NEGOTIATING IMPLEMENTATION OF A PEACE AGREEMENT: LESSONS LEARNED FROM FIVE YEARS AT THE NEGOTIATING TABLE

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I. INTRODUCTION

For five years (1994–1999), I directly negotiated on-the-ground implementation of the Oslo Peace Process in the Gaza Strip. In my capacity as the Judge Advocate General’s (“JAG”) Corps Legal Advisor to the Israel Defense Forces (“IDF”) Commander, Gaza Strip (1994–1997), I had primary responsibility for both interpretation and negotiation, first for the Gaza-Jericho Agreement and subsequently for the Interim Agreement as it applied to the Gaza Strip. Over the years, I have consistently resisted numerous offers and suggestions to address my involvement in the peace process publicly—orally or in print. Thanks to a fortunate convergence—the gracious offer by the editors of this distinguished journal and the persistent and friendly urgings of my friend and colleague, Professor Jim Holbrook—I have decided to put pen to paper (actually, * Professor of Law, S.J. Quinney College of Law, University of Utah (amos.guiora@law.utah.edu). In the midst of the long hours spent negotiating, I found that convincing myself that my efforts would contribute to a more secure future for my children was the most powerful motivation to keep at it. As a father to three children who have served, are serving, and will serve in the IDF, I clearly have a dog in the fight. It is to them that this article is dedicated in the hope that there will be peace in their lifetime. My involvement would not have been possible without my wife, Hagit, to whom I owe a never ending debt for her extraordinary understanding and patience. Many thanks to Laurie Blank for her important insights and comments and to Vanessa Clayton (J.D. expected 2011, S.J. Quinney College of Law, the University of Utah) for her invaluable editorial assistance.

1 My involvement and responsibility were extended, even though I was assigned to a different posting in the JAG Corps.


fingers to keyboard).\(^4\) My motivations are two-fold: to address an issue largely ignored in the literature and to present “lessons learned” for future negotiators. It goes without saying that nothing would bring me greater satisfaction than the thought that this article would contribute (however modestly) to an Israeli–Palestinian peace process. My Palestinian colleagues would say: inshallah (God willing).

It is not my intention in writing this article to cast aspersions as to the motivations and conduct of those involved, either in the drafting and negotiating of the Agreements or in their implementation.\(^5\) I leave that work to the historians and pundits. Rather, it is my goal to provide the reader with a bird’s eye view of the process and to discuss the “lessons learned” from it, in the hope of facilitating a more effective process next time. In doing so, I deliberately do not include names and specific positions of individuals because that is not the essence of this article. The broader issues are far more important and long lasting than the individual actors when examining the lessons learned from the process.

A. Short History

A short historical\(^6\) re-counting is in order: as a result of the 1967 Six Day War, Israel gained control of the Sinai Peninsula and the Gaza Strip from Egypt, the West Bank and East Jerusalem, which includes the Old City of Jerusalem, from Jordan, and the Golan Heights from Syria.\(^7\) The Gaza Strip and the West Bank are relevant to the focus of this article. The State of Israel did not annex either the Gaza Strip or the West Bank. Instead, it established a military government under the command of an IDF Gen-

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\(^4\) Professor Holbrook invited me to lecture before his negotiation class in the fall of 2007; much of this article is based on that lecture, and thanks to the extraordinary efforts Prof. Holbrook made to take notes of my talk, which he forwarded to me with a simple directive: “write an article about this.”

\(^5\) For purposes of clarity, the term “implementation” refers to on-the-ground negotiation of how the Agreements negotiated in Oslo would be implemented.

\(^6\) Discussing the history of the Middle East is fraught with danger; with no political agenda behind this article, I will use terms that reflect common usage and leave the political and historical debate for another day.

\(^7\) Michael B. Oren, Six Days of War: June 1967 and the Making of the Modern Middle East 308 (2002).
In accordance with international law, the existing civilian institutions were left intact; that said, a “military occupation” had still been implemented. From 1967–1987, the “occupied” Palestinian population was largely docile, tolerating the “occupation” with minimal resistance. In December 1987, a number of residents of the Gaza Strip were killed in a traffic accident caused by an Israeli driver. Long-simmering tensions quickly came to the fore in the immediate aftermath, arguably resulting in the Palestinian intifada.

Thousands of Palestinians—initially in the Gaza Strip and shortly thereafter in the West Bank—took to the streets, violently demonstrating against the occupation by throwing stones and then Molotov Cocktails at IDF soldiers and vehicles. Within a few months, Palestinians suspected of collaborating with the IDF and General Security Services were murdered. The Israeli authorities were caught completely off-guard; only days before, the Ministry of Defense had published a report stating, in part, that the Palestinian population in the West Bank was “grateful” to the IDF. The Palestinian leadership (from Tunis, following the eviction from Lebanon) was similarly surprised at the intensity and duration of these demonstrations and was also largely playing catch up with local Palestinian leadership.

9 See id.
11 See MERRIAM-WEBSTER ONLINE, Intifada, http://www.merriam-webster.com/dictionary/intifada (last visited Mar. 17, 2010). “Intifada” has loosely been translated to mean “ridding of.” In classical Arabic, “intifada” denotes, shaking-off, shrugging, shuddering, shivering; it is what you do to get rid of something that is attached to you or bugging you. The modern Arabic usage is basically figurative; it uses the shaking-off or shrugging-off figuratively to denote a popular uprising against an oppressor.
13 Today the General Security Services is known as the Israel Security Agency (“ISA”). During this period, I served as a Military Prosecutor in the West Bank Military Court. In December 1987, I appeared in the first intifada-related trial (in Hebron).
15 This was an internal IDF report that I recall holding in my hands at the same moment that I heard this news.
In 1992, the Labor Party won the Israeli general elections, and Yitzhak Rabin became Prime Minister. In August 1993, the Israeli media reported that Israeli and Palestinian negotiators had met in secret in Oslo and drafted a Declaration of Principles for the resolution of the Israeli-Palestinian conflict. In September 1993, Prime Minister Rabin and Palestine Liberation Organization (“PLO”) Chairman Yasser Arafat, President of the new Palestinian Authority, signed the Declaration in the presence of President Clinton at a ceremony on the White House lawn. In Cairo, May 1994, Rabin and Arafat signed the Gaza-Jericho Agreement, according to which a Palestinian state would be established within five years.

