessor to the ICJ), referring to the Norwegian foreign minister's statement, concluded that "a reply of this nature given by the Minister of Foreign Affairs on behalf of his government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs." In subsequent cases, the ICJ made clear that the effect of a unilateral statement depends upon the intention of the state in question. Speaking of a unilateral declaration by the government of France that it would halt nuclear tests in the South Pacific, the ICJ stated:

> When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legalundertaking. . . . In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect. . . .

Nuclear Tests (Austl. v. France), 1974 I.C.J. 253, 267. The Court did not decide whether unilateral engagements should be treated as the equivalent of treaty obligations but noted that all international legal obligations, from whatever source, should be governed by the principle of good faith. The ICJ returned to the issue of unilateral statements in *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda). In that case, the DRC sought to rely on a statement by the Rwandan Justice Minister, who told the UN Human Rights Commission that "reservations [to human rights treaties] not yet withdrawn will shortly be withdrawn." The DRC argued that the statement constituted a unilateral commitment to withdraw Rwanda's reservation to Article IX of the Genocide Convention. The Court noted that "with increasing frequency in modern international relations other persons [than the President or Foreign Minister] representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview," but added that "a statement of this kind can create legal obligations only if it is made in clear and specific terms." The Court found that the statement at issue was not sufficiently specific because it did not identify the treaties to which it applied or the time frame for withdrawal.

Under what circumstances, if any, are unilateral statements enforceable under domestic law? Should unilateral declarations by governments be treated as the equivalent of treaty obligations? Should such declarations be deemed legally binding on some other ground, such as estoppel?

2. Making Treaties: Who Speaks for the State?

The onset of intercommunal fighting in Cyprus in 1963 triggered a variety of challenges to the validity of the 1960 accords. As an initial matter, Greek Cypriots questioned whether Dr. Kutchuk and Archbishop Makarios possessed sufficient legal authority in 1960 to bind Cyprus in the absence of a referendum. When Kutchuk and Makarios attended the London Conference and initialed the texts of the 1960 accords, they were unelected leaders of political communities that themselves had no standing under international law. Formally, the accords did not come into force until after Makarios and Kutchuk had been elected president and vice president of Cyprus and had signed the accords as the highest officials of the state of Cyprus. Still, the process leading to the final signature of the accords, including the elections that transformed Makarios and Kutchuk from leaders of subnational communities into elected leaders of the state of Cyprus, arguably derived its legitimacy in substantial part from the prior consent of the two communities as manifested by Makarios and Kutchuk.

The Vienna Convention contains several articles relating to the capacity of states to enter into treaties and the authority of particular individuals to represent and commit their states. In evaluating the arguments of the parties to the 1960 accords, consider the following provisions of the Vienna Convention:

Article 6
Capacity of States to Conclude Treaties

Every State possesses capacity to conclude treaties.

Article 7
Full Powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

(a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty; . . . (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

Article 8
Subsequent Confirmation of an Act Performed Without Authorization

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State.

The early drafts of Article 6 of the Vienna Convention provided that some entities other than states also possessed the capacity to enter into treaties, and specifically identified international organizations and member states of federal unions, depending on the provisions of the federal constitution at issue. During the debate on Article 6, the United States argued that

> To limit the scope of the term "other subjects of international law" to international organizations, the Holy See and cases such as an insurgent community would . . . be too restrictive; for colonies and similar entities given some measure of authority in foreign relations, especially when approaching statehood, should not have to be in a state of insurgency to be capable of concluding a valid international agreement. . . . [S]o far as such a colony or entity is entrusted with a measure of authority by the parent State in the conduct of its foreign relations, it necessarily becomes a subject of international law [and] it would be paradoxical if at the present time areas approaching independence could not be encouraged by being entrusted with authority to conclude agreements in their own name.

Article 6 was eventually reduced to its present form in keeping with the decision of the International Law Commission to confine the Vienna Convention to treaties between states.

Consider also Professor Oliver Lissitzyn's comments on capacity:

> It may, indeed, be doubted that international law contains any objective criteria of international personality or treaty-making capacity. The very act or practice of entering into international agreements is sometimes the only test that can be applied to determine whether an entity has such personality or capacity, or, indeed, "statehood." For example, India had come to be regarded as an international person possessed of treaty-making capacity long before independence because, beginning with the Treaty of Versailles in 1919, there had developed a practice of India's becoming a separate party to international agreements. [After citing further examples, Lissitzyn continues:] Perhaps the only limitation on the possession and exercise of treaty-making capacity by a political subdivision is lack of consent to the exercise of such capacity by the dominant (or "sovereign") entity to which the subdivision is subordinate. Once such consent has been given, the capacity comes into being or is exercised whenever another entity is willing and able to enter into an agreement with the subdivision that is intended to be governed by international law. The very exercise of treaty-making capacity by a subordinate entity endows it with legal personality under international law. It makes little sense, therefore, to make possession of such personality a prerequisite to the conclusion of treaties.

