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Transitional Justice and Post-Conflict Israel/ Palestine: Assessing the Applicability of the Truth Commission Paradigm

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TRANSITIONAL JUSTICE AND POST-CONFLICT ISRAEL/PALESTINE: ASSESSING THE APPLICABILITY OF THE TRUTH COMMISSION PARADIGM

*Ariel Meyerstein **

Redemption lies in remembering.

The Baal Shem Tov

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I. INTRODUCTION

This article comes at a moment of profound questioning as to the possibility that Israelis and Palestinians will reach a negotiated permanent resolution to the conflict between them. Similarly, after years of intense activity and experimentation, the field of international justice and transitional justice also seems engaged in a process of self-critique with the aim of continuing its evolution. In particular, skepticism has grown regarding the international community's continued blind-faith preference for establishing internationalized, individual criminal prosecutions that focus primarily on high-level perpetrators.

This article seizes this critical moment as an opportunity to see what each of these troubled areas can do for the other by examining whether transitional justice has a place in the Israeli-Palestinian post-conflict, and if so, what form it should take. It is hoped that by recasting the former in light of the latter—i.e., by attempting to fit the Israeli-Palestinian conflict into the

transitional paradigm—that new challenges to the transitional construct will reveal themselves and challenges seen elsewhere will appear more pronounced. This thought experiment, which will no doubt be considered by some to be horribly premature let alone hopelessly idealistic, presents an opportunity to continue the ceaseless work of scrutinizing the relationships between justice, peace, truth, and reconciliation in post-conflict situations—even if only in theory. Such a reconsideration of the Israeli-Palestinian conflict may provide insights into what “peace,” in all the ways the word resonates in the souls of the weary populaces engulfed in it, will truly demand of them in the future.

The article proceeds in several parts. Part I portrays the reigning spirit of relations between Israelis and Palestinians as one of disengagement and separation, and describes this as an untenable situation, given that the forces of economic regionalization and globalization will likely not permit Israelis and Palestinians—whose lives are already inextricably linked—to live apart. The natural end of the current “peace process” is a two-state solution that will be created between political elites as they develop a skeletal framework of re-drawn borders and cease-fire declarations, while the inevitable interconnectivity of ordinary Israelis and Palestinians’ lives demands a true normalization of relations between them. At the same time, the two-state solution represents, to some, a compromise from the requirements of absolute justice (a complete reversal of the Palestinian refugee problem). Consequently, I argue that some process is needed to begin the work on a “peace beyond the peace process,” to both prepare the populations for sharing their intimate living quarters as well as to compensate or bridge the gap between the compromised justice of the peace process and the more robust visions of justice of which some dream.¹

¹ See Omar Barghouti, *Palestine’s Tell-Tale Heart*, in *THE NEW INTIFADA: RESISTING ISRAEL’S APARTHEID* 165 (Roane Carey ed., 2001). Barghouti argues that:

As in every other case of colonialism, the only logical, legal and moral reparation for the native population is embodied in the imperative of decolonization. But if all we can see of the Jewish presence in Palestine is its negation of our own moral right to the land, then we will possess only half the truth. The other half is that we must view the Jews in Palestine qua humans, above and beyond everything else. Otherwise, only revenge can settle the score. Palestinians have a moral obligation to make a distinction between “annulling the wrong,” as Hegel calls it, and revenge. The former aims to negate that which makes the colonist so, not to eliminate the human behind the colonist, for being so. Revenge however, primarily focuses on venting long-suppressed anger, frustration and humiliation, which leads to immoral acts, as witnessed in abundant cases of national or ethnic strife.

Id. at 175. Distinguishing between the alternative of coexistence, as occurred in post-apartheid South Africa, and the alternative solution of expelling colonialists, as occurred in Algeria, Barghouti claims that South Africa presents an important historical antecedent for Israel/Palestine because “there is no mother country for the Jews to go back to. Expelling the

To fully appreciate the need for a "peace beyond the peace process" it is essential to understand the conflict culture permeating Israeli and Palestinian society. The conflict culture consists of several different segments of each population—victims, perpetrators, collaborators, and beneficiaries—all of whom have conflict identities that express their particular relationship to the conflict. In most cases, there are overarching victim ideologies that inform each of these conflict identities, particularly their opinions regarding those on the other side of the conflict. Indeed, the foundational feature of the conflict culture is the mutual denial by both sides of the other side's distinct and oppositional narrative of the conflict. Taking the nature of the conflict culture, conflict identities, and the mutual denial of narratives into account, the article prescribes some reckoning with the past as the means of overturning the conflict culture.

Part II proceeds to discuss potentially appropriate post-conflict transitional justice mechanisms to facilitate a process of historical justice that would ideally further broader normalization of relations. The tribunal paradigm—and the retributive justice model more broadly—so favored by international lawyers is dismissed both for jurisdictional and political reasons, and because of the nature of the conflict: there is a vast, complex 'gray zone' of complicity that involves a diverse set of actors beyond the high-level perpetrators on whom formal criminal trials generally focus. Beyond the marginalization of beneficiaries and collaborators and the overshadowing of victims by the intense focus on perpetrators, the paucity of the narrative of the conflict produced by trials is seen as deficient to truly capture the diffuse 'conflict culture' in which Israelis and Palestinians are enmeshed. With the trial model deemed unhelpful, but the pressing needs for normalization still unplanned, the article turns to consider the potential contributions of the truth commission model.

Part III engages in a discussion of the complex regime design questions that would confront planners of an Israeli-Palestinian Truth Commission (IPTC), with special focus on the potential challenges presented by the two-state solution, a novel situation for the implementation of a truth commission. Part IV presents a minimalist appraisal of the potential of truth commissions to bring about reconciliation between fiercely divided political

colonists is not a moral option in the case of Palestine." *Id.* Barghouti's moral solution is advocating for a binational state. *Id.*

Of course, the vast majority of Israelis do not consider themselves colonizers, but rather, exiles who have returned to their homeland, a return expedited by hundreds of years of European persecution and finally, the Holocaust. Moreover, most Jewish Israelis view the notion of a binational state as destructive of the concept of Jewish self-determination and the historical necessity of a safe haven for the Jews of the world, which gave rise to Zionist ideology. If an unlimited "right of return" for Palestinians would meet the requirements of absolute justice, then, it is apparent that any two-state solution in the framework that has been discussed in the past will no doubt fall woefully short of this standard.

enemies. I highlight the Israeli Jewish public as comprising a large beneficiary class that above all other segments of the conflict culture, needs to come to terms with its role in Palestinian suffering, because it is this group that holds the keys to further attempts at historical justice. Because the results of any complex socio-political process are difficult to predict, and reconciliation truly is the work of generations, I do not offer any predictions as to the outcome of a commission's work, but do highlight current trends in Israeli and Palestinian society, particularly the ascendancy of post-Zionist discourse and the "new" Israeli historiography, as potentially significant developments—although marginalized for the time being—which could affect the prospects of the establishment of such a commission and the viability of its work.

II. UNDERSTANDING THE REALITY OF INTERCONNECTIVITY

A. *Interconnectivity and the "Peace & Prosperity Paradigm"*

Even as they attempt to separate themselves, the Israeli and Palestinian populations are continually being forced together by the powers of economic regionalization and globalization. Uri Avnery envisions a future of Israeli-Palestinian relations that seems a natural conclusion of the "peace and prosperity" paradigm that introduced itself into the region at the start of the Oslo process:

The idea of an Israeli-Palestinian two-state solution was always based on the assumption that the border between them would be open and that they would have a joint capital in Jerusalem. The guiding vision is not "separation" but partnership, with each nation expressing its identity in a national home of its own. I am convinced that after living together, side-by-side, with Jerusalem as their common capital, the State of Israel and the State of Palestine will grow slowly together, under the pressure of geography and economics, and form a kind of federation within a general regional organization—as I wrote fifty-one years ago—a kind of Semitic Union along the lines of the present European Union.²

² Uri Avnery, *A Binational State? God Forbid!*, J. PALESTINE STUD., Summer 1999, at 55, 59 (1999). For a more detailed discussion of the role of globalization in Israeli-Palestinian relations, see Gershon Shafir, *Business in Politics: Globalization and the Search for Peace in South Africa and Israel/Palestine*, in ISRAEL: THE DYNAMICS OF CHANGE AND CONTINUITY 103 (David Levi-Faur et al. eds., 1999). For an in-depth study of the Israeli case, see Gershon Shafir & Yoav Peled, *Peace and Profits: The Globalization of Israeli Business and the Peace Process*, in THE NEW ISRAEL: PEACEMAKING AND LIBERALIZATION 243 (Gershon Shafir & Yoav Peled eds., 2000) (arguing that the peace process is also clearly part of a much larger liberalization trend in Israel). For more on the global push for Israeli integration into the Middle East economy, see Jonathan Paris, *Regional Cooperation and the MENA Economic Summits*, in THE NEW ISRAEL: PEACEMAKING AND LIBERALIZATION, *supra*, at 265 (discussing the concerted effort by members of the Israeli and Arab business communities to create

Avnery's forecasts, echoing those of Edward Said,³ do strike the contemporary observer of Israeli-Palestinian relations as more than a little idealistic, and yet, there is a core truth to this vision.

Indeed, if the general sentiment among Israelis at the time of the signing of Declaration of Principles in 1993 was to disentangle themselves from the Palestinians for security purposes,⁴ it would seem that the Oslo

opportunities for trade and collaboration on regional projects). With the chilling of the peace process in the years of Benjamin Netanyahu's government, however, such experimentation decreased.

It is important to keep in mind that this intense relationship is skewed—the Israeli and Palestinian economies are currently, and most likely will continue to be, linked asymmetrically. Unfortunately, this cannot be explored in depth here, but in lieu of an extended discussion, I offer the following statistic that is quite exemplary of the relationship: according to the UN Special Co-Coordinator's Office in the Occupied Territories, in 1998, trade with Israel accounted for 79.8 percent of Palestinian commercial transactions. The second highest was trade with Jordan, its closest neighbor, at 2.39 percent. See Edward Said, *Palestinians Under Siege*, LONDON REV. BOOKS, Dec. 14, 2000, http://www.lrb.co.uk/v22/n24/said01_.html.

For a recent update of the economic crisis in the Palestinian Authority and the impact of Israeli policies, including border closure, on the economy in Gaza Strip and the West Bank, see THE WORLD BANK GROUP, WEST BANK AND GAZA UPDATE (2006), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2006/08/29/000160016_20060829135329/Rendered/PDF/371370ENGLISH0GZ0Update01Public1.pdf.

For more on the power inequities between Israel and the Palestinian Authority, and how Israel dictated the success and implementation of Palestinian "fiscal policy" during the Oslo years, see Jennifer Olmsted, *Thwarting Palestinian Development*, MIDDLE E. REP., Oct.–Dec. 1996, at 11 (arguing that Israeli restrictions on the mobility of the Palestinian labor force and on the movement of goods across the Israel-Palestinian border forces Palestinians into an untenable economic position requiring externally imposed structural adjustment policies); see also Sharif S. Elmusa & Mahmud El-Jaafari, *Power and Trade: The Israeli-Palestinian Economic Protocol*, J. PALESTINE STUD., Winter 1995, at 14 (considering the impact of the "Paris Protocol" on the Palestinian economy); Sara Roy, *Decline and Disfigurement: The Palestinian Economy After Oslo*, in THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID, *supra* note 1, at 91, 92 (arguing that Palestinian economic regression is the result of Israel's policy of closure, which restricts or bans movement of labor and goods from the West Bank and the Gaza Strip to Israel).

³ See Edward Said, *What Can Separation Mean?*, AL-AHRAM WEEKLY, Nov. 11–17, 1999, <http://weekly.ahram.org.eg/1999/455/op2.htm> ("Neither Palestinians nor Israelis can be made distant from the other. In the area between Ramallah in the north and Bethlehem in the south, 800,000 Israelis and Palestinians live on top of each other, and cannot be separated.").

⁴ As Shalom Achshav ("Peace Now," a mainstream peace movement) spokesman Amiram Goldblum stated it, "The goal is not to fall in love with them [the Palestinians], but to disengage from them." MERON BENVENISTI, *INTIMATE ENEMIES: JEWS AND ARABS IN A SHARED LAND* 23 (1995). A columnist wrote, "What do I care about left or right? . . . Independent of my opinions on the proper or desirable future political solutions, the current situation is no longer tolerable. . . . We must create a buffer, restrict contact, separate us from them for the interim." *Id.* Indeed, Yitzhak Rabin was elected on the promise "To get Gaza out of Tel Aviv," and his predecessor, Ehud Barak, in his own campaign, eloquently stated his intentions: "We are here and they are there." Danny Rubinstein, *Luckily, the Plan is Not*

process was quite ambivalent, for what actually occurred over the interim period under direction of the Oslo agreements was an intensification of relations. As Oslo's harshest critics have argued, what really occurred was a transformation of the situation from the terms of conflict into those of a "hegemonic peace," in which the consistent element throughout is Israeli domination and Palestinian supplication, but nonetheless, intense interaction.⁵

The peace and prosperity paradigm introduced itself into the region in the early 1990s. Loosely based on the tightening of relations throughout Europe over a fifty-year period, the notion is simply that peace is the key to further prosperity, and in turn, prosperity, it was argued, would help foster peace: "the precedence of economics over politics, and the formation of partnerships which can be instituted before borders are drawn and peace treaties signed."⁶ This hypothesis also assumes that once borders are established they will quickly lose their significance, as local, national, and separatist desires will bow to the force of regional integration (itself propelled by global integration).⁷ The problem, of course, is that the absence of peace ruins the chances for prosperity, and prosperity cannot begin to take hold without a basic atmosphere of stability, which is the key element in attracting foreign investment.

Throughout the Oslo years, there were numerous signs that the peace and prosperity paradigm was, in fact, in full-swing. Mark Tessler points out that only eight months after the signing of the Declaration of Principles in 1993, the *International Herald Tribune* ran an article entitled, "When Former Enemies Turn Business Partners," that documented the intense contacts between political and financial elites across the Middle East.⁸ There were also the series of international conferences in 1994, 1995, and 1996 convened to promote development. Tessler writes that King Hassan II

Feasible, HA'ARETZ, Feb. 25, 2002, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=134217&contrassID=2&subContrassID=4&sbSubContrassID=0&listSrc=Y&itemNo=1342175>.

⁵ See Glenn E. Robinson, *The Peace of the Powerful*, in *THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID*, *supra* note 1, at 111.

⁶ Shafir & Peled, *supra* note 2, at 252. For a representative example of this forecasting, see the Israel Ministry of Foreign Affairs website for documents relating to the "economy of peace," particularly "The Peace Economy—Possible Scenarios." Israel Ministry of Foreign Affairs, *The Peace Economy—Possible Scenarios* (Sept. 6, 1993), <http://www.mfa.gov.il/mfa/go.asp?MFAH0c260>.

⁷ See Guy Mundlak, *Labor in a Peaceful Middle East: Regional Prosperity or Social Dumping?*, in *THE MIDDLE EAST PEACE PROCESS: INTERDISCIPLINARY PERSPECTIVES* 199 (Ilan Peleg ed., 1998) [hereinafter *MIDDLE EAST PEACE PROCESS*].

⁸ See Mark Tessler, *Narratives and Myths About Arab Intransigence Toward Israel*, in *ISRAELI AND PALESTINIAN NARRATIVES OF CONFLICT: HISTORY'S DOUBLE HELIX* 174, 182 (Robert I. Rotberg ed., 2006) [hereinafter *HISTORY'S DOUBLE HELIX*].

of Morocco set up the initial conference, which was attended by representatives from sixty-one countries and 1,114 business leaders, to "further normaliz[e] Arab-Israeli relations."⁹ It is not just the business elites who engage in the peace and prosperity paradigm; Palestinian public opinion regarding peace with Israel and normalizing relations can also be shown to be shaped by considerations of political economy (as opposed to being dominated by religious and cultural considerations).¹⁰

Others insist that economics can only account for so much. As Donald Will concludes, "unlike South Africa, where it might be said that the economic benefits of ending apartheid outweighed its preservation, in Israel, the debate over the nature of the state would most likely not abandon discussions based in a nationalist discourse for the sake of economic growth." Thus, Will argues, "[n]ationalism remains the ideological norm for both sides to the Israeli-Palestinian dispute."¹¹ This seems a fair analysis that finds reinforcement in the continued appeal that "separation" (and its promises for the survival of the Jewish state) has for Israelis, especially after the violence of the second intifada.

Still, even though the Oslo process has always been directed at a two-state solution, and separation or "disengagement" is definitely the current overwhelming preference (evinced by the vast cement wall snaking its way essentially along a path demarcated by the 1967 Green Line), the forces of economic regionalization and globalization will only be held at bay for so long before deeper integration will appear a natural conclusion: a 2002 Saudi initiative called for universal recognition among Arab states of Israel's right to exist, normalize relations, and declare an end to the conflict, if Israel were to withdraw its forces to the 1967 borders, allow the Palestinian refugees a right of return, and establish a Palestinian state;¹² Turkey is up for admittance to the European Union; U.S.-Libya relations have started a process of normalization stimulated by weak but potentially promising cur-

⁹ *Id.* at 183.

¹⁰ *Id.* at 188. Tessler observes that survey data show that Palestinians who believe that peace with Israel will bring economic benefits "are more likely than others to favor reconciliation after a Palestinian state has been established." *Id.*; see also Jodi Nachtwey & Mark Tessler, *The Political Economy of Attitudes Toward Peace Among Palestinians and Israelis*, 46 J. CONFLICT RESOL. 260, 261 (2002) (applying the "political economy perspective" to "assess the degree to which economic evaluations help to explain attitudes toward the Palestinian-Israeli conflict in the years following the 1993 Oslo accords").

¹¹ Donald S. Will, *Non-Racialism Versus Nationalism: Contrasting Solutions to Conflict in South Africa and Israel/Palestine*, 25 PEACE & CHANGE 255, 260 (2000).

¹² See The Saudi Initiative: Arab League Beirut Declaration of 28 March 2002, http://www.peacelobby.org/saudi_initiative.htm. Hamas was even considering the Saudi initiative in April 2006. See Rafael D. Frankel, *Hamas Weighs Saudi Initiative*, JERUSALEM POST, Apr. 26, 2006, available at <http://www.jpost.com/servlet/Satellite?cid=1145961230656&pagename=JPost%2FJPArticle%2FShowFull>.

rents of internal reform in one of the Middle East's longest-running dictatorships; and there were fits-and-starts at democratic process in Lebanon (the so-called "Cedar Revolution" of 2005), all making Shimon Peres' vision of the "New Middle East"¹³ appear less crazy than it once did, though its arrival is still quite distant in time.

This is not to gloss over the turmoil in Iraq, the brewing confrontation between the United States and Europe against Iran, or what appears to be the start of a new war of attrition between Israel and Hezbollah in southern Lebanon (or other signs of fragmentation in that country). Nor does it mean to suggest that economic regionalization and the growth of free trade are the solutions to the woes of Palestinians¹⁴ or the slow process of development in many of the countries in the Middle East. Indeed, some analyses suggest that the effects of economic globalization can be counterproductive because of its disparate effects on populations of varying socio-economic backgrounds, leading to the entrenchment of resentment and solidifying nationalistic tendencies in those communities that benefit least from further economic integration.¹⁵

It does suggest, however, that the logic of the peace and prosperity paradigm of the "New Middle East" features a general stabilization of political relations through the normalization of economic relations, and vice versa. The trick, then, is to get a nominally politically stable environment, wherein the economics can proceed the politics and transborder economic relations become entrenched enough so that political violence simply becomes too costly for anyone to consider it as a viable mode of interaction.

¹³ SHIMON PERES & ARYE NAOR, *THE NEW MIDDLE EAST* (1993).

¹⁴ See THE WORLD BANK, *STAGNATION OR REVIVAL? ISRAELI DISENGAGEMENT AND PALESTINIAN ECONOMIC PROSPECTS 1* (2004), available at http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2005/07/19/000160016_20050719120558/Rendered/PDF/329720GZ0Stagn1cember0200401public1.pdf ("[Economic] prosperity is no guarantee of tranquility . . . [but] destitution, political instability and violence are constant companions."). See also Jamal Juma, *Cementing Israeli Apartheid: The Role of World Bank*, LEFT TURN MAG., Oct.–Nov. 2005, available at <http://www.leftturn.org/Articles/Viewer.aspx?id=766&type=M> (explaining the creation of industrial zones around the Wall/Fence). Juma argues that at the center of the World Bank plan for Palestinian economic development is the creation of "an export-orientated economy in which Palestinian dispossessed farmers are exploited as cheap labor and dominated by markets and free trade." *Id.* According to Juma, "Israeli and World Bank interests merge to destroy local forms of trade, sustainable patterns of agricultural production, and existing social structures." *Id.*

¹⁵ Uri Ram observes a similar dynamic all over the world, wherein the new wealth brought by globalization is not distributed equally, but on the contrary, augments economic inequality and social desperation. Thus, the forces that would bring peace simultaneously plant the seeds of its eventual undoing by fueling the resentment of the underprivileged that tend to gravitate toward more "localist" (as opposed to "globalist") and nationalist politics, which are generally opposed to peace. See Uri Ram, "The Promised Land of Business Opportunities:" *Liberal Post-Zionism in the Glocal Age*, in *THE NEW ISRAEL: PEACEMAKING AND LIBERALIZATION*, *supra* note 2, at 217.

Nonetheless, the paradigm of peace and prosperity still functions under the paralysis imposed by the current stalemate in the negotiations, though its existence these days is proven more by its inverse: war and economic depression. While the conflict rages, the Palestinian economy is vulnerable for its underdevelopment, with structural problems exacerbated by harsh Israeli restrictions on movement¹⁶ or the withholding of Palestinian import tax revenues.¹⁷ While Israel is vulnerable for its increasing integration into the global economy and consequent dependence on outside investors, one would not want to overstate the impact of the conflict and Palestinian terrorism on its economy. The Israeli economy has remained relatively stable throughout the second intifada, after an initial dip at the start of the uprising, which coincided with the bust of the "dotcom bubble," as well as the September 11th attacks on the United States, which may have caused systemic effects in the global economy that Israel felt as much as other countries.¹⁸

¹⁶ Since the start of the intifada, Israeli roadblocks and other restrictions have stopped thousands of Palestinians from working in Israel. Before the intifada, twenty-two percent of employed Palestinians worked in Israel or Israeli settlements, but by 2005, there were only ten percent were still employed by Israelis, and this group earned twelve percent of all Palestinian income. Israeli security measures have thus added to the already difficult conditions in the territories, where twenty-two percent are unemployed, forty-three percent are in poverty and fifteen percent are in "deep poverty" (i.e., people are at below subsistence levels). Esther Pan, *Hamas and the Shrinking PA Budget*, COUNCIL ON FOREIGN REL., April 21, 2006, <http://www.cfr.org/publication/10499/#5>.

¹⁷ Israel collects foreign import taxes on imports going into the Palestinian territories and charges value added taxes (VAT) on Israeli goods entering the territories. These collections totaled roughly \$75 million per month in 2005, of which Israel withholds money to pay the Palestinian Authority's water and electricity bills (approximately \$15 million per month) that the Palestinians have refused to pay for years in protest of the occupation. This leaves approximately \$60 million that would normally go to the PA but that Israel has withheld since Hamas was elected. *Id.* Israel maintained this policy from February 2006 until January 2007, collecting a total of \$660 million, before releasing \$100 million of these funds to Palestinian President Mahmood Abbas on February 19, 2007. See *Israel Releases Palestinian Funds*, AL JAZEERA ENGLISH, February 19, 2007, at <http://english.aljazeera.net/NR/exeres/3C2975DA-5CD3-472F-B7CA-F9159F2D152F.htm>.

¹⁸ The economic literature on the effects of Palestinian terrorism on the Israeli economy shows that the causal relationship between increased terrorism and negative economic indicators is attenuated. Though foreign tourist arrivals did sharply decline from an all-time high of 2.7 million tourists in 2000 to 996,000 in 2001 before hitting a bottom of 718,000 in 2002, the number of tourists recovered in 2003, rising moderately to 886,000, and then in 2004, to 1.25 million. Furthermore, despite the sharp rise in terrorism and worries that Israel would be a potential target during the Iraq war, domestic tourism, which accounts for 65-70 percent of all tourism revenues, was not harmed. Thus, out of the approximately three to four percent of Israel's GDP based on the tourism industry, terrorism only substantially affected a fraction of this (accounting for one to 1.5 percent of Israel's GDP). See Nadav Morag, *The Economic and Social Effects of Intensive Terrorism, Israel 2000-2004*, THE MIDDLE EAST REVIEW OF INTERNATIONAL AFFAIRS, Vol. 10, No. 3 (September 2006), at <http://meria.idc.ac.il/journal/2006/issue3/jv10no3a9.html>; see also Dotan Persitz, *The Economic Effects of*

B. The Current Moment: Paralysis

For the majority of the Israeli population, the Oslo years were relatively calm, albeit interrupted by sporadic bursts of violence in the form of gruesome suicide attacks in the heart of civilian population centers. This changed, however, with the collapse of the Camp David II accords in July 2000, as the outbreak of the second intifada brought a sharp increase in Palestinian extremist violence against Israeli civilians. Palestinian society collectively vented its rage over Israeli intransigence in its commitments during the Oslo era, principally the continuation of settlement building and continued restrictions on Palestinian freedom of movement, as well as a host of other violations of human rights and the Geneva Conventions' prescribed norms for the treatment of a civilian population by an occupying power.¹⁹

The intensity of the second intifada's violence convinced many Israelis that they had no peace partner among the Palestinian leadership led at that time by Fatah Chairman Yasir Arafat. Both Israeli public opinion and military strategic thinking concluded that there were dim prospects for a negotiated peace agreement in the short term. Given the increased violence

Terrorism: Counterfactual Analysis of the Case of Israel (working paper), at http://www.aeaweb.org/annual_mtg_papers/2007/0106_1015_1802.pdf. Persitz uses a counterfactual approach, and notes that "had Israel been free of terror in the last decade, the country's per-capita GDP in 2003:3 would have been 8.6% higher than it was. *Id.* at 6–7, but that overall "the evidence for structural change in the Israeli economy due to Palestinian terror is very weak." *Id.* at 7.

