

# THE DAY AFTER TOMORROW: WHAT HAPPENS ONCE A MIDDLE EAST PEACE TREATY IS SIGNED?

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Dealing with the Israeli-Palestinian conflict sometimes seems like wading into quicksand. Far more good ideas and good intentions have been focused on this conflict than would seem possible, judging by the progress over the last forty years (or eighty years).<sup>1</sup> And yet, good people on many sides of this conflict hope and expect that within their lifetimes, they will see the recognition of two states that can live with each other in peace.<sup>2</sup> So, one might ask, given how entrenched the conflict is and the extent of the work necessary to bring about peace, why focus on the day *after* a peace treaty? In fact, as we have now seen in numerous international conflicts, unless the players recognize the impact of different choices for moving forward, conflicts have a tendency to slide backward. We have a natural focus on “getting to yes” or “getting to peace” in order to end violence and resolve the dispute. This essay focuses on what peace will actually look like the day after such a treaty is signed.

This essay will lay out a number of considerations as we move forward in the Israeli-Palestinian conflict. First, I will examine the current situation to outline several of the theories used to explain the current stalemate and suggest paths forward. Second, by examining other post-conflict structures around the world, I will outline some common mistakes made by the international community in resolving disputes. Finally, I will look at the Israeli-Palestinian conflict specifically to outline what is needed once a peace treaty is signed (and, by implication, what should be contained in that treaty).

Trying to tackle any of these issues, let alone all of them, in a brief essay requires that much of the detail be left to those who have done far more extensive work on the Israeli-Palestinian conflict. Similarly, I will explain in overview fashion some theories and approaches to international relations which will, no doubt, simplify some important nuances. I encourage the reader to make use of the sources in this essay and others in this symposium for a fuller

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<sup>1</sup> As Mnookin notes, even the date of the start of this conflict is open to debate depending on whether the settlement of Jews in the British Mandate started the conflict, or Israeli independence, or the 1967 war. Robert H. Mnookin, Ehud Eiran, & Sreemati Mitter, *Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians*, 6 NEV. L.J. 299, 302-03 (2006).

<sup>2</sup> As Mnookin and others have noted, the two state solution is virtually assumed by the majority of the populations affected and by the vast majority of the rest of the world watching in. Mnookin et al., *supra* note 1, at 362-63.

understanding. I have also tried to point out some of the complementary work that is occurring in the field of dispute resolution and the field of international relations, because the understanding of international disputes is richer when informed by both fields.

## I. THE GRAVEYARD OF GOOD IDEAS—A.K.A. THE CURRENT SITUATION

Numerous excellent political scientists and legal scholars have written multiple explanations of what is preventing peace in the Middle East. These theories can be divided into three categories: solution-focused, party-focused, and international community focused.

### A. *Solution-Focused Barriers to Peace*

Scholars examining the Israeli-Palestinian conflict have taken different views of what has prevented peace thus far.

#### 1. *It's a Question of a Solution*

Early writings about the Israeli-Palestinian conflict pointed out the difficulty of finding a solution to such a complex situation. There were borders, religious sites, reparations, and mixed populations to be negotiated. And, of course, if one viewed the negotiation as sovereignty versus security,<sup>3</sup> solutions would appear even more difficult.

Even here, we now know that the negotiation teams made excellent progress at Taba, coming close on borders for Israel and the Palestinian state, solutions for the right of return, and border control.<sup>4</sup> In fact, most commentators would now agree that a lack of solution is not the problem here.<sup>5</sup>

#### 2. *It's a Question of BATNA*<sup>6</sup>

Linked to the question of solution is the question of the parties' alternatives to that solution. Russell Korobkin has written here and elsewhere that each side's BATNA determines how they can negotiate in the current situation.<sup>7</sup> As long as the respective BATNAs look better than the expected outcome, the current situation will continue.<sup>8</sup>

Korobkin writes that without an overlapping zone of agreement, agreement cannot occur. Of course, as he notes, part of the problem here could well be that the zone *does* exist and the battle is to divide the "surplus" of the agree-

<sup>3</sup> See ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 1981).

<sup>4</sup> See David Matz, *Intra-Team Miscommunication*, in *THE NEGOTIATOR'S FIELDBOOK* (Andrea Kupfer Schneider & Christopher Honeyman, eds., forthcoming 2006).

<sup>5</sup> See, e.g., Mnookin et al., *supra* note 1, at 299-300.

<sup>6</sup> FISHER & URY, *supra* note 3, at 101 (BATNA stands for "Best Alternative to a Negotiated Agreement"—what you would do if you did not reach agreement with the other side).

<sup>7</sup> See Russell Korobkin, *Exploring the Link Between Domestic Conflicts and Negotiation Failure in the Middle East*, 6 NEV. L.J. 388 (2006); Russell Korobkin, *Bargaining Power as Threat of Impasse*, 87 MARQ. L. REV. 867 (2004).

<sup>8</sup> See Russell Korobkin & Jonathan Zasloff, *Roadblocks to the Road Map: A Negotiation Theory Perspective on the Israeli-Palestinian Conflict After Yasser Arafat*, 30 YALE J. INT'L L. 1 (2005).

ment. This battle to divide the surplus leads to hard bargaining on both sides and, in the end, stalemate.

The problem with BATNA analysis in this particular conflict is that this requires the assumption that there are rational players with a rational view of the entire situation.<sup>9</sup> Outlining zones of agreement does not take account of cognitive and psychological barriers to settlement,<sup>10</sup> cultural and language barriers that keep parties apart, and team divisions so that the BATNA actually appears differently to different entities on the same side. While zone analysis might work in economic transactions with "rational" business people,<sup>11</sup> it is hard to argue that this approach on its own is sufficiently rich and nuanced for longstanding ethnic conflict.

### 3. *It's a Question of Ripeness*

Another theory examining the solution versus alternatives is William Zartman's theory of ripeness.<sup>12</sup> He explains that conflicts need to reach a mutually hurting stalemate before each side will be willing to sit and talk.<sup>13</sup> The stalemate is defined as a place where further escalation would not be expected to result in gains. If either side thinks that they can escalate the violence and make more progress that way, the stalemate (and thus the opportunity for progress) does not exist. In some ways, this is the international relations interpretation of the bargaining zone/BATNA analysis—a mutually hurting stalemate exists because the BATNA is lousy for one or both sides.

The problem with this theory, as Zartman acknowledges, is that waiting for this stalemate to end can be lengthy and guessing when that magically occurs can be difficult. One could have assessed a stalemate in 1994 before the Oslo Accords. One might have thought that there was a mutually hurting stalemate prior to Taba with Israeli elections looming and Sharon likely to invalidate most concessions made by Barak. Nonetheless, there is no good way to move the parties along while waiting if one thinks that only a mutually hurting stalemate will move the parties to peace. Professor John Paul Lederach has also commented on this dilemma, noting that the concept of mutually hurting stalemate creates an analogy to cherry-picking (as if the solution was only waiting there to be carried out) rather than recognizing the hard part of *cultivating* solutions to international conflict.<sup>14</sup> Lederach's vision of cultivation may be

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<sup>9</sup> See, e.g., Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319 (discussing the difficulty of translating theories to different contexts).

<sup>10</sup> See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994).

<sup>11</sup> See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000).

