

Path to Peace?

The Oslo Accords still may point a way out of the Middle East crisis.

BY JOEL SINGER

Given the recent bloodshed in the Middle East, people might be forgiven for forgetting the significance of Sept. 13, 1993. That day, under the welcoming arms of President Bill Clinton, Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yasir Arafat shook hands on the White House lawn, publicly sealing the Mutual Recognition Agreement those leaders had signed days earlier. That agreement was the precursor to approximately 10 subsequent agreements known collectively as the Oslo Accords. While no one seems to be explicitly acknowledging it today, a number of broad and indisputable legal principles underlying the Oslo Accords still survive, at least formally. To pretend that problems can be resolved based only on legal principles would be quite naive. But the continuing force of the Oslo Accords—or an acceptable legal substitute building on them—can at least provide a path to a more stable situation in the Middle East.

NO PALESTINE YET

In 1988, while the West Bank and Gaza were still under full Israeli occupation, the Palestine Liberation Organization proclaimed “the establishment of the State of Palestine on our Palestinian territory.” While Arab and Third World countries recognized the State of Palestine, Israel and the United States did not, nor did the rest of the Western world. But under both international law and explicit language later agreed to by the Palestinians, Palestine is not yet a sovereign state.

Three years after the Palestine declaration of independence, when the Klinghoffer family brought a lawsuit in a U.S. court against the PLO for the murder of Leon Klinghoffer on the hijacked ship *Achille Lauro*, the PLO argued that, as a sovereign state, it was immune from suit under the Foreign Sovereign Immunities Act. The 2nd Circuit rejected this argument in *Klinghoffer v. S.N.C. Achille Lauro* (1991), explaining that the

PLO did not meet any of the internationally accepted criteria necessary for an entity to qualify as a “state.” Those criteria, according to the court, are (1) a defined territory; (2) with a permanent population; (3) under control of a government; and (4) having the capacity to engage in formal relations with other such entities.

This conclusion remains valid after the implementation of the Oslo Accords. Under these accords, Israel delegated a wide range of powers and responsibilities to a Palestinian autonomous body, but retained supreme authority in security and foreign relations matters. In fact, the Oslo Accords deferred the resolution of the question of sovereignty in the West Bank and Gaza to the permanent status negotiations, which commenced formally at Camp David in Maryland in 2000 (with President Clinton) and continued at Taba, in Egypt, until January 2001. In those discussions, Israel accepted President Clinton’s proposal that a sovereign Palestinian state be formed in 97 percent of the West Bank and Gaza; however, a Permanent Status Agreement has not yet been concluded, because of disagreements over other issues.

Section 31(7) of the Interim Agreement on the West Bank and the Gaza Strip (signed on Sept. 28, 1995, in the White House, and also known as the “Oslo II Agreement”) states that “[n]either party shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.” Thus, so long as the Permanent Status Agreement is not concluded, the Oslo Accords prevent the Palestinians from declaring a Palestinian state unilaterally. Even if such a unilateral declaration were made, it is extremely doubtful whether it would have any legal effect under the test for statehood, given Israel’s effective control of the West Bank and Gaza.

ACCORDS STILL VALID

The Oslo Accords are generally considered to be binding international agreements, even if they are not technically “treaties” within the traditional meaning of the term. As binding international agreements, they are subject

to interpretation in accordance with the Vienna Convention on the Law of Treaties. Article 60 of the Vienna Convention permits a party to suspend or terminate its performance “in whole or in part” in response to a “material breach” by the other. A “material breach” is defined as a repudiation of the treaty or a “violation of a provision essential to the accomplishment of the object or purpose of the treaty.”

It is clear that for Israel, no Oslo Accords provisions are more “material” or “essential” to the accords’ “object or purpose” than the Palestinian commitments to fight against terrorism and prevent violence. It is also clear that the Palestinians have failed to carry out these obligations and that this failure is a material breach of the Oslo Accords. The Palestinians have often argued that Israeli retaliatory measures are material breaches of the Oslo Accords. The Vienna Convention, however, does not require a party to terminate or suspend its obligations in response to a material breach by the other party; rather, it merely entitles it to do so. If the innocent party refrains from taking any of these actions, the treaty remains in full force.

The recent Israeli incursion into West Bank and Gaza areas under Palestinian control means that Israel has suspended the application of the Oslo Accords, but its subsequent withdrawal means that this was only a temporary suspension. In fact, despite the Palestinian wave of violence and terrorism against Israel and the Israeli retaliations, neither party has repudiated the accords. The fact that each side accuses the other of violations of the accords indicates that they both continue to consider them to be fully binding.

NO RIGHT TO FIGHT

Palestinians have often argued that they have a “right” to fight against the Israeli “occupation” forces in the West Bank and Gaza. This argument, however, is wholly inconsistent with the Oslo Accords. First, to the extent that such a right exists, it applies only to areas under “belligerent occupation,” but not to areas placed under “non-belligerent occupation,” which is defined as occupation of land pursuant to an agreement with the host government. Accord-

ingly, a strong argument may be made that since the Oslo Accords became effective, the Israeli presence in the West Bank and Gaza has been tantamount to nonbelligerent occupation, because Israel's presence and functions in these areas are regulated by the Oslo Accords. Second, and more important, in the Oslo Accords the PLO, "representing the Palestinian people," undertook "to renounce the use of terrorism and other acts of violence and [to] assume responsibility over all PLO elements and personnel in order to assure their compliance, prevent violations and discipline violators." Subsequent Oslo Accords agreements included numerous additional commitments to cooperate with Israel in security matters, fight against terrorism, and prevent attacks against Israel. Therefore, the claim that the Palestinians have a right to fight against the Israeli presence in the West Bank and Gaza is, pursuant to the Oslo Accords, clearly baseless.