¹⁹ As in many seemingly endless conflicts, statistics can begin to lose meaning amidst endless violence, but it remains vital, particularly in looking toward the possibilities of transitional justice, to document and keep track of human rights abuses in as scientific a manner as possible. The most comprehensive accounting of the abuses of the Israeli occupation are provided by B'Tselem, a human rights organization that has monitored the occupation since 1989. *See generally* B'Tselem Publications, <http://www.btselem.org/english/publications/Ind ex.asp> (last visited Jan. 12, 2007); B'Tselem Statistics, <http://www.btselem.org/english/statistics/Index.asp> (last visited Jan. 12, 2007). The Israeli Ministry of Foreign Affairs also tracks acts of violence by Palestinians, including suicide bombings, since the signing of the Declaration of Principles in 1993, which ushered in the Oslo Peace Process. *See* Israel Ministry of Foreign Affairs, Fatal Terrorist Attacks in Israel Since the Declaration of Principles, <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+before+2000/Fatal+Terrorist+Attacks+in+Israel+Since+the+DOP+-S.htm> (last visited Jan. 12, 2007) [hereinafter Fatal Terrorist Attacks]. The Foreign Ministry tracks separately the violence that has occurred since the start of the Second Intifada in September 2000. *See* Israel Ministry of Foreign Affairs, Victims of Palestinian Violence and Terrorism Since September 2000, <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm> (Jan. 12, 2007) [hereinafter Victims of Palestinian Violence]; *see also* The Intelligence and Terrorism Information Center, <http://www.terrorism-info.org.il/engsite/home/default.asp> (last visited Jan. 12, 2007) (an Israeli nongovernmental organization created in "memory of the fallen of the Israeli Intelligence Community" and staffed by its former employees).

and the looming "demographic threat" to the long-term viability of a majority-Jewish state posed by the rapidly growing non-Jewish population between the Mediterranean and the Jordan River, strategists concluded that the only pragmatic strategy to pursue was complete disengagement.²⁰

This policy has been implemented via the unilateral withdrawal from the Gaza Strip (and in fact, even before this in 2000 with the withdrawal of forces in southern Lebanon), and the building of the Security Fence/Separation Wall (depending on whom you ask to describe it), roughly along the 1967 Green Line, with some disputed intrusions into Palestinian territory that have been addressed both by the International Court of Justice²¹ and the Israeli Supreme Court.²² Despite the controversy over its

²⁰ See Yossi Alpher, *The Future of the Israeli-Palestinian Conflict: Critical Trends Affecting Israel*, U.S. INST. PEACE, Sept. 2005, at 1, 3–5. As Alpher notes, the turn to unilateralism is a fallback to a "classic element in pragmatic Zionist strategic thinking and opting for demography over geography." *Id.* at 5. Ariel Sharon already acknowledged the primacy of the "demographic reality on the ground," over his historic preference for occupation of key tactical territory as a security buffer. In 2004, Sharon went so far as to make comparisons between Israel's anticipated situation were it not to relinquish territory, to that of apartheid South Africa, stating: "The alternative of one nation, where one rules over another, would be a horrible disaster for both peoples." *Id.* Even before Sharon's resignation to the primacy of demography over territory, however, Ehud Barak's 2000 election campaign slogan of "they're there and we're here" already appealed to an Israeli desire for disengagement not yet buttressed by profound pessimism that such separation could come through a comprehensive negotiated settlement. Thus, the desire for separation was not new, having existed since the start of the Oslo accords, see Rubinstein, *supra* note 4, but the momentum for unilateral separation was new.

²¹ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>. The Israeli government rejected the opinion because it failed to address "Palestinian terrorism" in a sufficient manner. See Israeli Ministry of Foreign Affairs, Statement on ICJ Advisory Opinion on Israel's Security Fence (July 9, 2004), <http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+ICJ+Advisory+Opinion+9-July-2004.htm>, which was the main criticism of the majority opinion leveled by U.S. Judge Thomas Buerghenthal's dissent. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9) (declaration to the Advisory Opinion of the Court), available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_declaration_buerghenthal.htm. Judge Kooijmans of the Netherlands echoed this criticism. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (July 9) (separate opinion of Judge Kooijmans, available at http://www.icj-cij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_separate_kooijmans.htm).

²² Shortly after the ICJ opinion came down, the Israeli Supreme Court released an arguably more measured opinion on the fence, instructing the Israeli government and military to redirect the fence's route in those locations where it intruded beyond pre-1967 borders. See HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 46(2) 150, available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf. The High Court recognized Israel's legitimate right to self-defense while finding certain areas of the barrier's planned route to violate international law.

route²³ and the true intention behind its construction, one thing is certain about the Fence/Wall: Israel views its completion as an absolute priority.²⁴ At the same time, the outbreak of armed conflict between Israel and Hezbollah in southern Lebanon in the summer of 2006 has also led many Israelis to conclude that unilateralism cannot solve their problems either.²⁵ The society finds itself scrambling from one emergency to another, with little stability in the highest echelons of power to steer the country through some grand strategy for solving its security dilemmas.

In a similar vein, with a post-Gaza disengagement reality sending clear signs that Israel is now in the driver's seat, Palestinians have become disengaged with a stalled peace process and have turned inward toward concerns over state-building, so much so that following the election of Hamas, the society appears on the brink of civil war. This momentum is helped along by Israel's attempts to sow dissension and chaos so as to unsettle Hamas' relative strength over Fatah following its win in the Palestinian parliamentary elections in January 2006.²⁶ Contrary to popular conceptions,

²³ To many observers, the Fence/Wall is an attempt to create facts on the ground, namely, the eventual borders of the Israeli state, which in the areas where it intrudes on Palestinian land, is seen as a land grab. The Israeli Supreme Court ordered the government to dismantle eight kilometers of the Fence/Wall near the West Bank Jewish settlement of Tzofin after a petition submitted by the mayors of nearby Palestinian villages of Azun and Nebi Elias presented the judges with documentation proving that the route of the Fence was plotted so that Tzofin would have land to expand and build an industrial zone. The decision was a reversal of an earlier 2002 decision on the matter, and the judges chastised the Israeli government for having concealed the information in the initial hearing of the case. This was the third major decision by the court against the route of the fence, including a decision in which the Court ordered the government to dismantle thirteen kilometers of the Fence/Wall near Alfei Menashe, and the 2004 decision in which the Court ordered the re-routing of thirty kilometers of the Fence/Wall northwest of Jerusalem. In fact, *B'Tselem*, The Israeli Information Center for Human Rights in the Occupied Territories, claims to have documentation proving that the route of the Fence is dictated by future expansion of Jewish settlements in eleven other cases. See Yuval Yoaz, *Court Orders Section of Separation Fence Torn Down*, HA'ARETZ, June 16, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=727626>. See generally *B'Tselem*, The Separation Barrier, <http://www.btselem.org/English/Separation%5FBarrier/> ("Even if we accept Israel's claim that the only way to prevent attacks is to erect a barrier, it must be built along the Green Line or on Israeli territory.").

²⁴ See *Sharpening Olmert's Message*, HA'ARETZ, June 12, 2006, at A1, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=725883> (explaining that Prime Minister Olmert spent a good portion of June 2006 trying to convince European allies to support his "convergence" plan).

²⁵ See Naomi Chazan, *Critical Currents: Unilateralism is Dead*, JERUSALEM POST ONLINE EDITION, Aug. 10, 2006, <http://www.jpost.com/servlet/Satellite?cid=1154525846322&pageName=JPost%2FJPArticle%2FShowFull>.

²⁶ Ariel Sharon's successor and political disciple Ehud Olmert, now head of the ruling Kadima party and Prime Minister of Israel, has pushed on with Sharon's plans, and in light of the reality of a Hamas-led Palestinian government, has pursued a coy strategy to ensure that Israel will be able to implement its unilateral vision for the West Bank. See *A Palestin-*

there are those who convincingly argue that Hamas' ascension does not in fact signify a generalized radicalization of the Palestinian populace with regard to the peace process, as much as it signals a rejection of the Fatah party's incompetent and corrupt leadership of the Palestinian Authority.²⁷ Disempowered by Israel's unilateral moves and the continuing repression of

ian View: Israeli Unilateralism is Not New, an Interview with Ali Jarbawi, PALESTINIAN-ISRAELI CROSSFIRE, May 29, 2006, <http://www.bitterlemons.org/search.html> (search for "Palestinian-Israeli Crossfire" and limit date to "May 29, 2006"). In Jarbawi's view, "what Israel is trying to do now is to evade a quarrel with the Americans over the two-state solution after Bush endorsed it. Israel is saying it agrees to the roadmap, but it is going to shape that solution on the ground according to its own requirements." *Id.* According to Jarbawi, this means that Israel will continue with plans for "cantonization of the West Bank, the wall and the closure of the Jordan Valley." *Id.*

²⁷ The most persuasive evidence for this proposition emerges from opinions expressed by Hamas' own supporters, who apparently do not share its views on the peace process:

Three quarters of all Palestinians, including more than 60 percent of Hamas supporters, are willing to support reconciliation between Palestinians and Israelis based on a two-state solution. During the last 10 years, the trend among Palestinians has been to move away from hard-line attitudes and to embrace moderate ones. Indeed, more than 60 percent of Hamas voters support an immediate return to negotiations with Israel. Had the issue of peace been the most important consideration in these elections, Fatah would certainly have won. But the peace process was the least important issue for the voters.

Khalil Shikaki, *The Polls: What the Palestinians Really Voted For: A West Bank Pollster Finds More Moderate Trends Underlying the Hamas Victory*, NEWSWEEK INT'L, Feb. 6, 2006, at 1, available at 2006 WL 1719223 [hereinafter Shikaki, *The Polls*]. As Shikaki noted after the election, voters "didn't just want to hurt Fatah. They wanted to defeat it," and since Hamas was the only party capable of defeating Fatah, "they voted for Hamas." Xin Li, *Win Blamed on Voter Anger Against Fatah*, WASH. TIMES, Jan. 31, 2006, at A12, available at <http://www.washingtontimes.com/world/20060130-101022-2264r.htm>. In fact, notes Shikaki, Hamas brilliantly raised the issues of corruption and law-and-order to the top of their agenda since they knew that "85 percent of the public believed the PA was corrupt and that more than eighty percent felt unsafe in their homes and neighborhoods." Shikaki, *supra*. Not surprisingly, exit polls showed that almost two-thirds of Palestinians considered these issues their top two priorities, while only twenty-five percent were most concerned about economic issues and a shocking fifteen percent felt the peace process was most important. *Id.* See also Khalil Shikaki, *Willing to Compromise: Palestinian Public Opinion and the Peace Process*, U.S. INST. PEACE, Jan. 2006, at 1 [hereinafter Shikaki, *Willing to Compromise*] ("Palestinian public opinion is not an impediment to progress in the peace process; to the contrary, over time the Palestinian public has become more moderate.").

Another poll taken several months after the elections confirmed this trend even after Hamas was in government for several months: between May 31, 2006 and June 2, 2006, of a twelve hundred-person sample of Palestinians, more than seventy-seven percent favored a referendum and planned to vote for Abbas' plan to renew negotiations if a referendum were held. The poll also showed Hamas losing ground to Fatah since the January elections, with respondents favoring each party equally at thirty-seven percent. The poll was conducted by Nader Said, a sociologist at Birzeit University in Ramallah who runs the Development Studies Program there. See Steven Erlanger, *Hamas Fires Rockets into Israel, Ending 16-Month Truce*, N.Y. TIMES, June 11, 2006, at 8.

the occupation and their own leaders' non-responsiveness to the needs of their people, the Palestinians feel that peace and an end to their struggle is more distant than ever. Though their election did not apparently signal overwhelming support for their tactics, Hamas is nonetheless now in power, which for many Israelis means that resumption of all out conflict is inevitable.²⁸

If negotiations resume at some point, the two-state solution remains the firm goal, though to some it is a necessary evil. Critics of the Oslo peace process have long contended that the notion of partition itself is so *fin de siècle*—a thing of the past,²⁹ a tired idea to be discarded after having failed the world consistently since it was first proposed in 1937 by the British Peel Commission in its report on the “irrepressible” conflict.³⁰ Indeed, while idealists on both sides continue to advocate for a binational solution within the shared territories of Israel/Palestine, this has always been politically infeasible, but is even more so now given Israel's renewed sense of being besieged by jihadist groups in the Arab world (Hamas and Hezbollah and their backers, among others) and because of the Quartet's strong preference that any negotiations will culminate in a State of Palestine alongside the State of Israel. The two-state solution is also no longer exclusively the Israeli public's preference; there is a growing consensus among individual Palestinians who, while holding strong to the principal and the ability to

²⁸ Indeed, a sixteen-month truce was ended in mid-June 2006 when Hamas militants fired over 50 Qassam rockets into the Israeli town of Sderot after an errant Israeli shell apparently exploded accidentally on a Gaza beach near the town of Beit Lahiya, killing eight Palestinians, including seven members of the Ghaliya family (a family that had lost four family members less than two years prior when another Israeli shell hit their farm).

Since the beginning of 2006, Hamas militants have launched hundreds of largely inaccurate missiles toward Israel, while the IDF has fired more than five thousand shells into Gaza. *See id.*; *see also* Amos Harel and Avi Issacharoff, *Kadima MK: 'Haniyeh May Be Targeted if Hamas Resumes Terror'*, HA'ARETZ, June 12, 2006, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=725849>.

²⁹ Said, *supra* note 3. Said described partition both as a “dying ideology of separation, which has afflicted Zionism and Palestinian nationalism,” and as a “legacy of imperialism,” whose tragic effects could be seen elsewhere throughout the world, calling it at best a “make-shift measure” that would not bring true resolution of the conflict. In opposition to separation, Said called for coexistence forged by local communities, not by elite politicians:

We must now begin to think in terms of coexistence, after separation, in spite of partition. And for this, as I said above, the only solution is a politics of the local, people on the ground who tackle injustice and inequity on the ground, far away from the misleading summits with Clinton, and the treacherous secret channels of Oslo. Those leaders are far from the real long-term interest of their people, but they do what they have to do. They can do no more.

Id.

³⁰ *See* BENNY MORRIS, *RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881–1999*, at 138–39 (1999).

exercise a "right of return" to historic lands inside Israel, would nonetheless prefer to live in a Palestinian state rather than reside in Israel.³¹

Having come so close at Camp David in July 2000 and at Taba in January of 2001 to reaching a peace forged between elite politicians, the violence of the last five years demonstrates³² that the wider populations need to be sensitized to co-existence for any elite-level negotiated settlement to last.³³ The promised intense interconnectivity between Israelis and Palestinians in the future, as they find themselves having to share land, water and other natural resources, collaborate on security, and interact within the trade of capital and labor, demands that more steps be taken to reconcile each population with the other. The psychological preparation of the current peace process, however, seems to be for a "divorce," or rather, a trial separation,³⁴ and thus, a discussion is sorely needed regarding how to bridge the gap between Oslo's minimal peace and justice of elites, and the broader and deeper preparation that a peace "beyond the peace process" will require as a foundation.

The following section reinforces the need for a peace "beyond the peace process" through a discussion of the symbolic violence of the conflict's key feature: the mutual denial of national narratives. It is argued that we must fight fire with fire, and that the solution to the denial of national

³¹ See Interview by Robert Siegel with Khalil Shikaki, (July 14, 2003), *available at* <http://www.npr.org/programs/atc/transcripts/2003/jul/030714.shikaki.html> (describing the results of a survey of over 4,000 Palestinian refugees, which asked if whether they were to exercise a right of return, where they would choose to live); *see also* Shikaki, *Willing to Compromise*, *supra* note 27, at 11 ("While surveys have consistently shown an overwhelming demand for an Israeli recognition of the refugees' right of return, surveys among refugees have shown that only a small minority are interested in exercising that right by returning to the state of Israel."); *infra* note 59 (Sari Nusseibeh explains that most Palestinians wish to hold onto the "right of return" but do not actually want to return if it means living in a Jewish state).

³² As of mid-summer 2006, over thirty-four hundred Palestinians had been killed during the second intifada and almost one thousand Israelis had been killed. *See* Henry Siegman, Op-Ed., *Is 'Moral Equivalency' Really So Wrong?*, L.A. TIMES, June 18, 2006, at M3, *available at* http://www.cfr.org/publication/10923/is_moral_equivalency_really_so_wrong.html?breadcrumb=default. For up to date statistics, *see* B'Tselem, Statistics - Fatalities, <http://www.btselem.org/english/Statistics/Casualties.asp> (last visited Jan. 12, 2007) [hereinafter Statistics - Fatalities].

³³ A wide spectrum of Israeli-Palestinian co-existence and reconciliation groups have sprung up in the last several years. *See* discussion *infra* section III.B; *see also* PRIME: Peace Research Institute in the Middle East and its proposal for a "localized" truth and reconciliation process based on personal histories and interpersonal encounters. <http://www.vispo.com/PRIME/truthandreconciliation.htm>.

³⁴ According to Edward Said, "Oslo set the stage for separation," and in fact had "put off the real reconciliation that must occur if the 100-year war between Zionism and the Palestinian people is to end." Edward Said, *Truth and Reconciliation*, AL-AHRAM WEEKLY, Jan. 14-20, 1999, <http://weekly.ahram.org.eg/1999/412/op2.htm>.

narratives is the affirmation of these narratives. It is this truth-telling that transitional justice may be able to facilitate. As will be discussed in Part III, a truth commission, rather than prosecutions, is better prepared to address the particular characteristics of the Israeli-Palestinian conflict.

C. *The Conflict Culture, Victim Ideologies, and the Need for Critical History*

Mahmood Mamdani recounts a 1996 visit to Kigali, Rwanda during which he had requested to speak to a history teacher in a local school. He was informed that his wish could not be granted because history was no longer taught in the schools because there was no agreement on what should be taught as history. "History in Rwanda," Mamdani notes,

comes in two versions: Hutu and Tutsi. Ever since the colonial period, the cycle of violence has been fed by a victim psychology on both sides. Every round of perpetrators has justified the use of violence as the only effective guarantee against being victimized yet again. For the unreconciled victim of yesterday's violence, the struggle continues. The continuing tragedy of Rwanda is that each round of violence gives us yet another set of victims-turned-perpetrators.³⁵

Thus, Mamdani explains, "the identification of both perpetrator and survivor is contingent on one's historical perspective. This is why it is not possible to think of reconciliation between Hutu and Tutsi in Rwanda without a prior reconciliation with history." In order to "break the stranglehold of Hutu Power and Tutsi Power" on Rwanda's politics, Mamdani proposes, it is first necessary to "break their stranglehold on Rwanda's history writing, and thus history making. This exercise requires putting the truth of the genocide, the truth of mass killings, in a historical context."³⁶

The parallels to the Israeli-Palestinian conflict are clear; at its core, it is a struggle over history, over what Homi K. Bhabha has called the "right to narrate."³⁷ The following discussion will not attempt to encapsulate the

³⁵ MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 267–68 (2001); see also Timothy Longman and Théoneste Rutagengwa, *Memory, Identity, and Community in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 162 (Eric Stover & Harvey M. Weinstein eds., 2004) [hereinafter *MY NEIGHBOR, MY ENEMY*] (presenting findings from research in three communities in Rwanda on popular responses to the government's attempts to fashion an official narrative of the genocide).

³⁶ *Id.* Though I do not wish to draw too many parallels between the conflicts, the cases of post-genocide Rwanda and post-apartheid South Africa will serve as useful precedents for working through the particular problems of post-conflict identity in the Israeli-Palestinian post-conflict, particularly because of the widespread diffusion of various forms of accountability throughout wide segments of society.

³⁷ HOMI K. BHABHA, *THE RIGHT TO NARRATE* (forthcoming 2007).

entire history of enmity between these groups, but merely will touch upon the core issues structuring the struggle between them. To the extent that the primary dynamic of the conflict consists of the mutual rejection of national narratives and legacies of suffering, this is what needs to be overturned for deeper reconciliation and normalization to occur.³⁸ Though a multiplicity of subcultures, ideologies, identities, and sub-narratives constitute both Israeli³⁹ and Palestinian society,⁴⁰ the following will present caricatures of the grand narratives that largely shape and continue to motivate the conflict.

The Palestinian narrative presents a story of colonization, displacement, and occupation at the hands of the Israelis.⁴¹ Many Jews and Israelis fail to recognize that for Palestinians, the national trauma of *Al nakba* ("the catastrophe")—the day when the Zionist *yishuv* leaders declared the establishment of the State of Israel—only completed and formalized the loss of their native land that had already occurred through the Zionist colonization project stretching back into the late nineteenth century. The 1948 war resulted in the dispersion of between "77 and 83 percent of the Palestinians who lived in the part of Palestine that later became Israel—i.e., 78 percent of Mandatory Palestine,"⁴² or roughly 750,000 people.

Contrary to dominant Zionist narratives, which view the Palestinians' displacement as an unintentional product of a defensive war forced on the Jewish population, in Palestinians' eyes, this displacement was no mere accident produced in the fog of war. Rather, the Palestinians view their expulsion as an "ethnic cleansing," the implementation of a strategy of "transfer" that had existed in various forms for decades among Zionist thinkers, by which the Jewish population would solidify their position in Palestine.⁴³

³⁸ See RASHID KHALIDI, *PALESTINIAN IDENTITY: THE CONSTRUCTION OF MODERN NATIONAL CONSCIOUSNESS* 204 (1997) (describing the 1993 Declaration of Principles as ending a "lengthy period of mutual denial, when both sides withheld recognition as if it were the ultimate weapon in a peculiar version of mutual deterrence.").

³⁹ See Eyal Naveh, *The Dynamics of Identity Construction in Israel Through Education in History*, in *HISTORY'S DOUBLE HELIX*, *supra* note 8, at 244, 260–61 (describing the six "subcultures" of Israeli society categorized by Baruch Kimmerling).

⁴⁰ See generally KHALIDI, *supra* note 39; see also Saleh Abdel Jawad, *The Arab and Palestinian Narratives of the 1948 War*, in *HISTORY'S DOUBLE HELIX*, *supra* note 8, at 72 [hereinafter Jawad, *Arab and Palestinian Narratives*] (describing the fragmented nature of the Palestinian narratives relating to 1948); see also Nathan J. Brown, *Contesting National Identity in Palestinian Education*, in *HISTORY'S DOUBLE HELIX*, *supra* note 8, at 225 (describing the complexity of Palestinian national identity, the central questions that shape it, and the way these issues have been reflected in educational curricula created for Palestinians, and later by Palestinians, since 1948).

⁴¹ See Jawad, *Arab and Palestinian Narratives*, *supra* note 41.

⁴² Ahmad H. Sa'di, *Catastrophe, Memory and Identity: Al-Nakbah as a Component of Palestinian Identity*, *ISRAEL STUDIES*, Vol. 7, No. 2 (Summer 2002), 175–198.

⁴³ See Jawad, *Arab and Palestinian Narratives*, *supra* note 41, at 75; see also Ilan Pappé, *The Bridging Narrative Concept*, in *HISTORY'S DOUBLE HELIX*, *supra* note 8, at 200 (noting

Israeli and Palestinian historians disagree both on the relative intentionality of the forced removals as well as the extent of the violence.⁴⁴ What is beyond dispute, however, is that following the war, the Israeli government compounded the original displacement of Palestinians with the destruction and literal erasure of hundreds of Arab villages from official maps, in order to clear the way for the continuation of the state-building enterprise.⁴⁵ For Palestinians, then, “Al-Nakbah represents, among many other things, the loss of the homeland, the disintegration of society, the frustration of national aspirations, and the beginning of a hasty process of destruction of their culture.”⁴⁶

To Palestinians, the true effort to deny their national narrative began in earnest with the occupation of the West Bank and Gaza Strip. The continual administration of the occupation left the Palestinians without political rights, and the continual expansion of Jewish settlements (often made possible by the destruction of Palestinian homes)⁴⁷ was a constant humiliation and reminder of their loss of homeland and the denial of the possibility of their return. This denial of ethno-nationalism has also extended to those Palestinian refugees who found themselves within Israel after the 1949 armistice lines were drawn.⁴⁸ Though eventually granted full citizenship, the Arab community in Israel has been discriminated against in housing and education spending, kept down within Israeli society because they were

that “the little research that we already have indicates clearly that, contrary to the description that emerges from the Israeli military archives, in many parts of Palestine, in 1948, there was no actual war, but rather, widespread operations of ethnic cleansing”); Nadim N. Rouhana, *Zionism’s Encounter with the Palestinians: The Dynamics of Force, Fear and Extremism*, in HISTORY’S DOUBLE HELIX, *supra* note 8, at 115; W. Khalidi, *Plan Dalet Revisited*, J. PALESTINE STUD., Autumn 1988, at 3; NUR MASALHA, *EXPULSION OF THE PALESTINIANS: THE CONCEPT OF “TRANSFER” IN ZIONIST POLITICAL THOUGHT, 1882–1948* (Institute for Palestine Studies, 1992).

⁴⁴ See Jawad, *Arab and Palestinian Narratives*, *supra* note 41, at 73–76.

⁴⁵ See MERON BENVENISTI’S SACRED LANDSCAPE: THE BURIED HISTORY OF THE HOLY LAND SINCE 1948 (2000) (tracing the topographical and linguistic colonization of Palestine by the Israelis).

⁴⁶ Sa’di, *supra* note 43, at 175.

⁴⁷ For statistics on house demolition for planning purposes, i.e., the destruction of Palestinian homes built without a permit, see B’tselem, Statistics–Planning and Building, http://www.btselem.org/english/Planning_and_Building/Statistics.asp (last visited Jan. 12, 2007). For statistics on homes demolished as an act of collective punishment, see B’tselem, Statistics – House Demolitions as Punishment http://www.btselem.org/english/Punitive_Demolitions/Statistics.asp (last visited Jan. 12, 2007) [hereinafter House Demolitions as Punishment], and for those demolished allegedly for military purposes, see B’tselem, Statistics–Demolition for Alleged Military Purposes, <http://www.btselem.org/english/Razing/Statistics.asp> (last visited Jan. 12, 2007) [hereinafter Demolition for Alleged Military Purposes].

⁴⁸ See Joseph Schechla, *The Invisible People Come to Light: Israel’s “Internally Displaced and the “Unrecognized Villages*, J. PALESTINE STUD., Autumn 2001, at 20.

always viewed as a "fifth column" that only needed an excuse to rebel against the Jewish population.⁴⁹ In short, the Palestinians' collective narrative is one of dispossession and cruelty at the hands of the Israelis.

The Israeli narrative instinctively sets the conflict with the Palestinians within a broader and much older collective history of persecution and ultimately, extermination, that indicts not just the Arab regimes of the Middle East but most of the governments of Europe for their disregard for Jewish life within their borders. Central to this collective Jewish and Israeli narrative of suffering and victimhood is the tragedy of the Holocaust—what Amos Elon has called "a basic trauma of Israeli society."⁵⁰ The birth of the State of Israel has always been viewed by most Jews and Israelis as nothing short of a miracle. It was unbelievable to many in 1948 that the remnants of a people who were hunted on the European continent wherever they went and no matter how much they assimilated to placate their host societies, were able to reestablish themselves with newfound political autonomy in their ancestral homeland after thousands of years spent in exile. Though the project of the Jewish state was conceived in the aftermath of the epitome of European anti-Semitism—the French Dreyfus Affair—and the argument for its necessity built force over the bloody decades at the end of the nineteenth century as Russian and other Jews sought refuge in Palestine from pogroms, the true moral imperative was only cemented in the international community in the wake of the Holocaust, as the world finally acknowledged how it had failed the Jewish people.

