REVIEW ESSAY

EXPLORING THE *OSLO ACCORDS*: RECIPE FOR PEACE OR FOOTNOTE TO HISTORY?

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The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements by Geoffrey R. Watson (New York: Oxford University Press, 2000)

The Middle East Peace Process opened in 1991 in the wake of the Gulf War.[1] The ensuing negotiations were divided into a series of bilateral talks between Israel and its neighbours, conducted in Washington, and several "multilateral tracks," meeting in various venues around the world, that were intended to address regional problems in a comprehensive manner. Initially, Israel entered into negotiations regarding the Occupied Territories with a delegation jointly representing the Palestinians and the Kingdom of Jordan. Then unexpectedly, in August 1993, it was announced that Israel and the Palestine Liberation Organization had been engaged in secret, direct negotiations in Oslo, Norway.[2] A few weeks later, on 13 September 1993, the two parties signed the *Declaration of Principles on Interim Self-Government Arrangements*.[3]

The *Declaration of Principles* sets out a framework for achieving peace between the Israelis and the Palestinians. The *Declaration of Principles* contemplated a five-year interim arrangement to be followed by a final "permanent-status" arrangement between the two sides. During the interim period, unspecified portions of the Occupied Territories would be transferred to Palestinian administration, while the two sides undertook an array of other confidence-building measures across a broad range of issues. The *Declaration of Principles* was deliberately ambiguous about many issues and did not even address explicitly what were likely to be the most difficult questions — the fate of Jerusalem and of the Israeli settlements in the West Bank and Gaza.

The *Declaration of Principles* produced a great deal of optimism that a final peace would be in place by the end of 1998. The mood was captured in a handshake between Israeli Prime Minister Yitzhak Rabin and Palestinian leader Yasser Arafat on the White

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1 See generally R. Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (London: Kluwer Law International, 1997) at 104-21.

2 The course of the secret negotiations are set out in M. Abbas [Abu Mazen], *Through Secret Channels* (Reading: Garnet Publishing, 1995); D. Makovsky, *Making Peace with the PLO: The Rabin Government's Road to the Oslo Accord* (Boulder: Westview Press, 1996); S. Segev, *Crossing the Jordan: Israel's Hard Road to Peace* (New York: St. Martin's Press, 1998); S. Peres, *Battling for Peace: A Memoir*, ed. by D. Landau (New York: Random House, 1995); and Shehadeh, *supra* note 1 at 104-31, 259-72.

3 *Declaration of Principles on Interim Self-Government Arrangements*, 13 September 1993, Israel and Palestine Liberation Organization, (1993) 32 I.L.M. 1525 and in (1993) 4 Euro. J. Int'l L. 572 [hereinafter *Declaration of Principles*].

House lawn at the signing ceremony.[4] Unfortunately, the agreement began to unravel almost as soon as the ink was dry. Both sides balked at full implementation of the *Declaration of Principles*.[5] For example, the Israelis undertook to expand the Israeli settlements and to build roads to those settlements that bypassed Palestinian towns,[6] despite their promise to "view the West Bank and the Gaza Strip as a single territorial unit, whose integrity will be preserved during the interim period."[7] Nor were such steps consistent with the commitment on both sides that the permanent-status talks "should not be prejudiced or preempted by agreements reached for the interim period."[8] Similarly, the Palestinians were reluctant to repudiate the clauses in their foundational documents that called for the destruction of Israel or to disarm or incarcerate Palestinians who openly espoused the continuation of armed struggle against Israel,[9] two things they had promised to do.[10]

Slowly, the difficulties seemed to be overcome by the two sides through protracted negotiations and gradual steps in the direction of compliance. They succeeded in negotiating a so-called Second Oslo — the *Interim Agreement on the Gaza Strip and the Jericho Area*[11] that resolved some of the more salient problems under the

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4 T. Atlas & M. Locin, "Handshake Heralds Peace: Rabin, Arafat Begin their Brave Gamble" *Chicago Tribune* (14 September 1993) A1; A. Devroy & J. Goshko, "Israel and PLO Sign Peace Pact: Rabin, Arafat Pledge Cooperation on Day of Historic Diplomacy" *Washington Post* (14 September 1993) A1; D. Firestone, "Handshake Reflects Ambivalence of Peace" *Newsday* (14 September 1993) 4; S. Friedman, "The Signing, a Handshake and a New Era in the Promised Land" *Newsday* (14 September 1993) 3; T. Shales, "Peace in their Time: Two Hands that Shook the World" *Washington Post* (14 September 1993) B1; S. Tisdale, "Shalom, Salaam, Peace: Rabin and Arafat Shake Hands on End of Enmity as Clinton Hails a Brave Gamble" *Guardian* (14 September 1993) 1.

