Toward a New Palestinian Negotiation Paradigm

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Toward a New Palestinian Negotiation Paradigm

Camille Mansour

Against a background of prolonged stalemate, this essay provides a detailed examination of two decades of Palestinian-Israeli negotiations with a view to identifying deficiencies in the Palestinian negotiating approach and drawing lessons of use to future Palestinian negotiators in the context of power imbalance. After outlining possible conditions for resuming and conducting negotiations (making the decision and timing tactical rather than strategic), the author advocates a shift in the Palestinian negotiating paradigm that considers negotiations as one diplomatic tool among others in the long Palestinian struggle to achieve their national program, and places the negotiations in the context of priorities for the coming period.

Almost two decades have passed since the launch of the Palestinian-Israeli negotiations, more if we count the unofficial contacts over the years that paved the way for formal talks. The "Declaration of Principles" (DOP) signed in Washington D.C. by the Palestine Liberation Organization (PLO) and the Government of Israel on 13 September 1993 provided for a transitional period not to exceed five years, during which all outstanding issues were to be resolved through negotiations and a final agreement reached. This provision notwithstanding, the transition period, with all of its well-known limitations and deficiencies, has continued with no mutually agreed-upon end in sight.

From the moment the DOP was signed, critics have argued that the Palestinian negotiators lacked the requisite competence and knowledge of the issues on the table; that their negotiating positions were not based on international law; that their lack of proficiency in the language of the negotiations, English, led them to agree to texts they did not fully understand. More crucially, it was argued that the negotiations had been futile from the start, since any resulting agreement could only reflect the existing (im)balance of power between the two parties.

Indeed, the results of the two-decade long Palestinian-Israeli "peace process" have been meager (not to say sometimes counter-productive) for the

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Palestinian side, and as the efforts to bring the parties back to the negotiating table underway since summer 2010 have foundered, it seems a good time to reassess the negotiations in some detail. Such an assessment is all the more relevant in view of Israel's relentless rightward march and the Obama administration's stunning retreat from its early attempt to change the ineffectual "rules of the game." The lessons that this essay will draw from the Palestinian experience will concern two sets of questions: (1) how these negotiations should have been—and should be—conducted; and (2) whether new bases, or even a new negotiation paradigm, should be adopted before reengaging in such asymmetrical negotiations.

In evaluating the negotiations to date, I will not utilize a historical framework of the process with its various stages and fluctuations, but rather will focus on significant issues typically considered in any international negotiating process—e.g. prenegotiations, decision-making structure, material and immaterial assets, psychological interaction, method, the role of third parties, and so on. I will examine each of these issues with regard to the Palestinian negotiating situation and approach to date, in light of the Palestinian national program outlined at the 1988 Palestinian National Council (PNC) session in Algiers, which called for the establishment of a sovereign Palestinian state in the West Bank and Gaza Strip with Jerusalem as its capital and a just resolution to the refugee problem in accordance with United Nations General Assembly (UNGA) resolution 194. I will complete this examination by looking at the negotiations from "outside the box" in order to suggest the conditions under which negotiations could take place and how they should be viewed from the viewpoint of the Palestinian struggle.

THE UNOFFICIAL PRENEGOTIATIONS MEETINGS

The 1980s, particularly the latter half of the decade, witnessed numerous meetings between Israeli personalities from the Left and Center, and Palestinian personalities close to the PLO in what is commonly referred to as Track II diplomacy.[1] From the Palestinian perspective, the purpose of these encounters was to clarify the national program led by the PLO, to bolster the legitimacy of the latter, and to demonstrate the possibility of peaceful coexistence between Israel and a future Palestinian state. The meetings were to serve as prelude to a formal negotiating process that would begin when the conditions were "ripe." It is important to note that many members of the Palestinian delegation to the negotiations in Madrid and Washington in 1991–93 had participated in these meetings.

If, given their purpose, the unofficial "Track II" talks held before the Madrid conference could be said to have played a positive role in preparing the ground for the official talks that followed in Oslo and beyond, this was no longer the case after the signing of the DOP. Once Israel recognized the PLO as the official representative of the Palestinian people and as the party empowered to negotiate on their behalf, Palestinian participation in Track

II talks became more a liability than an asset. An example is the so-called "Geneva Accord," the draft Palestinian-Israeli peace agreement signed by Israeli politicians left of the Labor Party and Palestinians close to the PLO in Autumn 2003—when Ariel Sharon headed an extreme right government. In such unofficial documents, any Palestinian concession is taken to signal Palestinian readiness to make the same concession in subsequent official negotiations, whereas the official Israeli side—not only the more powerful party but also the one occupying the land militarily—would not be bound by concessions made in a draft by Israeli *individuals* affiliated with an opposition increasingly seen as marginal in the Israeli political arena.

PALESTINIAN NEGOTIATING STRUCTURE

The first question that arises in connection with international negotiations concerns the extent of the mandate that the negotiators enjoy from their communities, and the degree to which their negotiating stances commit the latter. Thus the most crucial component of a negotiating structure is not the negotiating team itself, but the decision-making body that instructs it. While the criteria used for assessing a negotiating team is mainly its professionalism, a decision-making body should be evaluated by its institutionalized processes and procedures, its soundness as an operating polity, democratic accountability, fulfillment of a political program, and so on.