This tragic history naturally produced in the Jewish settlers of Palestine and subsequent generations a victim ideology that was only exacerbated by Arab-Jewish violence in pre-state Palestine and by the rejectionist stance of Israel's neighbors once it declared independence in 1948.⁵¹ In this regard, Israeli author Amos Oz describes the Israeli victim ideology succinctly: "We Israelis often look at Arabs not as fellow victims but as an incarnation of our past oppressors: Cossaks, pogrom-makers, Nazis who have grown mustaches and wrapped themselves in kaffiyehs, but who are still in the usual business of cutting Jewish throats."⁵² Through several wars launched against the Jewish state by its neighbors, who hurled slogans aiming to "push the Jews into the sea," this image has been confirmed again and again for Jews in Israel and the rest of world.⁵³

⁴⁹ See RIFT REPORT, *infra* note 168.

⁵⁰ Neil Caplan, *Victimhood and Identity: Psychological Obstacles to Israeli Reconciliation with the Palestinians*, in ISRAELI AND PALESTINIAN IDENTITIES IN HISTORY AND LITERATURE 63, 73 (Kamal Abdel-Malek & David C. Jacobson eds., 1999).

⁵¹ See Bar-On, *Conflicting Narratives*, *infra* note 130.

⁵² Caplan, *supra* note 51, at 64.

⁵³ But see Tessler, *supra* note 8, at 174. Tessler argues that although Arab states and their citizens have often challenged Israel's right to exist, that this narrative is only part of the

The Israeli psychological condition of feeling adrift amidst a sea of Arab states has only been heightened by Palestinian attacks against Israelis and Jews all over the world through spectacular acts of violence.⁵⁴ In the interim period (from the signing of the Declaration of Principles until the “end” of Oslo in September 2000), 256 civilians and soldiers were killed by Palestinian terrorist attacks.⁵⁵ Since September 2000, this number has grown four-fold, with a total of 1,124 people killed by Palestinian violence, and thousands more injured.⁵⁶ While a suicide bomber may kill only a handful of civilians and perhaps injure dozens more, the real violence done is psychological. Each injured person has a family, and each family has neighbors, no less than Palestinians whose homes get demolished. These attacks have been compounded by the rejection of Israel’s right to exist propounded by mainstream Arab politics since at least the 1948 war,⁵⁷ and by Palestinian politics in school curricula⁵⁸ and other official communications.

Historical truth exists somewhere in between these stylized collective memories, but it is nonetheless these national stories that dominate the conflict, serving as the competing meta-narratives that fuel the cycles of violence in which Israelis and Palestinians participate. On the whole, Palestinians fail to recognize the centrality of anti-Semitism, the Holocaust, and Arab rejectionism to Jewish mental life. Similarly, most Jews and Israelis cannot grasp how Palestinians perceive them as nothing more than coloniz-

historical truth, and most recently, “not the most important part.” *Id.* at 189. Tessler provides examples that interrupt the “unidimensional” narrative that features “Zionist peace seekers as heroes and Arab rejectionists as villains.” *Id.* at 189–90. In particular, “developments in the years following the Oslo Accords strongly suggest that Arab attitudes are indeed contextual and that for the most part Arabs seek territorial compromise and not the liquidation of the Jewish state.” *Id.* at 185.

⁵⁴ Palestinian terrorism has also targeted Jews all over the world, most famously in the Achille Lauro and Entebbe hijackings, and the murder of Israeli Olympians at the Munich Games of 1972.

⁵⁵ See Fatal Terrorist Attacks, *supra* note 20; see also Israel Ministry of Foreign Affairs, Suicide and Other Bombing Attacks Inside Israel Since the Declaration of Principles (Apr. 6, 1994), <http://www.israel-mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Palestinian+terror+since+2000/Suicide+and+Other+Bombing+Attacks+in+Israel+Since.htm>; Victims of Palestinian Violence, *supra* note 20; Statistics - Fatalities, *supra* note 33 (tracking the violence of the Second Intifada).

⁵⁶ Between September 29, 2000 and May 1, 2006, Magen David Adom treated a total of 7,844 casualties as follows: 999 killed, 642 severely injured, 940 moderately, and 5,263 lightly injured, among them eleven MDA staff members (IDF casualties treated by IDF medical personnel are not included in these figures). See Victims of Palestinian Violence, *supra* note 20.

⁵⁷ See Tessler, *supra* note 8, at 179 (acknowledging “Arab rejectionism” toward Israel after the 1948 war).

⁵⁸ See Brown, *supra* note 41, at 231 (noting “the maps in Palestinian textbooks that do not clearly label Israel but mention cities within Israel’s pre-1967 borders”).

ers who have unjustly deprived them of their land and historical roots. Accordingly, they also fail to see that Palestinian violence, far from merely unmitigated Jew-hatred that has existed uninterrupted and unaltered since the Middle Ages, is largely a consequence of *al nakba* and the brutality of the Occupation. The violence and repression of the Occupation—house demolitions, restriction of movement, humiliating checkpoints, and extrajudicial killings that often harm civilian populations—what to Palestinians is equivalent to state-sponsored terrorism and colonial land-grabbing, to Israelis are the necessary defensive measures required to secure the safety of their country from outside attack. And so it continues, with each population held hostage to a conflict culture and conflict identities forged from their own fears and mythologies of the other.

As Mamdani proposes for Rwanda, reconciliation between Israelis and Palestinians demands that there first be reconciliation with history. In this case, this reconciliation with history will come through exploring two historical questions. The first, whose land is it? will effectively be answered and settled (hopefully permanently) with the signing of a final peace accord. The first steps toward answering this question came in the Declaration of Principles in 1993, when each side recognized the legitimacy of the other and its right to its historical claims.

The second question, what did one side do to the other in defense of its historical claims to the land? will be left unanswered and, to a large extent, not even posed during the Final Status negotiations. The gravest of the issues related to this second question is the dilemma of the Palestinian “right of return.” Much of the rage of the Second Intifada no doubt stemmed from the failure of the Oslo process to address this most primal Palestinian demand in an acceptable fashion.⁵⁹

⁵⁹ One of the central criticisms of the Oslo process was its continual postponement of the most difficult issues, such as the status of Jerusalem and the refugee question, for so-called “final status negotiations.” The Israelis have preferred this gradual approach, with the exception of Ehud Barak’s full-blown offer (of contested generosity) at the Camp David II accords. For the debate over what actually transpired around Camp David II and Taba, compare Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y. REV. BOOKS, Aug. 9, 2001, at 59 (“[T]he Palestinians viewed [the offer] as neither generous, nor Israeli, nor indeed, as an offer.”), with Benny Morris, *Camp David and After: An Exchange (1. An Interview with Ehud Barak)*, N.Y. REV. BOOKS, June 13, 2002, at 42 (noting President Clinton’s statement to Ehud Barak, after the failure of the Camp David II accords, that the offer was “based on UN Security Council resolutions 242 and 338 [and] very close to the Palestinian demands”). See also Robert Malley & Hussein Agha, *Camp David and After: An Exchange (2. A Reply to Ehud Barak)*, N.Y. REV. BOOKS, June 13, 2002, at 46 (calling Ehud Barak’s assessment that Yasser Arafat is incapable of making peace with Israel because he rejected Israel’s “unprecedented offer” a “crude appraisal”); Dennis Ross, Letter to the Editor, *Camp David: An Exchange*, N.Y. REV. BOOKS, Sept. 20, 2001, at 90 (faulting Malley and Agha’s Aug. 9, 2001 article for its “glaring . . . omission of Chairman Arafat’s mistakes”).

It is not that Israelis and Palestinians do not deal with these questions regularly. On the contrary, the question is constantly posed in a self-referential manner: “what did *they* do to *us*?” This stranglehold by history on identity threatens the present, or as Nietzsche has argued about too much history—it threatens life itself. History can be made to serve life, however. One mode, according to Nietzsche, by which history can serve life is by “critical history,” which is essentially the work of a truth commission or

The Palestinians, on the other hand, have always preferred to deal with these more pressing issues up front, as evidenced by Mahmoud Abbas’ attempts to resume negotiations in 2005 following Arafat’s death. The refugee question is no doubt at the heart of the conflict and as such is perhaps the most challenging issue.

According to March 2006 figures, there are nearly 4.4 million Palestinian refugees registered with the United Nations Relief and Works Agency (UNRWA). See UNRWA in Figures as of 30 June 2006, UNRWA Headquarters (Gaza) (Sept. 2006), <http://www.un.org/unrwa/publications/index.html>. It is thus a central, if not *the* central concern of the Israeli-Palestinian conflict. The latest attempt to integrate UN Resolution 194 into the negotiations understands the Palestinian choice of self-determination as equivalent to choosing compensation rather than return, in the language of the resolution. It is upon this assumption that Israel has long been prepared to accept the implementation of Resolution 194, which in the last negotiations at Taba manifested itself in the “largely symbolic” gesture of allowing a few thousand refugee families from Lebanon to return over a fifteen-year period under the guise of “family reunification” and the formation of an international fund for refugee compensation and resettlement in the host countries (also in accordance with 194). The Israelis expect that in exchange for the implementation of Resolution 194 according to these parameters, the Palestinians will sign an “end of conflict” statement, freeing Israel from future claims/responsibility over the refugee issue. See Statement of Principles Signed by Ami Ayalon & Sari Nusseibeh on July 27, 2003, United Nations Information System on the Question of Palestine (UNISPAL) (July 27, 2003), <http://domino.un.org/unispal.nsf/5ba47a5c6cef541b802563e000493b8c/1273b3972da8e47185256dd00055a0cf?OpenDocument>.

Sari Nusseibeh, President of al-Quds University, has argued that ever since 1988, when the Palestinian National Council adopted a constitution calling for a secular democratic state alongside Israel, the national or collective right of return (a demand for self-determination) has taken precedence over the individual right (physical return of each individual to his/her home)—the two choices Nusseibeh claims were presented by UN Resolution 194, which first established the “right of return.” See G.A. Res. 194 (III), at 24, U.N. Doc. A/810 (Nov. 27, 1948).

Despite this reasoning, it is unclear that the “end of conflict” statement to be signed in the name of the collective can really negate the individual “right” enshrined in Resolution 194. The basic dilemma here is that perhaps a few generations down the line, descendants of original refugees will make individual claims to land or property within Israel, or seek restitution for atrocities or property loss affecting their family members during the 1948 war, claiming that their relatives were not justly compensated. Indeed, it is unclear whether the “end of conflict” clause—intended ostensibly to grant Israel immunity from further legal action pursuant to the creation of the refugee problem in 1948—would in fact have that effect. Jose Alvarez pointed out that the additional blessing of the UN Security Council over any such “end of conflict” document would probably strengthen its standing.

criminal tribunal: a close inspection of, as Nietzsche phrases it, "how far living and being unjust are one."⁶⁰

The diffusion of the conflict into every aspect of Israeli and Palestinian life long ago caused "normal" culture to mutate into what I call a "conflict culture." As the charter statement of "21st Year," an Israeli protest group formed in the twenty-first year of the Occupation (1987), declares, "The presence of the occupation [in Israeli life] is total."⁶¹ How much more so is this the case in Palestinian society—now into its third generation of refugees—which suffers from the daily humiliations of the Occupation, and must live with the continual knowledge that their very right to determine their own political destiny—their "right to narrate"—has been denied indefinitely. Ironically, this conflict culture is what Israelis and Palestinians share—both are initiated into it at birth, without choice. It is in a sense, their shared heritage, and potentially the basis for a common identity.⁶² Given its pervasive presence in Israeli and Palestinian life, it is foolish to think that military redeployments, redrawn borders, and a lasting ceasefire are sufficient to end the conflict and bring "peace"; peace is not the absence of war, it is the negation of the conflict culture.

The Oslo accords were initially welcomed as the start of a revolutionary movement toward transforming the conflict, beginning in 1993 with the signing of the Declaration of Principles and the exchange of letters of

⁶⁰ FRIEDRICH NIETZSCHE, *ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE* 22 (Peter Preuss trans., 1980). Nietzsche's account of the benefits and potential pitfalls of too little or too much history in any given society very presciently predict the tensions confronting transitional societies, but really any society that needs to deal with its past. *See generally id.*

⁶¹ LAURENCE J. SILBERSTEIN, *THE POSTZIONISM DEBATES: KNOWLEDGE AND POWER IN ISRAELI CULTURE* 167–68 (1999) (quoting MORDECHAI BAR-ON, *IN PURSUIT OF PEACE: A HISTORY OF THE ISRAELI PEACE MOVEMENT* 196 (1996)); *see also* Barghouti, *supra* note 1, at 167 ("Israelis seem to be haunted by . . . the curse of the original sin against the native Arabs. . . . [T]he dispossession and exclusion of non-Jews . . . is the most basic fact about Israel, and no understanding of Israeli reality is possible without it." (quoting BENJAMIN BEIT-HALLAHMI, *ORIGINAL SINS: REFLECTIONS ON THE HISTORY OF ZIONISM AND ISRAEL* (1993))).

Beyond the more metaphysical angst, social science research shows that Israelis and Palestinians are profoundly influenced psychologically by the conflict. A study conducted after the first two years of the Aqsa intifada of thirteen hundred children by a Tel Aviv University research shows that seventy percent of Palestinians in the West Bank and thirty percent of children in Jewish settlements are suffering from post-traumatic stress disorder due to the nearly two years of bloodshed. Between September 2000 and July 2001, Palestinian children had been exposed to an average of ten incidents of violence, while Israeli children living in the Gush Katif bloc in the Gaza Strip were exposed to an average of eleven incidents. *See Study: High Trauma Rate Among Palestinian, Settlers' Children*, HA'ARETZ, July 2, 2002.

⁶² *See* Marc H. Ellis, *The Future of Israel/Palestine: Embracing the Broken Middle*, J. PALESTINE STUD., Spring 1997, at 56 (arguing that the disappointments on both sides of the conflict constitute a shared ground—a "broken middle"—upon which to build a shared future).

mutual recognition between Yitzhak Rabin and Yasir Arafat.⁶³ Despite all of the taboos broken in the rounds of negotiations since 1993, since the failure of the Camp David II accords in 2000, Israelis and Palestinians have regressed to a stage of belligerency that has all but reversed Oslo's revolutionary trajectory.

As discussed above, the new unilateralism begun by Ariel Sharon and continued by Ehud Olmert, demonstrated the collective Israeli abandonment of their hope that they had a peace partner in the Palestinians, and thus signified a reversion to pre-Declaration of Principles politics. What other significance could have been ascribed to Sharon's declarations that Yasir Arafat sits at the head of a terrorist entity then the reversal of Oslo, whose core purpose was to "decriminalize" the Palestinians and recognize Arafat's Palestinian Liberation Organization as a legitimate partner for peace with whom the Israelis could negotiate? Similarly, Arafat's decision to sponsor violence against Israeli citizens following the failure of the Camp David II accords is viewed by most Israelis as a rejection of the new path chosen in 1993. The current relapse in Israeli-Palestinian relations only makes the argument for a peace "beyond the peace process" even stronger, since it is overwhelmingly clear that the mutual rejection of narratives persists.⁶⁴

But the call for a peace beyond the peace process would be just as strong even if negotiations were now progressing to the Final Status arrangements. If Israel were finally to fulfill Palestinian claims to self-

⁶³ In addition to the Declaration of Principles, the Oslo accords also included Letters of Mutual Recognition. In Arafat's letter to Rabin, he recognized the right of the State of Israel to exist in "peace and security," to accept UN Resolutions 242 and 338, and to renounce those articles of the Palestinian covenant which "deny Israel's right to exist." Arafat's letter to Norwegian Foreign Minister, Johan Jorgen Holst, states that, "the P.L.O. encourages and calls upon the Palestinian people in the West Bank and Gaza Strip to take part in the steps leading to the normalization of life, rejecting violence and terrorism, contributing to peace and stability and participating actively in shaping reconstruction, economic development and cooperation." Rabin's letter to Arafat states: "[T]he Government of Israel has decided to recognize the P.L.O. as the representative of the Palestinian people . . ." Special Document File, *The Peace Process*, J. PALESTINE STUD., Autumn 1993, at 104, 111–15 (1993).

⁶⁴ Collaborative work in opinion polling between December 2004 and January 2005 by Khalil Shikaki and Yaacov Shamir does cloud this oversimplified view, however:

Data from the Palestinian territories show that most Palestinians continue to support peace and, more specifically, that they accept Israel's existence as a Jewish state. The survey in Israel showed, however, that most Israelis believe that Palestinians think otherwise—that most Palestinians do *not* support peace or recognize Israel's existence as a Jewish state. Interestingly, this misconception is also common among Palestinians; many respondents told the interviewers, in contrast to what the surveys show to be the case, that they believe that their own acceptance of Israel is the position of only a minority of Palestinians.

Tessler, *supra* note 8, at 189.

determination through the implementation of UN Resolution 194 by facilitating Palestinian resettlement in the state of Palestine with full compensation, this would seem to be tantamount to what Mahmood Mamdani has termed a "diminished truth" within the South African context. Mamdani criticizes the South African Truth and Reconciliation Commission for (1) having embraced the "legal fetishism" of the apartheid regime in its fixing an historical limit on the period in which violations would be considered by the Commission, thus ignoring the grand violation of white colonization, and (2) for only considering those acts considered gross violations under apartheid, instead of focusing on the explicit illegality of the apartheid regime's laws themselves. It was through these "narrow lenses," Mamdani argues, that the TRC failed to distinguish between what is "legal and what is legitimate, between law and right," and in the process created further divisions between beneficiaries of apartheid and its victims—the very two groups between whom reconciliation was required.⁶⁵

Here we begin to see the links between truth, justice, and reconciliation. In the Israeli-Palestinian situation, it is clear that mere compensation, mere resettlement in a Palestinian state, and even mere independence will fall horribly short in doing justice to the Palestinians, and will be insufficient to lay the groundwork for true reconciliation between them and the Israelis. To the extent that a final settlement that includes a solution for the refugees would be acknowledged by both sides as having implemented Resolution 194, I would argue that this would achieve a minimal form of historical justice, at least with respect to the first generation of Palestinian refugees' claims against Israel.

However, this would be inadequate justice. It would be justice without reconciliation, which (as we have established) is not an option given future Israeli-Palestinian interconnectivity, just as it was not an option in the new South Africa. In addition, a strong case could be made that the question, what did one side do to the other in pursuit of its historical claims? would not be answered by a final settlement agreement—not in terms of the war of 1948, nor in terms of the military Occupation from 1967 until the present, and certainly not in terms of the broader historical period, which includes Jewish colonization starting from the last quarter of the nineteenth century. Nor would there be any discussion of Palestinian violence against Israelis and Jews, both inside and outside of Israel. Something is needed to address these broader aspects and larger history of the conflict.

⁶⁵ Mahmood Mamdani, *A Diminished Truth*, in AFTER THE TRC: REFLECTIONS ON TRUTH AND RECONCILIATION IN SOUTH AFRICA 58, 59–60 (Wilmot James & Linda van de Vijver eds., Ohio Univ. Press 2001) (2000) [hereinafter AFTER THE TRC].

Thus, in the post-conflict period,⁶⁶ Israel and the government of the future Palestinian state will find themselves in the same position of prior transitional regimes all over the world. The regimes in Israel/Palestine following a final status agreement will face the daunting challenge of distinguishing themselves from the policies of the former regimes, of re-establishing the rule of law, and building a new culture of human rights. As in other transitional situations, the way forward begins by stepping back into the past. It begins with the “truth.”

III. JUSTICE IN TRANSITION: FROM “TRUTH V. JUSTICE” TOWARD A SURVIVOR’S JUSTICE

This section will begin to explore the applicability of the transitional paradigm to post-conflict Israel/Palestine. Given some of the shortcomings of the international criminal justice model discussed below, and the unlikelihood that prosecution will be pursued by Israel, the Palestinian Authority, or by the international community, the need increases for alternative approaches to deal with the past, such as a truth commission. There are, nonetheless, fundamental structural characteristics of the Israeli-Palestinian post-conflict situation that would seem, at least at first, to diverge from the transitional paradigm as it has unfolded elsewhere. These challenges are by no means insurmountable, and in some ways may, in fact, enhance the ability of a truth commission to carry out its work. These structural dynamics, then, should not be used as reasons for rejecting a truth commission model out of hand, but rather, merely pose a new challenge to the truth commission model to demonstrate its utility as a post-conflict tool.

Before discussing the challenges the Israeli-Palestinian post-conflict would present to a truth commission,⁶⁷ however, it is important to elaborate on why a truth commission is better equipped than tribunals to address the nature and complexity of the Israeli-Palestinian conflict. Briefly though, a

⁶⁶ Siobhan McEvoy-Levy points out that in peace studies, conflict transformation refers to two related phenomena: (1) the period of conflict resolution in which the “nuts and bolts” of settlement are worked out; and (2) the larger project of conflict transformation that includes rehabilitation of victims and the work of reconciliation. See Siobhan McEvoy-Levy, *Youth, Violence and Conflict Transformation*, PEACE REV., 89, 89 (2001). My argument places an Israeli-Palestinian TRC in the second of these two phenomena, making it contingent on a peace agreement. The primary concern here is stability; a minimal foundation of stability is the prerequisite for the success of any TRC. This will certainly have an effect on the mandate of the truth commission, for instance regarding victim reparations, which in the case of the reparations for the harms suffered by first-generation Palestinian refugees may be dealt with during Final Status negotiations on a government-to-government basis. Nonetheless, other individual victim issues, such as reparations for Israeli incursions into the territories post-Oslo, or for Palestinian terrorist attacks on civilians in Israel, will not have an immediate forum where they can be addressed in a TRC post-conflict.

⁶⁷ See *infra* Part IV.

word is due regarding the actual political and legal potential for prosecutions at the international level.

A. *Legal and Political Obstacles to Prosecutions for Violations of International Law Arising out of the Israeli-Palestinian Conflict*

Sadly, the entrenched battle between Israelis and Palestinians has raged for most of the past half-century. From this wreckage, there is no question that an international prosecutor could build a case against either side for violations of international humanitarian law; against Israel for violations of the Geneva Conventions for acts carried out against the Palestinian population, beginning with their dispersion from what became the territory of the State of Israel in 1948, to the ravages of the Occupation,⁶⁸ and against the Palestinians for violence against Jewish and Israeli civilians both inside and outside of Israel in the pursuit of their national liberation struggle.⁶⁹ But from a political and legal standpoint, tribunal justice does not seem likely in the near future, principally because the ICC is unlikely to exercise jurisdiction over any claims arising from the conflict. Similarly, claims by Israel against the Palestinian Authority, its officials, or Palestinian militants are not a realistic possibility, although domestic claims in the U.S. have been filed.⁷⁰ This does not, however, foreclose the possibility of an

⁶⁸ There have been numerous General Assembly and other UN resolutions from elsewhere in the UN treaty system condemning the abuses of the Occupation for over forty years. This breadth of time and the scope of the documentation is far too numerous to catalogue here. For more detail, see The United Nations Information System on the Question of Palestine, <http://domino.un.org/unispal.nsf/frontpage5!OpenPage>; see also The Israeli Center for Human Rights in the Occupied Territories <http://www.btselem.org/english/statistics/Index.asp> (cataloguing violations since 1987). Of course, not all of these resolutions speak to alleged violations over which an international tribunal, such as the International Criminal Court (the "ICC"), could have subject matter jurisdiction. The ICC only has jurisdiction over genocide, crimes against humanity, crimes of war (as they are defined in the Geneva Conventions), and the crime of aggression. See The Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 5, 6, 7, & 8 (Jan. 17 2001), http://www.icc-cpi.int/library/about/official_journal/Rome_Statute_120704-EN.pdf.

⁶⁹ Human Rights Watch declared Palestinian suicide bombings to be crimes against humanity and possibly war crimes in 2002. Joe Stork, *Erased in a Moment: Suicide Bombing Attacks inside Israel*, Human Rights Watch (Oct. 2002), <http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002.pdf> (finding that "[t]he scale and systematic nature of these attacks in 2001 and 2002 meet the definition of a crime against humanity. When these suicide bombings take place in the context of violence that amounts to armed conflict, they are also war crimes. Human Rights Watch unreservedly condemns these atrocities."). Palestinians have launched terrorist attacks against Jews and Israelis both inside and outside Israel for decades, though there was relative calm following.

⁷⁰ Both Israeli and Palestinian civilians have in fact sought legal remedies in various jurisdictions for acts related to the conflict. There was a claim brought against Ariel Sharon, Israeli Gen. Amos Yaron, and former U.S. President George H.W. Bush in Belgium, based on its 1993 universal jurisdiction law, granting Belgium courts jurisdiction over genocide,

indictment arising in Israel, in a Palestinian national court or in the court of another sovereign against either Israeli or Palestinian defendants, but again, such claims do not provide meaningful reparations for all of the people affected and should not be seen as any kind of solution for the population writ large.

First, Israel is not a State party to the Rome Statute establishing the ICC,⁷¹ and so it cannot refer a situation to the court arising from events that occurred on its territory, or conduct by its nationals.⁷² The alternative, that the Security Council acting under Chapter VII of the UN Charter would refer a case arising out of the Israel/Palestine conflict to the ICC⁷³ is also not likely, as any such resolution would almost certainly be vetoed by the U.S. Even if Israel were to ratify the ICC statute and refer a situation herself, the ICC only has jurisdiction over acts carried out after its official establishment

crimes against humanity and war crimes. The claim was based on the role of Sharon and others in the Sabra and Shatilla massacres in southern Lebanon in 1982, for which an Israeli commission of inquiry had found Sharon “indirectly responsible.” See <http://www.indictsharon.net/case.shtml>. Belgium’s highest court eventually dismissed the case for lack of jurisdiction after the Belgian legislature, facing intense diplomatic pressure, drastically amended the universal jurisdiction law to apply only to individuals who were Belgian citizens at the time the alleged crimes were committed, thereby effectively stripping the court of jurisdiction. See *Belgium Drops War Crimes Cases*, DEUTSCHE-WELLE, Aug. 17, 2003, <http://www.dw-world.de/dw/article/0978973,00.html>.

There have also been claims in the U.S. against Yasir Arafat and other officers of the Palestinian Authority for terrorist attacks in Israel. These individual civil claims based on the 1990 Antiterrorism Act, however, are not solutions capable of providing meaningful restitution to large groups of people; they are mainly able to provide declaratory relief for the victims, and possibly compensate a handful of individuals, when they overcome the jurisdictional complications and the difficulties in collecting damages on any judgments awarded. See, e.g., *Flatow v. Alavi Foundation, et al*, 2000 U.S. App. LEXIS 17753 (4th Cir. 2000) (denying plaintiff’s appeal of the district court’s order granting defendant’s Motion to Release Properties, to Quash Writs of Execution, and to Enjoin Plaintiff from issuing Future Writs Against the Foundation’s Property); see also *Ungar v. The Palestinian Authority*, 2006 U.S. Dist. LEXIS 27384 (D.C. District court granting the “turnover order” of the plaintiffs—the estates of Yaron Ungar, a resident of New York, and his wife, Efrat an Israeli—in 1996, for over \$116 million in funds of the defendants deposited in the court’s registry by the Wachovia Bank).

⁷¹ Israel has resisted signing the Rome Statute because it is concerned about being the subject of prosecutions generated from the illegal status of the settlements in the Palestinian territories, which are considered by many to violate the Fourth Geneva convention. See U. N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, ¶ 35, U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001).