Palestinians and Israelis woke up to a new era: a peace process intended to enable both peoples, after years of conflict and strife, to move ahead under the structure of a negotiated peace. Although there was skepticism and opposition on both sides, the sense of optimism was undeniable.

B. The Agreement

A brief description of the Gaza-Jericho Agreement (“Agreement”) is necessary, even though this Article’s primary focus is...
on lessons learned rather than an analysis of the Agreement. The Agreement, in accordance with the Declaration of Principles (and as reflected in the subsequent Interim Agreement), called on the newly-created Palestinian Authority ("PA"), which had stepped into the shoes of the PLO, to assume responsibility for civilian and criminal affairs in the Gaza Strip and for Jericho, which is located in the West Bank.\footnote{22} The IDF maintained responsibility for all security affairs within the Gaza Strip, in the sea and air surrounding Gaza and on the "border"\footnote{23} between Gaza and Israel.\footnote{24} In addition, the PA was to be a partner in counterterrorism, particularly against Hamas and the Islamic Jihad.\footnote{25} Israel therefore supplied weapons and vehicles to a Palestinian police force created in the context of the Agreement.\footnote{26}

To symbolize the partnership, joint patrols consisting of Palestinian police and IDF soldiers were established, as were District Coordination Offices ("DCO’s") to facilitate joint resolution of on-the-ground issues emanating from the Agreement and the new reality it represented.\footnote{27} Although Israel maintained responsibility for granting entry permits into Israel from Gaza,\footnote{28} the DCO’s were intended to enable Palestinian participation in the process. The IDF maintained the right to arrest and engage Palestinians suspected of involvement in terrorism,\footnote{29} but the Agreement’s underlying philosophy was to create mechanisms and infrastructure for the PA to assume responsibility with respect to counterterrorism. For example, the Agreement called on the PA to extradite Palestinians suspected of involvement in terrorism against Israel.\footnote{30}

The Agreement called for the creation of a “Safe Passage” between the Gaza Strip and the West Bank.\footnote{31} While the Agreement viewed “the West Bank and the Gaza Strip as a single, territorial unit,"\footnote{32} the geographical reality seems to suggest that the phrase was used instead for political or negotiating purposes. Safe Pas-

\footnote{22}{\textit{Id.}}

\footnote{23}{The word “border” is in quotations because, according to international law, there is no border between a state and a non-state, so the border between Israel and Gaza has never been officially recognized.}

\footnote{24}{Gaza-Jericho Agreement, \textit{supra} note 2, at art. VIII, § 1.}

\footnote{25}{\textit{Id.} at art. IX, § 1; \textit{see also} Annex I, art. VIII.}

\footnote{26}{\textit{See id.} at art. IX, § 3; Annex I, art. III.}

\footnote{27}{\textit{Id.} at art. VIII, § 3.}

\footnote{28}{\textit{Id.} at art. VIII, § 1.}

\footnote{29}{\textit{Id.} at art. VIII, § 1; art. XVIII.}

\footnote{30}{\textit{Id.} at art. XVIII.}

\footnote{31}{\textit{Id.} at art. XI; Annex I, art. IX.}

\footnote{32}{Oslo Agreement, \textit{supra} note 17, at art. IV.}
sage was extraordinarily important for Arafat because if implemented, it would enable Palestinians to travel between the two areas of the PA. Although it would not physically connect the Gaza Strip and West Bank, Safe Passage would represent a meta-physical as well as a political connection. I will return to Safe Passage because its negotiation on-the-ground represents and manifests many of the lessons learned in this article. Safe Passage was successfully negotiated but its actual implementation was short-lived. Furthermore, the Agreement called for the establishment of a seaport and an airport in the Gaza Strip. The former was created but subsequently destroyed by the IDF, and the latter never came to fruition.

The Agreement called for the establishment of three distinct joint committees charged with its implementation: a Joint Civil Affairs Committee, a Coordination and Cooperation Committee for Mutual Security Purposes, and a Legal Affairs Committee. The

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Plans for the establishment of a port in the Gaza Strip in accordance with the Declaration of Principles, its location, and related matters of mutual interest and concern, as well as licenses for vessels and crews sailing on international voyages will be discussed and agreed upon between Israel and the Palestinian Authority taking into consideration the provisions of Article X of this Agreement. To this end a special committee will be established by the two sides.

34 Id. at Annex I, art. XII, § 8.

Security of the Airspace, Commercial, domestic and international air services to, from and between the Gaza Strip and the Jericho Area may be operated by Palestinian, Israeli or foreign operators approved by both sides, certified and licensed in Israel or in ICAO member states maintaining bilateral aviation relations with Israel. Arrangements for such air services, beginning with a service between Gaza and Cairo using two (2) fixed-wing aircraft with capacity up to fifty passengers each, as well as arrangements regarding the establishment and operation of airports and air terminals in the Gaza Strip and the Jericho Area, will be discussed and agreed upon by the two sides in the JAC.


A Joint Civil Affairs Coordination and Cooperation Committee (hereinafter “the CAC”) and two Joint Regional Civil Affairs Subcommittees for the Gaza Strip and the Jericho Area respectively shall be established in order to provide for coordination and cooperation in civil affairs between the Palestinian Authority and Israel, as detailed in Annex II.

37 Id. at Annex I, art. VIII, § 3.

A joint Coordination and Cooperation Committee for mutual security purposes (hereinafter “the JSC”), as well as three joint District Coordination and Cooperation Offices for the Gaza district, the Khan Yunis district and the Jericho district respectively (hereinafter “the DCOs”) are hereby established as provided for in Annex I.