Oliver J. Lissitzyn, *Efforts to Codify or Restate the Law of Treaties*, 62 Colum. L. Rev. 1166, 1183-1184 (1962).

Notes and Questions

1. Did Cyprus, as an emerging state, have the capacity to enter into treaties independently of the United Kingdom? Could it have done so even against the wishes of the United Kingdom?

2. Under the facts of the Cyprus case, should Makarios and Kutchuk be viewed as possessing sufficient legal authority to enter into the 1960 treaties on behalf of Cyprus? Was it essential that both agree to the treaties?

3. If Makarios and Kutchuk lacked sufficient authority to commit Cyprus to the 1960 accords, did the later conduct of Cyprus amount to confirmation of their authority within the meaning of Article 8 of the Vienna Convention?

3. Invalidating Treaties: Coercion and Consent

Greek Cypriots and their supporters questioned the validity of Cypriot consent to the 1960 treaties. At various points in the 1964 UN debates over Cyprus, the Greek Cypriots suggested that the treaties were "imposed" on Cyprus, that Makarios, as the Greek Cypriot representative, had no choice but to accept the treaties, and that the treaties were "unequal, inequitable and unjust."

According to Cyprus's UN representative:

> 108. Both of these treaties may fairly be described as having been arrived at in circumstances precluding free choice. Their basic articles were agreed upon in Zurich between the Greek and Turkish Governments in the absence of the representatives of the people of Cyprus. . . . The circumstances which compelled Archbishop Makarios, the leader then of the Greek majority of the people of Cyprus at the London Conference, to sign these Agreements are best described by him in a document dated 30 November 1963. . . .
>
> > At the Conference at Lancaster House on 5 February 1959, which I was invited to attend as leader of the Greek Cypriots, I raised a number of objections and expressed strong misgivings regarding certain provisions of the agreement arrived at in Zurich between the Greek and the Turkish Governments and adopted by the British Government. I tried very hard to bring about the change of at least some of those provisions. I failed, however, in that effort and I was faced with the dilemma either of signing the agreement as it stood or of rejecting it with all the grave consequences which would have ensued. In the circumstances, I had no alternative but to sign the agreement. This was the course dictated to me by necessity. . . .
>
> 109. The parties were in an unequal bargaining position and the Greek Cypriot side did not give its consent freely. In this respect, may I remind the members that when we speak of the Greek Cypriot side it is 80 per cent of the population. These treaties which contained onerous provisions were thus imposed on the majority of the people of Cyprus making the doctrine of unequal, inequitable and unjust treaties relevant.
>
> 110. Thus a Constitution was foisted on Cyprus. . . . The combined effect of the Constitution and the Treaty of Guarantee is that a situation has been created whereby the constitutional and political development of the Republic has been arrested in its infancy and the Republic as a sovereign State has been placed in a strait jacket.

U.N. SCOR, 19th Sess., 1098th mtg. at 19, U.N. Doc. S/PV.1098 (1964).

The representative of the Soviet Union, criticizing the efforts of "certain specific Powers . . . to force upon the people and Government of Cyprus a solution agreeable" to NATO, concurred:

> 16. . . . The Cypriots themselves were not, of course, even allowed to participate in the talks held at Zurich and in London in 1959, when a constitution was drawn up for Cyprus by strangers and when foreigners also laid the foundations for the inequitable agreements which were then presented to Cyprus in the form of an ultimatum. Hence it is quite clear . . . that these agreements were imposed on the people of Cyprus. . . .
>
> 18. The unprecedented infringement of the sovereignty of Cyprus, which has led to the maintenance of foreign military bases in its territory and to the deployment on this island of thousands of soldiers belonging to the armed forces of

> members of the NATO military bloc, was intended from the very beginning, not to ensure the independence of Cyprus, but to accomplish something quite the opposite of this. The dangerous actions of the NATO Powers in Cyprus are aimed with cynical frankness at nullifying the independence of the Republic of Cyprus, tying Cyprus to NATO and converting it into one of their military bridgeheads.

U.N. SCOR, 19th Sess., 1096th mtg. at 3-4, U.N. Doc. S/PV.1096 (1964).

