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Jonathan B. Schwartz

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Catering for Israeli-Palestinian Peace

Jonathan B. Schwartz *

I was on the White House lawn for the first time, cradling the final documents. Presidential adviser George Stephanopoulos asked me why I was holding up an internationally televised signing ceremony. For months Israeli and Palestinian negotiators had met in secret in Norway. Now they were ready to sign an historic "Declaration of Principles" that would provide a road map to resolve their fifty-year dispute.[1] I was preventing President Clinton, Prime Minister Rabin, and PLO Chairman Arafat from coming to the stage and Mr. Stephanopoulos wanted to know why.

In retrospect, that September day in 1993 was filled with irony. The United States has often been accused of serving merely as a "caterer for peace." By this, I suppose, is meant passively hosting ceremonial signings rather than exercising "superpower responsibilities." (The U.S. has also, of course, been accused of the opposite—dictating solutions to life-and-death issues whose consequences Americans will not have to bear.) All I knew at the time was that the Israeli and Palestinian legal representatives were not agreed on the final wording of their document, and I was not going to allow the dispute to move on to the stage to the embarrassment of all concerned.

This initial experience taught me there can be far more to "catering for peace" than meets the eye. Simply providing technical assistance in preparing documents or logistical support for negotiations can be tricky, even nerve-wracking.[2] But third-party facilitators can play an invaluable role in defusing the emotional barriers that impede constructive problem-solving for more than ceremonial events. For the United States, this has meant careful attention to nurturing the negotiating environment for Palestinian-Israeli peace talks. The U.S. has used its influence to urge the parties to restrain their public rhetoric and encouraged them to engage in confidence-building measures. More generally, it has expressed unwavering support for the process and sought to instill a sense of optimism to help build constituent support. When, as has happened all too often, the enemies of peace have lashed out violently, the United States has used its influence and prestige to overcome shocks to the process. It has

* The author is a member of the Office of the Legal Adviser, United States Department of State. The views expressed are personal and do not necessarily reflect those of the United States Government.

1. Israel-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Washington, DC, Sept 13, 1993, 32 ILM 1525 (1993).

2. In May 1994, the U.S. was again asked by the Israelis and Palestinians to help prepare their final document for a ceremony in Cairo hosted by President Mubarak. In the middle of the signing Chairman Arafat decided he was not satisfied with the maps and insisted on continuing the negotiations on stage. See Israel-Palestine Liberation Organization: Agreement on the Gaza Strip and the Jericho Area, Cairo, May 4, 1994, 33 ILM 622 (1994).

organized and hosted emergency summits, boosted its own counter-terrorism support, and given the parties the confidence to continue once they have buried their dead.

It is within this broader domain of political support that a third-party lawyer can best define his or her role. A key function for a State Department lawyer is to advise U.S. government officials on the full range of legal issues posed by the negotiations. On the Israeli-Palestinian peace process, this has meant counseling on the legal framework for the negotiations and the rationale and consequences of the parties' positions. My role has been to advise on domestic legal authorities for the U.S. regarding financial support and assurances to the parties. In addition, a third-party lawyer in a position like mine can also provide more direct support to the negotiating process, and that is what I would like to focus on here.

The first task for me or any third-party lawyer is basic to everything else—to listen carefully to each side's description of its approach and the underlying rationale behind its objectives. At the table the negotiators may be reluctant to go into depth about their proposals. This may be because they want to give the impression that they have no room for compromise. Alternatively, they may feel their position will be difficult to justify in detail, since it is based on domestic political factors or on interagency processes necessary to reconcile a variety of internal needs. But both sides may feel comfortable confiding in a third-party, who will thereby acquire a greater understanding of the negotiating dynamics than either side. By posing questions as a neutral observer, I have sought to encourage each party to review its own position more carefully and to see how it appears from the point of view of its negotiating partner.

This function of listening and probing can lead easily to a second, more active role in the negotiations. Equipped with an understanding of the parties' key motives, a third-party can provide vital assistance in explaining each side's position to the other, outside of their face-to-face negotiations. This not only can facilitate direct communication between the parties, but it can help the negotiators understand what is important to the other side, and why. I have been especially impressed by how third-party counseling and intervention can help reveal the way substance and appearance interrelate in the search for solutions.

A threshold is crossed when a third-party introduces its own ideas into the negotiations. This step often will require the consent of the parties. Nonetheless, there are gradations to this role, with some modes of suggesting ideas far less threatening then others. For example, one of the heaviest liabilities carried by negotiators is their reluctance to explore new ideas beyond the formal positions presented at the table. Creative brainstorming is often seen as a lack of resolve in one's position. The frequent perception in the Middle East that the issues constitute a zero-sum game reinforces this conservatism. I have found that a third-party has far greater freedom to explore a wide range of ideas without committing the parties to a particular approach. Indeed, only an outsider like an American official may have the psychological and political distance necessary to find ways to recast how issues are

framed or to see compensatory measures to offset concessions required of one of the parties. In the Israeli-Palestinian talks, the U.S. has sometimes been able to suggest five or ten possible solutions to a problem when the parties were fixated on only their two.