⁷² See The Rome Statute of the International Criminal Court, A/CONF.183/9, arts. 5, 6, 7, & 8 (Jan. 17, 2001), art. 11. Israel could hypothetically accept jurisdiction over a specific alleged crime by lodging a declaration with the ICC’s Registrar, but this is unlikely to happen. *Id.* art. 12.3.

⁷³ See *id.* art. 13(b).

on July 1, 2002.⁷⁴ Thus, any referral to the ICC at all would fail to address the vast majority of violations of international law that may have occurred over the course of the Israeli-Palestinian conflict, and would therefore be a paltry judicial response to the decades-long conflict and its consequences. Also, the prospects for the creation of an ad hoc tribunal are very slight, since the purpose behind establishing the ICC was to create a permanent home for such trials.

In sum, the prospects and benefits of international or national prosecutions are quite minimal. Beyond the legal and political obstacles to prosecutions, however, lie the deeper philosophical and pragmatic issues they raise, which in this situation and others suggest that truth commission should be pursued if not as an exclusive alternative, then at least as a supplement to prosecutions. The following section explores these issues in greater depth, elaborating on why the nature of the Israeli-Palestinian conflict suggests that a truth commission would be a more appropriate remedy to pursue.

B. *Truth vs. Justice*

The recognition of the institutional and political obstacles to domestic prosecutions long-ago led to the exploration of the use of truth commissions.⁷⁵ Truth commissions as a whole, however, have encountered criticism by the mainstream human rights movement. Convinced that the fight against impunity continues to improve, mainstream activists such as Ken Roth of Human Rights Watch and Aryeh Neier, President of the Open Society Institute, accuse truth commissions of obstructing justice because their emphasis on reconciliation and restorative justice lets perpetrators off too easily.⁷⁶ Critics of truth commissions have also lodged legalistic and formalistic complaints against perceived inadequacies of the due process of truth commissions; their procedures are viewed as inadequate and quasi-judicial, failing in the exacting standards of more formal criminal justice.⁷⁷ On the

⁷⁴ See *id.* art. 126.

⁷⁵ See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) (discussing the design of truth commissions).

⁷⁶ See Jonathan D. Tepperman, *Truth and Consequences*, 81 FOREIGN AFF., 128, 129 (2002) (offering a good overview of what could be called the "truth v. tribunalism" debate). Tepperman points out that Neier once thought of truth commissions as necessary compromises, but now, with the establishment of the ICC and other mechanisms, feels that truth commissions represent a compromise that is no longer necessary. *Id.* at 143.

⁷⁷ For what I would call a "legalistic" or "formalist" critique of the South African Truth and Reconciliation Commission (SATRC), see Frederik Van Zyl Slabbert, *Truth Without Reconciliation, Reconciliation Without Truth*, in AFTER THE TRC, *supra* note 66, at 62 (finding insufficiencies in the South African Truth & Reconciliation Commission's procedures, evidentiary standards and legality). For essays defending the procedures and overall work of the SATRC, see Alex Boraine, *The Language of Potential*, in AFTER THE TRC, *supra* note

whole, however, the debates between the relative merits of retributive justice and restorative approaches have largely been philosophical and ideological in nature,⁷⁸ as it is quite difficult to measure things such as “justice” and “reconciliation,” and few have tried to do so empirically.⁷⁹ Instead, most international lawyers and policymakers have until now settled for well-meaning, but thoroughly unsupported declarations about the power of prosecutions and truth commissions.⁸⁰

There is justification and perhaps even a need to implement both types of mechanisms in transitional situations, depending on the context. Indeed, practitioners of transitional justice advocate a holistic approach to post-conflict reconstruction. As Paul Van Zyl of the International Center for Transitional Justice notes, “[a]ny one of those five approaches [referring to criminal prosecutions, truth commissions, reparations, reform of state institutions, and interpersonal reconciliation groups] will often be insufficient and it is best to try to do as many of those as is possible in the circumstances.”⁸¹ Priscilla Hayner, also from ICTJ, has argued that truth commissions and trials are not mutually exclusive, and that in fact, in the cases of Argentina and Chad, the truth commissions actually uncovered evidence later used in prosecutions.⁸² It is important to note, though, that in these

66, at 73, and Albie Sachs, *His Name Was Henry*, in *AFTER THE TRC*, *supra* note 66, at 94. For a general review of the literature on social reconciliation in the aftermath of conflict, see Lysiane van der Knaap, *The Achievement of Social (Re)conciliation After a Violent Conflict: A Review of the Literature* (Feb. 2006), http://www.khulumani.net/component/option,com_docman/task,doc_download/gid,13/Itemid,113/.

⁷⁸ For arguments on the imperative to prosecute gross violations of human rights, compare Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2606–12 (1991) (claiming that the duty to prosecute genocide, crimes against humanity, and perhaps war crimes is *jus cogens* and cannot be derogated from even through a treaty between states, such as the “end of conflict” clause in a future Israeli-Palestinian Peace Treaty under consideration here), with Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991) (commenting and replying to Orentlicher). See also Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1, 39 (1996) (noting the attributes of amnesty, but also its limitations in “discouraging future atrocities”).

⁷⁹ See generally MY NEIGHBOR, MY ENEMY, *supra* note 36.

⁸⁰ See Eric Stover & Harvey M. Weinstein, *Introduction: Conflict, Justice and Reclamation*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 13–14 (articulating the abstract merits of trials and truth commissions, such as promoting reconciliation, achieving closure, and rebuilding society).

⁸¹ Justice for a Lawless World? Rights and Reconciliation in a New Era of International Law, <http://www.irinnews.org/webspecials/RightsAndReconciliation/54203.asp> (last visited Jan. 12, 2007).

⁸² HAYNER, *supra* note 77, at 93–94 (“[T]he National Commission on the Disappeared in Argentina played a critical role in the trials against members of the former military junta leadership, serving as a model for the positive relationship that can exist between truth com-

instances the truth commissions and prosecutions were separated by some passage of time.

Though in theory they may be able to complement one another simultaneously in the same transitional setting, the only practical knowledge we have to-date casts doubt on their ability to productively intermix without impeding one another's work.⁸³ Specifically, the experience of the Special Court for Sierra Leone and Sierra Leone's Truth and Reconciliation Commission should offer pause for reflection on future attempts to combine trials and truth commissions within one transitional society simultaneously. In particular, the Sierra Leone experience offers a lesson in how the poor institutional collaboration between a court and a truth commission can jeopardize the work of one or both institutions, thus limiting the potential of the transitional period, in addition to potentially having broader impacts on UN conflict resolution efforts elsewhere.⁸⁴ Rosalind Shaw notes that "[b]ecause of administrative delays, the TRC's statement-taking phase and hearings phase coincided with the Special Court's indictments in the first half of 2003, resulting in widespread ex-combatant fears that the TRC could be a covert conduit for the Special Court."⁸⁵ Among other rationales, these fears discouraged former combatants from participating as robustly as they might have in the absence of this unfortunate overlap and the poor sensitization of the population to the relationship between the two transitional justice mechanisms.

The above discussion begs the question, which form—if any—of transitional justice will prove beneficial to the populations of Israel and the future state of Palestine after the two sides have arrived at a comprehensive Final Status peace agreement? There may be those who will not be satisfied unless prosecutions are pursued and individual responsibility is assigned, but at the end of the day, political realities control. Thus, while the desire for revenge and retributive justice is extremely powerful, it seems that such inclinations must be suppressed for the sake of other goals, such as facilitating a peaceful transition. South African President Thabo Mbeki reflects on the South African transition:

missions and later prosecutions."); *id.* at 59 ("While there are significant limitations to the report . . . it is the only detailed, published record on the rights crimes under Habré, and thus was critical in providing leads to victims and other witnesses who could be used in a trial.").

⁸³ See James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 650–54 (2006) (noting the failure to cooperate between the Sierra Leone Special Court and Truth and Reconciliation Commission).

⁸⁴ See *id.* at 652–53 (noting that the Special Court's undercutting of the amnesty provision of the peace agreements could affect how combatants in other conflicts approach peace talks, undermining their confidence in the guarantees of amnesty offered in peace negotiations).

⁸⁵ Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone* (United States Institute of Peace Special Report, Feb. 2005), at 4.

Within the ANC, the cry was to “catch the bastards and hang them.” But we realized that you could not simultaneously prepare for a peaceful transition while saying we want to catch and hang people. So we paid a price for the peaceful transition. If we had not taken this route I don’t know where the country would have been today. Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment we would never have undergone the peaceful change.⁸⁶

Despite this political reality, emergent dissenting views in the field of transitional justice suggest that any investigation into the past might be too risky for fragile, post-conflict societies.

The reality is that given the political landscape of the Israel-Palestinian conflict, if anything is to occur, it is more likely to be a truth commission than prosecutions. The following section will discuss why this is not only the practical, but also the most desirable path.

C. *The “Gray Zone” of Complicity and the Need for Survivor’s Justice*

Individual criminal justice, whether implemented on an international or a national level, seems woefully inadequate to deal with the way complicity is spread so diffusely throughout Israeli and Palestinian society.⁸⁷ The conflict culture is so overbearing that the concepts of victim and perpetrator quickly lose meaning. Certainly there is an asymmetric power relationship between the populations, and the Palestinians have collectively suffered in many ways on a level incomparable to the grief of the average Israeli who has not suffered the abuses of the Occupation on a daily basis.⁸⁸ Regardless of the quantitative disparities, however, psychologically, it is clear that both populations espouse a victim ideology affecting their deepest levels of existence. This victim ideology prevents each group from considering themselves as anything other than victim, and their political other as anything but an enemy.⁸⁹

⁸⁶ THABO MBEKI, *AFRICA: THE TIME HAS COME* 29 (Frank Chikane et al. eds., 1998).

⁸⁷ Former deputy mayor of Jerusalem, Meron Benvenisti has described the Israeli-Palestinian conflict as “inter-communal,” which unlike conventional warfare, has every single individual join its army on the battlefield in a struggle not so much over a country’s borders, but over the legitimacy of its regime. See BENVENISTI, *supra* note 4, at 77–78. An intercommunal conflict is endemic, seemingly endless, but if it does finally end, Benvenisti writes, it is only “after the opponents find a way of accepting one another at the deepest, metapolitical levels of their existence, after they have clarified questions of self-identity and legitimacy for themselves and to their neighbors.” *Id.*

⁸⁸ See, e.g., HUMAN RIGHTS WATCH, *WORLD REPORT 2006*, at 455 (2006) (noting the “serious humanitarian crisis” of “extreme poverty, unemployment, and food insecurity” in the Occupied Territories).

⁸⁹ Just as the Occupation is omnipresent in the daily existence of Palestinians, and their reality is shaped by their history of dispossession, so too Jews in Israel and the Diaspora are

The fact that both Israelis and Palestinians view themselves as victims does not alter the facts of actual historical violations perpetrated by either side. It does help, however, to get a grasp of what is really the more salient feature of the Israeli-Palestinian conflict that most concretely informs the decision over which transitional justice approach that might be most appropriate for it. What we find in the Israeli-Palestinian situation, not unlike other transitional societies, is a complex "gray zone" of complicity, which is compounded by their continually evolving and intensifying inter-connectivity. In such a situation, any transitional justice apparatus must address not just the victims and perpetrators, but also, and perhaps more importantly, those at the margins of the conflict culture: collaborators and beneficiaries. Collectively, the perpetrators, victims, collaborators, and beneficiaries form different classes of people enmeshed in the conflict culture. The task of any transitional regime is to transform these individual identities with their idiosyncratic links to the conflict into "survivors"—a collective identity that transcends the relationships of the conflict and turns the conflict culture itself on its head.

1. Collaborators and Beneficiaries

Israel has a huge beneficiary class—arguably most of the Jewish Israeli population and to a more limited extent, the Christian Israeli population as well. Beneficiaries are those who benefit from the maintenance of the unjust status quo that persists so long as the Occupation remains in place. Israeli journalist Amira Hass, who has covered the Gaza Strip for over a decade, articulates this sense of complicity:

Let us leave aside those Israelis whose ideology supports the dispossession of the Palestinian people because "God chose us." Leave aside the judges who whitewash every military policy of killing and destruction. Leave aside the military commanders who knowingly jail an entire nation in pens surrounded by walls, fortified observation towers, machine guns, barbed wire and blinding projectors. Leave aside the ministers. All of these are not counted among the collaborators. These are the architects, the planners, the designers, the executioners.

But there are others. Historians and mathematicians, senior editors, media stars, psychologists and family doctors, lawyers who do not support Gush Emunim and Kadima, teachers and educators, lovers of hiking trails and sing-alongs, high-tech wizards. Where are you? And what about you,

shaped by their historical experiences. Palestinian terrorism has also targeted Jews all over the world, most famously in the Achille Lauro and Entebbe hijackings, and the murder of Israeli Olympians at the Munich Games of 1972. The effect such attacks have on the Jewish psyche cannot be underestimated; they, along with the suicide bombings, continuing existential threats posed by Hezbollah, Iran and Syria, are a constant affirmation of the Jewish victim ideology that has its roots in the two thousand years of persecution that climaxed in the *Shoah*, or Nazi holocaust.

researchers of Nazism, the Holocaust and Soviet gulags? Could you all be in favor of systematic discriminating laws? . . .

As Jews we all enjoy the privilege Israel gives us, what makes us all collaborators. The question is what does every one of us do in an active and direct daily manner to minimize cooperation with a dispossessing, suppressing regime that never has its fill. Signing a petition and tutting will not do. Israel is a democracy for its Jews. We are not in danger of our lives, we will not be jailed in concentration camps, our livelihood will not be damaged and recreation in the countryside or abroad will not be denied to us. Therefore, the burden of collaboration and direct responsibility is immeasurably heavy.⁹⁰

Thus, these segments of Israeli society benefit from all of the trappings of statehood and economic prosperity that flow from being Israeli citizens.

Israel also has the additional complexity of a huge collaborator class: most of the Jewish population over the age of eighteen has served in the armed forces for two to three years, and men continue with reserve duty for an aggregate of about another four to five years throughout the rest of their lives. At any moment a reservist can be transformed from citizen to soldier if called into action to defend Israel's borders and her citizenry. Though not all active or reserve soldiers serve or have served in the immediate administration of the Occupation, the performance of their duties elsewhere is part of the overall national defense effort; their energies expended in some part of the country allows other to perform their jobs in the territories. Beyond this, the entire population, merely by its tacit connection to Israeli democratic procedure, is in some immeasurable way complicit in the administration of the occupation, if only through paying the taxes that support the country's massive defense budget, electing officials that continue to pursue problematic policies such as settlement-building, or merely by remaining silent in the face of the abuses of its government against the Palestinian civilian population.

On the Palestinian side, there is also a problem of "collaborators," which refers here to two distinct groups of people depending on one's perspective. To Palestinians, collaborators are traitors, those who aid the Israeli occupation in any number of ways.⁹¹ The problem of the collaborator has

⁹⁰ Amira Hass, *Can You Really Not See?*, HA'ARETZ, Sept. 27, 2006, <http://www.haaretz.com/hasen/spages/756413.html>.

⁹¹ On collaborators in Palestinian society, see Human Rights Watch, *Justice Undermined: Balancing Security and Human Rights in the Palestinian Justice System*, at 23, E1304, Nov. 2001, <http://www.hrw.org/reports/2001/pa/isrpa1101.pdf> [hereinafter *Justice Undermined*] "Collaborators" in the Palestinian context refer to several kinds of people. *Id.* For most of the Israeli Occupation, the "intermediary" (*al-wasit*) "helped Palestinians do the complex paperwork and security checks the Israelis required before granting most services." *Id.* A different type, the "armed collaborator" (*al-'amil al-musallah*), accompanied Israeli Special Forces to identify the houses of wanted activists." A third type, the so-called "economic

been a source of constant tension within Palestinian society, and collaborators have been horribly treated in the past by the PA security forces and justice system.⁹²

From the Israeli perspective, collaborators refer to those segments of the civilian population who, though not engaging directly in militant activities, nevertheless aided and abetted militants wanted by Israel for their role in the deaths of Israelis, or for planning attacks that posed a security threat to Israeli citizens.⁹³ As a mode of deterrence to deal with the increase in attacks emanating from within the territories during the Second Intifada, Israel re-initiated a policy of house demolitions as collective punishment, a policy that ceased again as of February 2005.⁹⁴ Beyond civilian participation, the Israeli government also claims to have found evidence sufficient to

collaborator' . . . tried to promote Israeli products on the Palestinian market, often acting as representatives of Israeli companies," and finally, the "political collaborators" would "officially or informally represent[ed] Israeli interests, sometimes taking on positions of authority in local administrations." *Id.*

HRW notes that before the PA was established, hundreds of collaborators were "lynched, tortured or killed, at times with the implied support of the PLO." *Id.* Such street killings continued during the second intifada in fewer numbers, but the PA security forces did arrest hundreds of suspected collaborators, torturing many in order to extract confessions, and put some on trial and televised their confessions. Security and military courts convicted a handful of these individuals and, at the time of the authorship of HRW's report, had executed two of them. *Id.* at 22–23. "During the current Intifada particular focus has been put on two types of collaborators. The 'informant' (*jasus*) provides Israeli security forces with information about the activities and movements of Palestinian activists, while the 'infiltrator' succeeds in infiltrating Palestinian organizations and providing information from the inside. The 'land dealer' (*simsar al-aradi*) or broker facilitates the purchase of Palestinian land by Israelis, often by purchasing blocks of land and then reselling it." *Id.* at 23.

⁹² See Human Rights Watch, *The "Roadmap": Repeating Oslo's Human Rights Mistakes*, at 8, May 8, 2003, <http://www.hrw.org/backgrounder/mena/israelpa050603.pdf> [hereinafter *The "Roadmap"*].

⁹³ At the height of the second intifada in July 2002, Israel was considering implementing a policy of deporting family members of suicide bombers in an attempt to deter the attacks by depriving the terrorists a "supportive environment." Dani Taub, spokesman for the Israeli Ministry of Foreign Affairs, said the idea was intended to counter the support the families of suicide bombers receive from groups like Hamas and Islamic Jihad, and from outside governments (such as Iraq, which allegedly used to send \$25,000 to bombers' families), which Taub said amount to "bribery to commit mass murder." Such a policy would likely constitute collective punishment, a violation of the laws of occupation under the Geneva Conventions. See Amos Harel, *U.S. Slams Plan to Exile Families of Palestinian Militants*, HA'ARETZ, July 19, 2002.

⁹⁴ Between October 2001, when demolitions for the purposes of punishment resumed after a four-year stoppage, and January 2005, when they stopped again, the Israel Defense Forces demolished 668 homes as punishment for collaboration. See House Demolitions as Punishment, *supra* note 48. These figures does not include the number of houses sealed or partially sealed, nor those demolished for other rationales, such as the purported "military" reasons. See generally Demolition for Alleged Military Purposes, *supra* note 48. Between 1987 and 2001, Israel demolished 449 homes. See House Demolitions as Punishment, *supra*.

link Yasir Arafat and senior Fatah party officials to the funding and supplying of militants and terrorist groups.⁹⁵ Thus, the line between even official and non-official violence became blurred during the second intifada. The recent election of Hamas—with its continued espousal of violent struggle against both settlers and the occupation forces in the territories, as well as against Israeli citizens within Israel proper—also raises difficult questions as to whom complicity and accountability for violence against Israel extends.

2. The Problem of Narrative and Complicity

Furthermore, very much like apartheid in South Africa, the occupation spans thirty-nine years, a period longer than most armed conflicts, and the larger conflagration between Zionism and the Palestinians has raged for over a century, since hostilities already began to erupt during the first *aliyyot* of Jewish immigrants to Palestine as early as the 1880s following anti-Semitic pogroms in Russia and elsewhere. Thus, the notion that the conflict could be reduced to the singular actions and decisions of a few individuals in the higher reaches of military or political command seems to deny the basic reality and character of the conflict, and as Mamdani suggests, threatens to decontextualize the conflict beyond comprehension.⁹⁶ Certainly, there are individuals who took decisive actions that affected large groups of people, or even a few people, but overemphasizing their responsibility threatens to obfuscate the truly societal nature of the conflict. Bluntly put, scapegoating a few generals or a few militants here and there in the name of justice will not solve anything. On the contrary, it offers the rest of the population an excuse to continue denying their complicity in the suffering of the other side. As Stover and Weinstein observe,

Criminal trials in the wake of mass atrocity are inevitably limited and symbolic: a few war criminals stand for a much larger group of guilty. Nor do trials address the responsibility of those who, swept along by group emotion or solidarity, participated at the margins—looting, taunting, or profiting from the misfortune of their neighbors—or those who did nothing to stop or mitigate the violence, the so-called “innocent bystanders.” Thus, what is billed as individual justice actually becomes a *de facto* form of collective innocence that exonerates the far larger number of individuals

⁹⁵ See Israel Ministry of Foreign Affairs, Seizing of the Palestinian Weapons Ship Karine A (Jan. 4, 2002), <http://www.mfa.gov.il/MFA/Government/Communiques/2002/Seizing-of-the-Palestinian-weapons-ship-Karine-A+-htm>.

⁹⁶ See Mamdani, *supra* note 66, at 59 (“The TRC’s version of truth was established through narrow lenses, crafted to reflect the experience of a tiny minority: on the one hand, perpetrators, being state-agents; and, on the other, victims, being political activists.”).

who were indirectly responsible for the physical, social, and psychological destruction of their communities.⁹⁷

To the extent that everyone is somehow complicit in the struggle, caught within the suffocating "gray zone" of the conflict, too intense a focus on individual perpetrators threatens to spawn myths of collective innocence among the beneficiaries. Still more problematic, though, is that the emphasis on individual perpetrators within criminal justice, and even within the workings of the South African TRC,⁹⁸ can displace other categories of parties to the conflict, such as beneficiaries or collaborators, from the center of transitional project of recovering what historical processes enabled the conflict. An overemphasis on perpetrators also overshadows the suffering of the victims, though some have suggested that trials concerned with historical injustice actually provide a platform for the recognition and reincorporation of victims into the public sphere.⁹⁹ The logic of the "gray zone" of complicity found in the Israeli-Palestinian conflict suggest far more complex and ambiguous categories of guilt.¹⁰⁰ Teitel has noted that:

⁹⁷ Eric Stover & Harvey M. Weinstein, *Conclusion: A Common Objective, A Universe of Alternatives*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 36, at 335 [hereinafter Stover & Weinstein, *Conclusion*]; see also HAYNER, *supra* note 77, at 101 (quoting Paul van Zyl's observation that the focus on Eugene "Prime Evil" de Kock, a particularly ruthless member of the security services who was guilty of countless acts of violence, displaced many white South African's focus from their personal complicity in maintaining the apartheid regime, thereby enabling de Kock's actions).

⁹⁸ See Mamdani, *supra* note 66. Giorgio Agamben has argued that the Nuremberg Trials produced a false effect that the *Shoah* had been "dealt with" adequately: "it has taken more than half a century to understand that law did not exhaust the problem, but rather that the very problem was so enormous as to call into question law itself, dragging it to its own ruin." See Giorgio Agamben, *REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE* (Daniel Heller-Roazen trans., 1999).

⁹⁹ See generally Shoshana Felman, *Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, 27 *CRITICAL INQUIRY* 201 (2001).

¹⁰⁰ One useful framework for beginning to think of the levels of complicity is offered by Karl Jaspers' *The Question of German Guilt*, which distinguishes between *criminal guilt* (for those guilty of violence), *political guilt* (for politicians and the people who voted them into power), *moral guilt* (for those who did not do enough, who did not resist, who were passive), and *metaphysical guilt* (the guilt of existence, of having survived while others perished). See KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 31-32 (E.B. Ashton trans., 1947). I am by no means suggesting that this situation is comparable to the *Shoah*. It is not. However, Jaspers' thoughtful reflections do provide a stepping-off point for both populaces to begin to comprehend their complicity, which as I have tried to suggest, truly reaches out to everyone.

Scholars focused on international criminal justice have also focused on the problem of complicity. See Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 *Nw. U. L. Rev.* 539 (2005) (arguing that qualitative differences of mass atrocities requires distinct theories of punishment for these crimes); Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 *MICH.*

The massive and *systemic* wrongdoing that is particularly characteristic of modern repression implies a recognition of the mix of individual and collective responsibility. Hence, there is a pronounced overlap of punitive and administrative institutions and processes. Individualized processes of accountability give way to administrative investigations and commissions of inquiry, the compilation of public records, and official pronouncements about past wrongs.¹⁰¹

It is precisely because of the wide extension of the conflict throughout society that special notions of justice arise in transitional situations such as the Israeli-Palestinian post-conflict. Mamdani argues, “[w]here survivors—victims and perpetrators from an earlier round of struggle—must learn to live together, ways must be found to reconcile the logic of reconciliation with that of justice.”¹⁰²

Specifically, Mamdani argues for what he calls “survivor’s justice,” which “seeks to transcend the bipolar notions of victim and perpetrator.”¹⁰³ He explains this concept in distinction to the victor’s justice that often obtains in post-conflict situation, where the winners get to judge the losers. To elaborate, he compares victor’s justice and survivor’s justice to two post-war paradigms of justice: de-Nazification and de-Sovietization. The logic of de-Nazification was to blame the agent, through the Nuremberg trials and the lustration of party members, while de-Sovietization’s main imperative was blaming the entire system of Soviet rule. Whereas de-Nazification requires the identification of both victims and perpetrators, de-Sovietization finds itself in the identity of survivors—it “acknowledges victims, but not perpetrators,” because from this perspective, to label someone a perpetrator is to demonize them. To pursue a path of de-Sovietization, Mamdani argues, requires putting emphasis on institutions of rule.

Thus, while interpersonal reconciliation is important, and victims and perpetrators should be given opportunities interact and experience em-

J. INT’L L. 1013 (2005) (observing the inability of international criminal trials to integrate understandings of bystander accountability and proposing that international justice mechanisms “implement a model of operating as a judicial body while simultaneously attending to the social impact of their work,” which she argues can be achieved by judges leaving their opinions open to the question of bystander contribution to atrocities and by tribunals engaging bystanders as a target audience through outreach activities); see also Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 82–85 (2005) (evaluating the jurisprudence of the international criminal tribunals on command responsibility and joint criminal enterprise). For a contemporary philosophical account of complicity very applicable to the Israeli-Palestinian conflict culture, see CHRISTOPHER C. KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000).

¹⁰¹ RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 217 (2000).

¹⁰² MAMDANI, *supra* note 36, at 273.

¹⁰³ *Id.*

pathy for one another, I would follow Mamdani's suggestion of refocusing attention on the beneficiaries and the institutions of rule from which they benefited, particularly because in this case, it is the beneficiary class (the Jewish Israeli public) that will dictate the extent to which the "critical history" will go, and what should be done about its findings. To the extent that the Israeli democratic process will determine nearly every concession to the Palestinians in the post-conflict this is the group of people that most sorely needs to understand its role in the perpetuation of the conflict over the last several decades.