The Decision-Making Body

A sound constitutional interpretation of the distribution of power within the PLO would see its Executive Committee (EC) as responsible for the continuous supervision of the negotiations, and the PNC (in its capacity as guardian of the Palestinian national program) as responsible for overseeing the EC. When the above structure and its prescribed duties are compared to the actual situation of the last decades, the following observations can be made:

- The direct supervisory role of the EC, whether under Yasir Arafat or Mahmud Abbas, has significantly retreated since 1993;
- The physical relocation of the EC from exile (Tunis) to Palestine in 1994 gave Israel even greater leverage by enabling it to apply *direct personal* pressure on the EC members—including its chairman—and to restrict their freedom of movement as a warning or punishment for potential or actual stances or actions.
- The PNC's role as overseer of the EC has ceased altogether. Worse, since the early 1990s and particularly with the rise of Hamas (both in the West Bank and Gaza, and in the camps of Lebanon, Syria, and Jordan), the PNC no longer represents all Palestinian political forces;
- Developments within the Palestinian Authority (PA) have in no way compensated for the PLOs institutional crisis that followed Oslo. Quite

the contrary: the division between the West Bank and the Gaza Strip, the erosion of political pluralism in the two territories, the varying degrees of authoritarian grip of the ruling party in each, and the expiration since January 2010 of the terms in office of the PA president and the members of the Palestinian Legislative Council (PLC) have exacerbated the crisis. In the present situation, there is no longer a legitimate and active *regulatory body* that can oversee the actions of the Palestinian leadership with regard to diplomatic efforts and negotiations;

- With the weakening of the role of the EC, the inactivity of the PNC, and the absence of the PLC, it is not surprising that decision-making relating to the negotiations has been concentrated in the person of the EC chairman (simultaneously the PA president), and that powerful external pressures—especially from the United States and Israel—are brought to bear on him.

From these observations, we can readily conclude that the restoration of the PLO on a truly representative basis, along with robust institutional reform, is essential to charting a strong Palestinian negotiating position. Equally obvious is that reinstating a legitimate collective decision-making body in the form of an EC that executes its responsibilities beyond the daily reach of the Israeli occupier—even if some EC members remain in Palestine—would protect the EC chairman from external pressure, and at the same time contribute to a more independent Palestinian negotiating position. Unfortunately, the ease with which such conclusions can be reached in no way suggests a comparable ease of implementation.

The Negotiating Team

The Palestinian leadership has not shown consistent or careful judgment in forming its negotiating teams. In many instances, the teams have included members who either lacked the requisite qualifications or were insufficiently prepared on particular issues. In other cases, individuals were excluded not for inadequate qualifications but because they were known to be stubborn negotiators likely to cause "headaches" for the decision-makers. Sometimes technical experts were made to act as negotiators involved in bargaining, whereas their optimal roles would have been as advisors on specific issues. Nor were clear instructions always forthcoming.

Documents recently released by al-Jazeera[2] show that more than once contradictory instructions were given to negotiators on different committees in the *same* negotiating round, and that Palestinian delegates espoused contradictory positions at the *same* time in the *same* room. And if significant progress has been achieved in Palestinian competence since 1992–93—when some of the delegates were activists from the West Bank and Gaza Strip who used the negotiations sessions as opportunities to present the justice of the Palestinian cause instead of entering into the negotiation process itself—the fact that some of the more skilled negotiators became perennial members

of the Palestinian team has not always been a benefit. The Israeli side, by contrast, has never hesitated to change its roster of negotiators. This enabled Israel, thanks to the absence of mutually agreed minutes and with the acquiescence of its main patron, to ignore positions favorable to the Palestinians put forth by previous Israeli negotiators, while simultaneously reminding their "permanent" Palestinian counterparts of flexible positions they may have expressed in previous years.

The PLO Negotiations Support Unit (NSU) in Ramallah, established in 1998 to support the Palestinian team, is currently under fire for the leakage of documents to al-Jazeera. The idea of recruiting young talent to prepare negotiation files and position papers, and to document the negotiating proceedings was a good one, but the NSU's longtime dependence on foreign funding and administration was from the start a serious issue. Also problematic was the fact that instead of training competent local talent, the tendency was to hire experts from abroad, in some cases without proper vetting and without securing long-term commitments, resulting in high turnover. Some of the NSU staff have also overstepped their roles as experts.

From the foregoing, the following lessons can be drawn if and when final status negotiations take place in the future:

- The official Palestinian negotiation apparatus should be organized hierarchically, with the EC at the top and the experts at the bottom;
- Parallel negotiations without the knowledge of the official negotiating team cannot be allowed. If the Palestinian position is not absolutely unified, the Israeli side can easily exploit any contradictions in the Palestinian position;
- A negotiations steering committee, which would include some EC members, should be established. Its responsibilities, in consultation with the EC chairman, would be to provide close follow-up of the negotiations on a daily basis; help formulate negotiating strategies, positions, and tactics; receive and study negotiators' reports and on this basis issue the appropriate instructions; and finally, to take charge of relations with the media. Members of the steering committee should not participate in negotiations. The purpose of creating a committee specifically to direct the negotiations, while remaining entirely separate from the negotiators themselves, is to guard against the "chemistry" effects of interaction with the Israelis, thereby ensuring the committee's objectivity in assessing each situation.
- The negotiating team operating under the steering committee should be formed of highly competent individuals, headed by a skilled administrator, and including at least one legal expert;
- The involvement of the EC chairman in regular negotiation meetings should be avoided and restricted to critical junctures;
- The negotiating team, as well as the steering committee, should be supported by experts from various fields (e.g., international relations,

international law, Palestinian law, Israeli law, military affairs, security affairs) as dictated by the team's needs. The experts' role is to clarify issues within their fields of competence and to offer negotiating options and alternatives. Deciding on negotiating policies is beyond their purview.

- The negotiators (and their experts) must limit themselves to the final status issues and avoid engaging with the Israeli side on the day-to-day issues that have emerged out of the application of the Oslo interim agreements, such as expansion of area A, management of crossings to and from the West Bank and Gaza for people and goods, issuing residence permits, and so on. Any necessary communications with the Israeli side relating to the latter should be carried out by the relevant coordinating bodies.

POTENTIAL NEGOTIATING ASSETS

Beyond restructuring and improving the Palestinian negotiating apparatus, Palestinians can draw on certain potential assets which, being easily obscured by the marked inequality between the two sides, are not always apparent. It bears mentioning, however, that the Palestinian side cannot capitalize on any of its assets around the negotiation table, and more importantly, nurture them diplomatically and on the ground, until the internal Palestinian political situation is in order.