Substantive participation of this sort often raises fundamental questions about the involvement of a third-party lawyer in political disputes as deep-seated as the Israeli-Palestinian conflict. The natural tendency of the parties is to justify their positions through reliance on legal instruments they interpret as compelling a particular outcome. These may be U.N. Security Council or General Assembly resolutions, prior agreements of the parties, customary international law, natural justice, or even statements by influential countries like the United States. This inclination presents a serious challenge to any negotiation, since conflicting legal positions can be more difficult to overcome than divergent political interests. Legal positions tend to be stated in absolute terms so that any compromise is seen as an abandonment of fundamental rights. In this environment, the parties may not search for new ideas to accommodate their complex practical needs. Instead, their strategy may be to try to induce a third-party to take sides in the hope it will somehow force the other party to admit it is "in the wrong."

This dynamic can clearly present the U.S. with a dilemma as it seeks to broker a mutually-acceptable outcome. On the one hand, there is consensus on certain basic principles at the foundation of the Israeli-Palestinian negotiations. They are reflected in the terms of reference for the 1991 Madrid Conference that initiated the negotiations[3] and in the Declaration of Principles and subsequent agreements of the parties,[4] including most recently the Sharm el-Sheikh Memorandum signed in Egypt on September 4, 1999 by PLO Chairman Arafat and Prime Minister Barak.[5] The United States has regularly associated itself with these principles and stressed their importance to the parties.

At the same time, the United States has been acutely aware that if the two sides approach their negotiations as a zero-sum game, a permanent settlement is unlikely since neither side will, or perhaps can, accept being characterized as a legal loser. An important function of U.S. officials, therefore, has been to try to help shape outcomes that avoid the need for such concessions. This has been possible at times because the

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3. Letter of invitation to Madrid Peace Conference, United States and Union of Soviet Socialist Republics, (1991), website of Israeli Ministry of Foreign Affairs, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00p60> (visited Mar 4, 2000).
4. See Israel-Palestine Liberation Organization: Interim Agreements on the West Bank and the Gaza Strip, Washington, DC, Sept 28, 1995, 36 ILM 551 (1997).
5. Israel-Palestine Liberation Organization: The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreement Signed and the Resumption of Permanent Status Negotiations, Done at Sharm el-Sheikh (1999), as printed at website of Israeli Ministry of Foreign Affairs, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0fo30>; as printed at website of Palestinian National Authority, <www.pna.net/peace/sharm_sheikh_memo.htm> (visited Mar 4, 2000).

abstract legal formulations typically debated to a standstill may harbor flexibility in application. By pointing out such options, representatives like myself can help open doors to practical compromises that are at the heart of most negotiations. Indeed, sometimes it is just a matter of how a compromise is drafted that determines whether it can avoid the perception of a clear legal "winner" and "loser."

The value of such drafting assistance should not, in fact, be underestimated. At the time of the January 1997 Hebron Protocol (providing for redeployment of Israeli forces in the last remaining major West Bank city),[6] it was clear that Israelis and Palestinians needed a vehicle for reaffirming their previous mutual undertakings. Their confidence in one another had reached a low point in the wake of widespread violence following the opening of a Jerusalem archaeological site. A rededication to prior agreements and the Oslo process was needed before the Hebron agreement could be concluded. But negotiating about, or indeed renegotiating, these prior commitments would have taken too much time and jeopardized the fragile understandings that had been reached on Hebron.

To solve this problem, the United States hosted a meeting between PLO Chairman Arafat and then-Prime Minister Netanyahu so they could reach oral rather than written understandings on these matters. The points of agreement were then recorded by the U.S. in the form of a "Note for the Record" signed by the two leaders and the U.S. negotiator, Ambassador Dennis Ross.[7] Prior consultations had been held on the wording of this informal Note, but the central role of the U.S. team in which I participated helped the two sides reach agreement on issues that could have kept them apart for many more months.

U.S. assistance in drafting was even more pronounced in the Wye River Memorandum,[8] brokered in nine days of around-the-clock talks in the Maryland countryside in October 1998. After implementation of the Hebron Protocol, bilateral negotiations again stalled and United States emissaries engaged in extensive shuttle diplomacy in search of a way out of the impasse. Eventually the United States privately suggested a set of ideas to both sides based on what each had said would be acceptable. These ideas evolved into a specific textual proposal that we drafted for the parties to consider. At Wye this text was finalized through the personal participation of President Clinton, and the two leaders, Chairman Arafat and Prime Minister Netanyahu.

Such a full-bodied third-party role is perhaps necessary in circumstances where negotiators are barely speaking to each other. It nevertheless has obvious disadvantages. When the parties do not take full responsibility for shaping their

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6. Israel-Palestine Liberation Organization: Protocol Concerning the Redeployment in Hebron, Jerusalem, Jan 19, 1997, 36 ILM 650 (1997).