<sup>12</sup> See I. William Zartman, *The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments*, in CONTEMPORARY PEACEMAKING: CONFLICT, VIOLENCE AND PEACE PROCESSES 19-20, 24, 26 (John Darby & Roger Mac Ginty eds., 2003); I. William Zartman, *Timing and Ripeness*, in THE NEGOTIATOR'S FIELDBOOK, *supra* note 4.

<sup>13</sup> See Zartman, *The Timing of Peace Initiatives*, *supra* note 12, at 24-25.

<sup>14</sup> See John Paul Lederach, *Cultivating Peace: A Practitioner's View of Deadly Conflict and Negotiation*, in CONTEMPORARY PEACEMAKING, *supra* note 12, at 33-34.

more realistic in these long term intractable conflicts, albeit unsatisfying in terms of the amount of patience needed.

### *B. Party-Focused Barriers to Peace*

The second group of theories to explain peace or the lack thereof focuses on the parties themselves.

#### *1. It's a Question of Leadership*

Many columnists and opinion leaders wrote during the course of the last twenty years that if only the leadership could be changed—in both Israel and in the Palestinian territories—we would be able to achieve peace. Looking at the Palestinian side, many believed that if moderates were in charge of the PLO or if Yasser Arafat was no longer in charge, then the PLO would be able to move forward toward peace.<sup>15</sup> On the other side, there were many critics of Sharon's leadership as well.<sup>16</sup>

Of course, both of these predictions have proven false. The death of Yasser Arafat and the change in PLO leadership has not yet resulted in any dramatic change in policy nor in moving the peace process forward. Similarly, (and ironically), it has been under the more conservative Likud party leadership that significant deals have been made (Rabin) and the first actual land withdrawals have occurred (Sharon). Sharon's new party, Kadima, seems to have been created with the goals of continuing withdrawals that would have been fought by Likud.<sup>17</sup> While there have been times in history where the peaceful change in leadership has made dramatic progress in peace among neighbors, more often the change is not as dramatic as expected or does not produce the policy change that others might have expected. Abbas has not been able to control the extremist elements in the Palestinian territories and now, with Hamas in power, it is unclear that there ever will be a willingness to confront those elements and make true progress.<sup>18</sup>

#### *2. It's a Question of Internal Conflict*

The thesis of the Mnookin article is a failure of centrism among the two sides and a concurrent failure by leadership to control and mitigate the extremists.<sup>19</sup> Without leadership willing to control the extremists who support either the attacks on Israel or the expansion of settlements, true progress in the con-

<sup>15</sup> See, e.g., Clyde Haberman, *Dennis Ross's Exit Interview*, N.Y. TIMES Mar. 25, 2001, § 6 at 36; Editorial, *Looking Beyond Yasir Arafat*, N.Y. TIMES Dec. 14, 2001, at A38; Jane Perlez, *Clinton, After Courting Arafat, Feels Frustrated by Latest Turn*, N.Y. TIMES, Oct. 11, 2000, at A1.

<sup>16</sup> See, e.g., James Bennet, *Arafat Can Leave, But Only to Exile, Sharon Tells Him*, N.Y. TIMES, Apr. 3, 2002, at A1, A8; (Javier Solana, the foreign policy chief of the EU, referring to both Sharon and Arafat, "Neither is a saint, and sometimes I'm inclined to think that perhaps a new generation of persons in Israel and Palestine could in the 21st century come with a solution to the conflict."); see also Yossi Sarid, *Sharon and Arafat in a Deadly Dance*, N.Y. TIMES Dec. 20, 2001, at A39.

<sup>17</sup> See *The Surprising Mr. Sharon*, ECONOMIST, Nov. 26, 2005, at 13; *Ariel Sharon Sets Off on His Own*, ECONOMIST, Nov. 26, 2005, at 57.

<sup>18</sup> See *The Hamas Conundrum*, ECONOMIST, Nov. 12, 2005, at 48.

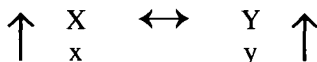
<sup>19</sup> Mnookin et al., *supra* note 1.

flict cannot be made. This internal tendency to move toward the extreme has been seen in numerous other situations as well.<sup>20</sup> Groups, talking primarily to themselves, support more extremist thinking than if they were forced to spend time with the other side of the dispute. The most successful example we have in recent times about the centrist push toward peace is in Northern Ireland with George Mitchell's procedure for mediation. In the way that he managed the process, Mitchell built trust and power with the center and enabled the centrists on both sides to move forward without letting extremists on either side derail the process.<sup>21</sup>

Mnookin's prescriptive advice is that we need both empathy and assertiveness in order to deal successfully with this move to the extremes.<sup>22</sup> Part of the problem with this advice is the timing of "empathy," let alone how to measure it. How does "empathy" turn into a procedure for peace? First, how long must the empathy with the other side last? The goal is obviously to build lasting empathy both within and across groups but, in the meantime, what can we expect from citizens? Should empathy trump new bombings? Harassing delays at border crossings? Second, how do we measure this empathy? If empathy is measured by eliminating suicide bombing or by holding off on responsive attacks, we can realistically *expect* this to be violated. The problem is that the restraint will not be perfect nor last for a significant period of time.

### 3. *It's a Question of Diplomacy*

Building on both the theories of bargaining range and dealing with domestic constituencies, political scientist Robert Putnam explains international negotiations as "Two-Level Games."<sup>23</sup> In other words, in negotiations between countries X and Y with their domestic constituencies represented by x and y, there are three negotiations going on.



Constituencies x negotiate with government X in order to set the negotiation range. Constituencies y negotiate with government Y in order to set their negotiation range. Then governments X and Y must negotiate on the basis of the range they have already negotiated domestically. As we might hypothesize, the bargaining range for any international agreement is significantly narrowed

<sup>20</sup> See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71 (2001).

<sup>21</sup> See GEORGE J. MITCHELL, *MAKING PEACE* (1999); Daniel Curran & James K. Sebenius, *The Mediator as Coalition Builder: George Mitchell in Northern Ireland*, 8 INT'L NEGOTIATION 111 (2003); Daniel Curran, James K. Sebenius & Michael Watkins, *Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20 NEGOTIATION J. 513 (2004).

<sup>22</sup> Mnookin, *supra* note 1, at 365-66.

<sup>23</sup> Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); see also DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS (Peter B. Evans et al. eds., 1993) [hereinafter DOUBLE-EDGED DIPLOMACY] (focusing on the problems of international bargaining and domestic politics as two-level games).

by the domestic level negotiations prior to any international negotiation.<sup>24</sup> As Frederick Mayer wrote in his analysis of NAFTA, "[w]e can better understand national bargaining behavior by recognizing that national negotiator preferences derive partly from a calculus of national (primarily economic) costs and benefits and partly from a calculus of political costs and benefits imposed in domestic bargaining."<sup>25</sup> Negotiators must consider not only good policy but what is good politics.<sup>26</sup>

#### 4. *It's a Question of Teams*

A fourth theory looking at the parties examines how the teams have operated in actual negotiations. David Matz has outlined a situation in which, fed by the internal conflicts explained above, the miscommunication among the negotiation team seriously hampered the negotiation.<sup>27</sup> In his analysis of the Taba negotiations, Matz explains that both the Israelis and Palestinians had designated team members to negotiate by issue. Each issue team actually made impressive progress at Taba but without coordination and general oversight of the teams, the progress was to no avail. Of course, as he notes, this is also a question of leadership.<sup>28</sup> To move forward, the teams themselves must better coordinate their communications within the team and, most importantly, with their own leadership.