38 Id. at Annex III, art. I, §§ 4, 4(b)(2). In addition, and without derogating from the territorial jurisdiction of the Palestinian Authority, Israel has the power to arrest and to keep in custody individuals suspected of having committed offenses which fall within Israeli criminal
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Security Affairs Committee was responsible for negotiating all security related matters relevant to the Gaza Strip, in particular how the IDF and PA were to establish mechanisms for cooperation in combating Palestinian terrorism;\textsuperscript{39} the Civil Affairs Committee was responsible for developing mechanisms to facilitate Palestinian responsibility for non-security related issues pertinent to daily life,\textsuperscript{40} and the Legal Affairs Committee (which rarely met) was responsible for a variety of legal issues, including extradition requests submitted by Israel for Palestinian terrorists (no extradition request was ever met).\textsuperscript{41}

For three years, in my capacity as the IDF Legal Advisor, I was the only individual to serve full-time on all three committees. Some individuals who were members of one committee would occasionally participate in a meeting of another committee.\textsuperscript{42}

II. IMPLEMENTING THE AGREEMENT: LESSONS LEARNED

In July 1994, I participated in what I believe to have been the first meeting of the Civil Affairs Committee. The meeting’s purpose—as briefly explained to me—was to establish procedures and mechanisms for the committee. Unfortunately, and most telling for our purposes, the PA representatives had a fundamentally different agenda. The meeting was essentially a dialogue of the deaf, which is why it is important to discuss its larger significance in the context of “lessons learned.” From the Israeli perspective, the two sides had turned a page and were now equals in this venture in terms of developing infrastructure for the negotiation and implementation of the Agreement. Palestinians, however, were requesting entry permits for family and friends at the meeting, indicating that their perspective was still one of being as if under the authority of the Israelis rather than as if acting in partnership with them. Up to that point, we had not appreciated that the shift from being jurisdiction as noted in paragraphs 2 and 7 of this Article, who are present in the Territory, in the following cases:

In the event that such an individual is suspected of having committed an offense against Israel or Israelis, and there is a need for further legal proceedings with respect to that individual, Israel may retain him or her in custody and the question of the appropriate forum for prosecuting such a suspect shall be dealt with by the Legal Committee on a case-by-case basis.

\textsuperscript{39} See supra, note 2, at Annex I, art. VIII, § 3.
\textsuperscript{40} See supra note 2, at Annex I, art. III, § 5.
\textsuperscript{41} See supra note 2, at Annex III, art. I, §§ 4, 4(b)(2).
\textsuperscript{42} Unlike prior positions, the PA did not name a counterpart to my position.
“occupied” by Israel to being in “partnership” with Israel was an incredibly dramatic change and would therefore take some time to fully integrate into the Palestinian mindset.

Furthermore, there had been no preliminary preparatory meeting (at least one to which I had been invited) addressing this major change in Israel-Palestinian relations. Instead, we simply walked into the room designated for the meeting, introduced ourselves to the Palestinians, and began the process. The process was not a process because it was readily apparent that mutuality of purpose, goal, and mechanism were clearly missing. That is, while each side had an internal understanding regarding the end purpose of the meeting, each side lacked understanding of the other side’s agenda. Simply stated, we were meeting for different and distinct purposes as reflected in our different understandings of each other’s practical and existential perspectives.

Perhaps this circumstance should not have been a surprise since, after all, it was the first meeting intended to begin the process of implementing a peace agreement. Despite that fact, my surprise reflected an impression that I had then and in innumerable meetings thereafter: that the two sides did not share a common understanding of why we were meeting. It was publicly stated that we were meeting to implement the Agreement, but I believe that there was a fundamental disconnect regarding what the phrase “implementing the Agreement” meant.

Perhaps, in retrospect, this disconnect was inevitable. After all, the Palestinians had lived under an occupation—and all that it entails—for twenty-seven years. Although we expected (or possibly hoped) that turning the page would be instantaneous in an effort to forge ahead, greater attention should have been paid to the psychology of the implementation process. What the IDF referred to as “changing of the disc,” articulating a fundamentally different paradigm defining the changed relationship between the parties, would actually be far more complex and difficult than anticipated by those who drafted the Agreements. In many ways, negotiating implementation demonstrated the profound gap between the sides and the long road that truly lay ahead.

By analogy, in writings and lectures elsewhere, I have criticized the U.S. military for paying insufficient attention to the soft elements of combat (e.g., teaching language skills, developing understanding of cultural and tribal nuance) with respect to Iraq and Afghanistan. The same criticism can be applied to how we approached negotiating sessions because we were, frankly, insuffi-
ciently sensitive to the radical transformation required of the Palestinian side. Although mistrust was inevitable given the history of the Israeli-Palestinian conflict, that may have been minimized if greater attention had been paid to the existential transformation required to move ahead.

That first meeting of the Civil Affairs Committee provides a useful jumping-off point for the lessons learned. The architects of Oslo, on both sides, did not fully appreciate the enormous complexity of implementing what they drafted. In this failure to grasp the nature of the task, they left those of us at the negotiating table with one key overarching lesson: implementers must have sufficient guidelines and structure regarding how an agreement is to be implemented on-the-ground, as well as clear instructions with respect to the true end game.

While I do not know the tone and tenor of the Palestinian internal discussion, our meetings were marked by an increasing realization that we were two ships passing in the night. Perhaps negotiating realities required vagueness, perhaps wiggle room was essential for domestic political consumption, perhaps lack of clarity reflected the personalities involved (including the leaders on both sides), but all these significantly impeded the on-the-ground implementation process. To be blunt, those of us mandated to negotiate implementation found ourselves wondering what the drafters intended.

The Oslo architects, with whom I never met, may have expected this, but perhaps they never fully considered or determined the true end game. Either way, the vagueness of the language they used, and, frankly, the absolute lack of direction they provided, left the implementers, including myself, in the position of trying to create agreements from scratch. In other words, those responsible for implementation were forced to assume the role of strategic (not tactical) negotiators because of the very limited guidance the Oslo language provided to us. Those of us negotiating implementation believed that the architects had addressed the big picture issues and we, the implementers, were to attend to the nuts and bolts. Their fundamental failure to provide us with clear guidelines meant that we, the implementers, were articulating policy.

