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Shadow or Shade: The Roles of International Law in Palestinian-Israeli Peace Talks

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Article

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With what faith
Can stars
Sparkle?
And naked trees
Cast shade?[1]

I. INTRODUCTION

Pacta sunt servanda, the cardinal rule of international law, prohibits the breaking of agreements. But what role should international law play in the making of agreements? In *How Nations Behave*, Louis Henkin challenges lawyers "to think beyond the substantive rules of law to the function of law, to the nature of its influence, the opportunities it offers, the limitations it imposes—as well as to understand the limits of its influence in a society of sovereign nations."[2] In that spirit, international law scholars have redoubled efforts during the last decade to measure the influence of law on international politics, drawing on theoretical and methodological frameworks developed by political scientists.[3] Relatively little attention, however, has been directed to explaining how law functions in international peace negotiations,[4] in part, perhaps, because it is difficult to find satisfying answers to this question within the framework of a single discipline. While contract and negotiation theorists have examined how parties make use of, and are constrained by, legal rules when engaged in private ordering, their analysis has tended not to address the peculiarities of the international setting—in particular, the relative indeterminacy of international legal norms and the relative unavailability of recourse to third-party adjudication and enforcement. Conversely, because studies by international law and international relations scholars have tended to focus on compliance with multilateral treaty regimes and adjudications by international tribunals, they overlook the unique roles that law plays in the context of international bargaining.

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1. Muhammad al-As'ad, *The Earth Also Dies*, *in* ANTHOLOGY OF MODERN PALESTINIAN LITERATURE 123 (Salma Khadra Jayyusi ed., May Jayyusi & Jack Collom trans., 1992).

2. LOUIS HENKIN, HOW NATIONS BEHAVE 4-5 (2d ed. 1979).

3. For a survey of recent work in this area, see MARKUS BURGSTALLER, THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW (2005); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT'L L. 107 (1998); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Anne-Marie Slaughter, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998).

4. A notable exception is Joaquin Tacsan's study of the Central American peace process in the 1980s. *See generally* JOAQUIN TACSAN, THE DYNAMICS OF INTERNATIONAL LAW IN CONFLICT RESOLUTION (1992).

The nature of these roles is of more than academic concern. When Palestinian and Israeli officials undertook from late 1999 to early 2001 to negotiate a "permanent status"[5] agreement in an effort to bring their century-long conflict to an end, they expressed sharply differing views not only about their respective rights and obligations under international law, but also, more fundamentally, about the relevance of international legal norms to the bilateral negotiation process in which they were engaged. Although their failure, ultimately, to conclude a peace agreement is undoubtedly attributable to a variety of factors, I submit that their differences regarding the role of international law in the peace talks form an important, and as yet insufficiently documented, part of the picture. Understanding the nature and consequences of those differences is valuable for the contribution it offers not only to research on the influence of law on international politics, but also, more importantly, to efforts to ensure that when Palestinians and Israelis eventually return to the negotiating table they have more success.

To be sure, the Palestinian-Israeli conflict and peace process are the focus of a voluminous body of academic literature. Political accounts of the peace talks have proliferated since the suspension of negotiations in January 2001.[6] In addition, legal scholars and advocates have explored in some depth both the substantive legal issues implicated by the underlying conflict and an array of process questions presented by the talks.[7] What continues to be

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5. In 1993 Palestinians and Israelis agreed to establish interim self-government arrangements for the Palestinian population in the West Bank and Gaza Strip and to commence "negotiations on the permanent status" of the Palestinian territories following a transitional period of five years. Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestine Liberation Organization, art. 1 (Sept. 13, 1993), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT: THE PALESTINIANS AND THE ISRAELI-PALESTINIAN PEACE PROCESS 890, 890 (M. Cherif Bassiouni ed., 2005) [hereinafter 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT].

6. *See, e.g.*, SHLOMO BEN-AMI, SCARS OF WAR, WOUNDS OF PEACE: THE ISRAELI-ARAB TRAGEDY (2005); CHARLES ENDERLIN, SHATTERED DREAMS: THE FAILURE OF THE PEACE PROCESS IN THE MIDDLE EAST, 1995-2002 (Susan Fairfield trans., Other Press 2003); WILLIAM B. QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 (rev. ed. 2001); DENNIS ROSS, THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE (2004); CLAYTON E. SWISHER, THE TRUTH ABOUT CAMP DAVID: THE UNTOLD STORY ABOUT THE COLLAPSE OF THE MIDDLE EAST PEACE PROCESS (2004); Hussein Agha & Robert Malley, *Camp David: The Tragedy of Errors*, NEW YORK REVIEW OF BOOKS, Aug. 9, 2001, at 59.

7. Recent contributions to this literature include: JOHN QUIGLEY, THE CASE FOR PALESTINE: AN INTERNATIONAL LAW PERSPECTIVE (2d ed. 2005); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000); Susan M. Akram & Terry Rempel, *Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees*, 22 B.U. INT'L L.J. 1 (2004); Roy Balleste, *The International Status of Jerusalem: The Legacy of Lasting Peace*, 43 REV. DER. P.R. 249 (2004); Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934 (2003); Dr. Fadia Daibes, *A Progressive Multidisciplinary Approach for Resolving the Palestinian-Israel Conflict Over the Shared Transboundary Groundwater: What Lessons Learned From International Law?*, 8 U. DENV. WATER L. REV. 93 (2004); Allison Beth Hodgkins, *Beyond Two-States: Alternative Visions of Self-Determination for the People of Palestine*, 28 FLETCHER F. WORLD AFF. 109 (2004); Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65 (2003); Orde F. Kittrie, *More Process Than Peace: Legitimacy, Compliance, and the Oslo Accords*, 101 MICH. L. REV. 1661 (2003) (reviewing THE ISRAELI-PALESTINIAN PEACE PROCESS: OSLO AND THE LESSONS OF FAILURE—PERSPECTIVES, PREDICAMENTS, AND PROSPECTS (Robert L. Rothstein, Moshe Ma'oz & Khalil Shikaki eds. 2002) and MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD'S TOUGHEST POST-COLD WAR CONFLICTS (2001)); Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L L. 1 (2005);

missing from the discussion, however, is both a theoretical framework for explaining the functions of law in international peace negotiations and a detailed retrospective analysis of the functions international law actually served—and failed to serve—in Palestinian-Israeli peace talks.[8]

This Article is intended to help fill both of these gaps. Part II of the Article introduces a theoretical framework for analyzing the functions of law in international bargaining. I begin by revisiting the critical insight, offered by Robert Mnookin and Lewis Kornhauser in their influential 1979 article, that parties bargain "in the shadow of the law."[9] As they explain, "the outcome that the law will impose if no agreement is reached gives each [party] certain bargaining chips" in negotiations, even if the parties choose to order their relations in a manner that departs from the outcome that law would otherwise prescribe.[10] Drawing on more recent scholarship by contract and negotiation theorists, I examine how legal rules function to promote efficiency and fairness by narrowing the scope of bargaining, framing trade-offs, providing objective standards for evaluating competing claims, and filling in gaps in an agreement.

I then turn to exploring how these functions translate to the international setting. As I describe, "the shadow of the law"—the influence law exerts on bargaining as a result of the possible imposition of a legal remedy if negotiations fail—is diminished at the international level, where norms are often under-developed and the adjudication and enforcement of legal rights tends to be a remote prospect at best. I argue, however, that the "shadow" metaphor fails to capture an important function of law in international bargaining. As a growing body of international law and international relations literature suggests, the influence of legal rules does not turn solely on the

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Randolph "Michael" Nacol II, *Negotiating on Un-Holy Land: The Road from Israel to Palestine*, 4 PEPP. DISP. RESOL. L.J. 87 (2003); Jonathan W. Reitman, *Ten Principles to Aid the Quest for Peace in the Middle East*, DISP. RESOL. J., Feb./Apr. 2002, at 50; Lewis Saideman, *Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return*, 44 VA. J. INT'L L. 829 (2004).

8. There is no lack of interest in the topic. In 1999, Case Western Reserve University School of Law convened a discontinuous symposium entitled "The Legal Foundations of Peace and Prosperity in the Middle East," contributions to which were subsequently published by the Case Western Reserve Journal of International Law. *See, e.g.*, John Quigley, *The Role of Law in a Palestinian-Israeli Accommodation*, 31 CASE W. RES. J. INT'L L. 351 (1999); Shimon Shetreet, *Negotiations and Agreements Are Better Than Legal Resolutions: A Response to Professor John Quigley*, 32 CASE W. RES. J. INT'L L. 259 (2000). Because the symposium took place prior to the resumption of permanent status negotiations in September 1999, however, the participants were unable to offer analysis of the negotiations themselves. More recently, the role of the law in resolving the Palestinian-Israeli conflict was the topic of a symposium sponsored by the Toda Institute for Global Peace and Policy Research, contributions to which were published by the Hastings International and Comparative Law Review. See George E. Bisharat, *Facts, Rights, and Remedies: Implementing International Law in the Israel/Palestine Conflict*, 28 HASTINGS INT'L & COMP. L. REV. 319 (2005). This was also the topic of a panel during the 2005 annual conference of the American Society of International Law. See Georges Abi Saab, Remarks, *Is There a Role for International Law in the Middle East Peace Process?*, *in* 99 AM. SOC'Y INT'L L. PROC. 215 (2005). Although participants in both events offered important insights, they did not undertake either to define a theoretical framework for analyzing how law functions in international bargaining processes or to examine in detail how it functioned in Palestinian-Israeli peace talks.

9. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

10. *Id.* at 968.

possibility of third-party enforcement; international law's influence also derives from the normative force of the ideas it embodies and its capacity to legitimize negotiated outcomes in the eyes of other international actors and domestic constituencies. In this respect, I submit, international law may influence the process and outcome of peace negotiations not only as a result of the shadow it casts, but also as a result of the shade it offers—i.e., the attributes of legal rules that *pull* parties to align a negotiated outcome with them, even when their ultimate enforcement is unlikely.

Applying this framework, I then turn, in Part III, to describing how law functioned—and failed to function—during Palestinian-Israeli permanent status negotiations. My analysis draws not only on published first- and third-party accounts of the negotiations, but also on unpublished draft texts, memoranda, and minutes prepared by and for the Palestinian negotiating team during the talks.[11]

In Part IV, I assess the factors that constrained the functioning of legal rules in Palestinian-Israeli peace talks, analyzing the consequences of the parties' disagreements about the applicability and determinacy of legal rules and about the efficacy of the outcomes they were claimed to prescribe, as well as the lack of recourse to external adjudication and enforcement. I conclude by suggesting steps that may be taken by the parties and the international community to address these factors. Ultimately, I argue neither that international law provides answers to all of the questions presented by the Palestinian-Israeli conflict, nor that it offers no answers at all. Instead, I submit that by understanding how law functions in international negotiations, and its limitations in that context, it is possible to use law more effectively to advance the cause of peacemaking—both as a tool for efficient resolution of disputed issues and as a means of promoting compliance with international standards of fairness.

II. THE FUNCTIONS OF LAW IN INTERNATIONAL PEACE NEGOTIATIONS: AN INTERDISCIPLINARY THEORETICAL FRAMEWORK

How do international legal norms influence peace negotiations? What functions can and should law serve in that setting? To answer these questions, this Part introduces a new theoretical framework, synthesizing efforts by contract and negotiation theorists to describe how law functions in the context of private ordering and studies by international law and international relations

11. As legal adviser to the Palestinian negotiating team from September 1999 to June 2001, I was involved in the preparation of some of these documents, and I was subsequently given access to other Palestinian records during my research on this project. Most of the materials I used were drawn from the electronic files of the Negotiations Support Unit (NSU) of the Negotiations Affairs Department. Having worked at the NSU during the period I describe in this Article, I am able to confirm the authenticity of the documents cited. Because the files are electronic and are not uniformly write-protected, however, it is possible (though unlikely) that minor alterations were made to them in the years since they were first prepared.

Although I have drawn upon published accounts by Israeli and American officials involved in the negotiations, I did not seek access to Israeli or United States government records. It is my hope that a fuller analysis of law's roles in the talks will be possible when these records enter the public domain.

scholars regarding the factors influencing compliance with legal rules[12] at the international level.

A. *The Functions of Legal Rules in Private Ordering*

Law is not, of course, the only factor that shapes the preferences and positions of participants in a bargaining process. Often, it is not even a primary factor: Summarizing a series of empirical studies of contracting behavior, Jay Feinman observes that, "when 'contracting,' people do not usually consciously shape their conduct to conform to the requirements of the law or to achieve certain legal effects; . . . often [parties] are unlikely to know of the content of the law or of the legal consequences of their actions."[13] Indeed, many factors, other than legal rights and obligations, have been found to influence bargaining behavior, including the economic costs and benefits of reaching agreement[14] and of continuing to negotiate;[15] interests in maintaining an ongoing relationship with the other party;[16] social norms;[17] cultural difference;[18] power disparities;[19] even spite or distrust.[20]

To acknowledge that legal rules are not the only—or even the primary—determinant of negotiated outcomes is not to suggest that they lack effect entirely. But how does law influence negotiations? In their article, *Bargaining in the Shadow of the Law: The Case of Divorce*, Robert Mnookin and Lewis Kornhauser examined how the formal legal system affects dispute settlement outside of court in the context of divorce settlement negotiations. As Professor Mnookin later explained, their "core idea is encapsulated by the 'shadow' metaphor: expectations about what might happen in court affect resolutions negotiated outside of court. The law's shadow is cast by legal rules and procedures, as well as by other institutional features of the formal legal

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12. In this Article, I use the terms "legal norms" and "legal rules" interchangeably, as is the convention in American international law literature. I do not treat them as the terms of art they represent in regime theory literature. *See, e.g.*, ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 57 (1984) (defining "norms" as "standards of behavior defined in terms of rights and obligations," and "rules" as "specific prescriptions or proscriptions for action").

13. Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1305-06 (1990).

14. Such analysis is the stock and trade of Law and Economics scholars. For a recent treatment, see generally Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000) (proposing a framework for analyzing negotiation processes based on economic choices parties face at each stage of bargaining).

15. *See* Mnookin & Kornhauser, *supra* note 9, at 971-72.

16. *See, e.g.*, Ian Macneil, THE NEW SOCIAL CONTRACT (1980) (describing non-legal mechanisms employed by parties to enforce obligations in ongoing relationships involving repeat transactions).

17. *See* Herbert Jacob, *The Elusive Shadow of the Law*, 26 LAW & SOC'Y REV. 565, 566-72 (1992).

18. *See generally* RAYMOND COHEN, NEGOTIATING ACROSS CULTURES: INTERNATIONAL COMMUNICATION IN AN INTERDEPENDENT WORLD (1992) (examining the effect of cultural difference on negotiating styles).

19. *See generally* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002) (reflecting on the differences between law-based and power-based bargaining in GATT and WTO legislative forums).

20. *See* Jack Hirshleifer & Evan Osborne, *Truth, Effort, and the Legal Battle*, *in* THE DARK SIDE OF THE FORCE: ECONOMIC FOUNDATIONS OF CONFLICT THEORY 131, 133 (Jack Hirshleifer ed., 2001); Mnookin & Kornhauser, *supra* note 9, at 974-75.

system."[21] Drawing on sociological data, Mnookin and Kornhauser found that parties' negotiating behavior is influenced by "the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement."[22] While parties may choose to conclude an agreement that departs from the allocation of rights and obligations that the law would prescribe if they litigated instead of negotiating, the anticipated results of that potential litigation give parties "bargaining chips"[23] that shape their preferences and positions. The value of these bargaining chips is affected by "the degree of uncertainty concerning the legal outcome if the parties go to court" and "the parties' attitudes towards risk."[24] Thus, because legal rules "cast a shadow" over negotiations to the extent that they are likely to be imposed by a court if negotiations fail, the length of their shadow derives from the probability of such enforcement, which, in turn, depends on the determinacy of the rules in question and the costs of seeking enforcement.

Mnookin and Kornhauser acknowledged that legal rules also serve other functions in the bargaining process—determining, for example, who is entitled to participate and the form an agreement must take[25] and defining minimum standards with which an agreement must conform.[26] They argued, however, that "the primary purpose of the legal . . . system should be to provide a framework for private ordering."[27] "After all," they asked, "who can better evaluate the comparative advantages of alternative arrangements than the parties themselves?"[28]

Law's role in facilitating and constraining private ordering by bargaining parties has been further elaborated in more recent studies by contract and negotiation scholars. In one recent article, Russell Korobkin offers a framework and vocabulary for analyzing bargaining processes that are particularly useful for understanding the functions of law. He suggests that negotiations comprise two distinct (though at times sequentially overlapping) phases: "zone definition" and "surplus allocation."[29] During the former, negotiating parties undertake to identify the substantive "bargaining zone" within which a deal is possible—i.e., "the distance between the reservation points (or 'walkaway' points) of the two parties."[30] To put it in simple commercial terms, if the highest price one party is willing to pay is lower than the lowest price at which the other party is willing to sell, the parties lack a bargaining zone, and they both will prefer to walk away from the deal. On the other hand, if the parties' bargaining zone comprises a number of different potential "deal points," they then engage in a process of allocating the

21. Fred R. Shapiro, *The Most Cited Articles from the Yale Law Journal*, 100 YALE L.J. 1449, 1494 (1991) (quoting commentary by Prof. Mnookin).
22. Mnookin & Kornhauser, *supra* note 9, at 966.
23. *Id.* at 968.
24. *Id.* at 966.
25. *See id.* at 951.
26. *See id.* at 955, 957.
27. Shapiro, *supra* note 21, at 1494 (quoting commentary by Prof. Mnookin).
28. Mnookin & Kornhauser, *supra* note 9, at 957.
29. Korobkin, *supra* note 14, at 1791-92.
30. *Id.*

economic "surplus," undertaking to persuade each other of the merits of their respective preferred outcomes.[31]

Legal rules may influence the parties' attempts both to determine whether they share a bargaining zone ("zone definition") and to persuade each other of the merits of their respective preferred outcomes within that zone ("surplus allocation"). Legal rules contribute to zone definition insofar as each party's reservation point is determined by the party's "best alternative to a negotiated agreement" (BATNA),[32] because the BATNA is shaped, in part, by the perceived availability, costs and contours of a legal remedy.[33] In other words, a party will walk away from a deal that is more costly to her than the result that the law is likely to provide if no deal is reached. This kind of influence is essentially the "shadow of the law" that Mnookin and Kornhauser described.[34]

Legal rules, like other "community norms of either procedural or substantive fairness," may also be invoked by the parties during the process of surplus allocation as part of their effort to persuade their counterpart of the virtues of a specific negotiated outcome.[35] Two characteristics of legal rules make them well suited to serve this function. First, because legal rules often are based on majority practices,[36] they provide bargaining parties with an indication of *best practices* in similar circumstances and, accordingly, a standard on which to base arguments for or against various potential deal points within their bargaining zone.[37] Second, because legal rules are defined "independent of each side's will," they provide an *objective* basis for evaluating the merits of various proposed deal points.[38] Both of these characteristics of legal rules make them potentially powerful tools for persuading an adversary of the virtues of a particular deal.

In addition to influencing what the parties choose to put into an agreement, legal rules may influence what they omit from it. As Allan Farnsworth explains, "It has become common in English to refer to [certain] rules as *default* rules, by analogy to the default settings on a computer, since they are subject to contrary agreement but apply by default absent such agreement."[39] Because parties to an agreement cannot foresee every contingency that may arise (and may find it excessively costly to negotiate in

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31. *Id.*

32. The expression was coined by Roger Fisher and William Ury. *See* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 97-106 (2d ed. 1991).

33. *See* Korobkin, *supra* note 14, at 1800-01.

34. *See* Mnookin and Kornhauser, *supra* note 9.

35. Korobkin, *supra* note 14, at 1792.

36. *See* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 821-26 (1992).

37. *See* Tamar Frankel, *Trusting and Non-Trusting on the Internet*, 81 B.U. L. REV. 457, 476 (2001) (discussing how contract law may have to adapt specifically for internet business and use default rules that follow fiduciary law to reflect the best practices of industries conducting business on the internet); Cass R. Sunstein, *Symposium: Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 117 (2002) (discussing the benefits of having default rules that reflect best practices in the employment context).

38. *See* FISHER ET AL., *supra* note 32, at 85.

39. ALLAN FARNSWORTH, CONTRACTS § 1.10, at 36 (3d ed. 1999). Examples of default rules in the domestic context include the rule in many states providing for maternal custody of the children in the event of divorce and the rule, under the Uniform Commercial Code, that an offeree respond to an offer within a reasonable time.

advance how to address even those they do foresee), all agreements are to some extent incomplete; and default rules provide some indication of how a court will fill in the gaps.[40] Accordingly, parties may decide as much by failing to—or choosing not to—address a particular issue in an agreement as by addressing it, at least insofar as legal rules are available to serve as gap-fillers and recourse is available to a forum capable of interpreting the agreement and the relevant law.

All three of the functions of legal rules described above—facilitating zone definition by helping each party to determine its BATNA, providing a persuasive standard for surplus allocation, and filling in gaps in the parties' agreement—are based on an essentially instrumental view of the law. Legal rules, in this conception, are relevant only to the extent that they are useful to the parties. What is at issue here is efficiency: even though legal rules may be designed to provide for an outcome that is fair or sensible, their value in the bargaining process derives not from their fairness or good sense but, instead, from their potential to reduce transaction costs—either by helping parties to predict the outcome of litigation or by providing ready, tested solutions to issues on the table, making it unnecessary for the parties to incur the costs of negotiating solutions to them. Insofar as law exists to facilitate private ordering, parties are free to agree to terms in accordance with legal rules or to terms that depart from them, if they so prefer. The assumption in both cases is that the parties themselves are in the best position to determine how to allocate costs and benefits between them.