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Balance of Power

No one would question Israel's overwhelming superiority in the military balance of power, reflected in everything from the continuing blockade of the Gaza Strip, to settlement expansion in the West Bank, to flying checkpoints and ongoing restrictions on Palestinian movement. The military imbalance, coupled with the unflagging U.S. support that shields Israel from international scrutiny and accountability weighs heavily on the negotiations in Israel's favor, to the point that the Israelis could boast that they were "negotiating with themselves" and that any Israeli-Palestinian agreement was little more than an Israeli-Israeli agreement bestowed upon the Palestinians simply for signing.

But the balance of power is not determined solely by its military component, and the defeatism that such psychological warfare is designed to create must be resisted. Other factors comprising the balance of power include demography, internal societal and political conditions, the people's attachment to the land, steadfastness, and so on. For all Israel's military superiority, some options are no longer available to it, including mass expulsion (at least in the present context) and complete annexation (though mass expulsion and annexation constitute, if not the goal, at least the logic behind Israel's

settlement activity), or even the reinvasion of the Gaza Strip and West Bank for the purpose of imposing direct and continuous military control of the cities, villages, and refugee camps through a direct civilian administration, as was the case prior to 1993. There is no necessary correlation between Israel's military power and arrogance on the one hand, and its actual ability to dictate terms to a people clinging to their land and refusing to surrender on the other.

In addition to these limitations of Israel's military superiority, the Palestinian side has some negotiating assets which, if used correctly, could enable it to avoid Israeli extortion and pressure. With regard to demography, for example, the absence of an Israeli-Palestinian settlement places Israel before an internal impasse that can only become more acute. It is worth mentioning that in 2010—perhaps for the first time in the history of the Arab-Israeli conflict—top U.S. officials publicly expressed concern about this impasse.[3] Furthermore, regional developments from southern Lebanon to Iran and Turkey show trends toward an expanding, rather than contracting, circle of hostility to Israel. Even the questions about Egypt's future orientation toward Israel in the wake of the 25 January revolution and the fall of Mubarak would not have been raised had a comprehensive Arab-Israeli peace settlement been achieved.

At the international level, any U.S. effort in favor of a more balanced Palestinian-Israeli settlement will not come from a sudden passion for Palestinian rights but from concern for its own regional interests. This being the case, any threat from Washington about ending its involvement in the peace process if the Palestinians fail to comply with its terms lacks all credibility.

International Law

When the PLO in 1988 announced its program to build a Palestinian state in the West Bank and Gaza Strip, and agreed to UN Security Council resolution 242 and UNGA resolution 194 (III) on refugees, it established complete consistency between its negotiating demands and international law. The question always arises about the usefulness of international law, especially given the fact that it came into existence through the efforts of European powers in complete disregard for what is today known as the Third World. As with domestic law, international law can be variously interpreted, allowing great powers to interpret it in their favor even as they violate it. International law also lacks enforcement mechanisms, as becomes evident when the violator is a powerful state and the party on the receiving end is weak, and nothing happens.

Despite these shortcomings, today's weaker party *can* find meaningful redress for international law violations it suffers, and this for a number of factors including the penetration of media and information technology into the remotest corners of the globe and the weight of Third World votes in institutions where international law is made. The right to self-determination, to

resist foreign domination (including by resorting to violence under appropriate rules), international humanitarian law, human rights law, and other conventions can be successfully deployed. Without doubt, these rules, despite their positive nature, do not express absolute justice and remain subject to interpretations imposed by the powerful violator that can void them of their substance. The aggrieved state or people are thus often left without recourse in the absence of a supranational court created to provide redress. Nonetheless, aggrieved parties today that struggle for a cause perceived as just have reason to hope that mobilization and diplomatic support will ultimately translate into meaningful constraints placed on the violator.

From the start of negotiations, the Palestinians have made concessions far below their minimum guaranteed rights under international law. There is no need to list them here, but the lesson to be retained is that, to be effective in the future, the Palestinians must henceforth adhere to certain guidelines, whether in negotiations, the diplomatic arena, or even internally. Among the priorities, they must:

- Stop treating international law as a mere public relations/media tool. Instead, Palestinians must do whatever possible to act in accordance with international law concerning Israel and with the rule of law in their own community. Palestinian leaders, factions, political movements, the press, and civil society must be educated in and converted to the rights and obligations embedded in international law. Short of this, the world community cannot be expected to take Palestinians seriously when they speak of their attachment to international justice;
- Reject the American-Israeli negotiating approach that insists on "needs" as the starting point for negotiations, which invariably means Israeli security needs or the needs of the current Israeli parliamentary coalition. Instead, the Palestinians must stubbornly insist on the principle that internationally defined rights and responsibilities be accepted as the relevant and binding criteria for the two sides.
- Formulate all Palestinian positions—whether negotiating or diplomatic, general or specific, public or private—on the basis of international law and relevant UN resolutions in such a way that the Palestinian people's attachment to their rights is treated as a diplomatic position, not just as an abstract legal one;
- Integrate the legal positions prepared by the legal advisors into the political positions adopted by policy makers and negotiators as decisive input, so that the Palestinian side articulates an integrated comprehensive approach. Otherwise, the negotiating strategy will appear split into two tracks: one prepared by the legal team for public relations purposes, and the other informing the pragmatic give-and-take of the political negotiators.
- Place the emphasis (in both media and diplomatic communications) on Israeli violations of international law rather than on Palestinian rights

and international legitimacy. Palestinians have far greater need for Israel to be held accountable for its violations than for verbal, non-effective expressions of support for Palestinian rights.