WITHOUT THE ACCORDS

If the Palestinian Authority disintegrates or if one of the parties does repudiate the Oslo Accords, a legal vacuum will be created. One possibility is that, as a result, the central regime in the West Bank and Gaza will be fragmented so that a multitude of small areas will be created, each ruled by a local warlord. This might happen, for instance, if Israel unilaterally withdraws from and separates itself from occupied territories. If this occurs, the resulting legal void will be dwarfed by the chaotic situation that the Palestinians and Israel will face. But there are other possible scenarios in which a more orderly legal regime may replace that established under the Oslo Accords.

One scenario—as undesirable as it would be to both Israel and the Palestinians—is that Israel may be compelled to reoccupy the West Bank and Gaza, if terrorist attacks against it continue. In this case, all the powers and responsibilities formerly delegated to the Palestinian Authority will revert to Israel, which will again govern the West Bank and Gaza in accordance with the legal standards established by the Fourth Geneva Convention.

That 1949 convention (technically, the "Convention Relative to the Protection of Civilian Persons in Time of War") applies primarily to occupied territories. Following the 1967 Six-Day War, in which Israel took the West Bank and Gaza from Jordan and Egypt, respectively, Israel did not accept the formal applicability of the convention in those areas, because it did not

recognize Jordanian and Egyptian sovereignty in these areas; however, Israel agreed to conduct its activities in these areas, in practice, based on the humanitarian provisions of this convention. If the Palestinian Authority disappears, the Fourth Geneva Convention may place upon Israel the responsibilities and authorities of the occupying power even if Israel abstains from physically reoccupying those areas.

As a variation on this approach, Israel may assume responsibility for security matters only, while a Palestinian government may continue to be responsible for all civil affairs throughout these areas, either on a de facto basis or through an agreed amendment to the Oslo Accords. Either way, there is nothing in this approach to preclude the resumption of negotiations. After all, the first five agreements of the Oslo Accords, including the historic 1993 Mutual Recognition Agreement, which was sealed with a handshake on the White House lawn, were concluded in 1993-94, while the West Bank and Gaza were under full Israeli occupation.

A second possibility is that some sort of central Palestinian government remains in the West Bank and Gaza, which could effectively prevent attacks against Israel. If so, Israel may decide not to oppose a unilateral declaration of independence by such a government, at least with regard to those parts of the West Bank and Gaza that come under Palestinian control under the Oslo Accords. Israel may then annex, also unilaterally, those parts of the West Bank and Gaza that would have been annexed to Israel, per the Clinton Proposal, had the Camp David discussions and Taba talks led to the conclusion of a Permanent Status Agreement. The remainder of the West Bank and Gaza would then be administered temporarily by Israel, under Fourth Geneva Convention standards, until a different political reality would allow the disposition of these areas through negotiations between Israel and a sovereign Palestinian state.

An early draft of the Oslo Agreement included the idea of placing the Gaza Strip under a United Nations trusteeship for a five-year interim period. Under Article 81 of the United Nations Charter, territories may be placed under an international trusteeship pursuant to a trusteeship agreement that shall specify "the terms under which the trust territory will be administered and designate the authority which shall exercise the administration . . . [which] may be one or more states or the [UN] Organization itself." If there is no

Palestinian central authority capable of governing the West Bank and Gaza and preventing terrorist attacks against Israel and if there is an interest in avoiding Israeli reoccupation of the West Bank and Gaza, perhaps the idea of placing these areas under international trusteeship should be revisited.

INTERNATIONAL POLICE?

Another possibility is that, following the example of the international police force deployed in Bosnia and Herzegovina, Israel and the PLO would agree that third party troops would be deployed in the West Bank and Gaza and assume responsibility for security, while a Palestinian government would continue to be responsible for the civilian affairs of Palestinians.

Unlike the mandate of U.N. observers (such as those operating in Lebanon or the Golan Heights), which is limited to observing and reporting violations, however, these international forces will require that the third party troops will actually assume responsibility for security in the West Bank and Gaza and, among other things, prevent attacks against Israel.

None of these solutions is easy. It is axiomatic that an agreed solution is much better than a unilateral one, imposed by either the Israelis or Palestinians. It is also clear that a solution that further empowers the Palestinian government, based on the Oslo Accords, is preferable to a third party-based solution. Moreover, Israel will certainly oppose the idea that the responsibility for its security rest with third party troops, while the PLO will likely oppose the idea of Israeli reoccupation. Furthermore, it is doubtful whether any country would agree to send troops to the West Bank and Gaza to fight against the Palestinian terrorist organizations, thus assuming the risk that it itself becomes the target of suicide bombers. Since it appears that preparations for a new regional peace conference are now gearing up, however, all options must be examined carefully with the objective of identifying the approach that will bring more stability and be more conducive to the resumption of negotiations. ■

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