5 Perhaps the most balanced account of the efforts at and failures in implementing the *Declaration of Principles* is found in R. Malley & H. Agha, "Camp David: The Tragedy of Errors" *The New York Review of Books* (9 August 2001) 59. See also J. Weiner, "Co-Existence without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements" (2000) 26 Brooklyn J. Int'l L. 591.

6 See generally G.R. Watson, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements* (New York: Oxford University Press, 2000) at 132-42. The number of housing units in the Israeli settlements increased from 33,000 in September 1993 to 52,000 in July 2000, with the number of settlers rising from 116,000 to around 200,000 during this period. A. Margalit, "Settling Scores" *The New York Review of Books* (20 September 2001) 20. These figures do not include approximately 210,000 Israeli Jews living in those parts of "Greater Jerusalem" that were part of Jordan before 1967. *Ibid.*

7 *Declaration of Principles*, *supra* note 3, art. IV.

8 *Ibid.*, art. V(4).

9 *Palestinian National Charter of 1968*, arts. 9, 21, 22, reprinted in J. Norton Moore, *The Arab-Israeli Conflict*, vol. 3 (Princeton: Princeton University Press, 1974) 706. See generally Watson, *supra* note 6 at 203-36.

10 National Charter: *Letter of Chairman Arafat to Prime Minister Rabin* (9 September 1993) reprinted in *Israeli Ministry of Foreign Affairs, Declaration of Principles on Self-Government Arrangements* (Jerusalem: Israeli Foreign Ministry, 1993) 38; J. Wrubel, ed., *Peacewatch: The Arab-Israel Peace Process and US Policy: Documents and Analysis*, January 1993 – March 1994 (Washington: Washington Institute for Near East Policy, 1994) 77. *Agreement on the Gaza Strip and the Jericho Area*, 4 May 1994, Israel and Palestine Liberation Organization (1994) 33 I.L.M. 622 at arts. VIII, XII [hereinafter *Gaza-Jericho Agreement*].

11 *Interim Agreement on the West Bank and the Gaza Strip*, 28 September 1995, Israel and Palestine Liberation Organization, (1995) 36 I.L.M. 557 [hereinafter *Interim Agreement*].

Declaration of Principles. Collectively, these and certain related agreements might be referred to as the *Oslo Accords.* Then, on 4 November 1995, a young Israeli assassinated Prime Minister Rabin. While it was not immediately evident, this event marked the beginning of the unravelling of the *Declaration of Principles.*[12]

Rabin was succeeded as Prime Minister by Shimon Peres, who, if anything, was even more committed to making the *Declaration of Principles* a success. In March 1996, Benyamin Netanyahu defeated Peres and became Prime Minister. Netanyahu made no secret of his skepticism of the *Declaration of Principles,* and immediately began to undercut the Oslo process.[13] Netanyahu succumbed to pressures, international and domestic, and eventually entered into an agreement with Arafat that was brokered by President Bill Clinton of the United States. This *Wye River Agreement*[14] called for the withdrawal from yet more territory and made other concessions. Once again the two sides were slow in carrying out their promises, but gradually took steps in the direction to which they had committed themselves.

Netanyahu, however, proved unable to resolve the growing tensions in the Jordan Valley and was in turn defeated by Ehud Barak in May 1999.[15] While Barak was now leader of the party of Rabin and Peres, he proved even more skeptical of the Oslo process than Netanyahu. That is, Barak had no faith in a process of gradually building confidence between the two sides through a series of interim agreements leading eventually to the successful negotiation of a final status agreement.[16] Barak therefore refused to carry out the agreements that Netanyahu had reluctantly negotiated with the Palestinians.[17] Instead, after delaying long enough to raise serious questions in President[18] Arafat's mind, Prime Minister Barak insisted in jumping to the final status talks without carrying out all of the arrangements that had already been negotiated. Barak's personal failures as a negotiator, Arafat's suspicions, and President Clinton's unbalanced attempts at mediation resulted in the complete breakdown of negotiations.[19] Shortly thereafter Palestinian riots led into a downward spiral of violence and the election of hard-liner Ariel Sharon as Prime Minister of Israel threatened the complete collapse of what had been accomplished in the ten years since the opening of the Madrid peace talks and eight years since the signing of the *Declaration of Principles.*

Against this background one might question whether the legal status and correct interpretation of the *Declaration of Principles* matter at all. Writing before the collapse of the *Declaration of Principles,* Geoffrey Watson did undertake to address this

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12 See generally Malley & Agha, *supra* note 5.

13 J. Immanuel & M. Yudelman, "Arafat: Israel Has Declared War on Us" *Jerusalem Post* (29 August 1996) 1; "The New Government's Guidelines" *Jerusalem Post* (18 June 1996) 3.

14 *The Wye River Memorandum,* 23 October 1998, Israel and Palestine Liberation Organization, (1998) 37 I.L.M. 1251.