Norms and Values

Beyond the aforementioned legal values, ethical and political norms such as freedom from colonization and values relating to collective Arab-Islamic identity, history, and memory should not be forfeited. For example, during the talks for the May 1994 "Gaza-Jericho" agreement involving the transfer of certain areas of responsibility from the Israeli military authority to the fledging PA, Palestinian delegates relinquished any claim to responsibility for Jewish sites in what was to be PA territory: ignorant of Arab history and the traditional role played by successive Muslim dynasties in preserving Palestine's holy places of all religions, these delegates did not consider that such sites were of any concern to them. The precedent set concerning a Jericho synagogue cost the PA dearly in the negotiations for the September 1995 interim agreement, which gave the Israelis direct control over Joseph's Tomb in Nablus and Rachel's Tomb in Bethlehem. The multiple consequences of that initial blunder are not limited to diminishing the geographical extent of PA control, but also aggravate the daily friction between Palestinian civilians on one side and Israeli settlers and soldiers on the other. It is imperative that the lessons from this experience be absorbed for the negotiations over Jerusalem.

Of the Palestinian values relating to collective memory and identity, the Nakba takes precedence. The Nakba makes it impossible for the Palestinians to sign off on any agreement that does not explicitly acknowledge Israel's responsibility for it. It is also the Nakba that makes it impossible for Palestinians to recognize Israel as a Jewish state, as such recognition implicitly nullifies the Palestinian millennial presence on the land, justifies their refugee status and condition of exile, and makes those who have remained in Israel strangers in the land of their ancestors, potentially vulnerable to expulsion of the kind experienced by Palestinian Jerusalemites since Israel annexed their city in 1967.

Negotiating an Israeli admission of responsibility for the Nakba does not mean only the demand for recognition of the Palestinian refugees' right to return, central though that is. In recognition of the legitimate attachment of all Palestinians (including those whose roots lie in the West Bank or Gaza Strip) to their historic homeland, Israel's acceptance (under a final settlement) of Palestinians' freedom to visit their towns and villages in Israel and other sites of importance to their collective history and memory (e.g., destroyed villages, cemeteries, religious sites) must also be included.

It would be impossible for Palestinians to overstate the enormity of the historic compromises they made for peace when they agreed to the two-state solution in 1988, and in their repeated expression of willingness to recognize Israel in accordance with international law. Palestinians must remind their

audiences and counterparts—whether in the media, diplomatic forums, or around the negotiating table—of the magnitude of these concessions again and again, emphasizing that the Palestinian people have none left to make.

It may be appropriate to end this section by pointing to rational argumentation as a value in and of itself. Can we, for example, question Palestinian logic in refusing to negotiate borders while Israel continues to build and expand settlements? Can the Israelis pretend that they are free to do whatever they want in annexed Jerusalem, if at the same time they have agreed in the DOP that Jerusalem is an issue to be settled in the final status negotiations? Exposing the coherence of one's arguments and the contradictions in the positions of the other side is an asset that no objective mediator or third party may dispute.

Some may question the importance we attach to these various values (including those covered by international law) as effective tools in the negotiation process. We consider them here not because we want to ignore the importance of the military balance of power, but because values and norms can be efficient tools in mobilizing Palestinian public opinion behind a strong negotiating position. They also have the potential of delegitimizing the policies, practices, and demands of the Israeli side and allowing for greater support at both the Arab and international levels.

NEGOTIATIONS ENVIRONMENT

Negotiations do not take place in a vacuum, but are influenced by external factors. Of particular relevance here are the locus of the negotiations, the psychological environment surrounding the negotiators, and exposure to the media. But in almost two decades of negotiations, these "environmental factors" have brought more risks than opportunities for the Palestinian side.

Location of Negotiations

The choice of negotiating venues such as Jerusalem, Tel Aviv, Washington, and Sharm al-Shaykh has without doubt had a negative effect on the Palestinian negotiating position. To reduce external and Israeli pressures as well as to ensure the formal protocol of the negotiations sessions, there can be no substitute for holding these meetings in neutral venues such as Switzerland, and under objective international sponsorship, such as the UN.

Psychological Interaction in Negotiations

The Palestinian negotiators have been widely perceived by the Palestinian public as lacking in decorum, restraint, and a sense of protocol in their interactions with their Israeli counterparts. While this behavior is particularly offensive to those who have lost homes and lands by Israeli action (either in 1948, 1967, or in the occupied territories via demolition or confiscation), it also has wider implications. I refer here to the "chemistry," already alluded to, created in interaction between negotiators of opposing sides, both inside and outside the negotiating room, which can affect the outcomes of the

negotiations themselves. Positive interactions become familiarity, even false familiarity, which in turn can easily lead to ill-considered statements by Palestinian delegates in unguarded moments, or, worse, to acquiescence in disadvantageous positions so as not to disrupt the "chummy" atmosphere or from fear of negative reactions from the Israeli "chum."

Especially for the weaker party, appropriate distance between the delegates of the opposing sides is absolutely essential, along with self control and deliberative speech. At the same time, threats that cannot be carried out are devastating for the negotiator's credibility and therefore effectiveness. Palestinian negotiators must also take care to acknowledge the other party's concessions or points that could serve their side, in order to "cash them in" and build on them in future rounds.

Negotiations, Secrecy and the Media

Among the lessons to be learned from the leaked NSU documents is that the Palestinians have a vital interest in unifying their secret and public positions. Aside from the fact that few things in public institutions located in occupied territory can remain secret for long, the Palestinian leadership must realize that secrecy with regard to negotiating positions is no benefit. On the contrary, constructive opposition from a public opinion that stands as a watchdog against potential concessions ultimately serves the leadership, and a well informed Palestinian public can act to strengthen rather than weaken the Palestinian negotiating position at important junctures. This requires a sober and thoughtful media strategy directed at both the Palestinian population and the international community.