What this emphasis on facilitating efficient private ordering overlooks, however, is the normative function of law. Contracts theorists recognize a distinction between "default" rules and "mandatory" rules[41] (sometimes called "immutable" rules).[42] Unlike default rules, mandatory rules may not be varied or waived by negotiating parties, even if both would choose to do so. Because the law of contracts is a system generally designed to permit, even encourage, parties to order their legal relations according to their own perceived interests and priorities, mandatory rules are rare.[43] Their primary purpose is not, like default rules, to facilitate efficient choices by bargaining parties. Instead, they operate forcibly to inject standards of procedural or substantive fairness into the bargaining process. According to Ian Ayres, these constraints may be "justified either by 'externalities' or 'paternalism' in that lawmakers might make rules mandatory to protect people not in contractual privity (e.g., as in the mandatory prohibition of criminal conspiracies) or to protect people who are parties to the contract itself (e.g., as in the mandatory prohibition against

40. *See* Barnett, *supra* note 36, at 821-26.

41. The term "mandatory rules" has a more specialized definition in the conflict of laws context than the one applied here. *See* Mohammad Reza Baniassadi, *Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration?*, 10 INT'L TAX & BUS. LAW. 59, 62-63 (1992).

42. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989).

43. *See* FARNSWORTH, *supra* note 39, § 1.10, at 36. Examples of mandatory rules in the domestic context include the implied obligation of good faith and the warranty of habitability.

contracting with infants)."[44] Thus, whereas default rules are concerned primarily with efficiency, mandatory rules are concerned primarily with fairness. Whereas default rules inform parties' choices about where the soft borders of their bargaining zone should be, mandatory rules comprise the hard borders of what may be called the "zone of lawfulness." Deal points outside that zone, while potentially acceptable to both parties, are not sanctioned by law.

It is consequently the case that the existence of mandatory rules forecloses certain deals that parties may otherwise have found it in their common interest to reach. Indeed, as Ayres observes, the enforcement of mandatory rules may serve in individual cases to leave the very parties the rules are intended to protect worse off, depriving them of the benefits that even a poor deal would offer.[45] As described in the next Section, this tension between the desire to promote adherence to legal rules that represent collective standards of fairness, on the one hand, and the desire to support any deal that will bring a dispute to an end, on the other, has been particularly acute in peacemaking efforts.

Taking this body of theory as a whole, legal norms serve one or more of the following functions in a bargaining process. Norms considered mandatory rules define a zone of lawfulness for negotiations, i.e., standards of procedural and substantive fairness that the parties may not lawfully contravene, even if they would prefer to do so. Norms not considered mandatory rules—i.e., default rules—may in turn serve several functions. First, they may help parties to define their bargaining zone; depending on their determinacy, these rules allow parties to anticipate the contours of a legal remedy should negotiations fail, facilitating definition of their respective BATNAs and, accordingly, their reservation points. Second, these norms may contribute to efficient surplus allocation by providing the parties with objective standards for choosing among potential deals. And, third, they may help a court to fill in gaps that the parties intentionally or unintentionally failed to resolve.

B. *International Bargaining: Analogies and Contrasts*

Does law play the same roles in public international negotiations that it plays in private ordering at the domestic level? The analogy between the two contexts, while inexact, is not incidental. In 1946, Hans Morgenthau observed (with some dismay) that "[t]he application of domestic legal experience to international law is really the main stock in trade of modern international thought."[46] And, indeed, when the drafters of the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention") undertook to codify customary international norms governing the making and breaking of

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44. Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U. L. REV. 897, 901 (1999).

45. Ayres notes, for example, that the "mandatory prohibition against usurious interest rates might limit the ability of high-risk consumers to borrow money or might induce sellers with bargaining power to extract their profits in a less efficient manner." *Id.* at 901-02.

46. HANS MORGENTHAU, SCIENTIFIC MAN VS. POWER POLITICS 113 (1946). As discussed further below, the conviction that the analogy between the domestic and international order is false lies at the center of the political philosophy articulated by Morgenthau and other Realists.

agreements between states, they drew substantially upon general principles of domestic contract law.[47] Accordingly, like a domestic contract, a treaty is voidable if conceived through fraud[48] or mistake,[49] and void if consent to it is procured through coercion.[50]

Although each of the functions served by legal rules in domestic bargaining have analogues in public international negotiations, the aptness of the analogy has been challenged. Skeptics ask how law can cast a shadow over negotiations when its content is unclear and its enforcement is unlikely. This Section examines both the analogies and the differences between law's roles in domestic and international bargaining. I conclude by arguing that the function of law in international negotiations is not confined to "casting a shadow" over talks—i.e., its influence is not simply a function of the legal sanction that will follow if no deal is reached. Drawing on recent international law and international relations scholarship, I suggest that law's influence is also a consequence of the *shade* it offers. By this I mean the attributes of legal rules that pull parties to reach an agreement in conformity with them even when enforcement is unlikely.

1. *Analogies*

Analogies may be drawn between each of the functions legal rules serve in the domestic setting and their roles in public international bargaining.

As in the domestic setting, mandatory rules of international law are rare. Under the Vienna Convention, a treaty is unenforceable if it conflicts with a peremptory norm of international law, which is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted . . . ."[51] Thus, an international agreement may not contravene certain legal rules—rules embodying the international community's most fundamental notions of fairness—even if both parties to the agreement would otherwise consent to do so.[52] In theory at least, jus cogens norms therefore represent the mandatory rules of international

47. *See* A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens, *as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 13 (1995). Indeed, delegations to the Conference raised the concern that elements of the International Law Commission's draft text were "based on 'the mechanical and unconsidered application of rules of internal private law to public international law . . . '" IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 174 (2d ed. 1984) (quoting U.N. Conference on the Law of Treaties, 1st Sess., 45th mtg. at 256, U.N. Doc. A/CONF.39/11 (Apr. 30, 1968)).

48. VIENNA CONVENTION ON THE LAW OF TREATIES art. 49, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VIENNA CONVENTION].

49. *Id.* art. 48.

50. *Id.* art. 52. *See also* Benedetto Conforti & Angelo Labella, *Invalidity and Termination of Treaties: The Role of National Courts*, 1 EUR. J. INT'L L. 44, 50-52 (1990) (citing decisions of three Netherlands courts that concluded that the German-Czechoslovak Nationality Treaty was void because it was concluded under unlawful duress).

51. VIENNA CONVENTION, *supra* note 48, art. 53.

52. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 (2), cmt. e (noting that while the U.S. has not ratified the Vienna Convention, "it is generally accepted that there are some peremptory rules of international law that are of superior status and cannot be affected by treaty").

law[53] and may be seen to form the hard edges of the zone of lawfulness within which states may negotiate. Although state practice in this area is extremely limited,[54] most international jurists "have accepted the principle that there may exist norms of international law so fundamental to the maintenance of an international legal order that a treaty concluded in violation of them is a nullity."[55] It is difficult, for example, to conceive of a judicial tribunal's enforcing an agreement that provided for rendition to torture, transfer of slave labor, or cooperation in perpetrating genocide.[56] And even outside of the human rights context, judges of the International Court of Justice have suggested that a treaty reservation contrary to a jus cogens norm would be void.[57]

The function of international law in international negotiation processes is not, however, limited to defining the boundaries of what is lawfully negotiable. In addition, legal rules may contribute to zone definition by helping a party to define its reservation point. As Roger Fisher observes, "law cannot restrain a government from doing what they [sic] want, but law affects what they [sic] want."[58] Examining the actions of the United States and the Soviet Union during the Cuban missile crisis, Fisher suggests that "[i]nternational law affected what the United States decided to try for": while American military authorities likely would have preferred to acquire and study Soviet missiles, "the United States had no legal right to seize those missiles, or even to destroy them." As a consequence, Fisher argues, the United States settled on a set of narrower objectives, including removal of existing missiles from Cuba, commitment not to install additional missiles there, and verification.[59] Louis Henkin reaches similar conclusions in his own analysis of the Cuban Missile Crisis. While acknowledging that "[n]o one can say exactly what factors, in what degree, weighed in the decision" between a ground invasion of Cuba, bombing of Soviet bases, and the "quarantine" ultimately chosen, he suggests that "legal considerations were not insignificant,"[60]

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53. For a thoughtful discussion of the domestic analogue to jus cogens rules, see SINCLAIR, *supra* note 47, at 204-07.

54. *Id.* at 215, 222.

55. *Id.* at 222; *see also* Jochen Abr. Frowein, *Jus Cogens*, *in* 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 327 (Rudolf Bernhardt ed., 1984).

56. *Cf.* United States v. Alfred Krupp, *reprinted in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 10, 1395 (1950) (finding that agreement providing for use of French prisoners of war as slave labor in German armament factories was *contra bonus mores* and consequently void); John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 198 (1998) (arguing that a party to an extradition agreement may refuse to extradite a person likely to be tortured by the receiving state because prohibition of torture is a jus cogens norm).

57. *See* North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.) 1968 I.C.J. 3, 182 (Oct. 12) (separate opinion of Judge Tanaka) (concluding that a reservation contrary to a jus cogens norm, such as the "essential principle of the continental shelf institution" would be void); *id.* at 97 (dissenting opinion of Judge Padilla Nervo) (concluding that jus cogens norms cannot be subject to unilateral reservations).

58. ROGER FISHER, INTERNATIONAL CONFLICT FOR BEGINNERS 163 (1969).

59. *Id.*; *see also* HENKIN, *supra* note 2, at 282-83.

60. HENKIN, *supra* note 2, at 286. Similarly, Abram Chayes argues that it is possible to determine "how" law influences decision-making, but not "how much," observing, "It is no more possible to demonstrate 'proximate' causation [in U.S. decision making during the Cuban missile crisis] . . . than in any other human process. The weight and consequence of legal advice in the final decision, like the weight and consequence of military judgment or Kennedy's machismo or the bureaucratic

explaining that concerns about the perceived legitimacy of the U.S. response among Latin American countries affected the choice among these options.[61] Thus, although a variety of political and security factors influenced American decision-making (not least, Soviet nuclear weapons), it seems likely that U.S. officials' assessment of what international law permitted, and of the cost of pursuing a remedy that would be regarded as a violation of international law, informed their definition of the United States's reservation point.

Legal rules may also contribute to zone definition by affecting the credibility of an adversary's reservation point. Fisher's analysis of the Cuban missile crisis is again instructive. Fisher argues that the United States's decisions to involve international institutions and to invoke international norms in support of its proposed blockade of Cuba gave it bargaining chips in its negotiations with the Soviet Union; he observes:

> By making offers and threats more legitimate, the law not only made them more acceptable; it also made them more credible . . . . The stronger the United States's legal case, the more credible each of these threats [became], and the less costly it would have been to the United States to carry them out. The international procedures followed and the legal rhetoric advanced in support of the United States position thus operated to make the threats more influential.[62]

Fisher's account suggests that by rendering its alternative to a negotiated outcome (its BATNA) more credible, the United States's invocation of legal norms also made its declared reservation point—the minimum it would accept from the Soviet Union—more credible. In essence, the message conveyed by American officials to their Soviet counterparts was the following: "The law entitles us to the fulfillment of certain minimum demands; if you are unwilling to accept them, we will walk away from the deal and pursue an alternative remedy." Of course, the United States's alternative remedy was not recourse to an adjudicative tribunal with enforcement capacity, as might be the case in the domestic setting, but rather, its own use of force.[63] By obtaining the imprimatur of international norms and institutions, however, the United States made its own use of force a more potent threat than it otherwise is likely to

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rigidity of the Air Force are, and must remain, unknowable." ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 4-5 (1974).

61. HENKIN, *supra* note 2, at 287-88. Henkin argues that while American concerns about Latin American perceptions of the crisis were political in nature, they "merely vindicate[d] the international norm and reflect[ed] the interests that [led] nations to accept it." *Id.* at 287. Indeed, as Henkin observes, the choice of the word "quarantine" also points to a U.S. desire to bolster the perceived legal legitimacy of its action: "The use of the word 'quarantine,' a legally neutral term, also suggests the lawyer's influence; it . . . emphasized that the action was limited and 'pacific,' while 'blockade' might have suggested war and belligerency." *Id.* at 289, n.†. Henkin's and Fisher's assessments are supported by evidence made available as a result of the declassification of executive branch materials on the missile crisis. *See* Timothy J. McKeown, *Plans and Routines, Bureaucratic Bargaining, and the Cuban Missile Crisis*, 63 J. POL. 1163, 1167-69 (2001) (describing discussion among executive branch officials about anticipated legal consequences of blockade of Cuba); Norbert A. Schlei, *Anticipatory Self-Defense*, 6 GREEN BAG 2d 195, 201 (2003) (reproducing memorandum from Department of Justice's Office of Legal Counsel examining international legal implications of various responses to potential establishment of missile bases in Cuba by the Soviet Union and recommending measures consistent with international law—some of which were adopted by Kennedy administration).

62. FISHER, *supra* note 58, at 171; *see also* HENKIN, *supra* note 2, at 290-93 (describing U.S. international law arguments before the Organization of American States).

63. *See* HENKIN, *supra* note 2, at 286.

have been. Thus, even though the avenues of enforcement of international legal rules are different than those in the domestic setting (a difference addressed further below), the effect on bargaining of their potential enforcement—"the shadow of the law" described by Mnookin and Kornhauser—is qualitatively the same.

In addition to facilitating zone definition, legal norms may provide standards for surplus allocation. As Joaquin Tacsan points out, "[t]hough parties to international disputes have certainly been known to manipulate international law in decidedly non-legal ways, such parties often enough choose to bargain on legal grounds because international law permits less of a range of manipulative calculation than other types of bargaining."[64] In his study of the Central American peace process in the 1980s, Tacsan observes that the parties sought to base their agenda on "absolute respect for the principles of self-determination and nonintervention," using these principles "as the common conflict-resolution criteria to guide the negotiations."[65]

The use of legal concepts may also obviate the need for parties to define every aspect of their relationship in their agreement. The relative precision of legal language—the possibility of "conveying a great deal of meaning" with relative economy through reference to established norms and standardized terms—makes it a valuable vehicle of communication between governments, both during negotiations and in agreements.[66] For example, an agreement delimiting the maritime boundary between two sovereign states need not include an exhaustive description of each state's rights on its side of the boundary. Because those rights are defined by international law, the parties can confine their bargaining to the issues with respect to which a departure from the norm is sought.[67] International legal rules therefore may offer negotiating parties a starting-point for bargaining or, alternatively, a default position with which gaps in their agreement may subsequently be filled.

As these examples suggest, legal rules serve functions in international negotiations that, in many ways, are analogous to those they serve in domestic bargaining. But how far does the analogy go? In what ways do the idiosyncrasies of international law and institutions alter the roles that legal norms play in international bargaining?

2. *Contrasts*

Skeptics submit that the analogy between the international and domestic settings is false or, at best, misleading. They highlight two primary differences between the two contexts. First, they argue that the influence of law on

64. TACSAN, *supra* note 4, at 187.

65. *Id.* at 189. Tacsan argues that the indeterminacy of these norms limited their usefulness as standards. *Id.* at 189-90. The challenge presented by the indeterminacy of international legal rules is addressed further below.

66. FISHER, *supra* note 58, at 167.

67. *See* Faraz Sanei, *The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with Its Geopolitical Realities*, 34 VAND. J. TRANSNAT'L L. 681, 800-01 (2001) (suggesting that application of U.N. Convention on the Law of the Sea as a framework for resolving Caspian Sea resource disputes would facilitate clear definition of littoral states' rights within their respective exclusive economic zones).

bargaining between governments is constrained by the indeterminacy of international legal rules, suggesting that international law's relative lack of development makes it difficult for negotiating parties to discern its meaning and implications and, accordingly, to use it effectively as a tool in negotiations. Second, they argue that the influence of law in domestic settings derives largely from the availability of some form of legal recourse, pointing out that enforcement of claimed legal rights at the international level is usually a remote prospect. I consider each of these arguments in turn.

a. *Indeterminacy of International Norms*

A rule's "determinacy" is the extent to which it "convey[s] a clear message" such that "one can see through the language of a law to its essential meaning."[68] According to Thomas Franck, the determinacy of a legal rule is "[t]he pre-eminent literary property affecting legitimacy."[69] Determinacy enables "states or persons to whose conduct the rule is directed [to] know more precisely what is expected of them, which is a necessary first step toward compliance."[70] Conversely, indeterminacy renders a rule so malleable that it is easier for a party to justify non-compliance with it.[71] In the context of bargaining, indeterminacy constrains the capacity of legal rules to serve the functions described above: It undermines their usefulness as predictors of the remedy a court (or other tribunal) would impose, making it more difficult for parties to assess the costs and benefits of a non-negotiated resolution of their conflict;[72] and it erodes the persuasive force of rules as objective standards for surplus allocation, resulting in differences between negotiating parties about how a given rule bears on an issue in contention.[73]

Are international legal rules sufficiently determinate to give them influence over international negotiations? Skeptics point out that even the mandatory rules of international law—jus cogens norms—are indeterminate in important respects.[74] Though hardly a skeptic himself, Ian Brownlie acknowledges that "more authority exists for the category of jus cogens than exists for its particular content."[75] Indeed, the Vienna Convention is silent about which rules are jus cogens norms, its drafters apparently having sought to avoid both "misunderstanding as to the position concerning other cases not mentioned in the article" and "prolonged study of matters which fall outside the scope of the present articles."[76] In its commentary to Article 50 of the

68. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 30 (1995) [hereinafter FAIRNESS].

69. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 52 (1990).

70. *Id.*

71. *See id.* at 54.

72. *See* Mnookin & Kornhauser, *supra* note 9, at 969 (explaining that the "lack of precision" of legal rules in the divorce context provides "a bargaining backdrop clouded by uncertainty").

73. *See* TACSAN, *supra* note 4, at 190-94 (observing that "ambiguity of legal norms" can result in manipulation of legal arguments by the parties, diminishing their value as objective standards).

74. *See, e.g.*, Weisburd, *supra* note 47, at 21-22.

75. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (3d ed. 1979).

76. *Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session*, 21 U.N. GAOR Supp. (No. 9), U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 169, 248, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

Vienna Convention, the International Law Commission did provide one illustration, characterizing "the law of the Charter concerning the prohibition of the use of force" as "a conspicuous example of a rule in international law having the character of jus cogens."[77] Other norms suggested for inclusion by various state delegations to the Vienna Conference included "the right to self-determination, human rights norms, rules of humanitarian law in warfare, and prohibitions of genocide, racial discrimination, and unequal treaties."[78] None of these rules, however, obtained the universal recognition of delegations to the Conference.[79]

This lack of consensus among the conferees in Vienna points to a larger tension in the international legal system. In addition to still unresolved questions about which international rules are non-derogable, and which may be negotiated around, the substantive contours of recognized peremptory norms remain a subject of controversy. For example, the norm of self-determination, to which the jus cogens label has been attached,[80] has proved to be difficult to apply with any coherence. As Cherif Bassiouni explains:

> "Self-determination" is a catch-all concept which exists as a principle, develops into a right under certain circumstances, unfolds as a process and results in a remedy. As an abstract principle it can be enunciated without reference to a specific context; as a right it is operative only in a relative context, and as a remedy, its equitable application is limited by the rights of others and the potential injuries it may inflict as weighed against the potential benefits it may generate.[81]

Some scholars submit that the indeterminacy of the norm of self-determination and the international community's failure to provide guidance as to its meaning in various contexts have prevented the rule from contributing constructively to resolution of the conflicts in which it has been invoked.[82]

The application of even clearly defined jus cogens norms has also proven difficult in some cases, particularly when strict adherence to the norm has been seen to undermine competing values. Thus, although the rule against the acquisition of territory by force has universally recognized jus cogens status, the international community, in the interest of bringing an end to armed hostilities, has endorsed agreements whose terms arguably derogated significantly from the rule.[83] Similarly, questions have arisen about the lawfulness, in the context of a peace agreement, of granting amnesty to

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77. *Id.* at 247.

78. Weisburd, *supra* note 47, at 16. *See also* Colm Campbell, *Peace and the laws of war: The role of international humanitarian law in the post-conflict environment*, 839 INT'L REV. RED CROSS 627, 632 (2000) (suggesting that a peace agreement granting formal amnesty to perpetrators of grave breaches of humanitarian law would be unlawful).

79. Weisburd, *supra* note 47, at 16.

80. *See* BROWNLIE, *supra* note 75, at 513; LAURI HANNIKAINEN, PEREMPTORY NORMS 'JUS COGENS' IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 424 (1988) (recognizing self-determination as a peremptory norm insofar as applied to "colonial-type domination").

81. M. Cherif Bassiouni, *"Self-Determination" and the Palestinians*, 65 AM. SOC'Y INT'L L. PROC. 31, 33 (1971).

82. CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 176-187 (2000) (examining Palestinian-Israeli and Balkan conflicts); TACSAN, *supra* note 4, at 81, 107-09 (examining Contadora process); WATSON, *supra* note 7, at 270-72 (examining Palestinian-Israeli conflict).

83. *See also* Francis A. Boyle, *Negating Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 515, 515-16 (1996); Weisburd, *supra* note 47, at 42-43 (pointing out that Dayton Peace Accord sanctioned forcible acquisition of territory by Serbia and Montenegro).

perpetrators of grave breaches of humanitarian law or violations of fundamental human rights.[84] Because international law is derived in part from state practice, efforts to address equitable concerns in peace agreements by departing from the outcome that legal norms would appear to prescribe arguably serve to render the norms less determinate (at least at their margins), further constraining their influence on international negotiations.