That frustration was particularly relevant to the negotiating of the Safe Passage Agreement, which was ultimately signed in a public ceremony in Jerusalem. The history of its negotiation is partic-

\footnote{43 Oslo Agreement, supra note 17.}
\footnote{44 Gaza-Jericho Agreement, supra note 2.}
ularly telling in the context of the lessons learned. A quick recounting is in order: one morning I received a phone call from a senior IDF Commander, who instructed me to meet that evening with a senior PA security official in order to hear what the PA “wants with respect to the Safe Passage.” So began an extraordinary period in my professional life.

My involvement in the Safe Passage negotiations serves, in many ways, as the core of many—if not most—of the lessons learned that I suggest in this article. To facilitate the reader’s understanding, the ten points below are the core lessons I propose addressing:

1) Assume neither side understands the other: parties have fundamentally different understandings of, and expectations about, important concepts including basic terms on the negotiating table
2) Negotiators must have an open line of “real time” communication with the principal decision maker
3) Continuity of participants—a core group—is essential to negotiation success: develop a core group, minimize substitute or “add-on” negotiators, and meet regularly
4) Understand with whom you are truly negotiating and their chain of command: members of negotiating teams may represent different and possibly competing factions
5) Have functional counterparts, such as military commanders or lawyers, on each side of the negotiating table
6) Problem-solving: develop mechanisms both internally (within your side) and externally (between the sides)
7) Crisis management: develop an agreed-upon mechanism and infrastructure because crises will occur
8) Sensitivity to cultural differences (such as what food to serve and what hour to meet) is essential
9) Minimize outside noise in order to stay on course—negotiating in the aftermath of a terrorist attack
10) Understand the costs and benefits of third-party involvement

A. Assume Neither Side Understands the Other

Safe Passage was intended to facilitate travel for Palestinians between the Gaza Strip and West Bank. The expression in Hebrew is ma’avarbatu’ah (transliteration); when the “b” is replaced

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with a “p” it, by transliteration, becomes ma’avarpatu’ah which, translated, is “open passage.” The Israeli side used the term with the “b;” the Palestinian side used the term with the “p.”

Language is essential to understanding the implementation process; the official language of the Agreement was English, meaning that the Agreement was written and signed in English. The negotiating sessions were conducted in English, though side bar conversations between individuals from the two sides were conducted either in Hebrew or Arabic. Nevertheless, the official discussions at the meetings during which I was present were always conducted in English, either directly or through translation, and all agreements (at least those that I wrote) were in English.

The difference between the two is fundamental and goes to the essence of the question: the Israeli side envisioned passage through Israel subject to rigid controls, strict monitoring, and limited hours; the Palestinians envisioned free and unlimited passage from part A to part B of a single territorial unit. At the first

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46 The adage that the “occupied knows the language of the occupier more than the occupier knows the language of the occupied” proved itself accurate; a number of Palestinian negotiators had learned Hebrew while imprisoned in Israeli jails. While I do not know whether Palestinian negotiators could read and write Hebrew, their spoken Hebrew was far superior to the spoken Arabic of IDF officers.

47 Oslo Agreement, supra note 17.
negotiating session, the Palestinian representative submitted a draft agreement clearly reflecting the Palestinian view. Later that day, I reported to my principal, who instructed me to prepare a counter proposal reflecting what he believed to be the Israeli position. The following day, I met with my Palestinian counterpart for what would become a fascinating routine of innumerable negotiating sessions in a small group followed by reporting to our respective principals.

The inherent difficulty with this reality is that we had a fundamental disagreement with respect to both the essence of Safe Passage and how it would look on-the-ground. That fundamental dissonance was a recurring theme: the two sides simply had fundamentally distinct understandings of what “Safe Passage” truly meant for Palestinians wishing to travel on the Safe Passage roads and for the IDF regarding security arrangements. The Palestinians viewed Safe Passage as linking the two units of the Palestinian Authority, whereas many IDF officers and the Israeli public were concerned about the possible danger to public safety and security.

B. Negotiators Must Have an Open Line of Real Time Communication to the Principal Decision Maker

“Frustrating” and “groping” would be appropriate terms to describe the lack of direction and instruction we experienced in the implementation process. The critical disconnect between the drafters and implementers manifested itself, from my perspective, in the failure to receive clear instructions from the decision-making level. At the risk of being repetitive with respect to the overarching lesson above regarding the need for clear instructions, but with an eye to emphasizing this crucial point, the following highlights the need for clear and steady communications between principals and implementers.

The lead IDF negotiator, who was tasked with the Safe Passage issue, reported to his senior command that the lack of direction from the drafters was extraordinarily problematic; in and of itself it directly contributed to an unclear implementation process. The results, frankly, were negotiations largely shaped by an intimate group devoid of direct communication with the drafting decision-makers.

48 Oslo Agreement, supra note 17, Annex II, § 3(g).
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Perhaps this lack of clarity and understanding was a deliberate policy intended to create an illusion of negotiation, but in essence it created a stalemate. While this might have been the case, the increasing number of meetings and discussions involving IDF officers and government officials alike suggests that there was not a Machiavellian intent at play here. Rather, the lack of direction reflected a fundamental failure to understand or decide how the Safe Passage language was to be implemented. That, I suggest, was the fundamental cause of the lack of direction, which in turn, explained the failure to communicate fully with the working level tasked with implementation.

While the above perhaps explains conduct, it is not intended to minimize the fundamental reality, which is that the implementation effort was conducted largely devoid of direction from the decision-making level. This fact, I suggest, reflected two fundamental realities: senior decision-makers were unclear regarding how to articulate their preferred final outcome and the drafters viewed the Safe Passage issue as an afterthought. In reality—for the Palestinians in general and Arafat in particular—it was perhaps the most important clause in the Oslo Accords to be negotiated.50 I am not convinced the Israeli side was sufficiently sensitive to the importance of Safe Passage for the Palestinian side, or possibly, precisely because its importance was correctly understood, the lack of direction was deliberate; it is hard for me to tell. The result was a lack of direct communications with those who could have shed light both on the larger picture and on a practical direction.

