Articles

Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat

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I.   INTRODUCTION

In 1979, Israeli Prime Minister Menachem Begin and Egyptian President Anwar Sadat signed a peace treaty arising from their negotiations at Camp David, bringing an end to the state of war that had existed between the two nations since Israel had declared its independence thirty-one years earlier.[1] In so doing, Egypt and Israel created a new international legal order in the Middle East and a framework for future treaties. The basis for the agreement was, simply, "land for peace": Israel returned to Egyptian sovereignty the Sinai Peninsula, which Israel had captured in the 1967 Six-Day War; Egypt recognized Israel's right to exist and established diplomatic and trade relations with the Jewish state.[2] The two nations have maintained a peaceful relationship, if not a friendship, for a quarter-century since.[3]

Following the Camp David model, the fitful efforts over the last decade to forge a negotiated peace between Israel and the Palestinians have also been based on the land-for-peace concept. With the signing of a series of agreements arising out of the Oslo negotiations between 1993 and 1995 (the Oslo Accords), Israel ceded administrative control over parts of the West Bank (captured from Jordan during the Six-Day War) and the entire Gaza Strip (captured from Egypt in the same conflict) to the newly recognized Palestinian Authority (PA) in return for the PA's renunciation of terrorism and

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1.   Two agreements creating a framework for peace were signed by the Israeli and Egyptian leaders on September 17, 1978. The peace treaty was signed on March 26, 1979. *See* SAADIA TOUVAL, THE PEACE BROKERS 300-03 (1982).

2.   Framework for Peace in the Middle East Agreed at Camp David, Sept. 17, 1978, Egypt-Isr.,   1138   U.N.T.S.   40,   *available   at*   http://www.jimmycarterlibrary.org/documents/-campdavid/accords.phtml (last visited Dec. 12, 2004); *see also* Jill Allison Weiner, *Israel, Palestine, and the Oslo Accords*, 23 FORDHAM INT'L L.J. 230 (1999).

3.   *See generally* Steven L. Spiegel, *That Sinking Feeling: At 25, the Israel-Egypt Treaty Survives But Is Badly Frayed*, L.A. TIMES, Mar. 28, 2004, at M1 (calling the countries' relationship a "cold peace").

recognition of Israel's right to exist.[4] The commitment of the two sides to "final status" negotiations by 1998 implied mutual promises of more land[5] for a lasting peace. The failed Camp David II summit of July 2000 and subsequent negotiations in the final months of Bill Clinton's presidency focused on proposals according to which Israel would cede more territory and permit the establishment of a Palestinian state as part of a final resolution of the conflict between the two nations.[6]

In September 2000, the second Palestinian intifada (uprising) erupted, and Israel and Palestine have essentially been at war ever since.[7] Despite the failure of earlier peace attempts, both official and unofficial efforts at achieving a peaceful resolution of the conflict during this time have continued to assume a land-for-peace framework. The U.S.-backed "Road Map" for peace, introduced in April 2003 and endorsed by United Nations Security Council Resolution 1515, called for an immediate end to Palestinian terrorist attacks; a stop to Jewish settlement expansion in the West Bank and Gaza (collectively, the Territories); and the establishment of a Palestinian state, on specific terms to be negotiated by the parties, by 2005.[8] The unofficial Geneva Accord of December 2003, negotiated by former Israeli cabinet member Yossi Beilin and former Palestinian Minister Yasser Abed Rabbo (but rejected by the leadership of both sides),[9] envisioned a final peace agreement between the

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4.   *See* Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr.-PLO, *reprinted in* 32 I.L.M. 1525 (1993) [hereinafter the Oslo Accords]; Agreement on the Gaza Strip and the Jericho Area, May 4, 1994, Isr.-PLO, *reprinted in* 33 I.L.M. 622 (1994) [hereinafter Cairo Agreement]. Described generally, the Oslo Accords recognized the Palestine Liberation Organization (PLO) as the sole legitimate representative of the Palestinian people, and created the Palestinian National Authority (PA) to govern specified areas within the West Bank and Gaza. The PLO, in turn, recognized the state of Israel and foreswore the use of violence to achieve its goals. Oslo was noteworthy more for what it did not say than for what it did. It did not specify which territories the PA was to control: the Cairo Agreement wound up giving it the Gaza Strip and the area around the city of Jericho. It also did not outline what the "final status" agreement between the parties would look like, putting aside contentious issues of borders, Jerusalem, security, and the Palestinian refugees and their descendants for future talks. Oslo, in short, created a negotiating process, but did not set forth a final dispensation. In our view, this was a serious error, and this Article proposes inter alia a specific American plan in place of Oslo's process-oriented approach.

5.   Although the Palestinian side viewed the endpoint of the Oslo process as Palestinian *statehood*, Israeli Prime Minister Yitzhak Rabin envisioned something short of that. *See, e.g.*, COLIN KNOX & PADRAIC QUIRK, PEACE BUILDING IN NORTHERN IRELAND, ISRAEL AND SOUTH AFRICA: TRANSITION, TRANSFORMATION, AND RECONCILIATION 100 (2000) (quoting Rabin as opposing the establishment of a Palestinian state and claiming that the Oslo Agreement does not promise one).

6.   *See, e.g.*, BERNARD WASSERSTEIN, ISRAELIS AND PALESTINIANS: WHY DO THEY FIGHT? CAN THEY STOP?, 141-45 (2003).

7.   By one count, as of June 2004, 3437 Palestinians had been killed and 33,776 wounded, and 864 Israelis were dead and 6399 wounded. David Rieff, *The Maimed*, N.Y. TIMES, July 18, 2004, § 6 (Magazine), at 30.

8.   The Road Map, drafted by the so-called Quartet (consisting of the United States, the European Union, Russia, and the United Nations), calls for a series of concessions by both sides eventually leading to the establishment of two states. Under the Road Map formula, first, Israel must cease settlement-building activities and the Palestinians must cease terrorist activities; second, the parties will agree to terms establishing a Palestinian state; and third, the parties will agree to terms concerning the status of Jerusalem. Milton Viorst, *The Road Map to Nowhere*, WASH. Q., Summer 2003, at 177.

9.   As soon as the Geneva Accord was announced, the Israeli government immediately condemned it. *See, e.g.*, Gershom Gorenberg, *Prefer Peace to the Temple Mount*, JERUSALEM REP., Nov. 17, 2003, at 90 ("Prime Minister Sharon labeled the unofficial accord, product of long negotiations by Israeli doves and Palestinian moderates, as 'an attempt . . . to topple the government by illegitimate means'—as if Yossi Beilin, the central Israeli negotiator, had circled the Knesset with tanks.").

two sides on the basis of the establishment of a Palestinian state equivalent in size to the Territories; the division of Jerusalem between Israel and Palestine, with Israel retaining sovereignty over the Old City and Palestine obtaining sovereignty over the Temple Mount; [10] and compensation of Palestinian refugees who fled Israel during the 1948–1949 Arab-Israeli War in exchange for Israeli control over how many refugees may return to Israel. [11]

While, as always, the devil is in the details, both the Road Map and the Geneva Accord underscore the continued appeal of the land-for-peace framework as the basis for a negotiated agreement that would end this long-standing conflict and establish a legal structure to govern the Israeli-Palestinian relationship. Ridding the lands in which they live of Israeli occupation, the Palestinians would realize their right to self-determination and self-government and, for the first time in history, would have the opportunity and agency to pursue their own vision of the good society. [12] Israelis, in turn, would free themselves from the physical, psychological, and economic burden of fighting an ongoing, low-level war against a tenacious enemy, which is unlikely ever to result in total victory.

The stubborn tenacity of the land-for-peace concept and the equally stubborn perpetuation of this state of war raise two obvious questions: *why* has

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Although the Palestinian negotiators of the Geneva Accord insisted that PA Chairman Yasser Arafat endorsed it, Arafat publicly rejected it. *See* Arnon Regular et al., *Arafat Rejects Geneva, But Lets Officials Attend Launch*, HA'ARETZ, Dec. 1, 2004, http://www.haaretz.com/hasen/pages/arch/-ArchSearchEngArt.jhtml ("Both supporters and opponents of the draft said they believe Arafat . . . in fact believes that the authors are 'trading in national assets and are collaborators with the American Zionist project.'").

10.   The Temple Mount, known as *Haram al Sharif* ("noble sanctuary") to Muslims, is the site of the Dome of the Rock, from which Muslims believe Mohammed ascended to heaven, and the al Aqsa Mosque, and is believed by Jews to be the site of the first and second temples. *See, e.g.*, Ken Ellingwood, *Israelis, Muslims Clash at Holy Site*, L.A. TIMES, Feb. 28, 2004, at A3.

11.   *See* The Geneva Accord (Draft Permanent Status Agreement) (Oct. 2003), *available at* http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=351461 (last visited Dec. 12, 2004). The People's Voice draft agreement, proposed last September by former Israeli Shin Bet security chief Ami Ayalon and Palestinian Sari Nusseibeh, prescribes a settlement quite similar to that of the Geneva Accord, calling for two states based on pre-1967 borders adjusted by equal territorial swaps, dismantlement of all Jewish settlements not covered by the land swap, an "open" Jerusalem with Israeli control over Jewish sectors of the city and religious sites and Palestinian control over Arab sectors and religious sites, and compensation but no right of return to Israel for Palestinian refugees from the 1948 War and their descendants. *See* People's Voice (July 27, 2002), *available at* http://www.mifkad.org.il/en/principles.asp.

12.   Palestinians have never had their own, internationally recognized state. The area known as Palestine was occupied by the Ottoman Empire in 1516 after its defeat of the Mongols. The Ottomans lost Palestine to Britain as a result of World War I (in 1917–1918), and the Arab-Israeli War of 1948–1949 left the Hashemite rulers of Jordan in control of the West Bank. *See generally* Weiner, *supra* note 2, at 234; Tanya Kramer, *The Controversy of a Palestinian "Right of Return" to Israel*, 18 ARIZ. J. INT'L & COMP. L. 979, 980-86 (2001). For excellent histories of the collapse of the Ottoman Empire and the creation of the British Mandate, see EFRAIM & INARI KARSH, EMPIRES OF THE SAND: THE STRUGGLE FOR MASTERY OF THE MIDDLE EAST, 1789-1923 (2000); DAVID FROMKIN, A PEACE TO END ALL PEACE: THE FALL OF THE OTTOMAN EMPIRE AND THE CREATION OF THE MODERN MIDDLE EAST (1990). An important although highly controversial description of Jordan's conquest of the West Bank in 1948–1949 is AVI SHLAIM, COLLUSION ACROSS THE JORDAN: KING ABDULLAH, THE ZIONIST MOVEMENT, AND THE PARTITION OF PALESTINE (1988). Shlaim's work receives a thorough, trenchant, and respectful critique in ITAMAR RABINOVICH, THE ROAD NOT TAKEN: EARLY ARAB-ISRAELI NEGOTIATIONS (1991), which also provides important background on Jordanian actions. It receives a thorough, trenchant, and not-very-respectful critique in EFRAIM KARSH, FABRICATING ISRAELI HISTORY: THE "NEW HISTORIANS" 69-193 (1997). Another excellent history of the 1948 war is YOAV GELBER, PALESTINE 1948: WAR, ESCAPE AND THE EMERGENCE OF THE PALESTINIAN REFUGEE PROBLEM (2001).

resolution of the Middle East conflict proven so elusive, and *how* can an interested third party such as the United States help break the deadlock? These questions are especially timely following the November 2004 death of Palestinian leader and icon Yasser Arafat. His passing, along with the end of the U.S. presidential election cycle, has created new enthusiasm for Middle East peace efforts.

There is, of course, no shortage of observers with opinions about why the Israelis and Palestinians are at war and what needs to be done to end it. Prescriptions abound on U.S. newspaper op-ed pages every day, and the Middle East conflict is a constant topic of discussion in news magazines and on television talk shows. Most of the participants in these debates are partisans of one side, more eager to denigrate the enemy and list conditions for what "they" need to do than to analyze why the parties have jointly failed to negotiate an agreement for a quarter-century. The scholarly literature is only slightly more dispassionate, and it also generally fails to put the collapse of negotiations in a useful theoretical framework.[13]

In this Article, we attempt to analyze the impasse in Israeli-Palestinian peace negotiations—asking why it has arisen and how a third party can help the two sides get beyond it—from a unique conceptual perspective. Rather than dwell on particular historical events and antagonisms, our approach will be to use the analytical tools of interdisciplinary negotiation theory to categorize the range of roadblocks to a land-for-peace agreement and, from that analysis, to deduce the features of a U.S.-sponsored peace initiative that would have the best possible chance of overcoming the impasse. Our goal, then, is not to offer new facts about the events and antagonisms of the Middle East. Rather, we aim to provide a new analytical framework for organizing and making sense of the consequences of those antagonisms and deriving public policy recommendations from them.

Our approach to examining the Israeli-Palestinian impasse leads us to the following conclusions. The failure of the parties to reach an agreement based on the land-for-peace framework can be attributed to some combination of three common roadblocks to negotiation success: (a) the absence of a bargaining zone, such that no single set of agreement terms would be preferable to continued impasse for both parties; (b) internal division within one or both principal parties, such that an agent or a minority faction with the ability to block an agreement undermines a result that would benefit the party as a whole; and (c) mutual "hard bargaining," such that both sides refuse to

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13.   *See, e.g.*, THE ISRAELI-PALESTINIAN PEACE PROCESS: OSLO AND THE LESSONS OF FAILURE (Robert L. Rothstein et al. eds., 2002) (various essays describing the failures of the Oslo peace process); *Reflections on the Peace Process and a Durable Settlement: A Roundup of Views*, J. OF PALESTINE STUDIES, Autumn 1996, at 5 (featuring commentary by Abdel Monem Said Aly, Rashid I. Khalid, Camille Mansour, Moshe Ma'oz, Sir Anthony Parsons, William B. Quandt, Eric Rouleau, Ghassan Salame, and Khalil Shikaki); Yuval Elizur, *Israel Banks on a Fence*, FOREIGN AFF., Mar./Apr. 2003, at 106; Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y. REV. BOOKS, Aug. 9, 2001, at 59; Deborah Sontag, *Quest for Middle East Peace: How and Why it Failed*, N.Y. TIMES, July 26, 2001, at A1. Two recent scholarly works putting the blame squarely on the Palestinians, and on Arafat in particular, are EFRAIM KARSH, ARAFAT'S WAR: THE MAN AND HIS BATTLE FOR ISRAELI CONQUEST (2003), and BARRY RUBIN & JUDITH COLP RUBIN, YASIR ARAFAT: A POLITICAL BIOGRAPHY (2003).

accept an agreement that would be preferable to impasse and instead hold out for an even more desirable agreement.

Because the parties' rhetoric can be consistent with any of these explanations, only an omniscient observer could know for sure which of these three roadblocks (or combination thereof) is actually the but-for cause of the ongoing impasse. Consequently, any U.S.-sponsored peace initiative would be most likely to succeed in bringing peace to the Middle East if it were to include a conscious plan to overcome each of these roadblocks. We propose that such a plan should include three crucial features. First, the United States should present a non-negotiable set of terms to the two disputing parties that they can either take or leave but not bargain over. Second, because carrots and sticks linked to the terms of the deal may maximize the chances of success, the United States should offer side payments to the parties if they accept the proposed deal and simultaneously threaten to withhold political and economic support if the plan is rejected. Finally, Washington should work with the disputants and with U.S. allies to limit the ability of Palestinians and Israelis who are opposed to an agreement to stand in its way.

Our analysis proceeds in five parts. In Part II, we define and describe those concepts from negotiation theory that are useful for organizing the analysis of any bargaining situation, and then situate the ongoing (if that word is not too optimistic) Israeli-Palestinian peace process within that conceptual structure. In Parts III, IV, and V, we specifically consider each of the three common roadblocks to a negotiated agreement as they relate to the Israeli-Palestinian dispute, and discuss what strategies might be appropriate to overcome those roadblocks and whether they are feasible in this particular context. In Part VI, we draw on the conclusions reached in the prior four Parts to propose and discuss the particular elements that should comprise a U.S.-sponsored peace initiative designed to maximize the chances of success.

II.   THE CONCEPTUAL APPARATUS

A.   Reservation Points and the Bargaining Zone

In any bargaining setting, negotiations can have only one of two outcomes: agreement or impasse.[14] Agreement, of course, requires the assent of each party. The minimum set of terms necessary for a party to prefer agreement to impasse is called that party's "reservation point."[15] If a set of terms causes a party to favor agreement over impasse, the potential deal "exceeds" the party's reservation point. The content of a party's reservation point depends on the consequence of impasse. The set of terms constituting a party's reservation point will be less favorable to that party, or "lower," if impasse is extremely undesirable than if impasse is only moderately undesirable. A negotiator's reservation point, then, is dependent on how that party perceives the quality of the outside options, or Best Alternative to a Negotiated Agreement (BATNA).[16] A person shopping for a new car will

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14.   *See* RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 14 (2002).
15.   HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 45 (1982).
16.   ROGER FISHER & WILLIAM URY, GETTING TO YES 104 (Bruce Patton ed., 1981).

have a lower reservation point if the car she currently owns is inoperable than if it is in good working order.

In a two-party negotiation in which the interests of the parties (other than their mutual interest in reaching an agreement) are generally opposed to one another (for example, an agreement term that benefits one party is costly to the other), we can plot possible sets of agreement terms (deals) on a simple one-dimensional graph (Figure 1 below). Deals more desirable to one party fall on the left side, and deals more desirable to the other party go on the right. If a car buyer negotiates with a car dealer, an agreement that includes a low price, an extensive warranty, and extra options would be located on the left side of the graph, indicating that such a deal would be relatively more favorable to the buyer. An agreement calling for a stripped-down model, a high price, and no warranty would be positioned on the right side, indicating that it would be relatively more favorable to the seller. Deals for a high price and an extensive warranty on the one hand, and for a low price and no warranty on the other, would be located in the middle of the graph, between the two extremes.

The buyer's and the seller's reservation points can also be plotted on the graph, dividing the deals that each would prefer to impasse from those deals they would not. If the buyer's reservation point is located to the right of the seller's reservation point, this indicates the existence of deals that both parties would prefer to impasse. This conceptual space is called the "bargaining zone."[17] The existence of a bargaining zone, which might contain only one deal or many different deals, is a necessary condition of an agreement because without a bargaining zone any set of deal terms will be unacceptable to at least one party. A bargaining zone is not a sufficient condition for agreement, however, because, for reasons explored below, one or both parties might refuse to agree to a set of terms that exceeds its reservation point.

FIGURE 1

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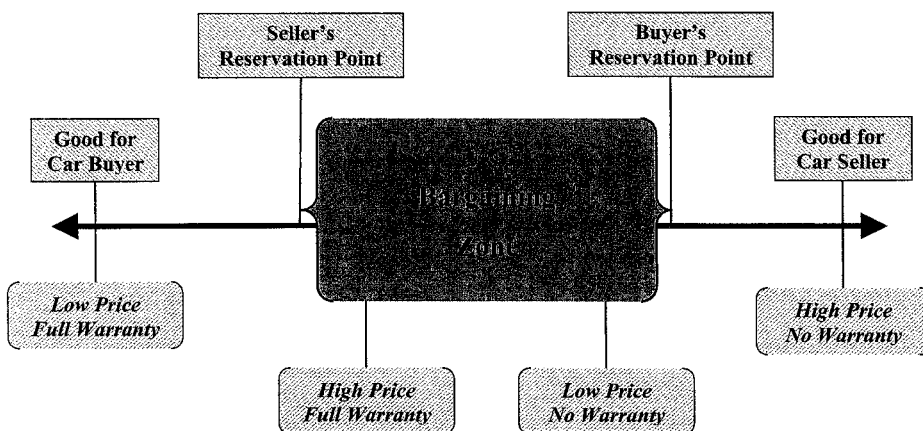
    17.   *See* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1792-94 (2000).

B.   *Situating the Middle East Conflict*

        The Israeli-Palestinian peace negotiations can be mapped on a similar graph (Figure 2 below). On the left-hand side is the best possible resolution of the conflict from the Palestinian perspective. This outcome might include a complete withdrawal of Jews from the region and the establishment of a Palestinian state in what is now Israel and the Territories. We can label this agreement "Israeli surrender." Closer to the middle of the chart, although only slightly, might be the withdrawal of Israeli forces from the Territories and East Jerusalem and the establishment of a Palestinian state therein; Israeli recognition of the right of return to Israel of Palestinian refugees who left their homes during the 1948 War; and no official recognition of Israel by the Palestinians. At the other end of the graph would be the best possible agreement from the Israeli perspective, which we can label "Palestinian surrender." Perhaps this outcome would include the Palestinians departing the Territories for other Arab lands, which would leave the entire territory currently controlled by Israel to the Jewish state. Slightly toward the center from that point would be Palestinian recognition of the state of Israel (including East Jerusalem); an end to all violence against Israelis; a renunciation of the right of return; maintenance of Israeli settlements in the Territories; and limited Palestinian autonomy in portions of the Territories.

FIGURE 2
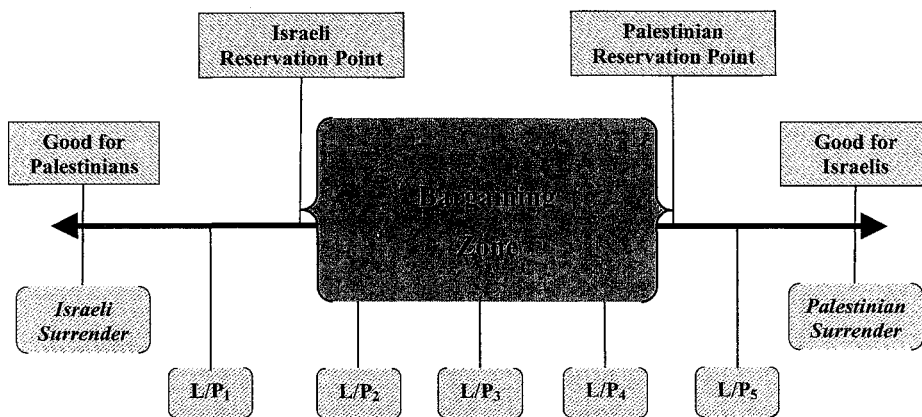
        Such extreme outcomes clearly lie outside of any bargaining zone that may exist. Somewhere toward the center of the chart are various conceptions of what we have described as land for peace, which are alternatively referred to as the "two-state solution."[18] All the proposals within this rubric envision a

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        18.   A comprehensive discussion of the idea and history of the two-state solution, and the antipathy that hard-line Israelis and Palestinians feel toward it, can be found in the introduction and articles   contained   in   *Is   the   Two-State   Solution   in   Danger?*,   HA'ARETZ,   *at* www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=383879 (last visited Dec. 12, 2004). *See also* When the   Two   State   Solution   is   No   Longer   Viable,   bitterlemons.org,   *at*

final-status agreement between the parties resulting in a state of Palestine living at peace with Israel. Beyond that fundamental starting point, however, the general land-for-peace concept is consistent with a variety of different specific agreements concerning difficult issues such as territorial boundaries, Palestinian refugees, Jewish settlements in the Territories, and control over Jerusalem and the holy sites. Depending on its specific terms, a land-for-peace agreement could be relatively more desirable for the Palestinians or for Israel. Versions of a land-for-peace agreement that lie to the left of Israel's reservation point or to the right of the Palestinians' reservation point, such as L/P_1 and L/P_5 in Figure 2, by definition cannot be achieved because one side or the other would prefer continued warfare to acquiescing to an agreement on such terms. In contrast, versions of an agreement that lie between the parties' reservation points (such as L/P_2 through L/P_4 in Figure 2), if they exist, are potentially attainable.

The following Parts of this Article rely on this conceptual structure as a framework for categorizing and analyzing why the Israelis and Palestinians have failed to reach a peace agreement to date, and for considering what U.S. policy initiatives might increase the likelihood of reaching an agreement. Two simplifying assumptions are employed. First, we assume Israel and Palestine to be unitary actors. This does not mean that we assume all Israelis or all Palestinians assess the situation in the Middle East identically or have the same preferences. We realize that diversity of preferences on one or both sides to the conflict can create barriers to agreement, and we explicitly consider this problem in Part IV. When we discuss the preferences of Israel or the reservation point of Palestine, however, we assume the existence of collective preferences of members of the two nations, be those preferences unanimous or merely a reflection of majority interests.

Second, we assume a "thin" version of rational behavior[19] on the part of Israel and Palestine. Thus, we assume rational behavior in the sense that each party has preferences for various deal terms and outcomes of peace negotiations, and that each acts in a way intended to maximize the satisfaction of those preferences given expected uncertainties.[20] In other words, we assume that neither side makes decisions or takes actions randomly, haphazardly, or without the desire to have those decisions or actions further identifiable goals. For example, the hypothesis that a party chooses an action obviously contrary to its interests and desires solely due to "God's will" falls outside of our model. If the long-standing impasse in the Middle East actually

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http://www.bitterlemons.org/previous/bl160603ed23.html (June 16, 2003); *cf.* S.C. Res. 1397, U.N. SCOR, 4489th mtg., U.N. Doc. S/RES/1397 (2002). Strictly speaking, the Resolution does not say "two states for two peoples," but rather merely envisions two states, Israel and Palestine, living side by side. Theoretically then, one could argue that "Israel" in this case would mean a predominantly Arab state. Linguistically, it is hard to imagine any Arab state calling itself "Israel"; more practically, it is hard to imagine that the United States would be willing to see the destruction of its principal ally in the Middle East.

19. *See generally* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY 17-19 (1994).

20. *Id.*; *see also* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1062-64 (2002) (describing the expected utility version of rational choice theory).

results from this type of thinking on the part of one or both parties, our analysis will shed little light on the conflict.

Our "thin" rationality assumption, however, does not mean that we assume that either party to the conflict maintains a particular ordering of preferences or set of beliefs about the world, or that its preference function reflects only material goals. Our framework allows that either side might have preferences or beliefs—based on emotions, culture, or history—that many outsiders might find difficult to understand, and that the extent to which the disputants are willing to trade material goods (such as money or territory) versus more intangible items (such as a sense of historical justice) might also perplex some outside observers. Finally, our framework allows for the possibility of miscalculation: that is, one or both parties might take actions on the mistaken belief that those actions will have a particular consequence, when in fact another consequence results.

C.   Roadblocks to Conflict Resolution

Our conceptual apparatus permits us to describe plausible explanations of why Israel and Palestine have failed to reach a negotiated agreement as falling into one of three distinct categories. First, it is possible that Israel, Palestine, or both have such high reservation points that no bargaining zone exists; that is, for all the talk of land for peace, there simply is no specific version of a land-for-peace agreement that both Israel and the Palestinians would prefer to continued warfare. Second, it is possible that there is a bargaining zone that encompasses one or more specific versions of a land-for-peace agreement, such that both parties would find that agreement dominates continued impasse, but that a minority of actors within Israel, Palestine, or both who hold contrary preferences can block agreement by preventing the majority from entering into or implementing the deal. Third, it is possible that there is a bargaining zone and that the parties have the ability to reach a mutually beneficial agreement, but that an agreement proves elusive nonetheless because both parties continue to press for a better deal rather than settle for a merely acceptable one.

The conceptual lens through which we view the Middle East conflict is useful not only for identifying and describing the causes of negotiation failure, but also for prescribing policy interventions geared toward breaking the impasse. Each of the three categories of roadblocks to a peace agreement that we describe logically suggests the need for different policies on the part of the disputants themselves or interested outsiders.

Whether a hypothetical agreement exceeds a negotiator's reservation point depends on the relationship between two variables, as perceived by the negotiator: the relative quality of the agreement's terms and the relative quality of the negotiator's BATNA. This suggests that if no bargaining zone currently exists, one might develop if the terms of the deal are altered to make agreement more desirable to one or both parties or if actions are taken to make the BATNA of one or both parties less appealing.

In contrast, if a bargaining zone exists but minorities block the agreement, the implications are dramatically different. Steps must be taken to

eliminate or co-opt the capacity of the rejectionist forces to exercise blocking power.

Finally, if a bargaining zone exists but impasse persists because one or both parties hold out for a more advantageous agreement rather than settling for one that is merely acceptable, the actions to be taken will differ once more. Either conditions must be changed to make one or both parties more impatient to reach agreement, or both parties have to be convinced that they can do no better than a particular set of terms that lies, among others, within the bargaining zone.

III.   ABSENCE OF A BARGAINING ZONE

At first glance, peaceful coexistence would seem to dominate ongoing warfare, with its accompanying death, physical destruction, and (at least for the Palestinians) economic hardship. In fact, however, there might be no specific set of land-for-peace terms such that agreement actually is preferable to conflict for both sides. This Part considers how the absence of a bargaining zone might be precluding a peace agreement. Conceptually, this could be the case if Israel has such a high reservation point that no version of a land-for-peace agreement is preferable to impasse from its perspective; if Palestine has such a high reservation point that no version of a land-for-peace agreement is preferable to impasse from its perspective; or if both parties have moderately high reservation points, such that some versions of a land-for-peace agreement would be desirable for each but no single possible agreement would be more desirable than impasse for both. We divide our discussion, however, into sections that consider why each party might have a reservation point sufficiently high that, given the other's reservation point, no agreement is possible, and a section that explores potential interventions to overcome this roadblock.

A.   *Potential Sources of a High Palestinian Reservation Point*

Pictures of Palestinians waiting for hours on end at Israeli military checkpoints, of Palestinian children caught in the crossfire as the Israeli army attacks militants, and of squalid living conditions in Palestinian refugee camps are fixtures on U.S. television news. Unemployment in the Territories exceeds fifty percent, and the Palestinian population, once wealthy by Arab standards, must rely on international aid to survive.[21] A negotiated agreement with Israel that results in the founding of an autonomous Palestinian state would immediately improve some of these features of Palestinian life and allow the Palestinians an opportunity to improve others. Surely, such a deal would be preferable to Palestine than pursuing its BATNA of armed insurgency against the best-financed and best-armed military force in the Middle East. This

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21.   *See* Ghassan Khatib, Where Are We Now?, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl1290903ed37.html (Sept. 29, 2003) ("In three years of confrontation, Israel managed to reduce by half the struggling Palestinian economy . . . . [and was] responsible for an unemployment rate that skyrocketed from 37 to 50 percent. The number of Palestinians living below the poverty line rose in turn to 60 percent.").

conclusion is not obviously correct, however, because it overlooks two important features of life in the region: emotion and demography.

1.   The Right of Return

In 1947, the United Nations approved a partition between Arabs and Jews of British Mandate Palestine, stretching from the Mediterranean to the Jordan River. Most Arab leaders rejected the terms of the partition. When the British withdrew from the area in 1948, Jewish leaders proclaimed an independent state of Israel, and war broke out between the fledgling nation and the armies of the surrounding Arab countries.[22] During the Arab-Israeli war of 1948–1949, between 500,000 and one million Palestinians who resided within the borders of what became Israel left their homes and moved to Arab-controlled lands.[23] The cause of this large displacement, known to Palestinians as al-Nakba (the "disaster" or "catastrophe")[24] is a bitterly contested historical fact: Palestinians claim that they were forced out by the Jewish military forces, while Israelis claim that Palestinians chose to relocate temporarily in the hopes that invading Arab armies would conquer the territory.[25] Today, these Palestinian refugees and their descendents, roughly four million people in all,[26] live in the Territories and in surrounding Arab nations, many of them in refugee camps.[27] Whatever the historical causes of this situation, the fate of the refugees has been a significant impediment to Israeli-Palestinian peace efforts for decades. Palestinian leaders have consistently demanded the right of return of the refugees and their descendants to their former homes inside Israel's pre-1967 borders as a prerequisite for a final peace agreement.[28]

It is widely believed that no peace agreement that were to include the right of large numbers of Palestinians to move to Israel proper would exceed Israel's reservation point.[29] Today, approximately twenty percent of Israel's

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22.   E.g., AVRAM S. BORNSTEIN, CROSSING THE GREEN LINE BETWEEN THE WEST BANK AND ISRAEL 39-40 (2002).

