

# EXPLORING THE LINK BETWEEN DOMESTIC CONFLICTS AND NEGOTIATION FAILURE IN THE MIDDLE EAST

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In “Barriers to Progress at the Negotiation Table: Internal Conflicts Among Israelis and Among Palestinians,”<sup>1</sup> Professor Robert Mnookin and associates Ehud Eiran and Sreemati Mitter provide a detailed description of the fundamental internal schisms within Israeli and Palestinian societies that complicate the conflict between them. In Israel, the domestic conflict concerns the West Bank settlements, home to 250,000 Israeli Jews, established after Israel captured the region from Jordan in the 1967 Six-Day War. Among Palestinians, the primary internal conflict concerns the claimed “right of return” to Israel of the Palestinians who fled Israel during the 1947-1948 war and their descendants—approximately four million people in all.<sup>2</sup>

It is indisputable that the West Bank settlements and the right of return are central issues in Israeli and Palestinian political life. Mnookin et al. demonstrate this fact through their compelling historical narrative and examination of modern-day politics between the Mediterranean Sea and the Jordan River. What is less clear is whether there is a *causal* relationship between these “behind the table” conflicts and the failure of Israel and the Palestinians to successfully negotiate a final status agreement “across the table.” The authors claim that the internal conflicts provide the “essential explanation” for the ongoing failure of the Israelis and Palestinians to end their dispute.<sup>3</sup> Although the authors do not explain precisely what they mean by this, the statement seems to suggest one of two possible beliefs. The stronger possible claim is that, were it not for these internal conflicts, Israel and the Palestinians would be able to negotiate a final status agreement. The weaker possible claim is that unless and until these internal conflicts are resolved, a final-status agreement will be impossible.

Although the authors convincingly demonstrate the depth of the internal conflicts among both Israelis and Palestinians, their claim concerning the centrality of these conflicts to the ongoing impasse is defended quite lightly. This is too bad, because the claim is both eminently plausible *and* certainly contestable. In this response, I will attempt to evaluate this claim. Building on my

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<sup>1</sup> 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 (2006).

<sup>2</sup> United Nations Relief and Works Agency, Total Registered Refugees Per Country and Area (June 30, 2003), [www.un.org/unrwa/publications/statis-01.html](http://www.un.org/unrwa/publications/statis-01.html).

<sup>3</sup> Mnookin et al., *supra* note 1, at 299.

recent work on negotiation theory as applied to the Israeli-Palestinian conflict,<sup>4</sup> I will argue in this essay that there are two other very plausible but-for causes of the observed negotiation failures that, together or separately, make it far from clear that the domestic conflicts are, in fact, the essential determinates of bargaining failure.

### I. IS THERE A "BARGAINING ZONE"?

To begin any analysis of a negotiation problem, the best place to start is usually to consider each party's "reservation point," meaning the maximum amount of concessions that each party can make and still prefer a negotiated agreement to impasse.<sup>5</sup> In a negotiation context in which many incommensurable issues are involved, each party's reservation point might be defined by one or more packages of terms. So, for example, if Alan is in a dispute with Ben and would be willing to give Ben six apples (but not seven) to settle the dispute, or four apples and three oranges (but not five apples and three oranges or four apples and four oranges), we can say that Alan has a reservation point of six apples or, alternatively, of four apples and three oranges. We could also therefore say that a settlement proposal that called for Alan to give Ben five apples therefore would "exceed" Alan's reservation point—meaning that such a proposal would be more desirable to Alan than impasse—as would a proposal that called for Alan to give Ben two apples and three oranges. In contrast, a proposal that would require Alan to give Ben six apples and four oranges would not exceed Alan's reservation price, meaning that Alan would never consent to such an agreement.

If there is at least one package of deal terms that exceeds the reservation points of both parties, we can say that there is a "bargaining zone,"<sup>6</sup> which means an agreement is possible (although not guaranteed). If there is no set of deal terms that satisfies this condition, we can say there is no bargaining zone. The lack of a bargaining zone will always cause negotiation failure (at least absent a mistake by one of the parties), because for any potential set of deal terms at least one party would prefer impasse to agreement, and simple self-interest thus makes an agreement impossible.

This analytical framework is easy to employ when each negotiating party is a single, unitary actor. As the Mnookin et al. article well demonstrates, however, Israel and Palestine are far from unitary actors. Each is a collection of groups with different and sometimes contradictory interests. In this situation, one way to evaluate whether there is a bargaining zone is to base each side's reservation point on the basis of the preferences of a majority of its constituents.

Mnookin et al. appear to believe that, determining reservation points of non-unitary actors in this way, there is a bargaining zone between "Israel" and

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<sup>4</sup> 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).