C. Continuity of Participants—A Core Group—Is Essential to Negotiation Success

It is important to recall the context of these implementation negotiations: after twenty-seven years of occupation, the two sides were now sitting together daily to implement an agreement largely devoid of guidelines. Negotiating is inherently difficult, but doing so in this most unusual of circumstances is all but impossible. Developing an orderly process, predicated on continuity, is essential to minimizing inevitable confusion and uncertainty.

Interchangeable parts are, perhaps, legitimate in athletics, but are extremely problematic in the negotiation context. Not only

49 Id.
50 Id.
does the coming and going of individuals from meeting to meeting impede progress, but it creates a lack of certainty regarding the decision-making process. On innumerable occasions, sitting across from me were individuals who had not participated in previous meetings and who were not seen again. Consistency is important for the following reasons.

First, a core group develops common language with respect to the issues negotiated, shared experiences, and mutual understanding of strengths and weaknesses. Furthermore, continuity of the group ensures that valuable time is not lost by constantly bringing new participants up to speed. On occasions when the core group was expanded to include individuals representing additional areas of expertise, the result was more often than not unhelpful. While the decision to expand may have reflected an overarching strategic goal, the reality was very different. To be blunt, both sides were feeling themselves and each other out with the result that decisions with strategic significance were made at the tactical level. This resulted in frustration, rather than a sense of progress.

Second, holding regularly scheduled meetings ensures continuity, which is vitally important with respect to both participants and content. Continuity significantly facilitates development of subject matter expertise, which only develops over time but is critical to issues that are legally, politically, and historically contentious. Expertise and understanding of nuance are essential to negotiating an agreement replete with an endless series of legally complicated and politically charged details. Negotiating with the same group, internally and externally, also facilitates the drafting process (tactical phase) and actual negotiation (strategic phase) because of the inherent continuity of the process and participants alike. The expertise and understanding that continuity brings is crucial for resolving the minute details—literally an endless series of legally complicated and politically charged details—that are the essence of drafting. There is no doubt that together the core group negotiating the Safe Passage Agreement became subject matter experts;\textsuperscript{51} we gained this expertise individually and collectively and came to understand the philosophical and practical essence of each other’s positions. That mutual recognition, even if not literally articulated, was essential to developing an infrastructure that allowed for a working environment predicated on a shared core understanding of the issue.

\textsuperscript{51} Id.
Third, continuity also significantly facilitates the mutual development of a set of ground rules for negotiating. This includes an agreed-upon mechanism for how to conduct the negotiations, ranging from where and when to meet to how to track changes in the evolving agreement. The development of ground rules is essential for enhancing an orderly process in a context that is largely disordered. Similarly, an agreed-to process enabling exchange of reliable drafts is extraordinarily important; otherwise, the negotiating sessions are haphazard at best and dysfunctional at worst.

Finally, continuity minimizes gamesmanship, while the introduction of new participants usually leads to posturing, which is generally intended to demonstrate strength and resolve. It is important to add—depending on the new participants’ identity—that both the core group and the new participants may engage in posturing. In either case, posturing is showmanship, which may be amusing, but actually impedes progress and affects the tenuous relationship that the core group has developed.

D. Understand with Whom You Are Truly Negotiating and Their Chain of Command

Members of negotiating teams may represent different and possibly competing factions, leading to uncertainty over who the participants are and whether they will be there the next time. The steady stream of new participants problem discussed above was particularly difficult for the negotiations when the new participants busily transcribed what other participants said, which in turn raised legitimate questions such as: for whom and for what purpose were they taking such copious notes?

Uncertainty regarding both the participants’ affiliation and the role played by their superiors affected the manner in which the negotiations were conducted and the overall ability to negotiate in an orderly and systematic fashion. The uncertainty was both internal and external, because individuals on the same side of the table were occasionally unsure as to whom their loyalties were owed. This was particularly acute when Palestinian negotiators representing different security organizations participated in the negotiating sessions. The inevitable internal politicking and playing to internal audience(s) significantly hampered progress when too many individuals representing competing organizations were present.
Arafat’s management theory was once described to me as “spokes,” with him in the middle, rather than as a hierarchical chain of command (as is, for example, the traditional military model). As a result, according to Israeli experts, competing Palestinian factions were in a constant battle to curry favor and to improve their position in his eyes. While that might be inevitable in the new PA regime paradigm, it dramatically impacted the negotiation process. While I was not privy to internal Palestinian memos or discussions, the description above resonates with respect to my negotiation experiences. Needless to say, this uncertainty over the chain of command presented a fundamental difficulty for both sides: the failure to clearly designate clear lines represents an important “how not to” lesson.

E. Have Functional Counterparts on Each Side of the Negotiating Table

Because common, professional language and similar experience are extraordinarily important process facilitators, having functional counterparts at the negotiating table significantly enhances the process. While senior Palestinian officials repeatedly told me that they would respect my interpretation of the Agreement, they were not my client. I owed my duty as agent to the IDF, my principal. The PA’s failure to appoint an attorney either to the Civil Affairs or the Security Affairs Committees was a source of puzzlement for me. I had, in different circumstances, interacted with outstanding Palestinian attorneys and was convinced that their abilities would have made a significant contribution to the implementation negotiations. In particular, the Safe Passage negotiations would have been significantly advanced if a Palestinian lawyer had been involved because much of the discussion turned on complicated legal terms and analysis.

Having functional counterparts on each side of the negotiating table was consistently reinforced in Security Affairs Committee meetings where commanders instinctively understood each other. Common language among commanders facilitated the resolution of important tactical disputes essential to implementation. Members on the Israeli side were current IDF commanders; members on the Palestinian side were individuals who had been arrested and in some cases deported, tried, and incarcerated for being involved in terrorism over the years. Some had been involved in attacks that
will long live in the collective memory of Israelis. That very experience, however, facilitated a common language among the participants who shared many similarities—they were commanders who understood decision-making under fire, confronted risks both to themselves and to those under their command, and knew how to “decide and act.” This shared professional culture contributed to meetings that were intense and fraught with tension (and, on occasion, raised voices), but more importantly it created a sense that issues could be resolved.