It is also important that the Palestinian public and international media be informed about the specifics of the Israeli stance compared to the Palestinian one. Palestinian as well as foreign journalists need to be given the necessary background information so they can thoroughly follow what is really going on in the negotiation room, and understand the gaps between the two sides so as to form their own judgments on responsibility for deadlock or failure. In countering the Israeli information machine—exemplified in the campaign attributing to the Palestinian side the failure of the Camp David American-Israeli-Palestinian summit in July 2000—nothing is more effective than the true story. While positions based on crude force tend to hide behind a smokescreen of *hasbara*, defendable positions (i.e. congruent with international law) gain at being publicized and at dispelling the smokescreen. Finally, even if the two sides have agreed not to disclose "what took place inside the room," the Palestinian negotiators should make important details available to the limited circle of close advisers rather than guard them with a jealousy befitting a priceless treasure.

PITFALLS FOR THE PALESTINIAN SIDE

Given the inequality between the two sides in terms of power, resources, and alliances, it is inevitable that the negotiating process be rife with pitfalls

for the Palestinians as they negotiate issues of such import for the rights of the Palestinian people, their unity, and the future stability of their political system.

Interim Negotiations vs. Final Status Negotiations

The Oslo process strictly distinguished between interim and final status negotiations, yet Palestinian negotiators have sometimes fallen into the trap of mixing the issues arising from the two. This includes responding to Israeli offers of "facilitations," "improvements," or "incentives" within the Oslo interim framework (often tied to Palestinian reciprocal concessions) as an alternative to delving into the core issues—even when the negotiations were specifically on "final status." Nor were the Palestinians themselves above making "transitional phase" demands in a final status context, for example in the Palestinian-Israeli working groups formed in 2008 after the Annapolis Conference (as shown in leaked NSU documents).

Besides being incompatible with sound negotiating strategy (delaying instead of hastening a final status solution), this approach holds genuine dangers for the Palestinian side—hence my recommendation above that Palestinian final status negotiators be barred from any involvement in issues relating to the implementation of self-government arrangements lest "improvements" on this front be presented as achievements towards the final status issues.

According to the DOP, final status negotiations were to start not later than the beginning of the third year of the interim period (5 May 1996) and lead to a permanent settlement no later than the end of the five-year interim period (4 May 1999). To avoid reaching a permanent settlement, and sometimes in response to U.S. pressures to "do something," Israel has resorted to alternatives, the most recent and notable being Israel's dismantlement of its Gaza settlements and redeployment around the Strip (resulting inter alia in the almost complete separation of Gaza from the West Bank). Other "substitutes" have included repeated talk about broadening area A in the West Bank and recognizing a Palestinian state with provisional borders. Moreover, Israeli negotiating tactics since the DOP have single-mindedly focused on details at the expense of general principles on the pretext of keeping talks pragmatic and away from "empty slogans" (i.e., Palestinian insistence on East Jerusalem as capital of the Palestinian state, Israeli withdrawal to the 1967 lines, Palestinian refugee return), summarily dismissed with rejoinders such as "you Palestinians do not negotiate, you sloganeer."

Negotiation Method

From the Palestinian perspective, the negotiation method should be structured in a hierarchical top-down manner starting from general principles and progressing to details. Instead, the negotiations have been conducted using the bottom-up approach dictated at the start by a combined Israeli-U.S. psychological assault under the banner of pragmatism. Based on the concept

that Israel is entitled to (or at least holds) all the rights and assets, and under the pretext of leaving the difficult negotiating issues for a later stage, the bottom-up approach has aimed at making negotiations an open-ended exercise that avoids anything involving the end of the occupation or any of the larger issues having bearing on final status. The approach consists of Israel's piecemeal relinquishment to the Palestinians of particulars (such as responsibilities in health, education, and so forth, or parcels of land defined as areas A or B), and regrouping them in expanding clusters as negotiations proceed, but on the condition that what is not specifically relinquished remains under Israeli jurisdiction (for instance West Bank lands that have not been explicitly transferred to areas A and B are necessarily considered area C, or even part of Israeli sovereign territory). But after twenty years of a so-called peace process, any attempt to avoid or postpone to a later round the "difficult" questions like Jerusalem or refugees can no longer be justified.

To be sure, the Israeli side has sometimes acknowledged (following back-and forth arguments and counter-arguments) a general principle, though invariably tying its acknowledgement to a number of exceptions. When, during negotiations for the DOP, for example, the Palestinian side was able to obtain from Israel the principle of PA authority over the West Bank and Gaza Strip, it was made conditional upon certain exceptions, notably the exclusion of Israeli settlements from PA territorial jurisdiction. Assuming that the Palestinians' acquiescence in excluding the settlements from the PA jurisdiction was unavoidable, the negotiators failed to press for agreement on a precise geographic definition of what constitutes a "settlement": is it the built-up area, or the vastly larger area for which it is zoned? Is it delineated by its geographic boundaries, or does its area also include the roads that connect it to Israel? During the implementation phase, Israel (not surprisingly) imposed its expansive concept of settlements, effectively invalidating Palestinian authority over the occupied territories.

A comparable example can be expected to arise when and if meaningful final status negotiations take place. Assuming that Israel will agree to some formulation of Palestinian "national sovereignty," its negotiators will certainly strive to circumscribe the concept and even hollow it out by conditioning their agreement to a proliferation of exceptions.[4] This is already clear with the reservations that Prime Minister Benjamin Netanyahu has attached to his acceptance of the principle of Palestinian statehood in his Bar-Ilan speech in June 2009 and repeated more than once since then. The lesson here is that before agreeing to a general principle and its exceptions, the Palestinians must insist that the content of the exceptions be clarified in detail, and afterwards, if they accept these, that they strive to narrow their scope to the extent possible.

There is another reason why an explicit common understanding of the *content* of any jointly-accepted general principle or concept must be obtained from the Israelis before any agreement is signed—and why the Palestinians must be relentless in pressing for it. Israel, as the more powerful party and the occupier

of the land under negotiation, will inevitably work to exploit all the ambiguities in its favor when the time comes to implement the words agreed upon.