23.   E.g., BENNY MORRIS, THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM, 1947–1949, at 297-98 (1987). Israelis and Palestinians disagree on the exact numbers, with Israelis favoring lower estimates and Palestinians higher estimates. See Kramer, supra note 12, at 990.

24.   Bornstein, supra note 22, at 40.

25.   Compare EDWARD W. SAID, THE QUESTION OF PALESTINE 101 (2d ed. 1992), with Marie Syrkin, The Palestinian Refugees: Resettlement, Repatriation, or Restoration?, in ISRAEL, THE ARABS AND THE MIDDLE EAST 157, 159-66 (Irving Howe & Carl Gershman eds., 1972). A good summary of the various competing claims is provided in ROGER FISHER ET AL., COPING WITH INTERNATIONAL CONFLICT: A SYSTEMATIC APPROACH TO INFLUENCE IN INTERNATIONAL NEGOTIATION 33-36 (1997). The truth almost certainly resides somewhere in between the two extreme views. See, e.g., Kramer, supra note 12, at 996-98; John Quigley, Displaced Palestinians and a Right of Return, 39 HARV. INT'L L.J. 171, 182 (1998); Wadie Said, The Palestinians in Lebanon: The Rights of the Victims of the Palestinian-Israeli Peace Process, 30 COLUM. HUM. RTS. L. REV. 315, 345 (1999); Justus R. Weiner, The Palestinian Refugees' "Right to Return" and the Peace Process, 20 B.C. INT'L & COMP. L. REV. 1, 22-23 (1997).

26.   See United Nations Relief and Works Agency, Total Registered Refugees per Country and Area (June 30, 2003), at http://www.un.org/unrwa/publications/statis-01.html.

27.   Contrary to the implication of the term "camps," these settlements are made of permanent, if often squalid, housing developments.

28.   Kramer, supra note 12, at 995; Weiner, supra note 25, at 1.

29.   Avishai Ehrlich, Israel's Religious Right and the Failure of the Peace Process, MONTHLY REV., Oct. 2001, at 16, 16-17; Weiner, supra note 25, at 1.

6.5 million citizens are Arab.[30] The mass immigration of the Palestinian refugees and their descendants to Israel would cause a huge shift in the demographic balance and, given the disparity between the birthrates of Israeli Arabs and Israeli Jews, would raise the likely prospect that in the very near future Israel would cease to be a majority-Jewish nation.[31] It is probable that Israel would prefer protracted warfare with a hostile neighbor to preserve its existence over a peace agreement that would sow the seeds for the non-violent destruction of the Jewish state.

But if any agreement that includes the right of return would fall below the reservation point of Israel, it is also possible that any agreement that sacrifices the right of return would fall below the reservation point of Palestine.[32] This point is difficult for many Westerners to understand because it seems to turn a blind eye to the current realities of life in the Middle East. Today, Palestinian refugees have no ability to return to their ancestral homes within pre-1967 Israel, and there is no realistic possibility of winning the right of return by force of arms. Thus, Palestinians would not be tangibly worse off by renouncing the right of return as part of a land-for-peace agreement, and a peace agreement would make them far better off in other respects. From this perspective, it would appear that the land-for-peace agreement strictly dominates the Palestinians' BATNA of continuing their low-level armed struggle against Israel.

The logic of this argument is inescapable on one level, but it might be flawed because it underestimates the emotional content of the issue for the Palestinian psyche.[33] The Palestinians might believe that the psychological cost of renouncing the right of return would be greater than the physical and economic deprivations that they suffer under Israeli occupation.[34]

2. *Demographic Shifts Favor Palestine in the Long Term*

Although land for peace undoubtedly would improve the quality of life for Palestinians in the West Bank and Gaza in the immediate future, Palestinians rationally might believe that their nation would be better off in the long term without such an agreement. Demographic trends suggest that the passage of time conceivably could aid the stated Palestinian goal of taking control of pre-1967 Israel, in addition to the Territories, even without the return of the Palestinian refugees to Israel.

As noted above, Arabs currently comprise approximately twenty percent of the population of Israel proper. But high Arab and low Jewish birthrates suggest that this population balance is not stable. According to one study, non-

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30.   Israeli Central Bureau of Statistics, The Population, by Religion and Population Group, http://www1.cbs.gov.il/shnaton55/st02_01.pdf (2004); *see also* WASSERSTEIN, *supra* note 6, at 25-26.

31.   Israeli Jewish women have on average 2.5 children. Israeli Arab women have on average 4.7 children. Palestinian women living in the Territories have on average nearly 6 children. WASSERSTEIN, *supra* note 6, at 26. For further discussion, see *infra* notes 35-37 and accompanying text.

32.   For some evidence that this may no longer be true, see *infra* Part VI.B.1.b.

33.   A Palestinian representative at the 2000 Camp David talks called the attempt to deal with the refugee issue "the moment of truth" and lamented the Israeli position on refugees as "[t]he greatest failure of the summit." Akram Hanieh, *The Camp David Papers*, J. PALESTINE STUD., Winter 2001, at 75, 82.

34.   Kramer, *supra* note 12, at 994-1001.

Jews will comprise approximately one-third of the Israeli population within the pre-1967 borders by 2020.[35] Other studies indicate that Israeli Arabs, who have the same voting rights as Israeli Jews, could outnumber Jews in Israel proper by mid-century,[36] especially if Jewish immigration to Israel from abroad slows, which it almost certainly must.[37] Palestinians willing to sacrifice present well-being for future goals (i.e., Palestinians with high discount rates) might think it worth the costs of occupation today to avoid an agreement that would recognize the ongoing existence of a Jewish state and provide an incentive for Arabs to leave Israel to settle in an independent Palestinian state. Although it is fanciful to think that Israel will be driven out of existence by force of arms, it is less fanciful to think that a peaceful takeover of the Jewish state through the electoral system is possible in time.

Although an enfranchised Arab majority within Israel proper is somewhat speculative and, at a minimum, remains decades away, an Arab majority in the combined areas of Israel and the Territories is virtually certain to become a reality in the very near future. Today, Jews slightly outnumber Arabs in the area from the Jordan River to the Mediterranean Sea, but higher Arab birthrates suggest Arabs should become the majority as early as 2007.[38] Although West Bank and Gaza Palestinians lack the right to vote in Israeli elections, when Arabs become the region's majority they could change their political goal from a separate Palestinian state to full citizenship in Israel, which they could then presumably dominate through the democratic process. It is unlikely Israel would grant such rights, but Palestine might believe that the moral force of its position in the eyes of the world would provide it with greater leverage in negotiating a land-for-peace deal than it enjoys now. Some researchers contend, in fact, that the high birthrate is viewed by some

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35.   Amon Soffer, Wash. Inst. for Near East Pol'y, *Demographics in the Israeli-Palestinian Dispute*, PEACEWATCH NO. 370, *at* http://www.washingtoninstitute.org/watch/Peacewatch/-peacewatch2002/370.htm (Mar. 22, 2002).

36.   *See* Erik Schechter, *Doomsday Demographer Gets a Hearing at the Prime Minister's Office*, JERUSALEM REP., Nov. 5, 2001, at 5 (citing Hebrew University demographer Sergio della Pergola for the projection that in fifty years the Jewish "majority would be severely eroded by the Israeli Arab natural growth rate of over 3 percent." Israel's annual Jewish growth rate, including immigration, says della Pergola, is 2.5 percent.).

37.   There simply are not many Jews left living in non-Western countries. For example, many Jews emigrated from former Eastern-block countries following the collapse of communism. Fewer than 500,000 Jews now live in the former Soviet Union. WASSERSTEIN, *supra* note 6, at 26. In 2003, fewer than 25,000 people immigrated to Israel. James Bennet, *Sharon's Wars*, N.Y. TIMES, Aug. 15, 2004, § 6 (Magazine), at 31.

38.   Reliable statistics on this issue are notoriously difficult to obtain because governments are not happy to disclose numbers and because of the difficulty of conducting surveys, particularly during a war. Hasan Abu Libdeh, the director of the Palestinian Central Bureau of Statistics, says that equilibrium will be reached by 2006, and the Palestinian majority will grow each year after that. *See* Time Is in the Palestinians' Favor, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl120104ed2.html (Jan. 12, 2004) ("If we talk about the area from the river to the sea, at this moment Jews are a minority vis-à-vis non-Jews, because we count about 300,000 foreign workers. Jews are about 48-49 percent, and will decrease to about 39 percent in another 16 years."); Where the Facts May Lead To, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl120104ed2.html (Jan. 12, 2004); *see also* Ina Friedman, *More Arabs than Jews Already Between the River and the Sea, Top Demographer Suggests*, JERUSALEM REP., Oct. 20, 2003, at 5, *available at* http://www.jrep.com/Reporter/Article-19.html (predicting demographic transition between the Jordan River and the Mediterranean Sea by 2010).

Palestinians explicitly as a political weapon.[39] With a perceived increase in bargaining power on the horizon, Palestine might believe that no land-for-peace agreement—or, alternatively, only versions of an agreement that would require it to make very few sacrifices—would exceed its reservation point.

B.   *Potential Sources of a High Israeli Reservation Point*

As is true for Palestinians, the benefits of a land-for-peace agreement for Israelis would be significant. Peace would mean an end to bus bombings, attacks on Israeli soldiers, negative publicity around the world, and the economic and psychological costs of occupying the West Bank and Gaza. But as is true for the Palestinians, it is not obvious from the Israeli perspective that the benefits of any particular peace agreement would outweigh its costs. Two plausible explanations exist for why Israel's reservation point might exceed the terms of any land-for-peace agreement—or at least exceed the terms of any version of a land-for-peace agreement that would require it to make significant sacrifices—thus constituting a roadblock to a negotiated settlement of the conflict.

1.   *"Greater Israel" and the Settlements*

After occupying the West Bank and Gaza during the Six-Day War, and especially after Prime Minister Begin's conservative Likud government came to power in 1977, Israel began an intensive government-sponsored program of constructing Jewish settlements throughout the Territories. [40] Today, approximately 440,000 Jewish Israelis reside in these settlements,[41] the largest of which houses 25,000 people.[42] Just as Palestine has its emotional issue in the conflict—the right of return—Israel has its emotional issue in the form of the settlements.

Although the relatively low cost of subsidized housing lured many Jewish settlers to the West Bank,[43] others moved to establish a Jewish presence on the land consisting of the biblical territories of Judeah and Samaria, which the Old Testament says God promised to the Jews.[44] To these settlers and their supporters in Israel, maintenance of Jewish control of the region is a religious imperative and anything, including living in armed fortresses indefinitely, is superior to a peace agreement that would ensure

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39.   *See* Elia Zureik, *Demography and Transfer: Israel's Road to Nowhere*, 24 THIRD WORLD Q. 619, 623 (2003).

40.   David Newman, *How the Settler Suburbs Grew*, N.Y. TIMES, May 21, 2002, at A21.

41.   This number includes settlements in parts of East Jerusalem annexed by Israel in 1980 and thus technically not considered part of the Territories by Israel. Israeli settlements in the West Bank house approximately 230,000 people, settlements in East Jerusalem count 200,000 residents, and 8000 settlers live in Gaza. Steven Erlanger, *Lawmakers Back Sharon on Plan for Leaving Gaza*, N.Y. TIMES, Oct. 27, 2004, at A1.

42.   Gershom Gorenberg, *Road Map to Grand Apartheid?*, AM. PROSPECT, July-Aug. 2003, at 16, 16.

43.   *See, e.g.*, WASSERSTEIN, *supra* note 6, at 128 (claiming most settlers were motivated to move to the Territories by their interest in cheap housing within commuting distance of Jerusalem or Tel Aviv); Newman, *supra* note 40.

44.   Ehrlich, *supra* note 29, at 16.

exclusive Arab control of the West Bank.[45] These religious ideals have had a significant effect on Israeli government policy. Yitzhak Shamir, Israeli prime minister from 1983–1984 and again from 1986–1992, famously admitted after leaving office that his participation in the "peace process" was designed to stall and avoid any agreement requiring the return of occupied territory to the Palestinians.[46] More recently, riots broke out in June 2003 when Prime Minister Ariel Sharon ordered a small Jewish settlement (of only 100 residents) dismantled as a gesture urged by President George W. Bush at the Road Map summit the prior month.[47]

2. "Land for War" and the Problem of Moral Hazard

No Palestinian government could guarantee that no act of violence would ever be committed against Israelis following a final agreement between the parties. But for the promise of "peace" in an agreement based on the land-for-peace concept to have any currency, Palestine would have to commit to using all the resources at its disposal to prevent any acts of terror from emanating from its territory and promise to punish harshly any such acts that do occur.

A common roadblock to reaching a negotiated agreement in any situation in which the parties' performance obligations will be non-simultaneous is the fear of the first-performing party that it will fulfill its duties in good faith, only to see the second-performing party shirk in the performance of its duties or act contrary to the interests of the first-performing party. This problem is commonly known as "moral hazard." [48] One impediment to insurance agreements, for example, is that once an insurance company assumes the risk of loss, the insured party loses some of its motivation to take all possible steps to avoid or minimize losses, and might behave carelessly. A barrier to the formation of service contract agreements is that once the customer agrees to a certain fee, the seller lacks an incentive to use maximum effort while performing the services.

In the context of a business transaction within the boundaries of a sovereign state with an established rule of law, the moral hazard problem is somewhat mitigated by the threat of the first-performing party to sue for breach of contract, at least if the second-performing party's obligations can be clearly specified ex ante and its failure to satisfy them proven in court ex post. International agreements lack this backstop of a judicial mechanism backed by the coercive power necessary to enforce its judgments.

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45.   *See, e.g.,* Benjamin Beit-Hallahmi, *Some Psychosocial and Cultural Factors in the Arab-Israeli Conflict: A Review of the Literature,* 16 J. CONFLICT RES. 269, 276 (1972); Uri Avnery, *Sharon May Have Helped Create a Monster—Israel's Settler Movement,* L.A. TIMES, May 5, 2004, at B13; Ammon Rubinstein, *Why the Israelis are Being Difficult,* N.Y. TIMES MAGAZINE, Apr. 18, 1971, at 32.

46.   Robert I. Friedman, *Land for Peace—Rabin's Dilemma,* NATION, Nov. 9, 1992, at 542, 542 (quoting from Shamir's interview with the Israeli paper Ma'ariv); Bob Hepburn, *Israeli PM's Dreams Turn into Struggle for Survival,* TORONTO STAR, June 25, 1993, at A25.

47.   Greg Myre, *Israel Dismantles a Settlement and Ignites a Family Feud,* N.Y. TIMES, June 20, 2003, at A10.

48.   *See generally* KOROBKIN, *supra* note 14, at 138-39.

Bargaining parties may further reduce the moral hazard risk by building into an agreement specific sanctions for shirking. In ordinary business negotiations, when moral hazard is a significant risk, contracting parties often structure agreements to make payment contingent on the quality of performance. For example, a homeowner is wise to structure an agreement with a contractor so that the final payment is withheld until work is complete to the homeowner's satisfaction.

In a land-for-peace agreement, however, all Israeli performance would necessarily be finished prior to the completion of Palestinian performance. That is, even as Israel fully withdrew from Palestinian lands and permitted the formation of an autonomous Palestinian state, it would continue to rely on the commitment of Palestine to use the full weight of its authority to prevent and punish any terrorist acts planned or committed by any enemies of Israel residing in Palestine.

The fundamental problem is that, in an agreement based on the concept of land for peace, territory must be provided at a point certain, whereas the obligation to provide peace continues indefinitely. If Israel's sacrifice of land were contingent on Palestine's indefinite provision of peace, Palestine would never receive its benefit of the bargain. But if Palestine's commitment of peace were contingent on Israel's provision of land, Israel could (and does) fear that once it acts, Palestine will shirk its continuing obligation to provide peace by using insufficient energy to identify terrorist networks, insufficient force to stop them, or insufficient punishment to incapacitate them.[49] At the extreme, the government of Palestine might even collude with terrorists, turning a blind eye to or supporting violence against Israelis.

Fears of this result could cause Israel to determine that a land-for-peace agreement would result in significant costs to Israel while failing to bring real peace. From this perspective, it is conceivable that Israel might believe that any land-for-peace agreement resulting in the establishment of a Palestinian state would fall below Israel's reservation point.

The evident futility of the Israeli government's apparent attempts to deal with this problem indicates how hard it is to solve. Prime Minister Sharon has often demanded that the PA crack down on terrorism prior to Israeli concessions or even peace talks, a position he reiterated immediately after Arafat's death.[50] If the PA can control militant groups, doing so would demonstrate that it is able to deliver peace when it is motivated to do so, and thus that militant groups cannot essentially veto a peace agreement. But PA compliance with this demand of Sharon's would not reduce the risk of post-

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49. A typical Israeli view is expressed by current Israeli Defense Forces (IDF) Chief of Staff Moshe Ya'alon, who recently remarked in an interview with the Israeli daily *Ma'ariv* that "Arafat saw Oslo as a Trojan Horse . . . he does not recognize Israel's right to exist as a Jewish state and his game plan is to bring about Israel's disintegration . . . . Time and after time, he promises his people that Israeli society is about to break." *Quote Unquote*, JERUSALEM REP., Sept. 23, 2002, at 51; *see also* Benny Morris, *Peace? No Chance*, GUARDIAN (London), Feb. 21, 2002, at 2 (arguing, among other things, that Palestinian peace moves are solely part of a strategy of stages designed to allow for more effective future warmaking).

50. *See, e.g.*, Aluf Benn & Amon Regular, *Sharon: No Gestures to PA After Arafat*, HA'ARETZ, Nov. 11, 2004, http://www.haaretzdaily.com/hasen/pages/ShArt.jhtml?itemNo=500074-&contrassID=1; Leslie Susser, *Conference? What Conference?*, JERUSALEM REP., June 17, 2002, at 14.

agreement shirking. What a person is willing to do in order to obtain what he wants is often very different from what he will do after he has obtained what he wants. The Israeli preoccupation with stopping terrorism *before* a negotiated agreement is reached belies the difficulty of preventing post-settlement shirking.

C.   *Overcoming the Roadblock of the Absence of a Bargaining Zone*

When no bargaining zone exists between the reservation points of negotiating parties, impasse is temporarily unavoidable—but two types of changes in circumstances can make agreement attainable. Changes to the status quo or other non-agreement alternatives can make the parties' BATNAs relatively less attractive, thus shifting the parties' reservation points lower. Alternatively, changes to the envisioned terms of a plausible agreement can make agreement relatively more desirable to one or both parties, effectively expanding the conceptual space between the disputants' reservation points.[51] This section explores the prospects for creating a bargaining zone in the Middle East if, in fact, the absence of a bargaining zone explains the long-standing impasse between Israel and Palestine.

1.   *Degrading BATNAs*

In a business negotiation, each party often has a BATNA beyond the control of the other. For example, if Seller S and Buyer B are attempting to negotiate a sales contract, S might have a BATNA of selling his goods to A for a certain package of terms X. To have any hope of reaching a deal with S, B must convince S that the terms he offers are superior to X; he has no hope of changing X. Conflicting nations, however, often have the power to affect their enemy's BATNA by making its pursuit unpleasant. This statement is certainly true in the Middle East.

One plausible explanation for the last thirty-eight years of violence and bloodshed in the Holy Land is that each side is engaged in a constant effort to convince the other that its BATNA is worse—in fact, much worse—than previously believed. Just in case Israel believed that its BATNA was to occupy the Territories peacefully, Palestine staged the first and second intifadas, effectively changing Israel's BATNA to include suffering attacks against Israeli military targets and suicide bombings aimed at Israeli civilians. Palestine believes that if Israel suffers enough, it will determine that its BATNA is so undesirable that it will lower its reservation point and be willing to agree to peace terms desired by Palestine.

Israel's armed responses to the intifadas in the Territories and terrorist attacks on Israeli civilians can be understood as an attempt to convince Palestine that the latter's BATNA is worse that it might otherwise have believed. If Palestinians understand that their alternative to a peace agreement is not merely Israeli control of the Territories but military rule, frequent curfews, endless waiting at checkpoints, border closures, high unemployment,

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51.   *See, e.g*, Korobkin, *Positive Theory, supra* note 17, at 1812-15.

demolition of Palestinian houses and symbols of nationhood, and attacks on suspected militants (often accompanied by collateral damage), perhaps Palestine will lower its reservation point and be willing to accept an agreement on terms favorable to Israel.

In theory, making a living hell out of an adversary's only alternatives to a negotiated agreement can reduce that adversary's reservation point and thus create the necessary conditions for reaching a more favorable agreement. Nearly four decades of cold hostility interspersed with hot warfare have probably lowered both Israeli and Palestinian reservation points. Not very long ago, most Palestinians said that they opposed recognition of Israel's right to exist on any terms, and most Israelis opposed Palestinian statehood.[52] Today, public opinion on these questions has changed among both populations, with recent polls showing that more than sixty percent of Israelis support the creation of a Palestinian state and that fifty-two percent of Palestinians favor living side-by-side with the state of Israel.[53] It is highly unlikely that this shift is the result of sudden altruistic impulses on either side; more likely, it reflects fatigue from living with what both sides realize are very poor BATNAs. International conflict scholars often refer to this type of situation as a "mutually hurting stalemate."[54]

If in fact no Israeli-Palestinian bargaining zone exists today, however, we doubt that either party acting alone could have a sufficient impact on the other's reservation point to create a bargaining zone. There are two reasons for this conclusion.

First, each party's ability to make the other's daily life even more violent and miserable than it has already is limited. Since George W. Bush became the U.S. president, the United States has alternated between turning a blind eye to Israeli retaliation for terrorist attacks and incursions into Palestinian-controlled portions of the Territories and, when the violence reaches a certain point, scolding the Israeli government and warning it not to escalate the

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52. *See* Glenn Frankel, *PLO Popular on West Bank: Arab Survey Shows Use of Force Backed*, WASH. POST, Sept. 9, 1986, at 15 (nearly 80% of Palestinians in the Israeli-occupied West Bank and Gaza Strip see a Palestinian state as an interim step toward "full control of all of what is now Israel"; more than 80% reject U.N. Resolution 242, which supports Israel's right to exist within secured and recognized boundaries; a "large majority" of Israelis oppose a Palestinian state). By 1991, things had changed somewhat on the Israeli side. *See* Lea Levavi, *90% of Public Favor Use of Nuclear Arms: But Jaffee Survey Shows Israelis are a Little More Dovish*, JERUSALEM POST, Apr. 15, 1991, at 2 (noting "crawling conciliation" among Israelis—and support for Palestinian state up to one-third from one-quarter in 1986). Not surprisingly, this "crawling conciliation" occurred in the wake of the first intifada, which began in December 1987.

53. *See* Palestinian Ctr. for Pol'y & Surv. Res. (PCPSR), Public Opinion Poll #8, http://www.pcpsr.org/survey/polls/2003/p8a.html (June 19-22, 2003) (52% of Palestinians support mutual recognition). The Israeli acceptance of a Palestinian state has been acknowledged even by those observers not generally sympathetic to the Israeli position. *See* Ghassan Khatib, At a Crossroads, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl250302ed.11.html (Mar. 25, 2002) (the "most promising source of hope comes from inside Israel itself. The last ten years have witnessed increasing Israeli public understanding and recognition of Palestinian rights and concerns. Beginning in 1991, with the start of the peace process, the Israeli public began to demonstrate an acceptance of the idea of a Palestinian state, an end to the Israeli occupation in most of the territories and agreement for sharing the city of Jerusalem.").

54. The coinage of this popular term is usually attributed to William Zartman. *See* I. William Zartman, Ripeness: *The Hurting Stalemate and Beyond, in* INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR 225 (Paul Stern & Daniel Druckman eds., 2000).

conflict.[55] Israel cannot afford to alienate the United States, its best friend and patron, so the military measures available to Israel have limits—and Palestine knows it. On the other hand, Palestine knows that when terrorist attacks reach a certain level, the United States will permit strong Israeli countermeasures and will use its influence in the Arab world to stem the flow of money and arms to terrorist organizations operating in the Territories.[56]

Second, both adversaries probably have what can be called "malevolent utility functions";[57] that is, each side derives positive utility from the other's failing to achieve its goals or fulfill its desires. Worsening Party A's BATNA should, in theory, lower Party A's reservation point. But, on the other hand, if Party A has a malevolent utility function, it will be extremely resistant to accepting any deal it views as beneficial to Party B. Consequently, Party A's response to attacks by Party B can be to redouble its commitment not to reduce its reservation point, or even to raise its reservation point. For every horror that Party B imposes on Party A, the latter will be motivated to keep the score even by returning the favor.[58]

A malevolent utility function probably motivates Prime Minister Sharon's occasional insistence that a period without any terrorist attacks against Israelis precede any peace negotiations. Responding to violence by negotiating peace will teach the Palestinians, Sharon argues, that terrorism works.[59] Allowing the Palestinian strategy to succeed is itself considered an undesirable result. The Palestinians, for their part, have demonstrated an extreme willingness to live in deprivation and fight a well-armed and trained enemy rather than give in to Israeli demands. If each party's malevolence is positively correlated with the amount of violence directed at it, it is possible that neither side can create conditions so bad that the other will essentially surrender.

In early 2004, Sharon announced his plan to withdraw unilaterally from Gaza, abandoning the Jewish settlements there, which house roughly eight thousand settlers, in the process. [60] The proposal drew opposition from Palestinian leaders, who fear that a withdrawal could set a precedent for Israel unilaterally establishing a de facto two-state solution on terms not to Palestine's liking, such as one that includes Israeli maintenance of West Bank

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55.   *See* James Carney, *How Bush Got Religion*, TIME, June 16, 2003, at 42, 42.
56.   *See* Jonathan Broder, *The Right's Red Lines*, JERUSALEM REP., June 21, 1999, at 36; Andrew Stephen, *Tony Blair and John Howard, the Australian PM, May Take the Middle East Road Map Seriously, But Bush Just Wants to Sweep It Hurried Under the Carpet*, NEW STATESMAN, May 12, 2003, at 8, 8.
57.   *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).
58.   *Cf.* ROGER FISHER ET AL., COPING WITH INTERNATIONAL CONFLICT 119 (1997) (noting that the principle of reciprocity can lead to a policy of "an eye for an eye").
59.   *See* Yuval Elizur, *supra* note 13, at 106; Rema Hammami & Jamil Hilal, *An Uprising at the Crossroads*, MIDDLE EAST REP., Summer 2001, at 2, 3.
60.   *See* James Bennet, *Angering Settlers, Sharon Says Most May Have to Leave Gaza*, N.Y. TIMES, Feb. 3, 2004, at A1. Sharon's proposal also calls for Israel to withdraw from four small settlements in the West Bank. *See* Steven Erlanger, *Israel Could Safely Withdraw from Golan, Army Chief Says*, N.Y. TIMES, Aug.14, 2004, at A2.

settlements and control over Jerusalem.[61] Sharon's proposal is perhaps best understood as an attempt to convince Palestine that its BATNA is not as desirable as it might think. Specifically, Palestine will not find itself in a stronger bargaining position in time as a result of demographic trends because Israel will act to reshape the region before those trends can work to Palestine's advantage.[62]

President Bush's support of Sharon's plan, along with his statements that Israel should be expected to keep at least some West Bank settlements in a final-status agreement and that Israel should not have to permit any Palestinian refugees a right of return,[63] provoked criticism from some commentators who pointed out that the president's pro-Israel slant seemed inconsistent with an intent to remain an "honest broker" between the disputants.[64] Rather than being politically clumsy, however, Bush's support of the Israeli prime minister is best understood as an effort to reinforce Sharon's message that Palestine's BATNA of delaying agreement is undesirable, and it should therefore reduce its reservation point.

Whether Sharon's attempt to weaken Palestine's BATNA by unilateral withdrawal is more likely to succeed than attempts by the disputants to weaken each other's BATNAs through violence remains to be seen. The perceived importance of the U.S. president's response to the proposal, however, illustrates a larger truth in the interdependent world of the twenty-first century: no nation is an island, and the BATNAs of both Israel and Palestine also depend on the actions of third parties. As the world's sole superpower, the United States enjoys substantial influence on both Israel and Palestine. If it chose to exercise that power to its fullest potential, it likely could shift one or both party's reservation points in the direction of accepting a land-for-peace agreement. This observation informs our recommendations for a new U.S.-sponsored peace initiative, which we develop in detail in Part VI.

2. *Improving the Benefits of Agreement*

If one way to create a bargaining zone is to reduce the quality of one or both parties' BATNAs, the other way is to improve the value of reaching an agreement to one or both parties. The trick—especially when the adversaries view each other as mortal enemies competing for scarce resources in a zero-sum environment—is to identify ways to improve the value of a deal to one party without reducing its value to the other party, or at least without reducing its value so significantly that it falls below that party's reservation point and out of the bargaining zone.

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61.   Steven Erlanger, *Sharon's "Gaza Problem": It May be Israelis, Not Arabs*, N.Y. TIMES, Sept. 9, 2004, at A1.

62.   *Cf.* James Bennet, *Sharon Advances Toward Removal of Some Settlers*, N.Y. TIMES, June 7, 2004, at A1 (observing that Sharon "has played down the demographic issue" when advancing his Gaza proposal but stated in a speech that the withdrawal would be "good for the demography of the Jewish people in Israel").

63.   *See* James Bennet, *Sharon Coup: U.S. Go-Ahead*, N.Y. TIMES, Apr. 15, 2004, at A1.

64.   *See, e.g.*, Nicholas Kristof, *The Bush and Kerry Tilt*, N.Y. TIMES, May 26, 2004, at A23 (criticizing Bush's support for Sharon as unbalanced).

Conceptually, the easiest way to accomplish this task is for a third party to offer side payments to the disputing parties as part of the terms of the agreement. Few bargaining participants are fortunate enough to find third parties sufficiently interested in the negotiation's outcome to subsidize agreement, but international disputes with the potential to destabilize non-parties are frequent exceptions to this rule, with the Israeli-Palestinian conflict being an obvious example. The United States and its allies have offered monetary incentives to grease the wheels of agreement between Israel and Palestine in the past,[65] and if the primary failure of the parties to reach an agreement to date is the absence of a bargaining zone, subsidies could play an important role in any successful peace initiative.

From a conceptual perspective, side payments need not be in cash to be effective. This insight could be useful in helping mitigate at least two drawbacks to a land-for-peace agreement that could be responsible for an absence of a bargaining zone. If the status of the Palestinian refugees renders a land-for-peace agreement inferior to Palestine's reservation point, interested third parties may be able to provide non-cash assistance that would increase the value of agreement. If the risk of post-agreement Palestinian shirking renders an agreement inferior to Israel's reservation point, a third-party guarantee of Palestinian performance—similar to the guarantee a co-signer can provide to reduce the moral hazard risk of a bank loan—could increase the value of agreement to Israel. Either or both of these types of in-kind side payments could help to create a bargaining zone. Consequently, we build on both ideas in constructing our proposal for a U.S.-sponsored peace initiative in Part VI.