Turkey's representative defended the adoption of the treaties:

> 192. It should be borne in mind that these treaties and the basic articles of the Constitution represented a compromise formula acceptable to all the parties and constituted the very *raison d'être* of the independence of Cyprus. Without these safeguards and without the basic articles of the Constitution the independence of Cyprus would have been unthinkable. . . .
>
> 193. This compromise arrangement was arrived at after long and bitter debates in the United Nations, as well as in international conferences, and convinced everyone of the necessity to establish a system which would take into consideration the rights and the legitimate interests of all concerned.

U.N. SCOR, 19th Sess., 1095th mtg. at 35, U.N. Doc. S/PV.1095 (1964).

In support of his position, Turkey's representative quoted a statement made by the Greek foreign minister, Mr. Averoff, shortly after the signing of the agreements:

> We signed these Agreements because this is in the common interest of our countries in the middle of a world which is full of dangers. . . . We signed these Agreements because we felt that they cover relatively and absolutely satisfactorily the interests of the people of Cyprus as a whole. We also signed these agreements because the respected man — and here he pointed to President Makarios — at the head of the Greek community in Cyprus and whom we considered in all our deliberations as representing the will of the Greeks of Cyprus, having been informed by us, said that he was in agreement with these Agreements.

U.N. SCOR, 19th Sess., 1098th mtg. at 35, U.N. Doc. S/PV.1098 (1964).

To this point, the representative of Cyprus replied:

> 186. . . . What the representative of Turkey has proved, I submit — and it is not denied — is that the Agreements were signed by Archbishop Makarios. . . . But the problem is: how did he come to sign them? He signed them because at that time he had no choice. That is the reality.

Id. at 36.

The Vienna Convention on the Law of Treaties contains a number of provisions pursuant to which a treaty may be held invalid. Many of those provisions, including provisions relating to error, fraud, and the corruption of a representative of a state, relate to the validity of a state's consent to the treaty at issue. Consider the following articles, and in particular, Article 42:

Article 42
Validity and Continuance in Force of Treaties

> 1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

Article 45
Loss of a Right to Invoke a Ground for Invalidating, Terminating, Withdrawing from or Suspending the Operation of a Treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 [dealing with internal law on competence to conclude treaties, authority to express consent, error, fraud, and corruption] or articles 60 [termination or suspension] and 62 [fundamental change of circumstance] if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

Article 51
Coercion of a Representative of a State

The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State by the Threat or Use of Force

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

In the course of the negotiations over the Vienna Convention on the Law of Treaties, many socialist and developing states favored inclusion of an article that would invalidate "unequal treaties." Treaties might be deemed unequal either because one party is in a position to dictate terms to the other party by applying economic or political pressure or because the terms of the treaty greatly favor one party at the expense of the other. As a practical matter, these two forms of inequality go together, because almost by definition, states that are in an equal bargaining position will not reach one-sided agreements.

Those who supported a provision on the invalidity of unequal treaties relied in part on the principle of the sovereign equality of states, one of the core principles of international law embodied in Article 2(1) of the UN Charter. Of course, the equality of states is juridical only. As a practical matter, states vary enormously in size, resources, population, military capacity, and economic strength. These disparities necessarily place some states in stronger bargaining positions than others in the negotiation of particular treaties. As a general matter, such inequalities do not preclude the conclusion of a valid treaty any more than similar inequalities in the bargaining positions of private parties preclude the formation of valid private contracts.

On the other hand, there are doctrines in the municipal law of many states that invalidate contracts procured through pressure, even when such pressure falls short of coercion, or that invalidate contracts that are unduly onerous to one of the parties. States that challenged the validity of "unequal treaties" focused on colonial-era treaties, especially those granting metropolitan states extensive trade, mineral, or other rights in their former colonies as an implicit condition of independence, and on neocolonial treaties viewed by some as perpetuating colonialism through economic domination.

By contrast, most Western states viewed the notion of unequal treaties as vague, easily manipulated, and likely to jeopardize the stability of treaty relations. The issue came to a head in connection with the drafting of Article 52. States sympathetic to the notion of unequal treaties urged a broad definition of "coercion," one that would encompass political and economic pressure and permit the invalidation of imposed or "unequal" treaties.