<sup>5</sup> See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L. J. 1789, 1792 (2000).

<sup>6</sup> *Id.* at 1792-93.

"Palestine." The authors observe that a final-status agreement based on Israeli relinquishment of most or all of the West Bank settlements, Palestinian renunciation of the right of return, and a division of Jerusalem would "serv[e] the interests of most Israelis and most Palestinians."<sup>7</sup> (I will refer to these terms as the "Geneva Proposal," since they are close to those put forward in the "Geneva Accord" negotiated in 2003 by former Israeli cabinet minister Yossi Belin and former Palestinian minister Yasser Abed Rabbo but rejected by the leadership of both sides.<sup>8</sup>) Mnookin et al. point out that Israelis with a material interest in maintaining the settlements are the religiously motivated settlers, who make up a small minority of Israel's 6.5 million citizens.<sup>9</sup> A greater percentage of Palestinians are refugees, or the descendents of refugees, but the authors remind us that, according to a much-discussed poll, only about ten percent of them would actually wish to exercise the right of return to Israel proper.<sup>10</sup> The authors contend that these minority groups within the Israeli and Palestinian camps are blocking an agreement that the majorities on either side would be willing accept.

Perhaps so. But there are reasons to question whether the Geneva Proposal does, in fact, exceed the reservation points of Israel and of Palestine, as determined on the basis of majority preferences. Some Israelis who have no theological commitment to maintaining West Bank settlements would oppose a peace agreement that required conceding all of the West Bank settlements on security grounds. It is true that, with the demise of Saddam Hussein's Iraq, an Arab land invasion from Israel's east seems extremely unlikely,<sup>11</sup> but West Bank territory does give psychological protection to a nation that has been attacked by its neighbors on numerous occasions and is only nine miles wide at its narrowest point.

Many more Israelis with no spiritual commitment to the West Bank would oppose abandoning the settlements unless and until the Palestinian Authority demonstrates the will and ability to prevent terrorist attacks against Israel from its territory. It is important to keep in mind that an agreement by the Palestinian Authority to renounce the right of return has no immediate material value to Israel, because under the status quo no Palestinian refugees are able to emigrate to Israel. Israel's primary incentive to agree to the Geneva Proposal would be the promise of peaceful coexistence that a final-status agreement would imply. A transaction in which one party's short term obligation (i.e., withdrawal from the settlements) is traded for the other party's long term commitment (i.e., ending the armed struggle against Israel and preventing terrorism now and in the future) creates the risk of moral hazard.<sup>12</sup> That is, the party with the long-term obligation might shirk in the performance of its responsibilities after receiving its benefit.

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<sup>7</sup> Mnookin et al., *supra* note 1, at 300.

<sup>8</sup> See Text of the Geneva Accord, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=351461> (last updated Jan. 12, 2003).

<sup>9</sup> Mnookin et al., *supra* note 1, at 310.

<sup>10</sup> See *Id.* at 338 tbl.3.

<sup>11</sup> See David Makovsky, *How to Build a Fence*, FOREIGN AFFAIRS, March/April 2004, at 50, 62.

<sup>12</sup> See generally RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 138-39 (2002) (discussing the structure of moral hazard problems in negotiation).

Israelis have long questioned the willingness of the Palestinians to ever actually live in peace with Israel.<sup>13</sup> These doubts were exacerbated by the failure of the Palestinian Authority, first under Yasser Arafat and now under Mahmoud Abbas, to take armed action against Palestinian militants to prevent terrorist attacks on Israel.<sup>14</sup> This inaction became visible after Israel's withdrawal from Gaza last summer. Not long after the Israeli Defense Forces ("IDF") turned Gaza over to Palestinian control, militants showered dozens of Qassam rockets on southern Israel, injuring a handful of Israelis and provoking a military response by the IDF.<sup>15</sup> The unwillingness or inability (or combination of the two) of the Palestinian Authority to prevent such attacks at a time when the Palestinians have an incentive to convince Israel that real peace is possible in order to win further territorial concessions<sup>16</sup> makes Israelis understandably concerned about whether sacrificing the West Bank settlements as part of a final status agreement would yield real benefits. The recent victory of Hamas in Palestinian elections can only further exacerbate this concern. Even Israelis with no messianic desire to maintain control of the West Bank would oppose giving up the settlements if they felt that taking that step would not lead to a true and stable peace. At a minimum, relinquishing the settlements means giving up a bargaining chip, and relocating the settlers into Israel proper would be extremely expensive.<sup>17</sup>

It is also unclear whether a majority of Palestinians would prefer a final status agreement that included Israel's concession of the entire West Bank in return for, among other things, a renunciation of the right of return. A coldly rational view of the current "facts on the ground" certainly suggest that such an agreement would be a tremendous improvement for all Palestinians other than (or, perhaps even including) the small number who actually hold out hope of some day returning to their former homes in Israel proper. But the analysis is not as obvious when the emotional content of the Israeli-Palestinian dispute and the changing demographics of the Holy Land are taken into account.