Indeed, with regard to determination and meticulous attention to the top-down approach, the Palestinian side would benefit from a return to the practice that prevailed at the 1992–93 Washington negotiating rounds. At that time, the Palestinian delegation (rightly) could not be budged from its stubborn insistence, which held up proceedings for several months, that the actual negotiations could not begin before a formal agenda was agreed upon. In this way, the Palestinians sought to make sure that issues of importance to them—such as the settlements—were included, and that they be referred to with the appropriate terminology. The insistence on an agenda is an important aspect of a structural approach to negotiations.

Another potential pitfall in the context of the negotiating method is the notion, accepted by both Israelis and Palestinians, that "nothing is agreed until everything is agreed." Even before the concept was distorted to suit the purposes of the Israelis and their U.S. backers, as appears to be the case today, this principle, however necessary in its original meaning, always represented a particular peril for the Palestinians. Between Israel's time honored tactic of stretching the negotiations out endlessly and the Palestinians' own eagerness to prove their goodwill to the American umpire by engaging, the Palestinian side has often been led to expose its areas of flexibility and possible concessions on key issues. Though not legally binding, these soft areas will certainly be treated as givens and used as the starting point for further concessions in subsequent negotiating rounds if negotiations resume within the framework applied so far.

Negotiating Borders

Most of the concessions on borders revealed by the NSU leaks have been known in their broad outlines since the December 2000–January 2001 Taba talks, but the negotiating flaws that led to these concessions need to be addressed. Of particular importance are the land swaps—exchanges of land in the occupied territories (where the larger Israeli settlements are situated) for land inside Israeli territory. In these border negotiations, the Palestinians not only agreed to land swaps in principle and identified which specific lands they might be willing to concede (i.e., some of the "large" settlement blocs), they also expressed this willingness while the Israelis were forging full speed ahead with settlement construction. The paradox of this approach is that it encourages Israel to intensify its settlement activity and to hasten the development of large new settlement blocs, in keeping with President George W. Bush's April 2004 promise that large settlement blocs would be annexed to Israel. The lesson to be drawn from this experience is obvious: the Palestinians must exclude the very concept of land swaps from their negotiating lexicon as long as Israeli settlement activity persists.

The U.S. proposal that the sides concentrate on reaching an expedited agreement on borders (within, for example, a three-month framework)

instead of "wasting time" arguing over settlement activity holds similar (and other) dangers. Besides postponing talks about Jerusalem (while Israel continues to expand its settlements inside and encircling the city), the U.S. proposal implies acceptance of settlement expansion *west* of whatever border would be agreed in the expedited talks and a settlement freeze to its *east*. Even if the Palestinians were to accept this formula, and even if, learning from experience, they extracted a clause precisely defining the settlement freeze on their side of the border so as to limit Israel's free interpretation of "freeze," the eventual dismantlement of the frozen settlements would face them with new difficulties. While Israel would not be able to contest the *principle* of dismantling these settlements located inside what would be mutually-agreed Palestinian borders, as actual occupier of the land it would be in a position to delay the actual dismantlement and to condition it on new Palestinian concessions. No agreement on borders should be reached if it does not include Jerusalem and if it does not provide for an iron-clad dismantlement timetable, so as to preclude the need for later talks on the subject.

Drafting the Text of an Agreement

The above warning about any agreement on borders that would require further talks to implement is based on the experience of the 1993 DOP and the strenuous negotiations on implementation that followed, which to this day are far from being completed. To obtain the DOP with all its well known shortcomings, the Palestinian leadership had to pay dearly: formal recognition of Israel, a five-year deferral of the final status, acquiescence in major exceptions relating to the territorial extent of its authority. Later, during the "implementation" of the DOP on interim issues, the Palestinian leadership gave up even more than was required of them under the agreement simply in order to receive "goods" the agreement had already promised. Thus, in return for Israel's partial military redeployment from Palestinian towns (in implementation of the DOP), the Palestinian leadership recognized "Area B" lands, where Palestinian authority and movement were circumscribed, and "Area C" lands, where they had no authority whatsoever (these last being exponentially greater than the exceptions listed in the DOP).

During DOP "implementation" on interim issues, the Palestinian leadership gave up even more than was required of them under the agreement simply in order to receive "goods" the agreement had already promised.

From this bitter experience, the Palestinians should learn that the text of any agreement should be both the *first* and the *final*, meaning that once agreed, it should require no further talks to be implemented. Any agreement in the form of a "Declaration of Principles for a Permanent Solution" or "Framework Agreement for a Permanent Solution" will inevitably lead the Palestinian people and their leadership to repeat the same bitter experience. What is required is an agreement that covers all possible details and clarifications, leaving no loopholes through which the more powerful party can

abusively (mis)interpret its provisions during the implementation period. This is not to say that temporary or interim agreements should be rejected outright, but rather that they should be rejected if the texts of such agreements do not include precise and unconditional timelines and deadlines. Naturally, despite all the precautions outlined here, complications and contradictory interpretations during an implementation phase are to be expected. Any agreement should therefore include a clause that submits any issues arising from different interpretations to compulsory arbitration based on the request of either party. It is to be noted that article XV-3 of the DOP did refer to arbitration, but submission required the approval of both parties on a case-by-case basis. This condition in fact nullifies the usefulness of the provision. Lastly, the agreement must specify the roles of third parties to guarantee implementation.