The case, however, should not be overstated. Determinacy, after all, is relative and situational: Although international legal rules may often prove indeterminate at their margins, the basic precepts of some rules are sufficiently determinate to allow parties to identify conduct that clearly contravenes them. Thomas Franck offers the following example from the litigation between the United States and Nicaragua in the International Court of Justice in the 1980s: Although the United States's reservation to its acceptance of the International Court of Justice's compulsory jurisdiction barred the Court from adjudicating any case involving "domestic" matters, as determined by the United States, the United States refrained from claiming that the mining of Nicaragua's harbors was a domestic matter, though doing so would have brought an immediate end to Nicaragua's suit against it.[85] Even though the definition of the term "domestic" was undoubtedly elastic at its margins, and subject to interpretation only by the United States, it was sufficiently determinate for certain conduct—the mining of another state's harbors—to fall clearly outside its scope.[86]

Moreover, the existence of differences between bargaining parties regarding the interpretation of rules does not necessarily indicate that the rules in question are indeterminate. As in the domestic setting, parties to international negotiations may adopt an interpretation of a rule that is at odds with a widely accepted understanding of its meaning. But whereas in the domestic setting recourse is available to a judicial tribunal capable of resolving the alleged ambiguity in the rule, the lack of robust international adjudicative and enforcement mechanisms can make it difficult to resolve even spurious claims of indeterminacy. Accordingly, it may be unclear what is prompting non-compliance—the rule's indeterminacy or the lack of recourse to a third party capable of interpreting and enforcing it. It is to the latter that I turn next.

b. *Lack of International Adjudicative and Enforcement Mechanisms*

Of the four functions of legal rules in negotiations that are described in the Sections above, three assume the availability of recourse to a forum capable of adjudicating and enforcing legal claims: mandatory rules will only appear credibly mandatory if transgressions are likely to elicit some form of sanction; and the usefulness of default rules, either as predictors of the

84. *See* Campbell, *supra* note 78, at 632; Ellen L. Lutz, Eileen F. Babbitt & Hurst Hannum, *Human Rights and Conflict Resolution from the Practitioner's Perspectives*, 27 FLETCHER F. OF WORLD AFF. 173 (2003).

85. *See* FAIRNESS, *supra* note 68, at 32.

86. *Id.*

contours of a non-negotiated outcome or as gap-fillers, turns on the expectation that some forum is positioned to impose a legal remedy if the parties fail to reach agreement on some or all of the issues in dispute. But if no such forum is available, or if recourse to it is unavailable, is law's role in negotiations limited to its persuasive power? And, if so, can a government be persuaded to accept a legal rule as a standard for prioritizing competing claims if it perceives compliance with the rule to be at odds with other interests?

The influence of international law on state behavior has been the focus of considerable attention by international relations and international law scholars. Realist scholars like Hans Morgenthau answer these questions in no uncertain terms. Characterizing the international system as "a competitive quest for power," Morgenthau expressed profound skepticism about the influence of international law on the decisions of states.[87] From the Realist perspective, international law is "epiphenomenal"[88]: The effectiveness of legal rules is contingent upon the threat of enforcement or sanction when the rule is violated; if such enforcement is left to individual states, as it is at the international level, the effectiveness of law is a function merely of states' relative power to sanction one another and their respective interests in doing so.[89] Accordingly, governments will not be constrained—or persuaded—by the invocation of legal rules to accept negotiated outcomes that they do not judge otherwise to be in their interests. Absent the threat of enforcement, law has no influence.

The response to the "Realist challenge" has been manifold.[90] Some scholars assert that Realists begin from the wrong starting-point by overstating the influence of enforcement in the domestic setting. Roger Fisher, for example, points out that "[f]or those in whose conduct we are interested—national governments—domestic law is backed up by less force than is international law,"[91] observing that governments "regularly comply with court decisions" even though courts lack the power independently to enforce their judgments against governments.[92] Governments do so because courts are "respected and disinterested," because judicial rulings take the form of "narrow and explicit demand[s]" rather than general rules, and because a decision to defy a court "would establish a disastrous precedent which others

87. Hans Morgenthau, *Positivism, Functionalism and International Law*, 34 AM. J. INT'L L. 260, 283 (1941).

88. Hathaway, *supra* note 3, at 1945-46 (observing that according to the Realist approach, "if compliance with international law occurs, it is not because the law is effective, but merely because compliance is coincident with the path dictated by self-interest in a world governed by anarchy and relative state power").

89. *See* Morgenthau, *supra* note 87, at 276-78; *see also* Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT'L ORG. 485, 488 (1988) (identifying five propositions that form the "core" of Realism, one of which is that international institutions will have only marginal effects on cooperation between states).

90. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L. L 205, 207-220 (1993) (describing "Realist challenge" and cataloguing responses to it from different schools of international law and international relations theory).

91. FISHER, *supra* note 58, at 152.

92. *Id.* at 154.

might follow."[93] Fisher suggests that the decisions of international courts and other international tribunals elicit compliance for similar reasons.[94]

Other responses to the Realist challenge have focused on the normative force of international legal norms, on the benefits of participation in international regimes, on the attitudes of domestic constituencies, or on the interaction of these factors. While it is not the purpose of this Article to assess the merits of the various perspectives advanced by compliance theorists, their central propositions, taken together, provide a useful framework for analyzing how the influence of legal rules in international negotiations differs from its influence in the domestic setting.

Oona Hathaway categorizes international law compliance theories into two primary models: "rational-actor" models and "normative" models.[95] Rational-actor models, she explains, "have at their heart a shared belief that states and the individuals who guide them are rational, self-interested actors who calculate the costs and benefits of alternative courses of action in the international realm and act accordingly."[96] The role of international law, from this perspective, is defined in instrumental terms—as one of a number of tools through which parties pursue their self-interest.[97]

Some rational-actor models, however, depart from the Realist assertion that law is effective only to justify decisions that would have been taken for other reasons.[98] Institutionalists, for example, argue that states comply with international law because participation in international institutions is useful to them, providing a means of achieving long-term goals that require at least a certain degree of cooperation with other international actors.[99] Thus, international law influences behavior insofar as failure to comply with it leads to reputational costs that diminish access to the benefits of participating in international regimes. "[B]y clustering issues together in the same forums over a long period of time, [international regimes] help to bring governments into continuing interaction with one another, reducing incentives to cheat and enhancing the value of reputation."[100] Liberal theorists, on the other hand, depart from the conception of the state as a unitary actor, submitting that a central factor in a government's compliance decisions is the existence of pressure from their domestic constituencies.[101] Accordingly, it is the internalization of international rules by persons and institutions *within* the

93. *Id.* at 156.
94. *See id.* at 158-59.
95. *See* Hathaway, *supra* note 3, at 1944-62.
96. *Id.* at 1944.
97. *See id.*
98. *See* Arend, *supra* note 3, at 115-16.
99. *See, e.g.*, KEOHANE, *supra* note 12, at 244-45; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1826-27 (2002).
100. KEOHANE, *supra* note 12, at 244-45. *See also* Hathaway, *supra* note 3, at 1950; Arend, *supra* note 3, at 120.
101. *See* Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L. ORG. 513, 513 (1997) (arguing that, particularly in democratic states, their very nature dictates that domestic societal preferences and pressures must shape the state preferences that are projected internationally). *See generally* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L. L. 503 (1995) (offering an overview of liberal theory and its implications for international law).

state and the pressure they exert that influence state behavior, not merely the threat of enforcement by external actors.

Normative theorists approach the question of compliance from a different angle entirely. As Hathaway explains, "Scholars adopting this approach argue that state decisions cannot be explained simply by calculations of geopolitical or economic interests or even the relative power of domestic political groups. A complete description of state action in the international realm, they argue, requires an understanding of the influence and importance of ideas."[102] From this perspective, compliance with law is not driven solely by the threat of enforcement; law also has influence because it is perceived to be legitimate and just.[103] Thomas Franck suggests that a number of factors affect the legitimacy of rules, including their determinacy and what he calls their "symbolic validation."[104] As he explains, "Determinacy communicates meaning. Symbolic validation communicates authority. Both affect the legitimacy of a rule or a rule-making or implementing process, its capacity to pull toward compliance."[105] Symbols, such as the rituals observed in diplomatic practice, bolster legitimacy by signaling "that authority is being exercised in accordance with right process, that it is institutionally recognized and validated."[106] Non-compliance with legal rules may be corrected through interaction and persuasive discourse at both the international level and the transnational level,[107] through the development of compliance capacity among governments, and through efforts to bolster the transparency and fairness of the international processes through which law is made.[108] Through this "transnational legal process," as Harold Koh has called it, state and non-state actors "interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."[109]

Thus, although the paucity of enforcement avenues undoubtedly shortens the shadow cast by international norms on public international bargaining, the shadow metaphor fails to capture important functions of law in bargaining between international actors. Legal rules may exert a "pull towards compliance"[110] as a result of a variety of factors other than the threat of enforcement. They may influence bargaining behavior because of their perceived fairness, at least insofar as they were developed pursuant to processes perceived to be legitimate. They may influence bargaining because of the reputational costs of non-compliance with them—costs that may hinder access to beneficial international regimes. And they may influence bargaining because domestic constituencies demand adherence to them.

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102. Hathaway, *supra* note 3, at 1955.
103. *See* Koh, *supra* note 3, at 2602.
104. FAIRNESS, *supra* note 68, at 34.
105. *Id.*
106. *Id.*
107. *See* Koh, *supra* note 3, at 2645-58.
108. *Id.* at 2645.
109. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-84 (1996).
110. FAIRNESS, *supra* note 68, at 34.

3. *The Shade of the Law*

Taken together, these theoretical approaches suggest that international law may exert influence not only as a result of the *shadow* it casts over bargaining, but also by virtue of the *shade* it offers—that is, its perceived value, independent of the threat of enforcement, as an objective and legitimate standard for resolving disputed issues.

Two examples of state practice illustrate these functions. In a recent study of early settlement in GATT and WTO disputes, Marc Busch and Eric Reinhardt found that a majority of concessions by defendants took place prior to the issuance of a formal ruling by a GATT or WTO panel.[111] Observing that "[n]either GATT nor the WTO possess centralized enforcement power, the upshot being that both have relied on the complainant itself to implement any retaliatory measures that may be authorized,"[112] and that the threat of such enforcement alone is "obviously insufficient" to induce concessions in a majority of cases,[113] Busch and Reinhardt offer several explanations for the tendency of states to settle their disputes prior to a formal ruling. They acknowledge that "the defendant's uncertainty about the complainant's willingness to implement retaliatory measures (if called upon to do so) is absolutely necessary to give recalcitrant defendants some interest, however slight, in cutting a deal in the first place."[114] They suggest, however, that a number of other factors are also influential:

> A panel ruling carries weight to the extent that it delivers a timely and coherent normative statement on the matter. Even without a credible threat by a complainant to seek authorization to retaliate, a definitive legal opinion from the institution may empower groups in the defendant state who oppose the disputed measure. Alternatively, a ruling may enable the defendant's executive to "tie hands," making concessions more politically palatable by citing the need to be a "good citizen" of GATT/WTO. A well-reasoned report may also set a *de facto* (if not formal) precedent that . . . may adversely affect the defendant's positions in ongoing multilateral trade round talks.[115]

Thus, even though an adverse ruling is often unlikely to be followed by effective enforcement, the threat of a ruling nevertheless may suffice to prompt a state to offer concessions in pre-ruling negotiations—because of the normative force of the ruling (the normativist view), the effect of resulting reputational costs on the state's participation in the international trade regime (the institutionalist view), and the likelihood that it will result in domestic challenges to the disputed practice (the liberal view). As far as these factors are concerned, it is the shade of the law—not its shadow—that influences bargaining behavior.[116]

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111. Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158, 162 (2000).

112. *Id.* at 163.

113. *Id.* at 164.

114. *Id.*, at 166.

115. *Id.* at 165 (citations omitted).

116. Of course, differences between negotiations conducted within the framework of an international trading regime and those conducted in the context of a peace process may affect the influence of legal rules in each. For example, a state's voluntary commitment to participation in the WTO (and the elaborate process by which that commitment is made) may signal a firmer embrace of the regime's rules – and, accordingly, a greater inclination to comply with them – than the near-automatic

A second example further illustrates the role that international legal rules and institutions can play in insulating government actions from domestic challenges. In 1982, the International Court of Justice accepted a request from the United States and Canada to establish a special chamber to resolve a dispute about the two states' maritime boundary in the Gulf of Maine, pursuant to a boundary treaty that entered into force in 1979.[117] Earlier efforts to resolve the countries' contentious dispute over fishing rights in the Gulf had proven unsuccessful, a fisheries treaty failing to earn ratification in the United States Senate due to fierce opposition by fishermen and members of Congress from affected northeastern states.[118] Ultimately, the boundary devised by the ICJ Chamber split the difference between the two sides.[119] By shifting the decision to the World Court, however, the political leaders on each side of the dispute were able to insulate themselves from the dissatisfaction of their constituents;[120] as the legal adviser who represented the United States at the ICJ later recounted:

> Georges Bank is no longer on the agenda of meetings between the President and the Prime Minister. So "throwing the matter to the lawyers" was a success in this regard. That is, a controversy that proved incapable of a compromise negotiated by diplomats was instead compromised by five judges, allowing the political bosses of both States to place any dissatisfaction with the result at the feet of the Chamber rather than at their own. This then is the "realpolitic" point of conjunction between international tribunals and diplomacy where mutual desperation proved such a potent internal political force in both States that our masters decided to grant the legal establishment the opportunity to "do its thing." So, that is what we did and the problem went away.[121]

Although the Gulf of Maine dispute culminated in joint consent by the parties to adjudication by an international tribunal, a step that few governments are prepared to contemplate,[122] it nevertheless demonstrates that international law and institutions can make unpopular political decisions easier by shifting some of the responsibility for them away from political leaders.[123]

Indeed, in an international order in which enforcement continues to be more often the exception than the rule, persuading a negotiating partner to seek the shade of the law may often be a better strategy than attempting to invoke its elusive shadow. Such a strategy may take a variety of forms.

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membership of states in the United Nations. In addition, the subject matter of the norms implicated in each context may affect states' willingness to conform their behavior to them. As John Yoo has observed, Realist scholars "reject[] the notion that international law can govern the use of force because security is too dear an interest to states." John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 731 (2004).

117. *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.) 1984 I.C.J. 246, 252 (Oct. 12).

118. *See* Davis R. Robinson, *The Convergence of Law and Diplomacy in United States-Canada Relations: The Precedent of* The Gulf of Maine Case, 26 CAN.-U.S. L.J. 37, 43 (2000).

119. *Id.* at 44.

120. *Id.*

121. *Id.*

122. *See id.* at 41-42 (observing that governments generally prefer to retain discretion to resolve disputes themselves, rather than "rolling the dice" by placing disputes before international tribunals).

123. According to William Ury, the decision by the governments of Peru and Ecuador to seek arbitration of their border conflict by the guarantors of a prior treaty between them was motivated by similar concerns: "With nationalist passions still running strong, political leaders felt it easier to accept a ruling by others than to make direct concessions to the enemy." WILLIAM L. URY, THE THIRD SIDE: WHY WE FIGHT AND HOW WE CAN STOP 152 (2000).

Institutionalist theory suggests that international legal rules are likely to be more persuasive—and, consequently, more effective tools for surplus allocation—if they are linked to participation in an international regime that offers concrete benefits to participants and imposes costs (even costs short of formal sanctions) for non-compliance. Liberal theory reveals the importance of directing efforts at persuasion not just at the government officials who are the immediate participants in international negotiations, but also at their domestic constituencies, which are likely to be particularly influential in democratic states. And normative theory demonstrates both that discourse about the fairness of legal rules is likely to be more persuasive than rote recitation of norms and that clarification of the content and implication of norms by authoritative actors in the international system may increase their influence even if enforcement capacity is wanting.

As I discuss in Part IV of this Article, these theoretical approaches offer lessons that may usefully inform future efforts to achieve a negotiated settlement of the Palestinian-Israeli conflict. In the next Part, however, I undertake not to look forward, but to look back—at how Palestinians and Israelis actually used international law during their abortive attempt to conclude a permanent status agreement between 1999 and 2001.

III. BARGAINING AT THE SHADOW'S EDGE: LEGAL DISCOURSE DURING PALESTINIAN-ISRAELI PERMANENT STATUS NEGOTIATIONS

In a recent forum on the Middle East peace process convened by the World Council of Churches, Professor Richard Falk and the former speaker of the Israeli Knesset, Avraam Burg, sparred regarding the appropriate role of law in Palestinian-Israeli peace efforts. Falk suggested that "The principal flaw in the Oslo peace process—and the problem with the Geneva Accord—is that both exclude the relevance of international law from the process."[124] Burg "asserted that peace would only succeed if peace negotiators focus directly on the practical concerns of ordinary citizens, rather than 'theoretical' international norms."[125] These disparate assessments of the utility and limitations of international law in Palestinian-Israeli negotiations, delivered several years after the suspension of the peace talks, mirror a persistent debate between the parties themselves. It is beyond the scope of this Article to trace the specific substantive contours of the parties' legal positions regarding each of the issues they were negotiating. Instead, drawing upon the theoretical framework defined in Part II, I undertake here to examine *how* the parties used international legal rules during their negotiation process. I begin by sketching the agreed legal framework and agreed structure of the negotiation process that the parties defined prior to the commencement of permanent status negotiations. I then proceed to analyze the functions served by international norms during the talks.

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124. Press Release, World Council of Churches, *Panelists at odds over role of international law in Palestinian-Israeli peace efforts* (Nov. 13, 2003), *at* http://www2.wcc-coe.org/pressreleasesen.nsf/index/pu-03-43.html (last visited Nov. 9, 2006).

125. *Id.*

A. *The "Agreed" Legal Framework*

In order to place the legal discourse during permanent status negotiations in context, it is useful to begin by assessing the extent to which the parties had agreed upon a legal framework for the talks: Had they reached an understanding about the zone of lawfulness within which they were bargaining? Did international legal norms help them to define their reservation points and the credibility of their counterpart's reservation points? Had they identified a body of norms that might serve as standards for resolving differences between them? Had they agreed on an institution or third party that could use law to fill in gaps in their agreement?

To the extent the parties had defined a legal framework, it was spare: The Declaration of Principles ("DOP"),[126] the foundational agreement that set the basic terms for the negotiation process that ensued, refers to only a few legal parameters. It defines the ultimate aim of the negotiations as follows:

> The aim of the Israeli-Palestinian negotiations within the current Middle East peace process is, among other things, to establish a Palestinian Interim Self-Government Authority . . . for a transitional period not exceeding five years, *leading to a permanent settlement based on Security Council Resolutions 242 and 338.*
>
> It is understood that the interim arrangements are an integral part of the whole peace process and that *the negotiations on the permanent status will lead to the implementation of Security Council Resolution 242 and 338.*[127]

Reflecting the inability of the parties to resolve a longstanding debate about whether Security Council resolutions 242 and 338 are self-executing or require further elaboration through negotiations,[128] the DOP simply incorporates the debate into its terms, providing in one clause that negotiations were to lead to a permanent settlement "based on" Security Council Resolutions 242 and 338 and, in another, that they would lead "to the implementation" of those resolutions.[129] The DOP, moreover, does nothing to articulate a common understanding of Resolution 242, the interpretation of which would become a major dispute when the parties commenced permanent status negotiations.[130]

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126. *See* Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestinian Liberation Organization (Sept. 13, 1993), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 890 [hereinafter DOP].

127. *Id.* art. 1 (emphasis added). U.N. Security Council Resolution 242 was adopted six months after the June 1967 Arab-Israeli war, see QUANDT, *supra* note 6, at 46, during which Israel seized the West Bank (then occupied and claimed by Jordan), the Gaza Strip (which was administered by Egypt), the Sinai Peninsula (Egyptian territory), and the Golan Heights (Syrian territory). In Resolution 242, the Security Council "emphasiz[ed] the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the region can live in security;" and it called, *inter alia*, for the "[w]ithdrawal of Israel armed forced from territories occupied" during the war, and the "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force." S.C. Res. 242, ¶¶ 2 & 4, U.N. Doc. S/RES/242 (Nov. 22, 1967). In Resolution 338, adopted in October 1973 during the Yom Kippur War, the Council called, *inter alia*, for the commencement of negotiations "between the parties concerned under appropriate auspices aimed at establishing a just and durable peace in the Middle East." S.C. Res. 338, ¶ 3, U.N. Doc. S/RES/508 (Oct. 22, 1973).

128. *See* ROSS, *supra* note 6, at 43-44.

129. DOP, *supra* note 126, at 890.

130. *See infra* notes 164-166, 180, 191-195 and accompanying text.

The DOP's few other references to international legal rules are even more oblique. The document's preamble states that the parties "recognize their mutual legitimate and political rights."[131] It does not, however, elaborate on the content of those rights or on their bearing on permanent status issues; and the letters of recognition exchanged by the parties prior to the DOP's signing provide only limited guidance.[132] The DOP does define a general substantive agenda for permanent status negotiations, which is to include "Jerusalem, refugees, settlements, security arrangements, borders, relations and cooperation with their neighbors, and other issues of common interest;"[133] but, with one exception, [134] it does not set out rules or principles to guide resolution of those issues other than through its references to Resolutions 242 and 338. According to Joel Singer, the legal adviser to the Israeli team that negotiated the DOP, the agreement's minimal definition of legal parameters was intentional, reflecting "the principle that all options should be left open."[135]

This "principle" is also apparent in the DOP provisions defining the process by which subsequent agreements, including the permanent status agreement, would be negotiated and disputes about them would be resolved. The PLO officials who negotiated the DOP sought "to retain the option of outside arbitration . . . to guarantee that the agreement would be fulfilled."[136] The DOP makes clear, however, that all disputes "arising out of the application or interpretation" of its terms would be resolved, in the first instance, through negotiations, with recourse to conciliation and arbitration only with the consent of both parties.[137] Reference of disputes to arbitration, moreover, would be limited to "disputes relating to the interim period."[138] Singer writes that this provision was intended to ensure that "[d]isputes relating to the permanent status agreement shall be resolved only through negotiations."[139] Indeed, the DOP leaves little doubt about the approach to conflict resolution it embodies: As declared in its preamble, the agreement set

131. DOP, preamble, *supra* note 126, at 890.

132. The PLO recognizes "the right of the State of Israel to exist in peace and security." Letter from Yasser Arafat, Chairman, Palestine Liberation Organization, to Yitzhak Rabin, Prime Minister of Israel (Sept. 9, 1993), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 889. Israel, in turn, recognizes "the PLO as the representative of the Palestinian people . . . ." Letter from Yitzhak Rabin to Yasser Arafat (Sept. 9, 1993), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 889.