Concerning the first point, as Mnookin et al. explain in great deal, the displacement of Palestinians from Israel proper during the 1948-1949 Arab-Israeli war is a fundamental element of the Palestinian historical narrative. To many Palestinians who have no interest in ever living in Israel, renouncing the right of return would mean accepting as permanent what they see as the fundamental injustice of their national movement. Swallowing such a bitter pill has real, if intangible costs. Mnookin et al. attribute the internal conflict among

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<sup>13</sup> See, e.g., DENNIS ROSS, *THE MISSING PEACE* 763 (2004).

<sup>14</sup> See generally Greg Myre, *Israel Security Aide Now Expects More Attacks from West Bank*, N.Y. TIMES, Sept. 22, 2005, at A8 (reporting that Palestinian leader Mahmoud Abbas "has declined to confront the armed factions, saying he wants to bring them into the political process . . .").

<sup>15</sup> See Greg Myre, *Israelis Air-strikes Hit Gaza After Hamas Fires Rockets*, N.Y. TIMES, Sept. 25, 2005, at A8.

<sup>16</sup> Cf. *id.* (reporting that Palestinian leader Mahmoud Abbas and his aides have called for an end to the rocket fire, but the Palestinian security forces have taken only limited steps to prevent such attacks.").

<sup>17</sup> The cost of relocating the 8500 Jewish settlers in Gaza is estimated to be \$1.7 billion. Greg Myre, *Israel Seeks \$2 Billion in U.S. Aid for Gaza Withdrawal*, N.Y. TIMES, July 12, 2005, at A3.

Palestinians over the right of return to “profound differences in their interests and circumstances.”<sup>18</sup> If this is the source of the internal conflict, then it is indeed the case that only a minority would oppose trading the right of return claim for a Palestinian state in the entire West Bank and Gaza. But if the source of the internal conflict is instead ideology and emotion, it is quite unclear whether the majority of Palestinians would in fact be willing make that trade.

The second point is that, even if bartering the claim to a right of return for the West Bank settlements would be preferable to the status quo for most Palestinians, many Palestinians believe their negotiating leverage will be greater in the future than it is today because the birthrate among Palestinians is much higher than that of Israeli Jews.<sup>19</sup> Today, in the land between the Mediterranean and the Jordan River, Jews slightly outnumber Arabs, but this will change soon—probably within the next decade.<sup>20</sup> In addition, it is possible that by mid-century, Arabs in Israel proper—now approximately twenty percent of the population—could become a majority.<sup>21</sup> As time progresses, separation from Palestinians will become more and more necessary for Israel if it is to maintain its democratic and Jewish character. Some Palestinians, and perhaps many, believe that sacrifices they would have to make today to achieve peace would be greater than the sacrifices they would need to make tomorrow and thus prefer not to have peace today.<sup>22</sup> The recent victory in Palestinian elections by Hamas, which claims to have no inclination to discuss peace with Israel, can be interpreted as evidence that this perspective is widespread.

To summarize, then, although the Geneva Proposal might be preferable to the status quo for the majority of Israelis and the majority of Palestinians, there are reasons to suspect that this might not be the case. If it is not the case, it would be difficult to blame the continuing failure of Middle-East peace efforts on conflicts between majorities and minorities on each side of the bargaining table. The better explanation would be that there simply is no bargaining zone such that both sides would prefer the Geneva Proposal to the status quo.

## II. HARD BARGAINING

This section suggests a different explanation for impasse between the Israelis and the Palestinians: that there is a bargaining zone, but rather than agreeing to a set of terms that minimally exceeds its reservation point, one or both sides chooses to demand an even more desirable set of terms than the

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<sup>18</sup> Mnookin et al., *supra* note 1, at 340.

<sup>19</sup> See, e.g., Elia Zureik, *Demography and Transfer: Israel's Road to Nowhere*, 24 *THIRD WORLD Q.* 619, 623 (2003). The birthrate among Israeli Jews is 2.5 children per woman; the birthrate among Palestinians in the West Bank and Gaza is nearly six children per woman. BERNARD WASSERSTEIN, *ISRAELIS AND PALESTINIANS* 26 (2003).

<sup>20</sup> See David Makovsky, *Engagement Through Disengagement* 23 (2005).

<sup>21</sup> Zureik, *supra* note 19, at 622.