The Role of Third Parties

The Palestinian side has suffered from the fact that the only third party that has mediated the Palestinian-Israeli negotiations has been Israel's staunch ally and near unconditional backer, and therefore constantly subject to Israeli pressure. What is needed is for the negotiations to be carried out under the official aegis of a party like the UN represented by its Secretary General, or a neutral state such as Switzerland, as long as the sponsoring body or state abides by international law. Items on the negotiating agenda may require coordination with relevant third parties, a clear example being the refugee issue, of direct concern to Jordan, Syria, and Lebanon; moreover, no Palestinian-Israeli settlement could be stable except within the framework of a comprehensive regional settlement. If a final agreement is reached, the Palestinian side will also need the involvement of third parties during the implementation phase, provided their roles are precisely delineated in the text. Examples of third party roles include:

- Participation in the monitoring of external borders, borders with Israel, and international crossings by deploying observers from third party states for a specified duration;
- Participation in guaranteeing the implementation of the agreement and the integrity and security of Palestinian sovereign territory under a UN Security Council resolution based on Chapter 7 of the UN Charter, with the declared, explicit endorsement of Israel, Egypt, and Jordan.

Third party participants should be chosen with caution, for any third party (not only the U.S.) will be partial to the stronger actor during the implementation stage. For the same reason, matters pertaining to interpretation of the agreement should be referred to arbitration and not be left to third parties.

NEGOTIATION PREREQUISITES AND BEYOND

The lessons that have been drawn so far have dealt with questions such as: How to supervise and prepare negotiations? How to bring assets to bear

on the latter? How to ensure a favorable environment? How to overcome pitfalls in the negotiation process? All the above lessons and recommendations, except perhaps those relating to borders, were made on the assumption that negotiations were effectively ongoing and would continue until a satisfactory agreement is drafted and signed.

However, this assumption, necessary as a methodological tool, would be misleading if it were taken to imply that negotiations for the Palestinians are the "only game in town." First, if the Palestinians were to adopt some of the recommendations made here (such as reconciliation between Fatah and Hamas, sticking to international law as the guiding principle for both sides, requesting a change in venue or a mutually agreed agenda), they would have to be prepared for the possibility (indeed likelihood) that the Israelis, supported by the Americans, would leave the negotiations room or at least refuse to budge. Second, the Palestinians, drawing from their twenty-year experience, need to look as of now to their future from outside the negotiating box. In this regard, I would like to suggest below the negotiation prerequisites (i.e., conditions under which the Palestinians could resume negotiations) and, perhaps more importantly, the place they should allocate to negotiations within the larger Palestinian struggle. Taken together, these suggestions constitute what I would call a shift in the Palestinian negotiation paradigm.

Terms of Reference

One of the most important criticisms directed at the Palestinian-Israeli negotiations has been that they took place under a ceiling of the vague principles outlined in the U.S. invitation to the autumn 1991 Madrid Conference,[5] which included the establishment of ambiguous interim "self-governing arrangements" during a five-year period that was to end with an agreement on an undefined permanent status. Consequently, according to the same criticism, any agreement produced by such negotiations would inevitably maintain the weaker party under this predetermined ceiling. Similarly the road map, announced by the U.S. State Department at the end of April 2003 subject to its acceptance by the two parties (in fact, Israel's endorsement of the road map included reservations so extensive as to virtually nullify its content), went into so much detail about the steps required along the road, particularly by the Palestinian side, that, contrary to the usual meaning of a "roadmap," it did not even clarify where the road was supposed to end.

Looking back at the negotiations since the Madrid Conference (including President Clinton's December 2000 "parameters" on final status issues), some (even many who supported the Oslo process) have concluded that there should be no return to the negotiating table as long as the Palestinians do not obtain from Israel a clear and unequivocal endorsement of terms of reference for negotiations that would spell out the final destination (i.e., a Palestinian state on the 1967 borders, with Jerusalem as its capital, Israeli recognition of the Palestinian right of return).

Despite my sympathy for this position, I think we have to differentiate between the *internally*-defined Palestinian terms of reference (i.e., the

Palestinian national program), and the terms of reference that must be *jointly* agreed for negotiations to go forward; indeed, if the two were congruent, there would be no need for negotiations. Certainly, the Palestinians should endeavor to bring the second as close as possible to the first before sitting down at the negotiating table. All means should be deployed to this end, including diplomatic efforts in cooperation with powerful international players like the UN, the United States, and the European Union. However, given the expected dynamics of the discussions aimed at hammering out clear terms of reference *as a prelude* to resuming negotiations, the Israeli side would certainly insist on including its own demands in exchange for accepting those of the Palestinians.

In such a situation, vaguer terms of reference should not necessarily be excluded, as long as the Palestinians' agreement to them—as well as their engagement in the negotiations—not be construed as a concession on their own internal terms of reference, or as a transgression of their own red lines. Negotiating under vague, jointly agreed terms of reference does not necessarily preclude the latter's being gradually overtaken by the Palestinian side under the impact of the negotiating process itself, and external factors such as regional or international developments.

Settlement Freeze

In contrast to the relative flexibility on joint terms of reference advocated here, the Palestinians—as already mentioned—must adamantly refuse to engage in any future negotiations dealing with final status issues without a complete settlement freeze. Not only is this activity a clear violation of international law, but negotiations should not be allowed, as in the past, to serve as a smokescreen for these unilateral Israeli actions. It goes without saying that "settlement freeze" must mean a total, public, and unconditional cessation of all Israeli settlement activity, including the expropriation of Palestinian lands and further construction of the Separation Wall. Acceptance of an equivocal, implicit, temporary, or partial settlement freeze as a sufficient condition for resuming talks, as the Palestinians were tempted to do in 2009–2010, can only be a sword of Damocles over their heads: experience has shown that if, in a given negotiating round, the Palestinian negotiators fail to agree to the concessions sought, their recalcitrance is used as a justification for resuming settlement building at a faster pace.