133. DOP, art. 5, *supra* note 126, at 890-91. Agreed minutes appended to the DOP add two issues to this list: "military locations" and "Israelis." Agreed Minutes, Declaration of Principles on Interim Self-Government (Sept. 13, 1993), sec. B, art. IV, *in id.* at 896-97.

134. The one exception appears in an annex to the agreement addressing cooperation in economic and development programs. It provides, "Cooperation in the field of water . . . will include proposals for studies and plans . . . on *equitable utilization of joint water resources* for implementation in and *beyond the interim period*." DOP, Annex 3, *supra* note 126, at 894-95 (emphasis added). This reference to the norm of equitable utilization would also be a focus of dispute during permanent status negotiations between the parties.

135. Joel Singer, *The Declaration of Principles on Interim Self-Government Arrangements: Some Legal Aspects*, JUST., Winter 1994, at 13.

136. URI SAVIR, THE PROCESS: 1,100 DAYS THAT CHANGED THE MIDDLE EAST 39 (1998).

137. DOP, art. 15, *supra* note 126, at 892-93.

138. *Id.*

139. Singer, *supra* note 135, at 6.

the parties on a path toward peace and reconciliation "through the *agreed political* process"—not through a legal process imposed by others.[140]

A broad cross-section of the international community undertook on various occasions to articulate additional parameters to guide the Palestinian-Israeli peace process. The United Nations General Assembly, for example, passed a series of resolutions during the decade before the commencement of permanent status negotiations that defined "principles for the achievement of comprehensive peace," including:

> *(a)* The withdrawal of Israel from the Palestinian territory occupied since 1967, including Jerusalem, and from the other occupied Arab territories;
>
> *(b)* Guaranteeing arrangements for security of all States in the region, including those named in resolution 181 (II) of 29 November 1947, within secure and internationally recognized boundaries;
>
> *(c)* Resolving the problem of the Palestine refugees in conformity with General Assembly resolution 194 (III) of 11 December 1948, and subsequent relevant resolutions;
>
> *(d)* Dismantling the Israeli settlements in the territories occupied since 1967;
>
> *(e)* Guaranteeing freedom of access to Holy Places, religious buildings and sites.[141]

Although resolutions of this kind received broad support within the General Assembly, Israel and the United States declined to sign on to them.[142]

Indeed, the United States made clear in a letter of assurances to the Palestinians in the run-up to the Madrid Peace Conference in 1991 that, so long as negotiations between the parties were underway, it would not support "a competing or parallel process" in the United Nations.[143] The U.S. maintained this position throughout the Oslo process.[144] In September 1999,

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140. DOP, preamble, *supra* note 126, at 890 (emphasis added).

141. G.A. Res. 44/42, U.N. Doc. A/RES/44/42 (Dec. 6, 1989); *see also* G.A. Res. 45/68, U.N. Doc. A/RES/45/68 (Dec. 6, 1990). U.N. General Assembly Resolution 194 (III), to which the cited resolutions refer, provides that Palestinian refugees "wishing to return to their homes and live at peace with their neighbours should be permitted to do so . . . and that compensation should be paid for the property of those choosing not to return . . . ." G.A. Res. 194 (III), at 24, U.N. Doc. A/194 (Dec. 11, 1948).

142. The 1989 and 1990 resolutions received nearly universal support, with only Israel, the United States, and Dominica voting against them. Support for these resolutions among European states and the U.S.S.R. trailed off in 1991, however, after the convocation of the Madrid Peace Conference. *See, e.g.*, G.A. Res. 46/75 (Dec. 11, 1991). From 1993 to 1995, the text of this series of resolutions was altered, expressing support for the peace process then underway, while omitting the references to the guiding principles expressed earlier. *See, e.g.*, G.A. Res. 46/75, U.N. Doc. A/RES/46/75 (Dec. 11, 1993). This formulation won the support of Israel and the United States. Resolutions reintroducing the principles (though omitting the reference to dismantling settlements) were again passed with broad support from 1997 through 1999, but these again were opposed by Israel and the United States. *See, e.g.*, G.A. Res. 52/52, U.N. Doc. A/RES/52/52 (Dec. 9, 1997).

143. Letter from James Baker, U.S. Secretary of State, to Palestinians (Oct. 18, 1991), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 881, 882.

144. For example, although President Clinton reassured Chairman Arafat in April 1999 that the United States "knows how destructive settlement activities . . . are to the pursuit of Palestinian-Israeli peace" and "will continue to exert maximum efforts to have both parties avoid unilateral steps or actions designed to change the status of the West Bank or Gaza or to prejudge or preempt issues reserved for permanent status negotiations," Letter from Bill Clinton, President, United States of America, to Yasser Arafat, President, Palestinian Authority (Apr. 26, 1999), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1145, the Clinton Administration declined even to allow censure of settlement activity in the Security Council, vetoing two resolutions that called on Israel to halt

shortly before the commencement of permanent status negotiations, the European Union's Minister of Foreign Affairs sent a letter to Chairman Arafat reaffirming "the continuing and unqualified Palestinian right to self-determination including the option of a state," and appealing to the parties "to strive in good faith for a negotiated solution on the basis of the existing agreements, without prejudice to this right, which is not subject to any veto."[145] Although the U.S. Secretary of State also conveyed a letter of assurances to the Palestinians in September 1999, the U.S. letter did not speak of an "unqualified" right to self-determination—or of legal rights and obligations at all. Secretary Albright did express concern about ongoing Israeli settlement activity, but her concerns were framed not in terms of the illegality of settlement construction but, rather, of its effect on the political environment within which negotiations were taking place.[146] Indeed, as it had emphasized in its 1991 letter of assurances to the Palestinians, which stated that it would "accept any outcome agreed by the parties," the U.S. government showed little inclination to recognize any legal constraint on the outcome of the Palestinian-Israeli peace process—other than the necessity that the outcome be negotiated.[147]

In sum, the parties entered permanent status negotiations in 1999 without first having agreed on a clear set of legal principles to guide their talks. Not only had they defined a legal framework of extremely limited scope (just how limited would become clear on the eve of the negotiations), they also had failed to establish any mechanisms—or to agree on any institutions—that could elaborate on it. And the third party that had assumed the lead role in mediating the peace process, the United States, expressed unwillingness to constrain the substantive direction of the talks through parallel action in the United Nations or pronouncements of its own understanding of applicable legal norms. The cumulative effect of these decisions was that a number of questions with important implications for the parties' negotiating positions and strategies remained unresolved upon the commencement of negotiations: Did any mandatory rules of international law narrow the range of negotiated outcomes the parties could reach? Did the parties share a bargaining zone—i.e., was there any overlap between the minimum each would accept? Which criteria, legal or otherwise, would be used to evaluate competing preferences? What principles or bodies of law could be used to fill in the unavoidable gaps

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construction of the settlement of Har Homa near Jerusalem. *See* Press Release, Security Council, Security Council Again Fails to Adopt Resolution on Israeli Settlement, U.N. Doc. SC/6345 (Mar. 21, 1997). The U.S. ambassador to the United Nations, Bill Richardson, explained the U.S. position during discussion of a similar resolution in the General Assembly, stating, "we must take great care to respond to developments in a constructive way that will bolster the negotiating process, not limit prospects for the successful conclusion of permanent status talks. We have never believed, despite the useful role the United Nations can play and has played in working for Middle East peace, that it is an appropriate forum for addressing the issues now under negotiation between the parties." U.N. GAOR, 51st Sess., 93d mtg., U.N. Doc. A/51/PV.93 (Mar. 13, 1997).

145. Letter from Taria Halonen, Minister of Foreign Affairs, Gov't of Finland, to Yasser Arafat, President, Palestinian Authority (Sept. 4, 1999) (on file with PLO Negotiations Affairs Dep't).

146. *See* SWISHER, *supra* note 6, at 152.

147. For example, in a letter from President Clinton to Chairman Arafat in May 1999, Clinton asks Arafat to "continue to rely on the peace process as the way to fulfill the aspirations of your people," adding that "negotiations are the only realistic way to fulfill those aspirations . . . ." ENDERLIN, *supra* note 6, at 108.

in an agreement? And what institutions or mechanisms could be employed to undertake that process of gap filling after the conclusion of an agreement? As will be seen, most of these questions remained unresolved through the duration of the negotiation process.

B. *The Agreed Structure of the Negotiation Process*

In the DOP, Israel and the PLO resolved to begin permanent status negotiations "as soon as possible, but not later than the beginning of the third year of the interim period,"[148]—i.e., in 1996.[149] Although a ceremonial session was held in May 1996, negotiations were suspended immediately thereafter, following the election of Benjamin Netanyahu as prime minister of Israel that June. Three years later, when Ehud Barak assumed office after decisively defeating Netanyahu, Israeli, Palestinian, and American peace advocates anticipated a prompt resumption—and resolution—of peace talks.[150] At a summit at the Egyptian resort of Sharm el-Sheikh in September 1999, this optimism found expression in an ambitious timetable for the negotiations. The parties agreed to "make a determined effort" to negotiate a permanent status agreement in two phases: First, they would conclude "a Framework Agreement on all Permanent Status issues" ("FAPS") within five months;[151] they would then conclude a comprehensive agreement ("CAPS") seven months later.[152] As discussed below, the vagueness of the parties' agreed legal framework placed severe pressure on their capacity to achieve either of these goals.

The bifurcated process agreed at Sharm—defining a framework of principles that would be elaborated later in a comprehensive treaty—mirrored the processes that had led both to Israel's peace treaties with Egypt and Jordan and to its agreements with the PLO within the Oslo framework.[153] These two sets of precedents, however, pointed in different directions in an important respect. The Camp David Accords of 1978, and the Israel-Jordan Common Agenda of 1993, not only invoked U.N. Security Council Resolution 242 as the basis for the treaties the parties were preparing to negotiate, but also clarified the parties' common understanding of the resolution: essentially, that Egypt and Jordan, respectively, would resume the exercise of full sovereignty up to their internationally recognized borders with Palestine[154] and that the parties would establish relations normal to states at peace.[155] The Camp David

148. DOP, art. 5(1), *supra* note 126, at 890-91.

149. By the terms of the agreement, the interim period commenced upon Israel's withdrawal from the Gaza Strip, *id.*, which took place in May 1994.

150. *See* ENDERLIN, *supra* note 6, at 109-111; SWISHER, *supra* note 6, at 13-16.

151. Sharm el-Sheikh Memorandum, para. 1(c), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1149.

152. *Id.* para. 1(d).

153. In both cases, negotiations of a comprehensive treaty commenced after the conclusion of a framework agreement. *See* Camp David Accords between Israel and Egypt [hereinafter Camp David Accords] (Sept. 17, 1978), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 865-869; Common Agenda between Israel and Jordan [hereinafter Common Agenda] (Sept. 14, 1993), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 889-90.

154. Camp David Accords, *supra* note 153, at 868; Common Agenda, *supra* note 153, at 889.

155. Camp David Accords, *supra* note 153, at 869; Common Agenda, *supra* note 153, at 889.

Accords also defined in somewhat greater detail the establishment of demilitarized zones in the Sinai Peninsula[156] and provided for free passage of Israeli ships through the Suez Canal "on the basis of the Constantinople Convention of 1888."[157]

Four aspects of these framework agreements bear emphasizing. First, they are brief documents, outlining in spare terms the principles that would guide negotiations over more comprehensive treaties. Second, despite their brevity, they define a bargaining zone for subsequent talks, at least with regard to key issues. Third, they incorporate international legal rules by reference to fill in gaps in the texts, such as provisions of the Constantinople Convention and international norms defining sovereignty and peaceful relations. Fourth, they provide detail regarding only the issues on which they depart from the default that international law would provide, such as the establishment of demilitarized zones in the Sinai.

In contrast, the DOP not only offered few substantive parameters for the permanent status negotiations that were to take place some years later,[158] it also failed to define clear principles to guide negotiations over arrangements for the interim period, outlining proposed arrangements in often ambiguous terms [159] and entirely without reference to international norms. These ambiguities, which some had hoped would be resolved in good faith by the parties as their mutual confidence grew,[160] instead resulted in protracted debates about a number of critical issues and substantial delays in the negotiation process.[161] They also made it difficult for the parties to assess whether they actually shared a bargaining zone: Although they had signed an agreement, the ambiguities in it left unclear whether the parties were actually in agreement regarding a range of specific issues—and even whether such agreement was possible.

Which of these models would the FAPS follow? The Palestinian leadership approached permanent status negotiations with the express intention of reaching a FAPS modeled on Israel's framework agreements with Egypt and Jordan, rather than on the DOP. Their popular legitimacy challenged by the perceived failure of the Oslo accords to deliver improvements in Palestinians' lives,[162] the leadership sought to effect a qualitative change in the relationship with Israel that had been established for the interim period and to emphasize that the Palestinians expected the same status and treatment as Israel's other neighbors. Accordingly, the Palestinian position paper on borders and security issues prepared prior to the commencement of negotiations states that the goal of permanent status

156. Camp David Accords, *supra* note 153, at 869.

157. *Id.* at 868.

158. See *supra* notes 127-134 and accompanying text.

159. *See* Kittrie, *supra* note 7, at 1700.

160. *Id.* at 1670.

161. *See generally* AHARON KLIEMAN, CONSTRUCTIVE AMBIGUITY IN MIDDLE EAST PEACE-MAKING (1999) (describing various instances of constructive ambiguity in Oslo Accords and disputes arising from them).

162. *See* Omar M. Dajani, *Surviving Opportunities: Palestinian Negotiating Patterns in Peace Talks with Israel, in* HOW ISRAELIS AND PALESTINIANS NEGOTIATE: A CROSS CULTURAL ANALYSIS OF THE OSLO PEACE PROCESS 39, 56 (Tamara Coffman Wittes ed. 2005).

negotiations is to implement U.N. Security Council Resolutions 242 and 338, explaining that "[t]he essence of implementation is reflected in the complete withdrawal of the Israeli military forces from the occupied Palestinian territories, terminating the Israeli security, military and economic control on the elements of the Palestinian life in some regions, removing all negative effects resulted from the Israeli occupation."[163]

The day before the first round of permanent status negotiations commenced, however, Prime Minister Barak articulated a very different understanding of the implications of Resolution 242. While attending the International Socialist conference in Paris, Barak announced to reporters that Resolutions 242 and 338 did not apply to Israeli-Palestinian negotiations, explaining:

> In the case of Jordan, Egypt, Syria, and Lebanon, we are talking about states that have recognized, agreed borders with us. In the past, on that same border there was belligerent action, the results of which led to Israel holding onto territory. Resolution 242 refers to these territories. There is no such border on the West Bank.[164]

In a later clarification, Barak stated that while Resolution 242 was indeed applicable to the negotiations, "its context with regard to negotiations with the Palestinians is different from the context with regard to the other fronts."[165] These statements "created misgivings about Israel's intentions,"[166] provoking a fiery response from Yasser Arafat, who declared in his own speech, "Our Palestinian Arab people are still knocking on the door of international legality . . . . International legality is pivotal in the search for a just and comprehensive peace."[167]

This disagreement about how Resolution 242 applied to the Palestinian-Israeli conflict not only foreshadowed a normative dispute that re-emerged once negotiations began, it also challenged the logic behind the bifurcated process and short timetable to which the parties had agreed at Sharm el-Sheikh. The brief timeframe initially allocated to negotiating the FAPS[168] was based on the expectation that the parties would conclude a relatively brief agreement—"a thin FAPS," as they called it—that, as its name suggested, would define the framework for a comprehensive agreement.

In order to conclude a thin FAPS, however, the parties needed either to agree on principles that were clear and robust enough to establish their bargaining zone (the Egypt/Jordan model), to rely on good faith in interpreting more ambiguous formulations (the DOP model), and/or to provide for a third party mechanism to resolve interpretive differences (as Egypt and Israel had done to resolve a border dispute about Taba). The public scrape over

163. Palestinian Committee on Borders and Security, A Position and Concept Paper about Borders and Security in the Final Status Negotiations (October 1999) (on file with PLO Negotiations Affairs Dep't).

164. YOSSI BEILIN, THE PATH TO GENEVA: THE QUEST FOR A PERMANENT AGREEMENT, 1996-2004 115 (2004).

165. *Id.*

166. *Id.* at 115-16.

167. *See* Jocelyn Noveck, *Israeli, Palestinian Leaders Disagree on U.N. Resolutions*, AKRON BEACON, Nov. 10, 1999, at A2.

168. Already brief, the time available for negotiation was shortened by Israel's decision to focus on negotiating a peace agreement with Syria during the same period.

Resolution 242 just before negotiations began raised questions about the parties' ability to agree on clear principles, and the lingering recriminations about the scope of and compliance with their respective obligations under the Oslo accords challenged each side's confidence in the other's good faith. Moreover, Israel had made clear in negotiations regarding interim issues that it regarded the strictly bilateral structure of the negotiations process as a "red line" and would not countenance third party involvement.[169] As discussed in the next section, these obstacles to concluding a thin FAPS ultimately proved insurmountable. As an Israeli legal adviser commented to me during a break in one of the early negotiation sessions, "Why is it only clear to the lawyers in the room that a thin FAPS is impossible? Where you want thin, we want fat, and where we want thin, you want fat!"

C. *Competing Visions of Law's Role in Permanent Status Negotiations*

Once permanent status negotiations eventually began in November 1999, the parties were confronted with a challenge of formidable proportions. Having committed to "make a determined effort to conclude a Framework Agreement on all Permanent Status issues" by February 13, 2000,[170] their first deadline loomed only 100 days ahead. Because the parties had reached agreement upon so little prior to the commencement of talks, however, the substantive questions they had yet to resolve were numerous, including:

- Would a Palestinian state be established in the West Bank and Gaza Strip?
- What course would the borders between Israel and the "Palestinian entity"[171] take? Would a territorial link between the West Bank and the Gaza Strip be established?
- How would sovereignty and control over the city of Jerusalem be allocated?
- What would happen to Israeli settlements in the West Bank, East Jerusalem, and the Gaza Strip and their residents?
- How would strategic and tactical security arrangements be structured in the future? Would Israel maintain military/security assets in or access to the West Bank and Gaza Strip and their airspace? Would limitations be placed on Palestinian military or security capacity?
- What would be the fate of the Palestinian refugees who fled or were expelled from territory in what is now the State of Israel? Would they be permitted to return to Israel? What would happen to their real property and other assets in Israel?

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169. *See* Omar M. Dajani, *Understanding Barriers to Peace: A Palestinian Response*, 20 NEG. J. 401, 404-05 (2004).

170. Sharm el-Sheikh Memorandum, para. 1(c), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1150.

171. Until May 2000, when Israeli negotiators began to acknowledge that a Palestinian state would be established in the West Bank and Gaza Strip in the context of a permanent status agreement, they tended to refer only to the "Palestinian entity" that would be established. *See infra* note 248 and accompanying text.

- How would sovereignty and control over critical resources such as water and the electromagnetic sphere be allocated and coordinated?
- What kind of economic relationship would the parties establish in the future? Would the modified customs union established by the Oslo Accords be replaced by a free trade area?

These questions, in turn, raised a range of difficult process questions: Which issues should be negotiated first? Which issues should be negotiated in tandem? Which, if any, were not subject to negotiation at all? Which issues should be addressed in the FAPS and which in the CAPS? Which should be addressed in other ways, such as through side agreements, unilateral declarations, or commitments to third parties? What effect would commitments in the FAPS have pending negotiation of the CAPS? With which Palestinian entity would each agreement be concluded—the PLO or the government of a Palestinian state? In what order would each side perform its obligations? Would a new set of transitional arrangements be defined? For what duration? How—and by whom—would disputes regarding interpretation or implementation of the agreements be resolved?

Presented with such a dizzying agenda and such a short deadline, each of the parties arrived at the table with ideas about how to simplify the task before them. Their ideas, however, differed, and one of the issues with respect to which they differed most was the role that international law should play in resolving the substantive and procedural questions the parties faced. In his memoir of the peace process, United States mediator Dennis Ross observes:

> Over time, the negotiations that emerged from the Madrid and Oslo processes were very detailed on all issues. But the points of departure were very different. The Arabs and Palestinians always sought acceptance of their principles while the Israelis always sought recognition of the practicalities. The gaps on the issues bore not just disagreements but very different attitudes about the negotiations, their purpose, and the tactics that should be employed.[172]

Even if one puts aside Ambassador Ross's implicit judgment about the reasonableness of the parties' respective approaches ("*their* principles" vs. "*the* practicalities"), I submit that his account misapprehends the core difference between them. As discussed below, both parties undertook to confirm that they shared a bargaining zone by seeking agreement to a set of guiding principles. Both parties also articulated principles on the basis of which, they argued, prospective deal points should be evaluated. What they differed about was which principles to use. Whereas the principles urged by the Palestinians tended to be defined in relation to international legal norms (at least initially), the principles advanced by the Israelis tended to be defined in relation to Israel's national security concept, domestic public opinion, and, toward the end of the negotiation process, American proposals.