15 "Final Vote Count, Prime Ministerial Race" *Jerusalem Post* (23 May 1999) 3.

16 See Malley & Agha, *supra* note 5 at 59-60.

17 *Ibid.* at 59.

18 Yasser Arafat had been elected President of the Palestinian Authority established to administer the portion of the Occupied Territories that the Israelis had evacuated.

19 Malley & Agha, *supra* note 5 at 60-65.

question in his book, *The Oslo Accords: International Law and the Israeli-Palestinian Peace Agreements.*[20] While Watson's book is not the first attempt to address these questions,[21] it is easily the most thorough and comprehensive attempt. Contrary to appearances raised by the current crisis, this effort actually merits the continuing attention of international lawyers.

First, despite the continuing downward spiral of events in the Jordan Valley, sooner or later the two sides will have to agree on an arrangement whereby they will have to live together. While any such arrangement could look very different in its details from the *Declaration of Principles,* the efficacy of the arrangement might very well entail the same sort of questions as those regarding the *Declaration.* Second, the Palestinians have long relied on international law as a primary tool in pressing the Israelis on nearly every issue that divides them, demanding that the Israelis comply with various UN resolutions, rules of customary law, and the Palestinian's interpretation of the *Declaration of Principles.*[22] The Israelis, on the other hand, have tended to view the questions to be decided as more political than legal, and thus open to whatever terms of agreement the parties might negotiate, regardless of the claims derived from various forms of international law.[23] Not only are the two sides concerned about international legitimacy, but many other nations involved to varying degrees in the peace process are even more concerned about such questions.[24] Thus, whether the *Declaration of Principles*, or other relevant agreements, resolutions, declarations, and so on, create specific binding obligations on the communities locked in the struggle in historic Israel/Palestine has some significance to the ongoing controversy. Finally, these legal issues raise important questions regarding other arrangements between states and near-state entities in the proliferating wars and pseudo-wars that were a feature of the late

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20 Watson, *supra* note 6.

21 See E. Cotran, C. Mallat, & D. Stott, eds., *The Arab-Israeli Accords: Legal Perspectives* (London: Kluwer Law International, 1996) at 199, 208; E. Benvenisti, "The Israeli-Palestinian Declaration of Principles: A Framework for Future Settlement" (1993) 4 Euro. J. Int'l L. 543; L.R. Beres, "Israel after Fifty: The Oslo Agreements, International Law and National Survival" (1999) 14 Connecticut J. Int'l L. 27; A. Cassese, "The Israel-PLO Agreement and Self-Determination" (1993) 4 Euro. J. Int'l L. 564; P. Malanczuk, "Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law" (1996) 7 Euro. J. Int'l L. 485; K. McKinney, "Comment, The Legal Effects of the Israeli-PLO Declaration of Principles: Steps toward Statehood for Palestine" (1994) 18 Seattle U. L. Rev. 93; K. Meighan, "Note, The Israel-PLO Declaration of Principles: Prelude to a Peace?" (1994) 34 Va. J. Int'l L. 435; J. Quigley, "The Israel-PLO Interim Agreements: Are They Treaties?" (1997) 30 Cornell Int'l L.J. 717; R. Shehadeh, "Can the Declaration of Principles Bring about a "Just and Lasting Peace"?" (1993) 4 Euro. J. Int'l L. 555; J.A. Weiner, "Comment, Israel, Palestine, and the Oslo Accords" (1999) 23 Fordham Int'l L.J. 230; J. Weiner, "Hard Facts Meet Soft Law — The Israel-PLO Declaration of Principles and the Prospects for Peace: A Response to Katherine W. Meighan" (1993) 35 Va. J. Int'l L. 931; J. Weiss, "Terminating the Israel-PLO Declaration of Principles: Is It Legal under International Law?" (1995) 18 Loy. L.A. Int'l & Comp. L.J. 109.

22 See, *e.g.*, M. Mazzawi, *Palestine and the Law: Guidelines for the Resolution of the Arab-Israeli Conflict* (Reading: Ithaca Press, 1997).

23 See, *e.g.*, L.R. Beres, "Why the Oslo Accords Should Be Abrogated by Israel" (1997) 12 Am. U.J. Int'l L. & Pol'y 267.

24 Russia and the United States signed the *Declaration of Principles* as "witnesses" and the United States gave various assurances to the two sides at several points during the negotiations and in connection with several of the agreements.

twentieth century and appear likely to be a feature of at least the early twenty-first century.[25]

Geoffrey Watson sets about to examine in considerable depth most of the specifically legal questions related to the *Oslo Accords*. Watson covers a great deal of ground. His book is divided into five parts:

(1) a "legal history" of the Arab-Israeli dispute;
(2) an inquiry into whether the *Oslo Accords* are legally binding;
(3) an examination of Israeli compliance;
(4) an examination of Palestinian compliance; and
(5) an inquiry about what international law might contribute to the resolution of permanent-status issues.