### C. *International Community & Systemic Barriers to Peace*

The third group of barriers to peace is more systemic and, in part, has to do with third parties.

#### 1. *It's a Question of International Pressure*

Early in the Israeli-Palestinian conflict (and even now) some argue that external pressure or superpower pressure is what is needed to move the parties to peace.<sup>29</sup> This was clearly the situation that ended both the 1967 and 1973 wars between Israel and its Arab neighbors (where the United States pressured

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<sup>24</sup> See case examples in DOUBLE-EDGED DIPLOMACY, *supra* note 23.

<sup>25</sup> FREDERICK W. MAYER, INTERPRETING NAFTA: THE SCIENCE AND ART OF POLITICAL ANALYSIS 147 (1998).

<sup>26</sup> See *id.* For more on this analysis applied to NAFTA, see Andrea Kupfer Schneider, *Getting to NAFTA: A Review of Interpreting NAFTA by Frederick W. Mayer*, 17 BERKELEY J. INT'L L. 330 (1999).

<sup>27</sup> Matz, *supra* note 4.

<sup>28</sup> David Matz, *Trying to Understand the TABA Talks (Part I)*, 10:3 PALESTINE-ISRAEL J. OF POL., ECON. & CULTURE 96 (2003), available at <http://proquest.umi.com/pqdweb?>.

<sup>29</sup> See, e.g., Yeshayahu Leibowitz, *Right, Law and Reality*, in JUDAISM, HUMAN VALUES, AND THE JEWISH STATE 232 (Eliezer Goldman ed., 1976) ("the way out for which we may hope is that partition of the county by a settlement imposed on both sides by the superpowers").

Israel to stop its military actions)<sup>30</sup> so it would not be illogical to assume that a similar approach would work today.<sup>31</sup>

Of course, it would be hard to argue that there has not been sufficient international attention to this conflict, particularly given the focus of the Clinton administration through multiple summits and meetings.<sup>32</sup> Even with a four-way push for peace (the contact group) it appears that neither party is likely to bow to outside pressure without all other interests being met.

## 2. *It's a Question of How We Negotiate*<sup>33</sup>

Another barrier to peace could be the way most international negotiations are conducted.<sup>34</sup> Much international relations analysis has traditionally viewed the world through the theory of realism.<sup>35</sup> More recently, liberal international relations theory has been used to analyze relations.<sup>36</sup> Realists would argue that conflict resolution will occur when parties find it in their best interests to end violence, while liberal theorists would argue the impact of international organizations in pushing and encouraging member states to end conflict for the good of many states. An example of liberal international relations theory in practice is the Andean Pact trade organization's requirement that its member states all are democratic.<sup>37</sup> While arguably a democracy is unnecessary for a free trade agreement, this provision has proven useful in maintaining democracy in the region.<sup>38</sup> The even greater economic incentive to join the EU has pushed many former communist countries to democracy as well.

<sup>30</sup> See HENRY KISSINGER, *WHITE HOUSE YEARS* (1979); Matthew A. Levitt, *Kilometer 101: Oasis or Mirage? An Analysis of Third-Party Self-Interest in International Mediation*, 15 *MEDIATION Q.* 155-61 (1997); SAADIA TOUVAL, *THE PEACE BROKERS: MEDIATORS IN THE ARAB-ISRAELI CONFLICT, 1948-1979* (1982).

<sup>31</sup> See, e.g., Saadia Touval, *The U.S. Tilt Helps Palestinians, Too*, WASH. POST, Nov. 19, 2000, at B3.

<sup>32</sup> See DENNIS ROSS, *THE MISSING PEACE: THE INSIDE STORY OF THE FIGHT FOR MIDDLE EAST PEACE* (2004).

<sup>33</sup> For comparisons between international negotiations and other processes, see Andrea Kupfer Schneider, *Public and Private International Dispute Resolution*, in *THE HANDBOOK OF DISPUTE RESOLUTION* (Michael L. Moffitt & Robert C. Bordone eds., 2005).

<sup>34</sup> For an illustration of how typical negotiations are carried out, versus how they could be done, see ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* (1994).

<sup>35</sup> See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT'L L.* 335, 336-38 (1989); see also Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT'L L.* 205, 214-18 (1993) (discussing realism theory). For more on realism, see generally ROBERT GILPIN, *U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* (1975); see also HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1952).

<sup>36</sup> See, e.g., Slaughter Burley, *supra* note 35; INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 *INT'L ORG.* 753 (1986); Andrew Moravcsik, *A Liberal Theory of International Politics*, 51 *INT'L ORG.* 513 (1997).

<sup>37</sup> See Additional Protocol to the Cartagena Agreement, [http://www.sice.oas.org/CAN/Prot/demc\\_e.asp](http://www.sice.oas.org/CAN/Prot/demc_e.asp) (last visited Feb. 4, 2006).

<sup>38</sup> See, e.g., Anthony DePalma, *Talks Tie Trade in the Americas to Democracy*, N.Y. TIMES, Apr. 23, 2001, at A1, A6.

Terrence Hopmann has explored the parallels between international relations and styles of negotiation.<sup>39</sup> The realist approach to the world tends to be reflected in “hard bargaining” while the liberal approach would be reflected in “problem solving.” Hopmann argues that perhaps the reason we see so much hard bargaining in the international arena is the prevailing view of realism in international relations. (And since hard bargaining leads to more stalemates and intransigence, this style default has implications). On the other hand, if we were to adopt a more liberal view of international relations where countries act together to meet their interests, perhaps we would see more problem solving in the negotiations among countries.<sup>40</sup>

### 3. *It's a Question of Our Goals*

Another systematic problem found in conflict resolution theory is balancing interests in peace versus interests in justice. In other words, is it more important to stop the violence or to pursue justice (often punishment) for those perpetrators of human rights violations? John Paul Lederach has labeled this dilemma as one of the primary paradoxes of conflict resolution.<sup>41</sup> As discussed earlier, many South and Central American countries chose “peace” (and moving toward democracy) over “justice” and granted the military amnesty for violations carried out under its regime. The resolution to the Bosnian civil war was a good example of pursuing peace (getting the Serbs to stop killing Muslims and Croats)<sup>42</sup> rather than pursuing justice (although the tribunals are supposed to be accomplishing one aspect of justice) since the carving up of Bosnia into two states was, in some ways, handing the Serbs the division for which they had clamored. Formerly mixed areas are now almost completely divided by ethnicity.<sup>43</sup> The question of what values to pursue can also be paralyzing. In the Israeli-Palestinian case, from the Israeli perspective making peace seems to reward terrorism. From the Palestinian perspective, making peace means an entire shift in identity and relinquishing much of the past.

By understanding how there are multiple barriers to peace, it is easier to understand why—even with an overlapping zone of agreement, mutually hurting stalemate, apparent solutions, and outside pressure—this conflict has not yet been resolved. All of the barriers in all three areas—solution, parties, and the international community—need to be removed before there will be peace in this situation. Similarly, as we think about what will happen after peace, problems can occur along these same three axes—solution, parties and international community.

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<sup>39</sup> P. Terrence Hopmann, *Two Paradigms of Negotiation: Bargaining and Problem Solving*, 542 ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1995, at 24.

<sup>40</sup> *Id.*

<sup>41</sup> Lederach, *supra* note 14, at 33-35, 37.