In this Section, I undertake to explain those differences by examining how the parties used, or attempted to use, international law and their discourse about its value and relevance to their negotiation process. Although it is difficult to generalize about a process that ultimately spanned thirteen months

172. ROSS, *supra* note 6, at 44-45.

and scores of meetings among changing teams of negotiators from each side, I suggest that the parties attempted to use international legal rules during the negotiations in four different ways: (1) to facilitate definition of either a zone of lawfulness or a bargaining zone; (2) as objective standards for choosing between competing positions; (3) to fill in gaps in the agreement; and (4) to challenge the legitimacy of non-legal criteria for resolving disputed issues. Each of these patterns is considered below.

1. *Use of Legal Rules to Facilitate Zone Definition*

During early negotiation rounds in the winter of 1999-2000, the parties dedicated considerable effort to discussing how to structure an agenda for the negotiation process—which issues would be addressed and in what order they would be negotiated. These discussions were sometimes contentious, often implicating the parties' substantive positions, and they never produced a lasting decision, the negotiations instead proceeding in an ad hoc manner. Indeed, debates about the sequence and content of the parties' substantive agenda persisted until well into June 2000[173]—seven months after the commencement of the talks. To a significant extent, as described below, the parties' disputes about how and what to negotiate arose from disputes about guiding principles.

Particularly during early rounds, the Palestinian team argued that negotiations should begin with an effort to reach a common understanding regarding the legal principles that would guide resolution of disputed issues. Their arguments took two forms. Initially, the Palestinian negotiating team took the position that international norms were *mandatory rules* that required resolution of disputed issues in particular ways, declining to discuss Israeli proposals until the parties reached consensus about the boundaries of the zone of lawfulness within which they were operating. Over time, however, Palestinian negotiators began invoking law in a different way, treating international norms as *default rules*. While acknowledging that the parties could depart from the default if they so agreed, the Palestinians turned to arguing that the rules established certain principles that should serve as a starting point for negotiations, in essence invoking the "shadow of the law" to bolster the credibility of their declared reservation points. The Israeli response to both kinds of arguments was to challenge the applicability and efficacy of international legal norms, as well as the Palestinians' interpretations of them.

a. *Mandatory Rules*

The Palestinians' initial approach is well-illustrated by their positions in early negotiation sessions on refugees, security, and territorial issues. In their first presentation of their "concept" for resolution of the refugee issue, for example, they argued that U.N. General Assembly Resolution 194, which provides, inter alia, that "the refugees wishing to return to their homes and

173. *See* Minutes, Palestinian-Israeli Negotiations, Bolling Air Force Base, Washington, D.C. (June 13, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

live in peace with their neighbours should be permitted to do so,"[174] simply "restated and reaffirmed a well-established norm in international customary law."[175] Accordingly, they submitted, "the Framework Agreement must give full recognition to the right of every refugee to return to his or her home" and provide for the implementation of that right.[176] Although the Palestinians' presentation also cited a range of non-legal justifications for refugee return,[177] the central thrust of their argument was that Palestinian refugees have a sacrosanct individual legal right to return and that negotiations should be confined to defining a process for its realization.[178]

The Palestinians' opening presentation on borders and security issues also undertook to narrow the scope of negotiations through reference to mandatory rules. This passage from the speech, a virtual paean to international law, is illustrative:

> We are convinced that the strongest and most durable foundation for peace between us is international law. In the wake of the Second World War, the international community united in an effort to prevent that terrible human tragedy from ever occurring again. That effort yielded two legal instruments that represent the international consensus regarding how we must conduct ourselves during times of peace and during times of war: the Charter of the United Nations and the Geneva Conventions of 1949. To be sure, these two legal instruments do not provide detailed answers to all of the questions presently before us . . . . They do, however, codify many of the principles essential to the orderly conduct of international relations—principles that must guide both our present deliberations and our relationship in the future.
>
> Central among these principles is the rule against the acquisition of territory by threat or use of force. As the United Nations Security Council recognized in Resolution 242, a just and lasting peace in the Middle East is contingent upon faithful application of that rule. Thus, although we believe that every State in the region is indeed entitled to live in peace within secure and recognized borders, we also believe that an unjust border can never be secure. Accordingly, a settlement involving anything less than Israeli withdrawal to 1967 borders and the realization of the civil, political, and economic rights of the Palestinian people will serve neither the interests of peace nor the interests of security.[179]

In this presentation, the Palestinians were not simply citing international norms as evidence of the fairness of their position; they were arguing that international norms mandated a particular result—i.e., that the "rule against the acquisition of territory by force" required nothing less than "Israeli withdrawal to 1967 borders." As Shlomo Ben Ami later recounted, "For the

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174. G.A. Res. 194 (III), 11 U.N. Doc. A/RES/194 (III) (Dec. 11, 1949).

175. Yasser Abed-Rabbo, Palestinian Authority Minister of Culture and Information, Palestinian Presentation on Refugees at the Palestinian-Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem (Dec. 9, 1999) (on file with PLO Negotiations Affairs Dep't).

176. *Id.*

177. Other justifications offered in the presentation included Israel's moral obligation "to shoulder the responsibility" for "the creation and perpetuation of the refugee problem over the past fifty years," the interest in "generating public confidence in peace," and interest in minimizing the threat to security represented by "keeping a population of refugees by force out of their places of origin." *Id.*

178. *Id.* At the conclusion of this presentation, the Israeli negotiating team declined to discuss the legal basis for refugee return, and the issue of refugees appears not to have been taken up again by the parties until March 2000. *See* ENDERLIN, *supra* note 6, at 143 (describing U.S.-moderated brainstorming session on refugees).

179. General Abdel Razzaq el-Yahya, Chairman of Palestinian Borders and Security Committee, The Palestinian Vision for Peace and Security, Presentation at the Palestinian-Israeli Permanent Status Negotiations, Neve Ilan Hotel, Jerusalem (Nov. 29, 1999) (on file with PLO Negotiations Affairs Dep't).

Palestinians, this was a simple, clear-cut process of decolonisation based on 'international legitimacy' and 'UN relevant resolutions.'"[180]

The Israeli team began from a very different starting point.[181] At a ceremony on September 13, 1999, marking the formal resumption of permanent status negotiations, Israel's then-Foreign Minister David Levy announced that "Israel is guided by four basic principles in negotiating a permanent status agreement: we will not return to the 1967 lines; united Jerusalem will remain the capital of Israel; settlement blocs will remain under Israeli sovereignty; there will be no foreign army west of the Jordan River."[182] The Israeli negotiating team's proposals during early rounds of negotiations conformed to these principles.[183] On December 20, 1999, for example, the Israeli team presented its "concept" for the "land basket" (i.e., issues with a territorial dimension).[184] Suggesting that "[t]he issue of settlements must be resolved in a permanent and realistic way—and we emphasize 'realistic,'" Israel's head of delegation, Ambassador Oded Eran, explained that there were 175,000 Israeli settlers in the West Bank[185] and that "[i]t would be unrealistic to expect that this number will be removed from where they live today."[186] Accordingly, he proposed, three categories of settlements were envisioned: those "in blocs under Israeli sovereignty"; "other individual settlements . . . under Israeli sovereignty"; and other settlements "not under Israeli sovereignty whose status will be negotiated."[187] With respect to the individual settlements to be placed under Israeli sovereignty, Eran stated that "four principles must be provided for in the agreement: (1) viability and future development of settlements[;] (2) means of livelihood and necessary infrastructure[;] (3) safety and security[; and] (4) free and secure movement and access."[188] In addition, Eran also proposed that a number of security zones—some under Israeli sovereignty, some under Israeli control—be established or maintained in the West Bank and Gaza Strip.[189]

When smaller teams from each side convened the next day to discuss territorial issues in greater detail, the differences between their approaches came into sharper focus. According to a report of the meeting prepared by the PLO's legal unit, the Palestinians continued to argue that international law mandated Israeli withdrawal to 1967 lines: "the Palestinian side emphasized that international law—specifically, the rule against the acquisition of territory by force—and the 'land for peace' formula promoted in Resolution 242

180. BEN AMI, *supra* note 6, at 246.

181. *See id.* at 247.

182. David Levy, Minister of Foreign Affairs, Address at the Ceremony Marking the Resumption of Permanent Status Negotiations, Erez Crossing Point (Sept. 13, 1999).

183. ROSS, *supra* note 6, at 624-25 (describing "the red lines that had governed the Israeli approach in the negotiations").

184. Ambassador Oded Eran, Presentation at Negotiation Session, Best Eastern Hotel, Ramallah (Dec. 20, 1999) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

185. Throughout the negotiations process, the parties disagreed about whether Israeli residents of East Jerusalem were appropriately considered settlers. Reflecting Israel's position, Eran refers here only to Israeli settlers outside of the municipal boundaries of Jerusalem established by Israel.

186. *See* Eran, *supra* note 184.

187. *Id.*

188. *Id.*

189. *Id.*

required Israeli withdrawal to the armistice cease-fire lines in force on June 4, 1967."[190] With respect to the Israeli presentation the day before, "[t]he Palestinian side asked a number of questions intended to probe the legal basis (or lack thereof) for the Israeli proposals," but the Palestinians declined to discuss the issues of borders, settlements, and security arrangements in detail unless "the Israeli side . . . agreed to withdrawal."[191]

The Israeli side, as the Palestinians perceived it, "appeared hesitant to discuss the legal basis for its proposals and sought, throughout the meeting, to shift the discussion to the concrete proposals they presented at the plenary session."[192] When pressed to respond to Palestinian questions about the applicable legal framework, "[t]he Israeli side suggested that international law can be useful in negotiations *only* if both sides agree that it is applicable and agree on its interpretation. They made clear . . . that they did not think there is agreement regarding either the applicability or the interpretation of international law in the present negotiations."[193] According to the Palestinians, the Israeli team responded to their specific legal arguments as follows:

> *Resolution 242.* The Israeli side argued that 242 simply requires a compromise between territory and security. They stated that, while the rule against the acquisition of territory by force was applicable, it was somehow applicable only to a limited extent in the context of the West Bank/Gaza. What 242 did require, they claimed, was the establishment, for each State, of "secure and defensible borders". It is unclear to what extent they regard this requirement as applicable to a state of Palestine, however: they reiterated that Palestine was not mentioned in 242 and that the [sic] Palestinian peoplehood had not received international recognition in 1967.
>
> *Fourth Geneva Convention.* The Israeli side refused to acknowledge that the Convention is applicable, arguing that Israel is not a belligerent occupant. They claimed that occupation presupposes the prior existence of a State and that "nobody knows" the status of the West Bank and Gaza Strip prior to 1967. . . . Although they acknowledged that Israel's views on this issue place it in the extreme minority, they asserted that "no one can force Israel to adopt another interpretation."
>
> *Peace treaties with Egypt and Jordan.* The Israeli side argued, without elaboration, that these peace treaties do not provide useful precedents because the factual contexts were different.[194]

In sum, the Israeli team argued that the legal rules cited by the Palestinians did little to define a zone of lawfulness for the talks: they were either inapplicable or indeterminate with respect to disposition of the issues on the table. They also maintained that Israel could not be obliged to accept the Palestinians' interpretation of norms, even if it was shared by the majority of the international community. Because legal norms were not "useful," the parties should resolve their disputes on the basis of other, more "realistic" grounds.

At virtually the same time that Palestinians and Israelis were debating these issues around the negotiation table, a very similar discussion unfolded among delegates to the sixty-eighth plenary meeting of the U.N. General

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190. PLO Negotiations Affairs Dep't Legal Unit, Report on Permanent Status Negotiations: Special Session on Borders Issues, December 21, 1999, Ramallah (Dec. 23, 1999) (on file with PLO Negotiations Affairs Dep't) (emphasis added).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

Assembly. As in previous years, the General Assembly considered a battery of draft resolutions relating to the question of Palestine.[195] In one of these resolutions, entitled "Peaceful settlement of the question of Palestine," the General Assembly noted "with satisfaction . . . the commencement of the negotiations on the final settlement,"[196] and emphasized the need for: "realization of the inalienable rights of the Palestinian people, primarily the right to self-determination;"[197] "withdrawal of Israel from the Palestinian territory occupied since 1967;"[198] and "resolving the problem of the Palestine refugees in conformity with its resolution 194 (III) of December 1948."[199]

The resolution was adopted by an overwhelming majority (149 votes to 3, with 2 abstentions), but the delegates' explanations for their votes are more illuminating than the final tally. The Palestinian and Israeli delegates, unsurprisingly, expressed very different views about the appropriate role for the international community in their negotiations. The Israeli delegate reaffirmed Israel's insistence on the strict bilateralism of the peace talks, explaining that Israel had chosen to vote against the resolution because it "openly seeks to predetermine the issues to be resolved by . . . negotiations, even as Israel and the Palestinians commit themselves to the permanent status talks that are now under way."[200] He argued, moreover, that a bilateral approach was explicitly mandated by the parties' earlier agreements.[201] The Palestinian delegate, in contrast, argued for a robust international role in ensuring that the talks were guided by international legal norms. He stated that the broad support for the resolution reflected "the commitment by the international community . . . to continue the efforts that we made to attain peace on the basis of international law and the principles of the Charter of the United Nations," expressing hope "that the Israeli side will abandon its present policy and positions and will start complying with requirements of international legitimacy" and calling on the international community "to take the necessary steps to end [Israel's] misguided conduct."[202]

The other delegates' speeches addressed the role of international law—and of the international community—in constraining the outcome of the peace talks in a number of different ways. A first group, comprised of representatives of Arab and Muslim countries and the Islamic Conference, spoke in the language of mandatory rules. Indonesia's delegate, for example, asserted that "everlasting peace can be established *only* with the full and unfettered exercise of the *inalienable* rights of the Palestinians and the *complete* withdrawal of Israel from all occupied Arab lands," and that "[t]he United Nations continues to bear a historical and moral responsibility for

195. *See supra* notes 141-142 and accompanying text.
196. G.A. Res. 54/42, ¶ 3, U.N. Doc. A/RES/54/42 (Jan. 21, 2000).
197. *Id.* ¶ 5.
198. *Id.*
199. *Id.* ¶ 6.
200. U.N. GAOR, 54th Sess., 68th plen. mtg. at 16, U.N. Doc. A/54/PV.68 (Dec. 1, 1999).
201. *Id.*
202. *Id.* at 20.

resolving this intractable conflict in all its aspects."[203] A second group, which included the delegates of Chile and Argentina, expressed support for strict application of international norms and UN resolutions to the resolution of the issues in dispute, but stopped short either of explaining what result that mandated or of demanding an international role in assuring it.[204] The Republic of Korea expressed support for the principles embraced by the resolution but seemed to suggest that the international community should focus on "endeavour[ing] to create the most propitious environment for peace to be realized" by facilitating Palestinian economic development.[205] The European Union simply "reiterate[d] its firm commitment to a just, lasting and comprehensive settlement in the Middle East based on the Madrid and Oslo Accords," leaving the support of its members for the resolution to speak for itself.[206] Finally, the United States, which joined Israel (and the Marshall Islands) in voting against the resolution, lent its support to Israel's bilateralist position, arguing that "[b]y adopting this . . . resolution, the General Assembly would seek to inappropriately interject its views into these negotiations," which "complicate[s] . . . the efforts of the parties themselves to achieve a settlement."[207]

It is risky to extrapolate too much about states' attitudes regarding the role of international law in peace negotiations from votes on resolutions of this kind and the speeches explaining them. The legal effect of General Assembly resolutions in general is a matter of some contention.[208] And when a resolution presumes to apply international law to a specific conflict, it is particularly hard to distinguish a commitment to a given norm from an effort to advance a narrower political agenda (e.g., supporting an ally, seeking a precedent that will advance a government's own interests in a separate (or related) context, or satisfying domestic constituencies with brave words in a setting that presents few costs). Moreover, the speeches offered in support of Resolution 54/42 express so many different rationales at such varying levels of abstraction that a prevailing "international community" position regarding the legal parameters—the zone of lawfulness—for a Palestinian-Israeli peace settlement is difficult to discern.[209]

What the discourse in the General Assembly in December 1999 does illustrate, however, is the challenges Palestinians were likely to face if they sought third-party adjudication or enforcement of the legal norms they were invoking at the negotiating table. Notwithstanding the near universal expression of support for their positions on key issues, the United States's opposition to even a limited normative statement by the international

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203. *Id.* at 2 (emphasis added). This position was also taken by the delegates from Lebanon, *id.* at 4; Oman, *id.* at 5; the Syrian Arab Republic, *id.* at 6-7; Qatar, *id.* at 10; and the Organization of the Islamic Conference, *id.* at 11.

204. *Id.* at 1 (Chile); *id.* at 9 (Argentina).

205. *Id.* at 8.

206. *Id.* at 13-14.

207. *Id.* at 16.

208. *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 207-211 (2002) (describing various theories regarding the General Assembly's law-making powers).

209. That said, the resolution arguably goes a good distance toward defining a prevailing international conception of the appropriate *political* contours of a peace settlement.

community did not bode well for the Palestinians' argument that the contours of a final settlement were constrained by mandatory rules of international law. Indeed, it foreshadowed the position that United States officials would take at Camp David a few months later.

For a time, however, the normative debate ended there. In January 2000, the parties shifted to negotiating the scope of still unfulfilled interim commitments, [210] and the Barak government focused its attention on negotiating a peace agreement with Syria.[211] The February 13, 2000, deadline for concluding the FAPS passed without fanfare—and without an agreement.

b. *Default Rules*

During the spring and summer of 2000, Palestinian negotiators began to change the way they used international law in negotiations. They continued to seek Israeli acknowledgement that international legal rules entitled the Palestinian people to certain benefits, but they expressed increasing willingness to exchange those benefits for others—essentially, to bargain in the shadow of the law.

This shift in approach first appeared during a round of "back channel" talks convened in late April and early May 2000 in Jerusalem and Stockholm as part of an effort to jump-start the moribund Palestinian-Israeli track.[212] During these talks, Palestinian negotiators for the first time "acknowledged that settlement areas like Gush Etzion, Ramot, and Gilo could become part of Israel given either their contiguity or their significance in terms of historical Jewish presence[,]"[213] but they continued to state that they "preferred to build the map from concepts rather than to build the concepts from the map."[214] These concepts included recognition of "the inadmissibility of the acquisition of territory by war and the obligation of states to conduct themselves in conformity with the U.N. Charter and the norms of international law, and the right of the Palestinian people to self-determination," norms the Palestinians sought to reference explicitly in the agreement.[215]

The Palestinian negotiators involved in the Stockholm round disclaimed their concessions when their talks were leaked to the public,[216] and Mahmoud Abbas, then head of the Palestinian Negotiations Affairs Department, made clear that Palestinians "could only accept the full implementation of the U.N.

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210. In the parties' earlier agreements, Israel had committed to undertake a series of redeployments from West Bank territory (territory over which the Palestinian Authority would assume jurisdiction), the last two of which had yet to be completed. The scale of these redeployments, along with other issues, was the focus of negotiation during this period. *See* ENDERLIN, *supra* note 6, at 138-40; *see also* ROSS, *supra* note 6, at 591-99.

211. *See* ENDERLIN, *supra* note 6, at 140-42.

212. These talks were held in secret, with the knowledge only of the participants and their principals, at the same time that "front channel" talks proceeded in the Israeli resort town of Eilat. For a detailed description of the Stockholm round, see ROSS, *supra* note 6, at 603-620; ENDERLIN, *supra* note 6, at 147-158.

213. ROSS, *supra* note 6, at 614.

214. *Id.*

215. ENDERLIN, *supra* note 6, at 154.

216. *Id.* at 158 (noting that Palestinian negotiator Ahmad Qurei' described the Stockholm paper as an "Israeli document").

resolutions now—on both territory and refugees." [217] Nevertheless, the Palestinians reverted to the approach they had taken at Stockholm when they arrived at Camp David two months later. The following exchange regarding territorial issues on July 12, 2000, the second day of the summit, illustrates this shift:

> *Abu Ala [Ahmad Qurei']*: Will you accept the June 4 border [as the basis of discussion]? Will you accept the principle of the exchange of territories?
>
> *Shlomo Ben Ami*: The Palestinian State will be created in the context of the agreement. This will be the solution to the refugee and Jerusalem problems. It will create a new situation, including various elements [that could play a role in the] exchange of territories.
>
> *Mohammed Dahlan (with Saeb Erekat translating from Arabic to English)*: We're entering the final week of a negotiation that has lasted five years. I know time isn't on our side. Will you accept Abu Ala's position on the subject of the line of June 4, 1967? We don't trust the way the Israelis are approaching the negotiation. You demand positions in Palestinian territory, we accept, and when all is said and done we wind up as strangers in this territory. We know what you want, but I don't think we can go further if you don't recognize the June 4 line. *After that, it will be possible to discuss modifications of the border and raise the question of the settlements. But this can't be done unless there's an agreement on the '67 line and [recognition of] the concept of an exchange of territories.*
>
> *Ben Ami*: We'll see that on the maps. But we've always taken the '67 line as a basis. The percentages of territory [that must be evacuated by the Israeli army] in the framework of the interim accord are on the West Bank, that is, on the basis of the '67 line.
>
> *Dahlan*: We're claiming the '67 line as a reality; it's not just a slogan for us. I reject on principle any agreement that will then be torpedoed in its implementation.
>
> *Madeleine Albright*: The Palestinians aren't clearly explaining their demands in the negotiation, and that makes the Israelis' task difficult. There has to be more depth in the presentation of your demands.[218]

Although the Palestinian negotiators in this exchange were not explicitly using the language of law, their statements treated the June 4, 1967 line not as a physical fact but as a legal construct. By seeking recognition of the 1967 line as the basis for negotiation, they were in effect claiming legal entitlement to the West Bank. Unlike in their early presentations, however, the Palestinian negotiators expressed willingness at Camp David to "discuss modifications of the border and raise the question of settlements," on the condition that they would receive compensation in the form of land exchange for any negotiated modifications to the 1967 line. Thus, they ceased to present Israeli withdrawal to the 1967 line as a mandatory rule that could not be varied, treating it instead as the default provided by law—a default that could be bargained around if commensurate benefits were offered.