In each area he meticulously assembles the possible legal options along with most or all of the published views on the legal controversies surrounding those options. In analyzing this material Watson readily expresses his own views on the legal controversies.

Watson has chosen a perilous course. Given the intense emotions surrounding these issues, other commentators are bound to criticize any conclusions.[26] Yet all in all Watson provides a measured, balanced account in which he offers moderate solutions to the difficult legal and political questions he addresses. Thus we find Watson concluding that "it is unlikely that [the UN resolution partitioning Palestine] is still binding,"[27] and that, while "states have *de facto* acquiesced in Israeli sovereignty over West Jerusalem," the Israeli claim to East Jerusalem "is weaker."[28] Watson's evaluation of Israeli settlement policies is similarly indecisive. He concludes that "the *Oslo Accords* do not outlaw existing settlements, but they do impose some restrictions on new settlements, especially in the West Bank and Gaza Strip."[29] He then goes on to write that "Israel is right that some voluntary, purely private settlement in the West Bank might be permissible under Article 49 [of the Fourth Geneva Convention]. But state-sponsored and -subsidized settlement does begin to look like an impermissible 'transfer' of civilians to occupied territory, a violation of Article 49."[30]

Watson argues that the *Oslo Accords* are not treaties because the Palestine Liberation Organization and the Palestine Authority are not states.[31] Watson then considers and rejects numerous other theories that have been advanced to justify the conclusion that the *Oslo Accords* are legally binding.[32] His own conclusion is that the *Oslo Accords*

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25 See R. Wilner, "Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination" (1995) 1 U.C. Davis J. Int'l L. & Pol'y 297.
26 See, *e.g.*, R. Sabel, "Book Review" (2001) 95 A.J.I.L. 248.
27 Watson, *supra* note 6 at 23.
28 *Ibid.* at 268.
29 *Ibid.* at 136.
30 *Ibid.* at 141.
31 *Ibid.* at 57-74. See also O. Dajani, "Stalled between Seasons: The International Legal Status of Palestine during the Interim Period" (1997) 26 Den. J. Int'l. L. & Pol'y 27.
32 Watson, *supra* note 6 at 75-90. But see Sabel, *supra* note 26 at 250-51.

are binding under international law because "national liberation movements" have the capacity to make binding international agreements with states.[33] Watson justifies this conclusion by reference to the many agreements made between former colonial powers and colonial independence movements before the colony became fully independent.[34]

So much has happened on the ground in the last two years, and even in the last two weeks,[35] that any study of the implementation of the *Oslo Accords* is bound to be dated. This is true of Watson's chapters on the Israeli and Palestinian implementation of the *Oslo Accords*.[36] Watson's chapters nonetheless provide a rich trove of information for lawyers and scholars interested in the earlier stages of the peace process.

On the other hand, Watson's legal analysis of the *Oslo Accords* themselves are not dated. Despite, or perhaps because of all that has been happening on the ground, no progress has been made in moving towards new agreements since the *Wye River Agreement* of 1998. Watson does not leave us there, however. He goes on to offer his own views on certain legal issues regarding a possible permanent-status agreement.[37] Watson summarizes his view on this issue by declaring that while the *Oslo Accords* "offer little guidance on the shape of a final settlement ... general international law does supply some general parameters within which negotiations may proceed."[38] This conclusion is by no means self-evident to many observers of the Middle East peace process. Unfortunately, Watson crams too much into the chapter either to develop fully the law relevant to the issues he considers or to demonstrate that the law he considers would or should constrain the Israelis and the Palestinians when they resume negotiations — as surely they must at some point.

Consider the issue of the water resources shared by the Israelis and the Palestinians. A great deal of the commentary on the Middle East peace process says remarkably little about the significance of water to the communities in the region and hence about the importance of negotiating an appropriate water-management regime for the communities' shared water resources as a central issue to be resolved in any permanent-status agreement. Even after eighty years of covert co-operation between the Israelis and their neighbours over water,[39] and ten years of negotiations over water, we find Avishai Margalit listing three issues as central to the peace process: the future of the Israeli settlements in the Occupied Territories, the future of the Palestinian refugees,

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33 Watson, *supra* note 6 at 101.

34 *Ibid.* at 95-98.

35 I write these words less than two weeks after the destruction of the World Trade Center.

36 Watson, *supra* note 6 at 103-264.

37 *Ibid.* at 267-311.

38 *Ibid.* at 309.