7. Israel-Palestine Liberation Organization: Note for the Record, Jerusalem, Jan 17, 1997, 36 ILM 665 (1997).

8. Israel-Palestine Liberation Organization: The Wye River Memorandum, Washington, DC, Oct 23, 1998, 37 ILM 1251 (1998).

understandings face-to-face, an agreement may not be precisely tailored to their needs. The resulting text may also be more likely to give rise to interpretive disputes. Most importantly, the parties may not have the same sense of ownership and partnership that flows from solving problems together. Particularly in agreements requiring extensive cooperation at the implementation stage, such partnership may prove indispensable. Nevertheless, in this case the parties had called on the U.S. to find a way out of their impasse and traditional "catering for peace" seemed unlikely to achieve that aim.

Indeed, to provide the parties confidence to move forward, it proved necessary for the U.S. to assign itself a role in helping to implement the Wye River Memorandum. This was quite unusual; the U. S. was not a party to the agreement, but only a witness. At Wye, U.S. officials were able to assure the two sides that the U.S. would be able to perform the functions described in the Memorandum. These primarily involved participation in bilateral and trilateral committees designed to monitor and discuss implementation[9] of the accord. Thus, mere hosting of signing ceremonies had evolved by the time of the Wye River Memorandum into organizing the negotiations, proposing ideas, drafting agreements, and participating in their implementation.

As robust as this participation was, the U.S. has on occasion provided assistance to the Palestinians and Israelis in their quest for peace that in a sense has gone even further. There are some issues that, despite the best efforts of all concerned, have not been resolved in an express bilateral agreement, even one drafted by the U.S. It was simply too hard politically at the time for the parties to tackle the problem head-on. For example, a stalemate resulted in January 1997 over the setting of the schedule for Israeli redeployments in the West Bank after implementation of the Hebron Protocol, and again, in April 1999, over the lack of agreement on the consequence of not meeting the agreed date for a permanent settlement. In both cases, the U.S was able to provide a protective umbrella for the negotiating process by stating a U.S. view of what should happen. And in each case, it was useful to have a lawyer involved to help ensure U.S. statements supported forward movement rather than provoked new disputes.

To overcome the impasse on Hebron, then-Secretary of State Christopher wrote carefully drafted letters to both leaders suggesting a schedule and mechanism for the disputed redeployments.[10] The letters were not cast as a diktat or a legal brief, but as a suggested course of action. The parties had signaled they could live with what

9. See id at Arts IIA1(b)-(c) and IIB3 (combating terrorism), IIA2(b)-(c) (eliminating illegal weapons), IIA3(b)(reducing incitement), IIC1(b)-(c) (size of Palestinian police force), IIC2 (revision of PLO charter), IIC3 (arrest/transfer of criminal suspects), IV (permanent status negotiations).

10. The letter to Prime Minister Netanyahu was posted on the Internet by the Israeli Government. See Letter from Secretary of State Warren Christopher to Israeli Prime Minister Netanyahu (Jan 17, 1997), as printed at website of Israeli Ministry of Foreign Affairs, <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00qo0> (visited on Mar 4, 2000).

Secretary Christopher was suggesting, but could not commit to it publicly. The Christopher letters therefore became a kind of "shadow agreement" that served as the parties' point of reference for the future.

Similarly, with the approach of May 4, 1999, President Clinton shared with Chairman Arafat his vision of what should happen over the following year in the negotiations.[11] This letter offered a basis for sticking with the negotiations at a time when some were urging a unilateral Palestinian declaration of statehood, which Israel had threatened would bring negotiations to a halt. A crisis was averted, at least in part, because of the willingness of the U.S. to state a view about the future which could substitute for an express understanding between the parties.

Why this worked is a complex political issue. It depended on a wide variety of factors in each case, including the unique relationship of the U.S. to the parties. But pursuing this course was one of those "out of the box" ideas that a third-party can bring to negotiations as a lifeline when there is risk of collapse. Still, in both cases, it was the parties themselves who had to make the hard decisions that would determine their future together. And this is the bedrock principle that must be kept in mind in any third-party effort to facilitate negotiations—whether or not that effort is characterized as "catering for peace"—just as I discovered on the White House lawn back in 1993.

There, after Mr. Stephanopoulos accepted my explanation for the delay, word eventually made its way that the final text of the Declaration of Principles had been agreed to in the White House between Israeli and Palestinian officials. Pages were quickly substituted, representatives of the parties initialed the necessary hand-written changes, and the texts were placed on the signing table. Within minutes, Prime Minister Rabin and Chairman Arafat reached across President Clinton to share the brave handshake that changed history.

11. See Press Briefing by White House Press Secretary Joe Lockhart (Apr 26, 1999), <http://www.Whitehouse.gov/WH/html/library.html> (visited on Mar 4, 2000).