<sup>42</sup> See Roger Cohen, *Lessons from Bosnia, 10 Years On: A U.S. Commitment Can Work*, N.Y. TIMES, Nov. 20, 2005, § 4, at 4.

<sup>43</sup> See LYNNE JONES, *THEN THEY STARTED SHOOTING: GROWING UP IN WARTIME BOSNIA* (2005).



## II. LESSONS FROM OTHER POST-CONFLICT SOLUTIONS<sup>44</sup>

This next section examines lessons from other conflicts that can be addressed when contemplating the resolution for the Israeli-Palestinian conflict.

### A. International Community Impact

When setting up an international tribunal, the first element is outside commitment. In other words, the international community needs to be fully committed to the tribunal's success. Often, this commitment is first demonstrated by money, as the UN or specific donors promise funds for the court or tribunal or whatever structure has been established. The lack of money, and its impact, has been well-documented in the tribunals for Rwanda, Sierra Leone, and East Timor among others. In East Timor, for example, the new court has an annual budget of only \$6.3 million<sup>45</sup> compared to the former Yugoslavia tribunal ("ICTFY") which has an annual budget of \$276 million<sup>46</sup> and the Rwanda tribunal's budget of over \$255 million.<sup>47</sup> This lack of money leads to delays in investigation, delay in resolution, and potential breakdown of the process. In Sierra Leone, funding is so scarce that the judges must split their days between two trials at once since there are not enough judges and the tribunal has even been told it cannot make photocopies of materials!<sup>48</sup>

In the Israeli-Palestinian conflict, since it is likely that reparations and rebuilding of economies will be part of a settlement, it is crucial not only that these economic plans are written into the treaty, but also that it is sufficiently funded (by the United States, by the European Union, by Israel, by other Arab states, etc.) so that the reparations are actually paid and the economy is rebuilt.<sup>49</sup>

The other key element for demonstrating international commitment to the process is that neighboring states, in particular, must be cooperative with whatever international structure has been established. For example, do other

<sup>44</sup> For comparisons among international trade dispute resolution mechanisms (set up to deal with other types of conflict), see Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697 (1999).

<sup>45</sup> See Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 258 (2003).

<sup>46</sup> See ICTY at a Glance, <http://www.un.org/icty/glance-e/index.htm> (last visited Feb. 4, 2006) (budget is over \$276 million for 2006-2007).

<sup>47</sup> See International Criminal Tribunal for Rwanda, General Information, <http://65.18.216.88/ENGLISH/geninfo/index.htm> (last visited Feb. 4, 2006) (budget was \$255.9 million for 2004-2005). Note that the lack of funding for the Rwandan domestic Gacaca courts seriously hampers their effectiveness as well. See Catherine Honeyman et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 PEACE AND CONFLICT: J. OF PEACE PSYCHOL. 1 (2004).

<sup>48</sup> See Andreas O'Shea, *Ad Hoc Tribunals in Africa*, 12 AFR. SECURITY REV. 17, 19 (2003), available at <http://www.iss.org.za/pubs/ASR/12No4/contentPDF.html>.

<sup>49</sup> See Oren Gross, *Mending Walls: The Economic Aspects of Israeli-Palestinian Peace*, 15 AM. U. INT'L L. REV. 1539 (2000); Oren Gross, *Regional Trade Arrangements in the Service of Peace in the Middle East*, in REGIONAL COOPERATION IN A GLOBAL CONTEXT 101 (R. Bar-El et al. eds., 2000); Oren Gross, *The Israeli-Palestinian Economic Permanent Status Agreement and Trade Regime*, ECON. Q. 50 (2000).

states arrest and send suspects to the tribunal? The delay in the ICTFY in getting suspects from Serbia, in particular, led many to question whether this would be successful early on.<sup>50</sup> An even more egregious example is in the case of the set of tribunals dealing with the aftermath of the Indonesian occupation of East Timor. While East Timor has indicted generals from the Indonesian army for gross human rights violations, there is no expectation that Indonesia will hand anyone over anytime soon. Without defendants, even though this tribunal was established and supported by the international community, it is likely that this tribunal will completely fail in its mission.<sup>51</sup>

In the Israeli-Palestinian situation, support of neighboring states will be crucial in carrying out whatever the terms of the final peace treaty are. First, borders must be protected and patrolled. If, for example, Egypt continues to permit heavy weaponry into Gaza,<sup>52</sup> Israel will probably need to take action in the future. Similarly, Lebanon, while dealing with its own struggle to throw off the Syrian-run government of the past, will have to maintain its peaceful border on the north of Israel. Although there have been skirmishes on the border because Hezbollah still has a presence in southern Lebanon, these have been relatively minimal. Even better would be establishing peaceful relations with Lebanon as it moves to true democracy. One issue with Lebanon, as noted by Mnookin, is that Lebanon has the highest percentage of Palestinian refugees after the West Bank and Gaza.<sup>53</sup> These refugees either need to be integrated into Lebanese society, or moved to a new Palestinian state in order to stabilize the region.

### *B. Parties to the Conflict*

The second major factor in determining effective post-conflict structures is whether there is internal commitment by the parties. In other words, are the countries themselves committed to the success of the post-conflict resolution structure? This internal commitment can be measured in three ways. First, the post conflict structure must be viewed as legitimate by the parties and by the populace of the countries. For example, in South Africa, the Truth & Reconciliation Commission ("TRC") is viewed as playing a legitimate role in the resolution of apartheid, its reports and witnesses are given high credibility by the public and the process is also viewed as fair by both observers and participants.<sup>54</sup> On the other hand, the ICTFY was for some time seen as unfair and biased against the Serbians. Trials and proceedings were not shown on Serbian television, and commentators decried the fact that, at least at the beginning, all

<sup>50</sup> See Theodor Meron, *A Trial Without Witnesses*, N.Y. TIMES, Mar. 7, 1996, at A25; Christopher S. Wren, *Judge Says Yugoslavia Impedes Work of War Crimes Tribunal*, N.Y. TIMES, Nov. 9, 1999, at A7; Ian Fisher, *Serbia Delays Extradition of War Crimes Suspects*, N.Y. TIMES, Apr. 1, 2002, at A6.

<sup>51</sup> See Herbert D. Bowman, *Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor*, 18 EMORY INT'L L. REV. 371, 397-98 (2004).

<sup>52</sup> See *Dealers Smuggle Weapons into Gaza from Egypt*, N.Y. TIMES, Sept. 15, 2005, at A7; Greg Myre, *Israel Security Aide Now Expects More Attacks from West Bank*, N.Y. TIMES, Sept. 22, 2005, at A8.

<sup>53</sup> Mnookin et al., *supra* note 1, at 307.

<sup>54</sup> See JAMES GIBSON, *OVERCOMING APARTHEID* 266-68, 284-88 (2004).

of the defendants were Serbian.<sup>55</sup> The importance of legitimacy cannot be underestimated in terms of effecting real change in the conflict.

Many experts have noted the important link of education, particularly for children, and how correct information about the conflict can allow the society to move forward.<sup>56</sup> In interviews with Bosnian Serbian children after the war, very few of them understood the role (and fault) of their government and forces during the war.<sup>57</sup> Some observers worry that ethnic tensions on the ground are now as high as anytime during the conflict. This can be compared to the education of German children (at least West German children) after World War II which clearly outlined the human rights violations of their own government.<sup>58</sup> Of course, one could argue that few German observers thought that Nuremberg was completely legitimate either (thus demonstrating the importance of long-term educational goals as well). In terms of the Israeli-Palestinian conflict, whatever resolution is arrived at must be seen as legitimate by both sides so that there is internal commitment to carrying it out and maintaining peace.