39 See A. Garfinkle, *Israel and Jordan in the Shadow of War: Functional Ties and Futile Diplomacy in a Small Place* (London: MacMillan, 1992) at 34-40, 79-83, 116, 162-73; D. Hillel, *Rivers of Eden: The Struggle for Water and the Quest for Peace in the Middle East* (New York: Oxford University Press, 1994) at 161, 168-69, 173; Y. Melman & D. Raviv, *Behind the Uprising: Israelis, Jordanians, and Palestinians* (New York: Greenwood Press, 1989) at 76, 180-85, 192; J. Dellapenna, "The Waters of the Jordan Valley: The Potential and Limits of Law" (1990) 5 Palestine Y.B. Int'l L. 15 at 27-28; and A. Wolf, "Water for Peace in the Jordan River Watershed" (1993) 33 Nat. Res. J. 797 at 830-31.

and sovereignty over Jerusalem.[40] (Margalit does mention water in passing,[41] but gives it negligible attention compared to what he indicates are the three leading issues, particularly the settlements.) Yet from the beginning of the peace process, all participants realized that no peace would be possible without a stable settlement of the water claims of the national communities in the region. One of the multilateral tracks is devoted to water — "The Water Resources Working Group."[42] The Working Group largely contented itself with promoting the sharing of data and other information, the training of water managers, and investment in research at improving the efficiency with which water is used. As part of the program of the Working Group, the Israelis, the Jordanians, and the Palestinians initialled a *Declaration on Principles for Cooperation on Water-Related Matters*[43] and called on the Lebanese and Syrians to adhere to this *Tripartite Declaration.*

Like so many other issues addressed by the multilateral tracks, the Water Resources Working Group dealt with important matters, but avoided the most important questions involving water in or near the Jordan Valley. Those questions involved the extent of any possible reallocation of water among the communities, the possibility of importing water from outside the region, and possible steps to direct the more efficient or more productive use of water within each community. The *Tripartite Declaration* expressly indicates that it does not supersede any bilateral agreements among the signatories[44] and only pledges that they co-operate on these and related matters without spelling out to any extent what the co-operation shall require. Although the three parties pledged to co-operate "through joint bodies on a ministerial and managerial level," these institutions, as well as the sharing of water resources, are left to further agreements.[45] In short, the *Tripartite Declaration* is an agreement to agree rather than a real solution for the water-management problems shared by the three communities. The *Tripartite Declaration* does not contain enough specifics about possible future agreements to create an enforceable legal obligation.

The central questions have not been addressed in a multilateral context in part because the Israelis have preferred a series of bilateral agreements with each neighbouring riparian community as a means of assuring that they are the managerial hub of the watershed, and not merely a partner in a more equal managerial

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40 Margalit, *supra* note 6 at 20.

41 *Ibid.* at 23-24.

42 S. Lonergan & D. Brooks, *Watershed: The Role of Fresh Water in the Israeli-Palestinian Conflict* (Ottawa: International Development Research Centre, 1994) at 212-14; M. Lowi, "Rivers of Conflict, Rivers of Peace" (1995) 49 J. Int'l Aff. 123 at 139-40; H. van Edig, "Strengthening the Regional Cooperation—The German View" in A.İ. Bagis, ed., *Water as an Element of Cooperation and Development in the Middle East* (Ankara: Aync Publications, 1994) 417 at 441-46; A. Wolf, "International Water Dispute Resolution: The Middle East Multilateral Working Group on Water Resources" (1995) 20 Water Int'l 141.

43 *Declaration on Principles for Cooperation on Water-Related Matters and New and Additional Resources*, 13 February 1996, Israel and Jordan-Palestine Authority, online: <www.israel-mfa.gov.il/peace/waterdop.html> (date accessed: 10 May 1996) [hereinafter *Tripartite Declaration*].

44 *Ibid.*, ss. 2.1, 5.6.

45 *Ibid.*, ss. 3.1, 4.2.

arrangement.[46] Water needs and claims have figured prominently in the bilateral talks appeared to be so productive between the Israelis and the Palestinians, and have been so productive between the Israelis and the Jordanians. Without any general progress in the talks between the Israelis and the Lebanese and the Israelis and the Syrians, however, no progress is yet apparent regarding water needs and claims between those communities, although no agreements among those communities will be possible without addressing water issues.[47]

Bilaterally, the Israelis and the Palestinians have addressed these questions somewhat. The *Declaration of Principles* itself did not mention water, but Annex III to the *Declaration* listed water first among the topics committed to an Israeli-Palestinian Continuing Committee for Economic Cooperation:

> The two sides agree to establish an Israeli-Palestinian Continuing Committee for Economic Cooperation, focusing, among other things, on the following:
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> 1. Cooperation in the field of water, including a Water Development Program prepared by experts from both sides, which will also specify the mode of cooperation in the management of water resources in the West Bank and Gaza Strip, and will include proposals for studies and plans on water rights of each party as well as on the equitable utilization of joint water resources for implementation in and beyond the interim period.[48]

Another Annex provided for a Regional Economic Development Program that specifically was to include the "Mediterranean Sea (Gaza)-Dead Sea Canal" and "Regional Desalinization and other water development projects" as well as the establishment of a "Middle East Development Fund" and eventually a "Middle East Development Bank" to fund the program.[49]