The Palestinians' approach appears to have represented an attempt both to establish a "bargaining endowment"—i.e., to invoke the shadow of the law to bolster the credibility of their claimed reservation point (establishing a Palestinian state on territory equivalent in size to the West Bank and Gaza Strip)—and to narrow the range of outcomes that could emerge from the negotiations, to obtain reassurance that there was a bargaining zone within which a deal acceptable to them could be reached. Colonel Dahlan's expression of concern that a lack of recognition of the 1967 line as a basis for

217. ROSS, *supra* note 6, at 624.

218. ENDERLIN, *supra* note 6, at 185 (emphasis added) (citation omitted).

negotiation would yield an agreement that would leave the Palestinians "strangers in the territory" and could be "torpedoed in implementation" was a direct reference to the DOP and other interim agreements, which left Israel wide latitude in determining how much territory Palestinians would control during the interim period.[219] The Palestinians' demand for recognition of their entitlement to the 1967 line at the beginning of the summit seems to have been an attempt to ensure that permanent status talks would not proceed along the same path.

At Camp David, however, the Palestinians' attempt to make international norms the starting point for bargaining encountered resistance not only from the Israeli team,[220] but also from the Americans, as reflected in Secretary Albright's intervention during the initial round of territory negotiations at Camp David.[221] American impatience grew even more pronounced as the summit progressed (or failed to). On July 15, when asked by President Clinton to comment on a map presented by the Israelis, Palestinian negotiator Ahmad Qurei' refused, stating, "The Israelis must first accept the principle of the exchange of territories. Besides, for the Palestinians, international legitimacy means Israeli retreat to the border of June 4, 1967." Clinton's response reportedly was explosive; he shouted, "Sir, I know you'd like the whole map to be yellow [sovereign Palestinian territory]. But that's not possible. This isn't the Security Council here. This isn't the UN General Assembly. If you want to give a lecture, go over there and don't make me waste my time. . . .You're obstructing the negotiation. You're not acting in good faith."[222] In an attempt to clarify their position, the Palestinians conveyed a letter to Clinton the next day, explaining, "The aim of the negotiations is the implementation of Resolutions 242 and 338 . . . that is, Israel's withdrawal to the line of June 4, 1967. We are willing to accept adjustments of the border between the two countries, on condition that they be equivalent in value and importance."[223] According to then-National Security Advisor Sandy Berger, the ensuing discussion between Clinton and Arafat was "very difficult," Clinton threatening to bring an early end to the summit unless the Palestinians responded to Israel's demands for annexation of settlement blocs containing 80% of Israeli settlers, for an Israeli military presence on the West Bank border with Jordan, and a stipulation that the FAPS would "signify the end of the conflict."[224]

The Palestinians' legal arguments did not fall entirely on deaf ears. Describing internal deliberations regarding the formulation of an American proposal on territory in September 2000, Dennis Ross writes:

> Aaron [Miller] was always arguing for a just and fair proposal. I was not against a fair proposal. But I felt that the very concept of "fairness" was, by definition, subjective.

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219. See Omar M. Dajani, *Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period*, 26 DENV. J. INT'L L. & POL'Y 27, 61-66 (1997).

220. Israelis continued to argue that discussion should focus on the arrangements to be put in place, not on legal rights. *See, e.g.*, ENDERLIN, *supra* note 6, at 201-03.

221. *See supra* note 218 and accompanying text.

222. ENDERLIN, *supra* note 6, at 202; *see also* ROSS, *supra* note 6, at 668-69 (describing same episode).

223. ENDERLIN, *supra* note 6, at 212.

224. *Id.* at 212-13.

> Similarly, both Rob [Malley] and Gamal [Hilal] believed that the Palestinians were entitled to 100 percent of the territory. Swaps should thus be equal. *They believed this was a Palestinian right.* Aaron tended to agree with them not on the basis of right, but on the basis that every other Arab negotiating partner had gotten 100 percent. Why should the Palestinians be different?
>
> I disagreed. I was focused not on reconciling rights but on addressing needs. In negotiations, one side's principle or "right" is usually the other side's impossibility. Of course, there are irreducible rights. I wanted to address what each side needed, not what they wanted and not what they felt they were entitled to.[225]

But while the Palestinians' invocation of legal rights at Camp David does appear to have persuaded some members of the American peace team, Ross's perspective ultimately prevailed, the U.S. government expressing no explicit position on the parties' legal rights during the remainder of the negotiation process.

Even so, the Palestinians attempted to obtain agreement on legal rules as guiding principles with respect to other issues as well. In negotiations regarding water, conducted over a number of sessions during the summer of 2000, similar dynamics emerged. At the opening session on water on June 26, 2000, the Palestinians began by presenting a list of principles "under which we would like to negotiate."[226] These principles included, *inter alia*, "the principle of equality between States," "[s]overeignty over unshared watercourses," and "[e]quitable utilization of international watercourses."[227] In response, the lead Israeli negotiator on water issues stated, "As for underlying principles: our approach should be pragmatic and practical,"[228] and argued, inter alia, that the agreement should be based "on existing water uses in existing aquifers and the development of new water sources, primarily through desalination."[229] After the Israeli presentation, the Palestinian team insisted that negotiations not go forward until the parties had reached agreement on guiding principles, and the following exchange ensued:

> *Dr. Erekat*: Before that [sic][discussing quantities to be allocated], we need to establish principles.
>
> *Amb. Eran*: We cannot have an answer to your question in isolation from the rest of the picture.
>
> *Dr. Erekat*: A working relationship must be based on the principle of equality. Separatism and pragmatism do not work. We say, "Be fair to us." Once you establish this principle, only at that point can we talk about joint needs.
>
> *Amb. Eran*: If I may add my own statement, the angle from which we are coming is that we do not doubt that you will have sovereignty over your resources.
> This is not the issue. Since we are dealing with present needs and future needs, if we are going to apply the principles of sovereignty, then we can harm ourselves.
>
> *Dr. Erekat*: We are a nation state, our needs do not mean a disregard of the other party.
>
> . . . .
>
> *Amb. Eran*: I want to [sic] the experts to sit down together, and I want to give them a time limit, then ask them to come back to us next time, with whatever they have.

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225. ROSS, *supra* note 6, at 726 (emphasis added). Ross does not explain which rights, in his view, are "irreducible" or on what basis the needs of the parties should be objectively assessed.

226. Minutes, State-to-State Relations Committee, Sheraton Plaza Hotel, Jerusalem (June 26, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

227. *Id.*

228. *Id.*

229. *Id.*

> We need them to put their agreement into writing, with I's and P's [designating differences in position].
>
> *Dr. Erekat*: Why start with this approach without agreeing on the principles?
>
> . . . .
>
> *Amb. Eran*: I am not willing to accept a principle without knowing what the implications are. I suggest that we let them sit with the principles and translate into a document. I don't want to trap them.
>
> *Dr. Sharif*: Mr. Noah [Kinnarti, Israeli water negotiator] has repeated pragmatism many times. There is no separation between pragmatism and ideology. The pragmatism is in the implementation.
>
> *Amb.Eran*: You cannot drink ideology.[230]

This exchange during the first round of water talks shows that, in this context as well, the Palestinian team sought Israeli acceptance of guiding legal principles—equality of states, sovereignty over endogenous watercourses, equitable utilization of shared watercourses—before it would agree to discuss specific allocations. Although the Israeli team acknowledged that Palestinians would possess sovereign rights to water resources, it expressed doubts about both the determinacy of the rules cited by Palestinians ("I am not willing to accept a principle without knowing what the implications are") and the efficacy of the rules as standards ("if we are going to apply the principles of sovereignty, then we can harm ourselves").

At the next session on water, held in Emmitsburg, Maryland, concurrent with the Camp David summit, the Israeli team again urged that discussion focus on the quantities of water the Palestinians sought to be allocated in the future.[231] The Palestinians again responded that "at that point in time, it was more important to agree on principles than on quantities," but they acquiesced and gave a presentation regarding their projected needs.[232] The Israeli offer made in response to this presentation, however, was "seen as woefully inadequate"[233] and prompted the Palestinian legal adviser in attendance to write to Sa'eb Ereikat, who headed the committee overseeing talks on future bilateral relations, complaining, "[T]he Israelis are negotiating in bad faith. They promised us that they would negotiate on the basis of relations between two sovereign states, but what they are proposing in many areas is a continuation of the interim agreement."[234]

When the parties resumed water talks in Jerusalem a few weeks later, the Palestinians demanded that legal advisers from each side meet to discuss the legal framework for the negotiations, and, after again expressing doubts about the value of such discourse, the Israeli team agreed.[235] During the next meeting, the Palestinians elaborated upon the legal framework that, they argued, governed resolution of water issues. They concluded their presentation by stating, "There is no difference between being practical and

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230. *Id.*

231. Memorandum from Gamal Abouali, PLO Legal Adviser, to Palestinian Water Auth. & Negotiations Affairs Dep't (July 18, 2000) (on file with PLO Negotiations Affairs Dep't).

232. *Id.*

233. *Id.*

234. Memorandum from Gamal Abouali, PLO Legal Adviser, to Sa'eb Ereikat, Head, Palestinian Side, Monitoring and Steering Comm. (July 18, 2000) (on file with PLO Negotiations Affairs Dep't).

235. Minutes, Water Comm. (Under State-to-State Relations Comm.), Neve Ilan (Aug. 20, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

following [international law]. It is a recognition of the development of the law, practice, uses, etc. We do not think that it shouldn't be applied to the Palestine-Israel situation."[236] What then proceeded was one of the few instances of explicit discourse between the parties about the role and relevance of international law to the talks between them. Once again, the Israeli team challenged the determinacy of the norms cited by the Palestinians, observing that, "The principle of sovereignty underwent a lot of changes in the past 50 years. No one knows how to define it anymore." The Israeli team argued that the principle of equitable utilization of international watercourses, on which the Palestinians sought to base water allocations, had not yet achieved the status of binding customary law.[237] In addition, the Israeli legal adviser challenged the utility of legal norms as a basis for resolving the issues under consideration, declaring at the conclusion of his presentation that "international law is vague, not pragmatic, and unrealistic—but that is our position."[238]

Ultimately, the parties were unable to agree on a set of guiding principles for resolution of the issues in dispute. As described above, Israelis rejected Palestinian attempts to obtain their acceptance of certain legal norms as parameters for the talks, a position supported by the United States. And, as described in Section 4, below, Palestinians were unwilling to accept non-legal guiding principles offered by Israel and the United States. Indeed, the parties' inability even at the end of the talks to come to a common understanding regarding the principles that should guide their negotiations raised questions on both sides about whether they shared a bargaining zone at all.

2. *Use of Legal Rules as Objective Standards*

The American response to the Palestinian legal arguments in the first days of the Camp David summit did not prompt them to cease invoking international law entirely. But the normative debate shifted from the beginning of the discussion to the middle of it: Palestinian negotiators for the most part stopped insisting that the Israeli team recognize Palestinian legal rights as a pre-condition for negotiation, but they continued to cite legal norms in support of their arguments for particular outcomes. For example, in two sessions on security issues in September 2000, the parties debated whether Israel or Palestine would control the Palestinian electromagnetic sphere. In his opening presentation, Israeli negotiator Gilead Sher stated, "we're not interested in any commercial use of the sphere. And whatever needs you may have in it, we shall do our best to accommodate—before signing the agreement."[239] When Palestinian negotiator Mohammad Dahlan responded to Sher the next day, he expressed willingness to construct a cooperative

236. Minutes, Water Comm. (Under State-to-State Relations Comm.), Neve Ilan (Aug. 24, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

237. *Id.*

238. *Id.*

239. Minutes, Palestinian-Israeli Permanent Status Negotiations, King David Hotel, Jerusalem (Sept. 17, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

framework for managing the electromagnetic sphere but rejected Israeli control on legal grounds:

> Regarding the [electromagnetic sphere], you use a phrase which I don't like—that you'll take care of my commercial needs. I'm talking about my rights. Give me your security concerns, and let's discuss it. The [electromagnetic] sphere . . . will be under our sovereignty and control. . . . Let the technical experts of both sides deal with these issues in coordination.[240]

Palestinians took the same approach to addressing control over airspace: while recognizing that there would be a need for close coordination between Palestinian and Israeli air traffic controllers, they rejected the Israeli demand for overriding control over Palestinian airspace, arguing that "it is Palestinian by right, and we will accommodate Israeli needs, not the other way around."[241] Similarly, in the last meeting between the parties and the American peace team before the outbreak of the intifada, Palestinian negotiators, who had earlier expressed willingness to accept Israeli annexation of certain areas of East Jerusalem,[242] argued that contiguity between Palestinian areas of East Jerusalem should trump contiguity between Israeli areas, stating, "the starting point should be that East Jerusalem is under Palestinian sovereignty and is Palestinian by right."[243]

3. *Use of Legal Rules as Gap-Fillers*

As described above, the bifurcated structure of the permanent status negotiation process was based on the expectation that the parties would conclude a relatively brief framework agreement—a "thin FAPS." As the negotiations proceeded, however, the parties came to recognize the need for a far more detailed agreement than was originally envisaged.[244] The need for detail arose from the parties' inability to agree on guiding principles: the Israelis had declined to embrace the legal norms urged by the Palestinians;[245] and the Palestinians were unwilling to accept principles that gave Israel wide discretion in defining the scale of its commitments.[246]

To a limited extent, however, the parties did use legal rules as gap-fillers. The issue of Palestinian sovereignty is illustrative. In the first months of permanent status negotiations, the Israeli negotiating team declined officially to acknowledge that a Palestinian state would be established in the context of a permanent status agreement. Until May 2000, they insisted on referring to the "Palestinian entity (PE)" that would emerge, instead of a

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240. Minutes, Palestinian-Israeli Permanent Status Negotiations, King David Hotel, Jerusalem (Sept. 18, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

241. inutes, Consultations with United States Officials, Washington, D.C. (Sept. 27, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

242. ENDERLIN, *supra* note 6, at 269-70.

243. Minutes, Consultations with United States Officials, Washington, D.C. (Sept. 27, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

244. *See* ROSS, *supra* note 6, at 616-18 (describing Israeli support for a "fat FAPS" and Palestinian insistence on "clear" agreement with "no ambiguity").

245. *See supra* Subsection III.C.1.b.

246. *See* ROSS, *supra* note 6, at 616.

Palestinian state;[247] and they undertook to define the rights and obligations of this "entity" from the ground up. For example, an Israeli outline of the structure of a permanent status agreement, presented at talks in Eilat in early May 2000, included headings such as "Foreign relations of the PE," "Territorial regime of areas under PE control and other areas," and "Israelis—Movement."[248] Thus, in the same way that the Oslo Accords had defined the powers delegated by Israel to the Palestinian Authority,[249] the Israelis' initial proposals for a permanent status agreement would have regulated the capacity of the "PE" to engage in foreign relations, its functional jurisdiction in various areas of the West Bank, and its personal jurisdiction over Israeli residents of settlements deep in Palestinian territory.

The parties' discourse changed, however, after Israelis began negotiating from the express assumption that the Palestinians would establish a state in the West Bank and Gaza Strip.[250] A number of the rights attached to statehood ceased to be topics of negotiation, such as Palestine's power to conduct foreign relations, its jurisdiction over all persons within Palestinian territory, and its right to control endogenous watercourses. Rather than defining the Palestinian state's powers from the ground up, the discussion shifted to reaching agreement on the specific derogations from sovereignty sought by the Israelis: assurance that Palestine would not enter into military or security alliances with states hostile to Israel; provision for Israeli military access to Palestinian territory in the event of an emergency; acceptance of monitoring of movement of persons and goods across Palestine's borders for a transitional period; and permission for Israel to apprehend unidentified and/or hostile aircraft approaching the two states and to conduct training exercises in Palestinian airspace. To be sure, some of the derogations sought by the Israelis were substantial, and Palestinians expressed concern that the exceptions would swallow the rule, constraining their sovereignty in ways that would challenge the economic or political viability of their new state.[251] It bears emphasizing, however, that the parties' point of departure had changed. By agreeing that the "Palestinian entity" would be a state, the "submerged" norms[252] of international law that define the rights and duties of states operated as both default rules and as gap-fillers, narrowing the scope of bargaining and helping to frame trade-offs.[253]

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247. During a negotiation round in Eilat, Israel, in late April 2000, Palestinian and Israeli legal advisers met in an effort to define a "structure" for the FAPS. Even at this time, five months after negotiations commenced, the draft presented by the Israeli side referred to "The Palestinian Entity (PE)," not to a Palestinian state. Daniel Reisner, Israeli Legal Adviser, Draft FAPS Structure (Bolling II round) (Apr. 29, 2000) (presentation to Ghaith al-Omari, PLO Legal Adviser) (on file with PLO Negotiations Affairs Dep't).

248. *Id.*

249. *See* Dajani, *supra* note 219, at 61-69.

250. *See* ROSS, *supra* note 6, at 609 (describing meeting at which Israeli negotiators "conceded statehood as a principle").

251. *See* Official Palestinian Response to the Clinton Parameters (and Letter to the International Community) (Jan. 1, 2001), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1162-67.

252. *See* HENKIN, *supra* note 2, at 21.

253. For example, in return for Palestinian consent to Israeli military access to Palestinian airspace, Israeli negotiators offered to make Palestine "the only sovereign state in the world that will have a specific, particular, privileged air corridor for your needs through Israeli skies." Minutes,

4. *Challenges to Non-Legal Standards*

In addition to urging that principles of international law guide the negotiations and serve as standards for choosing between competing positions, Palestinian negotiators used legal rules to challenge the legitimacy of non-legal standards proposed by Israeli negotiators and American officials for resolving disputed issues. As described above, Palestinians raised questions about the legal basis of the principles urged by Israelis from the outset of the negotiations.[254] When three of the four principles articulated by David Levy in September 1999 were incorporated into the "ideas" suggested by President Clinton in December 2000,[255] moreover, Palestinians undertook to challenge the Clinton ideas on both legal and non-legal grounds.

During the last rounds of negotiations in January 2001, the Israeli team invoked the principles outlined by Clinton in much the same way that the Palestinians had invoked international legal norms in earlier negotiation sessions. At the Taba talks, for example, the Israeli team challenged the "basis" of Palestinian proposals for border modifications, arguing that they were inconsistent with Clinton's proposal that Israel annex 4-6% of West Bank territory, including 80% of the settlers in blocs. As Shlomo Ben-Ami explained:

> With regards to territory we do welcome the fact that we have a map from your side that assumes the concept of annexing settlement blocks. We have the principle, but not the necessary quantity. According to our calculations your map represents . . . essentially 2.2%. . . . It does not correspond to the parameters of President Clinton. It does not address the major issues of stability, security, and political viability. This is why we included the 80% requirements. I cannot have an agreement that does not incorporate 80% of the settlers—it's more or less the concept, not a math thing. It is necessary for the stability of our borders and for the public to accept the deal.[256]

Thus, like the Palestinians' use of the 1967 line at Camp David, Israeli negotiators treated percentages of territory and settlers as a construct—a "concept" against which to evaluate Palestinian proposals. Like the Palestinians, Israeli negotiators also cited practical and political concerns (border security and domestic public opinion) in support of the principles they were advocating. For legitimacy, however, the Israelis turned not to "the international legality," as the Palestinians had, but instead to the proposals of the President of the United States.

Palestinian-Israeli Permanent Status Negotiations, King David Hotel, Jerusalem (Sept. 18, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't). Similarly, Israeli negotiator Gilad Sher acknowledged: "If I want to have control in the [electromagnetic] sphere for my security needs, I may have to compensate you in a completely different issue." *Id.*

254. *See supra* note 191 and accompanying text.

255. Like the principles articulated by Levy, the Clinton Parameters, *inter alia*, provided for Israel's annexation of settlement blocs, made no reference to the 1967 line, and proposed that Palestine be a "non-militarized state." The sole departure from Levy's principles in the parameters was Clinton's proposal for shared sovereignty in Jerusalem. *See* Clinton Parameters to Palestinian and Israeli Negotiators (Dec. 23, 2000), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1160-62.