Two U.S. government participants in the Vienna Convention negotiations describe the debate and its outcome:

> Afghanistan, Algeria, Bolivia, Congo (Brazzaville), Ecuador, Ghana, Guinea, India, Iran, Kenya, Kuwait, Mali, Pakistan, Sierra Leone, Syria, United Arab Republic, United Republic of Tanzania, Yugoslavia and Zambia proposed that the International Law Commission text . . . be amended by defining force to include any "economic or political pressure."
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> The nineteen-state amendment was vociferously supported and vehemently attacked in the committee debate. . . .
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> The proponents of the amendment made it quite clear in the committee of the whole that their amendment was directed toward "economic needs." . . . The Algerian representative advanced the thesis:
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> > . . . the era of the colonial treaty was past or disappearing, but there was no overlooking the fact that some countries had resorted to new and more insidious methods, suited to the present state of international relations, in an attempt to maintain and perpetuate bonds of subjection. Economic pressure, which was a characteristic of neocolonialism, was becoming increasingly common in relations between certain countries and the newly independent States.
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> > Political independence could not be an end in itself; it was even illusory if it was not backed by genuine economic independence. That was why some countries had chosen the political, economic and social system they regarded as best calculated to overcome under-development as quickly as possible. That choice provoked intense opposition from certain interests which saw their privileges threatened and then sought through economic pressure to abolish or at least restrict the right of peoples to self-determination. Such neo-colonialist practices . . . should therefore be denounced with the utmost rigour.
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> Statements of this character reinforced the already deep misgivings as to the effect of the amendment held by the states concerned with the stability of treaties. . . .
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> The course of the debate had made it clear that if the amendment were put to the vote it would carry by quite a substantial majority. On the other hand, in private discussions it had been made quite clear to the proponents that adoption could wreck the conference because states concerned with the stability of treaties found the proposal intolerable.
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> To reduce tension, discussion of the article was adjourned and private negotiations resorted to. A compromise solution was reached after some days of cooling off. The amendment was withdrawn. In its place, a draft declaration condemning threat or use of pressure in any form by a state to coerce any other state to conclude a treaty was unanimously adopted by the committee. Although at one point during the plenary it appeared that the compromise might be unraveling, it was adhered to by both sides. The declaration finally approved by the conference in 1969 is annexed to the Final Act.

Richard Kearney & Robert Dalton, *The Treaty on Treaties*, 64 Am. J. Intl. L. 495, 533-535 (1970).

Notes and Questions

1. Was Makarios subject to coercion within the meaning of Article 51 of the Vienna Convention? What type of pressure would amount to coercion for purposes of this article? Given that states are abstract entities that can only act through representatives, in what respects is coercion of a state's representative different from coercion of the state itself?

2. What "grave consequences . . . would have ensued" if Makarios had refused to sign the agreement? Does the possibility of such consequences amount to coercion?

3. Under Article 45 of the Vienna Convention, did Cyprus forfeit any claim of coercion by carrying out the terms of the 1960 accords for two and one-half years?

4. Which state or states might be viewed as having imposed the 1960 accords on Cyprus? Are the accords invalid under Article 52 of the Vienna Convention? Who decides whether coercion invalidates a treaty? Note that the government of Cyprus never formally claimed that the accords were coerced within the meaning of Article 52. What would have been the legal consequences of such a claim if it prevailed?

5. Does Archbishop Makarios's claim that the 1960 treaties were "unequal, inequitable, and unjust" raise a ground for invalidity recognized in any of the relevant articles of the Vienna Convention?

6. In 1995, representatives of Bosnia, Croatia, and the Federal Republic of Yugoslavia (FRY) met in Dayton, Ohio, to negotiate over the future status and political organization of Bosnia. The United States and its European allies used economic and political pressure to convince the FRY to participate; NATO, relying on UN Security Council resolutions authorizing the use of force in Bosnia for certain limited objectives, used air strikes to compel Bosnian Serbs to come to the bargaining table. The negotiations resulted in an agreement, the General Framework for Peace in Bosnia and Herzegovina (the Dayton Agreement), that rejected Bosnian Serb claims to independence and established power-sharing arrangements among the Bosnian Serbs, Croats, and Muslims. Bosnian Serbs initially rejected the results of the negotiations but ultimately acquiesced at the insistence of the FRY. The government of Bosnia also accepted the Dayton Agreement with reluctance. The Bosnian government felt it had no choice if it wished to avoid losing more people and territory in a war that it regarded as an international conflict launched by the FRY. Could any of the parties to the Dayton Agreement (FRY, Croatia, or Bosnia) refuse to carry out its terms on the ground that the agreement is invalid under Article 52 of the Vienna Convention?

In March 1999, NATO forces started bombing targets in the FRY to force it to end human rights abuses in Kosovo and to accept a political settlement on the future status of Kosovo. (Further background on NATO's action and discussion of related legal issues appear in Chapters 8 and 13.) After an extensive air campaign lasting several months, the FRY signed an agreement accepting NATO's terms for ending the conflict. Could the FRY later declare that agreement void under Article 52?

4. Evaluating and Interpreting Treaties

The Cyprus government's principal objection to the 1960 accords was that the Treaty of Guarantee, as interpreted by Turkey, could be construed to permit military intervention. In the UN Security Council, the government of Cyprus and its allies argued