As already noted, whether some of the promises in the *Declaration of Principles* were intended to create actual legal obligations or merely constituted an agenda for future negotiations is not clear. Several promises, however, appear unequivocally to create legal obligations, including the promise to create the Continuing Committee for Economic Cooperation charged to develop co-operative activities relating to water on the basis of the customary international law standard of equitable utilization.[50] Even if the duty to co-operate regarding water and the obligation to make only an equitable utilization are not themselves legal obligations but only promises to reach an agreement, they are something more than a mere political commitment. The promises lay down a clear obligation to reach an agreement and set out the basic terms of those future

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46 S. Elmusa, "The Jordan-Israel Water Agreement: A Model or an Exception?" in E. Cotran, C. Mallat, & D. Stott, eds., *The Arab-Israeli Accords: Legal Perspectives* (London: Kluwer Law International, 1996) 199 at 208.

47 This is recognized in the *Tripartite Declaration*, which lists Lebanon and Syria as additional "Core Parties" for the region's water resources and invites them to join the *Declaration on Principles*, *supra* note 3 at para. 3.

48 *Ibid.*, Annex III(1).

49 *Ibid.*, Annex IV(1), (3), (4).

50 Cassese, *supra* note 21 at 565-66.

agreements.[51] As such, these and other provisions of the *Declaration of Principles* go well beyond the provisions of the highly ambiguous Camp David Accords.[52] Yet without any legal mechanism for enforcing these obligations, and given the inherent vagueness of the notions of "co-operation" and "equitable utilization," these obligations must be described as imperfect obligations.[53]

Raja Shehadeh observed that the *Declaration of Principles* left Israeli orders and regulations in place, effectively depriving the Palestinian Authority of the ability to make the changes necessary to achieve an equitable sharing of the waters common to the two communities.[54] As if to underline this observation, the Israelis and the Palestinians followed with an *Agreement on the Gaza Strip and the Jericho Area* that, while not giving water such prominence as in the *Declaration of Principles*, provides in its Annex II for a limited interim transfer of authority from the Israelis to the Palestinians over water use by Palestinians living under Palestinian administration.[55]

The provisions were directed at protecting existing arrangements rather than providing for a more equitable sharing of water between the two communities. In particular, the provisions specified that existing patterns of water delivery to the Israeli settlements and military installation areas in or near the areas under Palestinian administration would continue to be provided by Mekorot (Israel's water company) and would be protected from interference by Palestinian activities. Any services provided by Mekorot to Palestinians would be paid for under a "commercial agreement" to be negotiated. The most forthcoming provision in the same Annex provides merely for

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51 *Ibid.* at 566; McKinney, *supra* note 21 at 99-105. See also Benvenisti, *supra* note 21 at 552-54. See generally H. Kelsen, *Principles of International Law* (New York: Rinehart, 1952) at 342-43; L. Oppenheim, *International Law* vol. 1, 8th ed., by H. Lauterpacht (London: Longmans, 1955) at 890-91; A.D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 27-29.

52 Lonergan & Brooks, *supra* note 42 at 217-21; A. Wolf, *Hydropolitics along the Jordan River: Scarce Water and Its Impact on the Arab-Israeli Conflict* (Tokyo: United Nations University Press, 1995) at 63-64; Cassese, *supra* note 21 at 570-71.

53 R.R. Baxter, *Legal Questions Arising Out of the Construction of a Dam at Maqarin on the Yarmuk River* (Washington: American Society of International Law, 1977) at 119-23, 136-38; International Law Association Committee on the Uses of Waters of International Rivers, *Helsinki Rules on the Uses of the Waters of International Rivers; Adopted by the International Law Association, at the 52nd Conference held in Helsinki on 20 August 1966* (London: International Law Association, 1967) at arts. 26-37 [hereinafter *Helsinki Rules*]; A. Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Dordrecht: Nijhoff, 1993) at 151-98; E. Benvenisti, "Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law" (1996) 90 A.J.I.L. 384 at 401-402, 412-13; S. McCaffrey, "The Law of International Watercourses: Some Recent Developments and Unanswered Questions" (1989) 17 Den. J. Int'l L. & Pol'y 505 at 511-13. See generally R. Baxter, "International Law in Her 'Infinite Variety'" (1980) 29 Int'l & Comp. L.Q. 549; M. Bothe, "Legal and Non-Legal Norms: A Meaningful Distinction in International Relations?" (1980) 11 Neth. Y.B. Int'l L. 65; M. Rogoff, "The Obligation to Negotiate in International Law: Rules and Realities" (1994) 16 Mich. J. Int'l L. 141; P. Weil, "Towards Relative Normativity in International Law" (1983) 77 A.J.I.L. at 413, 413-18.

