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Arbitrating the Israeli-Palestinian Territorial Dispute: A Riposte

In an insightful and original article Asaf Siniver argues that the current formula for resolving the Israeli-Palestinian conflict—bi-lateral talks between Israel and the Palestinians backed by US mediation—has been exhausted. Arbitration, he contends, should replace the now defunct framework for negotiations. It would serve not only to solve the territorial dispute between Israel and the Palestinians over the West Bank, but might also create the momentum required to conclude a binding agreement on other important issues: e.g., Jerusalem, the fate of Palestinian refugees, and the settlements. New ways of thinking about how to resolve the Israeli-Palestinian conflict are to be welcomed, but the notion that arbitration could serve as the way forward seems flawed.

First, Siniver's argument is based on an incorrect presentation of the successful arbitration process between Israel and the Egypt over Taba, as a precedent for resolving the dispute between Israel and the Palestinians over the West Bank. Israel and Egypt entered the arbitration process over Taba in 1986, after signing and implementing their peace agreement. This involved Israel's withdrawal from the Sinai Peninsula bar the Taba area. In 1986 the peace process had proved resilient to several formidable challenges: the assassination of President Anwar Sadat, who initiated the Israeli-Egyptian peace process, and the 1982 Israeli invasion of Lebanon. The arbitration process was completed in 1988, by which time the Israeli-Egyptian peace process had survived a third challenge: eruption of the first Palestinian Intifada. Thus, arbitration as a tool for conflict resolution in the Israeli-Egyptian context was introduced only after peace – albeit a cold peace - between the two countries had become an established fact.

By contrast, the Israeli-Palestinian negotiations neither yielded nor implemented a peace agreement. They resulted in interim agreements (1993, 1994, 1995), which were partially implemented, were subject to much dispute, and were renegotiated, for instance, in the Wye Summit (1998). Also, the Israeli-Palestinian process has not proven resilient to challenges similar to those that tested the Israeli-Egyptian peace process, for example, assassination of Israel's Prime Minister, Yitzhak Rabin. Thus, an analogy between arbitration over Taba and resolution of the dispute over the West Bank is unwarranted. Siniver correctly reminds us that efforts at mediation should be located in their specific temporal and spatial contexts and judged accordingly. The same should apply to analogies between past attempts at arbitration and its potential contemporary utility.

The false analogy between arbitration over Taba, and the West Bank is not the only problem with applying an arbitration mechanism to resolving the territorial dispute over the West Bank. Another and possibly more crucial problem derives from the notion that good faith between parties is a precondition for entering arbitration, let alone implementing it. Yet, surely, one of the key factors that has prolonged negotiations between Israel and the Palestinians - for almost two decades - is precisely the lack of good faith between the two sides. With the possible exception of the two years (1993-1995) before Rabin was assassinated, lack of good faith has marked negotiations between Israel and the Palestinians. The question that arises then, is how, in the absence of good faith, could arbitration, which is predicated on good faith, prove useful for resolving a dispute over the deeply contested territory of the West Bank, or even parts of it? Unless the process of arbitration creates good faith between two sides, which would seem not to be the case here, it will be doomed from the outset.

A further problem is the legal complications that would be involved were arbitration to be used to resolve the territorial dispute over the West Bank, or even as a sympathetic framework for settlement. As Siniver points out, when Israel and Egypt embarked on the arbitration process in 1986, they were in agreement that 'the border between the two countries was to be demarcated along the recognized international border between Egypt and the former mandated territory of Palestine'. Thus, the legal status of the territory was not disputed, only the location of the border. However, Israel and the Palestinians do not have a common view about the legal status of the West Bank. The Palestinians contend that the West Bank is under occupation and that Israeli settlements are illegal. Israel, on the other hand, claims that the West Bank was not seized from a 'recognized sovereign', but was secured in a war of self defence against Jordan, whose seizure of the West Bank in 1948 was never recognized by the international community. Israel argues that since the West Bank did not have a legitimate sovereign, under international law it could not be considered occupied but rather a disputed territory.[1] Given the current nationalistic political trends in Israel Siniver correctly identifies, and the increasing rapprochement between Hamas and Fatah, it would seem extremely unlikely that Israel and the Palestinians could agree a common international legal definition of the West Bank. If the two sides involved in the potential arbitration cannot agree on this most basic feature of the legal status of the territory being disputed, on what basis could they proceed towards arbitration?

What else might break the current deadlock in the Israeli-Palestinian conflict? The case for arbitration is based on the notion that mediation is the weakest link in the current peace negotiation formula. However, the current stalemate could be explained not in terms of ineffective mediation, but as testament to the shortcomings of negotiations premised on *bi-lateral* talks between Israel and the Palestinians. Clearly, as the past 20 years have shown, the

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[1] http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/11/Israel-%20the%20Conflict%20and%20Peace-%20Answers%20to%20Frequen, accessed, 12 Jan, 2012.

two sides cannot resolve the conflict by themselves. This, and not mediation, is the key problem with the current framework.

In 2002 the Arab League adopted a formula designed to shift Israeli-Palestinian negotiations from a bi-lateral to a multi-lateral track process. The Arab Peace Initiative (API), as it is known, demands that Israel withdraw fully from the territories seized in the 1967 war and agree to the establishment of a Palestinian state in the Gaza Strip and West Bank, with East Jerusalem as its capital. It stipulates also that the Palestinian refugee problem should be resolved in accordance with UN Resolution 194, which states that Palestinian refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date. In return, the Arab states will consider the Arab-Israeli conflict to be at an end, and relations with Israel will be normalized. The API offers clear advantages for key players in the Arab-Israeli conflict, including Saudi Arabia which first proposed the deal in 2002. For Israel it provides a viable political framework for a resumption of the Arab-Israeli peace process and the normalization of relations that Israel so craves. For the Palestinians, the API constitutes a crucial contribution to help compensate for the fragility of their current political system given the conflicts between Fatah and Hamas in recent years, which have jeopardized any prospects for achieving statehood for some time to come. For Saudi Arabia, the API is a political tool that can be used to curtail Iran's growing political and military power across the Middle East since the invasion of Iraq. This convergence of interest in the API—emanating from different motivations—could create the conditions for a meaningful revival of the Arab-Israeli peace process backed by US mediation.

Of course, there are a number of formidable obstacles to the API. One source of difficulty is Hamas's refusal to meet the three basic requirements of the Quartet—renouncing violence, recognizing Israel, and respecting previously signed agreements between Israel and the Palestinian Authority (PA). However, previous statements by the head of the movement's political bureau, Khaled Mashal, suggest that

Hamas's stance could change,[2] especially if backed by the Arab League. The stipulation that the Palestinian refugee problem should be resolved in accordance with UN resolution 194 constitutes another problem. This proposed solution is incompatible with Israel remaining a Jewish and democratic state, and is not politically, economically or socially viable to allow all refugees, and three generations of their offspring, into Israel. Yet the API terminology on this issue is sufficiently vague to allow compromise should this be political objective of the two sides. However, the most significant hurdle is the uncertainty created by the Arab uprisings, especially the turmoil in Syria. This process may or may not create more auspicious conditions for a re-launching of the API: it is too soon to tell. But if conditions become favorable, the international community should grasp this important opportunity rather than ignoring it as it has done since 2002.

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[2] Abbas: Hamas agreed to renounce terror, Ynet, http://www.ynetnews.com/articles/0,7340,L-4162912,00.html, accessed 12 January, 2012.