It would be fair to say that commanders had mutual respect for each other, and perhaps this is why the Security Affairs Committee was the most effective in problem-solving out of all the committees in which I participated. This last comment must be tempered, for progress was in large part tactical rather than strategic; nevertheless, the reality of negotiating the implementation of a peace agreement is that progress is largely in the sphere of tactical issues rather than overarching strategic considerations.

Choosing and developing negotiating teams is critical to the negotiation process. Decision-makers must be sensitive to the issues to be discussed and how to most effectively advance the ball. From my perspective, a Palestinian attorney would have significantly contributed to the discussion of the Safe Passage issue for the very reason that IDF and PA commanders were able to effectively address tactical issues. While the commanders did not always resolve their disputes, their dialogue was predicated on a common language that facilitated mutual understanding, if not agreement.

F. Problem-Solving: Develop Mechanisms Both Internally and Externally

It is important to develop internal and external mechanisms. This lesson is best explained with the following vignette. In November 1997, I was asked to accompany a high-level Israeli delegation to Washington, D.C. to meet with Palestinian representatives under the auspices of the United States government. After meeting for five consecutive days, we made significant progress on the Safe Passage issue. As the sole lawyer (even on this occasion the Palestinian delegation did not include a lawyer), I was asked by both sides to draft the agreement in accordance with the discussions. In order to guarantee accuracy, I shared the draft in pro-
gress with the Palestinian participants. Before leaving D.C., the Israeli and Palestinian negotiators met with Ambassador Dennis Ross, President Clinton’s chief Middle East negotiator; Mahmoud Abbas, a.k.a. Abu Mazen, then Arafat’s deputy, today the PA President; and David Levy, then Israel’s Foreign Minister, in order to report both on progress and to indicate how we intended to proceed upon our return home. It was agreed there that significant progress had been made.

A few days later, the same individuals who had participated in the D.C. negotiations, along with a few others, met in the Jerusalem area. Evidently, word of our progress had been leaked to the media. When I arrived, cameras and reporters were omnipresent. In accordance with the procedure agreed upon in D.C., I presented the updated version of the Agreement to the Palestinian representatives, including those who had been in D.C. Their response was quick in coming: “I have never seen this before.” The Israeli response was equally quick: the lead Israeli negotiator ordered that we immediately leave the room.

I subsequently learned the background. When the lead Palestinian negotiator reported our progress to Arafat, he was severely reprimanded for concessions agreed to in D.C. Furthermore, according to what I have been told by well-placed sources with intimate access to this information, the lead negotiator was ordered to publicly renounce the agreement.

Clearly there were problems in both the internal (intra-Palestinian) process and the external (Israeli-Palestinian) process that required resolution. While I cannot comment on how the Palestinians resolved crises, their reaction in this instance by questioning the document’s accuracy raised serious questions about trust and mutual confidence. Although the reaction was unrelated to the Israeli actions (according to Israeli sources), the vignette highlights the absolute necessity of establishing mechanisms to minimize the impact of internal and external crises. While drama is inevitable in negotiations, establishing mechanisms, including pre-negotiation preparatory sessions, would minimize its negative impact.

G. Crisis Management: Develop an Agreed-Upon Mechanism and Infrastructure because Crises Will Occur

Crises are inevitable. After all, while we were negotiating the implementation of the Oslo Agreement, terrorism was a daily real-
ity.\textsuperscript{52} Hamas and the Islamic Jihad rejected the peace process, vowing to continue to commit acts of terrorism in order to derail it. Jewish extremists were also violently opposed to the process, and Prime Minister Rabin was ultimately assassinated by a Jewish extremist terrorist\textsuperscript{53} who sought to derail the peace process.\textsuperscript{54}

Another vignette is in order. In October 1994, a number of Israeli soldiers were killed at the Netzarim Junction in the Gaza Strip in two separate attacks.\textsuperscript{55} Following the second attack, an emergency meeting of the Security Affairs Committee was called; participants included senior IDF and PA officials, including those not tasked as committee members. The two attacks were a direct challenge to the Agreement and how the IDF and PA would respond was critical.

During the course of my IDF career, I have participated in thousands of meetings and discussions. This meeting was, without a doubt, the most emotionally charged, bitter, and angry. In a nutshell, senior IDF commanders were convinced and made it very clear that they believed the PA was facilitating Hamas terrorism. That accusation was so directly and candidly made by a senior IDF commander that the PA representatives were clearly caught off guard. This was not theater; it was pure anger and resentment expressed by a commander who would need to bury his soldier the next day.

His outburst also unintentionally highlighted a fundamental weakness of the Agreement. The Agreement facilitated the meeting, but it did not create a crisis-management infrastructure. Although a meeting in response to a crisis is important, it is not akin to the mutual management of the crisis. Perhaps this event was too soon after the signing, and the environment was not conducive to mutual problem-solving. Mutual problem-solving was undoubtedly the architects’ intent, but the reality was fundamentally different. The meeting’s purpose and structure was inherently flawed, perhaps because it was called in response to a soldier’s death. In ret-

\textsuperscript{52} Id.


\textsuperscript{54} Prof. Holbrook has suggested that the appropriate terminology for peace-implementation negotiations is “negotiating a ‘cease fire.’” I am not sure the Oslo drafters would accept “cease fire” as the appropriate term because it suggests temporariness rather than finality. However, I would agree that meetings held in the immediate aftermath of a terrorist attack are suggestive of Prof. Holbrook’s phrase.

\textsuperscript{55} Minorities at Risk Project, Chronology for Palestinians in Israel (2004), http://www.unhcr.org/refworld/docid/469f38a8c.html (last visited Feb. 18, 2010).
rospect, the effectiveness of an emergency meeting as crisis management per se does not benefit from the presence of an individual who is not a regular member of either side’s negotiating team. While the theater may have been important for point making purposes, it did not facilitate resolution of the crisis at hand. The crisis would have benefited from a meeting of regular participants only.