The second part of internal commitment is demonstrated through the political will to carry out the resolution. Again, looking at the Bosnian conflict, it is only recently that the Serbian and Bosnian Serbian governments have searched for and turned over some of the higher ranking officials.<sup>59</sup> Similarly problematic is the situation in Indonesia where, even though the government has promised to prosecute violators of human rights, few indictments are actually handed down. And, even with indictments, no one is yet in prison. Of the sixteen Indonesians indicted thus far for human rights violations, all have been acquitted or freed while their cases are on appeal.<sup>60</sup> Other cases of lack of political will are unfortunately relatively easy to find in post-conflict resolutions. In El Salvador, at the end of the civil war which claimed 75,000 lives, the new government promised a truth commission to investigate allegations of human rights violations. Although the truth commission was able to write a report, because of lack of political will, no one was actually prosecuted. In fact, the government granted broad amnesty within a few days of the publication of the truth commission's report.<sup>61</sup>

It is clear that in the Israeli-Palestinian dispute, concern over lack of political will is one of the major concerns for the Israelis vis-à-vis the Palestinians. Without Palestinian political will to secure borders and prosecute terrorists, any

<sup>55</sup> One could of course argue that this was because most of atrocities have been carried out by Serbians, but it did help in terms of internal commitment once the ICTFY started to prosecute Croats and Bosnians.

<sup>56</sup> *But see After the Riots*, *ECONOMIST* Dec. 17, 2005 at 47 (noting that the debate over textbooks in France can actually fuel the flames of conflict rather than controlling them).

<sup>57</sup> See Jones, *supra* note 43; see also *A Better View of the Bad Guys*, *ECONOMIST*, Dec. 17, 2005, at 48 (outlining the progress made on "history manuals" for the Balkans which outline Balkan history from a variety of ethnic viewpoints).

<sup>58</sup> See, e.g., GITTA SERENY, *THE GERMAN TRAUMA: EXPERIENCES AND REFLECTIONS ON GERMANY, 1938-2001* (2001).

<sup>59</sup> See Nicholas Wood, *Prosecutor Says No. 1 War Crimes Suspect is Hiding in Belgrade*, *N.Y. TIMES*, Feb. 12, 2004, at A8.

<sup>60</sup> See, e.g., *Above the Law; Indonesia's Security Forces*, *ECONOMIST* Aug. 14, 2004; *Indonesian Wins Appeal Against Rights Verdict*, *N.Y. TIMES*, Nov. 6, 2004, at A6.

<sup>61</sup> See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 *VAND. J. TRANSNAT'L L.* 497, 537 (1994).

peace treaty will fail. Arguably, this political will must exist over the long term, perhaps even more than in the government that turns over an official, so that terrorism based in the new Palestinian state is eliminated. The political will required by the Israelis will include *not* building new settlements and emptying other West Bank settlements. Ensuring commitment on both sides is a key part of reaching peace.

The third part of internal commitment is sometimes hampered when the populace just wants to move on. After an exhausting and debilitating conflict, it is a natural desire to want to look forward. Rather than deal with the aftermath of what was usually a serious human rights violation, the government and the population might decide that it would be easier, better, or more secure to not focus on the conflict. Sometimes, this decision to move on is both effective and understandable. In many South American countries, it was both prudent and necessary to give army officers amnesty in order to permit free elections and a move to democracy. It is hard to criticize these decisions, given the situations.<sup>62</sup> Of course, the irony is that these amnesties are now being overturned and attention is finally being given to prosecuting these criminals.<sup>63</sup> There is also some evidence that rehashing violations in a truth commission without appropriate punishment only divides the parties further.<sup>64</sup>

Of course, avoiding the truth does not actually make it go away. Although there are, on occasion, issues over World War II between Germany and its former enemies (for example, Russia continues to claim that it does not need to return German art in its collections since this artwork serves as partial restitution for the destruction Germany inflicted during WWII),<sup>65</sup> the tensions between Japan and its enemies during WWII arise regularly.<sup>66</sup> The lack of acknowledgment for wrongs caused (Korean comfort women, the massacre at Nanking, etc.) continue to replay themselves because, in part, they were never sufficiently dealt with in the first place.

The situation in the Israeli-Palestinian conflict will be slightly different because "truth-telling" in terms of human rights violations is not a primary concern. Unlike some other conflicts, the identity of perpetrators and scope of

<sup>62</sup> See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

<sup>63</sup> See, e.g., Larry Rohter, *Argentine Ruling Revives Cases of 'Dirty War' Victims*, N.Y. TIMES, July 15, 2005, at A3; Larry Rohter, *Chilean Court Revokes Pinochet's Immunity from Prosecution*, N.Y. TIMES, May 29, 2004, at A5.

<sup>64</sup> See James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 644 (2005).

<sup>65</sup> See, e.g., AKINSHA KONSTANTIN & GRIGORII KOZLOV, BEAUTIFUL LOOT: THE SOVIET PLUNDER OF EUROPE'S ART TREASURES (1995); Lina M. Montén, Note, *Soviet World War II Trophy Art in Present Day Russia: The Events, the Law, and the Current Controversies*, 15 DEPAUL-LCA J. ART & ENT. L. & POL'Y 37 (2004).

<sup>66</sup> See Norimitsu Onishi, *In Japan's New Texts, Lessons in Rising Nationalism*, N.Y. TIMES, Apr. 17, 2005, § 4, at 4; Joseph Kahn & James Brooke, *Chinese Official Cuts Short Japan Trip to Protest Shrine Visit*, N.Y. TIMES, May 24, 2005, at A4; Norimitsu Onishi & Howard W. French, *Ill Will Rising Between China and Japan as Old Grievances Fuel New Era of Rivalry*, N.Y. TIMES, Aug. 3, 2005, at A7; Norimitsu Onishi, *South Korean Tells Japan's Leader to Stop Visiting Shrine*, N.Y. TIMES, Nov. 19, 2005, at A5.

violations have always been well-known and covered in the press. Nor, arguably, will this be helpful in this particular situation anyway.<sup>67</sup> More importantly, the desire to “move on” should actually motivate the populations toward peace rather than away from it. At the same time, we should be sure that resolution does include the truth as it defined for both sides—populations moves after the 1948 war, the toll of suicide bombers, etc.—and that the “truth” is shared across borders.

### C. “Solution Problems”—Issues with the Tribunal/Resolution Process

The final area that arises in terms of problems for post-conflict resolution is with the process itself—whatever process the parties have established to resolve the conflict.

First, sometimes there will be a lack of a formal process that ends the conflict, such as a ceasefire. The problem with a mere ceasefire versus a formal process—be it a tribunal, court, or TRC—is that the parties assume a ceasefire or peace treaty will be sufficient. But a ceasefire without a process merely freezes the situation on the ground and does little for moving the parties or the situation further. In order for the parties to have the benefit of internal legitimacy, there needs to be some sort of resolving process.

In the Israeli-Palestinian conflict, a mere ceasefire will do little. Previous ceasefires have accomplished little for long term peace in the region.<sup>68</sup> There clearly needs to be a process that resolves the border, refugee, restitution and security issues rather than relying solely on the cessation of hostilities.