54 Shehadeh, *supra* note 21 at 558-61. See also Benvenisti, *supra* note 21 at 550-51.

55 *Gaza-Jericho Agreement*, *supra* note 10, Annex II, paras. B(31)(a)-(i). See generally J. Weiner, "The Israel-Palestinian Peace Process: A Critical Analysis of the Cairo Agreement" (1995) 14 Wis. Int'l L.J. 223.

notice and co-operative response to "environmental risks, hazards, and nuisances."[56] An additional Annex on Economic Relations spelled out in greater detail the operations of the Joint Economic Committee without, however, mentioning water — despite the prominence of that topic in the corresponding part of the *Declaration of Principles*.[57]

Finally, the *Interim Agreement* signed in Washington on 28 September 1995, is a lengthy and detailed agreement, including 31 articles in the primary agreement and seven lengthy annexes.[58] Annex III (*Protocol Concerning Civil Affairs*) has only four modest articles, but an Appendix adds 40 articles and 11 schedules. As the articles in the Appendix appear alphabetically, Article 40, the article on water, is last in the Appendix.[59] Still, the importance of water to the longest Annex to the *Interim Agreement* is signalled by the fact that four of the eleven Schedules attached to the Appendix deal with water.

Article 40, with its Schedules, is long, detailed, and complex. In reality, it is virtually a separate treaty on water. Although the Israelis again recognized "the Palestinian water rights in the West Bank," the agreement still proceeds on a strictly interim basis.[60] The ambiguity of the recognition can only be clarified by reference back to the endorsement of the equitable utilization principle in the *Declaration of Principles* which the *Interim Agreement* was intended to implement.[61] The Israelis also promised to make available an additional 70-80 MCM/year to the Palestinians, mostly from additional pumping within the West Bank from the eastern branch of the Mountain Aquifer.[62] The Israelis promised to provide 14.5 MCM/year from their water system, 10 MCM/year to be provided to Gaza. The *Interim Agreement* also specifically preserved the existing levels of water usage in the Israeli settlements.[63] Finally, the agreement creates a Joint Water Committee to be composed of equal numbers of representatives and operating by consensus in deciding questions of policy, and Joint Supervision and Enforcement Teams to supervise operations under the agreement.[64]

If one adds the new water to the approximate existing withdrawals on the West Bank, the *Interim Agreement* increases the total water allocated to the West Bank to about 200 MCM/year for about 1,000,000 persons. This compares to the approximately 1,700 MCM/year consumed by about 4,000,000 Israelis.[65] The situation in Gaza is even more grim. These arrangements are hardly equitable and fall short of even the

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56 *Gaza-Jericho Agreement*, *supra* note 10, Annex II, art. II, para. 35.

57 *Ibid.*, Annex IV.

58 *Interim Agreement*, *supra* note 11.

59 *Ibid.*, Annex III, App., art. 40.

60 *Ibid.*, Annex III, App., art. 40(1), (5).

61 *Declaration of Principles*, *supra* note 3, Annex III, s. 1.

62 *Interim Agreement*, *supra* note 11, Annex III, App., art. 40(6), (7) and sch. 10.

63 *Ibid.*, Annex III, App., art. 40(25) and sch. 11.

64 *Ibid.* Annex III, App., art. 40(11)-(17) and sch. 8, 9. See also J. Alster, "Water in the Peace Process: Israel-Syria-Palestinians (Pt. II)" (1996) 9 Justice 4 at 8.

65 Wolf, *supra* note 52 at 60-61; H. Dichter, "Comment, The Legal Status of Israel's Water Policies in the Occupied Territories" (1994) 35 Harv. Int'l L.J. 565; J. Dillman, "Water Rights in the Occupied Territories" (1989) 19 J. Palestine Stud. 46, 52; F. Pearce, "Wells of Conflict on the West Bank" *New Scientist* (1 June 1991) 36.

lowest Palestinian projections of need.[66] They also reinforce the dependence of the Palestinians on Israeli water facilities, in effect converting Israel into the "upstream" partner in developing water from the aquifer. Palestinian concerns about subordination to the Israelis apply even to the Joint Water Commission as its authority is confined to the Palestinian areas, in effect giving the Israelis a veto over Palestinian decisions concerning water but leaving the Palestinians without a voice in Israeli water decisions.