<sup>22</sup> Cf. David Samuels, *In a Ruined Country: How Yasir Arafat destroyed Palestine*, *THE ATLANTIC MONTHLY*, Sept. 2005, at 60 (quoting an Israeli with close ties to Arafat's inner circle as saying of Arafat: “He thought that demographically they're going to win the war, and in order to do that, you have to be patient and let the Israelis bleed.”).

other side will accept. I refer to this possible cause of impasse as “hard” bargaining.

The existence of a potential agreement that exceeds the reservation points of both disputants is a necessary but not sufficient condition for the parties to reach agreement. Before agreeing to any set of terms that falls within the bargaining zone, a negotiating party must evaluate the risks and benefits of holding out for even more desirable terms; that is, it must decide whether to adopt the “soft” bargaining strategy of agreeing to any possible deal minimally superior to the status quo and thus reaping some benefit, or the “hard” bargaining strategy of demanding terms that are much more desirable. In choosing between these approaches, each disputant must compare the value of the excellent terms that it might obtain with a hard strategy to that of the minimally acceptable terms that a soft strategy would yield and discount that marginal benefit of the hard strategy by the marginal risk of impasse that it carries. It should then select the strategy with the greater risk-adjusted expected value.

Assume for the moment that there is a bargaining zone and that the Geneva Proposal lies within it. Even though Israel would prefer a final-status agreement on these terms to ongoing hostilities, it would undoubtedly prefer to end the conflict on terms even more favorable to it, such as keeping control of most of its settlements. Rational Israeli leaders would therefore compare the potential benefits of refusing to concede these settlements and winning Palestinian acquiescence nonetheless to the risk that taking such an aggressive negotiating position would cause an impasse that would otherwise be avoided. Palestinian leaders, for their part, would not only need to determine that the Geneva Proposal exceeds its reservation point, but also whether the potential benefits that might be gained by demanding more than what the Geneva Proposal would give them—perhaps a right of return for some percentage of the refugees, Israeli payments to refugees, etc.—would outweigh the risk that making additional demands would cause impasse and the leave the Palestinians worse off than they otherwise would be.

A negotiator is more likely to believe that a hard strategy will be successful if it believes its adversary is more disadvantaged than it is by the status quo, because under these circumstances the adversary is more likely to make concessions. It is quite possible that both disputants in the Israeli-Palestinian conflict have just such a belief.

Today, Israel controls much of the West Bank settlements, all of Jerusalem, and the Temple Mount. Palestinians might claim the right of return, but they can’t exercise it. Their territory is divided by Israeli occupation and their economy is in tatters. From this perspective, it would be sensible for Israelis to believe that a final-status agreement would provide the Palestinians with a relatively greater benefit, and therefore that the Palestinians should be willing to make relatively greater concessions to secure such an agreement.

On the other hand, as described above, demographic trends in the region favor the Palestinians. Palestinians might believe that rational Israelis will recognize that these trends will cause their position to grow weaker over time, and thus that Israel will make concessions to secure an agreement. Israel’s recent withdrawal from Gaza can be viewed as an Israeli attempt to undermine this mindset on the part of the Palestinians by demonstrating that unilateral action

can change the demographic outlook.<sup>23</sup> If Israel continues to pursue a policy of unilateral disengagement, it could conceivably withdraw from and turn over to the Palestinian Authority additional portions of the West Bank with large Palestinian concentrations to avoid the specter of a Palestinian majority within the territory it controls while maintaining many or even most of the Jewish settlements there.

When a hard strategy is successful, not only does the party implementing it get “more” out of the agreement, the other side achieves “less.” Thus, when deciding whether to implement a hard or a soft strategy, a party is more likely to determine that the risk-adjusted expected value of the hard strategy is greater if, rather than being concerned entirely with the benefits that would inure to it as the result of an agreement, it places a positive value on the other side not achieving what it wants. There is little doubt that state of affairs exists in the Israeli-Palestinian conflict. That is, both parties have what can be called malevolent utility functions. The long period of mutual hatred and the amount of blood that has been shed on both sides make it inevitable that each would prefer a final status agreement that minimizes the other’s happiness.

