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6-1-2002

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Arthur Lenk, *Fact-Finding as a Peace Negotiation Tool—The Mitchell Report and the Israeli-Palestinian Peace Process*, 24 Loy. L.A. Int'l & Comp. L. Rev. 289 (2002).

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LOYOLA OF LOS ANGELES
INTERNATIONAL AND COMPARATIVE
LAW REVIEW

VOLUME 24

JUNE 2002

NUMBER 3

Fact-Finding as a Peace Negotiation Tool—
The Mitchell Report and the Israeli-
Palestinian Peace Process

ARTHUR LENK*

I. INTRODUCTION

The peace process between the Israelis and the Palestinians requires creative concepts for conflict resolution. The “Oslo” process, which began as a series of discussions in Norway among academia, created a full range of legal and social relations between the Israelis and the Palestinians.¹ It used a range of differing methods and creativity to deal with seemingly irreconcilable issues between the parties.² The basic concept of the process was to begin with the “easier” issues and then gradually build a trusting

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1. See DAVID MAKOVSKY, *MAKING PEACE WITH THE PLO: THE RABIN GOVERNMENT’S ROAD TO THE OSLO ACCORD* 1-9 (Westview Press 1996).

2. See *id.* at 139-142.

relationship to tackle the most difficult points of conflict.³ The series of agreements, signed by Israel and the Palestine Liberation Organization between 1993-1999, were not merely written agreements. Rather, the agreements were steps in a process of reconciliation and confidence building that would lead towards addressing the most contentious issues.⁴ Despite the first genuine attempt to deal with these permanent status issues at Camp David in July 2000, violence erupted between the Israelis and the Palestinians in September 2000.⁵

In the days following these confrontations, the Israelis and the Palestinians, together with the active involvement of the United States and others (Egypt, Jordan, United Nations and the European Union), began to consider additional methods of conflict resolution to cease violence and return to a more constructive path.⁶ The parties involved decided to form a fact-finding body to examine the facts and causes of the violent outbreaks, and to propose ideas to prevent their recurrence.⁷ The idea to form such a body was first proposed at a summit in Paris on October 4, 2000.⁸ The Israelis and the Palestinians reached an agreement on the proposal at a second summit that took place in Sharm el-Sheikh, Egypt on October 16-17, 2000.⁹ Former U.S. Senator George J. Mitchell chaired the Sharm el-Sheikh Fact-Finding Committee (the Mitchell Committee).¹⁰ In April 2001, the Committee published the Mitchell Report, which summarized its findings and recommendations.¹¹

3. MAKOVSKY, *supra* note 1, at 141. See Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Israel-Palestine Liberation Organization, 32 I.L.M. 1525 (1993) [hereinafter Declaration of Principles].

4. See MAKOVSKY, *supra* note 1, at 141.

5. See SHARM EL-SHEIKH FACT-FINDING COMMITTEE, REPORT OF THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE 10-11, Doc. SN 3552/01 (2001) (available from Meridian International Center, 1624 Crescent Place, N.W., Wash., D.C. 20009 or www.meridian.org) [hereinafter COMMITTEE REPORT].

6. See *id.* at 7.

7. *Id.*

8. Arafat and Barak Reach Agreement to End Violence (Oct. 4, 2000) at <http://www.cnn.com/2000/WORLD/meast/10/04/mideast.violence.04/> [hereinafter Arafat and Barak].

9. The White House Office of the Press Secretary, Remarks by President Clinton and President Hosni Mubarak of Egypt in Delivery of Joint Statements at the Conclusion of the Middle East Peace Summit (Oct. 17, 2000) (on file with Office of the Press Secretary) [hereinafter White House Press Release].

10. See COMMITTEE REPORT, *supra* note 5, at 2.

11. See *id.*

This article seeks to examine the role of fact-finding as a tool of dispute resolution in the context of the Israeli-Palestinian peace process, and within the confines of the Mitchell Committee's works and findings. Some of the questions this article seeks to answer include: (1) what are the goals of fact-finding; (2) in what types of circumstances has it served as a successful method of confidence building; (3) how do the actions of the Mitchell Committee fit into the historic model of fact-finding; (4) what were the interests of the parties in forming the Mitchell Committee and what goals were set for its outcome; and (5) were the circumstances upon publication of the Mitchell Report conducive to acceptance of its findings? Finally, this article will question the contribution of the Mitchell Report and fact-finding to the peace process and conflict resolution in the Middle East. This article will conclude that fact-finding, however honorable the intention or positive the effort, cannot serve as a method to impact such weighty issues as the peace process in the Middle East.

II. FACT-FINDING IN INTERNATIONAL LAW

Fact-finding and inquiry are not new tools in international relations,¹² or even in the Israeli-Arab conflict.¹³ Generally, the terms "fact-finding" and "inquiry" have been more or less interchangeable.¹⁴ The goal in most cases is to examine the facts of an incident to reduce tensions and areas of disagreement in a problematic situation.¹⁵ A neutral and mutually trusted third party, which is selected by the parties, plays an important role.¹⁶ A determination of fact by a third party allows the sides to accept compromises or findings that might not be politically feasible without outside intervention.¹⁷

The original concept, described in the 1899 *Hague Convention for the Pacific Settlement of Disputes*, provided for the use of

12. See J. G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 44-61 (Cambridge Univ. Press 3d ed. 1998).

13. See Special Committee on Palestine, G.A. Res. 106 (S-1), U.N. GAOR, 1st Sess., 79th mtg. U.N. Doc. A/310 at 192 (1947). The U.N. created a fact-finding committee in 1947 "[T]o ascertain and record facts, and to investigate all questions and issues relevant to the problem of Palestine." *Id.*

14. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 277 (Routledge 7th ed. 1997) (1970).