IV. INTERNAL DIVISIONS: COALITION AND PRINCIPAL-AGENT PROBLEMS

In Part III, we considered the possibility that Israel and Palestine have failed to reach a negotiated agreement based on the land-for-peace formula because no specific set of agreement terms exists that would exceed the reservation points of both. In conducting that analysis, we made the simplifying assumption that each nation is a single, unified actor able to (1) compare different states of the world, such as the status quo and a land-for-peace agreement; (2) determine a preference between those different states; and (3) execute an agreement it prefers to the status quo, assuming that the other nation agreed to do the same. In this Part we relax this set of assumptions and consider the possible implications of internal divisions within one or both nations for understanding the failure of the land-for-peace approach to date.

Israel and Palestine are not monolithic actors, of course. Each is comprised of various subgroups that differ in their worldviews and preferences for peace. Each acts in the international arena through the agency of political leaders whose interests and worldviews are not necessarily aligned with those of the majority of their constituents. The result of these internal

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65. *See, e.g.*, Hanieh, *supra* note 33, at 79 (reporting that at the Camp David II summit President Clinton promised Yasser Arafat "huge financial support from the G-8 for any agreement the two sides would reach").

differences could be the failure to achieve an agreement even if there is a deal that would be desirable for both nations viewed as single, unified entities. This Part considers two types of roadblocks to a negotiated agreement that fall into this category: the problem of the "faithless agent" who serves his own interests rather than those of his principals; and the problem of the "blocking minority" able to veto—literally or figuratively—an agreement favored by the majority.

A.   A Problem of Leadership

Even assuming that Israel and Palestine would be best-served by a land-for-peace agreement, a necessary condition of reaching such an agreement is the willingness of the political leaders on both sides to give their consent. One possible explanation for the failure to date is a lack of will on the part of the Palestinian or Israeli leadership that is inconsistent with the preferences of the Palestinian or Israeli people.

1.   Arafat: Self-Image or Self-Protection

At the end of 2000, President Clinton proposed a land-for-peace agreement that would have set the stage for the establishment of a Palestinian state comprised of the vast majority of the West Bank and Gaza (including the Arab portions of East Jerusalem, where non-Arabs are a small minority), assured Palestinian control over the Muslim holy sites on Jerusalem's Temple Mount, and provided substantial financial compensation to Palestinian refugees.[66] Israeli Prime Minister Ehud Barak, who staked his political career on making peace with the Palestinians, was prepared to agree.[67] Yasser Arafat, leader of the Palestinian nationalist movement since the 1960s and president of the PA since its establishment as a result of the Oslo Accords, rejected the offer. This decision was not an accident or even a temporary miscalculation: Arafat had earlier declined a similar proposal at the July 2000 Camp David II summit, and on neither occasion did he present a counter-proposal.[68] Arafat's decision to walk away from these offers, effectively ending the Oslo peace process and inflaming the burgeoning second intifada that continues today, stunned the U.S. and Israeli leaders.[69] Later accounts suggest that Arafat's

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66.   For a detailed description of Clinton's post–Camp David ideas, see DENNIS ROSS, THE MISSING PEACE 712-58 (2004); *see also* Ahmad Samih Khalidi & David Makovsky, *Debate: Israel and Palestine: What's Gone Wrong?*, PROSPECT, Nov. 23, 2000, at 16, LEXIS, News Library, Prospect File.

67.   Khalidi & Makovsky, *supra* note 66 ("Ehud Barak put his political future and life on the line by going to Camp David to resolve all outstanding issues."); Matt Rees, *Barak's Cagey Resignation: Israeli Political Shocker*, TIME, Dec. 18, 2000, at 60, 60 (discussing Barak's resignation and the special election, during which he claimed that a vote for Sharon meant a vote against his prospects for a peace deal).

68.   Thomas L. Friedman, *Yasir Arafat's Moment*, N.Y. TIMES, July 28, 2000, at A21 (Arafat made no counterproposal and left the meeting); John Lister, *"Middle" Politics: Looking Again at the Peace Process*, MIDDLE EAST POL'Y, Sept. 2002, at 22, 23 (Arafat rejected Camp David and refused to make a serious counteroffer).

69.   Benny Morris & Ehud Barak, *Camp David and After—Continued*, N.Y. REV. BOOKS, June 27, 2002, at 47.

actions also stunned and confused a range of Arab leaders who had historically championed the Palestinian cause.[70]

One explanation of Arafat's behavior is that the Clinton proposal was inferior to Palestine's reservation point. That is, for the reasons considered in Part III, the nation of Palestine, as a hypothetical single entity, was better off living with the status quo than agreeing to the concessions implicit in a land-for-peace agreement, and the actions of Palestine's leader reflected this calculation. The deep disappointment in Arafat's actions expressed by some of Palestine's long-standing supporters in the Arab world[71] undermine this explanation to some extent, although they do not refute it.

Alternatively, it is possible that Arafat believed the Clinton proposal was desirable but strategically rejected the offer in the hope of obtaining even better terms in the future. Such strategic behavior as a possible explanation for the failure of diplomacy to date is discussed more generally in Part V. But if Arafat's behavior was motivated entirely by a desire to wrest marginal concessions from Barak, observers wondered, why would he fail to make a counter-offer to the proposals advanced by Barak and Clinton or otherwise state his demands?[72]

A third possibility is that Arafat walked away from a deal that would have benefited his people because making peace with Israel would not serve his personal interests. In other words, perhaps Arafat was a faithless agent.

Various commentators have relied on several related psychological theories to support the claim that Arafat was personally incapable of making peace with Israel, whatever the benefits to Palestine of doing so. One version of this conjecture is that, as the leader of a revolutionary movement for decades, Arafat's self-image depended on a state of war with Israel and could not coexist with a land-for-peace agreement. [73] This is, essentially, the conclusion reached by Dennis Ross, President Clinton's chief Middle East negotiator, whose recent memoirs place the blame for the failure of final-status negotiations in 2000 on Arafat's personal inability to enter into an irrevocable agreement.[74] A slightly different version is that Arafat believed that his image as a hero to Palestinians could not survive the transition from

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70.   Elsa Walsh, *The Prince: How the Saudi Ambassador Became Washington's Indispensable Operator*, NEW YORKER, Mar. 24, 2003, at 48 (discussing the Saudi Ambassador's surprise and unhappiness with Arafat's course of action at Camp David); Dennis B. Ross, *Yasir Arafat*, FOREIGN POL'Y, July-Aug. 2002, at 18, 20 (Arab leaders don't trust Arafat, but are also unwilling to oppose him).

71.   Jane Perlez, *A Fork In Arafat's Road*, N.Y. TIMES, Dec. 29, 2000, at A1 (moderate Arab leaders supported the Camp David proposal); Jane Perlez, *Three Arab Leaders React Favorably to Mideast Plan*, N.Y. TIMES, Dec. 28, 2000, at A1 (Arab leaders liked Camp David because it dealt with the Temple Mount issue); Walsh, *supra* note 70, at 48.

72.   *Cf.* Friedman, *supra* note 68, at A21; Hanieh, *supra* note 33, at 75, 88 (recalling that Arafat refused to even consider the proposals advanced by Clinton a "basis for negotiations"); Lister, *supra* note 68, at 22 (discussing various viewpoints on why Arafat did not pursue the peace talks further); Ross, *supra* note 70, at 19 ("Arafat missed a historic opportunity when he turned down the Clinton proposal.").

73.   Stephen Blank, *The Middle East—The Conventional Wisdom is Wrong*, 17 WORLD AND I, at 286, 292 (2002) (Martin Indyk and Dennis Ross agree that Arafat is psychologically incapable of making peace); Khalidi & Makovsky, *supra* note 66 (noting that Arafat's approval rating rose to 64% as a result of the beginning of the second intifada).

74.   ROSS, *supra* note 66, at 13 ("[A] comprehensive deal was not possible with Arafat. Too much redefinition was required. He was not up to it. He could live with a process, but not with a conclusion."); *see also id.* at 757-58.

leader of a revolutionary movement to administrator responsible for bringing ordinary Palestinians a better life. Or, as some have said, Arafat had no interest in "collecting the garbage,"[75] and would rather "play the victim than the statesman."[76]

Somewhat different hypotheses for why Arafat might not have been willing to accept the land-for-peace proposals concern his political and personal safety. These hypotheses are consistent with the observation that, in high-intensity conflicts, intransigence is often seen as a measure of loyalty to one's cause, and willingness to compromise can make one appear weak.[77] Any land-for-peace agreement requires sacrifices by both sides and, as Part III discussed, any agreement acceptable to Israel almost certainly would require Palestine to relinquish the refugees' claim to the right of return. Making peace on such terms, even if beneficial to the Palestinian nation as a whole, would undoubtedly have angered some constituencies, who would then have labeled Arafat a traitor to the movement he once led.[78] By signing a peace agreement, Arafat might have believed he would be signing his death warrant.[79]

2.   *Sharon: Can the Hawk Become a Dove?*

Military leader, champion of the settlements, and right-wing politician, Israeli Prime Minister Ariel Sharon has opposed the creation of an independent Palestinian state for as long as Yasser Arafat sought to establish one. As a Likud member of the Knesset for decades and occasional government minister, Sharon never supported the land-for-peace concept.[80] Catapulted to power in February 2001 as a result of an Israeli backlash against

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75.   *See, e.g.*, Douglas Davis, *Terrorism Most Intense When Peace Is In The Air*, JERUSALEM POST, Jan. 7, 2003, at 3:

> The mere prospect of peace would retarding [sic] all this at a stroke, for without the conflict, how much international attention could they seriously expect to command[?] Not for Yasser Arafat and his cronies the mundane business of nation-building, of organizing drainage for Jenin, garbage collection for Ramallah, street lighting for Kalkilya, and sewage facilities for Gaza. Not when the glittering state occasions beckon in European capitals.

76.   Thomas L. Friedman, *Arafat's War*, N.Y. TIMES, Oct. 13, 2000, at A33; Fouad Ajami, *The Sentry's Solitude*, FOREIGN AFF., Nov./Dec. 2001, at 2, 12 (Arafat did not want to agree to a peace for which he had not prepared his people); Lister, *supra* note 68, at 22 (Arafat never successfully made himself a legitimate statesman, but relied on his role as a revolutionary; he also relies on his mythical comparison to Saladin to determine his policy).

77.   *See* Herbert C. Kelman, *Social-Psychological Dimensions of International Conflict*, in PEACEMAKING IN INTERNATIONAL CONFLICT 191, 216 (William Zartman & J. Lewis Rassmussen eds., 1997).

78.   Isabel Kershner, *The Arafat Enigma*, JERUSALEM REP., Nov. 20, 2000, at 34, 34 ("If [Arafat] were to publicly come out and call for the end of all forms of resistance now . . . he would only lose popular credibility—and might even be exposed as impotent in the face of popular anger.").

79.   When explaining to Clinton why he was rejecting an agreement proposal at Camp David, Arafat reportedly asked the American President, "Do you want to attend my funeral?" Hanieh, *supra* note 33, at 75, 95. He reportedly asked American Secretary of State Madeline Albright a similar question. ROSS, *supra* note 66, at 693.

80.   Hussein Agha & Robert Malley, *Three Men in a Boat*, N.Y. REV. BOOKS, Aug. 14, 2003, at 32; James Kitfield, *Peace May Lie Only Beyond Sharon and Arafat*, 34 NAT'L J. 1074 (2002), LEXIS, News Library, National Journal File ("In Sharon, the White House must deal with an Israeli leader who has long opposed the essential principle of 'land for peace' that has been at the core of Israel's peacemaking efforts for decades, and which is the foundation of present proposals for a permanent peace.").

Arafat's rejection of the Clinton proposal and the beginning of the second intifada,[81] Sharon embodied the hard-line portion of the Israeli psyche. Nearly four years later, Sharon remains prime minister. Ever since the failure of the Camp David II talks discredited Barak, no strong leader of the more conciliatory Labor Party has emerged to mount a serious challenge for the nation's leadership.[82] Barak expressed willingness to enter a land-for-peace agreement in 2000, but Sharon's leadership could be a current roadblock to agreement. That is, even if the terms of specific versions of a deal based on the concept of land for peace would be superior to Israel's reservation point, Sharon's opposition could prevent the parties from reaching agreement at the present time.

In an apparent reversal of his life-long position, in 2003 Sharon expressed a willingness to agree to Palestinian statehood under the right conditions[83]—a willingness that has caused some upheaval within the ranks of his hawkish Likud Party and Likud's partners in Sharon's coalition government.[84] Whether Sharon has ever shifted from his belief in an Israeli-dominated West Bank is open to serious question, however.[85] The change in Sharon's stated position could be the result of a determination that Palestinian terrorism is unlikely to be defeated completely and decisively, and that the costs of retaining control over the Territories outweigh the benefits of continued occupation. On the other hand, there is evidence that Sharon envisions a future Palestinian state so small—perhaps only fifty percent of the Territories[86]—that an agreement based on such boundaries could likely never exceed Palestine's reservation point.

Also troubling is that, other than making statements cautiously supportive of land for peace, Sharon has taken no actions that demonstrate his willingness to enter into a negotiated agreement on that basis. At the 2003 summit in Aqaba, Egypt, Sharon pledged to disband settlements unauthorized by the Israeli government, but for every outpost removed by the Israel Defense Forces (IDF), settlers have constructed others without government opposition.[87] Despite considerable pressure from President Bush to comply

81.   *See generally* Kitfield, *supra* note 80. *See also* Aluf Benn, *The Last of the Patriarchs*, FOREIGN AFF., May/June 2002, at 64, 64 (stating that Sharon became the first Likud leader ever to agree publicly to the creation of a Palestinian state).

82.   Leslie Susser, *From Rabin to Ruin*, JERUSALEM REP., Feb. 24, 2003, at 20 ("Prof. Ephraim Ya'ar, head of Tel Aviv University's Steinmetz Center for Peace Research, argues that this is part of a long-term trend. Israeli democracy, he says, has entered a new era in which the right is totally dominant.").

83.   Leslie Susser, *Divided in Victory*, JERUSALEM REP., Feb. 24, 2003, at 18 (stating that Sharon and his party disagree about the possibility of Palestinian statehood, with Sharon supporting a state, albeit a "truncated" and "demilitarized" state).

84.   Benn, *supra* note 81, at 69 ("Many on Israel's right, led by Netanyahu, have dismissed Sharon's inactivity as weakness and have started calling for the reoccupation of the Palestinian territories, the expulsion of Arafat, and increased reprisals against the PA.").

85.   Leslie Susser, *Knesset Lists Show Labor, Likud, Heading to the Right*, JEWISH BULL. OF N. CAL., Dec. 13, 2002, *at* http://www.jewishsf.com/bk021213/i20.shtml ("Haim Ramon, chairman of the Knesset's Foreign Affairs and Defense Committee, said Sharon has no intention of negotiating Palestinian statehood or evacuating settlements.").

86.   *Cf.* Zureik, *supra* note 39, at 628 (claiming Sharon's plan is "to grant the Palestinians a Bantustan-like state in non-contiguous areas of the West Bank and Gaza").

87.   *See, e.g.*, Gideon Alon, *Defense Ministry Doesn't Know the Exact Number of Outposts*, HA'ARETZ, July 24, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml (stating

with the Road Map's demand that Israel freeze all settlement growth by May 2003, Sharon continues to authorize new housing units in West Bank settlements that clearly contradict the Road Map's spirit.[88] Freezing settlement activity is a relatively (although of course not entirely) painless concession for Israel to make because a freeze does not foreclose new construction in the future if no peace agreement is reached. Sharon's failure to implement a freeze casts some doubt on whether he is really prepared to trade land for peace.

In other words, the signals from Sharon are unclear. The prime minister's proposal to withdraw unilaterally all Jewish settlements from Gaza along with a few small West Bank settlements might suggest he would be amenable to a final-status agreement based on land for peace. On the other hand, his stated intention to retain most of the West Bank settlements hints that he might still be unwilling to part with a sufficiently large amount of territory to exceed Palestine's likely reservation point. An October 2004 statement to the Israeli media by a close Sharon advisor that the Gaza withdrawal is meant to "freeze" the peace process and "prevent the establishment of a Palestinian state," although disavowed by the prime minister's office,[89] is also not encouraging.

B.   *Coalition Members with Veto Power*

Internal divisions within nations can present impediments to international conflict resolution that are as significant as the primary dispute at issue.[90] Even if the Israeli and Palestinian nations believe that they would benefit from a land-for-peace agreement, and the leadership of each side is willing to represent those aspirations at the bargaining table, a minority group on either side with the power to veto a peace agreement could perpetuate the impasse. The preferences and worldviews of both nations are far from monolithic; even if a land-for-peace agreement is in the best interests of most citizens on both sides, significant minorities would prefer the status quo. Yet the respective tools that the Israeli and Palestinian holdouts could employ are quite different.

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that of ninety-one illegal settlements, only eleven have been dismantled); Uzi Benziman, *Corridors of Power: Bibi Meets His Match*, HA'ARETZ, July 18, 2003, http://www.haaretz.com/hasen/pages/-arch/ArchSearchEngArt.jhtml ("The U.S. has determined that, on balance, only one outpost has been removed, given the number of new outposts that sprang up in the wake of evacuation efforts.").

88.   Steven Erlanger, *Israel Adds to Plans for More Housing Units in Settlements*, N.Y. TIMES, Aug. 24, 2004, at A3 (announcing plans for 533 more housing units); Steven Erlanger, *Sharon Issues Bids for New Housing Units for Settlers*, N.Y. TIMES, Aug. 18, 2004, at A3 (announcing plans to build 1001 new apartments for settlers); *cf.* Steven R. Weisman, *Mideast Peace Plan's Sponsors Dismayed at Lack of Progress*, N.Y. TIMES, Sept. 23, 2004, at A3 (reporting that U.S. Secretary of State Colin Powell joined with European, Russian, and United Nations representatives in "expressing dismay over Israel's failure to freeze settlements").

89.   *See* Greg Myre, *Israeli Aide Hints that Gaza Exit Would Freeze Peace Plan*, N.Y. TIMES, Oct. 7, 2004, at A10.

90.   *See, e.g.*, Kelman, *supra* note 77, at 191, 200.

1. *Palestinian Rejectionists*

The international community recognizes the PA as the legitimate voice of the Palestinian nation; its leaders therefore have the ability to affix their signature to any negotiated agreement with Israel. Whether the PA has the ability to make peace in any sense beyond the ceremonial is a more contested question.

In Part III, we considered the possibility that a land-for-peace agreement might not exceed Israel's reservation point if Israel fears the Palestinians would lose the incentive to vigorously oppose terrorism after gaining the benefits of statehood.[91] Here, we consider a possible roadblock to agreement that is related but distinct: the question is not the Palestinian government's *incentive* to control terrorism after an agreement, but its current and future *capacity* to do so. If the PA cannot control militant, rejectionist elements within its borders and prevent future attacks against Israeli targets, those elements effectively possess the ability to block an agreement by preventing the PA from delivering peace. In this case, their power could take one of two forms: either Israel could refuse to enter into an agreement because it believes the PA could not implement it, or a signed agreement could not be implemented as a result of the activities of Palestinian rejectionists.

Hamas, Palestinian Islamic Jihad, and the Al-Aksa Martyrs' Brigade have demonstrated that they have the weaponry and the personnel to deny peace to Israel, of late through suicide bombings of civilian targets inside Israel proper.[92] These groups have not renounced the Palestinian Liberation Organization's historic mission to destroy Israel and establish in its place a Palestinian state.[93] What remains unclear is whether—if offered an Israeli withdrawal from most or all of the Territories, Palestinian statehood, and outside assistance in building and training a security force—the PA could prevent the violent operations of these groups. A negative answer to this question would prevent the parties from entering into a true exchange of land for peace, and could explain the lack of a negotiated settlement to date.

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91. *See supra* Part III.B.2.

92. Yonah Alexander, *Terrorism in the Name of God: Hamas, Islamic Jihad*, 17 WORLD AND I, at 38, 40 (2002) ("From September 2000 to March 2002, Hamas took responsibility for approximately 40 suicide bombing incidents, taking the lives of over 400 Israeli citizens."); Dan Ephron, *A Mideast Mandela*, NEWSWEEK, July 28, 2003, at 24, 24; Laurence Grafstein, *Age Limit*, NEW REPUBLIC, June 10, 2002, at 42, 42 (discussing the Hamas policy that suicide bombings must continue until Israel is destroyed).

93. Alexander, *supra* note 92, at 42 (explaining that Hamas and Palestinian Islamic Jihad share the goal of destroying Israel, and that the latter criticizes the PLO for participating in the peace process); Greg Myre, *Fencing Off: In the Middle East, Even Words Go to War*, N.Y. TIMES, Aug. 3, 2003, § 4 (Week in Review), at 3 ("Hamas, the Palestinian group responsible for the largest number of suicide bombings, typically claims responsibility by announcing 'a heroic martyrdom operation against the Zionist entity.' Hamas avoids mentioning 'Israel,' which it does not recognize, and does not use the term 'suicide bombing.'"). The Al-Aqsa Martyrs Brigades' overall political goal is not clear. The Brigades claim allegiance to Arafat and the PA, and at times they say that they are only fighting the Israeli occupation, but their insistence on the right of return undermines this argument.

2.   *Israeli Politics*

The Israeli body politic also contains radical, rejectionist elements that might try to use force to prevent the Israeli government from turning over the occupied territories to a Palestinian state. The assassination of Prime Minister Yitzhak Rabin in 1995 by an Israeli anti-peace extremist[94] demonstrated that people on both sides of the "Green Line"—the pre-1967 eastern Israeli border[95]—are willing to use violence to prevent an Israeli-Palestinian agreement. More recently, some Israeli settlers have vowed to ignore any government orders to leave their homes in the Territories.[96]

Unlike militant Palestinian groups, however, Israeli radicals clearly lack the ability to block a land-for-peace agreement through the use of force—any resistance would prove no match for the Israeli security forces. In contrast, it is conceivable that an Israeli minority opposed to land for peace could block such an agreement politically. In Israel, no party commands a majority of the Knesset: governing requires forming and maintaining a coalition. In the current Knesset, Likud controls only 40 seats out of 120.[97] Should Sharon indicate his willingness to sign a particular land-for-peace agreement, his hold on power could weaken, and he might be forced to hold new elections.

In early 2005, in the wake of defections from the coalition of right-of-center parties opposed to Sharon's Gaza withdrawal plan, the Israeli prime

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94.   Serge Schmemann, *Police Say Rabin Killer Led Sect That Laid Plans to Attack Arabs*, N.Y. TIMES, Nov. 11, 1995, at A1.

95.   The "Green Line" is actually the 1949 armistice line between Israel and Jordan. Between 1949 and 1967, Jordan occupied and administered the West Bank. BORNSTEIN, *supra* note 22, at 1.

96.   *Dousing the Candle*, ECONOMIST, June 14, 2003, at 12, 12 ("Although the 15 settlement outposts that [Sharon] has ordered dismantled are mostly uninhabited, the settler movement has responded angrily, threatening to create two new outposts for each one taken down."); *Words, Guns and Anguish*, MACLEAN'S, July 21, 2003, at 20, 20 ("Alex Bligh . . . bristles at the concept of 'land for peace.' For him, these are not settlements. 'This is our homeland,' he says. 'Being the only state established for Jews, by Jews, we have an obligation to exist. We can, and we will, defend ourselves.'"); Greg Myre, *Israelis Protest Sharon's Plan to Oust Jews From Gaza*, N.Y. TIMES, Sept. 13, 2004, at A3 ("Some right-wing settler activists have warned that government efforts to remove the 8,000 settlers from Gaza . . . could lead to open conflict among Israelis."). Whether these individual sentiments reflect widespread settler sentiment is not clear. A poll conducted by the anti-settlement group Peace Now found that 74% of Jewish settlers would leave their homes if offered compensation by the government. *See* Sharmila Devi, *Poll Says Jewish Settlers Will Leave if Paid*, FIN. TIMES, July 23, 2003, at 10, *available at* http://globalsecurity.com/road_map/poll_says/poll_says.htm. On the other hand, polls reported by the Palestinian Center for Policy and Survey Research were much more pessimistic. In 1995, only 30% of settlers said that they would return for compensation, with 58% refusing to do so; by 1997, this number had shrunk to only 23% agreeing to return for compensation, with 67% refusing. Palestinian Ctr. for Pol'y & Surv. Res., CPRS Polls—Survey Research Unit: Settlers Poll (2): The Future of Israeli Settlement in the West Bank, http://www.pcpsr.org/survey/cprspolls/97/setpoll2.html (last visited Dec. 12, 2004). Several factors suggest such wide discrepancies. The CPRS polls were taken before the second intifada broke out in September 2000, making the settlers' physical security far more precarious. On the other hand, caution should be used in relying on a poll conducted by an anti-settlement group.

97.   For a complete party-by-party breakdown of the results in the 2003 Knesset elections, see *Special Report, Israel Elections 2003*, HA'ARETZ, http://www.haaretz.com/hasen/pages/IsraelElections.-jhtml?contrassID=28 (last visited Dec. 12, 2004). As of this writing, Likud holds 40 Knesset seats, Labor 19 seats, Shinui 15 seats, Shas 11 seats, Arab parties 9 seats, National Union 7 seats, Yahad and the Democratic Choice 6 seats, United Torah Judaism 5 seats, National Religious Party 5 seats, and Am Ehad 4 seats. Among these parties, Likud, Shas, National Union, United Torah Judaism, and National Religious Party, composing 67 of the 120 seats, are considered right-wing and religious; Labor, Shinui, the Arab parties, Yahad and the Democratic Choice, and Am Ehad, composing 53 of the 120 Knesset seats, are considered left-center parties). *See* http://www.knesset.gov.il/-history/eng/eng_hist16_s.htm.

minister received Knesset approval to bring the opposition Labor Party and a small ultra-orthodox party into his government—a coalition that "should allow him to remain in office to carry out his plans to dismantle all Israeli settlements in Gaza and four in the West Bank."[98] Presumably, Labor would support any land-for-peace agreement that the more hawkish Sharon would be willing to sign. But it is unclear whether Sharon could marshal the support of his own Likud Party for an agreement that would permit Palestinian statehood—and without Likud, it would be impossible to put together a parliamentary majority for the agreement. In fact, some members of Likud's policymaking body voted in 2003 to oppose an independent Palestinian state on any terms.[99] In 2004, Likud's membership voted in a non-binding referendum to reject Sharon's Gaza withdrawal plan,[100] despite its approximately seventy percent support among Israelis.[101] Sharon also faced opposition to the plan from many of his own Likud cabinet members, and he was able to prevail in an early cabinet vote on the proposal only after he fired two ministers from an allied right-wing party, which then left the governing coalition.[102] Though Sharon's plan won a comfortable (but not overwhelming) majority of votes in the Knesset in October 2004, approximately half of the parliament's Likud members voted against their own prime minister's proposal despite considerable pressure to support their leader.[103]

Sharon's difficulty in garnering the support of his own party for his Gaza withdrawal plan bodes particularly ill for the future of a land-for-peace agreement because Gaza is home to very few Israeli settlers (approximately 8000) and, unlike the West Bank, has virtually no historical significance to religious Jews.[104] These events suggest that as long as right-of-center parties—that is, Likud and the smaller, farther-right parties[105]—control the majority of Knesset seats, an Israeli government might be unable to gain approval of a land-for-peace agreement, even assuming a specific set of terms that a majority of the public favors and the prime minister is willing to sign.[106]

98.   *See* Steven Erlanger, *New Coalition Led By Sharon is Approved in Parliament*, N.Y. TIMES, Jan. 10, 2005, at A1.

99.   Leslie Susser, *Sooner or Later, Sharon Will be Voted Down Over the Road Map, Says Likud Minister Uzi Landau*, JERUSALEM REP., July 14, 2003, at 6 ("In a late-May cabinet vote on the road map, only 12 (seven Likud and five Shinui) of the 23 ministers supported it. The other 11 either voted against (two National Union, two National Religious Party, and three Likud) or abstained (four Likud).").

100. *See* Andres Martinez, *One State of Two, Israelis and Palestinians Share the Same Economy*, N.Y. TIMES, May 28, 2004, at A20.

101. *See* Greg Myre, *Netanyahu Joins Call for Referendum on Pullout of Gaza Settlers*, N.Y. TIMES, Sept. 14, 2004, at A5 (citing Israeli opinion polls); Greg Myre, *Sharon to Face Cabinet Hard-Liners on Gaza Pullout Plan*, N.Y. TIMES, May 29, 2004, at A6 (same).

102. *See, e.g.*, Greg Myre, *Sharon Loses His Majority When 2 Ministers Resign*, N.Y. TIMES, June 9, 2004, at A10.

103. John Ward Anderson, *Sharon Wins Vote for Gaza Pullout: Israeli Parliament is Bitterly Divided: Likud Ministers Demand Referendum*, WASH. POST, Oct. 27, 2004, at A1; Steven Erlanger, *Lawmakers Back Sharon on Plan for Leaving Gaza*, N.Y. TIMES, Oct. 27, 2004, at A1.

104. *See* Joseph Berger, *For Orthodox Israelis, Views Differ on Yielding Gaza*, N.Y. TIMES, June 15, 2004, at A11.

105. *See supra* note 97 (giving the composition of the current Knesset and identifying those parties identified with the right and the left, respectively).

106. Any major peace treaty would have to be approved by the Cabinet, which could take this action unless there is a specific enactment forbidding it. *See* Basic Law: The Government § 1 (Isr.)

C. *Overcoming the Roadblock of Internal Division*

If internal divisions within one party to a negotiation are in fact preventing Israel and Palestine from agreeing to or implementing the terms of a negotiated settlement that lies within the bargaining zone, the theoretical approaches to overcoming this roadblock are relatively clear. How to implement these approaches in practice, however, is less evident.

1. *Discredit or Replace Unwilling Leaders*

If a negotiating party's agent stands in the way of achieving a mutually desirable negotiated agreement, the obvious implication is that the opposing negotiator, or interested third parties, should attempt to discredit or replace that faithless agent. The Sharon government followed this precise course of action following Arafat's rejection of the Clinton land-for-peace proposal in December 2000 and the elections that brought Sharon to power two months later. The Israeli leader attempted, quite methodically, to isolate Arafat physically and politically, dismantle his security apparatus, destroy his symbols of power, and he refused to negotiate with the PA as long as Arafat remained in control.[107]

How disputing parties can effectively discredit or replace opposing leaders unwilling to make peace is, it turns out, quite a difficult problem. In early 2002, Israel threatened to exile Arafat from the Territories[108] but declined to follow through, mainly because Arafat could potentially have been a more dangerous adversary in exile, flying around the world and putting himself front and center on the international stage.[109] Israeli attempts to isolate Arafat politically might have actually strengthened him in the eyes of Palestinians.[110]

("The Government is the executive authority of the State."); *see also id.* § 32 ("The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority."). The Cabinet, however, could face a vote of no-confidence were it to approve a treaty vehemently opposed by a majority of the Knesset. *See id.* § 28. One could argue that a Cabinet confident of a treaty's popularity would be willing to risk a fall of the government because it could then hold an election on that issue. That may be asking for too much courage. In any event, government members might find themselves endorsing a relatively popular treaty, but unable to run for Knesset because they would not be chosen for the candidate list by the relevant party. All major Israeli political parties have primaries in which only party members vote.

107. David C. Unger, *Maps of War, Maps of Peace: Finding a Two-State Solution to the Israeli-Palestinian Question*, WORLD POL. J., Summer 2002, at 1, 1 ("Prime Minister Ariel Sharon, and now President Bush, refuses to deal with Yasir Arafat, a man Israelis no longer trust and whom they blame, with considerable justice, for the breakdown of the 1993 Oslo Accords.").