The events following Israel’s withdrawal from the Gaza settlements provide an illustrative example. Rather than accept Israel’s relinquishments of the Gaza settlements gracefully, Palestinian factions (including Hamas, Islamic Jihad, and the Fatah-affiliated Al Aksa Martyr’s Brigade) declared “victory” in an attempt to heap humiliation on Israel.<sup>24</sup> Israelis were in no mood to accept a peace that would leave the Palestinians ecstatic. A month after the IDF left Gaza, *New York Times* foreign affairs columnist Thomas Friedman wrote that the “Israeli majority wants a deal with the Palestinians, but they want a mean, tough, hard-bargainer to negotiate it. They have had enough with nice guys.”<sup>25</sup>

Finally, a negotiating party is more likely to choose a hard strategy over a soft one in the absence of social norms that point toward a particular set of deal terms. When social convention makes a particular set of agreement terms highly salient, negotiators often believe that those terms are fair and will willingly assent to them.<sup>26</sup> In contrast, when there is no social consensus that makes a certain set of deal terms focal, negotiators are more likely to employ a hard strategy to avoid the risk of an outcome that leaves them believing they received less than their “fair share.” Imagine a commercial negotiation concerning a commonly traded commodity, where the seller’s reservation point is ten dollars and the buyer’s reservation point is twenty dollars. If the market price of the commodity in question is thirteen dollars, both parties are likely to agree to a transaction at that price. If the commodity is unique and there is no identifiable market price, however, a price that both sides can agree is “fair” is

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<sup>23</sup> See Korobkin & Zasloff, *supra* note 4, at 20-21. Sharon has observed that leaving Gaza has the effect of producing demographic benefits for Israel. See James Bennett, *Sharon Advances Toward Removal of Some Settlers*, N.Y. TIMES, June 7, 2004, at A1.

<sup>24</sup> See Steven Erlanger, *Gazans Revel as They Sift Through Ex-Settlements*, N.Y. TIMES, Sept. 13, 2005, at A1.

<sup>25</sup> Thomas L. Friedman, *Talking World Affairs*, TimesSelect, Sept. 27, 2005, <http://friedman.page.nytimes.com/?8hpid> (last visited Oct. 1, 2005).

<sup>26</sup> See Korobkin, *supra* note 5, at 1825-29.

more likely to be illusive. In this situation, the seller is more likely to demand nineteen dollars and the buyer to refuse to raise its offer above eleven dollars.

The unique issues raised by the Israeli-Palestinian conflict, as well as the differences between Israeli and Palestinian cultures, results in the lack of any universal justice norms that can coordinate the bargaining behavior of the disputants. Israel can assert that justice requires the preservation of the Jewishness of Israel, which implies the renunciation of the Palestinians' claimed right of return. It can also assert that justice demands a minimum of people of any nationality be evicted from their homes, suggesting Israel should keep the largest settlements closest to Israel. The Palestinians can assert that justice requires refugees be repatriated and they obtain complete sovereignty over their territory, as defined by United Nations resolutions. There is no neutral method of resolving these competing and mutually exclusive sets of claims.

If both parties adopt hard bargaining strategies, impasse is a likely result even if there is a viable bargaining zone. An agreement is even unlikely, however, if only one party adopts such a strategy, both because the demands of the hard-bargaining party might not exceed the reservation point of the softer-bargaining party and because the softer-bargaining party might believe the hard-bargaining party is unfairly attempting to exploit it, and for that reason refuse to continue negotiations.

In December 2000, President Bill Clinton proposed a final-status peace plan that would have established a Palestinian state to Israeli Prime Minister Ehud Barak and Palestinian leader Yasser Arafat.<sup>27</sup> Barak accepted the proposal; Arafat rejected it.<sup>28</sup> Why Arafat turned down the historic proposal is a matter of conjecture, but one recent explanation offered by Arafat confidants suggests it was part of a hard bargaining strategy. According to Mamduh Nofal and Yasser Abed Rabbo, Saudi officials told Arafat to hold out because they could get him a better deal from the incoming President Bush, the son of their "friend."<sup>29</sup> Arafat's tactics provoked an immediate backlash against the peace process by an Israeli electorate that felt its prime minister was playing the fool. Two months later, Barak lost reelection in a landslide to Ariel Sharon, who had criticized the concessions that Barak had indicated a willingness to make.

To summarize, even if a bargaining zone exists, strategic decisions to adopt hard bargaining approaches can cause impasse. In the specific context of the Israeli-Palestinian conflict, many factors support the hypothesis that such strategic behavior explains Israeli refusals to relinquish the West Bank and Palestinian refusals to renounce the right of return, and the subsequent failure of the parties to agree to the Geneva Proposal.

### III. INTERNAL CONFLICTS

The prior sections suggest two alternative explanations to internal conflicts for the failure of Israel and the Palestinians to negotiate a final-status peace agreement: (1) the absence of a set of terms that exceeds the reservation points of both sides; and (2) the adoption of hard bargaining strategies by one

<sup>27</sup> See Ross, *supra* note 13, at 712-58.

<sup>28</sup> *Id.* at 753-58.

<sup>29</sup> Samuels, *supra* note 22, at 77.



or both parties that have the effect of obscuring the existence of a bargaining zone. If either of these explanations is correct, internal conflicts amongst Israelis or amongst Palestinians are not a but-for cause of the impasse; that is, even in the absence of Israeli defenders of the West Bank settlements and Palestinian adherents of the right of return claim, the Middle East conflict would continue.