256. Minutes, Palestinian-Israeli Permanent Status Negotiations, Hilton Taba Hotel, Taba, Egypt (Jan. 25, 2001) (transcribed by the PLO's Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

Ultimately, the Israelis' attempt to focus discourse on the "Clinton ideas" had little more success than the Palestinians' earlier attempt to focus it on international law. In a reversal of roles, it was the Palestinians at talks in January 2001 who were urging discussion of the "practicalities":

> *Ahmad Qurei'*: [W]e don't want to discuss principles and parameters[. L]et's see the maps, the practicalities[,] and discuss.
>
> *Gilad Sher*: Do you agree[,] with C[linton], that [the Palestinian allocation of West Bank] territory is between 94% and 96%?
>
> *Qurei'*: We don't agree, but show us the maps and then we may be convinced.
>
> *Sher*: Do you agree we need to meet re[garding] territory [on] somewhere in the mid-90s?
>
> *Qurei'*: Let me see how you designed it, and then I can give a response. Let's see the maps. Let's see the maps.[257]

As part of their effort to shift discourse away from the Clinton "parameters," the Palestinians also argued—as their Israeli counterparts had regarding international law—that the "parameters" were fatally indeterminate. In a memorandum presenting their official response to Clinton, which was distributed to the international diplomatic and press corps on January 1, 2001, they expressed concern that "[t]he United States proposals were couched in general terms that in some instances lack clarity and detail," arguing that "a general, vague agreement at this advanced stage of the peace process will be counter-productive."[258] They also argued that Clinton's failure to offer a proposed map and to define the basis for the percentages of land it allocates to each side makes it "difficult to imagine how the percentages presented can be reconciled with the goal of Palestinian contiguity."[259]

In addition, the Palestinians raised questions about the legitimacy of the legal framework for Clinton's proposals. In the same memorandum, they argued that his use of "'settlement blocs' as a guiding principle" would "subordinate[] Palestinian interests in the contiguity of their state and control over their natural resources to Israeli interests regarding the contiguity of the settlements, *recognized as illegal by the international community*."[260] They complained that Clinton's proposal on refugees "reflects a wholesale adoption of the Israeli position that the implementation of the right of return be subject entirely to Israel's discretion," emphasizing that "[U.N. General Assembly] Resolution 194, long regarded as the basis for a just settlement of the refugee problem, calls for the return of Palestinian refugees to 'their homes,' wherever located—not to their 'homeland' or 'historic Palestine,'" as suggested by Clinton.[261] And they concluded the memorandum by reiterating "that we remain committed to a peaceful resolution of the Palestinian-Israeli conflict in

257. Minutes, Palestinian-Israeli Permanent Status Negotiations, Isrotel Tower and Hotel, West Jerusalem (Jan. 16, 2001) (transcribed by the PLO's Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

258. Official Palestinian Response to the Clinton Parameters (and Letter to the International Community) (Jan. 1, 2001), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1163-64.

259. *Id.* at 1164.

260. *Id.* (emphasis added).

261. *Id.* at 1166.

accordance with UN Security Council Resolutions 242 and 338 and international law."[262]

Four weeks after the Palestinians' official response to the Clinton ideas was delivered, President Clinton left office, Ariel Sharon was elected Prime Minister of Israel, and permanent status negotiations were suspended—permanently.

* * *

In sum, during the course of permanent status negotiations, international legal norms were invoked in a number of different ways: as guiding principles for the talks, as persuasive standards, as gap-fillers, and as a means of challenging non-legal standards on the basis of which resolution of disputed issues was urged. In the third and final Part of this Article, I undertake to explain why international law, for the most part, failed to serve those functions and to identify steps that may be taken to address the factors that constrained its effectiveness during the parties' abortive peace talks.

IV. CASTING SHADOWS, PROVIDING SHADE: ROLES FOR INTERNATIONAL LAW IN FUTURE PALESTINIAN-ISRAELI NEGOTIATIONS

The reasons for the failure of Palestinians and Israelis to achieve a negotiated settlement of their dispute have been the focus of sustained debate since the negotiations were suspended in January 2001. Although no consensus has emerged, many factors likely contributed to the parties' impasse, including: mutual mistrust arising not only from more than a century of conflict, but also from the perception that obligations established by previous agreements went unfulfilled; insufficient effort by each party to understand and respond to the other's national narrative; perceptions of bias on the part of American mediators; domestic political pressures and institutional dysfunctions on both sides; and a lack of clarity and frank discourse regarding the essential needs of each. The parties' differences regarding the content and role of international law consequently offer only a partial explanation for their inability to conclude an agreement. As Daniel Bethlehem observed in a recent forum on the role of law in the Middle East peace process:

> [O]ne of the questions we must ask ourselves is whether it was the presence or absence, or the sufficiency or insufficiency, of law that brought us either to the hopeful moments over the past twelve years or to the moments of despair. In my view, the answer to this is that one cannot place at the doorstep of the law either praise for the positive developments or castigation for the negative. The law provides context to the dispute. It is to be found to a greater or lesser extent in the engine room, either giving momentum to

262. *Id.* at 1167.

> initiatives towards peace or holding such initiatives back as it crystallizes the position of the parties at the furthest extremes of the debate.[263]

To be sure, the parties' legal disputes are part of a larger dynamic in which law is only one variable. As Bethlehem goes on to suggest, moreover, the Palestinian-Israeli conflict presents a number of issues that cannot be resolved simply through reference to international legal rights and obligations.[264] Law, simply put, does not provide all of the answers.

Even so, it can and should provide some of them. I submit that an understanding of how law functions "in the engine room" offers clues about how it might be made to function better—to provide not only "context to the dispute," but also tools that can help to resolve it. Accordingly, in this final Part, I examine the factors that constrained the functioning of international legal norms in the Palestinian-Israeli negotiations. I then turn to offering suggestions as to how the parties and the international community can make international legal rules more effective in negotiations like those undertaken by Palestinians and Israelis, both as tools of conflict resolution and as normative standards to guide the functioning of international relations.

A. *Why Didn't Law Help?*

The analysis presented in Part III of this Article suggests that several factors constrained the functioning of legal rules in Palestinian-Israeli negotiations: disagreements about the applicability and determinacy of legal rules; skepticism about the efficacy of solutions prescribed by legal rules; and the perceived lack of recourse to third-party adjudication and enforcement of legal rules. As discussed below, these factors served both to diminish international law's shadow over the negotiations and to deter efforts to seek its shade.

1. *Disagreements about Applicability and Determinacy of Legal Rules*

Explicit discourse between the parties about the substantive contours and implications of international law was rare during permanent status negotiations, occurring in only a handful of instances. To the extent it did occur, however, it provides some sense of at least the stated rationales for Israeli negotiators' reluctance to use legal rules as guiding principles, standards, or gap-fillers. Two kinds of *legal* arguments were advanced. First, Israelis argued that the legal norms on the basis of which Palestinians urged

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263. Daniel Bethlehem, Remarks, *Is There a Role for International Law in the Middle East Peace Process?*, 99 AM. SOC'Y INT'L L. PROC. 217, 218 (2005).

264. The need to devise arrangements through which Palestinian laborers can work in Israel, Israeli Jews can worship at holy sites in Palestinian territory (and Palestinian Christians and Muslims can do the same in Israel), and Palestinians can travel securely and in an unimpeded manner between the West Bank and Gaza Strip, for example, will oblige the parties to move beyond strict application of principles of territorial sovereignty. *See id.* Indeed, even advocates of a "rights-based approach" to resolving the Palestinian-Israeli conflict acknowledge the limitations of law. *See* Bisharat, *supra* note 8, at 330 ("[International law] will never provide all the answers. In respect to some issues, water, the status of Jerusalem, and perhaps others, international law may provide only the broadest parameters for equitable resolutions. Negotiations are thus crucial, and inevitable.").

resolution of many disputed issues were inapplicable to the Palestinian-Israeli conflict. For example, they argued that the principle of the inadmissibility of the acquisition of territory by force, affirmed in U.N. Security Council Resolution 242, was inapplicable to the West Bank and Gaza Strip because there was no recognized border between Israel and the occupied territory prior to 1967; and they rejected the argument that Israel's peace agreements with Jordan and Egypt established precedents with respect to the applicability and content of the norm because of this claimed difference in the factual contexts.[265] They advanced similar arguments with respect to the applicability of the Fourth Geneva Convention, claiming that Israel was not a belligerent occupant in the West Bank and Gaza Strip because they were not recognized as the sovereign territory of a state prior to 1967.[266] In the context of water negotiations, moreover, Israelis argued against the applicability of the principle of equitable utilization of international watercourses, asserting that the norm had yet to achieve customary law status and consequently was not binding upon Israel.[267]

Second, arguments about the applicability of international norms were closely linked to questions about their determinacy. In water negotiations, indeterminacy was raised explicitly: Israeli negotiators expressed unwillingness to agree to legal principles the implications of which, they argued, were unclear; and they took the position that international law is too "vague" to provide a useful framework for resolution of water issues. The disputes, in border negotiations, about the applicability of the principle of the inadmissibility of territory by force and the Fourth Geneva Convention may also be seen as arguments about the determinacy of these norms. Israelis were arguing, after all, that it was unclear how these norms applied in the context of the Palestinian-Israeli conflict. Implicit in their argument was the idea that, if Palestinians and Israelis each came to the table with different views about the applicability of the norms, the norms themselves were insufficiently determinate to guide resolution of disputed issues.

Of course, disagreement about the applicability or determinacy of legal rules does not, in itself, render the rules inapplicable or indeterminate. Whether offered in good faith or in bad faith, claims of inapplicability or indeterminacy are simply claims. In the domestic setting, the validity of those claims can be tested fairly readily, through recourse to a judicial forum. When that recourse is available, clearly frivolous legal claims will have only limited effect on bargaining: both parties will anticipate how they are likely to be received by a court and devise their negotiating positions accordingly. Because the influence of law on international bargaining is wielded through means more diffuse and less predictable than in the domestic setting, however, it is more difficult to trace. And, accordingly, it is more difficult to ascertain the effect of disagreements about the law on bargaining.

At a basic level, at least, disputes between Palestinians and Israelis about the applicability and determinacy of legal rules do seem to have constrained

265. *See supra* note 194 and accompanying text.
266. *See id.*
267. *See supra* note 237 and accompanying text.

their influence on the negotiations in a number of ways. In the absence of efforts by authoritative members of the international community to weigh in on the matter (an issue explored further below), the parties' disagreement blurred the lines of the zone of lawfulness within which they were bargaining. Thus, although international law's prohibition of acquiring territory by force is a jus cogens norm, that norm could not operate to rule out certain deal points, to narrow the scope of bargaining, if its applicability and interpretation were in dispute. Moreover, to the extent that influential third parties (like American officials) were persuaded that norms were inapplicable or indeterminate, it made invoking the norms an ineffective means of bolstering the credibility of a party's reservation point because uncertainty about whether or how the norms applied made it less likely they would be imposed on the parties in the absence of a negotiated agreement—the norms cast a minimal shadow over bargaining.

But were they perceived nevertheless to offer shade? The record is less clear on this point. On the one hand, allegations of inapplicability and indeterminacy did likely diminish the persuasive force of legal rules: because the parties could not agree on what the rules provided—or even whether they applied in given circumstances—the rules could neither serve as standards for resolving disputed issues (such as the allocation of sovereignty over Jerusalem) nor as an agreed means of filling in gaps in a "thin FAPS." In this way, claims of inapplicability and indeterminacy appear to have reduced the "compliance pull" of legal rules—the shade they were perceived to offer.

That analysis, however, arguably oversimplifies the picture. Notwithstanding its challenges to the applicability and determinacy of certain rules, over time Israel's positions on some issues moved closer to the outcome that Palestinians had argued the rules prescribed. For example, even though Israeli officials had made clear at the outset that they would not accept "return to the 1967 line," an EU paper on the final round of negotiations at Taba in January 2001 reports that "[t]he two sides agreed that in accordance with U.N. Security Council Resolution 242, the June 4[,] 1967 lines would be the basis for the borders between Israel and the state of Palestine."[268] Although the Israeli team at Taba continued to demand significant alterations to the 1967 line to permit annexation of settlement blocs,[269] their position represented a substantial departure from their earlier demands for annexation of much larger swathes of West Bank land and of isolated settlements.

A number of theories may explain this shift in position: that the Israeli team's stated opening position (or closing position) did not reflect its actual position; that the Israelis' assessment of the strategic, economic and political value of certain settlements changed over the course of the talks; or that other benefits presented by a peace agreement (either with respect to specific issues or the larger goal of ending the conflict) were perceived to outweigh the benefits of maintaining settlements. But one cannot rule out the possibility that legal rules influenced the decision—by virtue of the perceived

268. European Union Non-Paper on the Taba Conference, 2001, *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1169.

269. *See id.*

reputational costs of sticking to a position at odds with them or even, simply, by virtue of the normative force of repeated declarations by authoritative international institutions that the rules are applicable and controlling. Indeed, in view of the tremendous disparity in the parties' political, economic, and military power, it is worth considering whether settlements would even have been an item on the agenda of permanent status negotiations if the Palestinians were not perceived to have a legal basis for challenging them. In sum, although claims of inapplicability and indeterminacy reduced the instrumental value of legal rules as means of bolstering the efficiency of negotiations, it is not at all clear that they eliminated the rules' normative influence.

2. *Disagreement about the Efficacy of Legal Rules*

The parties' dispute about the role and relevance of international law was not confined to disagreement about the applicability and determinacy of legal rules; they also expressed differing views about the efficacy, as a matter of policy, of outcomes prescribed by legal norms. Arguments of this kind were advanced with respect to a number of issues, sometimes in tandem with legal arguments about applicability and indeterminacy, and sometimes independent of them.[270]

The parties' negotiations over future security arrangements offer a particularly good illustration of this kind of debate. By September 2001, Israeli negotiators had acknowledged that a Palestinian state would be established in the West Bank and Gaza Strip and that it would have sovereign powers in many spheres.[271] They sought, however, to obtain the Palestinians' agreement to a number of significant derogations from their sovereignty.[272] The Israeli team was not, by this stage, challenging the Palestinians' entitlement to territorial sovereignty; instead, they were arguing that structuring the agreement solely around sovereign rights would produce an undesirable outcome. Their position, they explained, was animated in part by practical considerations (such as the difficulty of dividing control over civil aviation in view of the size and idiosyncratic contours of the two states' territories).[273] It was also motivated, they said, by two elements of Israel's "national security concept": skepticism about the capacity of a peace agreement with the Palestinians to eliminate security threats from elsewhere in

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270. Israelis argued, for example, that the dismantlement of settlements was "unrealistic." *See supra* note 186 and accompanying text. They also argued against using sovereignty as a guiding principle for determining allocations of water because to do so, they claimed, would harm both parties. *See supra* note 230 and accompanying text. And while declining to concede Palestinian refugees' legal right of return, their arguments against it were framed primarily in terms of practical considerations—in particular, the possibility that its realization would eliminate the Jewish majority within the State of Israel.

271. *See supra* note 250 and accompanying text.

272. *See* Minutes, Permanent Status Negotiations, King David Hotel, Jerusalem (Sept. 17, 2000) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't). These derogations included demilitarization of the Palestinian state, the maintenance of Israeli military bases and early warning stations in Palestinian territory, the right to use Palestinian airspace for military training and operations, and the right to deploy Israeli forces in Palestinian territory during emergency situations. *Id.*

273. *See* Minutes, Permanent Status Negotiations, Hilton Taba Hotel, Taba (Jan. 23, 2001) (transcribed by PLO Negotiations Support Unit) (on file with PLO Negotiations Affairs Dep't).

the region and an unwillingness to compromise Israel's independent defensive capacity—to place Israel's security in the hands of others.[274]

Policy concerns of this kind made it difficult for the parties to agree that a set of norms, such as those defining the sovereign rights of states, would serve as guiding principles for the talks. They also limited the persuasive force of the legal rules invoked by the Palestinians, the Israelis questioning the extent to which the rules were responsive to the geo-political context in which the parties were negotiating. What was in dispute in this context, however, was not the content of the norms, but the value of the ideas they embodied. By challenging the efficacy of the norms, the Israelis were asserting that international law offers little shade.

3. *Lack of Recourse to Third-Party Adjudication and Enforcement*

As described in Part III, a broad cross-section of the international community undertook on a number of occasions to define a substantive framework for the resolution of permanent status issues, often through reference to international legal norms. From the beginning of the peace process, however, the United States declined to participate in such efforts, insisting that the Palestinian-Israeli conflict could be solved only through bilateral negotiations and refusing to support (or, indeed, permit) "a competing or parallel process" in the United Nations.[275] Once permanent status negotiations commenced, moreover, American officials expressed impatience with appeals by the Palestinians to weigh in on legal disputes. When President Clinton did eventually offer a set of "ideas" for resolution of key issues in December 2000, he referred to the parties' legal terms of reference only briefly—and in instrumental rather than prescriptive terms.[276]

To be sure, American officials were not entirely unwilling to wield the United States's influence, even beyond the articulation of "ideas" for resolution of the conflict. As Dennis Ross argues in the concluding chapter of his memoir:

> Almost by definition, the best measure of whether the parties are ready to conclude the conflict is whether they are prepared to make historic decisions. . . . We can offer guarantees on security; financial assistance to demonstrate the material benefits of hard decisions; and political and international support to bolster the legitimacy of the decisions, all of which may be important in helping each side cross historic thresholds.

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274. *See* Minutes, Permanent Status Negotiations, King David Hotel, Jerusalem (Sept. 18, 2000) (on file with PLO Negotiations Affairs Dep't).

275. *See supra* note 143 and accompanying text.

276. Clinton suggests that the parties "agree" that his proposed resolution of the refugee issue "implements [UN General Assembly] Resolution 194" and proposes that, upon conclusion of an agreement, the Security Council pass a resolution noting "that Resolutions 242 and 338 have been implemented." Clinton Parameters to Palestinian and Israeli Negotiators (Dec. 23, 2000), *in* 2 DOCUMENTS ON THE ARAB-ISRAELI CONFLICT, *supra* note 5, at 1160, 1162. This approach to addressing Resolution 242 was suggested by Prime Minister Barak at Camp David to "allow Barak to hold to his earlier claim that a settlement would fulfill 242, even if it was not based on 242." SWISHER, *supra* note 6, at 269.

> But we cannot create the will for such decisions. . . . Imposed decisions will not endure.[277]

As he describes it, Ross's vision is one of carrots rather than sticks, of offering incentives rather than imposing costs. It is a vision in which the enforcement of legal rules has no place. Indeed, Ross sees third-party intervention as a means of allowing leaders to escape responsibility for political decisions: "[T]he United States may make its greatest contribution to peace by standing against efforts to impose solutions and standing for the principle that regional leaders must finally exercise their responsibilities to confront history and mythology."[278] The American role, from Ross's perspective, is to facilitate negotiations, not to constrain their outcome.

Whether the United States actually played this role during Palestinian-Israeli peace talks is, of course, open to question. American officials, after all, did not limit themselves to providing a forum for the talks or to transmitting messages between the parties. On a number of occasions, they offered their own assessment of the reasonableness of the parties' positions, sometimes even characterizing Israeli proposals as American ideas.[279] Aaron Miller, who served with Ross on the American peace team, suggests that Israel more often than not was the beneficiary of American interventions:

> With the best of motives and intentions, we listened to and followed Israel's lead without critically examining what that would mean for our own interests, for those on the Arab side and for the overall success of the negotiations. The "no surprises" policy, under which we had to run everything by Israel first, stripped our policy of the independence and flexibility required for serious peacemaking. If we couldn't put proposals on the table without checking with the Israelis first, and refused to push back when they said no, how effective could our mediation be? Far too often, particularly when it came to Israeli-Palestinian diplomacy, our departure point was not what was needed to reach an agreement acceptable to both sides but what would pass with only one—Israel.[280]

On the other hand, American officials did not hesitate to "push back" when it came to the Palestinians. Near the conclusion of the Camp David summit, for example, President Clinton warned Chairman Arafat that a failure to offer further concessions would be costly: "You won't have a state, and relations between America and the Palestinians will be over. Congress will vote to stop the aid you've been allocated, and you'll be treated as a terrorist organization."[281]

Although Israeli negotiators had responded dismissively to Palestinian legal arguments in the first rounds of negotiations, stating explicitly that "no one can force Israel to adopt another interpretation" of disputed norms,[282] the American response to them challenged the Palestinian approach in a more fundamental way. The United States, after all, was not simply a mediator. Its tremendous international influence and its Security Council veto rendered it capable of blocking almost any effort to impose terms (or some form of

277. ROSS, *supra* note 6, at 772.
278. *Id.*
279. *See* SWISHER, *supra* note 6, at 297.
280. Aaron David Miller, *Israel's Lawyer*, WASH. POST, May 23, 2005, at A19.
281. ENDERLIN, *supra* note 6, at 253.
282. *See supra* note 194 and accompanying text.

censure) on the parties if they failed to reach agreement, as it had demonstrated repeatedly during the decade leading up to the Camp David summit.[283] Indeed, in a unipolar world, the shadow of the law is shaped by—if not coextensive with—the shadow of American power.[284] Accordingly, the unwillingness of the Clinton team to entertain Palestinian legal claims at Camp David, and the indication it provided of the attitude the United States was likely to assume if the parties failed to reach agreement, seriously eroded the credibility of the Palestinians' invocation of "international legality"; it shortened the shadow of the legal norms on which the Palestinians were basing their positions. It is consequently unsurprising that, following President Clinton's angry rebuke of Palestinian negotiators at Camp David, the Palestinians turned increasingly to citing legal norms as persuasive standards in negotiations rather than demanding agreement on them as a pre-condition for further talks. It is also unsurprising that the Palestinians increasingly based their arguments on non-legal grounds, both political and practical.

Of course, the United States is not—and was not then—the only actor on the international stage. On a number of occasions, Palestinians sought the involvement of others, particularly Arab and Muslim states and the European Union.[285] In this regard, it is not incidental that the Palestinians' January 1, 2001 memorandum explaining their concerns about the Clinton "ideas" was circulated widely to international diplomatic personnel rather than only to the Americans. But the Palestinians recognized that no other international actor had influence over Israel's actions comparable to that of the United States and that, consequently, appeals to others were unlikely to cast much of a shadow over the peace talks.[286]

B. *How Can Law Help in the Future?*

Future efforts to achieve a negotiated peace between Palestinians and Israelis must be informed by an appreciation of both the opportunities offered by law and the factors that constrained its effectiveness in the past. As described in Part II of this Article, law has the potential to facilitate bargaining in a number of different ways. It can operate to shape negotiating parties' bargaining zone, both disallowing certain outcomes and defining defaults that help each side to identify its own reservation point and assess the credibility of its adversary's. It can serve to fill in gaps in an agreement, obviating the

283. *See supra* notes 141-144 and accompanying text.