Opening a New Negotiating Page

In our discussion above on border negotiations, we advocated that the Palestinian side refuse any engagement whatsoever on the issue (especially on land swaps) in the absence of a total settlement freeze. Extending this discussion to include *all* the major negotiation issues, we are calling for a new page to be opened in the Palestinian negotiating approach, and for the previous page—where an all-too-obvious readiness for concessions that clearly transgressed the Palestinian "red lines"[6] only encouraged Israel to ask for

more—be closed once and for all. In turning the page, it is essential to return to the Palestinian national program of 1988 as the set of principles guiding Palestinian negotiators. One way of signaling the seriousness (and magnitude) of the change in the direction we are seeking could be a Palestinian declaration of commitment *only* to the 1993 DOP (including the Paris Protocol). In other words, all the subsequent agreements and arrangements, essentially concluded to elaborate on the DOP's provisions, would be discarded. These later accretions, epitomized in the parceling of the land into areas A, B and C, were never honored by Israel in the first place.

Why Negotiate?

The combination of flexibility and firmness I am calling for in negotiation prerequisites stems from the conviction that achieving the Palestinian national program remains a long-term goal, and that the compass that should guide the Palestinian polity is not a negotiated settlement per se, but rather the achievement of the national program itself. For sure, it is highly desirable that this achievement take place as soon as possible and through negotiations, but unfortunately, this appears to be wishful thinking in light of the insatiable land hunger of an occupier that is also a regional power enjoying the support of the global superpower. Consequently, there is a need to downplay the value of Palestinian-Israeli negotiations—to "de-sacralize" them, as it were—in the eyes both of those who see them as the only path to salvation and those who condemn them as the main source of the Palestinians' present predicament. Palestinians should view the negotiations process (including any prerequisite they attach to it) as a tool of the struggle alongside the other tools deployed to effect a change in the balance of power in favor of the just Palestinian cause. According to this perspective (or rather, this *shift* in perspective), the question of whether or not to enter negotiations at a certain point is no longer a strategic matter but becomes a tactical and circumstantial one, subject to calculations of benefit and cost. This is what I would call "playing the negotiation game."

In light of this reconceptualization, we should no longer see engagement in negotiations as aimed solely at reaching an agreement. To measure the success of an engagement in negotiations as part of the broader diplomatic activity, one should evaluate its contribution to Palestinian political assets both internally and internationally, and not necessarily by assessing the progress toward concluding an agreement in the coming months or years. In other words, what is normally seen as "success" in negotiations (i.e., a signed agreement between the parties) sometimes really means the submission and surrender of the weaker party, whereas "failure" may more accurately indicate steadfastness, the fruits of which may be harvested down the road.

BY WAY OF CONCLUSION

It could be said that the "new page"—setting conditions for entering negotiations and the negotiating framework itself—recommended in this paper is

idealistic and unattainable. We can be certain that in the current conditions, neither Israel nor the U.S. will accept the fundamental shift in the rules of the negotiating game such as those outlined here. However, it is the current conditions (Israeli intransigence, the relentless move to the extreme Right, continuation of settlement activity with implicit U.S. acquiescence, siege of the Gaza Strip, etc.) that have prevented the flexibility demonstrated by the Palestinian negotiators from leading to serious negotiations. Instead, Israel has exploited Palestinian concessions to gain time and as launching points for further concessions in possible future negotiating rounds.

The call for changing the rules of the negotiation game is based on the conviction that the Palestinians possess valuable negotiating cards—provided they believe in their value—exemplified by the continued development of institutional and social infrastructure, increased economic investment, a stubborn connection to the land, and growing popular mobilization, peaceful resistance, and work towards rallying supporters across the globe. Add to this the regional transformations, notably the Egyptian revolution of 25 January 2011, which can only strengthen the Palestinian negotiating position. The ultimate value of these negotiating cards, however, depends on the Palestinian leadership's ability to respond intelligently to these transformations and to deal seriously with the internal Palestinian political situation by paving the way for the reunification of the West Bank and Gaza Strip and rebuilding the Palestinian political system.

In addition to outlining conditions for resuming and conducting negotiations, this paper has advocated a perspective whereby the Palestinians should consider their decision on whether or not to enter negotiations as part of a diplomatic battle aimed at consolidating their assets for the eventual realization of their national program. In this regard, the first priority in the Palestinian negotiation game must be obtaining a total freeze on Israeli settlement activity. Given the risks inherent in Israel's relentless territorial expansion at Palestinian expense, this remains the urgent step that cannot be avoided if Palestinian independence is eventually to be achieved. Indeed, the question facing the Palestinian people today is whether it is still possible to establish an independent state in the West Bank and Gaza Strip without the collapse of the Israeli settlement project itself.

ENDNOTES

1. See for example Hussein Agha et al., *Track-II Diplomacy: Lessons from the Middle East* (Cambridge: MIT Press, 2004); Edy Kaufman et al. eds., *Bridging the Divide: Peacebuilding in the Israeli-Palestinian Conflict* (Boulder: Lynne Rienner, 2006).

2. As the documents leaked by al-Jazeera show. The documents are available on the al-Jazeera Transparency Unit Web site at http://transparency.aljazeera.net/.

3. See for example President Barack Obama's speech to the UN General Assembly on 22 September 2010 at http://www.whitehouse.gov/the-press-office/2010/09/22/excerpts-president-obamas-remarks-united-nations-general-assembly; see also U.S. Secretary of State Hilary Clinton's speech

to the American Israel Public Affairs Committee (AIPAC) on 22 March 2010 at http://www.state.gov/secretary/rm/2010/03/138722.htm.

4. Concerning the sovereignty requirements for a Palestinian state, see Camille Mansour, "How Sovereign a State?" Al-Shabaka Policy Brief, Al-Shabaka, 11 April 2010, http://al-shabaka.org/policy-brief/negotiations/how-sovereign-state?page=show.

5. See Special Document I-A., U.S. Letter of Assurances to the Palestinians, *Journal of Palestine Studies* 21, no. 2 (Winter 1992): pp. 118–119.

6. For a brief overview of Palestinian concessions as revealed by the negotiations documents leaked by al-Jazeera, see Clayton E. Swisher, *The Palestine Papers: The End of The Road?* (London: Hesperus, 2011), pp. 25–71.