This does not mean, of course, that internal conflicts on one or both sides of the bargaining table are not a sufficient cause of the impasse. Although other causes of bargaining failure might exist, internal conflicts could constitute an independent barrier to peace. One possibility is that there is no bargaining zone between Israel and the Palestinians at present, but that even if the parties were to determine that the terms of the Geneva Proposal exceed their reservation points, internal conflicts would still prevent the negotiation of a final-status agreement. Another possibility is that strategic hard bargaining by the parties prevents agreement, but that even if the disputants wished to adopt softer positions in an effort to reach agreement, internal conflicts would prevent them from doing so. If either of these explanations is correct, the internal conflicts would be a critical impediment to peace even if they are not the only impediment, and resolving these conflicts would be a necessary step to the negotiation of a final-status agreement.

To evaluate the claim that internal conflicts impede agreement, it is necessary to consider what mechanism or mechanisms a minority of Israelis or of Palestinians with strong opposition to the Geneva Proposal could prevent the adoption of that proposal, assuming that majorities on both sides favored doing so.

Israel's government is a parliamentary democracy with multiple political parties and competitive elections. Nevertheless, it is not necessarily the case that if the majority of Israeli citizens favored the Geneva Proposal the government would sign on. Assuming majority support for that proposal, the relatively dovish Labor Party and its left-of-center allies would undoubtedly favor its enactment. These parties currently hold only 53 of 120 seats in the Knesset, however, so their support would not be enough.

The far-right and religious parties, which would certainly oppose conceding the settlements, hold only twenty-seven Knesset seats. Right-of-center Likud holds the remaining forty seats,<sup>30</sup> and the recent political upheaval in Israel strongly suggests that it too would oppose ceding the settlements even in return for a renunciation of the right of return. When Ariel Sharon championed last year's withdrawal from the Gaza settlements and invited Labor into a unity government with Likud to secure the votes necessary to approve the plan,<sup>31</sup> he had to drag his Likud colleagues along kicking and screaming, and the party's rank and file cast an advisory vote against the plan.<sup>32</sup> Former Prime Minister Benjamin Netanyahu, a staunch opponent of the Gaza withdrawal, launched an

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<sup>30</sup> For a breakdown of the Knesset seats by party, see <http://www.knesset.gov.il> (follow "Entrance" hyperlink; then follow "Current Knesset Members" hyperlink; then follow "Factions" hyperlink).

<sup>31</sup> See Steven Erlanger, *New Coalition Led by Sharon is Approved in Parliament*, N.Y. TIMES, January 11, 2005, at A3.

<sup>32</sup> See Andres Martinez, *One State of Two, Israelis and Palestinians Share the Same Economy*, N.Y. TIMES, May 28, 2004, at A20.

effort to unseat Sharon as Likud's leader and, whether or not Netanyahu would have succeeded, his insurgency helped convince Sharon to bolt Likud and found the new Kadima party in late 2005. Withdrawing 8500 settlers from Gaza, which has no religious significance, and withdrawing 250,000 settlers from the West Bank are propositions of very different magnitudes. The significant Likud opposition to the former implies there is almost no chance that party would ever agree to the latter.

If distribution of power in the Knesset were static, then, it might be the case that a minority of Israelis could use their political power to block an agreement that the majority favored. But political power in Israel is quite dynamic, a fact that recent events accentuate. Prior to Sharon's stroke in January 2006, polls tracking voter preferences for the March 2006 Knesset elections showed his just-established Kadima party with a comfortable lead.<sup>33</sup> As this article goes to press, Israeli elections are only a month away and Kadima remains the favorite to win a plurality of the vote. The best interpretation of Kadima's popularity is that most Israelis favor withdrawing from at least some additional settlements: if Sharon did not want to abandon more settlements, he would have had no reason to leave Likud and found Kadima, and if the public did not support him in this endeavor, Kadima would not poll so well. This extremely quick political shift certainly suggests that if a majority of Israelis were to favor the Geneva Proposal, a realignment of Israeli political parties that would provide a Knesset majority favorable to that proposal would probably ensue. Thus, there is good evidence indicating that if the majority of Israelis wished to accept the Geneva Proposal, and if the Palestinians were also willing to accept that proposal, an Israeli minority hostile to that plan would not be able to block its acceptance through the political process, at least not for very long.