Thus, the political situation dictates the transitional justice response. Just as white power in South Africa was able to shape the nature of post-apartheid justice by including an amnesty clause in the interim constitution, so too we must understand the immediate limits upon judicial responses imposed by the power relations of any given situation.¹⁰⁴ With these political realities in mind, Charles Maier has argued that in transitional societies, where an accounting for the past is so painfully needed, often the choice is not between what he would term "strong" retributive justice (criminal or punitive justice) and "weak" retributive justice (shaming or extracting contrition)—i.e., between "highly imperfect trials" and truth commissions—but in fact, it is between "a truth commission and silence."¹⁰⁵ Even silence, however, is not a long-term option; as the cases of Chile, Argentina,¹⁰⁶ and

¹⁰⁴ Patricia Lundy and Mark McGovern have raised important considerations for why a truth commission may not be the most appropriate mechanism for truth recovery and justice in the Irish post-conflict situation, noting that since the Good Friday Agreement has not produced a "wholesale break with pre-existing structures of power and authority," the needs of the British state to preserve the "legitimacy" of its institutions into the future makes it "highly unlikely that it would be willing to countenance a wholesale inquiry into the past actions of its agents and functionaries." Patricia Lundy & Mark McGovern, *The Politics of Memory in Post-Conflict Northern Ireland*, 13 PEACE REV. 27, 30 (2001). Furthermore, they note, none of the participating parties in the Good Friday Agreement suggested or made demands for a TRC to be included in the negotiations. *Id.* It seems that the negotiators regarded a TRC as a destabilizing factor that could elevate tensions and even threaten the progress of the peace process as a whole. While it has been argued that in South Africa justice was sacrificed for truth and peace, in Northern Ireland it seems that "truth and justice were compromised" for peace. *Id.*

¹⁰⁵ See Charles S. Maier, *Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 261, 269 (Robert I. Rotberg & Dennis Thompson eds., 2000).

¹⁰⁶ A series of developments in Chile and Argentina has led to the further erosion of the impunity from prosecution held by members of the upper political and military echelons. See Peter A. Barcroft, *The Slow Demise of Impunity in Chile and Argentina*, ASIL INSIGHTS, Jan. 2005, <http://www.asil.org/insights/2005/01/insight050107.htm>; see also Rebecca Lichtenfeld, *Accountability in Argentina: 20 Years Later, Transitional Justice Maintains Momentum*, INT'L CENTER FOR TRANSITIONAL JUST., Aug. 2005, <http://www.ictj.org/images/content/5/2/525.pdf> (outlining transitional justice developments in Argentina and exploring the history behind these advances). After Argentina's Supreme Court ruled the amnesty law

elsewhere¹⁰⁷ demonstrate, most societies eventually force open the door to their pasts, even if they were initially sealed shut by the strong arms of corrupt political leadership. Further, it is clear from diverse contexts all over the world that even in the face of official reluctance by political elites to delve into the past, survivors feel a universal need for justice and truth¹⁰⁸ with respect to loved ones, and survivors act on such impulses by engaging in unofficial truth recovery, or “memory projects,” even when such activities are not blessed by official sanction.¹⁰⁹ It is important that we begin to explore how Israelis and Palestinians can constructively indulge their impulses for justice and truth about the perceived injustices visited upon them by their political others.

IV. DESIGNING AN ISRAELI-PALESTINIAN TRUTH COMMISSION (IPTC)

A. *Initial Objections*

Before engaging in the more involved discussion of the specific design and mandate of an IPTC, some initial objections must first be overcome. From the view of transitional justice in every other situation in which it has been implemented, the Israeli-Palestinian conflict poses unique problems: (1) it would involve institutional bridging across two sovereign states; (2) there would be no straightforward regime change as in other transitional situations where a democratizing successor regime revisits the abuses of prior regimes; and finally, (3) a Final Status agreement between the parties would mean that there would be no declared political or moral victor of the conflict. Despite what would appear to be non-starters to a discussion of a

passed in the 1980s unconstitutional in 2005, individuals who have lived in impunity for the last thirty years are beginning to be the subjects of re-trials. The first individual to face re-trial was Miguel Etchecolatz, the former police chief in the city of La Plata, who had previously served only a few months of his sentence for ninety-one counts of torture before being released due to the amnesty law. See Daniel Schweimler, *Argentina Ex-President Testifies*, BBC NEWS, Aug. 30, 2006, <http://news.bbc.co.uk/2/hi/americas/5300412.stm>.

¹⁰⁷ See Publications – International Center for Transitional Justice, <http://www.ictj.org/en/news/pubs/index.html> (last visited Jan. 12, 2007) (providing background on transitional justice in other contexts); see also HAYNER, *supra* note 77 (discussing transitional justice in South Africa, El Salvador, Argentina, Chile and Guatemala).

¹⁰⁸ See LAURA NADER, *THE LIFE OF THE LAW*, 14–15 (2002).

¹⁰⁹ See Lundy & McGovern, *supra* note 106, at 28. Lundy and McGovern trace several attempts at unofficial memory work by several groups in Northern Ireland, many of which have been joint projects by Catholics and Protestants, who are finding the search for truth to be a common goal, despite official reluctance to pursue the past. See *id.* (“Officially sanctioned memories and voices can be contested from within civil society, and these challenges can help define and redefine the profile of who gets to be heard and what is remembered.”). The authors link these developments elsewhere where civil society groups have fought against impunity, like the Madres and Hijos in Argentina. See *id.* at 27 (noting that truth commissions have been a “key mechanism for coping” in Argentina).

truth commission, however, I would argue that these structural qualities may even enhance the ability of the truth commission to carry out its work, and furthermore, these "obstacles" may help illuminate the true dynamic of transitions that is harder to grasp in more "conventional" transitional situations.

1. Two-State Solution

Some may argue that a truth commission is inappropriate for interstate situations (though the only empirical argument against it is that it has yet to be tried). However, as Henry Steiner observed, an argument for a truth commission gains strength in those interstate conflicts where conflicting parties continue to inhabit the same territory, because the proximity of the conflicting groups makes the interstate situation seem more like an *in-trastate* situation, effectively erasing the borders.¹¹⁰

2. No Regime Change

Another possibly significant divergence from the transitional paradigm present in the Israeli-Palestinian post-conflict is the fact that there will not be a regime change; the dominant regime—the Israelis—will remain in power after the peace agreements. This creates a difficulty for the transitional paradigm, for a significant—if not the dominant—characteristic of transitional societies is the fledgling new regime that needs to distinguish itself from prior repressive governments. This is achieved by demonstrating a respect for human rights and civil liberties, which usually entails establishing the rule of law, rehabilitating victims either through compensation and/or the extension/assertion of their equal protection under the law, and investigating past abuses to demonstrate a new level of accountability and transparency in the government and civil apparatuses. In other words, the central task of transitional societies is the work of nation building.

Given these criteria, Israel/Palestine clearly fit within a transitional paradigm, as they both will find themselves with much work to be done in the post-conflict to repair civil society and the governmental institutions that were tarnished by the years of conflict. In addition, one might argue that there will indeed be a regime change in the sense that a "new regime" will be created in Palestine. Thus, the new government of the Palestinian state has the same opportunity to distinguish itself from the prior regime (Israel and the PA) as other transitional governments have had in the past. With the new regime actually physically displaced from the old one (whereas they are usually not co-existent), a new opportunity is also created for the con-

¹¹⁰ See HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM, TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT, 81 (1997) [hereinafter TRUTH COMMISSIONS], (briefly discussing the topic of an Israeli-Palestinian truth commission).

tinuing regime, Israel, to reform. In a way, the persisting presence of the old regime simply reinforces all of the historic justifications of a more “traditional” transitional situation. Simply put, the absence of a physical change from the past creates an even greater need to deal honestly with past abuse, demonstrating that the continuing regime has indeed “turned a new leaf.”

3. No Moral Victor

Another distinguishing characteristic of the Israeli-Palestinian post-conflict is that, unlike other situations in which transitional justice has been implemented, no clearly identifiable moral victor will have emerged at the end of the conflict. Certainly, to most observers on both sides of the conflict, the violence may appear asymmetric, with their side suffering more than the other does, but the conflict itself will end in a negotiated, political compromise—a truce—in which neither side can truly claim absolute political, military, or moral victory. The perpetuation of a victim ideology by both groups indeed creates a situation where neither side is eager to concede that they may have been “in the wrong.” This factor will be shown to have considerable effects in the actual “performance” of a truth commission and is quite informative as to the realistic and appropriate aims of “truth telling,” even in situations when a moral victor is more easily discernable, since official apologies or judicial pronouncements of the perpetrators’ guilt does not necessarily trickle down to ordinary individuals who still firmly hold on to their subjective views of which side is morally wrong.¹¹¹ Nowhere is this dynamic demonstrated more clearly than in the former Yugoslavia and in Rwanda, where ethnic and nationalist divisions remain alive and festering, even though there has been very little violence in either place since the end of hostilities.¹¹² Such divisiveness can perhaps be attributed to the fact that no truth commission had yet been established in either situation, but this is an historical hypothetical. It is also important to note that in both instances, the outreach efforts of the tribunals have been woefully inadequate.¹¹³

¹¹¹ See, e.g., Laurel E. Fletcher & Harvey M. Weinstein, *A World unto Itself? The Application of International Justice in the Former Yugoslavia*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 45.

¹¹² See Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 183; see also Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 206.

¹¹³ See Fletcher & Weinstein, *supra* note 111, at 33 (asserting that the absence of institutional links between the tribunals and other institutions working toward societal reconstruction in Yugoslavia caused the ICTY to seem to be a world unto itself, independent from the world of those effected by the tribunal); see also Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1017 (2005) (examining the limitations international criminal law, and exploring how these limita-

José Zalaquett has noted that in situations in which there is a clear victor, the winner simply prosecutes the loser.¹¹⁴ As Todorov argued, you must first defeat your enemy in order to judge him. However, in situations such as the Israeli-Palestinian conflict, where there will be no clear winner, truth commissions have been established. If both sides negotiate an agreement, publicly declare their wrongdoings, and pledge to refrain from such actions in the future, Zalaquett argues, then there is no need for a truth commission.¹¹⁵ The current paradigm for negotiations between Israel and the Palestinians would not entail this degree of acknowledgment. Such acknowledgment constitutes the first step in a long journey toward reconciliation.¹¹⁶

B. *Architecture of an Israeli-Palestinian Truth Commission*

What would this mechanism look like? How would it function in post-conflict Israel and Palestine? Given the assigned task—namely, to put the truth about the conflict in historical perspective—it seems that what is called for is a truth commission along the lines of the comprehensive South Africa Truth and Reconciliation Commission (SATRC), the most ambitious project of its kind to date. The Sierra Leone Truth and Reconciliation Commission, which modeled itself on the SATRC, will also provide some important insights.

This raises a litany of questions concerning the particulars of the proposed truth commission's design and mandate, not to mention the necessary, skeptical questions regarding the efficacy of the very idea of a truth commission, which will be dealt with in Part V. After a discussion of the most central aspects of designing an IPTC, I will focus on the activity of 'truth-telling' itself, and what it offers to post-conflict societies, particularly in this unique bi-national situation.

In discussing the design of a truth commission anywhere in the world, it is helpful to keep in mind several underlying principles. First,

tions constrict the ability of international tribunals to promote their social and political goals). See also Longman et al., *Connecting Justice To Human Experience*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 213 (noting that in Rwanda, 55.9 percent of respondents claimed to be "not well informed," and 31.3 percent to be "not informed at all," about the work of the ICTR).

¹¹⁴ See TRUTH COMMISSIONS, *supra* note 110, at 70.

¹¹⁵ *Id.* ("If both parties negotiate an agreement, publicly declare their wrongdoings, and pledge to refrain from such actions in the future, then there is no need for a truth commission.").

¹¹⁶ See Jodi Halpern & Harvey M. Weinstein, *Empathy and Rehumanization After Mass Violence*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 305 (arguing that the first step in reconciliation is rehumanization, facilitated by encouraging parties to understand the subjective perspectives of their former enemies).

every situation is unique, and demands a unique response.¹¹⁷ This principle was demonstrated in the Sierra Leone Truth and Reconciliation Commission; during the swearing-in of its commissioners, the Chairman, the retired Rev. Dr. Humper, emphasized that the commission could not rely upon a prescribed model, but rather, because the conflict was unique, it demanded a response that is “uniquely Sierra Leonean, at all times guided by what is in the best interests of the people of Sierra Leone.”¹¹⁸ Every post-conflict society that employs transitional mechanisms has a unique history and cultural background that must be taken into account when designing transitional mechanisms. Even though the Sierra Leone TRC emphasized the uniqueness of its approach, at the same time, its model was heavily indebted to the South African TRC, which, in turn, based itself on overtones of Christian forgiveness that conflicted with popular notions of justice and retribution among some local communities in South Africa.¹¹⁹ Similarly, as Rosalind Shaw notes, despite an active NGO community embracing this kind of truth-telling approach, for a variety of practical and cultural reasons, there was very little popular support for the truth commission, since most people

¹¹⁷ See Rev. Dr. Joseph Humper, Chairman, Truth and Reconciliation Commission, Address at the Inauguration of the Truth and Reconciliation Commission (July 5, 2002), available at <http://www.sierra-leone.org/josephhumper070502.html> (last visited Jan. 12, 2007).

Though it would be most beneficial for Israelis and Palestinians to come to their own conclusions as to the best way to construct a truth and reconciliation commission, we may still look to the SATRC as a possible model upon which to construct an IPTC for two reasons. First, many parallels have been drawn between the nature of the two conflicts, and thus, if the problems are similar, perhaps the model used for the solution should be similar as well. The systematic nature of Israeli oppression in the territories and its institutionalized discriminatory practices against Arab citizens of Israel suggest comparisons to South Africa, as does the significant human rights violations perpetrated by the opposition forces, which in this case would be the various Palestinian militant groups. The second reason for looking to the SATRC is that in the evolution of truth commissions, the SATRC set new benchmarks in the scope of its ambition and work. A similarly substantial mechanism, not a more limited one like the truth commissions in Guatemala or elsewhere, seems appropriate to deal with the complex problems involved with reconciling Israelis and Palestinians.

¹¹⁸ *Id.* More specifically, Rev. Dr. Humper said that the Commission will be “victim-driven” and “pay special attention to the needs of women and children. . . . People need to have their experiences validated and recognized,” he said, “[t]here is no family, village, community, chiefdom or district that has not been affected by the conflict one way or the other. To that extent, we are all victims of the conflict.” *Id.* Indeed, the TRC in Sierra Leone will have to contend with a widespread conflict (over forty-seven thousand combatants recently disarmed) that produced several distinct categories of victims: two million people were displaced; twenty thousand people suffered mutilations, over five thousand children were forced into combat, forced labor or sexual slavery, and an unknown number of women were raped. These diverse classes of post-conflict citizens demand specific attention by trauma specialists of different varieties, and the commission cannot treat each group as if they had suffered in the same way as others.

¹¹⁹ RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 227 (2001).

avored instead a "forgive and forget" approach.¹²⁰ In addition, the Sierra Leone TRC began its work in a wider social environment in which "alternative practices of reintegration, reconciliation, and social recovery were already established in many locations," thereby undermining the TRC's grip on the popular imagination.¹²¹ Thus, for the top-down model of a national-scale truth commission to have localized significance, designers of a truth commission must pay special attention to, and try to harmonize their work with, existent cultural preferences and informal processes.

The second principle to remember is that the very decision to institute a truth commission must be seen as revolutionary within the context of whatever injustice preceded it, whether it was mass political repression, a civil war, or worse. This cannot be emphasized enough; the decision to initiate transitional justice mechanisms is a decision to continue an engagement with a political other that seeks to transcend the sickly relationship of the past. Therefore, while we can begin to discuss the basic outlines of an IPTC, the most important decision is not in the details (though certain factors will certainly bear heavily on the effectiveness and success of the commission)¹²² but in the spirit of the work itself: the commitment to continue building a post-conflict reality. Working out the details and the conflicts that are bound to arise is in fact an excuse for both sides to engage a political other, thereby building the trust required for the survival of a post-conflict culture.¹²³ Naturally a post-conflict culture will build itself on inter-

¹²⁰ Shaw, *supra* note 87, at 4.

¹²¹ *Id.* at 11.

¹²² See generally HAYNER, *supra* note 77 (discussing the design of truth commissions); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995). TruthCommission.org, www.truthcommission.org (last visited Jan. 12, 2007) (offering an in-depth, interactive study of design factors to consider in creating a truth commission; HAYNER, *supra* note 77, app. 1 (suggesting several ideal parameters for most circumstances, including: a \$5–35 million budget; one hundred or more staff members; a duration of one to two years (commissions, she writes, should have deadlines, even if extendable); powers of subpoena, search and seizure and witness protection; powers of reporting, i.e., naming perpetrators, and making mandatory recommendations to executive branches). This last power cannot be emphasized enough. If a truth commission is unable to see its work actualized, there can be little hope for any measurable changes, let alone reconciliation.

¹²³ The International Center for Transitional Justice has seized upon a notion of reconciliation that is not so much interpersonal as societal, describing a "civic trust" model of reconciliation where it is defined as:

[T]he condition under which citizens can once again trust one another as citizens. That means that they are sufficiently committed to the norms and values that motivate their ruling institutions; sufficiently confident that those who operate those institutions do so also on this basis; and sufficiently secure about their fellow citizens' commitment to abide by these basic norms and values.

Reconciliation—International Center for Transitional Justice, <http://www.ictj.org/en/tj/784.html> (last visited Jan. 12, 2007).

personal reconciliation as well, but this form of reconciliation is more difficult to engineer in official, top-down institutionalized forums, though a truth commission should attempt to create a space for this as well to the extent that this is possible.

The South African Truth and Reconciliation Commission was established by an act of parliament called the National Unity and Reconciliation Act, which called for seventeen commissioners to serve full-time, and provided for the establishment of three separate committees within the SATRC: (1) the *Human Rights Committee*, which conducted public hearing for victims and survivors; (2) the *Reparation and Rehabilitation Committee*, charged with developing a policy for long-term reparations as well as urgent interim relief (responsible only for making recommendations to the President, and not capable of enacting policy or awarding reparations itself); and (3) the *Amnesty Committee*, which reviewed and held hearings for amnesty applications. The commission held separate hearings on institutions, such as political parties; the legal system; the business, labor, and health sectors; the faith communities; and the armed forces. Special hearings were also held to examine the experiences of particular groups, such as women and children, during apartheid. The TRC had powers of subpoena, search, and seizure, which greatly facilitated access to the files of political parties and government and security institutions.¹²⁴

The Sierra Leone Truth and Reconciliation Commission also offers a useful model upon which to base an IPTC's structure. The Sierra Leone commission had four different types of hearings: (1) *witness hearings* (for individual witness testimony); (2) *thematic hearings* (aimed at producing a "social analysis that describes and explains the past in relation to a number of identified themes," enabling the Commission to "address patterns of abuse and broader social analysis regarding the enabling background conditions" of the conflict); (3) *institutional hearings* (which consider "whether there were specific civil society institutions (such as the media) or state actors (like the military) that warrant particular scrutiny for their role in inflicting, legitimizing or ignoring abuses," and further, whether there were "sectors of the society (such as certain corporations) who benefited from abusive structures," or "institutions that were targeted unfairly"); and (4) *event hearings* (aimed at "establish[ing] whether particular events served an especially catalytic role in the history of human rights abuse in Sierra Leone").

¹²⁴ For a detailed discussion of the structure, processes and philosophical underpinnings of the TRC, see Truth and Reconciliation Commission, Final Report Presented to President Nelson Mandela on October 29, 1998, available at http://www.news24.com/Content_Display/TRC_Report/VOLUME1.HTM (last visited Jan. 12, 2007) [hereinafter TRC Final Report].

Some combination of these models should prove helpful as a starting point for designing an IPTC. The exact shape of the IPTC and its specific structure will flow from decisions regarding the commission's mandate, the scope of its inquiry, the resources available for its operating budget, and the length of time that the governments will allow it to complete its work. Though the SATRC provides a good model, it also serves as a cautionary tale; much criticism of the SATRC followed its work, mainly out of a sense of unfulfilled expectations, which in retrospect, were simply set too high. As the Human Rights Committee of the SATRC warned in 2000:

[T]he situation facing us is an unwelcome cocktail. The blend of a great number of rights institutions together with wide mandates may instead of providing for an effective and efficient system of promoting rights . . . actually result in a flailing around . . . We have the suspicion that too many institutions are trying to be too much to too many with the result that they are doing too little for too few.¹²⁵

Thus, while it is necessary to endow a truth commission with robust powers and to give it enough time to complete its work, it is equally essential that a commission, the commissioners, and the public writ large have realistic expectations for what it can and cannot do. With these useful overarching lessons in mind, I now turn to consider the specific design questions that will structure the work of an IPTC.

C. *Mandate—History, Violations, and Reparations*

1. Scope of Historical Inquiry

First and foremost of concern to architects of an IPTC would be what historical period the commission would investigate. The history involved is daunting; Meron Benvenisti has described the conflict as an "inter-communal" one lasting approximately a century, with the violence of the second intifada representing the fifth inter-communal flare-up.¹²⁶ Palestinians do not think that their troubles began with their displacement and dispossession in 1948, but rather, in 1882, with the initial expansion of the Jewish *yishuv*, and similarly, for Israelis the issue is not as simple as how to

¹²⁵ WILSON, *supra* note 121, at 226.

¹²⁶ The previous flare-ups include the guerilla fighting of the British Mandatory period, in 1936 and 1947–48; the Lebanon War of 1982, and the first intifada launched in 1987. Benvenisti does not include the interstate wars of 1948–49, 1956, 1967, and 1973 because they were between states, and resembled more conventional warfare (besides the fact that the Palestinians had relatively little political agency in those conflicts). See BENVENISTI, *supra* note 4, at 78–79. Others, such as Edward Said, have described the conflict as lasting one hundred years. See Said, *supra* note 34.

resolve the immediate conflict with the Palestinians. Rather, they view their predicament within a regional dynamic of Arab rejectionism¹²⁷ and a historical mission to guarantee the survival of the Jewish people; the same impulse, which spurred by centuries of European anti-Semitism, first led to political Zionism and the Jewish colonial project in Palestine at the end of the nineteenth century.

It is indeed tempting to take a very wide view of the history of the conflict and the diverse contributing causes to what Benvenisti calls the “intimate enmity” between Israelis and Palestinians. Beyond the more dramatic conflagrations of the various wars, there are other historical causes that leave a direct imprint on the current situation, including European anti-Semitic violence and the *Shoah*, the nature of Ottoman and then British rule during the pre-mandate and mandate periods; Jewish colonization (and Palestinian dispossession) of Palestine leading up to Israeli independence, and Palestinian responses, including anti-Jewish violence in 1920, 1921, 1929, and the Great Arab Revolt of 1936–1939;¹²⁸ and the expulsion of Jews from Arab countries in reaction to the conflict in Palestine (leading to further emigration to Israel). One would think, then, that for the successful implementation of the commission, the inclination would be to narrow the mandate, perhaps to focus on contemporary violence (perhaps the Oslo period and onward), or maybe violations that have occurred during the occupation (since 1967). Conventional wisdom would suggest avoiding these more difficult and controversial issues because they are certain to re-enact the central arguments of the conflict, and perhaps would ultimately prevent the parties from establishing a common historical ground.¹²⁹

¹²⁷ It has been suggested, however, that this story (of Arab intransigence), which plays a significant role in the larger Zionist narrative and continued justifications over the years for the proliferation of the Israeli settlements and various security-minded strategies, is “in substantial measure a myth.” Tessler, *supra* note 8, at 177. Tessler argues that “accounts which stress abiding Arab intransigence and a militant commitment to the annihilation of the Jewish state are incomplete, simplistic, and in many ways false.” *Id.* at 179. Tessler also points to opinion polls and other historical data that supports his view that Arab opinions, and more specifically Palestinian public opinion, on Israel have not been consistently hostile, as the Zionist narrative claims, but have been contextual and have varied with other developments and historical moments. *Id.* at 185.

¹²⁸ Mordechai Bar-On, *Conflicting Narratives or Narratives of Conflict: Can the Zionist and Palestinian Narratives of the 1948 War be Bridged?*, in HISTORY’S DOUBLE HELIX, *supra* note 8, at 158 [hereinafter Bar-On, *Conflicting Narratives*] (describing these “repetitive violent attempts of the Palestinians to disrupt the Zionist project” as a “central feature of the socialization of young Israelis and new immigrants alike”).

¹²⁹ Indeed, many historians flatly reject the possibility of the two sides ever arriving at actual agreement on a variety of issues within the conflict and the conflict as a whole. See Pappé, *supra* note 44, at 194 (discussing the views of several historians on the possibility of constructing shared or mutually reinforcing narratives of the conflict, and arguing that Israeli and Palestinian historians can construct “bridging narratives” on several issues, particularly

Despite this concern, however, we must keep in mind the potent critique of the SATRC leveled by Mahmood Mamdani and others. Mamdani argues that the TRC erred both in limiting the historical scope of its inquiry and in limiting the types of violations it investigated. He argues that restricting its investigation to the period between 1960–1994, the TRC looked at history through overly legalistic “narrow lenses,” missing the bigger picture of apartheid, i.e., its historical foundations in colonization.¹³⁰ Consequently, he claims, the TRC failed to distinguish between what is “legal and what is legitimate, between law and right,” and in the process created further divisions between beneficiaries of apartheid and its victims—the very two groups between whom reconciliation was required.¹³¹ One could easily see similar criticisms emerging if the Israeli-Palestinian commission ignored the broader historical movements that serve as backdrop to the current conflict. History, after all, is at the center of the conflict, a failure to consider all of it would reflect poorly on the credibility of the commission, and more importantly, would not truly reflect the reality of the conflict, as it has existed in history.

Still, too wide a mandate would no doubt drown the commission in a sea of history, potentially impeding the more forward-looking aspects of its work in the process. One way of avoiding the pitfall of decontextualizing the more specific instances of violence and abuse to be explored in the victim and perpetrator hearings while not simultaneously inhibiting their work is to follow the model of the Sierra Leone Truth and Reconciliation Commission’s thematic hearings, which explored deep social and historical causes of the conflict, as well as the event hearings, which focused on particularly significant events.

Rather than focus on the themes, or in addition to a thematic-based focus, a separate “historical clarification” committee could be set up whose sole function would be to perform an historical analysis of the deep causes and history of the Israeli-Palestinian conflict. The aim of this committee would be to address the more systematic and deeper historical movements that have fueled the conflict.¹³² Having this “historical clarification” committee meet separately from the Human Rights and Amnesty (perpetrator and victim) hearings and other institutional hearings would allow those

from the perspective of non-elites (workers, peasants, etc.) in both communities, who at various points in time may have had a great deal more common ground than they realized).

¹³⁰ See Mamdani, *supra* note 66, at 58, 59.