Second, there is often a lack of clarity in the applicable law or the mandate of the structure is too narrow. Laws or procedures are cobbled together (often from other examples of post-conflict resolutions)<sup>69</sup> but once the procedure is started, the officials are actually unclear about to whom the law applies or the

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<sup>67</sup> See, e.g., *Truth Commissions: A Comparative Assessment* at 76 (Harvard Law School Human Rights Program) (1997) (comments by Yael Tamir) (arguing that a truth commission for the Israeli-Palestinian conflict could be harmful). But see Matthew A. Weiner, Note, *Defeating Hatred with Truth: An Argument in Support of a Truth Commission as Part of the Solution to the Israeli-Palestinian Conflict*, 38 CONN. L. REV. 123 (2005).

<sup>68</sup> In this situation, the concept itself is problematic because of a cultural/linguistic mismatch in translation of terms. For example, “ceasefire,” in English, seems to mean the ending of hostilities; “hudna,” in Arabic, means a temporary scaling down of hostilities (with time to rearm); while “hafsakat esh,” in Hebrew, means the ending of all attacks unless a preemptive strike is needed. This translation issue, in fact, also occurred with the famous UN Resolution 247 where the English and Russian translations (without “the”) seemed to imply return of [some] territories, while the French and Spanish translations state that Israel should return [all ] territories. See Sanda Kaufman, *But What Do They Really Mean? The Interpreter as Intervener or a Ceasefire Story*, in THE NEGOTIATOR’S FIELDBOOK, *supra* note 4.

<sup>69</sup> It is both understandable and quite striking how much the language to establish tribunals in the 1990s looks alike. See Statute of the International Criminal Tribunal for Rwanda, <http://65.18.216.88/ENGLISH/basicdocs/statute.html> (last visited Feb. 10, 2006); International Criminal Tribunal for the Former Yugoslavia, [www.un.org/icty/index.htm](http://www.un.org/icty/index.htm) (last visited Feb. 10, 2006); Truth Commissions Digital Collection: Reports: El Salvador, [http://www.usip.org/library/tc/doc/reports/el\\_salvador/tc\\_es\\_03151993\\_toc.html](http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_toc.html) (last visited Feb. 10, 2006); The Special Court for Sierra Leone, <http://www.sc-sl.org/index.html> (last visited Feb. 10, 2006); Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/index.html> (last visited Feb. 10, 2006).

scope of the law. In the International Criminal Court ("ICC"), although it has not yet been tested, Article 78(1) of the treaty discusses the importance of offense gravity toward sentencing in addition to other factors, but fails to give guidelines to weigh these competing principles.<sup>70</sup>

Alternatively, the narrow mandate given in some instances is almost perverse. At the Rwandan tribunal, prosecutions are only for events that occurred during the actual genocide and do not cover the actions and planning leading up to the genocide or the instances of violent backlash afterwards.<sup>71</sup> In the case of the TRC in Guatemala, the commission was given only six months to investigate and report on violations occurring over thirty-six years!<sup>72</sup>

In the Israeli-Palestinian conflict, the resolution must include all borders, refugees, and restitution issues. This is a conflict well experienced with narrow or partway solutions and we know the idea of leaving the details to be worked out later (like the Oslo Accord) is not going to work here.<sup>73</sup> This solution, when it finally occurs, must be recognized by all parties as encompassing the primary issues.

Finally, problems often occur with post-conflict resolution when the structure does not match the purpose—when the people want truth, but we have a court that only offers part of the story. Alternately, some countries, like El Salvador, Guatemala, and Peru have set up TRCs only to find that interests in justice go unmet.<sup>74</sup>

In moving forward in the Israeli-Palestinian conflict, one needs to be sure that where the purpose is restitution, proper arbitration (much like the Swiss Claims Tribunal) is set up efficiently to move forward. (Efficiency, of course, is a matter open to interpretation—after all, there are still cases from the United States-Iran Claims Tribunal!)<sup>75</sup> Where the purpose is reconciliation, then rebuilding co-existing narratives in addition to exchanges and education needs to occur. Where the purpose is economic building, then there must be sufficient funding.

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<sup>70</sup> Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT'L & COMP. L.Q. 81, 93 (2003).

<sup>71</sup> See Statute of the International Criminal Tribunal for Rwanda, *supra* note 69 (specifying that the tribunal only applies to crimes carried out between Jan. 1, 1994, and Dec. 31, 1994).

<sup>72</sup> See Neil J. Kritz, *Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 127, 142-43 (1996).

<sup>73</sup> See Yossi Beilin, *Road Maps and Dead Ends*, N.Y. TIMES, Oct. 20, 2005, at A27.

<sup>74</sup> For El Salvador, see Tina Rosenberg, *Another Hallowed Terror Ground*, N.Y. TIMES, Jan. 13, 2002, at F26. For Peru, for example, see *Difficult Truths: An Indifference to Past Crimes*, ECONOMIST, Aug. 28, 2004, at 33; Juan Forero, *Truth Commission Leaves Many Indians in Peru Unsatisfied*, N.Y. TIMES, Aug. 31, 2003, at 12. For Guatemala, see Guatemala's Lethal Legacy of Impunity, <http://web.amnesty.org/wire/March2002/Guatemala> (2002). For both Peru and Guatemala, see JOANNA CRANDALL, TRUTH COMMISSIONS IN GUATEMALA AND PERU: PERPETUAL IMPUNITY & TRANSITIONAL JUSTICE COMPARED, <http://www.peacestudiesjournal.org.uk/docs/perpetualimpunity.PDF> (2004).

<sup>75</sup> See Recent Iran-United States Claims Tribunal Awards and Decisions in Intergovernmental Cases, <http://www.iusct.org/awards-eng.html> (last visited Feb. 10, 2006) (listing awards as recent as 2000).

### III. WHAT NEEDS TO HAPPEN AS PART OF A PEACE TREATY

The International Center for Transitional Justice has outlined five potential areas to be addressed in moving countries out of conflict and into peace (the process called transitional justice). While each area might not be needed in each conflict, it is a useful framework of analysis to see what is needed here. The Center examines: (1) prosecuting individual perpetrators (justice); (2) establishing truth-seeking initiatives; (3) providing reparations; (4) reforming institutions (like the police or the courts); and (5) facilitating reconciliation processes.<sup>76</sup> As we examine what is needed in this conflict, perhaps all of these elements except (4) could be included in a peace treaty between Israel and the Palestinian Authority.<sup>77</sup> Furthermore, as discussed above, it is more helpful in this conflict to include truth-seeking as part of the reconciliation process rather than have a separate entity to perform that function.

#### A. *Justice—Should There Be Prosecutions?*

Justice is a loaded word, and even more so in this conflict. What could this mean? Acknowledgement of wrongs committed? Expulsion of Arabs? Expulsion of Jews? State-supported terrorism? In many conflicts, international law (or at least the international community) has a relatively clear narrative of the aggressor and the victim, the human rights violator, and the population that suffered. As others have already pointed out, that narrative is much more complex here, both from the inside and the third-party perspective.