The recognition of Palestinian water rights and the agreement to provide some (albeit remarkably little) new water to the Palestinians is an effort at attaining a more equitable sharing of the resource, but to achieve real equity requires the sacrifice of some existing Israeli uses. Thus far the Israelis are not willing to consider that possibility, yet long-term stability in water arrangements would seem to demand greater equity.[67] Instead, the *Interim Agreement* is replete with promises that the parties will not allow "any harm" to the resource.[68] On their face, the promises bind both sides to the agreement, yet in fact they will operate against the Palestinians rather than against the Israelis, both because the Israelis are downhill on the aquifers and because the enforcement mechanism operates only on the Palestinian side of the emerging boundary. In a text where the only extensive application of the no-harm principle is to prevent pollution,[69] one could argue that the point of the no-harm provisions is precisely to protect the "water and sewage resource" from harm, and not anyone's uses. The ability of the Israeli members of the Joint Water Committee and the Joint Supervision and Enforcement Teams to veto any Palestinian activity that would interfere with an Israeli use, however, makes certain that the narrower interpretation will not prevail. It also makes certain that the two communities will still have considerable need to rethink the allocation of water in negotiating the final status agreement.

In a water-scarce region like the Jordan Valley, consent agreements would perpetuate disputes, not resolve them. Easy trade-offs will be rare and the inability to make difficult trade-offs will only paralyze development. So long as one community is confident that it can impose its will on its neighbours, that community may be satisfied with the result; it cannot expect its neighbours to feel anything but abused. As the *Declaration Terminating Belligerency* between Israel and Jordan recognized, this can only feed extremism and violence.[70] An inequitable sharing of water resources becomes a breeding pond for wars, not a school for peace. The communities involved will have to make their choice. The Israeli–Palestinian agreements, however, leave considerable room for further work necessary for allocating water among the communities and for the completion of arrangements for co-operative management necessary for optimizing the use of the water available to these communities. The parties have not yet attempted a final definition of "equitable utilization." The Israeli–

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66 S. Elmusa, *Negotiating Water: Israel and the Palestinians* (Washington, Institute for Palestine Studies, 1996) at 53-54; N. Kliot, *Water Resources and Conflict in the Middle East* (London: Routledge, 1994) at 244-45; J. Quigley, *Palestine and Israel: A Challenge to Justice* (Durham: Duke University Press, 1990) at 187-88.

67 See Alster, *supra* note 64 at 7-8.

68 *Interim Agreement*, *supra* note 11, Annex III, App., arts. 40(3)(e), (3)(h), 40(21)-(24).

69 *Ibid.*, art. 40(21)-(24).

70 *Declaration Terminating Belligerency*, 25 July 1994, Israel and Jordan; *The New York Times* (26 July 1994) A8 at para. 8.

Jordanian agreements — particularly the *Peace Treaty* — have arrived at tentative agreements on what the "rightful allocation" of existing water sources is as between those two communities.[71] The Israeli–Jordanian *Peace Treaty*, however, leaves the Jordanians in a similarly inequitable, albeit less extreme, position relative to water when compared to the Israelis, as the *Second Interim Agreement* left the Palestinians. Even the Israelis and the Jordanians are likely to find a need to return to the concept of "equitable utilization" to work out the further arrangements that the *Peace Treaty* clearly contemplates.[72]

Watson covers these contentious issues in seven pages,[73] most of which are devoted to a superficial examination of the controversial provisions dealing with customary international law of transboundary water resources as expressed in the *Helsinki Rules*[74] and in the *UN Convention on the Law of Non-Navigational Uses of International Watercourses*.[75] Watson makes no attempt to apply that body of law to the dispute. Instead, he issues a far-from-satisfying conclusion that is characteristic of many of his conclusions throughout the book:

> In sum, the ... new ILC Convention[76] ... suggests that Israel has a legitimate right to protect its existing uses, so long as those uses are not unduly profligate or wasteful, and that the Palestinians have a legitimate right to seek a greater allocation of water that meets their social and economic needs.[77]

Watson's research is painstaking, his writing style is pleasant, his analyses lucid. Unfortunately, his attempts to achieve balanced conclusions leaves his book less interesting than it might have been. All too often his conclusions are so balanced that, like his conclusions about the relevance of international water law, they are almost devoid of content. The book will remain an important resource for future research. However, the book will not provide much guidance about how law impacts, or ought to impact upon the course of future negotiations to place the parties in a situation where they might be able to live together in peace, and eventually to co-operate in creating mutual prosperity.

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71 *Treaty of Peace*, 26 October 1994, Israel and Jordan, (1995) 34 I.L.M. 43 at art. 6. See also S. Rodan, "The Ice Cube on Jordan's Team" *Jerusalem Post* (23 September 1994) 2B; N. Telerant, "Riparian Rights under International Law: A Study of the Israeli-Jordanian Peace Treaty" (1995) 18 Loy. L.A. Int'l & Comp. L.J. 175 at 199-200.

72 *Treaty of Peace*, *ibid.*, Annex II, art. 3.

73 Watson, *supra* note 6 at 300-307.

74 *Helsinki Rules*, *supra* note 53.

75 Res. 51/229 (21 May 1997) UN Doc. A/51/869, (1997) 36 I.L.M. 700.

76 Watson's term for the UN *Convention*.

77 Watson, *supra* note 6 at 306.