108. Leslie Susser, *Anyone but Arafat*, JERUSALEM REP., Feb. 25, 2002, at 12.

109. This essentially is the reason why the United States has pressured Israel not to do so, which has been a principal reason for Israeli forbearance. *See* Chris McGreal, *Israelis Threaten To Exile Arafat*, GUARDIAN (London), Sept. 12, 2003, at 2 ("Richard Boucher, a spokesman for the Bush administration, which has previously warned Israel against exiling Mr. Arafat, said: 'We think that it would not be helpful to expel him because it would just give him another stage to play on.'").

110. We say "might" because in fact the evidence on this is murky. The PCPSR survey of Palestinian public opinion reported a temporary increase in Arafat's popularity. Interestingly, it found that the vast majority of Palestinians believed that Arafat's popularity increased due to Sharon's pressure, a belief that might have become a self-fulfilling prophecy. The survey found:

> The results of this poll point to a degree of contradictions in Palestinian public attitudes toward domestic political issues as well as issues of peace and security. The results show a large increase in Arafat's popularity not seen during the last five years. They also show

In theory, if the leader of a disputing party poses a serious roadblock to peace, a third party with leverage is more likely than the adversary to promote a change in leadership effectively. In practice, though, the Bush administration's policy of backing Sharon's effort to seek a change in Palestine's leadership—effectively the core of its Middle East policy throughout Bush's first term in office—failed to bear fruit for four years.

Death, not Israeli or U.S. pressure, ultimately succeeded in eliminating Arafat's influence in Palestinian affairs. His demise, and the recent election of the moderate Mahmoud Abbas (also known as Abu Mazen) as PA president, might turn out to be fortuitous for the cause of peace. But while waiting for a leader's death is certainly one way to overcome a faithless agent roadblock, such a strategy is unpredictable, and the wait could be indefinite.

2.   Eliminating or Co-opting Minority Groups

When minority factions within one principal party oppose a negotiated agreement and have the ability to block its acceptance or implementation, proponents of agreement on both sides of the bargaining table and interested observers can pursue either or both of two strategies for overcoming the roadblock. They can eliminate the minority faction's power to block agreement, or they can restructure the terms of the deal to garner the faction's support without sacrificing the assent of the majorities on both sides of the negotiating table.

a.   Co-opting with Side Payments

Just as incorporating monetary or in-kind side payments to one principal party into the terms of a proposed agreement can lift the agreement option above that principal's reservation point, side payments to a disaffected faction within a principal party may buy its cooperation, if not its active support.

Side payments are a powerful tactic because they need not garner the support of every member of the minority faction to have the desired effect; they need only sway the loyalties of a sufficiently large portion to take away the faction's blocking ability. Thus, for example, while it would never be possible to convince every supporter of Hamas to favor a peace agreement recognizing Israel's right to exist, even within its pre-1967 borders, proponents of an agreement need only persuade enough Hamas supporters so that the group loses the ability to pose a significant threat to peace. Conversely, although Israelis who believe Jewish occupation of the West Bank is a religious imperative will always oppose land for peace, pro-peace forces need only convert enough would-be rejectionists so that those who remain lack the political power to derail an agreement.

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widespread support for his decision to declare a state of emergency and to appoint Ahmad Qurai' as a prime minister. In addition, 60% support placing all Palestinian security services under the control of a national security council headed by Arafat. Nonetheless, the overwhelming majority of Palestinians believe the increase in support for Arafat is due to Sharon's recent threats against him.
Palestinian Ctr. for Policy and Survey Research, PSR—Survey Research Unit: Public Opinion Poll #9, http://www.pcpsr.org/survey/polls/2003/p9a.html (Oct. 7-14, 2003).

Side payments may vary in source or type. The source of side payments can be the minority faction's own government, the opposing party, or third parties with an interest in successful negotiations. Moreover, as noted above, side payments can be in cash or in kind. Such offers as substantial resettlement payments to Palestinian refugees, specific settlement rights within the new Palestinian state, or settlement rights in third countries might increase Palestinian support for a land-for-peace agreement and reduce support for the rejectionist groups. Similar promises to displaced settlers might reduce Israeli opposition to such an agreement. Moreover, when side payments to minority factions come from the faction's own government, the payment need not directly remedy the burdens suffered as a result of a land-for-peace agreement. For example, Israel might garner land-for-peace support from some religious opponents by offering concessions to positions held by ultra-Orthodox religious groups on other domestic issues.

b.   *Degrading the Capacity to Block Agreement*

If the ability of rejectionist Palestinian groups, such as Hamas and Palestinian Islamic Jihad, to negate a Palestinian promise of peace creates a significant roadblock to a land-for-peace agreement, the most direct approach to the problem would be to destroy these groups' capacity to launch terrorist attacks. The Sharon government's Palestinian policy, it might be said, has been based principally on this reasoning, with the IDF responding to virtually every suicide bombing with attempts to capture or assassinate rejectionist leaders in the occupied territories, or otherwise disrupt the terrorist infrastructure in (or sometimes outside of)[111] the Territories.[112] President Bush has largely endorsed this approach, stressing that the destruction of militant Palestinian groups is a prerequisite for a Palestinian state.[113]

While logically defensible, this approach has failed to achieve its desired end. If anything, repeated Israeli military assaults may have strengthened support for Hamas and other Palestinian rejectionist groups.[114] To further

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111. In October, the Israeli Air Force raided a training camp for Palestinian terrorist groups inside Syria. Washington ensured that Israel would not receive U.N. sanctions for the raid and blocked a Security Council Resolution condemning it. *See* Amos Harel et al., *IAF Strikes Camp Deep in Syria*, HA'ARETZ, Oct. 7, 2003, http://www.haaretz.com/hasan/pages/arch/ArchSearchEngArt.jhtml. For a good overview, see Yossi Alpher, *Add Him to the List*, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl031103ed40.html (Nov. 3, 2003).

112. Benn, *supra* note 81, at 64; Michael Elliot, *Sharon's Game*, TIME, June 23, 2003, at 35 (discussing Sharon's response to suicide bombers, including such actions as launching missiles at Hamas leaders, and quoting him telling his Cabinet ministers, "Jewish blood can't come cheap. We aren't going to be put on the altar of the road map." The article primarily discusses Sharon's response to suicide bombers, including such actions as launching missiles at Hamas leaders.); Abraham D. Sofaer, *The U.S. and Israel: The Road Ahead*, COMMENT., May 2003, at 21, 23 ("Until recently . . . the State Department has joined in castigating Israel for capturing or killing leaders and members of [Hamas, Islamic Jihad, and the Popular Front for the Liberation of Palestine].").

113. James Bennet, *Accord Reported on Israeli Pullout from Gaza Areas*, N.Y. TIMES, June 28, 2003, at A1 ("Mr. Bush has also called a cease-fire insufficient, saying Hamas must be 'dismantled.'").

114. *Cf.* Rosemary Hollis, *The Israeli-Palestinian Road Block: Can Europeans Make a Difference?*, 80 INT'L AFF. 191, 200 (2004) (claiming that senior IDF officers believe that Israel's attempts to suppress the current intifada have created increased support for Palestinian extremists). There is no simple one-to-one relationship between Israeli military attacks and Palestinian radicalism. In July 2000, for example, 63% of Palestinians said that Palestinians should emulate the tactics and

complicate matters, Israeli military operations aimed at degrading the Palestinians' ability to attack Israelis have severely degraded the PA's security apparatus,[115] which the Israelis at times have considered complicit in such attacks.[116] But without a well-armed and organized security force, the PA can never establish control over rejectionist groups. With recent history suggesting that direct military force is unlikely to resolve the blocking minority problem on the Palestinian side, we suggest in Part VI that a U.S.-sponsored peace initiative emphasize alternative methods of degrading the military capacity of Palestinian rejectionists.

Eliminating Israeli rejectionists' capacity to block a land-for-peace agreement that would serve the interests of both Israel and Palestine as a whole presents a political rather than a military challenge. The specific challenge is to ensure that the minority that opposes the creation of a Palestinian state on any terms does not exercise political power substantially disproportionate to the number of Israelis that it represents. In Part VI, we also explore approaches that might accompany a U.S.-sponsored peace initiative designed to achieve this result.

V.   HARD BARGAINING: FAILURE TO AGREE TO SPECIFIC DEAL TERMS

An irony of the negotiation process is that, although a bargaining zone is a necessary condition of reaching agreement, the existence of a relatively large bargaining zone often makes an agreement more elusive rather than bringing it closer within reach. Reaching an agreement requires the parties to coalesce around a specific set of terms. A large bargaining zone makes many different sets of deal terms available and can thereby exacerbate disagreement over which terms to choose.[117] If a buyer's reservation price for a seller's wares is $20, and the seller's reservation price is also $20, the bargaining zone

strategy of Hizbullah. *See* Palestinian Ctr. for Policy and Survey Research, Public Opinion Poll #1, http://www.pcpsr.org/survey/polls/2000/p1a.html (July 27-29, 2000). One could interpret this finding as showing that even before the current war, Palestinians supported terrorist activity. That said, it is also undeniable that support for Arafat and his Fatah Party, relative to more radical Palestinian groups, has taken a strong hit since the outbreak of the war. As Khalil Shikaki has noted, "the domestic legitimacy of the PA has been severely damaged. Its ability to provide services has been crippled, and the standing of Yasir Arafat and Fatah has dropped dramatically." Khalil Shikaki & David Makovsky, Wash. Inst. for Near East Pol'y, *Special Policy Forum Report: Assessing Palestinian-Israeli Violence: Two Years On*, PEACEWATCH NO. 398, *at* http://www.washingtoninstitute.org/watch/index.htm (Oct. 3, 2002). In other words, a complicated process emerges whereby Israeli attacks undermine the PA and its ability to provide services, leaving a gap to be filled by Hamas. It is not clear that this trend will continue inexorably; instead, Hamas has achieved important political gains from the intifada and has been able to become the dominant force in Palestinian politics. It may have hit its maximum. *See* David Makovsky, Wash. Inst. for Near East Pol'y, *Israel and the Palestinians: An End of Year Assessment (Part I)*, PEACEWATCH NO. 438, *at* http://www.washingtoninstitute.org/watch/index.htm (Dec. 23, 2003).

   115.   Martin Indyk, *A Trusteeship for Palestine?*, FOREIGN AFF., May/June 2003, at 52-53 (discussing how a Palestinian government would require its own security mechanism for fighting terrorism so it would not have to rely on Israel and the United States, as it currently does).

   116.   Reuel Marc Gerecht, *Hardly Intelligent: How the CIA Unintentionally Aids Terrorism in the Middle East*, WKLY. STANDARD, June 10, 2002, at 24, 24 ("Arafat's political-paramilitary organization, Fatah, the principal force within the Palestine Liberation Organization and the Palestinian Authority, is on display as the proud mother of the Al Aksa Martyrs Brigade, one of the primary groups sponsoring suicide-bombing operations."); Sofaer, *supra* note 112, at 23 ("The PA has advocated, planned, financed, and rewarded terrorism against Israel and Jews.").

   117.   *See, e.g.*, KOROBKIN, *supra* note 14, at 150.

consists of precisely one agreement, and a deal will be struck at the price of $20 or not at all. In contrast, if the buyer's reservation price is $30 and the seller's reservation price is $10, a deal price of anywhere from $10 to $30 is possible. If the buyer insists on $10 (or $11, or $12), while the seller insists on $30 (or $29, or $28), impasse is a very probable outcome. Similarly, if a land-for-peace agreement is significantly—rather than only marginally—superior to the reservation points of Israel and Palestine, the benefits to be gained by reaching agreement could themselves create a roadblock to peace, as each side angles for the largest possible share of the gains-in-trade that a deal will create.

Fundamentally, there are two ways for bargaining parties to agree on a single set of deal terms when more than one set lies within the bargaining zone. First, one or both parties can attempt to exercise bargaining power to convince its adversary that it will not yield, and that reaching agreement therefore requires the adversary to agree to the terms held by the resolute party. Second, the parties can agree to accept a particular set of deal terms based on the implicit understanding that those terms are objectively fair or reasonable, according to some neutral criteria. This Part considers the possibility that the impasse over land for peace stems from the failure of the parties to use one of these approaches (or a combination of the two) to identify a specific set of deal terms.

A.   *Strategic Behavior*

1.   *Misrepresenting Reservation Points*

Because each negotiator's reservation point is based on unobservable private information—such as the negotiator's relative preference for agreement versus its BATNA, and the negotiator's subjective assessment of the risks associated with agreement and impasse—a bargaining party can never know its adversary's reservation point with certainty.[118] So each negotiator has an incentive to try to convince its opponent that its reservation point is higher than it actually is and that, therefore, the opponent must make concessions in order to avoid an impasse. For example, if a buyer believes that a seller might be willing to part with his wares for $10, the buyer might employ "strategic bargaining" and claim that he is willing to pay no more than $10 for those wares, even if his reservation point is really $30.

The flip side of the incentive for strategically misrepresenting one's own reservation point is the mutual disincentive to make an offer that is not extremely favorable to the offering side. A specific proposal signals that the terms are superior to the offeror's reservation point, which can result in the offeree inferring that the offeror is willing to yield further. Thus, if a buyer offers to pay $20, the seller may infer that the buyer's reservation point is at least $20 and is highly likely to be somewhat greater than $20. This inference can lead the offeree to believe that a price above $20 is achievable and hence to reject the offer of $20.

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118.   *Cf.* Korobkin, *supra* note 17, at 1797-99 (discussing how negotiators estimate their opponents' reservation points).

To summarize, a strategic bargainer tries to convince his adversary that his reservation point approaches what he estimates the adversary's reservation point to be, while refusing to propose any agreement that might suggest his reservation point is lower—an approach sometimes labeled "hard bargaining." If both negotiators adopt this posture, their positions will seem far apart (even if a bargaining zone does actually exist), and neither side will make an offer that the other will accept. Unless one party, or both, softens its approach, impasse will result. And if the parties have malevolent utility functions,[119] impasse is particularly likely—not only do both parties wish to obtain the most advantageous agreement possible, they also wish to prevent the other from obtaining a favorable deal.

Many different specific sets of deal terms are consistent with the land-for-peace framework. In terms of land, Israel could agree to any of the following options (or some combination thereof): the establishment of a Palestinian state in all the territory beyond Israel's pre-1967 boundaries, Israel's retaining portions of the West Bank located close to the Green Line, or Israel's retaining some territory beyond the Green Line in exchange for some territory within Israel proper. The state of Palestine could consist of only portions or the entirety of the West Bank and Gaza, which are not contiguous, or it could include some territory linking the two Palestinian areas. Israel could keep possession of part or all of East Jerusalem, or all of East Jerusalem could be turned over to Palestine. Control over the religious sites on the historic Temple Mount could go to Israel or Palestine individually, together with joint authority, or could be divided between them. Finally, territory could be transferred from Israeli to Palestinian control all at once, or in steps over time. Similarly, in terms of peace, Palestine could guarantee Israel that it would follow a wide range of possible policies for stopping and punishing renegade acts of terror launched by Palestinian militants.

Many other significant issues that are too numerous and complex to canvass here could also potentially be resolved in a variety of ways. For example, the state of Palestine could be completely demilitarized, it could be permitted some limited defense capability, or there could be no limitations. Palestinian refugees could be entitled to financial compensation of various amounts, or to none at all. Palestine could disclaim the right of return, Israel could grant some number of refugees the right to immigrate to Israel, or the refugees could receive a symbolic right of return that could not be exercised in practice. Israel could guarantee Palestinians specific rights to work and travel in Israel, or there could be no guarantees. [120] Any treaty establishing a Palestinian state would have to deal with a range of additional economic issues, one of the most important being the division of water rights.[121] With so

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119. *See* Hirshleifer & Osborne, *supra* note 57, at 131, 133.

120. Indyk, *A Trusteeship for Palestine?*, *supra* note 115, at 62-65 (describing the various suggestions for resolving the conflict); Daniel Pipes, *Does Israel Need a Plan?*, COMMENT., Feb. 2003, at 19, 19 (same); Unger, *supra* note 107, at 1 (same).

121. ARNON SOFFER, RIVERS OF FIRE: THE CONFLICT OVER WATER IN THE MIDDLE EAST 189-95 (1999); Daniel J. Epstein, *Making the Desert Bloom: Competing for Scarce Water Resources in the Jordan River Basin*, 10 TEMP. INT'L & COMP. L.J. 395, 415 (1996); Raed Mounir Fathallah, *Water Disputes in the Middle East: An International Law Analysis of the Israel-Jordan Peace Accord*, 12 J. LAND USE & ENVTL. L. 119, 122 (1996).

many issues and so many possible resolutions of each, the permutations of any possible final-status agreement are nearly limitless.

Each party can threaten to reject any agreement containing particular terms, essentially claiming that such a deal would be inferior to its reservation point, regardless of how desirable the other terms in the package may be. The veracity of such a claim is unverifiable. It can be made by a party for whom the term at issue is so critical that it would make any agreement inferior to that party's reservation point, or it can be made by a party trying to squeeze further concessions out of its bargaining opponent. For example, at various times, Israeli leaders have claimed they would never agree to the division of Jerusalem.[122] Both sides have demanded control over the Temple Mount.[123] Palestinian leaders have claimed they would never concede their claim to the right of return.[124] When President Bush released the Road Map in the spring of 2003, Prime Minister Sharon accepted the document as a starting point for discussions but immediately announced fourteen specific exceptions to its content.[125]

A negotiator's claims that certain terms are non-negotiable can quickly become self-fulfilling prophecies, because a subsequent reversal of position can be viewed as losing face.[126] This outcome is especially likely when the negotiator relies on an image of strength and resolve to maintain his office, as do Israeli and Palestinian political leaders. What begins as an impediment to agreement caused by strategic behavior can evolve into an impediment caused by a conflict of interest between principals and their agent.

A somewhat different point, rooted in unconscious psychological processes rather than calculated strategic behavior, is that negotiators often react negatively to agreement terms that in theory are acceptable once those terms appear achievable, especially when an adversary proposes the terms. This "grass is always greener on the other side of the fence" or "you always want what you cannot have" phenomenon is sometimes called "reactive devaluation."[127]

A recent study suggests how this phenomenon could apply to the Israeli-Palestinian conflict specifically, causing the disputants to represent higher reservation points than a more objective comparison of potential deal terms to their BATNAs would rationally support. Jewish and Arab Israeli students were presented with a proposed term for a hypothetical interim agreement,

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122. Sofaer, *supra* note 112, at 25; Unger, *supra* note 107, at 4-6.

123. David B. Green, *Battle over the Bulge*, JERUSALEM REP., Oct. 21, 2002, at 36; Yossi Shain, *Jewish Kinship at a Crossroads: Lessons for Homelands and Diasporas*, POL. SCI. Q., Summer 2002, at 279, 305 (describing how many conservative, religious Israeli Jews believe Temple Mount belongs to all Jews, and its surrender is not under negotiation); Leslie Susser, *Which Way Forward Now?*, JERUSALEM REP., Nov. 6, 2000, at 17 (during the Camp David negotiations, both sides demanded sovereignty over the Temple Mount).

124. *Cf.* Kramer, *supra* note 12, at 994 (quoting refugees who claim that no Palestinian leader can sign an agreement that gives away their land).

125. Peter Beinart, *Empty Cabinet*, NEW REPUBLIC, June 16, 2003, at 6, 6 ("Only seven of the 14 ministers from Sharon's own Likud voted yes and only because Sharon attached 14 revisions to the plan."); Bruce Stokes, *Peace on Paper*, 35 NAT'L J. 1000, 1002 (2003) (reporting that Sharon's government leaked 100 proposed amendments to Ha'aretz).

126. *See, e.g.*, Korobkin, *supra* note 17, at 1809.

127. *See generally* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution, in* BARRIERS TO CONFLICT RESOLUTION 26 (Kenneth Arrow et al. eds., 1995).

and asked to rate how good the proposal was for Israel and how good for the Palestinians.[128] Some participants were told that it was proposed by Israel, and others that it was suggested by the Palestinians.[129] Jewish students who believed the proposal was advanced by Israel rated it significantly more desirable for Israel than did Jewish students who believed it was advanced by the Palestinians.[130] Arab students rated the proposal as less desirable for the Palestinians when they were told that Israel, rather than the Palestinians, advanced the proposal.[131] These results suggest that, in the course of bilateral bargaining, agreement proposals that fall within the bargaining zone might be devalued and subsequently rejected, fueling a cycle of hard bargaining and making even a mutually desirable agreement elusive.

2.   *Demonstrating Patience*

Standard game theory models of negotiating behavior assume that when two parties attempt to demand agreements that are significantly superior to their reservation points, the party that can be the most patient in conducting the bargaining should prevail in the hard bargaining contest and enjoy the more favorable deal terms.[132] Assume, for example, that Buyer, with a reservation price of $30, refuses to offer more than $10 for Seller's wares, while Seller, whose reservation price is $10, demands $30. Assume also that Seller is in no hurry to convert the goods to dollars, but Buyer, for financial reasons or merely as a result of personal preference, is extremely anxious to complete the purchase immediately. Buyer's greater desire to complete the transaction should lead him to increase his offer before Seller will decrease her demand. In fact, if Buyer knows that he is less patient than seller, he should increase his offer immediately because there is no point in postponing the inevitable when delay is costly.

This model will fail to predict bargaining outcomes, however, if both negotiators believe they are the more patient side. In such a situation, as a primary negotiation tactic, each party will continue to demand the most beneficial agreement possible consistent with its estimate of the adversary's reservation point. As a secondary negotiation tactic, each party will attempt to demonstrate its relative reservoir of patience in order to convince the adversary to make concessions. If both sides remain tenaciously patient and believe they can outlast the other, the impasse can continue indefinitely.

This dynamic could be an important roadblock to peace in the Middle East. In Part III, we suggested that the cycle of violence between Israel and Palestine could be characterized as both parties attempting to convince the other that "your BATNA is worse than you think." This message would aim to

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128.   Ifat Maoz et al., *Reactive Devaluation of an "Israeli" vs. "Palestinian" Peace Proposal,* 46 J. CONFLICT RES. 515, 528-29 (2002).

129.   *Id.* The term was actually offered by the Palestinian delegation in 1993 as part of the negotiations that eventually led to the Oslo Agreement. *Id.* at 528.

130.   *Id.* at 530 tbl.2.

131.   *Id.*

132.   *See, e.g.,* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 218-24 (1994); Russell Korobkin, *Aspirations and Settlement,* 88 CORNELL L. REV. 1, 6 (2002).

make the other side prefer an imperfect peace agreement to the status quo:[133] acknowledgment that it will continue to suffer until an agreement is reached ought to make it impatient and willing to make concessions to achieve a deal. Palestinian suicide bombers can thus be seen as a tactic for making Israel impatient for a deal, because the attackers are effectively saying, "until we get what we want, you will suffer." Israeli military reprisals, planned and collateral damage to the lives and property of Palestinians, border closures, checkpoint lines, and curfews can be seen as tactics designed to make Palestinians impatient for peace, as they reply to the suicide bombers, "you will suffer more than we will." As long as both sides remain patient, the cycle can continue.

B.   A "Fair Deal"

Not all negotiators, of course, are hard bargainers who misrepresent their reservation points and attempt to outwait adversaries until fatigue forces concessions. Rather, most negotiators reach agreement through mutual concessions—they realize they might have held out for a slightly more advantageous deal, but they also know that agreeing to terms that are reasonable and fair to both sides avoids undue unpleasantness, a protracted power struggle, sore feelings in the future, and the real possibility of ongoing impasse. In the context of the Middle East, history makes achieving a consensus as to what constitutes a fair compromise seem remote.

Reaching what both parties would consider a fair deal requires the negotiators to agree on a reference transaction from which to evaluate various sets of deal terms.[134] Often, this means the parties must agree on what preferred norms of justice are most relevant to the negotiation.[135] For example, Buyer and Seller might agree to a deal at the market price of Seller's wares, even if in the particular situation Buyer's reservation point is higher than the market price and Seller's reservation point is lower. If Seller has particularly high costs, he might argue that a more appropriate norm is that the price reflect Seller's costs plus a standard profit margin. If Buyer and Seller are regular trading partners, Buyer might argue that it has a reasonable expectation of paying the price it paid in the last transaction.

In commercial transactions, bargaining parties often disagree as to which justice norms should underlie the terms of a particular deal. The disagreements are likely to be more extreme in international disputes, however, for two reasons. First, in many cases, there is no substantially similar transaction that can serve as a reference point or model for an agreement. Second, cultural differences and the emotional content of the dispute often make the parties' particular claims more deeply felt and entrenched. In these situations, it will be difficult to reach common ground concerning the appropriate justice norms for resolving a disagreement.

In the Israeli-Palestinian context, most justice claims can be met with plausible competing claims from the other side. The assertion that justice

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133. *See supra* Part III.A.
134. *See* Korobkin, *supra* note 17, at 1825-29.
135. *Id.* at 1828-29.

requires that Palestinian refugees be able to return to their homes, for example, can be met with a claim that justice requires the preservation of a Jewish state. The argument for drawing territorial boundaries based on current demographics, and thus leaving Israeli settlements in place, can be countered with the claim that Israel should not be permitted to gain an advantage by virtue of having established such settlements in the first place. The claim that all Palestinians deserve self-determination can be met with the claim that Israelis, surrounded by hostile neighbors, are entitled to secure borders. The list could go on indefinitely.

C.   *Overcoming the Roadblock of Hard Bargaining*

When more than one agreement lies within the bargaining zone but two negotiating parties cannot agree on a substantively just resolution to their dispute and neither will make concessions, an alternative course of action is for the parties to attempt to agree on a process from which a specific set of terms can unfold. Agreeing on a process for determining the terms of an agreement is different from the scripted confidence-building approaches often called "peace processes" that are intended to push parties toward eventual settlement. The Road Map's call for Palestine to halt terrorist attacks and for Israel to stop settlement construction as a prelude to a final resolution of the conflict,[136] for example, viewed in its best light, seeks to pave the way for the parties to discuss substantive peace terms. But this approach will not help to resolve the difficult substantive issues such as borders, refugees, and the status of Jerusalem that the parties must confront in order to achieve peace. This Article speaks of negotiating a process to mean the parties determining a procedure, or a set of rules, that will in turn define a substantive set of peace terms that the parties will agree to abide by ex ante.

1.   *Negotiating a Process*

One process-based approach to reaching an agreement is to formulate rules that encourage each party to reveal its preferences, and then to use those revealed preferences to create a set of substantive terms that maximize the parties' joint gain created by settling their dispute. A simple example, known to every child, is called "divide and choose."[137] One child cuts a cake into two pieces, and the other child chooses his piece. The first child has an incentive to cut the cake as evenly as possible; the second child has an incentive to reveal honestly which piece he finds more attractive.

A more sophisticated procedure with a similar goal calls for parties to agree on a range of plausible terms for an agreement and then bid for those terms with a fixed number of points allocated to each side.[138] Each negotiator then wins terms relatively more important to it, while losing some terms

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136.   Sofaer, *supra* note 112, at 21; Press Statement, Office of the Spokesman, Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr. 30, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/20062pf.htm.

137.   *See, e.g.*, STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION 8-9 (1996).

138.   *See id.* at 68-75 (describing the adjusted winner procedure); KOROBKIN, *supra* note 14, at 214-18.

relatively less important. A recent article proposes a resolution of the Israeli-Palestinian dispute based on precisely this approach, while trying to predict what the specific settlement terms might look like by relying on results of public opinion polls to rank the importance of the various central issues to each side.[139]

While negotiating a procedure is easier than negotiating the substantive terms of an agreement in many contexts, hard bargaining can undermine even this approach. With as much as is at stake in the Middle East, both parties would no doubt look ahead to predict the substantive consequences of a particular negotiating procedure and strategically bargain for that procedure in much the same way that they bargain over substantive issues directly. In other words, it is hard to imagine that both parties would not try to "game" any negotiations over process in a way that effectively replicates the strategic behavior that they exhibit in negotiations over substance. Thus, it seems unlikely that substituting negotiations over a process for reaching a substantive agreement for negotiations over the substance itself would make the dispute significantly more tractable.

2.   Delegating Authority to a Third Party

Rather than agree on procedural rules for determining substantive deal terms, an alternative procedural approach for resolving conflict is for negotiators to agree to delegate authority for determining the substantive terms to a third party. Submitting domestic disputes to a judge or jury is a form of this approach. In the international commercial setting, parties often resolve disputes by submitting them to a neutral arbitrator, agreeing in advance to regard the arbitrator's decision as binding.[140] In general, the impartiality of the adjudication model gives it legitimacy to the parties, thus making it appear fair ex ante.[141] In theory, the Israeli-Palestinian dispute could be resolved using a version of this model.

A decision to delegate deal-making authority to a third party would create two challenges in the Israeli-Palestinian context, however. First, the parties would have to decide on the rules that would govern the arbitrator. No nation would risk its entire future on the general wisdom of a third party, so parameters would be necessary. At a minimum, each nation would require that the range of terms open to the arbitrator be limited such that any resulting agreement would be preferable to the status quo.

Second, both parties would have to agree on the arbitrator, which is to say that both sides would have to believe the arbitrator would faithfully apply rules and make any unconstrained judgments neutrally. Disputants are unlikely to voluntarily trust arbitral powers—that is, the authority to dictate the terms of an agreement—to any third party whose allegiance or sympathies

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139.   Tansa George Massoud, *Fair Division, Adjusted Winner Procedure (AW), and the Israeli-Palestinian Conflict*, 44 J. CONFLICT RES. 333 (2000).

140.   Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, DISP. RESOL. J., June 1994, at 12.

141.   *See* ROGER FISHER ET AL., BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 77 (1994).

might lie with the adversary, which makes the possibility of resolving the Israeli-Palestinian dispute through an arbitral procedure appear quite small. It is unlikely that Israel would trust any nation or international body with this power, other than perhaps the United States. It is equally unlikely that Palestine would trust the United States in this role, especially given the perception in the Middle East that U.S. policy has tilted decidedly toward Israel and away from Palestine since Arafat rejected the final Clinton peace proposal in 2000 (and Clinton blamed Arafat for the failure), and especially since the events of September 11, 2001 and the ensuing U.S. war on terrorism.

Importantly, although perceived neutrality and evenhandedness are critical qualities for an arbitrator in international conflicts, a mediator need not be seen as perfectly neutral in order to succeed in helping the parties reach an agreement. In fact, disputants have much to gain from the assistance of a mediator perceived to be allied with their adversary because the mediator can often put pressure on its ally to adopt a more moderate posture. [142] Our recommendations in Part VI for a more assertive U.S. mediative role in addressing the conflict implicitly build on this observation.

VI.   DEVISING A U. S. POLICY TO OVERCOME ROADBLOCKS

In Part II, we presented a framework for understanding the continuing impasse in Israeli-Palestinian attempts to negotiate a lasting peace, and in Parts III-V we described each category of possible explanations for that impasse. In this Part, we use the analysis presented in Parts II-V as the basis for proposing an integrated U.S. foreign policy initiative that we believe would maximize the chance of successfully brokering a stable land-for-peace agreement between Israel and Palestine.