¹³¹ *Id.*

¹³² See Edward W. Said, *Palestinians Under Siege*, in *THE NEW INTIFADA*, *supra* note 1, at 27, 41 (Roane Carey ed., 2001) (proposing a historical clarification committee to help move past the impasse of the second intifada, and pointing out that it may be premature for a truth and reconciliation commission). Israeli new historian Illan Pappé has called for similar work, at least within Israeli and Palestinian historiography. See Pappé, *supra* note 44.

other hearings to focus directly on individual cases of gross human rights abuse as well as those perpetrated by specific industries and sectors of society. This would allow these hearings to concentrate all of their attention on the primacy of violated individuals, without grander historical arguments interfering and confusing what is at issue, namely, the suffering of human beings. I would also expect that this historical clarification committee, perhaps to consist of Israeli, Palestinian, and other international academics and intellectuals, would be highly contentious, and thus, if it were to fall short of expectations—and not manage to write “bridging narratives” as Israeli historian Ilan Pappé proposes¹³³—its lackluster performance would not disrupt the important work of the testimonials in the other committees.

2. Types of Violations to Consider

Another pillar of the commission’s mandate is the decision over what kinds of human rights violations the commission will consider. In South Africa, 21,400 victims gave testimony on only *gross violations of human rights*, including murder, torture, and kidnapping, whereas an estimated 3.5 million blacks suffered under apartheid legislation. Mamdani claims that this over-individualization of the apartheid story missed the more disturbing systematic violations—the social and economic violence committed against the blacks of South Africa—and allowed the totality of the machinery of this illegal regime to escape comprehension.

Just as it is not easy to encapsulate the breadth of the historical causes and developments of the conflict, it is similarly challenging, if not impossible, to give an accounting for the variety of violations that have kept its momentum going for decades. Mamdani’s precautionary note, however, is very relevant to the Israeli-Palestinian context, particularly given the systemic nature of the human rights abuses of the Israeli Occupation. If an IPTC focused solely on gross violations of human rights, such as murder, kidnapping, or torture, it would miss the real story of the Occupation, with its pervasive presence in Palestinian life, and the daily symbolic, systemic violence it visits upon Palestinians on an individual and societal level.¹³⁴

This concern, however, comes into conflict with other practical considerations, such as realistic expectations for the commission’s work capacity and the length of time the commission should remain in operation.¹³⁵ The Sierra Leone Commission’s additional “event hearings” provide

¹³³ See Pappé, *supra* note 44.

¹³⁴ See THE HANDBOOK OF REPARATIONS 8 (Pablo De Grieff ed., 2006). De Grieff takes Mamdani’s point and notes that the way repressive systems tend to make “victims of virtually all those [subjected] to [them]” suggests that “distributive justice policies leading to the redress of structural imbalances” are best suited to address such widespread violation. *Id.*

¹³⁵ See HAYNER, *supra* note 77, at 222 (suggesting that Commissions should not remain in operation for too long a period); See WILSON, *supra* note 121, at 226 (“Truth commissions do

a model that could be adopted to help deal with this challenge. In addition to addressing specific events that impacted large numbers of people, a separate committee could focus on repetitive violations occurring throughout the conflict.¹³⁶ Daily recurring violations, such as house demolitions, restrictions on the freedom of movement, destruction of personal property, discriminatory laws, unlawful detentions, suicide bombings, and other anti-Jewish or anti-Israeli attacks, were perpetrated by Israeli forces in the administration of the occupation, but do not rise to the level of gross violations of human rights. Victims who suffered particular abuses could be grouped by the nature of the violation incurred, and rather than holding individual hearings for every house demolition or suicide attack, similarly-affected individuals could testify or participate in some way at a collective hearing addressing the shared violation.

3. Reparations: "Vertical Reconciliation"

a. Lessons Learned

Practitioners of transitional justice continue to wrestle with arriving at pragmatic conceptions of justice, reconciliation, and social repair. One formulation—the "civic trust" model of reconciliation—has posited that reconciliation is a societal, rather than an interpersonal phenomenon, and it describes the situation that obtains when post-conflict citizens can once again (or for the first time) trust one another as citizens.¹³⁷ This "civic trust" occurs in two dimensions: horizontal (between citizens) and vertical (between citizens and institutions of rule).¹³⁸ As Mamdani suggests, when co-

not function well if they are overloaded, as the South African TRC was, with a variety of tasks including holding public hearings, writing a report on the past, recommending reparations policy and granting amnesty.").

¹³⁶ De Grieff argues that the South African Commission left out important categories of victims:

[T]here were discussions within the TRC about whether to make reparations on behalf of combatants who died during military actions in situations that did not constitute clear violations of international humanitarian law; or victims of the routine violence that accompanied the operation of the social engineering aspects of apartheid, such as people who died not in political demonstrations but, for example, in forced removals; or people who were detained under provisions of the state of emergency. None of them were eligible for reparations as a class, and arguments can be made that they should have been.

THE HANDBOOK OF REPARATIONS, *supra* note 136, at 8.

¹³⁷ See Reconciliation - International Center for Transitional Justice, *supra* note 125.

¹³⁸ According to the practitioners of the ICTJ, "civic trust" is more than

relying on a person to do or refrain from doing certain things; it also involves the expectation of a commitment to shared norms and values. The sense of trust at issue here is not the profound sense of trust characteristic of relations between inti-

existence is required it is essential to focus on beneficiaries and the institutions of rule from which they have gained advantages over other segments of society. Accordingly, a major focus of post-conflict reconstruction has to be on reforming institutions of rule, as they embody a society's values and perpetuate them through their organization of social life. South African jurist and TRC Commissioner Albie Sachs highlights the deeper importance of institutional reform as a means of reparation beyond the immediate demands of punishing perpetrators and exposing the truth:

The real reparation we want ties in with the constitution, the vote, with dignity, land, jobs, and education. If we get all those things and there is a sense of forward movement and the creation of a nation and a real, shared dignity in this country, then I think the pressure simply to punish, to penalise and have commissions of truth becomes much less. Although I strongly support a commission of truth, . . . the danger is that it should never be a substitute for . . . real dignity and the real overcoming of apartheid.¹³⁹

Without lasting reforms to institutions of rule, society cannot stabilize itself enough to give peace an opportunity to take root and reconciliation to develop between former political enemies.

Pablo De Grieff of the International Center for Transitional Justice echoes Sachs' sentiments in part, but also makes a compelling argument for the special place of monetary reparations among the various transitional measures employed by governments. This special role of monetary reparations is only heightened in many post-conflict societies, which in addition to overcoming legacies of political violence, must also reconstruct economies, social services, infrastructure, etc., or create them from scratch. Beyond

mates, but rather, 'civic' trust, which can develop among citizens who are members of the same political community but are nonetheless strangers to one another.

Civic trust includes 'horizontal' trust among citizens and also 'vertical' trust between citizens and their institutions. How is the latter to be understood if trust involves something that is possible only among individuals? To trust an institution amounts to knowing that its constitutive rules, values, and norms are shared by participants and that they regard them as binding.

Id.

¹³⁹ Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH CONFESSIONS, *supra* note 107, at 68, 89; see also Azmi Bishara, *Reflections on October 2000: A Landmark in Jewish-Arab Relations in Israel*, J. PALESTINE STUD., Spring 2001, at 54 (offering an eloquent exploration of the status of the Palestinian Arabs, an exploration in which Bishara warns against Israeli attempts at placating the Arab community and at co-opting them, essentially robbing them of their own distinct Arab identity, but more importantly, of true equality); NADIM N. ROUHANA, PALESTINIAN CITIZENS IN AN ETHNIC JEWISH STATE: IDENTITIES IN CONFLICT (1997) (exploring the conflicted status of Palestinian Israelis and arguing for a new civic supra-identity of "Israeli" referring not to the dominant ethnic class, Israeli Jews, but to all Israeli citizens).

economic necessity, however, De Grieff makes more philosophical and pragmatic arguments for the special role of reparations, noting in particular its victim-centered focus in contrast to other mechanisms that do not really attend to the needs of victims.

For example, De Grieff argues that criminal justice, even in an idealized situation where it is completely successful (which is virtually impossible due to the numbers of perpetrators and the difficulties with evidence and other procedural issues), is "in the end, a struggle *against perpetrators* rather than an effort *on behalf of victims*."¹⁴⁰ The same can be said, De Grieff claims, for truth telling. Though potentially providing victims with closure and the satisfaction of having official acknowledgment of a loved ones' fate, "in the absence of other positive and tangible manifestations truth, by itself, can easily be considered as an empty gesture, as cheap and inconsequential talk."¹⁴¹ Indeed, Rosalind Shaw notes that nearly all of the chiefs and local government officials in Sierra Leone to appear before the truth commission there "ended their testimony with appeals for economic assistance, suggesting that many of them had testified in the belief that this would give them access to such assistance."¹⁴² Similarly, institutional reform is by necessity a long-term project that affects victims only indirectly, whereas monetary compensation can have a more immediate impact: "[h]ence," De Grieff writes, "it makes sense to think that at least in terms of potential direct impact on victims, reparations do occupy a special place among transitional measures."¹⁴³ De Grieff's research shows that monetary compensation schemes in several different contexts (he notes Chile and Germany in particular) have gotten progressively more comprehensive and complicated in design, and vary significantly based on the context of the conflicts they are meant to address.¹⁴⁴ As in other areas of truth commission design, then, this very complex discussion, which will certainly involve many political power plays, must be something decided among the parties. We can still learn, however, from South Africa's experiences, as well as those of other countries.¹⁴⁵

¹⁴⁰ THE HANDBOOK OF REPARATIONS, *supra* note 136, at 2.

¹⁴¹ *Id.*

¹⁴² Shaw, *supra* note 87, at 8.

¹⁴³ THE HANDBOOK OF REPARATIONS, *supra* note 136, at 2.

¹⁴⁴ De Grieff points to the emerging trend of including the provision of mental health care in reparations benefits, various proposals to address victims of sexual violence, and ideas about linking reparations benefits and microfinancing plans "so as to increase the impact of even modest benefits and to give them some sustainability particularly in economically deprived contexts." *Id.* at 14. This would certainly be applicable in the economically depressed Palestinian territories, which in recent years have at times teetered on humanitarian disaster-like economic conditions. *Id.*

¹⁴⁵ *Id.* at 9; For more on reparations, symbolic and otherwise, in the South African context, see Ciraj Rassool et al., *Burying and Memorialising the Body of Truth: The TRC and Na-*

The SATRC contained a Committee on Reparation and Rehabilitation and held institutional hearings on various sectors of society. Committee on Reparation and Rehabilitation was charged with the task of developing a cohesive policy on reparation and restitution in five categories: urgent interim reparation, individual reparation grants, community rehabilitation, institutional reform, and symbolic reparation.¹⁴⁶ What emerged was a fascinating discussion regarding the tension between the conflicting interests of, on the one hand, individual compensation and rights, and on the other, rehabilitation and collective community empowerment. De Grieff highlights several principles that should guide designers of truth commissions and reparations schemes.¹⁴⁷ One such principle worth discussing in depth is what De Grieff refers to as coherence—both internal and external.¹⁴⁸

Internal coherence describes the internal consistency and support between various internal aspects of a reparations program.¹⁴⁹ De Grieff suggests that U.S. reparations to Japanese Americans for their treatment during WWII were more internally coherent than Brazil's reparations; U.S. reparations included both payments and an official apology, whereas Brazil distributed money without any official acknowledgment of wrongdoing.¹⁵⁰ The U.S. program, with its close relationship and mutual support between the various forms of reparations, is preferable, in De Grieff's view, to the Brazilian program, which had less internal consistency.¹⁵¹

External coherence describes the relationship between the reparations programs and other transitional mechanisms, such as criminal justice, truth telling and institutional reform.¹⁵² De Grieff argues that complementarity between the different transitional mechanisms creates the perception that transitional efforts, "on the whole, satisfy the expectations of citizens."¹⁵³ For example, truth telling without reparations efforts can be seen as an empty gesture, just as reparations without introspection and inquiry in the

tional Heritage, in AFTER THE TRC, *supra* note 66, at 115; see also Naomi Roht-Arriaza, *Reparations in the Aftermath of Repression and Mass Violence*, in MY NEIGHBOR, MY ENEMY, *supra* note 36, at 121.

¹⁴⁶ TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 180–81 (Susan de Villiers ed., Bath Press 1999) (1998); see also Warren Buford & Hugo van der Merwe, *Reparations in Southern Africa*, 44 CAHIERS D'ÉTUDES AFRICAINES 263 (2004).

¹⁴⁷ See THE HANDBOOK OF REPARATIONS, *supra* note 136, at 6–13.

¹⁴⁸ *Id.* at 10–11.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 11.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ THE HANDBOOK OF REPARATIONS, *supra* note 136, at 11.

form of truth telling could be perceived as the state attempting to buy victims' and their families' "silence or acquiescence."¹⁵⁴

A similar "bidirectional relationship" exists between institutional reform and reparations efforts, since "democratic reform that is not accompanied by any attempt to dignify citizens who were victimized can hardly be understood."¹⁵⁵ It also stands to reason that reparative payments will seem unhelpful and perhaps less legitimate when they are made in the absence of deeper institutional reforms that address the structural inequities that enabled the violence in the first place, and presumably would work against the repetition of violations.

Finally, De Grieff notes, reparations and criminal justice are also linked; from the victims' perspective, "especially once a possible moment of satisfaction derived from the punishment of perpetrators has passed, the condemnation of a few perpetrators, without any effective effort to positively redress victims, could be easily seen by victims as a form of more or less inconsequential revanchism."¹⁵⁶ On the other hand, "[r]eparations without any effort to achieve criminal justice may appear to them as nothing more than blood money."¹⁵⁷ It should be clear, then, that the transitional mechanisms must be carefully coordinated with one another so that each supports the others and together they create the appearance of momentum toward revolutionary change in the society.

In South Africa's deliberations over the contours of its own reparations programs, several specific questions came straight to the forefront of national discussions. First, should reparations be symbolic or financial, and if financial, should there be a monetary package or a service package? They decided on a well-structured monetary grant, based on indications by victims surveyed that they preferred monetary to other forms of compensation.¹⁵⁸ Second, where would they get the money? There were controversial suggestions that beneficiaries of the apartheid regime (businesses and private persons) be obligated to contribute to reparations funds via a one-time wealth tax.¹⁵⁹ Eventually President Mbeki squashed these recommendations, instead encouraging all South Africans to contribute voluntarily to a President's Fund established to distribute the reparations checks.

Another issue was the power of the TRC to implement its own recommendations. At the end of the day, it was not granted this broader power, which lead to great frustration among victims' groups, since beside the ini-

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Buford & van der Merwe, *supra* note 149.

¹⁵⁹ *Id.*

tial urgent relief funds paid out, further reparations checks have not been forthcoming, and victims have been frustrated by their exclusion from the governance of the President's Fund and the transparency of the management of the fund. As of April 2006, billions of rand in payments had yet to be made.¹⁶⁰ Further, dissatisfied with holding governmental actors responsible for their role in the violations of the apartheid regime, victims also launched an unprecedented lawsuit in the United States under the Alien Tort Claims Act for compensation for the damages resulting from the collaboration of twenty-three multinational corporations with the apartheid government.¹⁶¹ The case, however, was dismissed in 2004.¹⁶²

b. Applying the Lessons to an IPTC

In adopting this model for the Israeli-Palestinian situation, I would propose something unique to accommodate the two-state structure of the Israeli-Palestinian post-conflict. Perhaps there should be an umbrella committee including both states, and then two sub-committees, each operating within the framework of each country, with an expanded mandate concerning institutional reform.

There are several reasons for this proposal. First, because political stability necessitates that the truth commission would occur after the Final Status negotiations, it is important to realize that a key component of victim rehabilitation—compensation—would likely have taken place, but only partially. This compensation would most likely be limited, in accordance with U.N. Resolution 194, to reparations paid to refugees and descendants from the 1948 war. These payments, however, would exclude those internally displaced by the war, who have since become members of the Arab sector in Israel (and likely those most affected by the long-standing systematic discrimination against Arab citizens in Israel). Even if the Israeli government extended reparations to the rest of the Arab sector in Israel, it would be restricted to estimated costs incurred by the 1948 displacement

¹⁶⁰ According to the Khulumani Support Group, a membership organization representing over fifty thousand victims of apartheid, the reparations process has been tragically frustrating for victims. See Dr. Marjorie Jobson, Acting Director, Khulumani Support Group, *The TRC: Ten Years On* (Apr. 21, 2006), available at http://www.khulumani.net/component?option=com_docman/task,cat_view/gid,97/Itemid,113/.

¹⁶¹ *Id.*

¹⁶² See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (granting defendant corporations' motions to dismiss on finding, inter alia, that none of plaintiffs' theories supported jurisdiction under the ATCA, specifically that no facts had been pleaded that would allow the court to find the corporations engaged in state action by acting under color of law with the apartheid regime in South Africa, because merely defending their premises from uprisings did not alone constitute joint action with the apartheid regime).

and would not cover the systematic injustices suffered by the Arab sector *as Israeli citizens* over the last half century.

Furthermore, Israeli military operations in the Occupied Territories since the start of the second intifada have significantly damaged public institutions and infrastructure—such costs would also not be included in an initial calculation of compensation for Palestinian refugees, nor would those damages resulting from the first intifada, the Palestinian nationalist revolt that raged from 1987 until the Oslo process began.¹⁶³ There would also not likely be discussion on reparations for Jewish Israeli victims of attacks carried out by Palestinian militant organizations.

The umbrella committee could carry out these further calculations and negotiations. The umbrella committee would also be responsible for establishing joint Israeli-Palestinian peace initiatives, specifically focusing on educational curricula and cultural projects, or perhaps for creating an international foundation that can support coexistence initiatives in the future. It may also be the appropriate place to carry out much of the “coopera-

¹⁶³ The Knesset has tried to legislate impunity for Israel regarding Palestinian civil claims for damages arising out of the Occupation. It passed a bill to curb the ability of Palestinians hurt by the first intifada from getting compensation from Israel. Up to now, six thousand claims have been filled by Palestinians against Israel, with nine hundred cases still pending. Israel has already paid three hundred million shekels to compensate for physical injuries and property damage sustained during the first intifada. The proposed bill, which is called the “Law for Handling of Claims Related to IDF Activity in Judea and Samaria,” has been in the works since 1992. One motivation for the bill, which some view as superfluous because most claims are rejected anyway (in 1997, 82% were rejected), is to curb fraudulent claims. See Gideon Alon, *The Cost of the First Intifada Still Mounts*, HA’ARETZ, June 24, 2002.

Other legislation has passed in relation to the current intifada, but it is constitutionality under review by the Israeli Supreme Court. In July 2005, the Knesset passed the fifth amendment (dubbed the “intifada law”) to the Civil Torts (Liability of the State) Law, designed to exonerate Israel from any responsibility for injury caused to any citizen of an enemy state or resident of hostile territory. As of 2002, over six hundred claims had been filed for the amounts of hundreds of millions of shekels. Whereas the earlier bill simply limits the ability of Palestinians to file claims (particularly the statute of limitations), the new bill intends to deprive Palestinians of *any* right to claim compensation for damages caused by the IDF. The amended law grants the Minister of Defense the authority to proclaim any area outside of the state of Israel a “Conflict Zone,” even if no war-related activity has occurred there. This proclamation denies those who sustain injury within the area the right to seek compensation from Israeli courts. The Law operates retroactively in cases of damages sustained since September 29, 2000, the date of the outbreak of the Second Intifada, and for claims already pending before the courts. In September 2005, nine human rights organizations collectively brought suit challenging the law as in contravention not only of international humanitarian law and international human rights law, but also of Israel’s Basic Law: Human Dignity and Liberty, and therefore unconstitutional. See *Nine Human Rights Organizations Petition the High Court of Justice: Law Preventing Palestinians from Claiming Compensation from the State of Israel is Unconstitutional and Thus Void*, ASS’N C.R. ISRAEL, Sept. 1, 2005, <http://www.acri.org.il/english-acri/engine/story.asp?id=223>.

tive” work proposed in the Oslo accords.¹⁶⁴ If backed by international funds to support its continued work, the establishment of this committee would serve to address a great deal of the criticism of the South African TRC, namely, that its following up, especially in regard to reparations, has been poor. This is primarily due to the fact that the South African TRC did not have the power to implement reparations, but rather, only to make recommendations for their implementation to the President.

Given the likely two-state resolution of the conflict, it is necessary to address other questions of institutional reform in the distinct national contexts, since after the creation of a separate Palestinian state, it is Palestinians and their institutions of rule that must inculcate a culture of rule of law and human rights within Palestinian society, just as Israeli institutions have a similar function in Israeli society. The two national subcommittees would operate individually within each country and would concentrate on institutional reform and rehabilitation of citizens within state boundaries.

c. Reforming Israeli Institutions: Addressing Systemic Discrimination Against Arab Israelis/Palestinian Israelis

Unlike the blacks of South Africa during apartheid, Arabs in Israel (or as some prefer to be called, Palestinian Israelis or Israeli Palestinians), have enjoyed full citizenship for a good portion of the historic duration of the conflict. However, despite their *de jure* status as full citizens, they have nonetheless been systematically discriminated against (mainly through unequal budget allocations), and thus, are not *de facto* equal citizens of the State of Israel like their Jewish counterparts. Though it is long overdue, the Israeli government has recently started to address these historic inequalities.

A report, *After the Rift: New Directions for Government Policies Towards the Arabs in Israel*, submitted to then Israeli Prime Minister Ehud Barak on November 28, 2000, directed itself at addressing long-term Arab dissatisfaction within Israel in order to make recommendations for how policy changes may improve the Arabs’ situation.¹⁶⁵ Among its many im-

¹⁶⁴ See Israel Ministry of Foreign Affairs, Declaration of Principles on Interim Self-Government Arrangements, arts. 10, 11, apps. 3, 4 (Sept. 13, 1993), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Principles.htm>.

¹⁶⁵ See DAN RABINOWITZ ET AL., *AFTER THE RIFT: NEW DIRECTIONS FOR GOVERNMENT POLICY TOWARDS THE ARAB POPULATION IN ISRAEL* (2000) [hereinafter RIFT REPORT]. The report, a product of a collective effort of twenty-five Israeli academics (fourteen Jewish, eleven Arab), was authored in the immediate aftermath of the deaths of thirteen Arab Israelis who were shot by Israeli policemen during riots in October of 2000 (subsequently, the Or Commission of Inquiry was initiated to investigate the deaths and is currently in the process of handing out “warnings” to certain state officials, including former Prime Minister Barak, informing them that damaging information about them has been uncovered by the inquiry). The report consists of six papers addressing the following issues: (1) land and planning; (2) local authorities and welfare services; (3) identity and civic-cultural inclusion; (4) schooling

portant recommendations, is the recognition of the tension between individual and collective rights, and the importance of developing a "constitutional and legislative agenda" that recognize a group's "expectations as a collective." Noting Israel's "almost principled refusal to address the historical sources of present discontent," the paper recommends the establishment of "laws and jurisprudence of reconciliation" (similar to Australia's "jurisprudence of regret" aimed at acknowledging abuses suffered by the Aboriginal population there). In addition to reparations for individuals, and comprehensive institutional reform for the betterment of the community, there is also a need for symbolic reparation.¹⁶⁶ All of these instruments and these "affirmative actions" are intended to repair an essential power imbalance, to reverse the inequities of the past—to stop the lies from circulating and make it so Israelis can no longer say, "I didn't know." These steps are in fact already underway, as is evident not only by the Or Commission¹⁶⁷ and the *After the Rift* report in 2000–2001, but also by a recent resolution by the World Zionist Congress, which recognizes that "[t]here is no dispute on the major gap between Israeli Arab, Druse and Circassian citizens, and Jewish Israeli citizens in a wide range of measurements of quality of life, economy, public sector resources, integration within governmental and public institutions," and calls upon the Israeli government "to act urgently to implement its deci-

and further education; (5) employment and economic development; and (6) law and society. Each section is co-authored by a team of Jewish and Arab specialists. For a review of the report, see Elia Zureik, *Review Essay: Being Palestinian in Israel*, J. PALESTINE STUD., Spring 2001, at 88. Subsequently, in 2006, a coalition of Palestinian Israeli politicians, intellectuals, and civil society organizations released a report detailing its vision for the future of the state. The coalition argued that

Defining the Israeli State as a Jewish State and exploiting democracy in the service of its Jewishness excludes us, and creates tension between us and the nature and essence of the State. Therefore, we call for a Consensual Democratic system that enables us to be fully active in the decision-making process and guarantee our individual and collective, civil, historic, and national rights.

See The National Committee for the Heads of the Local Arab Councils in Israel, *The Future Vision of the Palestinian Arabs in Israel* (2006), at 3, at [http://www.mossawacenter.org/files/File/Reports/2006/Future%20Vision%20\(English\).pdf](http://www.mossawacenter.org/files/File/Reports/2006/Future%20Vision%20(English).pdf).

For more on Israeli discriminatory policies and a particularly philosophical view, see Bis-hara, *supra* note 142; see also Major Findings of Adalah's Report to the UN Committee on the Elimination of Racial Discrimination (Mar. 1998), <http://www.adalah.org/eng/publications/violations.htm>.

¹⁶⁶ The symbolic community reparation proposed in South Africa consisted of renaming buildings and streets, constructing monuments and museums, and instituting "National Day of Remembrance" to further reconciliation.

¹⁶⁷ See *infra* note 173.

sions to reduce the gaps between the Arab citizens and the Jewish citizens in the State of Israel in all areas of life.”¹⁶⁸

Other than its discriminatory practices against its Arab population (and similar but not nearly as harsh practices against Druze, Mizrahim [Jews of Middle Eastern descent], immigrants, and migrant workers), the state of Israeli democracy is in relative good health; there exists a strong civil society, transparent democratic institutions, and freedom of the press. There is a highly developed respect for the rule of law,¹⁶⁹ and evolved mechanisms to ensure transparency and accountability,¹⁷⁰ though when it

¹⁶⁸ Resolutions of the Thirty-Fifth Zionist Congress, Res. 53 (Jun. 19–22, 2006), <http://www.jewishagency.org/NR/rdonlyres/F7D58228-2B1E-4D71-91F3-B9C40E612CD2/29961/Resolutions35thZionistCongress.doc>.

¹⁶⁹ The Israeli Supreme Court has made several bold and respected decisions in recent years as it attempts to engage the conflict. Beyond its ruling on the Security Fence/Separation Barrier, which was arguably much more measured and careful in applying international law than the International Court of Justice’s ruling, the Court also produced a firm ruling on the use of Palestinians as “human shields,” effectively sticking its neck deep within military affairs. See *Supreme Court Prohibits the Use of Palestinians as Human Shields During IDF Military Operations*, ASS’N C.R. ISRAEL, Dec. 22, 2005, <http://www.acri.org.il/english-acri/engine/story.asp?id=250>. Further, the definition of respect for the rule of law should include not simply the review of illegal government actions, but also, the implementation of a court’s review of those acts. On this front, the Supreme Court has set strong precedent. Following a subsequent decision on the Fence/Wall’s impact on the Palestinian town of Tzofin, Israeli Defense Minister Amir Peretz ordered a thorough review of the Fence’s/Wall’s route, demanding that his legal team report on any other cases like Tzofin where the planned expansion of settlements dictates the route of the Fence/Wall. See *Americans for Peace Now*, Middle East Peace Reports, <http://www.peacenow.org/mepr.asp?id=&cid=2686>.