If it seems unlikely that opponents of the Geneva Proposal could block its adoption through parliamentary means if a majority of Israeli's favored it, it also seems unlikely that such a minority could exercise a veto through extralegal means such as violent resistance or civil disobedience. Despite fears of violence,<sup>34</sup> protests of the Gaza withdrawal were mostly peaceful.<sup>35</sup> Many settlers vowed not to leave, but by the deadline imposed by the Israeli government most did.<sup>36</sup> Several thousand protesters from outside Gaza moved in ahead of the evacuation and refused to leave,<sup>37</sup> but the well-trained and well-organized IDF removed them in a matter of days without bloodshed, surprising observers

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<sup>33</sup> Steven Erlanger, *Sharon, Health an Issue, to Face Netanyahu*, N.Y. TIMES, Dec. 20, 2005, at A12.

<sup>34</sup> See Greg Myre, *Israeli Troops and Police Clear all by 5 Gaza Settlements*, N.Y. TIMES, Aug. 20, at A3.

<sup>35</sup> See Steven Erlanger, *Gaza Pullout: New Scars for Arabs and Israelis*, N.Y. TIMES, Aug. 22, 2005, at A1. (noting that "prophecies of 'civil war' have proved hollow"). There were a handful of minor episodes of violence. See, e.g., Steven Erlanger & Dina Kraft, *Israeli Soldiers Pour in to Sway Gaza's Holdouts*, N.Y. TIMES, Aug. 17, 2005, at A1 (two Israeli policemen injured by caustic acid and urine); Steven Erlanger & Greg Myre, *Soldiers Evict Gaza Resisters in 2 Synagogues*, N.Y. TIMES, AUG. 19, 2005, at A1 (fourty-four soldiers and police officers lightly injured evicting large group of protesters from Gaza synagogue).

<sup>36</sup> See e.g., Erlanger & Kraft, *supra* note 35.

<sup>37</sup> See, e.g., Erlanger & Myre, *supra* note 35.

with its speed and efficiency.<sup>38</sup> Much was written about the possibility that soldiers, whose officer ranks are disproportionately populated by settlers, would refuse to follow orders to forcibly remove settlers,<sup>39</sup> but the fears of a mutiny never came to pass. Israel's democratic institutions are strong, and the IDF is well-disciplined and well-respected. If the order came to evacuate the West Bank settlements, the Gaza experience suggests that there is little likelihood that opponents could stop its execution through the use of force.<sup>40</sup>

The best chance that the religious-settler minority would have of stopping Israel from agreeing to the Geneva Proposal (assuming, again, that a national majority wished to enter such an agreement) would come from a more subtle tactic than electoral or physical intransigence. By its vigorous opposition, such a minority could conceivably convince the majority that such an agreement would cause so much internal strife and ill-will that the psychological costs of a divided Israeli public would exceed the benefits of peace with the Palestinians. In other words, although the minority would be very unlikely to wield enough power to stop a majority inclined to the Geneva Proposal from ratifying it, it might be able to persuade the majority that withdrawal from the West Bank settlements would produce a minority so permanently embittered that the game would not be worth the candle. Even if the Israeli majority wants peace with the Palestinians, the cost of a cold war with its countrymen might seem too high.

The same analysis is plausible on the Palestinian side of the bargaining table. That is, if a majority of Palestinians favored entering into an agreement based on the Geneva Proposal, the threat of a deepening rift with the minority that hopes to claim the right of return could cause the majority to disavow an agreement that would require renouncing that claim.

The threat of violent opposition to a peace agreement is also more likely to give Palestinian opponents an effective veto over the ratification of such an agreement than the Israeli settlers could effectively wield. Militant Palestinian groups, such as Hamas and Islamic Jihad, which refuse to recognize Israel's right to exist,<sup>41</sup> would likely oppose such a concession. These groups are, of course, well armed, and Palestinian President Mahmoud Abbas has avoided direct confrontations with them since assuming office in January 2005, to the

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<sup>38</sup> The operation, expected to take weeks, took the Israeli army only six days. Steven Erlanger, *Israel Completes Pullout Ahead of Schedule, Without Serious Violence*, N.Y. TIMES, Aug. 24, 2005, at A8; see also Erlanger, *supra* note 35; Myre, *supra* note 24.

<sup>39</sup> See, e.g., Greg Myre, *Heavy Israeli Armor Presses Gaza Border*, N.Y. TIMES, July 18, 2005, at A6 (noting that some Israelis were predicting large number of soldiers would rebel if ordered to forcibly evacuate settlers).

<sup>40</sup> Cf. Myre, *supra* note 34 (quoting Israeli security experts as claiming that the ease the military had removing Gaza protesters suggests that in the future the government will know it can handle settler protests).