Designing a model peace initiative would be a far simpler task, at least analytically speaking, if it were clear which of the potential roadblocks to peace have actually caused the ongoing impasse in the Middle East. Unfortunately, while the issues that divide the parties are well known, the precise cause of their failure to bridge those differences in light of the obvious benefits of peace to both sides remains unknown, even to the most knowledgeable observers. Numerous potential factors could explain why Israel and Palestine remain at war fifty-seven years after the founding of Israel and thirty-eight years after the Six-Day War: perhaps no bargaining zone exists that encompasses a specific set of deal terms; internal divisions in the guise of faithless agents or blocking minorities may have prevented the parties from concluding a peace agreement on mutually beneficial terms; or the parties' desires to negotiate a perfect agreement may have prevented the conclusion of a merely acceptable one.

This observation suggests that a prudent U.S. peace effort would attempt to address all three of the potential categories of roadblocks simultaneously,

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142. *See* TOUVAL, *supra* note 1, at 325-26; *cf.* ROSS, *supra* note 66, at 768 (contending that "Arafat saw [the United States] as his equalizer with the Israelis"); Jeswald W. Salacuse, *Lessons for Practice, in* POWER AND NEGOTIATION 255, 259 (I. William Zartman & Jeffrey Z. Rubin eds., 2000) (observing that Egyptian President Anwar Sadat succeeded in negotiating with Israel by enlisting the United States in the process and thus getting help in winning concessions from Israel).

and as many of the specific potential causes of impasse within each category as possible. The alternative to such a comprehensive approach is to forge a policy that is based essentially on guesses as to which of the plausible negotiation roadblocks actually have frustrated Middle East peace for two generations and continue to do so. Such an approach would run the obvious risk of failing to resolve the impasse, and it could even exacerbate the conflict by allowing current problems to fester. With this logic in mind, this Part attempts to outline the fundamental elements of a comprehensive U.S. policy initiative.

Before we begin, two qualifications are in order. First, our proposals assume that the United States wishes to use its influence to try to mediate[143] peace in the Middle East, but we make no attempt here to defend this desire either as a descriptive or a normative matter. Second, our proposals are directed at the goal of maximizing the likelihood that, if implemented, Israel and Palestine would reach a peace agreement. That is, our proposals are normative. The extent to which the potential efficacy of our proposals might conflict with competing domestic political concerns, thus creating challenges to their adoption, is beyond the scope of this analysis. We do believe, however, that although they would be politically difficult to implement, our proposals are politically plausible—that is, the second Bush administration potentially could choose to implement them—thus making the normative analysis more than merely an intellectual exercise.

A. *Eliminating Strategic Hard Bargaining Over the Cooperative Surplus*

Compared to the other potential roadblocks to peace explored in this Article, the problem of hard bargaining over the cooperative surplus that a mutually beneficial transaction would create receives relatively little attention. But because the insistence of even one disputant on achieving better deal terms can prevent the parties from reaching any mutually beneficial agreement, any sensible U.S. initiative should take steps to preclude such destructive hard bargaining. Overcoming the roadblock of hard bargaining is only one of three prongs of our policy proposal, but it is the linchpin on which the efficacy of the other prongs rests. Accordingly, we begin our analysis with consideration of this roadblock, first explaining why we believe it is a significant impediment to peace unlikely to be overcome without a third party's assistance, and then suggesting an approach to confronting it.

1.   *The State of the Roadblock: The Problem of Mutual Patience*

Even assuming that Israel and Palestine both determine that the value of a land-for-peace agreement exceeds their reservation points and that no agents or minority constituencies can block agreement, no agreement will be reached

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143. For a good discussion of various conceptions of what constitutes mediation in the international dispute resolution context, see Jacob Bercovitch, *Mediation in International Conflict: An Overview of Theory, a Review of Practice, in* PEACEMAKING IN INTERNATIONAL CONFLICT, *supra* note 77, at 125, 126-30. Which of the various definitions of mediation one adopts is not critical to our analysis.

if both sides believe they can garner even better terms by waiting for additional concessions from the other party. The passage of time is unlikely to resolve such a stalemate between the parties, each seeking relative advantage, for the following reasons.

First, the existential nature of the conflict makes the specific terms of a land-for-peace deal extremely important to the citizens of both nations, which means that both parties are likely to be inclined to hold out indefinitely for the best deal possible rather than compromise.[144] As a result, both parties have extremely high aspirations concerning the terms of any peace agreement, and they are likely to perceive any concessions they might make as losses relative to what they consider possible, rather than perceiving concessions as the normal cost of reaching any agreement between parties with opposing preferences.[145]

Second, neither party is likely to determine that the adversary has the capacity to be more patient, and thus that having to make concessions is inevitable. Willingness to suffer now for future benefit is a major component of both nations' self-conception; or, as economists would say, Israel and Palestine both have low discount rates. Israel's national self-image is built on images of the history of the persecution of Jews worldwide and the ability of the fledgling nation to win its independence by single-handedly defeating the combined armies of the Arab world in the 1948 war.[146] Israel's history of fighting the entire Arab world for survival against long odds leads to a willingness to suffer high costs rather than make concessions, as does a history of more than two thousand years of suffering anti-Semitic persecution and slaughter. Palestinians also view their history as one of suffering, especially since 1948.[147] Their long struggle, first against the existence of the Jewish state and later against Israeli control of the occupied territories, makes stoic acceptance of suffering part of their self-image as well, and makes concessions just to avoid further suffering unlikely.

Unfortunately, frameworks adopted to structure Israeli-Palestinian negotiations in the past have exacerbated rather than mitigated the problem of mutual strategic behavior. Under the terms of the Oslo Accords, each side was to make less difficult concessions first, while the more difficult issues—such as whether there would a Palestinian state and the final status of Jerusalem— were postponed until the end of the process.[148] The Oslo process stressed

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144. *Cf.* Daniel Druckman, *Negotiating In the International Context, in* PEACEMAKING IN THE INTERNATIONAL CONTEXT, *supra* note 77, at 81, 100 (nations that perceive a security risk are less likely to cooperate in the negotiation setting); Kelman, *supra* note 77, at 191, 196 (nations' "sense that their identity, security, and existence as a national group are at stake" makes them "afraid to make the necessary concessions or accommodations for the negotiations to move forward").

145. *See* KOROBKIN, *supra* note 14, at 33-36.

146. *Cf.* C.D. SMITH, PALESTINE AND THE ARAB-ISRAELI CONFLICT. 157 (1996) (defining "Ben Gurionism" as Israel's perceived need to demonstrate military superiority until others sue for peace); Benjamin Beit-Hallahmi, *supra* note 45, at 269-80; Marc H. Ellis, *The Future of Israel/Palestine: Embracing the Broken Middle,* J. OF PALESTINE STUD., Spring 1997, at 56, 57 (observing an aura of victimization in Israel); KNOX & QUIRK, *supra* note 5, at 89 (noting that Israeli politics are characterized by a "siege mentality").

147. *See* ROSS. *supra* note 66, at 42 (observing that "[v]ictimization has deep roots in the Palestinian mind").

148. *See, e.g.,* Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories,* 26 FORDHAM INT'L L. J. 934, 956 (2003); Unger, *supra* note 107, at 8.

confidence-building measures designed to establish trust between Israel and Palestine, with the expectation that trust would magically lead to agreement concerning specific terms. By leaving the issues of greatest importance for last, this framework virtually guaranteed that as time passed bargaining would become harder and more strategic.

The current Road Map repeats this process flaw. The Road Map calls for the parties to make some initial concessions—such as freezing settlements and ending violence—but it provides no hint as to the specific substance of a final agreement.[149] The Road Map also calls for the establishment of a Palestinian state by 2005, but on no specific terms.[150] President Bush has defended the lack of specificity by saying that the terms are for the parties themselves to determine.[151] However, this approach implicitly assumes that the critical barrier to peace is the parties' unwillingness to deal with each other, rather than the parties' mutual refusal to make a concession as long as there is a possibility that the other party will make a concession. If this assumption is incorrect as a factual matter, any negotiation framework that promotes hard bargaining will deepen the impasse between the parties rather than help to overcome it. It follows that a U.S.-sponsored peace initiative should not merely seek to make the parties amenable to the idea of an agreement; it should guide them to a set of substantive agreement terms.

2. *Policy Initiative: A Detailed, Non-Negotiable U.S. Proposal*

In the terms of negotiation theory, in attempting to mediate the Middle East conflict, President Bush, like President Clinton (with one exception, described below) before him, has played essentially a "facilitative" role, disclaiming an intention or desire to impose a particular substantive resolution of the conflict.[152] The United States should abandon this approach. Instead of

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149. Joshua Muravchik, *The Road Map to Nowhere: Do We Really Need Another Doomed Mideast Peace Process?*, WKLY. STANDARD, Mar. 31, 2003 at 28, 28. (claiming that the ultimate settlement is unclear from the roadmap); Press Statement, Office of the Spokesman, Department of State, *supra* note 136.

150. Muravchik, *supra* note 149, at 28.

151. This is traditional U.S. policy. *See, e.g.*, Indyk, *supra* note 115, at 53-54 ("For decades the United States has rightly preferred that the onus for resolving the Israeli-Palestinian conflict remain on the parties themselves. The appropriate role of the United States and other external parties, officials believed, was to facilitate agreements arrived at through direct negotiations."); Eran Lerman, How Will the 2004 Elections Influence the U.S. Role?, bitterlemons.org, *at* http://www.bitterlemons.org/previous/b1011203ed43.html (Dec. 1, 2003) ("American policy in general . . . rejects the prospect of externally imposed solutions, which will always be, by definition, unpopular and brittle.").

152. *See generally* Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996). Many different terms are used to distinguish third-party participation in disputes to merely facilitate negotiation and third-party attempts to use influence or leverage to push the parties toward agreement. *See, e.g.*, Chester A. Crocker et al., *Multiparty Mediation and the Conflict Cycle*, *in* HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD at 19, 20-24 (Chester A. Crocker et al. eds., 1999) (distinguishing between the "structuralist" mediation paradigm in which the third party uses "persuasion, incentives, and disincentives" to encourage settlement and "social-psychological approaches" to third-party intervention based on the goal of facilitating "processes of communication and exchange"); Loraleigh Keashly & Ronald J. Fisher, *Towards a Contingency Approach to Third Party Intervention in Regional Conflict: A Cyprus Illustration*, 45 INT'L J. 425, 434 (1990) (distinguishing between the third-party approach of "consultation," premised on the belief that an improved relationship between disputants will lead to a

presenting the parties with a broad framework, as the Road Map does, the United States should assume a more directive position and present the parties with a detailed set of agreement terms that it considers fair and reasonable to both sides. The U.S. president should then make it clear that the terms are not the starting point for negotiations, but the ending point; the United States should not dicker over the terms.

Facing a set of non-negotiable terms, both parties will have the choice between agreeing to those terms and impasse. The option of holding out for better terms in the future—a recipe for stalemate if adopted by both sides—disappears, not only because the United States will not countenance arguments for altering the terms, but because it would be difficult under such circumstances for either party to accept anything less that what is contained in the proposal. It is doubtful that the Israelis would accept any settlement that the United States believed was unreasonably biased in favor of Palestine. The same is true for Palestine, and especially so if the U.S. position had Arab support.

In order for this approach to succeed, of course, the U.S. resolve not to dicker over terms must be firm, and the commitment of the United States not to relent must be credible in the eyes of both disputing parties. Both Israel and Palestine would be likely to respond to a substantive U.S. peace proposal by contending that they could not accept the terms as presented and that extensive alterations favoring their side must be made. Agreeing even to consider any such alterations, however, would only encourage both parties to resume their tradition of hard bargaining in search of advantage rather than agreement.[153]

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 as well. Not only would international backing undermine likely claims that the United States is biased in favor of Israel[154] and undermine the oft-stated although highly contested Palestinian claim that an unlimited right of return for refugees is required by international law,[155]

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good substantive outcome, and "mediation" premised on the belief that a good substantive settlement will lead to a better relationship); I. William Zartman & Saadia Touval, *International Mediation: Conflict Resolution and Power Politics*, J. SOC. ISSUES, Spring 1985, at 27, 38-39 (distinguishing between mediators that play the role of a "communicator" or "formulator" from those that play the role of a "manipulator").

153. The Camp David II negotiations provide an example of how this dynamic has worked in the past. On the third day of the summit, the U.S. delegation prepared a draft framework agreement designed to serve as the basis for continued negotiations. The Israeli delegation objected strongly to a number of the items, causing the Americans to make revisions. Sensing that the Israelis were gaining the upper hand in the bargaining, the Palestinians responded by voicing their unwillingness to negotiate based on those terms. *See* ROSS, *supra* note 66, at 658-62.

154. Any perception that U.S. sympathies tilt toward Israel and away from the Palestinians cannot help the United States mediate an agreement between the parties, but there is little reason to believe that a lack of perfect neutrality will be fatal to such efforts. It is sufficient for the parties to believe that the mediator wants to achieve and can help the parties to achieve an agreement that is acceptable to both sides. *See* Zartman & Touval, *supra* note 152, at 37.

155. Palestinian commentators often argue that U.N. General Assembly Resolution 194 grants the right of return and represents international legal acceptance of this principle. *See, e.g.,* HENRY CATTAN, PALESTINE AND INTERNATIONAL LAW 213-23 (2d ed. 1976); Sari Hanafi, Without the Right of Return There Can Be No Solution, bitterlemons.org, *at* http://www.bitterlemons.org/previous/-bl270904ed.html#is1 (Sept. 27, 2004); W. Thomas Mallison & Sally V. Mallison, *The Right of Return,*

Security Council backing would help to strengthen the credibility in the eyes of both parties of the claim that the terms are truly non-negotiable, rather than merely the opening gambit in a new round of bargaining. International solidarity would make it less likely that Israel's leaders would believe the United States would support Israeli rejection of the proposed terms[156] and that Palestinian leaders would believe that the international community would support its rejection of those terms.[157] A Security Council resolution would also transform the proposal from a U.S. to an international initiative, providing political cover to the Arab states and allowing them to support the proposal without appearing to have succumbed to U.S. pressure.[158] The international status of the proposal would also appeal to European states.

Our proposal that the U.S. government advance a non-negotiable set of peace terms raises an obvious question: What would be the substantive content of the proposal? From the perspective of our theoretical approach, the substance of the terms proposed is irrelevant. What matters is only that the set

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J. PALESTINE STUD., Spring 1980, at 125, 128-30. It is hard to give this assertion much purchase. The Resolution states that "the refugees wishing to return to their homes and live in peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return." G.A. Res. 194, U.N. GAOR 3d Sess., P 11, U.N. Doc. A/RES/194 (1948). Thus, by its specific terms it does not refer to the descendants of refugees, rejecting current Palestinian claims. Moreover, its permissive language ("should be permitted") suggests that this does not create a legal right but rather a general political desire, especially in light of the provision that the return date is that which is "practicable" and that refugees must desire "to live in peace with their neighbors." A persuasive analysis of the text of Resolution 194 is found in Ruth Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 ISR. Y.B. HUM. RTS. 103 (1986).

As a General Assembly resolution, Resolution 194 does not have binding legal effect. Most importantly for our purposes, however, Resolution 194 would most likely be preempted by Security Council Resolution 242, which the PLO accepted as part of the Oslo Accords, and which simply refers to a "just settlement of the refugee problem." S.C. Res. 242, U.N. SCOR, 22d Sess., P2, U.N. Doc. S/INF/22/Rev. 2 (1967) In general, then, we are confident that international law provides no basis for a general right of return. A compelling demonstration of this point most generally is found in Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. INT'L L. 295, 321-29 (1995).

156. Sharon has staked much of his domestic credibility on maintaining American support. It would obviously be much more difficult to maintain this strategy if his government were to violate an American-sponsored Security Council resolution—assuming, of course, that the U.S. administration were then to follow through on it.

157. Moreover, Arafat and many other Palestinian rejectionists have consistently argued that appeals to the international community will eventually lead to the triumph of their strategy. *See, e.g.,* Leslie Susser, *Hesitating, As the Tension Rises*, JERUSALEM REP., May 20, 2002, at 20 ("From the very start of the violence in September 2000, Yasser Arafat's main strategic goal has been to 'internationalize' the conflict . . . ."). This has been admitted by their leadership. *See* Hanna Amireh, *Ushering in Year Four: A Reassessment*, bitterlemons.org, *at* http://www.bitterlemons.org/-previous/bl290903ed37.html (Sept. 29, 2003) ("The gamble made by the Palestinian leadership—and one initially fully justified—relied on the assumption that escalating Israeli military measures and aggression reap Arab and international solidarity."). Amireh is a member of the PLO's Executive Committee. He writes that "it *is* possible to employ efforts that will alter international positions still more dramatically in favor of the Palestinian people, their president and their leadership. This external support is an instrument of pressure that no Israeli government can ignore." *Id.* This attitude would be more difficult to maintain in the face of a Security Council resolution rejecting the PLO's terms.

158. Since the first Arab-Israeli war, U.N. Security Council resolutions have, at least on some occasions, provided political cover for Arab actions that might otherwise have been viewed as concessions. *See, e.g.,* TOUVAL, *supra* note 1, 37 (claiming that a "strong Security Council resolution enabled the Arab governments" to agree to an eventual 1949 armistice with Israel, ending the war "without losing face").

of terms falls inside the bargaining zone (i.e., inside the area between the parties' reservation points), so that both parties will prefer agreement on the terms included in the initiative to the impossibility of reaching any agreement.[159] Because the primary risk of advancing a non-negotiable set of terms is that the proposing party will miscalculate and unintentionally design an agreement that is inferior to one side's reservation point, prudence (in addition to commonsense notions of fairness) suggests that the United States attempt to design the substance of the initiative so that its attractiveness relative to each party's reservation point is approximately equal.

Determining what specific terms would satisfy this criterion would require a considerably more detailed analysis than is possible in this Article. With this said, however, it seems likely that the terms of a non-negotiable U.S. peace plan would probably resemble in content the Geneva Accord and the similar but less well-known People's Voice initiative,[160] although in considerably greater detail. These two recent plans are both final-status documents negotiated by prominent Israelis and Palestinians (although not by elected leaders), and both have received substantial public support in each nation.[161] These facts suggest that a more detailed plan that follows the outline

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159. *Cf.* Zartman & Touval, *supra* note 152, at 33 (noting that mediators in international disputes often have substantive preferences as to terms, but that their interests "usually allow for a wider range of acceptable outcomes than the immediate interests of the parties").

160. *See supra* note 11 and accompanying text. Admittedly, the People's Voice initiative and the Geneva Accord do differ in some critical respects, most importantly in regard to Palestinian refugees. The People's Voice initiative quite clearly states that refugees shall have the right to return to the Palestinian state, but not to Israel. People's Voice, *supra* note 11. The Geneva Accord is more complex. Article VII specifically states that Israel will have complete "sovereign discretion" as to how many refugees it will accept, and further states that it will only have to accept the number that it submits to the International Commission overseeing the process. Geneva Accord, *supra* note 11, art. 7, § 4(e)(iii). At the same time, however, the Accord creates a number of Technical Committees to "oversee and manage" the refugee issue, *id.* § 11(a)(iii)(1), which "shall have full and exclusive responsibility for implementing all aspects of this Agreement pertaining to refugees," *id.* § 11(a)(i), and "shall establish mechanisms for resolution of disputes arising from the interpretation or implementation of the provisions of this Agreement relating to refugees." *Id.* § 11(c)(iv). Skeptics argue that providing for such committees presents a procedural opportunity to inflame the refugee issue and could allow a Commission so disposed to interpret the agreement to force Israel to take in hundreds of thousands of refugees. They argue that the Commission would be so disposed because of its members, only the United States would be sympathetic to Israel (other prominent members could include Arab states, the European Union, and Norway).

The foregoing describes the ambiguities contained in the Accord's English text. For these reasons, some sophisticated observers who believe in a two-state solution have expressed qualms about the Accord. *See* Asher Susser, *A Shaky Foundation*, HA'ARETZ, Dec. 15, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml. *Cf.* M. Cherif Bassiouni, *Laudable in Rekindling Hope*, bitterlemons-international.org, *at* http://www.bitterlemons-international.org/previous.php?opt=1&id=17 (Nov. 13, 2003) (noting that the Geneva Accord "fudges the issue"). There is little doubt in our minds that the best reading of Article VII protects Israel's interest on the issue, and that "sovereign discretion" actually means sovereign discretion. Thus, we feel confident, despite the differences, in aligning the Geneva Accord with the People's Voice initiative. Still, we acknowledge that the creation of the International Commission does introduce a potentially dangerous procedural wrinkle. *Cf. Regulatory Reform Act: Hearings on H.R. 2327 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. Dingell) ("I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time."); KARL N. LLEWELLYN, THE BRAMBLE BUSH 9 (1960) ("[W]hat substantive law says should be means nothing except in terms of what procedure says that you can make real.").

161. *See Poll: Most Israelis, Palestinians Support Geneva Accord*, HA'ARETZ, Nov. 24, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml (citing a poll finding that Israelis

of these documents would be likely to fall between the parties' reservation points. Moreover, both accords have attracted substantial international support,[162] so basing an U.S. proposal on them would sharply increase the likelihood of desirable Security Council approval.

One possible objection to our proposal is that such directive behavior by the United States would require Israel and Palestine to relinquish some sovereignty, and it would be morally objectionable or politically impossible for either side to do this. Put in the terms we have used, if one or both parties were to view a non-negotiable set of terms as inappropriately coercive, this might have the dynamic effect of raising one or both reservation points. The result could be that the proposal would fall outside of the bargaining zone, even if the substance of the proposal (if it could be separated from the element of coercion) would rest comfortably inside it. Moreover, a coerced agreement, even if grudgingly accepted by the parties, would lack legitimacy and fail to endure over time.

This objection misunderstands the exact message communicated by providing a "non-negotiable" set of deal terms. By providing such terms, the United States would not be attempting to force either party to accept them, as it did, for example, when it insisted that Iraq permit access to UN weapons inspectors on threat of military force. Rather, by providing a specific set of terms, the United States would create a focal point for the parties' attention, making it extremely hard for either party to accept less.[163] This approach would actually empower Israel and Palestine to accept the proposed terms because the other party would be unlikely to accept less than what the U.S. president described as fair. A clear focal point can be an excuse for the parties

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support the Accord 53% to 44% opposed, and Palestinians support it 56% to 39% opposed). Israeli support for the Accord declined toward the end of 2003; one commentator suggests that support "dropped as the public became aware of the full extent of its implications," "its identification with Yossi Beilin, who is viewed as Israel's leading dove," and "because of the Accord's European support." Makovsky, *supra* note 114. Still, Makovsky concedes that opposition to the Accord only reached 50%, hardly a stinging rebuke. *Id.* Makovsky also reports that 58% of Palestinians opposed the Geneva Accord, mostly due to its provisions on refugees and its limitations on Palestinian sovereignty. *Id.* These poll results also suggest that political space exists to gain Palestinian approval. In addition, Makovsky states that only 37% of the Israeli public opposed the People's Voice initiative, and that the initiative had gained 100,000 Israeli and 60,000 Palestinian signatures through the end of October 2003. *UN's Annan Boosts Nusseibeh-Ayalon, Geneva Peace Plans,* HA'ARETZ, Oct. 29, 2003, http://www.haaretz.com/-hasen/pages/arch/ArchSearchEngArt.jhtml. A resolution along the lines of the Geneva Accord and People's Voice would also be unlikely to attract a French veto, as Paris has already endorsed the Accord. *See France, Belgium Draw Israeli Ire Over Geneva Accord,* EurActiv.com, http://www.euractiv.com/Article?tcmuri=tcm:29-116516&type=News (Oct. 28, 2003). French and Belgian support for the proposal is so strong that Israeli officials believe that Paris and Brussels are bankrolling it. *See* Gideon Alon & Aluf Benn, *Shalom: France, Belgium Offering $7 Million To Promote Geneva Accord,* HA'ARETZ, Oct. 23, 2003, http://www.haaretz.com/hasen/pages/arch/-ArchSearchEngArt.jhtml. Former Israeli Foreign Minister Shlomo Ben-Ami has called for a Security Council resolution embodying the Clinton Plan of December 2000, which is referenced in the Geneva Accord and is essentially restated by People's Voice. *See* Shlomo Ben-Ami, *The Security Council May Hold the Key,* INT'L HERALD TRIB., Nov. 13, 2003, at 6.

162. *See To Israelis and Palestinians: A Statement of Support,* N.Y. REV. BOOKS, Jan. 15, 2004, at 46. As we argue below, international actors play a crucial role in maintaining both the Israeli and the Palestinian positions. Thus, strong international support of the American proposal would also significantly assist in creating the bargaining zone because this could change the adversaries' BATNAs. *See* Part VI.B.2 *infra.*

163. *Cf.* KOROBKIN, *supra* note 14, at 352-53 (describing how third parties can create focal points to encourage settlement between disputants).

to stop fighting for marginal leverage that makes a peace agreement impossible, even if a bargaining zone exists, because the existence of this focal point sharply reduces the expected value of such strategic efforts.[164] Moreover, because its adversary would not be able to negotiate for any "improvements" in the terms of the deal, each party could interpret the outcome of the "negotiations" as successful for it.[165]

Similarly, a U.S.-proposed set of non-negotiable terms also can be understood as a method that helps the parties to solve the prisoner's dilemma that they find themselves facing.[166] Assuming that the U.S.-proposed terms were to fall within the bargaining zone, mutual acceptance of those terms (i.e., "cooperation") would by definition render both parties better off than if both reject those terms (i.e., "defection"). Both parties fear, however, that indicating a willingness to cooperate would make them vulnerable to exploitation by their adversary and leave them worse off than they would be in a world of mutual defection (i.e., result in receiving the "sucker's payoff"). By making its proposed terms non-negotiable, the United States would create conditions under which a disputant's acceptance of the terms would not put it at risk of exploitation because the United States would have already committed to not allow the other party to seek more advantageous terms.

A second possible objection to our proposal is that U.S. insistence on specific terms might preclude the parties from identifying and taking advantage of mutually profitable trades—to use negotiation jargon, from taking advantage of "integrative bargaining" opportunities.[167] For example, more than eighty percent of Jewish settlers in the Territories live in settlements around Jerusalem or on the far-western edge of the West Bank.[168] Consequently, it is likely both parties could benefit by drawing the border between Israel and Palestine such that most of these settlements become part of Israel and some lands on the Israeli side of the Green Line are in return awarded to Palestine.[169] A U.S.-specified land swap could and should attempt to take advantage of such mutually beneficial trades; nevertheless, the attempt might fail to capitalize on all such opportunities.

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164. *Cf.* Howard M. Sachar, *Great Powers Hold Key to Mideast Peace*, L.A. TIMES, Feb. 16, 2004, at B13 (contending that pressure from the "Great Powers" would give Arafat and Sharon political cover to accept a compromise).

165. *Cf.* I. William Zartman & Jeffrey Z. Rubin, *Symmetry and Asymmetry in Negotiations, in* POWER AND NEGOTIATION, *supra* note 142, at 271, 286 (concluding that agreement "often depends on the ability of each side to claim that it did well in the negotiations").

166. *Cf.* KOROBKIN, *supra* note 14, at 224-25 (describing the requirements of a "prisoner's dilemma" game).

167. *See, e.g., id.* at 111-15; ROBERT H. MNOOKIN ET AL., BEYOND WINNING, HOW LAWYERS HELP CLIENTS CREATE VALUE IN NEGOTIATIONS (2000); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 33 (1982).

168. *See* WASSERSTEIN, *supra* note 6, at 132.

169. It is largely assumed that a final settlement between Israel and Palestine would allow Israel to keep a small portion of the West Bank—from 2% to 5%—that is adjacent to Israel and has the most dense settler concentrations in return for transferring some land to Palestine. According to one account of the Camp David II and subsequent negotiations, Israeli and Palestinian negotiators agreed in principle to a land exchange for up to 3% of the West Bank. *See* Miguel Angel Moratinos, *EU Non-Paper Summarizing Discussions at Taba, at* http://disarm.igc.org/morotinosdocument1.htm (Jan. 2001). The recent, although unofficial, Geneva Accord and People's Voice draft agreement both anticipate some type of a land swap as part of a final settlement. *See supra* note 11 and accompanying text.

Insisting on a non-negotiable set of terms, however, would not preclude the parties from taking advantage of available mutually profitable trades in the future. It would only establish the non-negotiable set of terms as the baseline for future negotiations. Once both sides accepted the non-negotiable terms, nothing would prevent them from sitting down to renegotiate.[170] Should renegotiations fail, however, the parties' fallback position would be the U.S.-directed land-for-peace terms rather than ongoing conflict. Contracts scholars will recognize the non-negotiable terms as "default terms," which the parties may contract around but which would govern the parties if they were not able mutually to agree otherwise.[171]

Granted, as is the case for any set of default contract terms,[172] it would be difficult for the parties to renegotiate their legal relationship after the U.S.-proposed terms have been accepted because the behavioral tendency to be loss-averse causes negotiators to view sacrifices from a reference point as more costly than gains from that reference point;[173] further, the legal status quo is the most natural reference point from which parties to the Israel-Palestine dispute view possible changes as gains or losses.[174] But this status quo bias might also be preventing the parties from offering concessions in the current environment, in which the status quo is ongoing warfare. The imposition of U.S.-directed terms would not make successful *renegotiation* any more unlikely than successful *negotiation* is at present,[175] and those terms would provide a baseline regime that is better for both disputants than the present status quo.

In December 2000, in a last-ditch attempt to help the disputants reach a peace agreement, President Clinton submitted a set of proposed agreement terms to Israel and Palestine, breaking a long U. S. tradition of avoiding such directive behavior.[176] Barak accepted the terms; Arafat rejected them. Although the Clinton proposal was less detailed than the proposal we urge—in fact, it was presented to the parties only orally—it did attempt to resolve the

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170. *See generally* Howard Raiffa, *Post-Settlement Settlements*, 1 NEGOTIATION J. 9 (1985).

171. *See generally* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L. J. 729 (1992).

172. *See* Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) (finding that experimental subjects placed a higher value on specific contract terms if they were identified as the legal default terms than if they were identified as different from the legal defaults).

173. Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039, 1056 (1991); *see also* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1250-55 (2003) (discussing various motivational explanations for loss aversion).

174. *See, e.g.*, William Samuelson & Richard Zeckhauser, *The Status Quo Bias in Decision Making*, 1 J. RISK AND UNCERTAINTY 7 (1988).

175. In fact, although the status quo bias would provide an obstacle in both cases, a future renegotiation would be more likely than a successful negotiation at present if an agreement on the basis of U.S.-proposed terms resulted in reduced hostilities between the disputants. *Cf.* Keashly & Fisher, *supra* note 152, at 438 (recommending arbitration in order to produce "at least a temporary settlement and control the escalating hostility and aggression," as part of a strategy to encourage agreement in international disputes).

176. ROSS, *supra* note 66, at 4 (calling the Clinton proposal the "first" and "last" time "the United States put a comprehensive set of proposals on the table designed to put an end to the conflict").

most contentious issues and was presented as non-negotiable,[177] so it bears a strong relationship to what we envision.

Two observations about this event are important. First, Clinton's proposal came at the urging of the parties' negotiators, who believed a third-party proposal was necessary because neither party would accept terms proposed by the other.[178] In other words, the assumption that neither side would ever propose terms that were not somewhat better than its reservation point meant, in practice, that the recipient of any offer would always believe that a slightly more advantageous deal was possible and would respond by rejecting the offer and demanding more. This suggests that, rather than perceiving a non-negotiable proposal to be coercive and threatening to their sovereignty, the parties could understand such a proposal as an attempt to empower them to overcome a prisoner's dilemma.