¹⁷⁰ Several elected officials have been investigated in the last decade for electoral violations in fundraising, embezzlement of public funds, and sexual harassment, etc. The politics can be as dirty as they are elsewhere, but there are certainly instruments to monitor and check oversight. While the Israeli judiciary is structurally in good shape, and the Israeli Supreme Court has been generally progressive, it continues to exhibit its political ties to the ethnic Jewish majority, tending to define dangers to Jewish hegemony as dangers to “national security,” again, citing the prolonged state of emergency induced by the Arab-Israeli conflict as justification. See Gad Barzilai, *Political Institutions and Conflict Resolution: The Israeli Supreme Court and the Peace Process*, in MIDDLE EAST PEACE PROCESS, *supra* note 7, at 87, 90. In addition, there have been several Official Commissions of Inquiry used to investigate particularly important events and incidents of government oversight or abuse. Most notable was The Kahan Commission, established to investigate claims of Israeli negligence in preventing the massacre of Palestinian refugees by Christian Phalangists in the Sabra and Shatilla camps in Lebanon. The Commission found then Defense Minister Ariel Sharon “indirectly responsible” for the massacres, and banned him from ever holding military office again (although he was elected to the Premiership in 2000). A more recent commission, the Or Commission, investigated the deaths of thirteen Arab Israeli citizens following the outbreak of the Second Intifada. For background on the Or commission, see online coverage, Ha’aretz Daily Newspaper Israel, <http://www.haaretz.com>; see also ADALAH: THE LEGAL CENTER FOR ARAB MINORITY RIGHTS IN ISRAEL, ADALAH: COMMISSION OF INQUIRY, <http://www.adalah.org/eng/commission.php> (last visited Jan. 12, 2007).

comes to Palestinian claims against Israeli military forces, investigations are less frequent and less thorough.¹⁷¹ The same cannot be said, however, for the Palestinian Authority.

d. Reforming Palestinian Institutions: Overcoming Legacies of Corruption and Internal Division

Since its inception, the Palestinian Liberation Organization's charter has declared its intention to establish a secular democratic state for the Palestinian people. In practice, however, the PA has been anything but democratic. Sara Roy notes that "the PA's disrespect for its own people, as seen in its consistent disregard for human rights and the rule of law, and its authoritarianism and repression, have had a pernicious effect on the economy and society alike."¹⁷² With the eventual withdrawal of Israeli forces and settlements from the West Bank, perhaps the most dangerous threat to future Israeli-Palestinian political settlement and to long-term reconciliation and regional stability is the prospect that the future Palestinian state will not realize its democratic aspirations.

Though Hamas' commitment to negotiation and compromise with Israel is questionable,¹⁷³ the fact that they were elected through democratic elections should be taken as a token of hope given the PA's authoritarian history.¹⁷⁴ However, holding free elections is only the barest minimum of

¹⁷¹ See, e.g., *The "Roadmap,"* *supra* note 94, at 6. ("According to statistics of the Association of Civil Rights in Israel (ACRI), from September 2000 to December 29, 2002, only thirty cases involving the unlawful use of lethal force have been fully investigated by the Israel Defense Forces (IDF), and only five resulted in prosecutions before military courts."). HRW points to several sources for these figures, and notes that the Israeli military did not respond to requests for updating them. *Id.*

¹⁷² Roy, *supra* note 2, at 93. As discussed above, some analysts consider Hamas meteoric rise to power to be a reaction to Fatah's years of mismanagement and corruption at the head of the PA. See *supra* note 27. The Palestinian "street's" evaluation of the status of democracy, PA performance and the levels of corruption did drastically decrease over time, particularly once the second intifada began. While in 1996, at the peak of the peace process, 43% of Palestinians surveyed evaluated the status of Palestinian democracy and human rights positively, by 2000–2001, this percentage more than halved itself to roughly 21%. Evaluation of PA institutional performance similarly plummeted from 64% in 1996 to 44% in 2000. See generally Khalil Shikaki, PALESTINIAN CENTER FOR POLICY AND SURVEY RESEARCH (PSR), <http://www.pcpsr.org/survey/survey.html> (last visited Jan. 12, 2007).

¹⁷³ As of this writing, Hamas had rejected explicitly recognizing Israel, a possibility advanced as part of the national unity government proposed by Palestinian Authority President Mahmoud Abbas. See *Palestinians Split on Unity Plan*, BBC NEWS, Sept. 22, 2006, http://news.bbc.co.uk/2/hi/middle_east/5369496.stm.

¹⁷⁴ For more on the autocratic rule of the Palestinian Authority, see Yezid Sayigh & Khalil Shikaki, Independent Task Force Report: Strengthening Palestinian Public Institutions (June 28, 1999) (working paper, Council on Foreign Relations), available at <http://www.ciaonet.org/conf/cfr19>; see also Rema Hammami & Salim Tamari, *The Second Uprising: End or New Beginning?*, J. PALESTINE STUD., Winter 2001, at 19 (noting that "the ongoing elision of

what is required for a stable democracy, and while Hamas rose to power based on its track record for transparent and accountable provision of social services, it remains to be seen (as in other countries in the Middle East) whether Islamist political movements can be comfortably reconciled with democratic institutions of rule.¹⁷⁵

Thus, the future Palestinian state has a great deal of work ahead of itself, and once the Israeli occupation ends, the PA must seize the opportunity to reform itself and improve the life of its people.¹⁷⁶ Arguably, this should have already happened, and need not wait for the end of the conflict.¹⁷⁷ The institutional committee within Palestine could focus on these questions of reform, and in the process, present the Palestinian public with a record of the abuses perpetrated against it by its own leaders during the Oslo period, most notably, the embezzlement of international aid,¹⁷⁸ the repressive judicial system.¹⁷⁹

D. *Other Design Issues*

The other important design decisions for an IPTC include what kind of amnesty will be offered; the procedural operation of the commission including the integration of both Israeli and Palestinian judiciaries; the degree

political and civil institutions" under PA rule has resulted in "the dilution of the rule of law and democratically elected institutions").

¹⁷⁵ See Nathan J. Brown et al., *Islamist Movements and the Democratic Process in the Arab World: Exploring the Gray Zones*, CARNEGIE ENDOWMENT FOR INT'L PEACE PAPER, Mar. 2006, at 3, available at http://www.carnegieendowment.org/files/cp_67_grayzones_final.pdf. Though they do not give an extensive treatment to Hamas, the overall conclusion drawn from other contexts of Islamists' interactions with political systems elsewhere in the region suggests that profound ambiguities persist in the embrace by these groups of democratic habits of mind, and it remains unclear whether the rise of Islamist movements will lead "the countries of the Arab world, finally, toward democracy or, conversely, to a new form of authoritarianism with an Islamic character." *Id.* at 17.

¹⁷⁶ For an analysis of Palestinian reform efforts prior to Hamas' election, see Nathan J. Brown, *Evaluating Palestinian Reform*, The Carnegie Endowment for International Peace, Carnegie Paper No. 59, May 2005, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=16974>.

¹⁷⁷ See NATAN SHARANSKY & RON DERMER, *THE CASE FOR DEMOCRACY: THE POWER OF FREEDOM TO OVERCOME TYRANNY AND TERROR* 277 (Public Affairs, 2004). The difficulty with Sharansky's approach, however, is that he does not recognize the tremendous difficulty in inculcating democratic habits of mind in a society that lives in a state of siege, though this rebuttal does not excuse the complete failure of the Palestinian leadership in creating viable democratic institutions in the Palestinian Authority.

¹⁷⁸ The scope of this issue is too vast to summarize. For a comprehensive discussion, see EU Funding of the Palestinian Authority, <http://www.eufunding.org/accountability/default.html> (last visited Jan. 12, 2007).

¹⁷⁹ See, e.g., *Justice Undermined*, *supra* note 93 (noting the general arbitrary arrest and detention as well as other criticisms of the judicial system).

of publicity of the commission's work; and other considerations that will reflect upon the commission's legitimacy, such as who will serve as the commissioners. These detailed regime design choices are best dealt with by the parties themselves and lie beyond the scope of this article. A few words, however, will be offered on the important elements of amnesty, transparency, and outreach.

1. Amnesty and Naming Names

The amnesty decision, and the more general decision to "name names," is not a simple nor easy one and in many ways lies at the crux of the dilemmas of pursuing transitional justice.¹⁸⁰ As Priscilla Hayner notes, many truth commissions' terms of reference have not specifically addressed this question, thereby effectively leaving the decision to the commissioners themselves. Despite the fact that "most commissions have had the power to name perpetrators," only a handful of commissions have chosen to do so, including "El Salvador, Chad, the second commission of the African National Congress [in South Africa], and the South African Truth and Reconciliation Commission."¹⁸¹ As Hayner points out, the fight over naming names lies at the junction of competing rights: one the one hand, due process concerns that those accused of crimes have a full hearing with proper evidentiary standards and other protective measures in which they can defend themselves before being pronounced guilty, and on the other, the impulse for justice and revealing the truth when there is clear evidence of an individuals' guilt.¹⁸² There is also the larger philosophical debate between those who see "justice" (retributive justice) as necessary for any society to move forward and, therefore, disparage granting amnesty and the "truth as justice" paradigm of which it plays a central role as a woeful compromise of the rights of victims, and those who embrace amnesties because of their utility as truth-acquiring tools.¹⁸³ In South Africa, individualized amnesties were extended to motivate perpetrators to step forward and tell the truth, thereby contributing to the historical record of the truth commission and the narrative history of the abuses of the apartheid regime. Amnesties were granted upon an applicant's willingness to testify and only upon a showing that the acts were politically motivated.

¹⁸⁰ See HAYNER, *supra* note 77, at 107 (discussing the controversy over whether to name publicly those "responsible for human rights crimes").

¹⁸¹ *Id.* at 107-08.

¹⁸² See *id.* at 107.

¹⁸³ See *supra* notes 77-78 and accompanying text.

It is perhaps quixotic to criticize amnesties from the perspective of legalistic, formalized justice,¹⁸⁴ since this is really to compare two different forms of justice (retributive and restorative).¹⁸⁵ Once transitional regimes have placed the recovery of the truth about past abuses over the prerogative to punish perpetrators, it does not make sense to then criticize commissions for not reaching the standards of formalized justice, in terms of due process protections and evidentiary standards, as would be obtained in formal criminal courts, because the accused is not going to be punished.

However, it is also important to bear in mind that truth commissions compete with popular conceptions of justice. Anthropologists observing these commissions conclude that so long as they attempt to substitute reconciliation efforts, or “reconciliation talk” in the place of criminal prosecutions, such gestures will unfailingly be “resisted by some victims and denounced as a ‘sell-out’ by informal justice institutions.”¹⁸⁶ Similarly, privileging this form of “truth-telling” on a national scale may also find resistance by those who wish to “forgive and forget,” as was the case in Sierra Leone. Rosalind Shaw observes that the Sierra Leone TRC “set itself in opposition to widespread local practices of social reconstruction as forgetting by valorizing verbally discursive remembering as the only road to reconciliation and peace.”¹⁸⁷ This exclusionary approach backfired, according to Shaw, who concludes that the Sierra Leone case demonstrates that even when a truth commission is demanded and embraced by local NGOs, its failure to take seriously and to build upon local practices of healing and

¹⁸⁴ For such a critique, see Van Zyl Slabbert, *supra* note 79, at 71 (questioning whether reconciliatory truth can be attained solely through legal processes and without personal confession).

¹⁸⁵ For essays defending the theoretical foundations of the TRC’s work, see Boraine, *supra* note 79, at 73; see also Albie Sachs, *His Name was Henry*, in *AFTER THE TRC*, *supra* note 66, at 94.

¹⁸⁶ WILSON, *supra* note 121. Wilson argues that the “reconciliation talk” of the SATRC undermined the very human rights culture that the commissioners were attempting to create, because at the foundation of a human rights culture is the notion of accountability, and here the TRC was letting perpetrators off the hook for their apartheid crimes. *See id.* at 228 (“[I]nternational human rights treaties [hold] that those responsible for gross human rights violations must be brought before a court of law and held accountable.”). These overtones of forgiveness were not readily accepted in the townships, because it conflicted with local conceptions of retribution and also because there were insufficient efforts to engage individuals in communities in constructive reconciliation work. *See id.* at 227 (“TRC hearings were often little more than a symbolic and ritualized performance with a weak impact on vengeance in urban townships. The transfer of values from an elite to the masses was uneven and equivocal. . . . [There was no] attempt to facilitate victim-offender mediation between individuals, either by the TRC itself, or through the many conflict resolution non-governmental organizations available.”).

¹⁸⁷ Shaw, *supra* note 87, at 11.

reintegration can undermine its effectiveness.¹⁸⁸ Thus, as Wilson concludes, "human rights institutions ignore popular conceptualizations of justice at their own peril."¹⁸⁹

At the end of the day, the decision over whether to name names or to offer any form of amnesty will be an intensely political one. As noted above, the choice in South Africa was between offering the individualized amnesty or not having a democratic transition, and instead, heading for war.¹⁹⁰ Still, in Sierra Leone the preference expressed was to keep discussion of the war and its effects within households and to not bring it out into the street, for fear that such public invocation of the past would lead to more violence in the future.¹⁹¹ As this discussion shows, the decision to encourage truth-telling and to provide amnesties to encourage this behavior is shaped by context and politics.

2. Transparency

Though it might seem to make perfect sense for an IPTC's work to be open and transparent to the public, not all truth commissions have, in fact, met this standard in their operation. Beyond widely distributing its findings to make the largest possible segment of the post-conflict citizenry aware of its work, transparency is essential because it is a performance of the better governance to follow in the post-conflict period. In other words, the manner in which a truth commission carries out its work can serve as a model for future institutions, thereby reversing the prior pattern of behavior.

Ruti Teitel notes that in the case of Chile, the president reviewed the findings of the truth commission in the same large stadium where much of the killings and repression took place.¹⁹² The symbolic power of the president, embodying the nation to apologize to those who had been marked as "enemies of the state"¹⁹⁶ and subverting the meaning of the site of former state violence, is truly powerful. The SATRC had public hearings devoted to victims' testimony and broadcast these hearings, which were often held at places formerly symbolic of white power. Because hearings were open, survivors, with the assistance of lawyers, could challenge the amnesty applications by questioning the amnesty applicant's version of the events. In addition, an Investigative Unit provided limited research into the cases prior to the hearing, enabling Committee members and lawyers representing survivors to cross-examine the applicants to ensure for accuracy. The exact scope of the survivors' rights to challenge were not clearly demarcated in

¹⁸⁸ See *id.* at 7.

¹⁸⁹ WILSON, *supra* note 121.

¹⁹⁰ See MBEKI *supra* note 88.

¹⁹¹ Shaw, *supra* note 87, at 9.

¹⁹² RUTI G. TEITEL, TRANSITIONAL JUSTICE 84 (2000).

the Truth and Reconciliation Act, and an IPTC should clarify explicitly in its mandate what role can be made for survivors and other participants in the perpetrator and victim hearings.¹⁹³

3. Outreach

Transparent proceedings and publication of the commission's work are only first steps, however. As Richard Wilson argues, "for all their media coverage, TRC hearings were often little more than a symbolic and ritualized performance with a weak impact on vengeance in urban townships. The transfer of values from an elite to the masses was uneven and equivocal."¹⁹⁴ Thus, while the TRC was ever-present in the public's attention, thanks to the extensive media coverage,¹⁹⁵ Wilson's chief criticism is that there was not enough follow-up with concrete mechanisms to pursue conflict resolution on the community level. Thus, even in an age of intense media coverage, transparency is only a necessary, but far from sufficient element in making a commission's work have broader effects in society.

With this in mind, architects of an IPTC would need to think creatively about engaging the populations beyond the ritualistic displays of empathy and compassion that might ensue at the victim-perpetrator hearings. The lack of appropriate outreach mechanisms may have permanently tarnished the lasting legacy of the ICTY and ICTR.¹⁹⁶ But outreach properly should consist of far more than merely updating citizens of recent developments in the truth commission. Ideally, outreach would consist of affirma-

¹⁹³ Therese Abrahamsen & Hugo van der Merwe, *Reconciliation Through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission*, CENTRE FOR STUDY OF VIOLENCE & RECONCILIATION, n.5, <http://www.csvr.org.za/papers/paptahv.htm#note5>.

¹⁹⁴ WILSON, *supra* note 121, at 227.

¹⁹⁵ James Gibson attributes part of the TRC's success to this media saturation in which the African Broadcast Corporation aired special reports on the TRC every Sunday from April 1996 until March 1998, often scoring among the highest ratings on South African television. This exposure, furthermore, was "miniscule in comparison to radio exposure, which is crucial since radio is the most widely available information medium for most South Africans." See James L. Gibson, *The Contributions of Truth to Reconciliation: Lessons from South Africa*, 50 J. CONFLICT RESOL. 409, 416 (2006) [hereinafter *Contributions of Truth to Reconciliation*]; see also JAMES GIBSON, *OVERCOMING APARTHEID: CAN TRUTH AND RECONCILE A DIVIDED NATION?* (2004).

¹⁹⁶ See *supra* note 113. As a means of repairing the damage done, or rather, the lack of positive effects, Laurel Fletcher has proposed that international tribunals implement corrective practices. First, she proposes, judges should write opinions in such a way as to give greater attention to the role of bystanders in crimes against humanity. Second, tribunals should enhance their outreach programs to not only inform local populations about the workings of international liberal legalistic justice as they currently do, but also to "correct any misperceptions that tribunal opinions exonerate the undicted or that only those who committed criminal acts contributed to the cataclysm." See Fletcher, *supra* note 100, at 1090–92.

tive steps to filter the lessons learned from the hearings down to the institutions and social actors for whom they are most relevant. This would include changes to educational curricula and the textbooks used in Israeli and Palestinian schools,¹⁹⁷ to public media campaigns informing and sensitizing people to the mission and goals of the truth commission. Outreach efforts should also tap into the grassroots peace and reconciliation movement that has started in the absence of more official processes;¹⁹⁸ these activists and ordinary citizens comprise the vanguard of social change around the issue of the conflict and could contribute significantly to helping make the commission's work resonate with average Israelis and Palestinians who may have been shielded from the worst effects of the conflict.¹⁹⁹

Another important element that should be considered under the rubric of outreach is follow-up. Both in its failure to engage local populations and its lack of a mandate to actually implement its own recommendations, particularly regarding the reparations schema it devised, the South African TRC fell short of its bold ambitions. The Sierra Leone Truth Commission, perhaps mindful of this shortfall, has been empowered to do more.

As Priscilla Hayner notes, the Truth and Reconciliation Act in Sierra Leone "sets out specific follow-up procedures that are stronger than those of previous truth commissions, and it commits the government to ful-

¹⁹⁷ For discussion of the way Israeli and Palestinian textbooks and curricula have helped shape Israeli and Palestinian national and civic identity, see Brown, *supra* note 41. Brown deals with the international controversy over the charges that the Palestinian textbooks incited hatred of Israel and Jews, which he claims "stemmed largely from an attempt to hold Palestinians responsible for the content of Egyptian and Jordanian books that were used while the [Palestinian National Authority] authored its own." *Id.* at 228 (footnote omitted). Regarding the treatment of Jews in the textbooks, Brown writes, "the [Palestinian National Authority] textbooks are more remarkable for their omissions than for their content. Palestinian schools do not teach hate through their books" *Id.* at 240-41. See also NATHAN BROWN, *PALESTINIAN POLITICS AFTER THE OSLO ACCORDS: RESUMING ARAB PALESTINE* 240 (2003) (noting that Palestinian textbooks are commonly "a politically attractive target" in the United States for "wildly inaccurate charges"). On Israel, see Naveh, *supra* note 40. As Naveh points out, a new history curriculum was introduced in Israel in 1995 that sought to expose students to new historiography, to deter dogmatism, imbue critical thinking skills and promote tolerance, but still failed to fully recognize the plight of Arab Israelis (Palestinian Israelis) or the particular narratives of Israel's over one million Russian immigrants. See *id.* at 265-66.

¹⁹⁸ See *infra* Part IV.B.2.

¹⁹⁹ See Fletcher, *supra* note 100, at 1091-92 (noting that the Special Court for Sierra Leone's Outreach Program has a very broad approach to public engagement, including awareness building among legal professionals, but also among the armed forces and the police, in schools, and colleges, and has "[t]hrough a series of Victim Commemoration Conferences . . . brought together members of government and civil society from the local, national, and international level to discuss and address concerns about the court").

filling the TRC's recommendations."²⁰⁰ Specifically, the Act calls upon the President to appoint a follow-up committee comprised of national and international members who will write quarterly public reports on the status of implementation of the TRC's recommendations. In addition, the government itself is required to submit quarterly reports on the steps it has taken to fulfill the commission's recommendations. All of these reports will be made available to the public.

In short, it is difficult to imagine an IPTC being successful unless it comes to occupy a permanent place in each society's collective psyche for at least the duration of its work, if not longer. This can only be accomplished with affirmative outreach efforts and constant engagement with civil society and the media.

V. REASSESSING THE POWER OF TRUTH COMMISSIONS

A. *Legal Stagecraft and the Uncertainties of Collective Memory*

The above discussion touched upon what an IPTC might look like and how it might function, but it is still unclear what the nature of its existence would be within the nation (or between nations). I have thus far rested on the unspoken assumption that a truth commission actually can lead to reconciliation, to the "peace beyond the peace process" that I claim is required for Israelis and Palestinians to co-exist in the post-conflict reality. But it is far from proven that truth commissions always contribute to reconciliation.²⁰¹ So we must ask challenging questions about how truth commis-

²⁰⁰ See PRISCILLA HAYNER, *THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION: REVIEWING THE FIRST YEAR* 6 (2004), <http://www.ictj.org/images/content/1/0/100.pdf>.

²⁰¹ The research from South Africa in this regard is cautiously optimistic. See *Contributions of Truth to Reconciliation*, *supra* note 199, at 410. Gibson claims:

Based on an analysis of a representative sample of ordinary South Africans, that inquiry concludes that truth and reconciliation are connected, that truth (*as promulgated by the TRC*) did *not* undermine reconciliation within any of the groups in South Africa, and that for whites, Coloured people, and those of Asian origin, truth may actually have *caused* reconciliation. And among at least some blacks—those who are not religious—truth also seemed to facilitate reconciliation. The truth and reconciliation process was certainly costly, in terms of both money and in the failure to produce retributive justice. But the clear conclusion of that research is that the truth and reconciliation process was worth its considerable price because it contributed positively to the initiation of democratic reform in South Africa.

Id. (citations omitted). Gibson also contends, albeit with less certainty, that "those subscribing to the TRC's truth are more likely to be reconciled." *Id.* at 414. Gibson also notes, however, that it may be that the TRC itself was merely an effect of the existing cultural and political institutions present in South Africa (political pluralism and a rule of law culture) which suggests that the reconciliation process would have occurred with or without the TRC's work. *Id.* at 411. As a reviewer of Gibson's book-length work notes, however, these causal arguments are extremely complicated and the proper methodology and evidence needed to

sions are experienced by those involved and whether they aid in the project of reconciliation between political others, allowing them to evolve into post-conflict citizens.

As mentioned above, scholars of transitional justice have started revisiting earlier assumptions about the nature of political transitions and the possibilities for social reconstruction in the aftermath of mass atrocity.²⁰² The most current scholarship suggests that we must not take anything for granted in a transitional situation, as backsliding into conflict always offers an easy way of deferring more difficult but necessary political compromises. The ultimate question of reconciliation is inextricably tied to interrelated questions of identity, collective memory, and the meta-narrative of nations.²⁰³ As such, the work is always messy, contingent, and hopelessly fragile, and so there can be no hard science to constructing a post-conflict future wherein true reconciliation can take root, as different segments of different communities will process the history of the conflict in vastly different ways.²⁰⁴

accurately support these claims are elusive, though Gibson does an admirable job at mitigating some of the difficulties. See David Backer, *Book Review: Gibson, J.L. (2005). Overcoming Apartheid: Can Truth Reconcile a Divided Nation?*, 39 COMP. POL. STUD. 9, 1157–68 (2006).

²⁰² See generally MY NEIGHBOR, MY ENEMY, *supra* note 36; Shaw, *supra* note 87; WILSON, *supra* note 121; *Contributions of Truth to Reconciliation*, *supra* note 199.

²⁰³ See Ernest Renan, What Is a Nation?, Lecture at the Sorbonne (Mar. 11, 1882), in BECOMING NATIONAL: A READER 42, 45 (Geoff Eley & Ronald Grigor Suny eds., 1996), available at <http://www.nationalismproject.org/what/renan.htm> (discussing the role of memory in nation-making, specifically how exploring original acts of violence can be a danger to nationalist projects); see also Jacques Derrida, *Interpretations at War: Kant, the Jew, the German*, in ACTS OF RELIGION 135, 184–85 (Gil Anidjar ed., 2002).

²⁰⁴ See Stover & Weinstein, *Conclusion*, *supra* note 99, at 326. Stover and Weinstein argue that:

[S]ocial reconstruction commences at varying times for different sectors of society. An individual's receptivity to social change, for example, may vary or be wholly absent depending on his or her experiences of war, exposure to trauma, and economic status, as well as whether he or she was a perpetrator, accomplice, victim, or bystander. Similarly, some segments of communities, hardwired to their nationalist ideologies, may never be receptive to change, while others may begin to go down the path to cross-ethnic engagement once a small factory or new school is opened in their neighborhood."

Id.

Indeed, the notion that trials and truth commissions, by offering a national ritual or performance of truth-telling, can be a cathartic process creating empathy in former political enemies, leading to the quick "healing" of a society must be viewed with skepticism. Analogies to individual healing are perhaps informative: psychotherapists have taken a critical view of the prospects for a quick, effective catharsis, and warn of the potential negative effects arising from "injudicious catharsis"—defined as a catharsis that comes prematurely, too hastily, or without the proper context in which to explore overly powerful and traumatic memories. *Id.*

Indeed, many scholars have concluded that it is extremely difficult to impose a history of any conflict on its participants; such narratives will always remain contested in the post-conflict as the survivors to the conflict struggle to process their experiences. As other scholars have shown, it is similarly challenging and perhaps unwise to impose a form of transitional justice on societies, as these contested forms will at best be marginalized and lack effectiveness and, at worst, carry the potential to provoke social unrest, and possibly a return to the violence of the past.²⁰⁵ Mark Osiel has written a great deal on twentieth century attempts to use the law to create social cohesion in the wake of administrative massacre.²⁰⁶ As Osiel points out, this strategy has been attempted in countless settings, such as in Argentina after the “Dirty War” and during the trial of Adolf Eichmann in Israel.²⁰⁷ But as Israeli Prime Minister Ben Gurion learned after the trial, he could not impose an historical meaning on Eichmann’s significance or neatly tie up the entire history of the Holocaust in one trial. The trial became an “event,” in the sense described by one of the first theorists of collective memory, Pierre Nora:

Like truth, the event is always revolutionary, the grain of sand in the machine, the accident that shakes us up and takes us by surprise . . . there is no event without critical consciousness, there is an event only when, offered to everybody, it is not the same for all.