<sup>41</sup> See, e.g., Greg Myre, *Death of Sheik Raises Questions of Hamas Fate*, N.Y. TIMES, March 23, 2004, at A1.

disappointment of American and Israeli leaders.<sup>42</sup> It is unclear whether Abbas could, in fact, disarm these groups.<sup>43</sup>

The firepower of Palestinian militants opposed to any recognition of Israel gives them two potential avenues of blocking even a peace agreement that a majority of Palestinians would support. First, the possibility that entering into such an agreement would touch off a Palestinian civil war could dissuade Abbas from taking that step, even if he would otherwise be inclined to do so. Second, since Israel's primary tangible inducement for entering into a peace agreement presumably would be an end to terrorism and threats of violence,<sup>44</sup> the refusal to accept a final-status agreement on the part of a well-armed and well-organized Palestinian minority might itself preclude Israel from entering into or implementing the agreement, at least without demonstrable proof that the Palestinian Authority could disarm that minority.

One could argue, however, that these impediments to a final-status agreement are not really the consequence of internal Palestinian conflict over the *right of return*, but rather a consequence of the internal Palestinian conflict over whether to recognize Israel's right to exist. Mnookin et al. point out that the concepts are logically intertwined, in the sense that renouncing the right of return logically requires recognition of Israel's existence, if not the morality of its existence. But the two concepts are not one and the same. The possibility of violence on the part of a minority of Palestinians that could threaten the viability of an agreement in which the Palestinian Authority would renounce the right of return would also threaten the viability of any final-status agreement—even one in which the Palestinians did not renounce the right of return. Thus, even if the threat of violence by Palestinians who reject recognition of Israel were sufficient to prevent the implementation of a final-status agreement, it is still highly questionable whether it would be accurate to construe this set of facts as evidence that the internal Palestinian conflict over the right of return, per se, is impeding peace.

#### IV. CONCLUSION

There is no question that the maintenance of West Bank settlements divides public opinion in Israeli society, and that the maintenance of the claimed right of return to Israel for Palestinian refugees divides public opinion in Palestinian society. There is similarly no question that these divides, which underscore differing aspirations for the future amongst both groups of people, are central to the political life of both societies. The future health of each nation requires that their respective internal conflicts be dampened, if not resolved.

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<sup>42</sup> See, e.g., Steven Erlanger, *Abbas's Gamble: Pulling a Foe into Palestinian Politics*, N.Y. TIMES, May 26, 2005, at A3; Greg Myre, *Israel Tightens Restrictions After Attacks Kill Three*, N.Y. TIMES, Oct. 17, 2005, at <http://www.nytimes.com/2005/10/17/international/middleeast/17cnd-israel.html?ex=1287201600&en=4252e8516b002117&ei=5090&partner=rssuserland&emc=rss>.

<sup>43</sup> Cf. Greg Myre, *Israel Security Aide Now Expects More Attacks From West Bank*, N.Y. TIMES, Sep. 22, 2005, at A8 (quoting the head of Israel's Shin Bet security service as saying the Palestinian Authority's ability to impose order is "negligible at best").

<sup>44</sup> See *supra* Part I.

It is not clear, however, whether these internal divisions are of critical importance to understanding why the Israelis and Palestinians have failed to make peace with each other, nor whether resolving them is of central importance to reaching a final-status agreement. One possible explanation of the current impasse in the Middle East peace process is that most Israelis would not be willing to sacrifice the West Bank settlements for a peace agreement (even if they might for actual peace), and/or that most Palestinians would not be willing to cede their claim to the right of return in return for a final status agreement. A second explanation is that the Geneva Proposal exceeds the reservation points of both sides, but one or both sides prefers to maintain a hard bargaining posture in an effort to secure an even better set of terms.

It is also possible that a negotiated agreement proves elusive because, although the majority of citizens on both sides would prefer to enter into an agreement on the terms of the Geneva Proposal, a militant minority of Israelis, or of Palestinians, or of both, are able to effectively veto an agreement or convince their majority that the internal division such an agreement would create is too costly to endure. But this is at best only one of three possible explanations of the impasse, and it is not necessarily the most likely one. At a minimum, the claim of its centrality needs to be better defended.

Finally, a careful assessment of the ongoing impasse between the Israelis and Palestinians and any prescriptive recommendations for achieving a final-status peace agreement also must differentiate between the impediments to peace created by the *existence* of the settlements and of the claimed right of return and the impediments to peace created by *internal divisions* over these issues. It might be the case (although this is by no means certain) that if there were no Israeli settlements in the West Bank and if no Palestinians demanded a right of return to Israel, Israel and the Palestinian Authority would be able to conclude a peace agreement. The claim offered by Mnookin et al., however, is that the conflicts within Israeli society and within Palestinian society are themselves an impediment to peace. This claim is possibly true, but it is not obviously so.