284. *See generally* Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003) (describing United States's "hegemonic" influence over development and enforcement of international law within U.N. Security Council).

285. *See* ENDERLIN, *supra* note 6, at 180; SWISHER, *supra* note 6, at 175-76.

286. *See* Miller, *supra* note 280, at A19 ("I believe in the importance of a strong U.S.-Israeli relationship. Paradoxically, it is our intimacy with the Israelis that gives America—only America—the capacity to be an honest and effective broker. Arab governments have come to accept this reality. That is why—even now—when our credibility is so diminished in the region, they continue to press for U.S. engagement."); *see also* INT'L CRISIS GROUP, MIDDLE EAST ENDGAME I: GETTING TO A COMPREHENSIVE ARAB-ISRAELI PEACE SETTLEMENT 9 (2002) (observing that "unique relationship between Washington and Jerusalem" and "America's unmatched ability to provide logistical backing to a peace deal" make American involvement in Middle East peacemaking essential); SWISHER, *supra* note 6, at 147-48 (noting Palestinian perception that pleas to the U.N. General Assembly were unlikely to affect course of negotiations if American support was wanting).

need to negotiate, in detail, every aspect of the parties' future relations. As an expression of best practices or by virtue of its objectiveness, it can provide a standard with which to evaluate the efficacy or fairness of a particular proposal. And it can provide legitimacy, a means of validating proposals (and negotiated outcomes) in the eyes of domestic constituencies and other international actors whose support is critical to the success of an agreement.

Each of these functions might have served Palestinian and Israeli negotiators well during the peace talks. Greater clarity from the outset regarding the legal framework for the talks might have helped to prevent the extreme divergence between the parties' respective opening positions—a divergence that not only generated misgivings on each side about the other's intentions, but also made it difficult for the parties to assess what kind of deal was possible, greatly slowing the pace of negotiations. In addition, in a process constrained politically by the short deadlines defined by the parties, consensus about guiding legal principles might have enabled the parties to make constructive use of legal norms as gap-fillers and as a means of framing tradeoffs. To cite one example, a shared acknowledgement of the applicability of the Fourth Geneva Convention to the West Bank and Gaza Strip—and of the fact (recognized by the Security Council[287] and the International Court of Justice[288]) that Israel's settlements in occupied territory contravene Article 49 of the Convention—would not have foreclosed a range of negotiated solutions to the issue of settlements, including some combination of annexation by Israel, dismantlement, long-term leasing, desegregation, and territory exchange. It would, however, have framed the trade-offs that a territorial compromise would require and offered both a standard for prioritizing competing Israeli and Palestinian claims to contiguity in the West Bank and East Jerusalem and a default with which to fill in gaps (and resolve ambiguities) in proposals like those presented by President Clinton in December 2000. Moreover, clearer alignment between the Clinton "ideas" and recognized international norms may well have bolstered their legitimacy in the eyes of Palestinians and of other governments called upon to convince Chairman Arafat to accept them.

Of course, arguing that law might have helped the parties in the past simply begs a larger question: How can law be made a more effective tool in the future? In order for legal rules to function better when Palestinians and Israelis try again to resolve their dispute at the negotiating table, efforts must be undertaken to address the factors that constrained their capacity to bolster the efficiency and fairness of the parties' last attempt to negotiate a peace agreement. Potential responses to those factors are described briefly below.

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287. *See* S.C. Res. 465, U.N. Doc. S/RES/465 (March 1, 1980).

288. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, para. 134, at 54 (July 9), *available at* http://www.icj-cij.org/icjwww/docket/imwp/imwpframe.htm [hereinafter I.C.J. Advisory Opinion on Construction of a Wall].

1. *Clarifying Rules*

The parties' disagreements about the applicability and determinacy of legal rules, as they bear on the issues in dispute, oblige a response on several levels. At a basic level, there continues to be a need for further development of international legal rules to ensure that they are responsive to recent transformations in the international system, including evolving conceptions of state sovereignty, global security, and the relationship of both to individual rights.[289] That process, however, is likely to be slow; and the need for flexibility in international rules—both to garner support for them from ever-reluctant governments and to ensure that the rules have the capacity to accommodate equitable concerns—will limit the determinacy of even those rules that are embraced by the international community.

What is more critical—and more feasible—at this juncture is a concerted effort by states and international institutions to articulate a common understanding regarding the applicability and implications of existing norms in the Palestinian-Israeli context. Such an effort could serve to increase the compliance-pull of the relevant norms—the shade they offer—by rendering them more determinate and bolstering their perceived legitimacy. It could also serve to facilitate the imposition of costs on the parties for failure to comply with the norms, extending the norms' shadow over future bargaining.

The advisory opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory goes some of this distance, establishing, *inter alia*, that "the [Fourth Geneva] Convention is applicable in the Palestinian territories,"[290] and that "the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law."[291] (Both of these conclusions received the unanimous support of the Court.)[292] Although the World Court does not offer any judgments regarding the bearing of the Fourth Geneva Convention on the *disposition* of settlements, confining itself to encouraging peace efforts "with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems,"[293] its opinion does resolve at least one of the normative disputes that divided Palestinians and Israelis during permanent status negotiations.

The World Court's advisory opinion and other efforts by international institutions to clarify normative standards are unlikely to have a direct influence[294] on future negotiations, however, unless authoritative members of

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289. *See* High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, ¶¶ 29-30, U.N. Doc. A/59/565 (Dec. 1, 2004) (declaring that sovereignty "carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community"). Such efforts may help to address challenges to the efficacy of international legal rules like those raised in the security talks described above. *See supra* notes 273-274 and accompanying text.

290. *I.C.J. Advisory Opinion on Construction of a Wall*, para. 101, 2004 I.C.J. at 40.

291. *Id.* para. 120, at 46-47.

292. *Id.* paras. 2 & 9, at 1 & 4 (declaration of Judge Buergenthal).

293. *Id.* para. 162, at 62.

294. The litigation before the World Court arguably has already had an indirect influence on Israel's legal posture. *See* YOSSI ALPHER, U.S. INST. FOR PEACE: SPECIAL REPORT NO. 149, *THE FUTURE OF THE ISRAELI-PALESTINIAN CONFLICT: CRITICAL TRENDS AFFECTING ISRAEL*, 9 (Sept. 2005), *available at*

the international community both embrace their conclusions and take the additional step of reaching consensus regarding their basic implications vis-à-vis permanent status issues. In this regard, a number of commentators have suggested that the parties' impasse will only be overcome if the international community, led by the United States, articulates clearer parameters to guide future negotiations. For example, in a recent article, Russell Korobkin and Jonathan Zasloff argue that the United States should present the parties "with a detailed set of agreement terms that it considers fair and reasonable to both sides," [295] a conclusion also reached by the International Crisis Group ("ICG").[296] Korobkin and Zasloff take no position, however, regarding the content of these terms or their relation to international legal norms; indeed, "[f]rom the perspective of [their] theoretical approach, the substance of the terms proposed is irrelevant. What matters is only that the set of terms falls inside the bargaining zone . . . so that both parties will prefer agreement on the terms included in the initiative to the impossibility of reaching any agreement." [297] Although the ICG does offer suggestions regarding the substantive content of the proposed parameters, it also is silent with respect to their relationship to international legal norms.[298]

What these proposals underestimate, however, is the importance of making clear that proposed parameters are in alignment with established international norms. As described in Part III, the influence of the Clinton "ideas" during the last weeks of permanent status negotiations was undermined by the Palestinians' perception that the ideas were the product of pro-Israel bias on the part of the American team and represented a departure from their recognized rights—perceptions that arguably reinforced each other. An effort to demonstrate the consistency of new parameters for the negotiations with international norms is likely to bolster their persuasiveness not only among Palestinians (and perhaps also Israelis), but also among other members of the international community, whose support for the parameters would provide a critical indication of their legitimacy.[299]

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http://www.usip.org/pubs/specialreports/sr/49.pdf (suggesting that Israel High Court of Justice opinion in *Beit Sourik Village Council v. Gov't of Israel* was decided "partly in anticipation of the ICJ ruling"). The Court's decision is also likely to shape future Israeli court decisions, which could, in turn, affect Israel's position in future negotiations with the Palestinians. Moshe Hirsch, *The Impact of the Advisory Opinion on Israel's Future Policy: International Relations Perspective*, 1 J. INT'L L. & INT'L REL. 319, 334-35 (2005).

295. Korobkin & Zasloff, *supra* note 7, at 46.

296. *See* INT'L CRISIS GROUP, *supra* note 286, at 12.

297. Korobkin & Zasloff, *supra* note 7, at 47-48.

298. *See* INT'L CRISIS GROUP, *supra* note 286, at 14-17.

299. The inattention of Korobkin and Zasloff and the ICG to the value of linking proposed parameters to established international norms is surprising in view of the emphasis placed by both on the importance of obtaining broad international support for the parameters. *See* Korobkin & Zasloff, *supra* note 7, at 46-47 ("The support of the international community for the U.S. proposal, perhaps in the form of a U.N. Security Council resolution, would have important benefits," including "undermin[ing] likely claims that the United States is biased in favor of Israel"; diminishing the credibility of the "Palestinian claim that an unlimited right of return for refugees is required by international law"; bolstering the credibility of the United States refusal to accept further negotiation of the proposal's terms; and "providing political cover to the Arab states and allowing them to support the proposal without appearing to have succumbed to U.S. pressure."); INT'L CRISIS GROUP, *supra* note 286, at 10 (calling for international backing of parameters).

To be sure, not all of the parties' disputes regarding the determinacy of international legal rules can be resolved by the international community. As Abram Chayes observes:

> International law, in its normative sense, must be seen as indeterminate with respect to much of the array of concrete choices open in a particular situation. Often the rules have no authoritative formulation in words. Even when they do, the terms are open to a broad range of interpretation and emphasis. They do not dictate conduct so much as orient deliberation, order priorities, guide within broad limits.[300]

But even if the most that international law can do with respect to some issues is to "orient deliberation, order priorities, [and] guide within broad limits," that is no small contribution in the highly politicized context of peacemaking—particularly when even the broad limits are in dispute. Indeterminacy, moreover, need not foreclose legal discourse. Indeed, the flexibility created by a certain degree of indeterminacy may serve to facilitate discourse about fairness: As Thomas Franck suggests, "the legitimacy costs of introducing less determinate elements of distributive justice into the text of a rule . . . are more than balanced by the gains achieved when that law's standard opens a more generous fairness discourse."[301] Thus, while the incorporation of equitable standards into legal rules (such as those discussed by the parties during their water negotiations)[302] may serve to make the rules less useful in defining predictable outcomes, it also increases their perceived fairness—and, consequently, the willingness of parties to resolve disputes within the framework of law. Put another way, while equity shortens the shadow of the law, it may make the shade it does offer more attractive.

2. *Focusing on Persuasion*

The perceived inefficacy of solutions prescribed by international legal norms is in some ways a more difficult challenge to overcome. To a certain extent, it can be addressed through persuasive discourse—by moving beyond simply reciting norms to explaining how the other party's equitable concerns can be addressed within the framework of law. As the Israelis made clear during negotiations over water issues, a party will hesitate to embrace a norm as a guiding principle for talks without some idea of its implications and without confidence that the proposed legal framework is responsive to the party's needs. Although it may seem to be putting the cart before the horse, a detailed explanation of the practical consequences of accepting particular legal rules as standards for the resolution of disputed issues may be necessary to persuade the other party to embrace them. In an international system that continues to be built on consent, adversarial legal arguments devised for the courtroom are unlikely to be effective in the negotiating room, even if they are emotionally satisfying.

Discourse about the responsiveness of legal norms to equitable concerns should not, moreover, be confined to the negotiating room. As Harold Koh

300. CHAYES, *supra* note 60, at 101-02.
301. FAIRNESS, *supra* note 68, at 33.
302. *See supra* note 227 and accompanying text.

has argued, governments' internalization of international norms is often the product of interaction at the transnational level—among a range of governmental and non-governmental actors—rather than solely at the intergovernmental level.[303] This is not simply a matter of public relations, though outreach of that kind is important; it is also a matter of making the case in the myriad of forums where government officials, judges, academics, and technical experts interact. While the general public in Israel, Palestine, and elsewhere may have little appetite for a disquisition on the finer points of the United Nations Convention on the Non-Navigational Uses of International Watercourses, for example, second-track negotiations, academic conferences, and meetings of (and with) international institutions provide rich opportunities for exploring how the concerns and interests of both parties can be addressed within bodies of law. The fact that the influence of these forums on governmental decisions is difficult to anticipate and measure does not make its influence less real.

As the parties' disagreements in security talks make clear, however, it is particularly challenging to overcome skepticism about the efficacy of international law-based solutions when it is animated by skepticism about the international system itself. Convincing a nation still haunted by the Holocaust to abandon a security concept built upon independent defensive capacity in favor of a model based on cooperation, sovereign rights, and international guarantees is not an easy task in the best of circumstances. When it is undertaken only a few years after the international community again failed—twice—to prevent genocide, it becomes even more difficult. To acknowledge this difficulty is not to suggest that Israel's current security concept is either effective or sustainable, or that the Palestinians and others should cease to urge a different approach. The credibility of such persuasive efforts, however, is inextricably linked to the perceived strengths and frailties of international institutions and processes. The international community's failure to prevent and respond effectively to international crises will have implications far beyond the specific crisis in question, and attempts to promote compliance with international law by restricting access to or participation in international institutions will have little effect if the institutions themselves are not perceived to offer real benefits. Simply put, a naked tree will not be seen to offer much shade.

3. *Exerting Third-Party Influence*

It is difficult to conceive of the circumstances that would prompt the international community to intervene militarily to end the Palestinian-Israeli conflict, even if such intervention were likely to be effective. Despite the lack of recourse to police action, however, third parties are not without means to influence the negotiating positions and preferences of Palestinians and Israelis. As noted above, they have an important role to play in helping to clarify the content and implications of international law. In this regard, third party governments should explicitly link both peace proposals (like the

303. Koh, *supra* note 3, at 2648-49.

Clinton "ideas" or the "Roadmap") and expressions of censure (such as the condemnation of settlement construction or the refusal of many states to deal with the Palestinian Authority's Hamas-led government) to relevant international norms. Conversely, discourse in intergovernmental forums like the United Nations should move beyond rote citation of norms to a broader discourse about what law does *not* address—and the opportunities that silence offers for addressing equitable concerns (like the factors supporting border modifications) within a legal framework. Third parties also can contribute much by building the capacity of international institutions to provide forums and tools for resolving disputed issues. Indeed, because so many of the issues on the table in Palestinian-Israeli negotiations demand cooperative solutions requiring substantial technical expertise—such as the management of cross-border trade and movement of persons, control over and allocation of electromagnetic frequencies, the management of the two countries' airspace and of infrastructure in shared spaces such as Jerusalem, and even ongoing responses to low-level security threats—international and regional organizations have much to offer the parties as vehicles both for the exchange of information about best practices and for involving other interested parties in solving specific problems.[304]

These kinds of efforts can increase the compliance pull of legal rules[305]—the shade of the law—which, in turn, may bolster their effectiveness as persuasive standards and gap-fillers. In addition, third parties can extend the shadow of international law by taking steps that impose costs on the parties for non-compliance. As others have observed, such steps may include withholding or constraining trade privileges, [306] suspending economic assistance,[307] facilitating criminal prosecution in domestic and international forums of officials accused of war crimes and related offenses, [308] and economic sanctions.[309]

It is beyond the scope of this Article to assess the merits or feasibility of these kinds of measures, but two points bear emphasizing. First, although it is undoubtedly advantageous to all concerned to allow Palestinians and Israelis

304. These organizations may include international bodies such as the International Telecommunications Union (which has expertise in addressing electromagnetic sphere issues), the International Civil Aviation Organization, and the World Trade Organization, as well as regional bodies such as NATO and the Organization for Security Cooperation in Europe. *See generally* Robert O. Keohane, *The demand for international regimes*, *in* INTERNATIONAL REGIMES 141, 170 (Stephen Krasner ed., 1983) (describing how international regimes facilitate substantive agreements between states).

305. *See generally* Hirsch, *supra* note 294, at 332-43 (assessing, from liberal and constructivist viewpoints, the likely impact of the I.C.J. advisory opinion on Israeli policy).

306. *See* Quigley, *supra* note 8, at 378-79 (describing, with approval, efforts to enforce human rights provisions within agreements between the European Union and Israel).

307. *See* Korobkin & Zasloff, *supra* note 7, at 60-61 (suggesting economic assistance to Israelis and Palestinians be made contingent on acceptance of U.S.-proposed parameters).

308. *See MP's call for sanctions against Israel for shootings*, TELEGRAPH (U.K.) (Apr. 4, 2006), *available at* http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/04/11/usanctions.xml (last visited Apr. 22, 2006).

309. *See* John Quigley, *The Oslo Accords: International Law and the Palestinian-Israeli Peace Process*, 25 SUFFOLK TRANSNAT'L L. Rev. 73, 88 (2002) (suggesting sanctions as one potential means of encouraging Israel to adhere to international-law based solutions); Carlos Ortiz, Note, *Does a Double Standard Exist at the United Nations?: A Focus on Iraq, Israel and the Influence of the United States on the UN*, 22 WISC. INT'L L.J. 393, 395-96 (2004) (same).

maximum flexibility to structure their future relationship according to terms that they deem mutually beneficial and sustainable, the international community has a responsibility to ensure that their agreement falls within the broad limits defined by mandatory rules of international law—the zone of lawfulness. The functions served by mandatory rules in domestic settings—compensating for distortions in the bargaining process resulting from gross inequality between the parties and ensuring that a negotiated agreement does not violate important public policies or the rights of those unrepresented at the negotiating table—are no less important at the international level. Indeed, they are of particular relevance when the negotiating process takes place in the context of military occupation.[310] When the norms in question are central to the proper functioning of the international system, moreover, the entire international community has a stake in compliance with them, if only because non-compliance creates a precedent that may encourage illegal behavior by others and may compromise the legitimacy of international efforts in other contexts to respond to it.

Second, clarification by the international community of the content and implications of legal rules and of the costs of failing to reach an agreement in accordance with them may bolster not only the fairness of a negotiated outcome, but also the efficiency of the negotiation process. In addition to narrowing the scope of bargaining, framing trade-offs, and providing defaults with which to fill in gaps, such clarification may help to reduce the domestic political costs to the parties' respective leaderships of making a deal, as illustrated by the Gulf of Maine litigation. Ultimately, the compromises necessary to bring the Palestinian-Israeli conflict to an end will, as Dennis Ross observes, require the leadership of both sides to "exercise their responsibilities to confront history and mythology,"[311] an effort that inevitably will invite opposition within both communities even if majorities on both sides favor compromise. To require Palestinian and Israeli leaders to bear that responsibility alone in the fragile, fragmented political context in which both operate is to make peace contingent upon visionary, self-sacrificing political leadership that is as rare in Palestine and Israel as it is in the rest of the world.

V. CONCLUSION

Palestinian poet Muhammad al-As'ad asks, "With what faith can . . . naked trees cast shade?"[312] In an international legal order that remains "inchoate, unformed and only just discernible,"[313] and in which the enforcement of legal norms is rare, the value of international law in peacemaking is to some extent a question of faith—faith in the power of ideas, in the effectiveness of institutions, and in the commitments of others. In the

310. Humanitarian law acknowledges the potential for coercion inherent in negotiations between an occupying power and "the authorities of the occupied territories." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 47, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* Quigley, *supra* note 8, at 377-78; Imseis, *supra* note 7, at 126-27.

311. ROSS, *supra* note 6, at 772.

312. al-As'ad, *supra* note 1, at 123.

313. SINCLAIR, *supra* note 47, at 223.

continuing struggle over the fate of the Holy Land, however, these kinds of faith have failed to command enough believers.

As I have undertaken to demonstrate in this Article, the capacity of law to facilitate and guide negotiations rests on the perception by bargaining parties that legal rules either cast a shadow or offer shade. Norms whose enforcement appears remote or whose fairness or capacity to deliver benefits is in question will exert minimal influence over bargaining. Indeed, in the context of Palestinian-Israeli negotiations, international law too often was perceived as a naked tree. The reluctance of the United States to constrain the substantive direction of the peace talks or to permit censure of Israel for non-compliance with international law substantially shortened the perceived shadow of the law. At the same time, the shade of the law—its "compliance pull" independent of the prospect of enforcement—was diminished by a number of factors: the tendency of Palestinian negotiators, particularly early in the negotiations, to cite legal norms as dictates that require strict adherence, without undertaking to persuade Israeli negotiators about the responsiveness of the legal framework they invoked to Israeli equitable concerns; disputes between the parties about the applicability and determinacy of relevant norms; and a prevailing skepticism among Israeli political and military elites about the capacity of international law and institutions to offer benefits and security to Israel, in view of their impotence in addressing many of the crises of the twentieth century.

What I hope this Article also demonstrates, however, is that international law need not be a naked tree. Efforts by the international community to clarify the content and implications of international legal rules, at least as they apply to the Palestinian-Israeli conflict—and to impose costs on the parties for non-compliance—can do much to extend law's influence. In addition, such efforts should be complemented by persuasive discourse regarding the fairness and efficacy of resolving disputed issues within a legal framework: Although the recognition of legal rights should inform the framework for negotiations, it neither obviates the need to explain the legitimacy and justness of the rights invoked nor should it foreclose discussion of equitable interests that may justify a departure from the remedy prescribed by law. This kind of persuasive effort, moreover, should not be confined to discussions between legal counsel across the negotiating table, and it need not await the formal resumption of negotiations. Indeed, if international law is to embody the international community's values and ideals—if it is to provide shade from the glare of political conflict—then broad-based discourse about its content, its demands, and its limitations should be an integral component of efforts to build popular support for peace.