Furthermore, while international law is often seen as the savior for the weak, in the Israeli-Palestinian conflict, both sides remain highly skeptical of international law. From the Israeli perspective, the UN has had no credibility dating to at least the infamous 1973 General Assembly resolution that Zionism was a form of racism. The UN refugee agency, UNWRA, has long been suspected of backing the Palestinians while ignoring violations, and allowing itself to be used as a political tool. More recent accusations include ignoring the kidnapping of Israeli soldiers carried out in front of UN observers,<sup>78</sup> and insufficiently condemning suicide bombing. Most recently, the General Assembly brought a case against Israel to the International Court of Justice ("ICJ") regarding the building of the barricade between Israel and the Palestinian territories. The ICJ case itself and the decision, which condemned the building of the barricade without acknowledging that the fear of terrorist attacks might have been a partial (or complete) motivation, was yet another example of what Israelis see as a hopeless UN bias against them. The case against Israel brought by the General Assembly to the ICJ two years ago, was merely the most recent example of where, in the Israelis' eyes, the UN is hopelessly biased against Israel—condemning the building of the barricade between Israel and the West Bank, while not acknowledging the reason for the barricade—the impact of

<sup>76</sup> INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE ANNUAL REPORT 2003/2004, <http://www.ictj.org> (follow "ICTJ 2003/2004" hyperlink).

<sup>77</sup> While there is little doubt that internal reform is needed by the Palestinian Authority, it is unlikely to be a subject addressed in a peace treaty with Israel.

<sup>78</sup> See, e.g., Susan Sachs, *U.N. Admits Error in Handling Video of Arab Fighters*, N.Y. TIMES, Aug. 4, 2001, at A1.

terrorism in Israel.<sup>79</sup> The Palestinians could also be suspicious of international law which, aside from popular backing in the UN, has not brought them much. With the United States as the primary power broker in the region, the Palestinians could view their victories in the General Assembly as completely hollow.

More important than the view of law, however, is what a tribunal or court would actually be able to accomplish in this situation. Most courts that have been set up try to accomplish one of several purposes: compensation (as in the Iran or Swiss claims tribunals); getting out the facts of the situation (as in Rwanda, Bosnia, and Nuremberg); and/or punishing the perpetrators. In the Israeli-Palestinian situation, it is unclear that any of these purposes is necessary or even helpful. First, truth finding through a court is highly suspect. We do need more understanding of each side in this conflict,<sup>80</sup> but the adversarial procedures of prosecution are not the best way to accomplish this because of the obvious conflict between the procedural narrowing of the issues to provide for fair trials and the wide-ranging investigation that is needed to promote understanding.

Second, punishment and prosecution will clearly not be agreed to by either side in this conflict. Could we imagine prosecuting the PLO for its links to suicide bombing? Could we imagine individual Israelis suing the Palestinian government for injuries or deaths? Since terror victims are compensated by the Israeli state, (although they could clearly use and deserve more money for their injuries) the traditional tort case seems unnecessary. And, since almost all the Fatah leadership, let alone Hamas, at one time or another condoned suicide bombing (if only by failing to speak out against it) a prosecution of those responsible could cripple the Palestinian leadership. Similarly, are we going to have trials of Israeli government officials for increasing the number of settlements during the last decades, demolitions of homes on the West Bank, or actions taken in 1948 to force Arabs to leave?

One could imagine a limited claims commission, much like the Iranian or Swiss claims tribunals, in which Palestinians present evidence of their losses (land taken from their family, olive groves destroyed for the barrier, etc.) for recompense by the Israeli government. However, this also has potential for breakdown for at least two reasons. First, Israelis might protest a claims commission that only hears claims from Palestinians for economic loss without equally allowing Israelis to bring claims for their own economic losses. Israelis could claim losses due to Jewish expulsions from Arab lands after 1948 (estimates range up to one million Jews who were expelled forcibly from Arab countries)<sup>81</sup> as well as economic losses from terrorism. Second, if, in fact, the

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<sup>79</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (follow "ICJ Advisory Opinion of 9 July 2004" hyperlink); Gregory Crouch & Greg Myre, *Major Portion of Israeli Fence is Ruled Illegal*, N.Y. TIMES, July 10, 2004, at A1 ("I believe that after all the rancor dies, this resolution will find its place in the garbage can of history," Raanan Gissin, senior advisor to (Israeli Prime Minister Ariel Sharon).

<sup>80</sup> See *infra* Section II.B (for more ideas on how understanding of each side in this conflict should occur).

<sup>81</sup> See American Sephardi Federation, [http://www.americansephardifederation.org/sub/sources/jewish\\_refugees.asp](http://www.americansephardifederation.org/sub/sources/jewish_refugees.asp) (2005) (850,000 Jews expelled); Palestine Facts, [www.palestinefacts.org](http://www.palestinefacts.org) (2006) (600,000 expelled); Arab-Israeli Conflict: Basic Facts, <http://www.science>



commission hears both sides, there may be the strong potential to try to even out the payments so that both governments are happy. In the case of the Eritrean-Ethiopian claims commission, for example, the commission seemed to value even-handedness over accuracy. The commission's attempt at balance and at making both parties happy undercuts its own legitimacy.<sup>82</sup> Rather, the primary needs of reconciliation and economic growth need to emerge from different structures established in the peace treaty.

### B. Reparations—The Need for Economic Growth

One of the primary determining factors of post-conflict resolution is the economic well-being and stability of the participants. While much aid has flowed to the Palestinian authority, economic growth needs to be spread out among the entire Palestinian population and maintained. In the long term, this economic growth will most likely occur by opening borders with Israel (which has long employed thousands of Palestinians) as well as by developing markets in Europe.<sup>83</sup> The importance of economic growth for the entire population cannot be underestimated.

First, economic growth provides jobs, money, and respect. While lack of jobs does not lead directly to political instability, there is no question that a high unemployment rate among a population is not the best thing for peace. The riots in Paris in November 2005 are just the latest example of this phenomenon.<sup>84</sup> Economic growth will also demonstrate to Palestinians that they are better off maintaining peaceful relations with Israel. Finally, as we have seen in other post conflict resolutions, populations are unable to move past the conflict if their primary needs are still not being met. Similar to Maslow's argument about a hierarchy of needs,<sup>85</sup> reconciliation and understanding are unattainable if food and housing are still a primary concern.<sup>86</sup> Finally, economic growth will demonstrate the workability of the refugee issue. If refugees still feel unfairly treated and still believe that they would be better off with a return of their land (however romantic and unrealistic that vision might be), the treaty itself will be suspect.

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co.il/Arab-Israeli-conflict.asp (last visited Feb. 10, 2006) (one million expelled); Justice for Jews from Arab Countries, [http://www.americansephardifederation.org/PDF/sources/JRAC/Justice\\_for\\_Jews\\_from\\_Arab\\_Countries.pdf](http://www.americansephardifederation.org/PDF/sources/JRAC/Justice_for_Jews_from_Arab_Countries.pdf) (last visited Feb. 10, 2006) (outlining the legal claims of Jewish refugees from Arab countries) ("hundreds of thousands" expelled).

<sup>82</sup> See Tony Cotton & Awet N'Hafsa, *Have the Masses Attained Victory? Fourteen Years of Eritrean Independence and the Activities of the Claims and Boundary Commissions* (Student Paper on File with Author, May 2005). See also Nejib Jibril, Note, *The Binding Dilemma: From Bakassi to Badme—Making States Comply with Territorial Decisions of International Judicial Bodies*, 19 AM. U. INT'L. L. REV. 633 (2004).