As the Eichmann trial ably demonstrates, it is necessary to understand the sheer unpredictability of collective memory and the way that a performative truth-telling’s effects are extremely unpredictable.²⁰⁸ Osiel concludes from

²⁰⁵ See WILSON, *supra* note 121; see also Shaw, *supra* note 87.

²⁰⁶ See generally MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997).

²⁰⁷ As Hannah Arendt complains, the very purpose of the trial—not so clearly second in priority to bringing Eichmann to justice—was a pedagogic one. Israeli Prime Minister David Ben-Gurion saw it as an opportunity to teach Israelis and the world a lesson (in fact, several), the most important of which was the creation of a “national saga that would echo through the generations.” *Id.* at 15–16. Ben-Gurion sought this saga because he felt that “something was required to unite Israeli society—some collective experience . . . that would be gripping, purifying, . . . a national catharsis.” *Id.* at 16 n.15.

²⁰⁸ It is this unpredictability that causes Shoshana Felman to write about the Eichmann trial as an “event,” which she defines as the “capacity of happenings to shock and to surprise—in excess of their own deliberateness,” this following Pierre Nora’s description. Felman, *supra* note 101, at 210 n.16. The Eichmann trial was truly an event because besides creating the historical record, it unintentionally established the counter-narrative of Jewish collaboration in aspects of Nazi persecution both in the ghettos and the camps, and created space for Arendt’s “critical consciousness,” of the trial, namely, her perception of the “banality” of Eichmann’s (and by extension the Nazis) evil, a perspective that served to undermine the monumental elevation of the victim to the center of the trial. Though this critical consciousness only emerged in Arendt’s reportage, it did eventually find its way into public Israeli discourse of the trial. See Felman, *supra* note 99, at 225.

his study of deliberate attempts to forge post-conflict history that "[t]he least we might fairly expect from courts, at such trying times, is a stimulus to democratic dialogue between those who wish us to remember very different things."²⁰⁹ As Michael Ignatieff has argued,

All that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse. In Argentina, its work has made it impossible to claim, for example, that the military did not throw half-dead victims in the sea from helicopters. In Chile, it is no longer permissible to assert in public that the Pinochet regime did not dispatch thousands of entirely innocent people.²¹⁰

As in any other transitional situation, it would be foolish to think that an Israeli-Palestinian truth commission could instantaneously impose a new historical understanding on either side of the conflict. Such an attempt, argues Charles Maier, is not even necessary.

Maier notes that truth commissions reveal that both perpetrators and victims have a history, but questions to what extent they come to "share a narrative."²¹¹ To conceptualize this complex relationship to history, Maier offers a musical analogy. He explains that history must aspire not to be "harmonic," but rather, "contrapuntal."²¹² The "shared" narrative must allow the particular histories of the national groups to be woven together "linearly alongside each other so that the careful listener can follow them distinctly, but simultaneously, hearing the whole together with the parts." These different communities with distinct histories can be seen in the 'Two Nations' living in South Africa post-apartheid that are divided along socio-economic lines and continue to be separated in many ways by the legacies of apartheid even as official truth-telling and reconciliation have been pursued.²¹³

It would seem that the Israeli-Palestinian situation would facilitate this kind of contrapuntal history precisely because what is required is not *one* coherent national narrative, but rather, *two* disparate national narratives that concur and overlap beyond question on certain fundamental truths, most significantly, the fact of suffering on both sides of the conflict.²¹⁴ No

²⁰⁹ OSIEL, *supra* note 210, at 282.

²¹⁰ Boraine, *supra* note 79, at 151–52.

²¹¹ For similar conclusions, see Bar-On, *Conflicting Narratives*, *supra* note 130; Jawad, *Arab and Palestinian Narratives*, *supra* note 41.

²¹² Maier, *supra* note 107, at 274–75.

²¹³ See Statement of Deputy President Thabo Mbeki at the Opening of the Debate in the National Assembly, on Reconciliation and Nation Building, National Assembly Cape Town, 29 May 1998, <http://www.dfa.gov.za/docs/speeches/1998/mbek0529.htm>.

²¹⁴ See Dan Bar-On & Sami Adwan, *The Psychology of Better Dialogue Between Separate but Independent Narratives*, in HISTORY'S DOUBLE HELIX, *supra* note 8, at 205, 216 ("[W]here a single-state political solution emerge[s], one could think in terms of developing

more than historians strike some perfect balance between collective memory and history, can everyday citizens of the conflict come to acknowledge this very basic fact. It is such acknowledgment of basic human dignity that enables the kind of peaceful relations needed in carrying out all the many collaborated activities that will begin in full force once a minimum peace is established. As Halpern and Weinstein argue, this rehumanization process, fueled by empathic encounters, is central to any basic conception of reconciliation.²¹⁵

B. The Responsibility of the Beneficiary

Once the final permanent borders of the two-states are established, Israelis will be in a more comfortable position to begin to proceed toward this acknowledgement. This group of people—at once collaborators and beneficiaries—continue to reap the benefits of Palestinian dispossession: citizenship, economic prosperity, and the enjoyment of the basic rights Palestinians see denied on a daily basis. The continued, imbalanced power dynamic between Jewish Israelis, on the one hand, and Arab Israelis and Palestinians on the other, dictates that it is precisely this class of people who seem to hold the power for real change in the post-conflict era.

The South African TRC's Commissioners learned this lesson (of the responsibility of the beneficiary) only later:

In this process of bridge building, those who have benefited and are still benefiting from a range of unearned privileges under apartheid have a crucial role to play. Although this was not part of the Commission's mandate, it was recognized as a vital dimension of national reconciliation. This means that a great deal of attention must be given to an altered sense of responsibility; namely the duty or obligation of those who have benefited so much (through racially privileged education, unfair access to land, business opportunities and so on) to contribute to the present and future reconstruction of our society.²¹⁶

The question remains, of course, as to whether either side of the conflict, but particularly the Israeli population, will be willing to engage this altered sense of responsibility in the future.

a bridging narrative; but when there are two societies that want to live separately, side by side, a two-narrative solution seems more suitable.”).

²¹⁵ See Jodi Halpern & Harvey Weinstein, *Empathy and Rehumanization After Mass Violence*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 36, at 303.

²¹⁶ TRC Final Report, *supra* note 126, ch. 5, para. 111.

1. Post-Zionism and Palestinian Self-Critical Historiography

The current *kulturcampf* raging in Israel brought on by the rise of post-Zionism suggests that Israeli society is on its way to critically evaluating the history of the conflict but is still very much in the beginning of this process.²¹⁷ Post-Zionism stands for a variety of things and has different meanings for different groups of people, but at its core, post-Zionism is a struggle over Israeli collective and national identity and the ideological and political underpinnings of the State of Israel.²¹⁸ At the center of the post-Zionist question, along with larger questions of the Jewish character of the state, is the ongoing debate about the security of the Jews in the Middle East, which affects Jewish Israeli relations with Arab Israelis, with Palestinians, and with their other Arab neighbors. Sammy Smooha asserts that the resolution of the peace negotiations with the Palestinians will "usher in a

²¹⁷ For more on the Israeli *kulturcampf* and the rise of post-Zionism, see BARUCH KIMMERLING, *THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY* (2001) (offering an overview and analysis of the construction and deconstruction of hegemonic, secular Zionist Israeli national identity from the early years of the Zionist movement to the present); Stuart A. Cohen, *The Peace Process and Societal-Military Relations in Israel*, in *MIDDLE EAST PEACE PROCESS*, *supra* note 7, at 107. For an excellent overview of the post-Zionism debates, see SILBERSTEIN, *supra* note 62; see also Myron J. Aronoff & Pierre M. Atlas, *The Peace Process and Competing Challenges to the Dominant Zionist Discourse*, in *MIDDLE EAST PEACE PROCESS*, *supra*, at 41; Ilan Pappé, *Post-Zionist Critique on Israel and the Palestinians: Part I: The Academic Debate*, J. PALESTINE STUD., Winter 1997, at 29; Ilan Pappé, *Post-Zionist Critique on Israel and the Palestinians: Part II: The Media*, J. PALESTINE STUD., Spring 1997, at 37; Ilan Pappé, *Post-Zionist Critique on Israel and the Palestinians: Part III: Popular Culture*, J. PALESTINE STUD., (Summer 1997), at 60; BAR-ON, *supra* note 62, at 150–68; Eyal Naveh, *The Dynamics of Israeli Identity Construction Through Education in History*, in *HISTORY'S DOUBLE HELIX*, *supra* note 8, at 260 (reviewing the impact of post-Zionist discourse on the Israeli educational curriculum, particularly in the teaching of history).

²¹⁸ The philosopher Yosef Dan offers the following definition of post-Zionism:

Post-Zionism means Israeli nationalism based on territorial minimalism, without any specific social or moral aspirations, without any significant religious dimension, without the adoption of a traditional culture, without eschatological foundations, without a deep-rooted Hebrew language that draws upon its origins, and based on a desire to achieve both a fuller normalization of Israel's status among the nations and spiritual integration, from a position of equality with other cultures.

Quoted in Naveh, *supra* note 40, at 262. Naveh also notes the definition offered by anthropologist Uri Ram, who explains that post-Zionist ideology "talks about what comes or might come after Zionism in the historical sense." *Id.* It acknowledges both the "reality created by the Zionist movement in Israel/Palestine," and "the wrong that was done to the Palestinians—dispossession and oppression." Ram emphasizes, notes Naveh, that this acknowledgment does not "negate the State of Israel," but merely strives to "reform it, in the direction of de-Zionization." *Id.* In this way, post-Zionism represents a struggle to shape Israeli collective identity and "an aspiration to begin distinguishing between nation and state in Israel—in other words, to create a universal democratic framework in Israel in which no particular national tradition or ethnic group is given special status." *Id.*

quiet revolution in Israeli society and will recast Arab-Jewish relations.”²¹⁹ This trend is perhaps most evident in the growing numbers of Israeli youth and reservists conscientiously objecting to serve in the occupied territories.²²⁰ As Nadim Rouhana observes:

The weakening of the security preoccupation will have a dramatic impact on the internal dynamics of the three guidelines of Israeli policy. The contradiction between democracy and the Jewish state that was concealed behind the security concerns will emerge as the cardinal contradiction, not only in Israel’s policy toward its Arab population but also in the very structure of the state. The weakening of the security rationale will put pressure on Israeli society to face the contradiction between equality and constitutional exclusivity because many of the political and psychological mechanisms that were developed to maintain this contradiction relied on the security concerns.²²¹

Thus, while until recently, it has been possible for the State of Israel and much of the Jewish public to attribute inequality, discrimination, and different treatment of the Arab citizens to “security considerations,” this will no longer be true in the post-conflict, as the security rational argument will lose much of its force. Still, it is difficult to predict how resolution of the Israeli-Palestinian conflict will affect the positions of jihadist organizations like Hamas, Hezbollah, or the governments that back them, such as Iran and Syria.

As Israeli historian Mordechai Bar-On describes it, the post-Zionist debates have not been confined to stuffy academic discussions but are playing out within the larger setting of Israeli society,²²² though it is hard to measure what percentage of Israelis beyond the academic and artistic elites embraces post-Zionist discourse and to what extent. Eyal Naveh has also noted the extension of post-Zionist discourse beyond the university to the cultural realm, influencing “theatre, filmmaking, journalism, art, literature,

²¹⁹ Myron J. Aronoff & Pierre M. Atlas, *The Peace Process and Competing Challenges to the Dominant Zionist Discourse*, in MIDDLE EAST PEACE PROCESS, *supra* note 7, at 41, 57 (quoting Sammy Smooha).

²²⁰ See Lily Galili, *Every Man Has a Red Line*, HA’ARETZ, Mar. 31, 2002, http://www.bin.tjbeil.com/articles/en/020331_galili.html. Another group of soldiers have formed an organization called *Shovrim Shtika* (“Breaking the Silence”), which serves as a forum for them to disseminate their testimony of their own abuse of Palestinian civilians while serving in the Occupied Territories. See http://www.shovrimshtika.org/about_e.asp.

²²¹ ROUHANA, *supra* note 142, at 222.

²²² See Mordechai Bar-On, *Historiography as an Educational Project: The Historians’ Debate in Israel and the Middle East Peace Process*, in MIDDLE EAST PEACE PROCESS, *supra* note 7, at 21. Elsewhere Bar-On describes the revisionist historians—the so-called “new historians”—as engaged in “an ambitious project of reeducating Israelis. . . . The goal of the project is nothing less than to change the parameters and reformulate Israel’s perception of its own collective identity.” Bar-On, *Conflicting Narratives*, *supra* note 130, at 155–56.

and law," but points out the "conspicuous" paucity of "social movements and political bodies committed to the post-Zionist agenda."²²³ As Naveh rightly observes, the post-Zionist agenda has few backers in mainstream Israeli politics (the Arab political parties and "a few members of the extreme leftist factions" in the Knesset), and indeed, establishment politicians consider post-Zionism "loathsome," and portray it as a project to "undermin[e] the foundations of the Jewish state" and replace its iconography with that of "a state for all its citizens."²²⁴ There is good reason to suspect that official introspection and government sanctioned inquiries will not commence before a final status agreement is signed, if ever. Still, of the contemporary draft peace agreements in circulation that are sponsored by a mix of high-profile Israelis and Palestinians (none of whom are empowered by electoral politics to reach a peace settlement), all three propose some form of historical inquiry into the causes and consequences of the creation of the Palestinian refugee problem. None go further, though, and propose inquiry into the abuses of four decades of occupation, or the attacks of Palestinian terrorists on Israelis and Jews.²²⁵

For similar reasons, Bar-On has suggested that Palestinian historiography, let alone Palestinian society, is not yet prepared to enter a truly self-critical mode.²²⁶ Palestinian historian Saleh Abdel Jawad concurs in this judgment, noting in particular that the fact that "this Palestinian narrative will have to be forged in the context of an unfavorable balance of power, in the absence of a Palestinian state, and in the absence of democratic tradi-

²²³ Eyal Naveh, *The Dynamics of Israeli Identity Construction Through Education in History*, in *HISTORY'S DOUBLE HELIX*, *supra* note 7, at 244, 262.

²²⁴ *Id.*

²²⁵ See Adam Keller, A Comparison of Three Drafts for an Israeli-Palestinian Peace Agreement (2003), <http://zope.gush-shalom.org/home/en/channels/archive/1155051488/> (comparing the Gush Shalom, a left-wing Israeli peace movement, Proposal of 2001, The Ayalon-Nusseibeh Statement of Principles of 2002 and the Geneva Initiative of 2003).

²²⁶ Bar-On concludes his analysis by noting:

The lesson Palestinians should learn from Israel's revisionist historiography is not how correct they are in their own narratives but rather how self-critical they, too, must become. . . . One should not forget that we, the Israelis, are still the occupiers, and they, the Palestinians, remain the occupied, uprooted, and dispersed people. The deep and in many ways justified sense of injustice and suffering that Palestinians must confront every day and everywhere in their land makes it very difficult for Palestinian historians to be more impassioned when they investigate the roots of their humiliations. The Jews of Palestine have already achieved and established their national sovereignty and collective identity. But the Arabs of Palestine are still in the middle of their uphill struggle to realize those goals. Nevertheless, writing in this context, I believe that my Palestinian colleagues will soon attain the self-confidence that will allow them to feel totally free to develop their work as historians.

Bar-On, *Conflicting Narratives*, *supra* note 130, at 168.

tions of free inquiry makes the work more difficult but no less urgent.”²²⁷ Perhaps once Palestinians are secure within the borders of their own state, they too will be prepared as a society to explore their past with a more critical eye.

2. Grassroots Reconciliation Efforts

There are groups of Israelis and Palestinians, however, who do not want to wait for such explorations of their complicity and connectivity to the conflict to be politically correct or even officially condoned. Several Israeli-Palestinian reconciliation groups have sprouted up in the last decade.²²⁸ Many of these organizations view their missions as conducting interpersonal and inter-group peace-building irrespective of progress achieved by the political elites in the peace process itself or broader social or political movements.

One such organization, whose members were recently featured in the award-winning 2006 documentary, *Encounter Point*,²²⁹ is the Parents Circle Families Forum. The Parents Circle consists of over five hundred members, all of whom lost an immediate family member to the violence of the conflict, who come together to share their stories of loss in an attempt initiate a process of reconciliation between the peoples.²³⁰

Another innovative organization, OneVoice, has embarked on an ambitious project of trying to “amplify the voice of the overwhelming but heretofore silent majority of moderates who wish for peace and prosperity.”²³¹ In addition to training youth in community leadership and conflict

²²⁷ Jawad, *Arab and Palestinian Narratives*, *supra* note 41, at 103–04.

²²⁸ The Alliance for Middle East Peace, a U.S.-based umbrella organization that helps organize and advocate on behalf of thirty-eight reconciliation and peacebuilding projects, has information on various groups. See The Alliance for Middle East Peace, About ALLMEP, <http://www.allmep.org/documents/aboutallmep.pdf> (last visited Jan. 12, 2007); see also Middle East Peace Dialogue Network, Inc., Mission Statement, <http://mpdn.org> (last visited Jan. 12, 2007) (listing links to organizations involved in Jewish-Arab coexistence and Israeli-Palestinian reconciliation efforts).

²²⁹ See Just Vision, About the Film: Encounter Point, http://www.justvisions.org/about_the_film.php (last visited Jan. 12, 2007).

²³⁰ The Parents Circle claims that:

Palestinians and Israelis have so far avoided recognizing the pain of the other side. A reconciliation process initiated by the Families Forum can put victims, who refuse to revenge their loss and choose to reconcile at the forefront of public awareness. In doing so it will humanize both sides and will act as an example to the Israeli and Palestinian people.

The Parents Circle—Families Forum, Long Term Goals, http://www.theparentscircle.com/Pages.asp?page_id=7 (last visited Jan. 12, 2007).

²³¹ OneVoice—About Us, <http://www.onevoicemovement.org/wps/portal> (follow “About OneVoice” hyperlink). OneVoice “deploys cutting edge technology, electronic democracy, a

resolution skills, supporting pro-peace political candidates, and other activities.²³² OneVoice has also launched a series of referenda—the Citizen Negotiation Platform—on the key issues of the peace process with the aim of demonstrating by population survey that there is a broad mandate for making particular concessions on both sides. Over 110,000 Israelis and Palestinians voted on the issues through several rounds of weighted voting, coming to some common ground on many of the most difficult of the conflict's various issues.²³³

Other initiatives come on a smaller scale, such as the collaboration between Israeli conductor Daniel Barenboim and the late Edward Said to create a joint Israeli-Palestinian orchestra, the West-Eastern Divan, or attempts by educators to create “double narrative” teaching guides addressing various historical events in the conflict for use in Israeli and Palestinian schools.²³⁴ The work of many of these organizations has been supported by the Alliance for Middle East Peace, a U.S.-based umbrella organization consisting of twenty-eight NGOs helping to raise awareness about reconciliation groups as well as increase federal appropriations to support these groups' important work.²³⁵

network of activists and member organizations, and a broad cadre of experts, dignitaries, celebrities, business leaders and spiritual authorities.” *Id.*

²³² See OneVoice by Numbers, <http://www.onevoicemovement.org/wps/wcm/resources/file/eb02a5088e43e48/OVBYNUMBERS.pdf> (describing the scope and impact of OneVoice's activities).

²³³ The Citizen Negotiation Platform was created by an Israeli-Palestinian panel of community, religious, and other leaders who collaboratively broke the conflict down its “10 most seemingly intractable areas of dispute” (the end of the conflict, education and reconciliation, holy sites, Jerusalem, security, the end of the occupation and terrorism, settlements, borders, and a two-state solution). OneVoice Movement FAQ, <http://www.onevoicemovement.org/wps/portal> (follow “FAQs” hyperlink). They then presented potential resolutions to these problems to Israelis and Palestinians through several rounds of voting. As their website describes the project, “[w]here there was no consensus between Israelis and Palestinians, the council of experts was asked to come up with new solutions, based on feedback from the average Israeli and an average Palestinian. Thus a negotiation system was created to engage citizens on both sides and build a popular mandate for peace.” *Id.*

²³⁴ Bar-On & Adwan, *supra* note 218.

²³⁵ In an attempt to build upon the “Wye River People-to-People Exchange Programs” of 2000, which made a one-time grant of ten million dollars to help fund seventeen Israeli-Palestinian coexistence initiatives, the Alliance for Middle East Peace (ALLMEP) is currently involved in a campaign to create a special “Middle East People-to-People Coexistence Program” that would earmark ten million dollars in funds exclusively for Middle East coexistence projects. A special Middle East-focused fund is needed because, though ALLMEP helped increase global funding of coexistence projects from eight million dollars in 2004, to twelve million dollars in 2005 and fifteen million dollars in 2006, USAID has since imposed a cap of five grants per region on coexistence funding. The Middle East NGOs submit forty to fifty grant applications themselves, ten times as many as any other region, and thus, a separate fund would be required to augment Middle East funding without detracting from coexistence initiatives elsewhere. See ALLIANCE FOR MIDDLE EAST PEACE, SUPPORT MIDDLE

To be sure, these are positive signs in an otherwise perennially bleak spot in the world. It will also be vital for an IPTC's outreach efforts to tap into these movements and organizations to build support not only for its own work, but to further the overall project of reconciliation. This lack of coordination and follow-through hampered the overall impact of the South African TRC's work,²³⁶ just as the geographical distance and lack of outreach efforts by the international criminal tribunals has diminished the impact of their work on those societies.²³⁷ If Israelis and Palestinians decide to embark on this path, it will require a great deal of partnerships to be forged not only across borders, but within them, as government actors and civil society groups must work to complement each other's efforts.²³⁸

VI. CONCLUSION AND THE UNWRITTEN EPILOGUE

This article aims to present a realistic picture of the real prospects for a "peace beyond the peace process"—particularly in the form of an Israeli-Palestinian Truth Commission—as well as to portray a sober depiction of the true powers of truth commissions to facilitate reconciliation in the aftermath of political violence. At this stage there is no conclusion; the conflict continues to rage with misunderstandings and resentment as deep as ever before, even as both Israeli and Palestinian societies recognize the inevitable resolution of the conflict in a negotiated compromise resulting in a two-state solution. Similarly, transitional justice, though past its infancy, remains in a stage of development and a process of maturation that will only be furthered by more empirical work on the effects of transitional mechanisms on post-conflict reconstruction. But at this point, research conclusions must remain tentative, particularly because reconciliation—however it is defined—is the work of generations, and the causal mechanisms from which it originates cannot be measured with true precision.²³⁹

But we do know a great deal from other instances of intense conflict. We know that people, as individuals and collectively, have an impulse for justice and for recognition of their rights when they have been trampled.

EAST PEACE-BUILDING NGOS IN FY '07 (unpublished, promotional material on file with author). As of September 2006, the House of Representatives' FY 2007 Foreign Operations appropriations bill included six million dollars for a special Middle East fund, but ALLMEP had met resistance for similar provisions in the Senate (email interchange with Avi Meyerstein, founder of ALLMEP) (on file with author).

²³⁶ See Humper, *supra* note 119.

²³⁷ See Fletcher & Weinstein, *supra* note 111, at 33.

²³⁸ See Kirsten McConnachie et al., *Truth Commissions and NGOs: The Essential Relationship (The "Fratr Guidelines" for NGOs Engaging with Truth Commissions)*, INT'L CENTER FOR TRANSITIONAL JUST., Apr. 2004, <http://www.ictj.org/images/content/1/0/106.pdf>.

²³⁹ See *Contributions of Truth to Reconciliation*, *supra* note 197, at 409; see also Stover & Weinstein, *Conclusion*, *supra* note 99, at 323.

We also know that true social change cannot take place in the absence of institutional reform. To the extent that a truth commission can facilitate both processes—recognizing the suffering of individual victims and casting a critical gaze at the institutions of rule that enabled such violations—it seems not only worthwhile, but imperative, to pursue the establishment of such an institution in the post-conflict. Though I have sketched the outlines for how an IPTC might function best, all questions of mandate and design will necessarily be tempered by the power relations of the post-conflict and the preparedness of the two peoples for engaging one another and history.

As idealistic as this all may seem, to justify establishing an IPTC we need not view it as a panacea or a vehicle for salvation and redemption for whole societies. A truth commission may have a limited, inherent value—what we can call a “procedural value”—without satisfying the expectations pronounced by the platitudes that remain the dominant discourse in transitional justice.²⁴⁰ On the contrary, perhaps all that can be anticipated from a truth commission is merely the instantiation of a new dynamic between former political enemies; the content of the historical narrative it will produce, the transformative potential of the interpersonal encounters to be had during the victim and perpetrator hearings, and the way the entire project will be received and integrated into Israeli and Palestinian life is wholly contingent. But even with these uncertainties and minimal assessments, a truth commission seems indispensable to the future coexistence of Israelis and Palestinians.

Nonetheless, detracting voices rightly observe that in some instances, “truth-telling” on so grand a scale, is not prudent. It may conflict with localized popular conceptions of what justice and reconciliation entail, diminishing the legitimacy needed to encourage robust participation in a commission’s work and limiting its ability to carry out its mission effectively and have a real impact on society.²⁴¹ Others question the power of both retributive and restorative justice to bring about reconciliation and even warn that truth and justice seeking can reanimate traumas, inflict new ones, and possibly work against reconciliation because it reminds participants of their sufferings and reaffirms their victim ideologies and hatred of their political others.²⁴² Integrating these criticisms, and mindful of the po-

²⁴⁰ See generally Stover & Weinstein, *supra* note 82, at 4–5 (challenging the “vague assertion” that international criminal trials should produce reconciliation).

²⁴¹ See Shaw, *supra* note 87; see also WILSON, *supra* note 121, at 227.

²⁴² See Shaw, *supra* note 87, at 7 (noting a 1997 study by the Trauma Center for Victims of Violence and Torture in Cape Town, which found approximately sixty percent of those who testified in the South Africa’s TRC felt worse after testifying); Stover & Weinstein, *Conclusion*, *supra* note 99, at 323 (finding no connection between criminal trials, at any level—international, national, and local/traditional—and reconciliation, and in particular, that criminal trials of local perpetrators often divided small, multi-ethnic communities because of their

tentially overstated powers attested by truth commission advocates, the ultimate question for Israelis and Palestinians is whether a truth commission has the ability to do more good than harm for their respective societies. In forwarding a procedural conception of the power of truth commissions, I would argue that, at a minimum, an IPTC should be able to do just this.

In establishing a truth commission, Israelis and Palestinians will embark on a structural shift, radically altering the calculus of the conflict from one of violence and the mutual denial of conflicting narratives, to one of peaceful negotiation and recognition of the other's narrative of suffering. This minimal achievement—continuing the process of negotiation, compromise, and rehumanization—is not something to be taken for granted given the duration and intensity of this conflict over the last century. Even from this minimalist account of the power of truth commissions to “heal” societies, it seems that without such a commission, Israelis and Palestinians may never achieve peaceful coexistence.