The unilateral restrictions that the IDF imposed on the Palestinian population in the aftermath of this crisis violated the Agreement. In this vein, it is important to recall the fundamental inequality between the two sides. The Palestinians were still under Israeli occupation and in a much weaker position than Israel, a reality that, in retrospect, the Israeli side had not fully and consistently internalized. Even though the Agreement clearly stated that terrorism was to be fought jointly by the IDF and by the PA, the inequality between the two sides due to on-the-ground circumstances did not allow for that. IDF commanders argued that the attacks reflected a fundamental failure of the PA, but the PA was still in its earliest stages as crises were occurring only months after the Cairo signing ceremony. While this explanation is not intended to excuse the PA for its failings, there was a clear distinction between expectations and obligations arising from the Agreement and the PA’s ability and willingness to deliver.

As a result, it was incumbent upon IDF commanders to understand that creating a viable, effective PA was not going to be an overnight occurrence. Creating a PA and arming it was a rational (albeit, controversial) decision by Rabin; although reacting in the heat of the moment was perhaps understandable, its significance should not be lost as a lesson learned from a process perspective. Unilateral measures reinforced the inherent imbalance between the sides and signaled to the Palestinians that at moments of crisis, the former “occupier-occupied” paradigm would be the dominant reality and that partnership in the fight against terrorism was largely ephemeral.

Did the PA make every effort to prevent the attack? Considering it occurred exactly where a similar attack had occurred only one week before, the answer to me is no. Having to impose unilateral measures on the Palestinians, however, in the wake of such attacks illustrates the lack of process for facilitating joint responses

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57 This article is not intended to offer an analysis of the PA.
to significant crises. Crisis-response meetings are important, but they are not an operationalized, mutual crisis management process. The Oslo drafters should have anticipated the need for crisis-response paradigms, but either did not foresee or did not sufficiently address this need. Perhaps the essence of implementation negotiations, however, is to create such an infrastructure mutually and from scratch. If so, creating an appropriate and effective mutual infrastructure during a crisis is an “iffy” proposition at best, dependent more on the personalities involved and not on the reactive-response lessons of history.58

In contrast, the following anecdote reflects a far more measured response to a crisis and, to the best of my knowledge, reflects the individual decisions of two senior commanders who understood the importance of developing a process response. I do not suggest there had been a strategic lesson learned after the October 1994 Netzarim Junction attacks; however, I do believe this incident shows how individuals working within a developing paradigm—the essence of peace implementation negotiations—can create a crisis management process.

On December 31, 1994, a number of Palestinian policemen were killed. The circumstances were cloudy, but it was widely assumed that the IDF was responsible for the attack. In an effort to both defuse the extraordinary tension and to determine the facts on-the-ground, a joint commission of inquiry was established. I served as the legal advisor to the commission, which met for five very intense weeks gathering evidence, questioning witnesses, and analyzing information received from numerous sources. The commission did not jointly announce its findings, nor was there an official termination of its responsibilities. The importance of the commission’s efforts, however, should not be diminished. It was, in every sense, a joint commission; any strong suspicions that the Palestinians may have had regarding the circumstances did not destroy the joint effort.

Those parties responsible for creating the commission understood that its implementation was dependent on mutuality rather than on the unilateralism that occurred in the aftermath of the October 1994 attacks. Although not privy to the decision-making regarding the commission’s establishment, given the short time from attack to decision, I doubt the commission’s establishment was the result of intensive discussions between the commanders. Rather,

58 This suggests the appropriateness of Prof. Holbrook’s “negotiating a cease fire” comment, and simultaneously suggests an inherent weakness in the Oslo process.
based on my working relationship with those involved, I believe its success was personality-based and predicated on those commanders’ joint and correct assessment of what was required on-the-ground and on their understanding of the essence of mutual implementation.

As such, the commission represents a significant improvement over the unilateral measures following the October 1994 attacks, but I am not convinced that the commission manifested a crisis management infrastructure. The commission did, however, demonstrate the manner in which insightful and thoughtful personalities can be utilized to minimize extraordinary tension, thereby achieving ad hoc crisis management. Unfortunately, this anecdote highlights the overwhelming importance of personalities; successful crisis management must be systemic and structured with built-in rules and guidelines rather than dependent on who has a seat at the table.

H. Sensitivity to Cultural Differences is Essential

It became a running joke among the core group that meetings the Palestinians hosted were gastronomically far superior to meetings the IDF hosted. We served basic IDF food; they served the best Middle Eastern dishes. It was, frankly, one of the few side benefits of my five-year involvement in the peace process. Humor aside, cultural sensitivity is an important issue because it addresses how each side views the misnamed, so-called “soft issues,” which are of enormous importance to the success or failure of the negotiating process. The IDF culture is largely brusque, impatient, and devoid of social lubricants; the Palestinian culture, with respect to hosting, is fundamentally different. Although cultural sensitivity does not guarantee a successful negotiating session, the environment and atmosphere subtly impact the tone and tenor. The oft-used expression “breaking bread” may be the most accurate description of the soft aspect of negotiation. Perhaps under-appreciated, I would suggest it can significantly contribute on both a tactical and strategic level alike. Breaking bread with the other side does not, obviously, guarantee success, but it does represent the negotiators’ fundamental mutual task of working together.

The physical environment of a negotiating session must offer, in addition to the main meeting room, more intimate, private rooms for additional discussion. The importance of corridor or
hallway talk (during breaks) should not be minimized, because off-the-cuff human encounters are essential in seeking to understand better the experiences and motivations of negotiating “partners.” Since negotiators on both sides were subject to their respective chains of command, participants’ better understanding of the other side’s limitations and expectations could have been helpful on two counts: a) such insight could have facilitated understanding regarding how a particular negotiating session should be conducted; and b) it would have also provided insight into expectations or assumptions regarding how and what an individual was likely to report regarding the session. The latter point is of extraordinary importance because the information the decision-maker receives both dictates the responses to a previous session and influences future discussions.