Second, the failure of the Clinton proposal to produce an agreement does not suggest that a non-negotiable proposal cannot be successful in forging agreement between the parties. The timing of Clinton's proposal ensured that it could not be presented (or understood by the parties) as the only set of terms the United States would support. Clinton told the parties that his proposal would be withdrawn when he left the White House the following month.[179] Even without this explicit disclaimer, the imminent end of the Clinton presidency and the succession of a Republican president made it obvious that the United States might take a different position on negotiations after January 20, 2001. In other words, Clinton's proposal might have been non-negotiable, but only for a month. Thus, although the Palestinians might have been wise to believe that Bush would not extend the efforts to achieve an Israeli-Palestinian peace that Clinton did, they need not have believed that the terms proposed by Clinton were the best that they could hope to achieve.

In addition, Arafat's rejection of the proposal could have been—indeed, we believe was—due not to the non-negotiability of Clinton's terms, but to one or more of the other roadblocks to peace that we have discussed. This underscores the importance of any U.S. initiative incorporating not only a non-negotiable proposal to eliminate the roadblock of hard bargaining but also efforts to insure that a bargaining zone exists and that internal divisions do not block the parties from reaching agreement. We now turn to these roadblocks.

B.   *Creating a Bargaining Zone*

Skeptics might contend that our initial focus on countering the roadblock of mutual hard bargaining might be overly optimistic in the sense that hard bargaining can be the but-for cause of a negotiation impasse only if a bargaining zone exists. A straightforward implication of the historical failure of the parties to reach an agreement might be that there is simply no bargaining zone for the reasons we discussed in Part III.A.

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177.   *Id.* at 751. For a transcript of Clinton's proposal, see *id.* at 801-05.
178.   *See id.* at 719 (Barak believed the United States "would have to present a proposal if there was to be an agreement."); *id.* at 724 (Palestinian negotiators also believed an American proposal was critical.).
179.   *Id.* at 4.

As we will explain, there are good reasons to believe that there is a reasonable, non-negligible probability that a bargaining zone does in fact exist. Because only an omniscient observer could know for sure whether this is the case, however, any U.S. peace initiative should err on the side of caution and assume that a bargaining zone does not exist presently. A non-negotiable peace proposal advanced by the United States should be accompanied by the deliberate creation of a bargaining zone in order to ensure that the proposal is superior to continued impasse for both principal parties, and thus that the proposal is potentially acceptable.

If a bargaining zone does in fact already exist, such efforts will not be wasted. They will have the effect of expanding the bargaining zone, thus increasing the likelihood that the non-negotiable proposal will fall within the zone rather than (by miscalculation) outside of it and below one of the parties' reservation points. As noted above,[180] a large bargaining zone can encourage hard bargaining because more variations of agreement terms are possible, which means in turn that there is more cooperative surplus at stake in the selection of a specific set of terms. For this reason, in order to ensure that third-party attempts to increase the size of the bargaining zone make agreement more rather than less likely, it is important to pair this strategy with the introduction of a non-negotiable set of terms designed to prevent hard bargaining, as described in the previous Section.

1.   The State of the Roadblock: Reasons for Cautious Optimism

There is some reason to believe that, whether or not the historical failure of Israel and Palestine to reach a negotiated peace agreement can be attributed to the absence of a bargaining zone, social and political changes in the Middle East over the last decade have enabled a bargaining zone to emerge. This Section describes the reasons for such optimism.

a.   Israel and the Occupation: Diminishing Benefits, Rising Costs

At its thinnest point, pre-1967 Israel is only nine miles wide, making the heart of the country extremely vulnerable to a first-strike military attack by hostile Arab forces without the West Bank serving as a buffer. Former Israeli Foreign Minister Abba Eban, a dove by Israeli standards, once provocatively described the pre-1967 territorial lines as "Auschwitz boundaries."[181] In light of this geographical fact, Israel might have believed in the past that its BATNA of occupying the territories and endlessly battling Palestinian nationalism was a more desirable option than trading land—especially the West Bank—for peace. In fact, many Israeli military and political figures contended that retaining control of most or all of the West Bank was an absolute requirement of Israeli security.

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180. *See supra* Part V.
181. Interview with Daniel Pipes, *CNN Newsnight* (CNN television broadcast, Mar. 26, 2002), *available at* http://www.danielpipes.org/article/144.

This view seems untenable today. Israel enjoys a better-equipped and better-trained army, navy, and air force than all Arab states combined.[182] The Jewish state is at peace with Egypt and Jordan. Israeli-Syrian relations remain cold, but the recent demolition of Saddam Hussein's regime in Iraq destroyed the last serious Arab military threat to Israel's existence. With this development, Israeli control of the West Bank can no longer be considered strategically critical, and security concerns that impeded Israeli-Palestinian negotiations as recently as the 1990s are far less critical today. Although Islamic militant groups operating beyond the Territories present a very real threat to Israeli security, the threat of a conventional army attack across Israel's eastern border is extremely small—even smaller than it was just two years ago.[183]

In contrast, the economic and psychological costs to Israel of occupying and governing a territory that is home to 3.5 million hostile Palestinians are large.[184] Added to this is the fact that Palestinian militants have demonstrated their ability to keep Israeli citizens in near-constant fear of terrorism, creating further crippling economic as well as psychological effects.[185] These primary results of the ongoing intifada on Israeli society are compounded by the secondary effect of mounting emmigration of Israeli Jews—often the better educated—which increases the risk of worsening both Israel's long-term economic growth prospects and its precarious demographic balance.[186] Overall, it seems that the possibility of trading land for peace would dominate Israel's alternatives. Polls of Israelis bear this out.[187]

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182. For specific figures, see CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK: ISRAEL, *at* http://www.cia.gov/cia/publications/factbook/geos/is.html (last updated Nov. 2, 2004) [hereinafter WORLD FACTBOOK: ISRAEL].

183. *See, e.g.*, David Makovsky, *How to Build a Fence*, FOREIGN AFF., Mar./Apr. 2004, at 50, 62:

> [M]any Israelis of both parties have long considered the Jordan Valley essential to their security . . . . [But] as former IDF Strategic Division Head General Shlomo Brom and others note, there has not been an interstate war against Israel since 1973, and Israel has since signed peace treaties with Egypt and Jordan. Syria's military prowess has been greatly weakened by the loss of its Soviet patron and the end of the Cold War, and the U.S. toppling of Saddam Hussein has removed the Iraqi threat. The Jordan Valley is therefore no longer a likely gateway for an invading Arab army.

184. A 2002 Israeli National Security Council report concluded that continued occupation of the Territories endangers both the Jewish and the democratic character of Israel. *See* Aluf Benn, *Background: Mapping out Israel's Future*, HA'ARETZ, Aug. 23, 2002, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml.

185. *See, e.g.*, Erik Schechter, *Back to Square One?*, JERUSALEM POST, July 11, 2003, at 1B (observing that Palestinian terrorist groups caused "a tremendous amount of psychological, economic and military pain to Israel," and "terrorism within the Green Line costs Israel . . . 14 to 19 billion [shekels] a year in lost revenue and the country's GDP per capita is plummeting at a rate of 3% per year").

186. *See* WASSERSTEIN, *supra* note 6, at 27.

187. Recent polls have found, for example, that 78% of Israelis support withdrawal from most of the settlements in the Territories, and even a (slim) majority of conservative Likud voters were willing to accept a Palestinian state. *See* James Bennet, *Israel Coalition Nears Collapse in Budget Fight*, N.Y. TIMES, Oct. 30, 2002, at A1.

b.   *Palestine: A New Realism?*

As is true for Israel, the likelihood that Palestine perceives a land-for-peace agreement as superior to its BATNA of continued political and military struggle against Israel seems to have increased in recent years. While many Palestinians still dream of conquering the Jewish state, there is no serious prospect of this taking place. If there were any hope of Arab armies "liberating" Jerusalem after the Soviet Union collapsed and its military sponsorship of Arab states disappeared, the destruction of Saddam Hussein's regime in Iraq extinguished it. With Saddam's armed forces disbanded, no Arab nation to Israel's east possesses conventional military forces that could plausibly be considered a threat to the Jewish state.

Following Israel's withdrawal from southern Lebanon in 2000, many Palestinian leaders, and particularly Arafat, believed that Israel was a "spider web": [188] outwardly impressive but ready to collapse in the face of a Palestinian military challenge. Four-and-a-half years of the second intifada and the continued disintegration of Palestinian civil society with no signs of Israeli capitulation, however, have undermined this theory severely. Palestinian disillusionment is exemplified by one Palestinian commentator writing recently in an Arabic newspaper:

> Today I feel great bitterness . . . .
>
> This bitterness emanates from my realization that, in the final analysis, the Palestinian intellectuals do not really care about the suffering of their people. Most of them live in fancy houses in the U.S. or Europe, [drive] luxury cars, and [send] their children to attend prestigious schools. And every time a solution to the Palestinian problem is proposed they say "No" [and choose] steadfastness, sacrifice, and *Shahada* [martyrdom]. And who is the shahid [martyr]? Not any of their sons. Not at all. Rather, one of the children of the unfortunate [Palestinians].
>
> For 50 years we have seen the pictures of the weeping, mourning mothers, and of their demolished homes, and no one thinks of ending this suffering. The stone has become more important than the man. Instead of the land serving man—man has become the servant of the land. The history of Palestine is an entire century of acts of idiocy by its intellectuals, of egotism, of arrogance, and of national foolishness, which tore their land to shreds and brought catastrophes upon their people.[189]

Recent polls show that this Palestinian writer's feelings are widespread. While a majority of Palestinians polled often express support for armed confrontation with Israel, majorities also favor peace based on the concept of Jewish and Palestinian states existing side by side.[190] A July 2003 poll

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188.   The phrase is actually that of Hizbullah leader Sheikh Hassan Nasrallah. Farid Mustafa, *In Hizbullah's Footsteps?*, JERUSALEM POST, June 2, 2000, at 3B. *See also* KARSH, *supra* note 12, at 181-82 (showing the influence of Lebanon withdrawal on Palestinian strategic thinking).

189.   Khaled Al-Qishtini, *First Palestine, Second Iraq*, Al-Sharq Al-Awsat, July 23, 2003, trans. Middle East Media Res. Inst., Special Dispatch Series No. 545 (July 31, 2003), http://www.memri.org/bin/articles.cgi?Area=reform&ID=SP54503.

190.   *See* WASSERSTEIN, *supra* note 6, at 173; Glenn E. Robinson, *Being Yasir Arafat: A Portrait of Palestine's President*, 82 FOREIGN AFF., Nov./Dec. 2003, at 136, 138 ("Polls consistently show that about 70 percent of Palestinians [in the Territories] want a two-state solution and believe in reconciliation with Israel after the Palestinian state is created."); Palestinian Ctr. for Pol'y and Surv. Res., Poll No. 5, http://www.pcpsr.org/survey/polls/2002/p5epressrelease.html (Aug. 26, 2002) (finding

conducted by respected Palestinian political scientist Khalil Shikaki found that more than ninety percent of Palestinian refugees do not actually want to return to pre-1967 Israel.[191] A large majority said they would accept resettlement in the Palestinian state or elsewhere and compensation in lieu of the right of return to Israel.[192] The percentage rose when pollsters told respondents their original pre-1948 villages no longer existed.[193] These numbers suggest that giving up the right of return as part of a land-for-peace agreement might no longer be the third rail of Palestinian politics.

2.   *Policy Initiative: Sweeten the Agreement, Worsen the BATNA*

To help create a bargaining zone if none currently exists—or, alternatively, to increase the breadth of the existing zone—a U.S. peace initiative should maximize the benefits of agreement to each party while simultaneously maximizing the costs of impasse by reducing the desirability of each party's BATNA of maintaining the status quo.[194] To satisfy the first goal of maximizing the benefits of agreement, the U.S. proposal should include the promise of side payments when the proposed agreement is implemented, both in the form of cash assistance and in-kind aid.[195] These side payments should be designed to mitigate the most serious objections that the parties are likely to have to a land-for-peace agreement. To satisfy the second goal of maximizing the costs of impasse, the proposal should also be accompanied by the threat of serious adverse consequences should the parties reject the proposal.[196] The ability of the United States, based on its economic, military, and political power, to employ both "reward power" and "coercive power"[197] gives it the unique ability among possible mediators of the Israeli-Palestinian dispute to implement this proposal.[198]

73% of surveyed Palestinians residing in the Territories support reconciliation between the Israeli and Palestinian people on the basis of Israeli recognition of a Palestinian state).

191.   The best description of the poll's findings and guide to interpreting it is found on the website of the Saban Center at the Brookings Institution. Khalil Shikaki, Palestinian Refugees: Preferences in a Final Israeli-Palestinian Peace Agreement, Luncheon Discussion (July 16, 2003), http://www.brookings.edu/fp/saban/events/20030716.pdf.

192.   *Id.*

193.   *Id.*

194.   This approach is called "mediat[ion] with muscle." *See* TOUVAL, *supra* note 1; Keashly & Fisher, *supra* note 152, at 438.

195.   *Cf.* Daniel Ehrenfeld et al., *Aid Conditionality and the Peace Process: An Analysis of Its Implementation,* INT'L J. WORLD PEACE 59 (2003).

196.   *Cf.* Chester A. Crocker et al., *Multiparty Mediation and the Conflict Cycle, in* HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD, *supra* note 152, at 19, 31 (noting that "offers of side-payments or coercive threats" will sometimes have to be used by third parties to change the "cost-benefit calculus of warring parties away from violence to a consideration of various political alternatives"); Jeffrey Z. Rubin, *Conclusion: International Mediation in Context, in* MEDIATION IN INTERNATIONAL RELATIONS 249 (Jacob Bercovitch & Jeffrey Z. Rubin eds., 1992) (discussing "reward power" and "coercive power" employed by mediators).

197.   For a typology of power that includes the use of these terms, see *id.* at 249, 255.

198.   The Arab-Israeli conflict demonstrates the importance to would-be peace-makers of the ability to use positive and negative leverage to affect the choices of disputants. In a careful study of mediative interventions in the region, Saadia Touval juxtaposes a description of a failed mediation attempt in which a U.N. envoy "possessed no resources that could enable him to provide incentives or to threaten punishment" with the effort of an American envoy (acting on behalf of the United Nations) the following year who succeeded in brokering an Arab-Israeli armistice, in part due to his potential ability to "affect U.S. attitudes and relationships with the government[s] in question," all of whom wanted

a.   *Carrots*

The most obvious way that a U.S.-sponsored peace initiative could increase the relative benefits to both Israel and Palestine of reaching a peace agreement is by offering increased cash assistance to both parties if they sign on to the U.S. plan. While the idea of sweetening an agreement with aid is, of course, hardly original—President Carter pledged $2 billion to Egypt and $3 billion to Israel as part of the Camp David Accords,[199] while President Clinton reportedly offered the Israelis and Palestinians a combined $35 billion at Camp David in 2000[200]— it should be a core ingredient in any peace proposal.

Presumably, any set of land-for-peace agreement terms proposed by the United States would include a commitment by Palestine to use the full force of its security apparatus to guarantee peace to Israel by preventing violence against Israelis emanating from its soil. As discussed in Part III, Israel's fear of post-agreement shirking by Palestine could render an agreement inferior to Israel's reservation point and therefore lead Israel to reject a U.S.-sponsored non-negotiable agreement proposal.

There are, in theory, ways to mitigate this moral hazard concern within the substantive provisions of the proposed peace agreement itself. For example, the agreement terms could establish specific objective standards to evaluate Palestine's compliance with this commitment, name a neutral tribunal to adjudicate factual disputes concerning whether the standards had been met, and include a Palestinian warranty of compliance giving Israel the right to take military action within Palestinian territory or reclaim territory ceded as part of the agreement if the PA breaches its obligations. In other words, the agreement's terms could be structured to partially address the strategic problem caused by the fact that a land-for-peace agreement, by its very nature, anticipates non-simultaneous performance by the parties. Under this approach, although Israel still would perform first, its self-help remedy in the case of Palestinian shirking would make the permanence of Israel's performance contingent on Palestinian performance.

Attempting to mitigate the moral hazard problem in this way, however, would raise a raft of practical problems. The type of effort that the agreement would demand of Palestine would be difficult to observe, let alone clearly verify. Guaranteeing the neutrality of a tribunal would be difficult. Israel would be justifiably hesitant to condition its right to take military action against terrorists on the findings of a tribunal. Finally, Palestine would be justifiably hesitant to agree to any treaty under which it would be obligated to allow incursions into its territory by a foreign army or surrender territory based on the findings of an external tribunal.[201]

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diplomatic or economic assistance from Washington. TOUVAL, *supra* note 1, at 51-52, 72-73. Touval also, in explaining how U.S. Secretary of State Henry Kissinger succeeded in forging a series of Arab-Israeli agreements in the early 1970s, calls the "weight of American pressure and the lure of U.S. incentives . . . the decisive impact." *Id.* at 281.

199.   *Id.* at 317.

200.   *See, e.g.,* Scott Lasensky, *Paying for Peace: The Oslo Process and the Limits of American Foreign Aid,* 58 MIDDLE EAST J. 210, 227 (2004).

201.   U.S. foreign policy has a history of unsuccessfully attempting to solve highly charged and often violent political struggles through mediation by "neutral" and "objective" adjudicators. *See*

In light of these implementation concerns, rather than drafting the agreement terms to provide Israel with a self-help remedy in the event that Palestine fails to provide peace, the United States should attempt to increase the attractiveness to Israel of a negotiated agreement by making a side commitment to serve as a guarantor of Palestinian performance.[202] The United States has made commitments to facilitate past Arab-Israeli agreements, such as providing aerial surveillance and civilian presence in the buffer zone between the Israeli and Egyptian militaries in 1975[203] and promising to supply oil if Israel could not procure supplies from elsewhere after it withdrew from the oil fields of the Sinai Peninsula as part of the Camp David Accords.[204] In the current conflict, the United States could serve as a guarantor of Palestinian performance in any number of ways. One specific approach would be for the United States to pledge to station U.S. soldiers as peacekeeping forces in Israeli locations most likely to be the targets of terrorist attacks.[205] While peacekeeping forces alone are unlikely to prevent terror attacks, stationing U.S. troops in harm's way provides a powerful incentive for Palestine to use the full extent of its resources to prevent such attacks. Any terrorist act could result in the death of U.S. soldiers, and such deaths would jeopardize Palestine's relationship with the United States.[206]

The United States could conceivably increase the value of the proposed agreement to Israel more dramatically by offering a U.S.-Israeli mutual defense treaty or membership in NATO[207] as incentives, such that a failure of

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Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV. 583 (2004). Thus, while recognizing the theoretical promise of neutral panels to arbitrate disputes over adherence to treaty obligations, we are hesitant to recommend here that the United States make this a centerpiece of a peace initiative.

202.   *See, e.g.*, TOUVAL, *supra* note 1, at 200 (observing that an important contribution that peace mediators can make is "the provision of insurance in order to help the parties to manage the risks which the agreement entails").

We recommend that the United States guarantee as a supplement to Israel's inherent right of self-defense under Article 51 of the U.N. Charter, which reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. CHARTER art. 51.

203.   *See* TOUVAL, *supra* note 1, at 266.

204.   *See id.* at 308.

205.   A related recommendation—that NATO could provide a peacekeeping force in the region—has gained adherents recently. *See, e.g.*, Steven Everts, *The Ultimate Test Case: Can Europe and America Forge a Joint Strategy for the Wider Middle East?*, 80 INT'L AFF. 665, 671 (2004) ("Dismissed earlier as ludicrously ambitious, the idea of a NATO-led force in Gaza and the West Bank is slowly gathering support."); Hollis, *supra* note 114 (proposing that NATO offer Israel security guarantees in return for Israel abandoning claims to the West Bank and Gaza).

206.   A similar sort of arrangement was proposed for American troops on the Golan Heights in early 2000, when it appeared as if Israeli-Syrian negotiations would bear fruit. *See* Brent Scowcroft, *A U.S. Role on the Golan Heights?*, N.Y. TIMES, Jan. 6, 2000, at A25; *cf.* THOMAS C. SCHELLING, ARMS AND INFLUENCE 47 (1966) (describing the role of American and Allied troops in Berlin as a "trip wire").

207.   Some signs indicate that such a possibility might be on the horizon. *See* Aluf Benn, *NATO Invites Israel to Joint Military, Anti-Terror Exercises*, HA'ARETZ, Nov. 18, 2004,

Palestine to live up to its commitment to maintain peace for Israel could result in direct U.S. military intervention. Israel might balk at such an arrangement as compromising its right to use military force in self-defense in any way that it sees fit, without approval from other nations.[208] But even in the absence of a formal security relationship, Israel depends heavily upon U.S. goodwill and is constrained in its actions by its desire not to risk alienating its most important supporter. Throughout 2001, the Israeli military refrained from entering Palestinian-controlled areas or otherwise retaliating against terror attacks. The United States clearly demanded the policy, and it relented only after the wave of suicide bombings continued and Arafat refused to make any effort to stop or punish them.[209]

Any specific land-for-peace arrangement would almost surely require Palestine to compromise its demand for the right of return to Israel of all refugees from the 1948 war and their descendants, a step that Arafat consistently refused to take.[210] For some Palestinians who reject the concept of land for peace, the refugee issue has little to do with the status of the refugees themselves and much to do with seeking the destruction of the Jewish state through demography.[211] But for other Palestinians, the demand of

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http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml. It would be bad enough for Palestine to face retribution from Israel and the United States in the event of terrorist activities; Palestine would be even worse off were it also to face military and economic pressure from NATO. To be sure, there is no assurance that NATO members, which might be generally hostile to Israel, would respond and support their new member. The possibility of NATO involvement, however, would create great uncertainty for a new Palestinian state seeking to establish itself in the international community.

208. Although the United States has supplied military technology and hardware to Israel since the early 1960s, it has never sent soldiers to fight on Israel's behalf. *See* Douglas Little, *The Making of a Special Relationship: The United States and Israel, 1957-1968*, 25 INT'L. J. MIDDLE EAST STUD. 563 (1993); *see also* WILLIAM B. QUANDT, DECADE OF DECISIONS: AMERICAN POLICY TOWARD THE ARAB-ISRAELI CONFLICT, 1967–1976 (1977). Israel, for its part, has jealously guarded the autonomy of its military. *See, e.g.*, WARREN BASS, SUPPORT ANY FRIEND: KENNEDY'S MIDDLE EAST AND THE MAKING OF THE U.S.-ISRAEL ALLIANCE 186-238, 251-53 (2003) (explaining that Israel pursued a nuclear weapons program despite opposition from and possible angering of the United States).

209. *See* Eric Silver, *Bush Withholds PA Funding, Reassesses Attitude to Arafat*, JERUSALEM REP., Feb. 11, 2002, at 5; *see also* Ehud Ya'ari, *Neighborhood Watch: Three Cheers for the Spooks*, JERUSALEM REP., May 20, 2002, at 30 (noting that Israeli intelligence services uncovered evidence of Arafat's support of terrorism, which the United States and some European states found persuasive).

210. The claims of some commentators, notably Robert Malley and Hussein Agha, that Arafat was simply looking for a proper rhetorical formula to do so, both at Camp David and upon receiving the Clinton Plan, *see* Malley & Agha, *supra* note 13, simply do not bear scrutiny. Arafat consistently refused even to negotiate on the issue, and refused to issue a counterproposal. If he was truly looking for a suitable formula, he could have suggested one himself. His only statements on the matter suggest that he insisted on adherence to General Assembly Resolution 194, which is a non-starter from the Israeli or the American standpoint, since it has arguably been superseded by Security Council Resolutions 242 and 338. Even more recently, Arafat pointedly refused to endorse the Geneva Accord. *See* Arnon Regular et al., *supra* note 9. It is difficult to argue, then, that Arafat was actually trying to reach an agreement on the issue.

211. *See, e.g.*, Fouad Ajami, *Arafat's War*, WALL ST. J., Mar. 29, 2002, at A12:

> [Arafat] was offered statehood some 18 months ago. He walked away from it and unleashed a phantom of incalculable power: the Right of Return, a claim not on the West Bank and Gaza, but on Jaffa and Haifa and Galilee, a way, insinuating and understood by his people and by Arabs beyond, of contesting Israel's very existence and statehood.
>
> An old hard-liner of Mr. Arafat's entourage, Farouk Kaddoumi, a man who in the nature of such titles and honorifics, passes himself off as the foreign minister of Mr. Arafat, cut to the heart of the matter in recent days: "The Right of Return of the refugees to Haifa and Jaffa," he said on the eve of the Arab summit as he met with the leader of Hezbollah (the Party of God) in Lebanon, "is more important than statehood." With this,

the right of return is rooted in a concern for the property or dignitary rights of the refugees,[212] which could be addressed by means other than repatriation. By offering side payments to the refugees as part of a peace proposal, the United States, hopefully with the help of other nations, could significantly increase the value of a peace agreement for Palestine by finding a way to honor these dignitary rights without actual settlement in Israel.

The United States could significantly increase the value of a land-for-peace agreement to Palestine by offering permanent residency to all Palestinians who fled the region during the 1948 conflict and remain refugees to this day. Such a gesture would not create a significant burden for the United States because most of these Palestinians are in fact not refugees at all under international law: they either live in the West Bank and Gaza (thus making them internally displaced persons, not refugees), have accepted citizenship in other countries (most notably Jordan), or are the descendants of those who fled Israel.[213] As a symbolic matter, however, such an offer would be quite significant because it would essentially privilege the Palestinian refugee question above other international humanitarian efforts, giving special recognition to the plight of Palestinian refugees. If Canada and the European Union (EU) were to join the United States and agree to accept other segments of the Palestinian population, land for peace would become even more desirable to Palestine. Quite literally, such an offer is one that hundreds of millions of people around the world would give quite a lot to obtain: in its wake, no one would be able to say that the world had ignored or dismissed the predicament of the Palestinians.

b.   *Sticks*

There are, of course, two ways that the United States can maximize the likelihood that its peace proposal would fall within a bargaining zone lying between the parties' reservation points. In addition to maximizing the value to each party of its specific land-for-peace proposal, a U.S. initiative should include an attempt to reduce the value to Israel and Palestine of pursuing their BATNAs of continued warfare. Specifically, the United States should threaten to undermine the political and economic bases of Israel and Palestine if they refuse to agree to the U.S.-backed peace initiative.[214]

For the United States, this task is far easier in regard to Israel. The Jewish state receives more U.S. foreign aid than any other country: $2.8

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the logic of things is laid bare: Whatever the summiteers wish and say, a foul wind blows through Arab lands, a conviction has taken root in the popular Arab imagination that Israel is on the run, that perhaps the verdict of the war of 1948 (not the verdict of the Six-Day War of 1967) could be undone.

212.   This is the argument advanced in George E. Bisharat, *The Power of Apology*, HA'ARETZ, Jan. 2, 2004, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml.

213.   *See* Erik Schechter, *Redefining the Refugees*, JERUSLAEM REP., Jan. 28, 2002, at 22-27 (parsing the differing definitions of refugees and explaining the difference between internally displaced persons and refugees).

214.   As one scholar of international conflict has written, "it is the whip of external pressure and the pain of unacceptable alternatives that drives [international antagonists] to the bargaining table." Rubin, *supra* note 196, at 252.

billion in 2002.[215] This aid subsidizes the Israeli economy and military. If Israel perceived its BATNA to be existence without any U.S. support, it is likely that its reservation point in peace negotiations would drop precipitously.[216] If it is serious about maximizing the likelihood of success of a peace initiative, the United States should commit to drastically slashing or even eliminating its aid to Israel unless Israel accepts the U.S.-sponsored plan. The U.S. president could make such a threat, of course, but its credibility would be immediately questioned. Congress controls the purse strings, and the power of the pro-Israeli political lobby would make it difficult, and perhaps impossible, for the President to follow through if the threat fails to satisfy its objective. To make the threat credible, the President should seek a Congressional resolution at the time the peace proposal is unveiled that makes U.S. aid to Israel contingent on its acceptance of the peace proposal, thus tying Congress' hands.[217] Such a resolution would significantly reduce the value of Israel's BATNA.

Is the idea that the U.S. government might threaten aid reductions to its closest and most reliable ally in the Middle East at all plausible? Although extensive U.S. military and economic aid to Israel seems a bedrock principle of U.S. foreign policy today, U.S. aid has often been made contingent on Israeli cooperation with U.S. peacemaking efforts in the Middle East. Substantial U.S. economic support of Israel did not begin until the early 1970s, when the Nixon administration began using the promise of aid to Israel (as well as Arab states) to encourage Middle East peace agreements.[218] In 1973, that administration threatened that it would look less favorably on future aid requests if Israel did not cooperate with the U.S. attempt to arrange a ceasefire in that year's Yom Kippur War.[219] In 1975, the Ford administration threatened reassessment of its Middle East aid policy—widely viewed as a thinly veiled threat to Israel's annual aid package—should Arab-Israeli disengagement negotiations remain stalled.[220] When the Camp David peace process appeared threatened, President Carter threatened to withhold U.S. aid and political support if Israel did not make concessions.[221] In 1991–1992, President George H.W. Bush made substantial loan guarantees to the Jewish state contingent on Israel freezing the expansion of West Bank settlements, and received congressional support for his policy notwithstanding intensive Israeli lobbying efforts.[222] The loan guarantees were ultimately provided, but not until the hawkish Yitzhak Shamir was replaced as prime minister by Yitzhak Rabin and the latter repudiated the aggressive settlement policy of the

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215. Clyde R. Mark, Congressional Research Service, Middle East: U.S. Foreign Assistance, at 6 (Mar. 28, 2002), http://fpc.state.gov/documents/organization/9190.pdf; James Kitfield, *The Ties That Bind and Constrain*, NAT'L J., Apr. 20, 2002, at 1152, 1152.

216. *Cf.* Ehrenfeld et al., *supra* note 195, at 73 (arguing that conditioning aid to Israel on making concessions to the Palestinians could be effective).

217. *Cf.* THOMAS SCHELLING, THE STRATEGY OF CONFLICT 21-25 (1980) (explaining the benefits of binding one's future action in order to insure that one cannot retreat from a position taken).

218. *See* Lasensky, *supra* note 200, at 212.

219. TOUVAL, *supra* note 1, at 234-35.

220. Lasensky, *supra* note 200, at 214; Saadia Touval, *The Superpowers as Mediators, in* HERDING CATS: MEDIATION IN INTERNATIONAL RELATIONS, *supra* note 196, at 232, 241.

221. TOUVAL, *supra* note 1, at 315.

222. Lasensky, *supra* note 200, at 215-18.

former. [223] President Clinton sought congressional delay of a promised supplemental aid appropriation to Israel in 1999 as a response to Israeli Prime Minister Benjamin Netanyahu's Palestinian policy, a request that was rescinded only after Netanyahu was replaced by Ehud Barak.[224] Despite the close relationship between the United States and Israel, history suggests that making U.S. aid contingent on Israeli acceptance of a U.S.-proposed peace initiative is neither politically impossible nor unprecedented.

U.S. influence over the Palestinians poses far greater problems. Washington should, of course, adopt the same policy concerning Palestine as it would toward Israel and condition all aid to the PA on its agreement to and implementation of the U.S.-sponsored peace plan. The PA is heavily dependent on international assistance,[225] and much of that assistance emanates from the United States. [226] So this commitment would make Palestine's BATNA appear worse than it appears today. Yet the threat of suspending U.S. economic support would have far less of a deleterious effect on Palestine's BATNA than the equivalent threat would have on Israel's BATNA. To begin with, Palestine's standard of living is quite low. The Gross Domestic Product (GDP) of the occupied territories was $4.6 billion in 2000, compared to Israel's GDP of $102.9 billion in 2004.[227] With such a low baseline, Palestine has less to lose from economic pressure. In addition, greater economic deprivation would not be likely to generate the same response from the Palestinian citizenry as it would from the Israeli population. The Palestinian population tends to view economic devastation as the consequence of oppressive Israeli occupation rather than as a result of poor internal leadership.[228]

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223. *Id.*

224. *Id.* at 225.