<sup>83</sup> See Oren Gross articles, *supra* note 49. See also Greg Myre, *Gaza Gets Ready for a Harvest of Produce and Promise*, N.Y. TIMES, Nov. 28, 2005, at A4. But see Harvey Morris, *Palestinians Grow Frustrated Waiting for the Expected Economic Recovery*, FIN. TIMES Nov. 29, 2005, Middle East & Africa, at 6.

<sup>84</sup> See *France's Failure: Of Riots and Failure*, ECONOMIST, Nov. 12, 2005, at 53.

<sup>85</sup> Abraham Maslow, *Classic Motivation Theories: A Theory of Human Motivation*, in SKYHOOKS FOR LEADERSHIP: A NEW FRAMEWORK THAT BRINGS TOGETHER FIVE DECADES OF THOUGHT—FROM MASLOW TO SENGE 169 (John A. Shtogren ed., 1999).

<sup>86</sup> See James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38 LAW & SOC'Y REV. 5 (2004).

The needs for economic growth and stability are similar for the Israelis even though the Israeli economy is quite strong. There will be serious budgetary pressures from moving thousands of settlers back into Israel. The government will be responsible for housing and finding new employment for many of these citizens. While Israel might be better able economically to handle this, attention must also be paid to the economic equation on this side. Many settlers, as Mnookin has pointed out, moved to the settlements because of economic opportunities and incentives.<sup>87</sup> Replacement communities will have to be built in new regions of Israel to house the settlers and offer similar opportunities for economic development. Aid to Israel and other types of development will be needed. Similar to the Palestinians' position on a peace treaty, any peace treaty will have far more credibility in Israel if affected Israelis feel that their lives have improved or at least remained more or less the same. If settlers are left in a much worse economic situation after their removal, this important political bloc is more likely to continue to advocate expansion rather than withdrawal.

### C. *A New Narrative—Reconciliation*

In the end, peace and economic growth will be best fostered by increased peaceful contacts among the populations and better understanding from each side of the stories told about the conflict. Many organizations, both governmental and otherwise, have already started good work on cross-cultural exchanges and joint projects. Seeds of Peace (which does youth exchange and camps),<sup>88</sup> Hand in Hand (which focuses on joint Jewish-Arab schools),<sup>89</sup> and other exchanges<sup>90</sup> continue to help build contacts and understanding.

The media can also play an important role in this understanding.<sup>91</sup> For example, Al Jazeera covered the withdrawal of settlers from the Gaza Strip. As many articles noted, while Palestinians and other Arabs were in favor of their removal, the media aired coverage of Israelis crying at their losses and succeeded in humanizing the other side.<sup>92</sup> Another example is that most Israeli textbooks now are more balanced in their coverage of the 1948 war and discuss how some Palestinians were forced from their homes.<sup>93</sup> These stories of loss on both sides need to be taught. A wonderful example of this in practice is the Parents Circle, comprised of families who have lost a loved one in the Israeli-

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<sup>87</sup> Mnookin et al., *supra* note 1, at 310.

<sup>88</sup> Seeds of Peace homepage, [www.seedsofpeace.org](http://www.seedsofpeace.org) (last visited Feb. 10, 2006).

<sup>89</sup> Hand in Hand homepage, [www.handinhandk12.org](http://www.handinhandk12.org) (2005).

<sup>90</sup> See, e.g., Playing for Peace homepage, [www.playingforpeace.org](http://www.playingforpeace.org) (last visited Feb. 10, 2006) (Israeli-Palestinian basketball camps).

<sup>91</sup> The role of the media should not be underestimated. Whatever processes are created should make sure that, like the televised trial of Saddam Hussein throughout Iraq, proceedings or findings are widely available to the populations of Israel and the Palestinian state.

<sup>92</sup> See James Bennet, *For Palestinians, Joy and Some Hints of Sympathy*, N.Y. TIMES, Aug. 18, 2005, at A1; Daoud Kuttab, *Live From Gaza: A New View of Israel*, N.Y. TIMES, Aug. 21, 2005, § 4, at 11.

<sup>93</sup> See, e.g., David K. Shipler, *A Conflict's Bedrock is Laid Bare*, N.Y. TIMES, May 27, 2001, § 4, at 1; Deborah Sontag, *'A' is for Arafat, 'B' is for Bethlehem*, N.Y. TIMES, Sept. 13, 2000, at A10.

Palestinian conflict.<sup>94</sup> The Parent Circle is based on restorative justice principles and focuses on using stories of loss to move toward peace. Broadening this opportunity for dialogue will only be helpful as the parties move forward after a peace treaty.

As part of this reconciliation, each side needs to create a new narrative for itself and its role in the future. Part of domestic opposition to Israeli occupation, for example, always came from the fact that many Israelis could not view themselves as "occupiers." A narrative of democracy in action will continue to hold weight among Israelis. More importantly, the narrative of the Palestinians must be dramatically changed. The narrative for the Palestinians begins primarily with their expulsion from Israel and, thus, has primarily been one of victimhood. This narrative of victimhood must be replaced by another narrative so that the populations can feel part of creating their own future. The narrative should include a successful Arab democracy with a free and open economy—and describe a people in charge of their own destiny. Ironically, the Palestinians could use the example of the Israelis, changing their own narrative from one of victims of the Holocaust to builders of a nation.

#### IV. CONCLUSION

In some ways, this essay is a cautionary tale of theories and practices gone wrong—and, more optimistically, how any resolution for the Israeli-Palestinian conflict can avoid some of these pitfalls. While numerous scholars and practitioners have tried to explain the failure of the Israelis and Palestinians to make peace, each shift in the domestic political balance within each group potentially heralds the potential for change. Mnookin and colleagues correctly assess that, in the end, the push for settlement will come from within, when each group better manages its internal conflicts to move the larger conflict forward. On the optimistic side, Sharon's creation of a new political party, joined in the center by his erstwhile political enemy Shimon Peres,<sup>95</sup> shows a remarkable willingness to change political stripes. We can only hope that Hamas also moves from the extreme to some flexibility in dealing with Israel.<sup>96</sup>

The second part of this essay—focusing on problems in other post-conflict structures—tries to draw some broader lessons about what is feasible. External and internal commitment are both absolutely necessary. One could, in fact, argue that the breakdown of the Oslo process was exactly because of a lack of internal commitment on both sides to move the process forward. The commission or tribunal likely to be set up to hear financial claims must also be wary of the common mistakes of lack of clarity or scope that end up undermining the effectiveness of the process.

The final point of the essay looks forward in order to look back to what must be drafted. So much of the Israeli-Palestinian conflict is focused on the past—what has occurred, who is to blame, how to punish. And yet to move

<sup>94</sup> The Parents Circle homepage, [www.theparentscircle.com](http://www.theparentscircle.com) (last visited Mar. 18, 2006).

<sup>95</sup> See Greg Myre, *Old Leftist Friend Is to Join Sharon's Party*, N.Y. TIMES, Nov. 30, 2005, at A14. (Whether Kadima survives post-Sharon, of course, is another question).

<sup>96</sup> As one of my colleagues has noted, perhaps this is the "Nixon to China" potential for Hamas. Of course, it could also lead to Intifada III.

forward to peace, we must also think clearly about the structures necessary to handle peace. As John Paul Lederach said: "[W]hen things are suddenly headed towards an agreement the work is hardly over. It has only begun."<sup>97</sup> In other words, by examining what we need the day after tomorrow, we can move toward a peace treaty today.

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<sup>97</sup> Lederach, *supra* note 14, at 37.