The physical environment where negotiating sessions are conducted is important; physical comfort or discomfort directly contributes to the tone and tenor of meetings. It was well known that Arafat led a nocturnal existence, which directly affected when negotiations were scheduled because Palestinian representatives would meet with him directly before or after meeting with us. There must have been an implicit understanding that this was the way negotiations were conducted because I do not recall discussions about the inherent inconvenience to all involved. The significance of this arrangement should not be dismissed because it highlights an important reality: the imposition of personal or cultural norms and mores should be minimized because they serve little, if any, benefit. For example, it was known that I am a rabid fan of Hapoel Jerusalem, the professional basketball team in the Israel Basketball league. When we scheduled negotiating sessions, my counterparts regularly asked me whether a time would conflict with one of the team’s evening games, a concern for which I was immensely appreciative. This point, coincidentally, reinforces the important value of having a core group, as discussed above.

I. Minimize Outside Noise In Order to Stay On Course

A wide variety of circumstances dictate how much to allow external factors to influence the negotiation process. First and foremost: can the parties ignore outside noise and how much do

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59 To see one’s existential opponent as a negotiating “partner” in a mutually-determined process is in itself a huge breakthrough in visualizing what successful implementation requires.
they want to be influenced by it? More specifically, for example, should they and can they negotiate in the immediate aftermath of a terrorist attack? To appreciate these tensions fully it is important to understand the political and practical realities under which we were operating. As discussed above, both sides were subjected to vociferous internal opposition, both sides were under the watchful gaze of the U.S., whose representatives were deeply involved, and both sides had to deal with the constant presence of the media.

In response to the October 1994 terrorist attack discussed above, a previously scheduled negotiating session was cancelled and the negotiating process was stopped. Whether those decisions were correct depends on a wide array of factors ranging from what message was being sent, what issues were to be discussed, whether the particular session would have contributed to stability, and what a cost-benefit analysis would suggest regarding the implications of cancelling negotiations in response to an attack.

Although I understood the justification for the decisions, I am not sure in retrospect that they were the correct calls. While internal political considerations and message-sending to the other side were the impetus for cancellation, developing and implementing a process should have outweighed these more short term calculations. Perhaps once a process has been sufficiently developed, additional considerations could come into play.

The public invariably clamors for an aggressive military response in the aftermath of an attack, yet implementation of a peace process would suggest that negotiating in the face of terrorism is the essence of the process. This is easy to suggest years later; nevertheless, I would suggest that the decision to negotiate a peace agreement requires a giant leap of faith and an understanding that specific terrorist attacks should not be distractions, notwithstanding the anger, pain and tragedy they intentionally create. While it is understandably easy to lose sight of the larger picture when victims of terrorism are shown on television, a peace process seeks to fundamentally re-articulate the traditional negative-reactive paradigm. There is, I suggest, neither a right nor a wrong answer here; rather, it is incumbent to understand that implementing a peace agreement implies a fundamentally different decision-making process.
J. Understand the Costs and Benefits of Third-Party Involvement

During the course of my involvement, it became clear that there were two minds regarding the efficacy, effectiveness, and worthiness of third-party involvement. The discussion below is predicated on a third party that the two principal parties understood was in a position to directly influence the process. On the one hand, the third party clearly forced both parties to stay focused within the parameters of the discussion. Both parties, however, also played to the third party, hoping to curry favor and score points. The former result is a benefit; the latter is a cost. In the negotiating sessions I participated in with American representatives, they were actively engaged during breaks from the negotiation in speaking with their colleagues by phone and receiving instructions regarding specific issues relevant to the discussion. For a third party to contribute, he must demonstrate expertise regarding the issues, devoid of favoritism or preference. That said, there is a larger, more fundamental question: what is the most appropriate role of the third party and how to most effectively implement that role?

Discussing the political basis and ramifications of American involvement in the Middle East peace process is beyond the purview of this Article, but addressing the impact of third-party participation is an important aspect of the lessons learned. With respect to third-party presence, the dilemmas are complex. In a nutshell: when representatives of the United States were present, both sides spoke to each other through the U.S. representative rather than directly. Ostensibly a bilateral process became “bi-lateral plus” in the presence of U.S. representatives (not quite tri-lateral because the United States was not negotiating directly, but rather was observing and facilitating).

I do not recall discussions regarding this issue. Even though they may have been conducted at more senior levels, those actually negotiating need to have a clear understanding of the role of additional parties. Otherwise, the parties directly involved are groping, trying to determine how to structure their arguments and presentations. A third party is not invisible; it is quite the opposite. On a number of occasions, American participants directly intervened, forcing the parties to articulate their positions more rigorously and to better understand the other side. Conversely, American representatives were relegated to note-taking only several times, without
directly participating. The inconsistency—perhaps reflective of a policy decision with the approval of senior Palestinian and Israeli decision-makers—resulted in significant confusion from the perspective of those tasked with actual negotiation. In a word, an inconsistent, poorly defined role for third parties unquestionably impacts their ability to contribute.

III. Conclusion

I was extraordinarily fortunate to have been invited to participate in the implementation process. While the tensions, frustrations, and disappointments were enormous, the sense of being directly and intimately involved in a major historical event far outweighed the negatives. It was an honor and a privilege. The list of lessons reflects my checklist; it is, in essence, a modest proposal for guidelines that can hopefully be effectively implemented, in whole or in part, both in the Middle East and in other parts of the world. Negotiating is, as I came to know, extraordinarily complex and inherently complicated by political and historical tensions, deeply held suspicions, and cultural differences.

The architects saw themselves as painting a broad strategic canvas intending the implementers to merely paint within the clearly contoured lines and limits they laid down. The reality, as I came to know it, was fundamentally different: the implementers became responsible for strategic considerations because the architects failed to pay sufficient attention to on-the-ground realities and circumstances. The overwhelming lack of instruction and guidelines meant—in reality—that the implementers became, in many ways, the architects. Historians will judge everyone involved; perhaps, given the political circumstances and realities of the time, such an approach was the only way to forge forward. I only hope that the guidelines above will benefit architects and implementers alike for future peace accords.