225. WORLD BANK, FIFTEEN MONTHS—INTIFADA, CLOSURES, AND PALESTINIAN ECONOMIC CRISIS: AN ASSESSMENT (Mar. 18, 2002), *available at* http://lnweb18.worldbank.org/mna/mena.nsf/-Attachments/complete/$File/complete.pdf; *see also* Ehud Ya'ari, First Deal With Anarchy, bitterlemons-international.org, *at* http://www.bitterlemons-international.org/previous.php?opt=1&id=26 (Jan. 29, 2004) ("In many ways the PA has become a pay station whose primary task is to take out loans in order to pay salaries to tens of thousands of officials, security personnel, teachers, etc., many of whom have long since ceased showing up at work.").

226. The United States is the second-largest contributor, having provided roughly $500 million to the PA between 1993 and 1998. Thomas O. Melia, Book Review, *Legislative Politics in the Arab World: the Resurgence of Democratic Institutions*, MIDDLE EAST POL'Y, October 2000, at 187, 187; *see also* Lasenksy, *supra* note 200, at 232 (estimating current U.S. aid at $75-$100 million per year).

227. Palestinian Central Bureau of Statistics, GDP by Expenditure in Palestinian Territories 1994-2000, *at* http://www.pcbs.org/nat_acco/nat_main.aspx; Central Intelligence Agency, *supra* note 182. While we do not vouch for the exact accuracy of the numbers, the general point is still clear: Palestinians have a lot less to lose than Israelis.

228. *Cf.* Shlomo Avineri, Critical and Organic Intellectuals, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl070703ed26.html (July 7, 2003). In this article, Avineri draws on Antonio Gramsci's distinction between "critical" intellectuals, who "speak truth to power," and "organic" intellectuals, who merely repeat the master nationalist narrative. "Hardly ever does one hear a Palestinian intellectual question Palestinian policies, let alone the Palestinian master narrative. If there is criticism of the Palestinian Authority, it is that it is too accommodating to Israel, or that it is corrupt— the latter being a merely generalized accusation." *Id.* Economic collapse brought about by American actions therefore will not result in popular, self-critical re-examination of Palestinian bargaining positions. *See also* FOUAD AJAMI, THE DREAM PALACE OF THE ARABS: A GENERATION'S ODYSSEY 253-312 (1998) (demonstrating how the intellectual opinion-makers in the Arab world resist accommodation with Israel and are more comfortable with revolutionary resistance.). While it is certainly true that one cannot infer popular opinion from the positions of intellectuals, it is also true that "in the eyes of the

Politics are more important than economics to the Palestinians, and in the economic sphere, other sources of assistance are more important to sustaining the value of Palestine's BATNA of continuing hostilities with Israel than what it receives from Washington. For both reasons, the road to worsening Palestine's BATNA runs through Europe.

The EU's contribution to the PA dwarfs that of the United States.[229] To the extent that economic pressure matters, EU cooperation will be absolutely critical to the U.S. effort. Moreover, European diplomacy has proved central to maintaining the Palestinian war effort. Many European countries, notably France, Belgium, and the Scandinavian states, have become increasingly hostile to Israel.[230] The EU has also refused to audit the funds that it gives to the PA, enabling it to funnel such money to terrorist groups for military purposes. European diplomats routinely visited Yasser Arafat while he was alive and continued to back him diplomatically even when events suggested he lacked commitment to reaching a peace agreement.[231]

In this light, it may seem unrealistic to think that the United States could acquire European support for changing the Palestinian BATNA, but several factors suggest otherwise. Not all European countries are hostile to Israel: the Jewish state has received support recently from Eastern Europe, the Netherlands, Italy, and even Germany.[232] Despite the enormous strides made over the last two decades in the direction of European unity, Henry Kissinger's famous quip that Europe has no telephone number[233] remains true: European policy remains constantly shifting depending upon ephemeral

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average Palestinian, intellectuals form one of the most credible sectors of society." Ghassan Khatib, *Very Little Give and Take*, bitterlemons.org, *at* http://www.bitterlemons.org/previous/-bl070703ed26.html (July 7, 2003). It thus stands to reason that this lack of self-criticism among intellectuals should be mirrored in Palestinian society at large.

229. The EU and its individual member states provide 60% of the PA's foreign aid. Nicholas Simon, *Show Us the Money!*, JERUSALEM REP., Mar. 10, 2003, at 34.

230. During the initial outbreak of violence in September 2000, French President Jacques Chirac strongly encouraged Yasser Arafat and refused to condemn Palestinian violence. "Chirac was so supportive of Arafat that the Palestinian leader, already reluctant to finalize an agreement, decided that he could do better by not continuing the talks." RUBIN & RUBIN, *supra* note 13, at 206; *see also* KARSH, *supra* note 13, at 202. France recently threatened to block an EU move to cite Hamas as a terrorist group, saying that it needed "more evidence." Herb Keinon, *France Remains Unconvinced Hamas Should Be Placed on Terror List*, JERUSALEM POST, Aug. 26, 2003, at 2; *see also* Netty C. Gross, *How Bad Could It Get?*, JERUSALEM REP., June 3, 2002, at 14 (stating that the European Parliament voted for sanctions against Israel although they were not adopted by the European Commission); David Horovitz, *Europe Buys the Big Lie*, JERUSALEM REP., May 20, 2002, at 5.

231. *See* Leslie Susser, *supra* note 108, at 12 (the EU maintains strong support of Arafat despite Israeli and American efforts to sideline him). On the European Commission's refusal to audit Arafat's finances, see Igal Avidan, *Time Running Out on Bid for EU Probe of PA Spending*, JERUSALEM REP., Jan. 13, 2003, at 12.

232. *See, e.g.*, Aluf Benn, *Israel Sees Signs of Thaw in EU Relations*, HA'ARETZ, Apr. 7, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml; Adar Primor, *Where Will the Weather Vane Stop?*, HA'ARETZ, Mar. 7, 2003, http://www.haaretz.com/hasen/pages/arch/-ArchSearchEngArt.jhtml.

233. For the quotation, in a particularly pertinent context, see Michael Steinberger, Interview with Samuel Huntington, *So, Are Civilisations at War?*, OBSERVER (London), Oct. 21, 2001, *at* http://observer.guardian.co.uk/islam/story/0,1442,577982,00.html:

> The problem with Islam is the problem Henry Kissinger expressed with regard to Europe:
> 'If I want to call Europe, what number do I call?' If you want to call the Islamic world,
> what number do you call? If there was a dominant power in the Islamic world, you could
> deal with them. Now what you see is the different Islamic groups competing with each
> other.

political coalitions. This means that European support for shifting the Palestinian BATNA can be garnered as long as it is accompanied by a serious overall effort at peacemaking. Palestinian rejection of the non-negotiable U.S. proposal (codified in a Security Council resolution) might provide the necessary background for such support.

That said, the United States could certainly do more to create a united U.S.-European front dedicated to worsening Palestine's BATNA. The Bush administration's decision to invade Iraq alienated many European governments,[234] but this policy decision came on the heels of a series of earlier actions that Europe viewed as contrary to its interests.[235] Many influential Europeans believe that the United States is bent on achieving hegemonic power and thus see little advantage in supporting U.S. proposals.[236] If the United States would compromise on one or two of the issues that divides it from Europe, the administration could likely secure in return commitments from Europe to end support to either disputant that chooses not to accept the land-for-peace proposal.

The value of Palestine's BATNA of continuing its war with Israel rather than accepting a peace agreement depends on its access to political as well as economic support. In recent years, the PA has received critical political backing from, among other countries, one of the closest U.S. allies in the Middle East—Egypt. When Arafat repeatedly rejected the Barak and Clinton peace proposals in 2000, Egyptian President Hosni Mubarak gave Arafat strong and public backing.[237] In support of Palestine and in violation of the 1978 Camp David Accords, Egypt recalled its ambassador from Tel Aviv

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234. Not all European governments opposed the invasion. The United Kingdom, Spain, Italy, Poland, and many Eastern European countries all strongly supported U.S. policy. *See* Jose Maria Aznar et al., *United We Stand*, WALL ST. J., Jan. 30, 2003, at A14 (supporting U.S. policy in Iraq) (the authors are, respectively, the prime ministers of Spain, Portugal, Italy, the United Kingdom, Hungary, Poland, and Denmark. Thus, although Defense Secretary Donald Rumsfeld's dismissal of Franco-German opposition as the remnants of "Old Europe" was simplistic and needlessly inflammatory, it was not wholly without support. *See Outrage at "Old Europe" Remarks*, BBC NEWS (Jan. 23, 2003), *at* http://news.bbc.co.uk/2/hi/europe/2687403.stm; *Rumsfeld Dismisses "Old Europe" Defiance on Iraq*, CBC NEWS, *at* http://www.cbc.ca/stories/2003/01/23/rumsfeld030123 (Jan. 23, 2003).

235. Examples include American opposition to the establishment of the International Criminal Court, opposition to European-supported approaches to climate change such as the Kyoto Treaty, American steel and textile subsidies, and abrogation of the Antiballistic Missile (ABM) treaty. This is not to suggest that the United States is alone to blame for the trans-Atlantic rift. For an incisive analysis on this point, see Thomas L. Friedman, *Our War with France*, N.Y. TIMES, Sept. 18, 2003, at A31 ("It's time we Americans came to terms with something: France is not just our annoying ally. It is not just our jealous rival. France is becoming our enemy.").

236. The truth of European suspicions is peripheral to our analysis. The point is that Europe will be more likely to cooperate with the United States if it receives policy concessions from Washington. The European attitude is most closely associated with former French Foreign Minister Hubert Vedrine, who has expressed anger over what he calls U.S. "hyperpower." *See generally* HUBERT VEDRINE & DOMINIQUE MOISI, FRANCE IN AN AGE OF GLOBALIZATION (Philip H. Gordon trans., 2001). *See also Japan, France to Join Forces Against U.S. "Hyperpower,"'* GLOBAL INTELLIGENCE UPDATE, Dec. 17, 1999, *at* http://www.atimes.com/global-econ/AL18Dj01.html:

> The unbridled nature of US power has rankled France more than any other nation. Once a world power, French influence is overshadowed by Hollywood, McDonalds, the US economy—and Washington's military muscle. Jospin, President Jacques Chirac and Foreign Minister Hubert Vedrine have in the last month repeatedly condemned U.S. "hyperpower" and stressed the importance of a multi-polar world.

237. *See* RUBIN & RUBIN, *supra* note 13, at 200.

early in the intifada.[238] In 2001, the Egyptian government issued postage stamps with the image of a Palestinian boy allegedly killed by the IDF.[239]

The United States can and should ensure that Egypt supports the U.S. land-for-peace proposal and ends its support of Palestine if Palestine rejects it. Egypt currently receives just under $2 billion in U.S. aid each year, second only to Israel in terms of U.S. foreign assistance.[240] Moreover, Egypt enjoys this level of assistance as a result of a deal struck by Anwar Sadat to switch sides in the Cold War.[241] In other words, this support is a historical artifact irrelevant to current U.S. foreign policy concerns. The United States must ensure that continuation of this level of aid is conditional on Egypt's assistance in assuring the success of a U.S.-sponsored peace initiative.

Although the goal of weakening Palestine's BATNA would be aided substantially by enlisting European and Arab assistance, the United States can directly reduce the value of Palestine's BATNA without the support of its allies through its political influence over Israel's political and military responses to terrorist attacks that emanate from the Territories. First, the United States should make it clear that if Palestine rejects its land-for-peace proposal, Washington will refrain from using its influence to restrain Israel's response to future terrorist attacks,[242] an influence that undoubtedly keeps Israel's military actions more measured than they otherwise would be. Second, the United States should make it clear that a Palestinian rejection of its proposal will result in U.S. political support—including U.S. vetoes of future U.N. Security Council resolutions—for feared Israeli plans to effectively redraw the border between Israel and the West Bank unilaterally, both by withdrawing from small parts of the West Bank while reinforcing Israeli control of the settlements and adjacent land, and by continuing to construct Israel's controversial, partially completed security barrier far to the east of the Green Line.[243]

C. *Preventing Internal Divisions from Blocking Agreement*

We believe that by crafting a specific land-for-peace proposal that serves as many interests of both parties as possible, accompanying that proposal with

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238. *Egypt Recalls Ambassador from Israel*, GUARDIAN (London), Nov. 1, 2000, *at* http://www.guardian.co.uk/israel/Story/0,2763,400871,00.html.

239. *See* Palestine Nat'l Info. Ctr., World Reactions to the Latest Developments in the Palestinian Territories, http://www.pnic.gov.ps/arabic/quds/eng/reactions/2001/2001_1/e_reaction_26.-html (Jan. 26, 2001).

240. *See* Jim Lobe, *U.S.: Bush's Foreign Aid Request Takes on Cold War Cast*, INTER PRESS SERVICE, Feb. 3, 2004, *available at* http://www.aegis.com/news/ips/2004/IP040205.html. The Congressional Research Service publishes a more comprehensive listing. *See* Mark, *supra* note 215, at 6.

241. *See, e.g.*, AJAMI, *supra* note 228, at 194-95.

242. An analogy might be drawn to tactics used by the United States in its attempts to forge a treaty to end the Bosnian War of the early 1990s. The United States attempted to bring the Bosnian Serbs to the bargaining table by unleashing Bosnian Muslim and Croat military offensives, *see* Saadia Touval, *Coercive Mediation on the Road to Dayton*, 1 INT'L NEGOTIATION 547, 557 (1996), thus "demonstrating to the Serbs that their defiance would be severely punished." *Id.* at 559. At the Dayton peace talks, the United States warned the Bosnian Muslims that if that group did not demonstrate flexibility, "the U.S. would abandon them, that they [would] be on their own." *Id.* at 566.

243. Further background and discussion of the security fence, along with an argument that a U.S.-backed peace initiative should include affirmative support for the construction of the fence but not necessarily along the route now planned, can be found *infra* at Part VI.C.2.b.ii.

offers of side payments and other forms of U.S. assistance if it is accepted, offering that proposal on a strictly non-negotiable basis, and taking steps to worsen the quality of both Israel's and Palestine's BATNA of continuing the conflict, the United States can create a situation in which agreeing to the terms of that proposal will dominate any other option available to either side. This scenario will not guarantee that the proposed agreement is signed and implemented, however. As Part IV discussed, two very different types of internal divisions within one negotiating party can prevent the consummation of an agreement that is desirable for both sides: the party can be represented by a faithless agent, or a minority faction can have the power to block an agreement desired by the majority.

In Israel, the ideologically driven and politically powerful settler community, though relatively small in number, has long set the agenda within the dominant Likud party.[244] It has also managed to extract significant and extremely costly benefits from the central government, even during times of economic hardship and national political peril.[245] Recently, settler opposition led Sharon's own Likud party to reject his proposal for unilateral disengagement from Gaza, and threatened his hold on the governing coalition.[246] Any U.S. peace initiative needs to take steps to minimize the likelihood that minority preferences could control Israeli policy concerning a peace agreement to the detriment of Israel as a whole.

Internal divisions on the Palestinian side present an even greater threat to the achievement of a mutually beneficial peace agreement. The Bush administration's Middle East policy attempted to address both the agency and blocking-minority problems with a single initiative: creating the office of the Palestinian prime minister. Although this initiative failed miserably, its ultimate goal—the replacement of Arafat as Palestinian leader—was recently achieved by Arafat's death. However, if internal divisions within the Palestinian nation in the form of a blocking minority are a primary roadblock to a peace agreement, the Bush approach shows no signs of surmounting it in the near term, and a new initiative is needed.

244. *See, e.g.,* Yossi Alpher, Eighteen More Months At Least, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl290903ed37.html (Sept. 29, 2003) (noting that while Israel has the ability to deal with its major threats, "the Jewish body politic appears to be paralyzed by fear" of, inter alia, "angry settlers and their rabbis").

245. *See The Price of the Settlements,* HA'ARETZ, Sept. 26, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml (noting that the Israeli government spends 2.5 billion shekels per year on the settlements and 40,000 shekels per settler family over and above the normal funds spent per citizen); Moti Bassok, *Decades of Tax Breaks for the Settler Population,* HA'ARETZ, Sept. 26, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.-jhtml. The settlers have, in fact, brilliantly used their leverage between the larger parties to extract enormous benefits out of proportion to their numbers. In a classic article, Albert Hirschmann demonstrated the underlying logic of this strategic behavior. *See* Albert O. Hirschmann, *The Stability of Neutralism: A Geometric Note, in* ECONOMIC THEORIES OF INTERNATIONAL POLITICS 292-99 (Bruce M. Russett ed., 1968) (showing how "Thirdonia" can extract large payments out of "Usonia" and "Russonia").

246. *See infra* Part V.C.2.a.

1. *The State of the Roadblock: The Accidental Success of the "Replace Arafat" Strategy*

Early in his presidency, George W. Bush concluded that Yasser Arafat was himself a roadblock to a negotiated peace, both because the Palestinian leader was not willing to approve a land-for-peace agreement and because he would never use the full power of his office to stop terrorism and thus ensure that a Palestinian minority could not prevent an agreement.[247] This belief created hope that a Palestinian leader more committed to peace would solve not only the agency problem but the blocking minority problem as well.

Accordingly, Bush initiated what might be called the "replace Arafat"[248] strategy, according to which the President pledged that no peace plan would move forward unless the Palestinians adopted leadership that rejected terror— a thinly veiled swipe at the Palestinian leader himself.[249] For a brief time, the policy appeared to succeed by creating enough pressure that Arafat reluctantly appointed the moderate Abbas as Palestinian prime minister in 2003.

With Abbas installed and pledging that a Palestinian state would be a peaceful neighbor to Israel,[250] Bush moved quickly to reengage the United States in the Middle East peace process by issuing the Road Map. Just months later, however, Abbas and Arafat were no longer on speaking terms, and Abbas soon thereafter resigned his position, claiming Arafat had undermined his authority.[251]

He was right. Although Abbas held the title of prime minister, Arafat remained the president of the PA and retained control over most of the PA's multilayered security apparatus through the Palestinian National Security Council, a group of hand-picked loyalists dependent upon Arafat for salaries and patronage.[252] Abbas convinced the Palestinian rejectionist groups to agree

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247. ROSS, *supra* note 66, at 784 ("President Bush . . . believe[d] that we had indulged Arafat too much.").

248. The term is ours, not President Bush's.

249. Muravchick, *supra* note 149, at 28 ("President Bush's landmark speech of June 24, 2002, called for 'a new and different Palestinian leadership . . . not compromised by terror.'"); *see also* Steven R. Weisman, *Bush Rebukes Israel for Attack in Gaza*, N.Y. TIMES, June 11, 2003, at A1 ("Mr. Bush decreed that no one in the administration would ever deal with Mr. Arafat.").

250. Elisabeth Bumiller, *Israel and Palestinians Say They Will Take First Steps in Quest for Mideast Peace*, N.Y. TIMES, June 5, 2003, at A1 ("In his statement, Mr. Abbas promised 'a complete end to violence and terrorism,' as well as the collection of illegal weapons and a stop to any encouragement of violence by Palestinian institutions—apparently a reference to schools and the news media."). The administration also provided diplomatic pressure. Matt Rees, *Who's the No. 1 Palestinian Now?*, TIME, June 9, 2003, at 42; Weisman, *supra* note 249.

251. *See Palestinian Prime Minister Abbas Resigns*, CNN, (Sept. 6, 2003), *at* http://www.cnn.com/2003/WORLD/meast/09/06/mideast (last visited Dec. 12, 2003) (Abbas cited "lack of support for the government's policies; harsh and dangerous domestic incitement against the government and the obstruction of its functions, and unjustified accusations that the government and the prime minister had the motive of either having control over everything or nothing.").

252. Fred Barnes, *Time to Hit the Road Map?*, DAILY STANDARD, Apr. 24, 2003, *at* http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=2593 ("Arafat has lost only a bit of his power. He retains a virtual veto over any steps Abbas may want to take, plus the right to fire Abbas at any time, Which means that the chief Palestinian impediment to peace, Arafat, is still in a position to impede."); Indyk, *supra* note 115, at 51 ("Arafat will do everything he can to undermine [Abbas] in order to retain power."); Rees, *supra* note 250, at 42 ("Arafat is working behind the scenes— with some success—to undermine the new Prime Minister."); Stokes, *supra* note 125, at 1003 ("[T]he

to a temporary ceasefire with Israel in the summer of 2003.[253] But when that ceasefire collapsed in mid-summer, Abbas shied away from a military confrontation with the militants, presumably because without Arafat's support he lacked both the military muscle and popular political backing to prevail in such a confrontation.[254]

According to the Road Map, the PA must reduce its number of security services to three, all of which must answer only to the Interior Minister, who in turn must answer only to the prime minister.[255] Arafat ignored this requirement during Abbas's tenure as prime minister. After appointing Parliament speaker Ahmed Queria, also known as Abu Ala, to replace Abbas, Arafat continued to ignore the Road Map's clear mandate,[256] rejecting Queria's nominee for the office of Interior Minister and maintaining firm control of the security services.[257] Not long after his appointment, Queria resigned his post and agreed to rescind his resignation only after Arafat promised to reform the Palestinian security services and give more control to Queria.[258] Like many of Arafat's promises, however, this one remained largely unfulfilled.[259]

Mortality, of course, achieved the tactical goal that U.S. policy could not—the removal of Yasser Arafat as agent of Palestine. Although this might move the parties one step closer to agreement, it will not necessarily overcome even the roadblock of internal division. The "replace Arafat" strategy was premised implicitly on two assumptions. The first was that a Palestinian leader who supported the concept of land for peace would exert the power of the PA to crack down on the rejectionist factions. The second was that the PA has the power to stop terrorism and thus prevent Palestinian rejectionists from exercising a de facto veto over a peace agreement by

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law creating [the Prime Ministry] left Arafat in charge of security in the Palestinian Authority, raising doubts about [Abbas's] ultimate authority.").

253. *See generally* James Bennet & Greg Myre, *Israeli Forces Withdrawing from Gaza*, N.Y. TIMES, June 30, 2003, at A1 ("Hamas and Islamic Jihad, the militant Palestinian groups [sic] announced a three-month halt to attacks.").

254. *Cf.* James Bennet, *Accord Reported on Israeli Pullout from Gaza Areas*, N.Y. TIMES, June 28, 2003, at A1 ("Mr. Abbas has argued that he needs to extract concessions from Israel . . . before he will be politically strong enough to confront Hamas . . . ."); Ehud Ya'ari, *Riding Low*, JERUSALEM REP., June 30, 2003, at 23 ("The moment he gave his word that he would not attempt to harm Hamas, even if they continued with their terror attacks, Abu Mazen lost one of his main instruments of leverage over the organization and was left as nothing more than a lobbyist for ending the spiral of violence.").

255. *See* U.S. Dept. of State, Press Statement, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israel-Palestinian Conflict (Apr. 30, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/20062.htm ("All Palestinian security organizations are consolidated into three services reporting to an empowered Interior Minister.").

256. *See* Yossi Alpher, Strategy and Local Politics, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl101103ed41.html (Nov. 10, 2003) ("In Ramallah, Palestinian leader Yasir Arafat is again fully in control, having beat back the reformers. He and his Fatah Central Committee cronies retain a strategic approach that ultimately relies on violence . . . .").

257. *See* Isabel Kershner, *Separation Anxiety*, JERUSALEM REP., Sept. 6, 2004, at 22-23.

258. *See, e.g.*, Greg Myre, *Arafat Agrees with Premier on Ending Their Standoff*, N.Y. TIMES, July 28, 2004, at A9.

259. *See* Kershner, *supra* note 257, at 22-23 ("[O]nce more, Arafat's [star] appears to be the strongest in the constellation. 'It seems that the president has prevailed,' says Ziad Abu Amr, a Palestinian Legislative Council member and reform advocate from Gaza City. 'He managed to get away with his new appointments, and reasserted his authority vis-à-vis his security services.'").

continuing to make war on Israel. The second premise remains untested because, up until Arafat's death, the first proved false.

It is therefore critical to recognize that even if Abbas, the newly elected president of the PA, uses all the tools at his disposal, it remains unclear whether the PA, acting alone, can prevent Palestinian rejectionists from routinely launching terrorist attacks against Israel and thus effectively blocking the implementation of any land-for-peace agreement. Consequently, a U.S. policy designed to maximize the likelihood of helping the disputants reach a peace agreement (in addition to providing a specific, non-negotiable set of peace agreement terms and a series of strong measures to establish or widen the bargaining zone) must consciously include efforts designed to disempower Palestinian rejectionists and thus prevent internal divisions within Palestine from blocking implementation of that agreement. A U.S.-sponsored peace initiative should also take seriously the possibility that Israeli rejectionists can wield their influence in Sharon's Likud party to block the implementation of a land-for-peace agreement.

2. *Policy Initiative: Disempower Rejectionist Groups*

No U.S. policy that hopes to forge peace in the Holy Land can succeed if the leaders of Israel or Palestine do not have the power to commit their internal constituencies to the terms of the deal proposed.[260] As discussed in Part IV.C, a threat posed by a minority constituency to the adoption or implementation of a negotiated agreement can be confronted by co-opting or disempowering those constituencies. Carefully drafted, the terms of a specific land-for-peace agreement could co-opt many opponents to peace, winning their acquiescence if not their active support. For example, if the specific territorial division permits Israel to retain some Jewish settlements located near the Green Line and in the Jerusalem suburbs, perhaps in return for some Israeli territory elsewhere, many settlers would no doubt support the agreement. If the proposed terms also provide sufficient rights to Palestinian refugees—whether in terms of very limited opportunities to immigrate to Israel, financial compensation, citizenship in third countries, or some combination of these—many Palestinians who support rejectionist groups such as Hamas and Palestinian Islamic Jihad might reassess their opposition to peace.

This said, it would be unrealistic to believe that, whatever the specific terms of a land-for-peace agreement, all of the Israelis who believe that the land between the Mediterranean and the Jordan River must be entirely Jewish and all of the Palestinians who believe the same land must be entirely Arab could ever be assuaged. Consequently, a U.S. peace initiative should focus on disempowering these groups—that is, making it impossible for their opposition to block the implementation of a land-for-peace agreement.

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260. *Cf.* Lawrence Susskind & Eileen Babbit, *Overcoming Obstacles to Effective Mediation of International Disputes*, *in* MEDIATION IN INTERNATIONAL RELATIONS, *supra* note 196, at 30, 33 (noting that a condition of mediation effectiveness is that party representatives have "authority to speak for their members and to commit to a course of action").

a. *Detaching the Settlers*

For the past thirty years, Israeli settlers and their supporters have become a key component—perhaps the key component—in the power base of Ariel Sharon's Likud party. [261] These Israelis provide Likud's core constituency, and the Party reciprocates by providing enormous government benefits to the settler movement. [262] The intifada, among other problems, has caused Israel's worst economic crisis since the early 1950s, [263] yet the government continues to spend billions of shekels on settlement development at the expense of education, health care, and economic development within pre-1967 Israel. [264] The IDF spend scarce resources defending militarily indefensible positions in the settlements, risking the lives of hundreds of soldiers and doing little to protect the vast majority of Israel's citizens from terrorism. [265]

Sharon's plan to unilaterally abandon the settlements in Gaza enjoys broad support among the Israeli public, [266] and polls show that most Israelis support the concept of dismantling most of the West Bank settlements as part of a peace agreement. [267] The opposition of settlers, however, could lead to Israeli rejection of a land-for-peace proposal. Recent events illustrate the political power that defenders of the settlements have in Israel, despite their minority status. When Sharon proposed withdrawal from Gaza, the membership of his Likud party voted overwhelmingly to reject the plan, embarrassing the prime minister and demonstrating that the settlers' political power is much greater than suggested by the four percent of the Israeli population that they comprise. [268]

Any U.S. initiative should drive a wedge between the settlers and both their supporters inside the Green Line and the rest of the Israeli population. U.S. efforts to reduce the quality of Israel's BATNA by threatening to withhold economic, military, and political support should Israel reject the proposed agreement, as explained above, might have this effect. According to one prominent scholar of the Arab-Israeli conflict, Israeli prime ministers

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261. For a background on the settler movement and its role in the Likud, see Isabel Kershner, *Tearing Ourselves Apart*, JERUSALEM REP., Nov. 18, 2002, at 12. Over the last four years, right-wing settler movements have become more influential within the Likud party. *See* Leslie Susser, *The Infiltrators*, JERUSALEM REP., Dec. 2, 2002, at 34.

262. *See, e.g.*, Gerald M. Steinberg, Israel's Best Option, bitterlemons.org, *at* http://www.bitterlemons.org/previous/bl090204ed5.html (Feb. 9, 2004) (noting that Sharon's "long-term core constituency" is the settler population located in "Judea, Samaria and Gaza").

263. *See, e.g.*, Pinhas Landau, *Needed: New Ideas, New People*, JERUSALEM REP., Dec. 16, 2002, at 39; Leslie Susser et al., *Six Key Challenges for the Next Government*, JERUSALEM REP., Feb. 10, 2003, at 15-16 (noting that Israel has a 10.4% unemployment rate, two years of negative economic growth, 7% inflation, and the West's largest rich-poor gap).

264. *Cf. The Price of the Settlements*, *supra* note 245; Bassok, *supra* note 245.

265. *Cf. The Price of the Settlements*, *supra* note 245 (noting that the IDF spend 4 billion shekels each year defending the settlements).

266. *See* Greg Myre, *Netanyahu Joins Call for Referendum on Pullout of Gaza Settlers*, N.Y. TIMES, Sept. 14, 2004, at A5.

267. *See, e.g.*, James Bennet, *Israel Coalition Nears Collapse in Budget Fight*, N.Y. TIMES, Oct. 30, 2002, at A1 (citing an Israeli poll finding that 78% of Israelis surveyed would favor dismantling the settlements); Everts, *supra* note 205, at 673 (citing a Ha'aretz report for the proposition that "a majority of Israelis still favour removing most settlements in the context of a peace deal").

268. *Cf.* Avnery, *supra* note 45.

dating back to David Ben-Gurion and Golda Meir have justified making concessions in negotiations with their Arab neighbors by claiming they were "necessitated by threatening notes from American presidents."[269] In addition, the U.S.-sponsored land-for-peace initiative should include as one element a large economic aid package to Israel for use in dismantling the settlements on land that would, under the proposal's terms, be part of the state of Palestine.[270] Withdrawing from the settlements would be tremendously expensive—the cost of withdrawing from just the small Gaza settlements is expected to exceed $1 billion, including relocation payments.[271] It would be particularly difficult for Sharon's government to reject a U.S.-sponsored agreement if an obvious and immediate consequence of doing so would be to turn down a large subsidy to dismantle settlements and instead sacrifice services to Israelis living within the Green Line in order to preserve the settlements.[272]

> b.   *Controlling the Capacity of Palestinian Rejectionist Groups*

As we asserted above, any U.S.-sponsored peace agreement should include a specific warranty committing the PA to use all its available resources to dismantle the infrastructure of terrorist organizations within the Territories.[273] However, relying on the PA alone to control terrorism and make a land-for-peace agreement both possible and enduring has failed thus far, and its future prospects remain uncertain at best. To maximize the chances of success, a U.S. peace initiative should include a multi-pronged approach to controlling terrorism by Palestinian rejectionists, with commitments of the Palestinian security forces only part of that approach. In addition, the United States needs to exert direct political pressure on Arab and Muslim nations that provide economic and military assistance for Palestinian rejectionists to eliminate (or, more likely, reduce) that assistance, and to support Israel's construction of a separation barrier to provide a level of defensive protection against terrorist attacks.[274]

> i.   *External Funding of Terror*

Although Arab and Islamic nations historically have provided little assistance to the PA,[275] they have strongly supported the Palestinian

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269. TOUVAL, *supra* note 1, at 269-70.

270. As we suggested above, a U.S.-sponsored land-for-peace agreement might permit Israel to retain some settlement blocks that are located close to the Green Line, perhaps in return for territorial concessions elsewhere. *See supra* Part VI.A.2. Any land-for-peace proposal, however, would likely call on Israel to evacuate a large number of settlements and turn the land over to Palestine.

271. Greg Myre, *Israeli Panel Approves Payout for Settlers Who Leave Gaza Strip*, N.Y. TIMES, Sept. 15, 2004, at A5.

272. By one estimate, relocating all Jewish settlers into Israel would cost $6 billion. Dan Ephron, *Middle East: The Sky's the Limit*, NEWSWEEK, May 27, 2002, at 44, 46.

273. *See supra* Part VI.B.2.a.

274. *See infra* Part VI.C.2.b.2.

275. *See* Peter Hansen, Statement to Council of Arab Ministers of Foreign Affairs, League of Arab States (Mar. 12, 2001), http://www.un.org/unrwa/news/statements/arab-mar01.html:

> Ever since 1987, this esteemed Council's resolution no. 4645 has called on Arab
> countries to increase their contributions to the Agency's annual budget to the level of

rejectionists with financial assistance for Hamas and Palestinian Islamic Jihad, military technology and expertise, training facilities, and logistical help in smuggling weapons and explosives into the Palestinian territories.[276]

In launching the Road Map, President Bush urged Arab and Islamic nations to cut off all sources of financial and military support for the militant Palestinian factions that promote terrorism.[277] Moral pressure has not been sufficient, however, and is not likely to be. More diplomatic arm-twisting is necessary—arm-twisting that can be attempted only by the United States, in light of the importance that the Arab states attach to their ties with Washington.[278]

To be fair, the administration has taken some steps in this direction. The U.S. invasion of Iraq had the side effect of reducing the ability of Palestinian rejectionists to foment terror by eliminating one regime that had provided economic support for Palestinian extremists.[279] In the wake of the Iraq war, Pentagon sources hinted that the United States believes Syria assisted Saddam Hussein [280] and tacitly threatened that Syria's Ba'athist regime, long a supporter of Palestinian rejectionists, might suffer the same fate that befell Saddam if its behavior did not improve.[281] Washington also protected Israel diplomatically when its air force raided Palestinian terrorist training camps inside Syria in 2003,[282] and dropped its opposition to tough sanctions against Damascus.[283] Syria should know that any further sponsorship of Palestinian

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7.8% of UNRWA's annual budget. In 2000, total Arab contributions to UNRWA's budget were 1.9% only. Having the privilege and honour to be here on behalf the 3.8 million refugees we serve and the 22,000 employees we employ, I sincerely hope that your esteemed Council will find a way to implement its 14 year old resolution which will bring us much closer to making ends meet this year and for as long as our services are required.

The official website of the United Nations Relief and Works Agency (UNRWA) lists pledges from donor states, although it does not break down actual contributions. Still, it shows that Arab states' actual support for UNRWA is negligible, paling before EU and Scandinavian contributions, and distantly behind that of the United States. *See* United Nations Relief and Works Agency, *How UNRWA Is Funded?*, http://www.un.org/unrwa/finances/index.html (last visited Dec. 12, 2004).

276. We use the somewhat inelegant phrase "Arab and Islamic nations" here primarily because the largest regional (and perhaps global) supporter of Islamic radicalism and Palestinian extremism is Iran, a non-Arab state.

277. Sofaer, *supra* note 112, at 25 ("President Bush made clear where he stands in his speech of June 24, 2002: 'Every nation actually committed to peace must block the shipment of Iranian supplies to [terrorist] groups and oppose regimes that promote terror, like Iraq. And Syria must choose the right side in the war on terror by closing terrorist camps and expelling terrorist organizations.'").

278. *See generally* FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD 151 (2003) ("[E]very country [in the Middle East] views its relations with Washington as the most critical tie they have.").

279. *See, e.g.*, Mohammed Daraghmeh, *Iraq Boosts Suicide Payment*, ASSOCIATED PRESS, Apr. 3, 2002, http://www.firstcoastnews.com/news/2002-04-03/usw_iraq.asp.

280. *See* Bob Drogin and Jeffrey Fleishman, *Banned Arms Flowed Into Iraq Through Syrian Firm*, L.A. TIMES, Dec. 30, 2003, at A1.

281. *See generally* Alpher, *supra* note 111.

282. Washington ensured that Israel would not receive U.N. sanctions for the raid and blocked a Security Council Resolution condemning it. *See* Harel, *supra* note 111.

283. *See* Syria Accountability and Lebanese Sovereignty Restoration Act, 22 U.S.C.S. § 2151 (West Supp. 2004). The Act empowers the President to impose sanctions on Syria as well as to ban the export of weapons and weapons-ready materials to Syria. The Act offers the President six further sanctions, including a ban on all U.S. exports to Syria except food and medicine, restrictions on Syrian diplomats in Washington and at the United Nations to a 25-mile radius of that city and that building, and

rejectionists would substantially worsen U.S.-Syrian relations and put the Damascus regime at risk.

Saudi Arabia provides significant economic and moral support to Palestinian rejectionism. Prominent elements of the Saudi royal family and Wahhabi clerics closely tied to the regime provide crucial financial and logistical support to Hamas and other radical Palestinian groups.[284] Saudi television has held telethons to support families of Palestinian suicide bombers,[285] and the network of Saudi religious institutions throughout the world serves as an international funding conduit for Palestinian terrorism.[286] Although the U.S. government has long been silent on the subject of Saudi support for Palestinian rejectionists,[287] as part of a U.S.-sponsored peace initiative, Washington should reassess its relationship with the House of Saud. The destruction of Saddam Hussein's regime has given the United States more strategic leverage than it has had in the past: Washington no longer needs to base troops in Saudi Arabia to protect the Kingdom's oil supplies, and it no longer needs to buttress Saudi military forces to protect against Saddam's aggression. Thus, Washington should condition ongoing military aid to Riyadh on its cessation of funding of Palestinian rejectionist groups that would seek to block a peace agreement or sabotage its implementation.[288]

The Saudi role in Middle Eastern politics is more complex than merely as a backer of Palestinian rejectionism. Indeed, our proposal for a U.S. non-

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a ban on all Syrian-owned or operated aircraft from taking off, landing, or flying over the United States. *Id.*

284. *See, e.g.,* Simon Henderson, *The Saudi Way,* WALL ST. J., Aug. 12, 2002, at A10 (noting that the Saudi royal family continues to ensure that money will flow to Hamas); Matthew Levitt, Wash. Inst. for Near East Pol'y, *Combating Terrorist Financing, Despite the Saudis,* POLICYWATCH NO. 673, *at* http://www.washingtoninstitute.org/watch/policywatch/policywatch2002/673.htm (Nov. 1, 2002). This is true not only for Palestinian terrorism but for radical Islamist terrorist groups worldwide, including Al Qaeda. *See, e.g.,* Glenn R. Simpson, *Al Qaeda List Points to Saudi Elite,* WALL ST. J., Mar. 18, 2003, at A7.

285. *See, e.g.,* Press Release, Office of Sen. Charles Schumer (D-NY), Schumer Urges Saudis to Fire Minister in Charge of Saudi Anti-Terrorism Efforts (July 31, 2003), *at* http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR01912.html; *Documents: Saudis Paid Bombers' Families,* Fox News Channel (Apr. 26, 2002), *available at* http://www.foxnews.com/printer_friendly_story/0,3566,51252,00.html.

286. *See, e.g.,* Daniel McGrory, *Militants Outside Control of Mosques Target Teenagers,* TIMES (London), Dec. 28, 2001, LEXIS, News Library, Times File; Fareed Zakaria, *The Politics of Rage: Why Do They Hate Us?,* NEWSWEEK, Oct. 15, 2001, at 22, 30:

> Disoriented young men, with one foot in the old world and another in the new, now look for a purer, simpler alternative. Fundamentalism searches for such people everywhere; it, too, has been globalized. One can now find men in Indonesia who regard the Palestinian cause as their own. Twenty years ago an Indonesian Muslim would barely have known where Palestine was.

See also Interview with Vali Nasr, Associate Professor of Political Science, University of San Diego, *PBS—Frontline: Saudi Time Bomb?* (PBS television broadcast, Oct. 25, 2001), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/saudi/interviews/nasr.html; *Lawmakers Criticize Saudi Arabia,* CNN (May 18, 2003), *at* http://www.cnn.com/2003/ALLPOLITICS/05/18/-lawmakers.terrorism/.

287. *See generally* ROBERT BAER, SLEEPING WITH THE DEVIL (2003).

288. The Saudis depend heavily upon American F-15s for military aviation, and firm American measures—such as refusing to supply spare parts or withdrawing American personnel necessary for the operation of Saudi air bases—could quickly destabilize the Royal Saudi Air Force. For a persuasive demonstration of this proposition, see Michael Knights, Wash. Inst. for Near East Pol'y, *Saudi Saber Rattling,* POLICYWATCH NO. 802, *at* http://www.washingtoninstitute.org/watch/Policywatch/-policywatch2003/802.htm (Oct. 30, 2003).

negotiable offer along the lines of the Geneva Accord and the People's Voice initiative, together with firm threats against continuing backing of terrorism, recognizes the complexity of contemporary Saudi politics. In a recent analysis, Michael S. Doran has observed that the Saudi royal family is sharply divided between westernizers, led by Crown Prince Abdullah, and sympathizers with radical Islam, led by Abdullah's half-brother Prince Nayef.[289] By providing a non-negotiable land-for-peace offer, U.S. foreign policy would support the westernizing factions of the Saudi royal family in two ways. First, it would promote several of the ideas advanced by Crown Prince Abdullah in his peace initiative of spring 2002; second, it would belie the Islamists' assertions that the United States seeks to destroy Palestinian nationhood and is simply a stooge of Sharon and the Israeli settlers.[290]

Finally, there is Iran, the most vocal advocate of the destruction of Israel in the Middle East today[291] and the chief patron of both Hezbullah and Palestinian Islamic Jihad.[292] Iranian cooperation against Palestinian rejectionists is impossible as long as radical mullahs, led by Ayatollah Ali Khamenei (the nation's Supreme Leader), remain in power. The clerics in Tehran prefer continued attempts to liquidate the Jewish state to an Israeli-Palestinian peace agreement.[293]

Islamism is deeply unpopular in Iran, suggesting that time itself might end Iranian support of Palestinian rejectionism. Eliminating the threat to a peace agreement posed by Palestinian rejectionists in the near term, however, calls for a U.S. commitment to isolate the mullahs and expose their corruption[294] as well as support reformers in every way possible.[295] In

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289. *See generally* Michael S. Doran, *The Saudi Paradox*, FOREIGN AFF., Jan./Feb. 2004, at 35.

290. *See* BAER, *supra* note 287.

291. Former Iranian President Hashemi Rafsanjani bluntly stated that his country desires nuclear weapons so that it can obliterate Tel Aviv. *See* Middle East Media Res. Inst., *Former Iranian President Rafsanjani on Using a Nuclear Bomb Against Israel*, Special Dispatch Series No. 325 (Jan. 3, 2002), http://www.memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP32502. Iran is so virulently anti-Israel that it refused humanitarian assistance from Israel after the devastating December 2003 earthquake in Bam, which took more than 20,000 lives. *See* USA Today, *Tens of Thousands Said to Be Dead in Iranian Earthquake*, (Dec. 26, 2003), *available at* http://www.usatoday.com/news/world/2003-12-26-iran-earthquake2_x.htm (quoting the mayor of Kerman as saying "[w]e welcome assistance from all countries except Israel.").

292. *See, e.g.*, Ely Karmon, Wash. Inst. for Near East Pol'y, *The U.S. Indictment of Palestinian Islamic Jihad Militants: The Iranian Connection*, POLICYWATCH NO. 718, *at* http://www.washingtoninstitute.org/watch/Policywatch/policywatch2003/718.htm (Mar. 3, 2003); Middle East Media Research Inst., *Khamenei's Response to Israeli-Palestinian Fighting*, Special Dispatch Series No. 365, http://www.memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP36502 (Apr. 10, 2002).

293. *See, e.g.*, Leslie Susser, *The Iranian Threat*, JERUSALEM REP., Mar. 11, 2002, at 12.

294. Fareed Zakaria states:

Iranians now have a visceral disgust with clerics in power, a backlash that is more likely to produce the separation of mosque and state than scholarly writings about an Islamic reformation. Washington should make a major effort to publicize the mullahs' greed. It can obtain—from Switzerland, Luxembourg, wherever—the hard evidence that will show Iranians that their sainted leaders are as corrupt as Africa's worst tin-pot tyrants . . . . Washington should also fund the satellite-television stations, many beaming out of Los Angeles, that have become manna for information-starved Iranians. Most of their programs are not particularly political, but news, entertainment, fashion—all harmless windows into the modern world—are the slow killers of a closed society. Many of these stations are struggling for lack of money. Small sums could make a big difference.

Fareed Zakaria, *Time to Expose the Mullahs*, NEWSWEEK, Dec. 23, 2002, at 45, 45.

addition, as noted above, America needs to engage its European allies to work with it in isolating Tehran.[296] The United States does not have good options with Iran, but coordinated multilateral efforts at isolating the regime, thus far ignored, could make life more difficult for the Palestinian rejectionists and convince Israel that the days in which those rejectionists receive support from Tehran are numbered.

ii.   *The Security Barrier*

After the failure of the Camp David II peace talks, Israeli pessimism with the peace process gave an old idea of building a separation barrier between Palestine and Israel new political currency.[297] In 2002, Israel began unilateral construction of a barrier between Israel and portions of the West Bank, with plans calling for a barrier that stands as tall as fifty feet in places and has several border crossing points.[298] The following year, the Israeli government completed plans to extend the barrier 720 continuous kilometers nearly all the way around the West Bank.[299] It is now approximately twenty-five percent complete. [300] Israel argues that the barrier will provide a substantial level of protection against Palestinian terrorists. In support of this

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295.   A U.S. effort to encourage regime change in Tehran need not imply an Iraq-style invasion. As recent Nobel Peace Prize laureate Shirin 'Ebadi has noted, in Iran there is an internal mechanism for change based upon Parliament. Middle East Media Res. Inst., Shirin 'Ebadi, *Iranian Nobel Peace Prize Laureate, Special Dispatch Series No. 325.* http://www.memri.org/bin/articles.cgi?-Page=archives&Area=sd&ID=SP59603 (Oct. 24, 2003).

296.   As of now, the Bush administration appears to be moving in precisely the opposite direction, softening its position on Tehran in response to election-year imperatives and not engaging its European allies on this issue.

> The Bush administration, which has abandoned Afghanistan to warlordism and seems resigned to tribalism and fragmentation in Iraq, has now opted to discard 'regime change' in Iran. One can almost hear the election speeches of US President George W. Bush. The administration's capitulation to the right-wing mullahs at the moment of the reversal of American fortunes in the Middle East will be spun as Iranian capitulation in the face of Washington's show of force in Iraq. This is no surprise. The US has put spreading democracy in the Middle East on the backburner, especially this election year.

Ahmad Sadri, Daily Star, *Indifference and Iran's Reformists*, Feb. 6, 2004, *available at* http://www.dailystar.com.lb/article.asp?edition_ID=ID&article_ID=223&categ_id=5.

297.   A few portions of a security fence had been built by the Rabin government in the early 1990s. *See, e.g.,* WASSERSTEIN, *supra* note 6, at 147 (calling this construction "haphazard and uncoordinated"), but the project lay dormant during the latter part of the decade. Shimon Peres, Rabin's successor, believed that economic integration was the key to peace, and so rejected separation strategies such as the fence. Peres's successor, Benjamin Netanyahu, rejected the fence because of his political ties to West Bank settlers. *See* Makovsky, *supra* note 183, at 53.

298.   *See* Ze'ev Schiff, *Something's Afoot Along the Fence*, HA'ARETZ, Dec. 12, 2003, http://www.haaretz.com/hasen/pages/arch/ArchSearchEngArt.jhtml.

299.   Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. No. 131 (July 9), para. 80, *available at* http://www.icj-cij.org/icjwww/-idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.htm   [hereinafter *Legal Consequences*]. It is impossible to present a precise account of exactly where, how long, and how high the fence will be when completed because the Israeli government's plans for it appear to change rapidly. *See, e.g.,* WASSERSTEIN, *supra* note 6, at 149 (fence will be 215 miles long with five checkpoints); Makovsky, *supra* note 183, at 59 (under the Ministry of Defence plans, there will be "five enclaves west of the fence, which would be connected to the West Bank by underpasses or checkpoints."); Schiff, *supra* note 298 (fence will be between 500 and 750 kilometers long, with precise numbers of checkpoints to be decided).

300.   Greg Myre, *Israelis To Extend Barrier Deeper Into the West Bank*, N.Y. TIMES, June 15, 2004, at A11.

claim, the Israeli government credited a fence that separates the Gaza Strip from Israel with being largely responsible for the fact that only one suicide bombing has originated from Gaza during the second intifada.[301] It also argues that Palestinian terrorist attacks in Israel launched from the West Bank have already been reduced substantially in the areas adjacent to the portions of the barrier that currently exist.[302]

The plan to build the security barrier has been a lightening rod for international criticism. Last summer, by a vote of fourteen to one, the International Court of Justice (ICJ) issued an advisory ruling that the barrier violates international law by impeding the movement of West Bank Palestinians and potentially altering the demographic balance of the region.[303] Shortly after, the U.N. General Assembly voted to demand that Israel dismantle the barrier.[304] An earlier U.S. veto prevented the U.N. Security Council from adopting a Resolution along the same lines, but even the United States has expressed concerns about the construction of the barrier deep inside

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301.   At the end of 2003, the number was zero:

[S]ince early 2001, not a single successful Palestinian suicide bomber has infiltrated Israel from Gaza, and mortar shells fired from within the territory have failed to kill any Israelis. Given that Gaza has been surrounded by a fence since 1994, this fact has had a heavy impact on arguments for a barrier around the West Bank: many Israelis see it as proof that a fence can stop terrorism.

Makovsky, *supra* note 183, at 55. In March 2004, two Hamas suicide bombers were able to sneak out of the Gaza Strip and blow up a section of the port of Ashdod. *Sharon Cancels Peace Talks*, CBS News (Mar. 15, 2004), *available at* http://www.cbsnews.com/stories/2004/03/16/-world/main606574.shtml.

302.   This is certainly the view of pro-Israel analysts, even when suicide bombers have managed to get through.

The bombing in Tel Aviv Sunday showed distress among the terrorist organizations. It is further proof that Israel is winning the war on Palestinian terror and that the security barrier has a central role in this . . . . The 180 kilometers of the planned 780-kilometer fence has been completed and is under full patrol by the IDF. This has substantially stabilized the terror.

The Palestinians are deterred by the fence and there have been very few attempts to try and infiltrate it. There is no longer the situation where a suicide bomber gets into a car in Tulkarm and half an hour later blows himself up in Netanya, as had happened three times in the past two years.

According to security establishment statistics, in the past 11 months since the fence was declared operational, just three suicide bombers succeeded . . . . This was a 90 percent drop from the 73 suicide attacks in the 34 months before the barrier was built.

Arieh O'Sullivan, *Blips in the Stats*, JERUSALEM POST, July 12, 2004, at 1. Many Palestinians agree. *See* Joshua Hammer, *A Change of Direction*, MSNBC (Aug. 30, 2004), *available at* http://msnbc.msn.com/id/5784338/site/newsweek ("The few active guerrillas in the West Bank admit that attacking Israeli targets has become a near-insurmountable challenge. 'The [724-kilometer security] wall has made it almost impossible for us to conduct operations,' says Zacaria Zubeideh, the leader of the Al Aqsa Martyrs Brigades in the Jenin refugee camp."). The successful Hamas attack on August 31, 2004 in Beersheba, southern Israel, was blamed on the absence of the fence in the southern sector. *See* Dan Ephron, *16 Killed in Suicide Bombings in Israel*, BOSTON GLOBE, Sept. 1, 2004, at A1 ("Several Israeli officials said delays in erecting a disputed separation barrier in the West Bank . . . allowed the bombers to cross from their home in the southern West Bank town of Hebron to Beersheba.").

303.   *Legal Consequences*, *supra* note 299, para. 134.

304.   Warren Hoge, *Remove Wall, Israel Is Told by the U.N.*, N.Y. TIMES, July 21, 2004, at A10. The vote was 150 in favor, 6 against (including the United States), with 10 abstentions. *Id.*

the West Bank,[305] going so far as to cancel loan guarantees to Israel equal to the costs of barrier construction.[306]

Although objections have been raised to the mere existence of a barrier that essentially fences in West Bank Palestinians, international opposition has been focused primarily on its location.[307] Parts of the completed and planned portions of the barrier are located on the Green Line, but much of the barrier is located much further east, cutting through large swaths of Palestinian territory.[308] Critics of the barrier, which, according to a U.N. Secretary General's Report, will place 16.6 percent of the West Bank and 320,000 Jewish settlers on the Israeli side,[309] charge that its construction is an Israeli attempt to de facto annex portions of the Territories, and that its existence will further entrench the settlements lying inside the fence and make a negotiated peace even more difficult to achieve.[310] The Israeli government contends that the fence has no political purpose and will not prejudice the content of a future Israeli-Palestinian agreement, and that its location is dictated solely by military and security necessity.[311] Whatever the actual motivation for the barrier's route, it is clear that its location is causing, and will continue to cause, substantial hardship to as many as 237,000 West Bank Palestinians who will find themselves physically separated from West Bank population centers and as many as 160,000 more who will find themselves in communities almost completely encircled by the barrier.[312]

Just prior to the issuance of the ICJ opinion, Israel's Supreme Court heard a challenge raised by a number of Palestinian villages on the West Bank to the location of specific portions of the barrier located near Jerusalem. Ruling for the villages in seven challenges out of eight, the Court held that the challenged portions of the fence were illegal and ordered the government to

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305. *See, e.g.,* Myre, *supra* note 300 (noting that the Bush administration "does not object to the barrier in principle" but has expressed concerns about its location beyond the Green Line).

306. *See* Steven R. Weisman, *U.S. Rescinds Part of Loan Guarantees to Israel,* N.Y TIMES, Nov. 26, 2003, at A12.

307. In its advisory ruling on the wall, the International Court of Justice (ICJ) specifically noted that it was not "called upon to examine the legal consequences arising from the construction of those parts of the wall" on Israeli territory. *Legal Consequences, supra* note 299, para. 67.

308. In point of fact, there are, as of this writing, two major plans for the fence. One plan is properly referred to by David Makovsky as the "encirclement fence," for it would leave Palestinians with only 53% of the West Bank, stranding more than 270,000 Palestinians and 147 Palestinian villages on the Israeli side of the fence. *See* Makovsky, *supra* note 183, at 51 & 60-61. It would also cut Palestinian land into several noncontiguous cantons, with no real border with any state except Israel. *Id.* at 60-61. Another plan would be much more circumscribed: Palestinians would have 85.5% of the land, and only 10,000 Palestinians and 32 villages would be stranded on the Israeli side. *Id.; see also* Schiff, *supra* note 298 (noting that the Ministry of Defence plan has begun to dominate Israeli government planning). The fence envisioned under the Geneva Accord goes further, leaving 100% of Palestinians on the Palestinian side and not confiscating any Palestinian land. *See* Makovsky, *supra* note 183, at 61.

309. *Legal Consequences, supra* note 299, para. 84.

310. *See, e.g.,* Isabel Kershner, *Zoned Out,* JERUSALEM REP., Jan. 26, 2004, at 24, 25 ("The Ramallah-based PLO Negotiations Affairs Department speaks of Israeli 'de facto annexation' of the land between the wall and the Green Line, and of an Israeli attempt to 'cleanse' these areas of their Palestinian population."). The PLO led a successful effort to get the U.N. General Assembly to condemn the fence and send the issue to the ICJ in The Hague. Ina Friedman, *Fencing in The Hague,* JERUSALEM REP., Jan. 12, 2004, at 24.

311. *Legal Consequences, supra* note 299, para. 116; H.C. 2056/04, Beit Sourik Village Council v. Gov't of Israel, para. 28, *available at* http://62.90.71.124/eng/verdict/framesetSrch.html (June 30, 2004) [hereinafter *Beit Sourik Village Council*].

312. *Legal Consequences, supra* note 299, para. 84.

relocate or remove them.[313] Unlike the ICJ, which concluded that the harm to Palestinians caused by the barrier "cannot be justified by military exigencies or by the requirements of national security or public order,"[314] the Israeli Supreme Court held that both international and Israeli law require that marginal security benefits be proportional to the marginal hardship that the location of the barrier creates for Palestinians.[315] The Court accepted the government's argument that the barrier was sited on flat, high ground and at a distance from Israeli population centers for security-related purposes,[316] but it determined that the hardship created clearly outweighed the strategic benefits, at least in some instances. In its analysis of eight different portions of the barrier, the Court found in seven instances that that the military could site the barrier in an alternative location that would substantially reduce hardship to Palestinian villages while imposing at most a small security disadvantage for Israel.[317]

The Israeli Supreme Court's careful analysis leaves little doubt that a defensive barrier can be constructed on Israeli territory and still contribute substantially to Israeli security from terrorists, even if Israeli territory does not always provide the optimal location for the barrier as judged from a military perspective. In light of this finding, U.S. financial and political support for the construction of a security barrier along the final Israeli-Palestinian border should be an element of a U.S.-sponsored peace proposal. If the Israeli government believes that portions of the proposed border would be strategically unsuitable for the barrier, it could (after agreeing to the non-negotiable agreement terms) attempt to renegotiate portions of the border with Palestine. If Palestine believes that a security barrier across portions of the new border would be undesirable for economic, social, or political reasons, it could attempt to renegotiate the location of the border or provide security sufficient to convince Israel to abandon the barrier altogether. In either case, the barrier would not be inconsistent with international law (because it would be built entirely on Israeli territory) or present an impediment to negotiating a peace agreement (because its construction and location would be part of a peace agreement).

It would be naïve to believe that any physical barrier could ever eliminate the terrorist threat to Israel posed by Palestinian rejectionists. This reality is underscored by rockets frequently launched by Palestinians in Gaza at Israeli towns across the Gaza fence[318] that usually do not cause any harm but occasionally result in fatalities.[319] Some Palestinian radicals opposed to

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313. *Beit Sourik Village Council, supra* note 311, para. 86.
314. *Legal Consequences, supra* note 299, para. 137.
315. *Beit Sourik Village Council, supra* note 311, paras. 36-39.
316. *Id.* para. 29.
317. *Id.* paras. 61, 67, 76, 80.
318. *See* Greg Myre, *Israeli Pullback in Gaza Met with Palestinian Rockets*, N.Y. TIMES, Aug. 6, 2004, at A3 ("Palestinians have fired more than 300 Qassam rockets from Gaza in the past few years."). For a thorough account of the background of the Hamas "Qassam Guys," and the effects that the missile launches are having on ordinary Palestinians, see Isabel Kershner, *Qassam City*, JERUSALEM REP., Sept. 20, 2004, at 24-26.
319. Greg Myre, *Sharon Said To Agree To Pull Back Troops*, N.Y. TIMES, Oct. 15, 2004, at A10 (reporting that two Israeli children in Sederot were killed by rockets); *see also* Joseph Berger,

peace will no doubt go to substantial effort to find ways through, around, or over the barrier. Notwithstanding this reality, a substantial and well-patrolled security barrier certainly would reduce the severity of that threat, thus mitigating the ability of rejectionists to prevent Palestine from providing Israel with the peace that would rightfully be due to Israel as part of a land-for-peace bargain. Thus, U.S. support for the barrier's construction as part of a peace agreement would increase the desirability of such an agreement from Israel's perspective compared to its BATNA of continued hostilities.

VII. CONCLUSION

A conflict that can be alternately described as national, ethnic, or religious, that has existed in its present form for thirty-eight years and has centuries-old roots, and that has repeatedly defied resolution by Nobel Peace laureates and leaders from every corner of the globe, quite obviously lacks any easy solutions. Our treatment of the problem is not meant to imply that we believe we have all of the answers. To even be attempted in full, our proposal would require that the United States adopt a foreign policy that would engender significant opposition domestically, make threats and commitments that would be difficult to carry out, and depend on the support and cooperation of other nations with which Washington cooperates sometimes, rarely, or never, as the case may be. To make these efforts succeed, our proposal would require that U.S. policymakers understand the Middle East well enough to craft a specific agreement that falls within the parties' bargaining zone, while taking steps to make certain that Middle Eastern leaders do not doubt U.S. resolve. In addition, our proposal requires that Israelis and Palestinians react to the U.S.-sponsored initiative with cold rationality and a desire to serve their long-term best interests rather than with hot, short-sighted emotion. The obvious difficulty of implementing such a policy might explain why no U.S. government has attempted to do what we propose.

The repeated failure of Israelis and Palestinians to negotiate an enduring peace agreement, however, suggests the need for new analytical prisms through which to view the Middle East conflict. We believe that our framework, informed by negotiation theory, presents a fresh way to conceptualize the impediments to peace in sufficient detail to generate policy proposals but not in so much minutiae that paralysis results.

Our framework also leads logically to policy prescriptions for the United States that do not fit neatly into the usual political debates on the subject. Neoconservatives (often closely aligned with the Bush administration) have argued that to struggle for Middle East peace requires the United States to use all military, political and economic means at its disposal to pressure recalcitrant Arab and Muslim regimes to make peace and overthrow those that will not.[320] Liberals, in contrast, insist that Middle East peace requires the

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Militants Force Palestinian Family into an Agonizing Choice, N.Y. TIMES, July 24, 2004, at A4 (reporting that an Israeli child and an Israeli adult were killed in Sederot).

320. *See generally* DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR (2004). Frum served as President George W. Bush's principal speechwriter during the first

United States to become directly involved in Israeli-Palestinian negotiations and work more closely both with multilateral institutions such as the United Nations and with its European allies. [321] Our framework suggests that a strategy most likely to help break the impasse would include elements of both of these approaches plus a number of other features as well.

Most importantly, our analysis suggests that any U.S.-sponsored Middle East initiative can maximize its likelihood of success by consciously addressing the full range of potential roadblocks to peace. The Bush administration's determination that Yasser Arafat was the primary impediment to peace resulted in four years of single-minded focus in Washington on eliminating his influence. Pursuing a policy so narrow was and continues to be a high-risk approach. Even if Arafat's ultimate successors are faithful agents of the Palestinian people, the absence of a bargaining zone, blocking minorities on one or both sides, and strategic hard bargaining will still threaten to derail attempts to settle the Israeli-Palestinian conflict on the basis of land for peace. Arafat's death has given many Israelis, Palestinians, Americans, and other interested parties a renewed sense of optimism that an Israeli-Palestinian peace might be possible. A reinvigorated U.S. policy must be comprehensive—that is, consciously designed to circumvent each of the potential roadblocks.

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two years of the Bush administration; Perle formerly served on the Defense Intelligence Advisory Board and is a leading thinker in the neoconservative camp.

321. A representative statement can be found in Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1490-91 (2003).