15. *Id.*

16. *Id.*

17. See *id.*

inquiry commissions for disputes involving neither honor nor essential interests.¹⁸ This limitation was intended to ease the concerns of smaller states that such commissions might serve as a vehicle for foreign intervention.¹⁹ Especially in response to the conflict between Spain and the United States following the mysterious sinking of the *USS Maine* in January 1898, the international community wanted to prevent disagreements from escalating into armed conflict.²⁰ The 1907 Hague Convention expanded on its predecessor, offering an extremely detailed series of procedures for inquiry commissions.²¹ Such a mechanism can be initiated by a multilateral or bilateral treaty,²² through a decision by an international organization,²³ or by a mutual agreement between the parties.²⁴

18. *Convention for the Pacific Settlement of International Disputes*, Hague Title III, art. 9, <http://yale.edu/lawweb/avalon/landofwar/hague01.htm> (July 29, 1899) [hereinafter *Convention for the Pacific Settlement of International Disputes*].

19. MERRILLS, *supra* note 12, at 45.

20. *See id.*

21. *See id.* at 47. The Hague Convention of 1907 dedicated twenty-eight of ninety-seven articles to the concept of commissions of inquiry. NISSIM BAR-YAACOV, *THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY 2* (Oxford Univ. Press 1974). The Hague Convention proclaims that states involved in disputes, which arise from a difference of opinion on factual points, would agree to establish a commission of inquiry whose task is to facilitate a solution to the dispute by an impartial and conscientious investigation. *Id.* The report is confined to finding of facts and is not considered as having a character of an arbitral award. *Id.* The parties reserve complete freedom to accept the findings. *Id.*

22. During the thirty years following the second Hague Convention, many states signed bilateral treaties calling for the settlement of disputes by commissions of inquiry or arbitration. *See* MERRILLS, *supra* note 12, at 51-52. Although an extensive series of treaties were signed, a pattern of inquiries was not established. *Id.* at 52. In the 1990s, however, a fact-finding committee was set up based upon a 1914 treaty between the United States and Chile in the case of *Letelier and Moffit*, which arose from the alleged assassination of two Americans by Chilean intelligence officers in Washington D.C. in 1976. *See id.* at 55-57. The sides reached a compromise based on the Committee findings in 1992. *Id.* at 56-57.

23. *See* BAR-YAACOV, *supra* note 21, at 2-3. This is an area that most frequently uses fact-finding. *See id.* at 5. The U.N. Security Council has inquiry authority per Article 34 of the *Charter of the United Nations*. *Id.* at 3. Over the years, the United Nations, the International Red Cross and the International Court of Justice established a variety of methods of inquiry with a range of rules for procedures and mandates, often based upon the needs of specific circumstances. *See id.* at 8-9. The United Nations initiated a number of studies and resolutions on the matter of fact-finding. *See e.g.*, *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security*, G.A. Res. 46/59, U.N. GAOR, 67th Sess., U.N. Doc. A/Res/46/59 (1991); United Nations Secretary General, *Methods of Fact-Finding: Report of the Secretary General*, U.N. GAOR, 20th Sess., Annexes, Agenda Items 90 & 94, U.N. Doc. A/5694/Annexes (1965);

In cases where the parties themselves agreed to such involvement, the mandate and terms of reference of the body are sometimes determined by an *ad hoc* agreement between the parties.²⁵ In most cases, the mandate determines the facts in dispute that lead to a negotiated settlement between the parties.²⁶ Although there are no express obligations to accept the findings, they usually are accepted.²⁷

Despite the vision of the Hague Conventions and the subsequent series of treaties and international activity, this tool is infrequently used.²⁸ Only four inquiries used the Hague Convention model in the past eighty-one years.²⁹ The main reason for such limited use is that states are reluctant to allow interference with their sovereignty.³⁰ The states are understandably hesitant to be held accountable for their acts in an international forum.³¹ Fact-finding will only be employed when the key issues involve fact, rather than policy or law, and most importantly, when all of the parties are "willing to accept that their version of events may be proven wrong."³²

In most circumstances, parties seek non-binding suggestions to dispute resolutions.³³ Conciliation, a related method of dispute resolution, is sometimes also employed.³⁴ The Institute of International Law defines conciliation as:

A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of

and U.N. GAOR, 21st Sess., Annexes, Agenda Item 87, U.N. Doc. A/6228/Annexes (1966).

24. The two most famous cases that used the Hague model of fact-finding were The Dogger Bank Case (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 403 (Comm'n of Inquiry 1905) and the Red Crusader Inquiry (1961). Both of these cases, like many others, availed fact-finding and involved events at sea.

25. See MALANCZUK, *supra* note 14, at 277.

26. *Id.*

27. *Id.*

28. See MERRILLS, *supra* note 12, at 47.

29. *Id.* at 47-50.

30. See *id.* at 60.

31. See *id.* at 61.

32. *Id.* This was not the case in the Israeli-Palestinian conflict and the work of the Mitchell Committee.

33. *Id.* at 45.

34. *Id.* at 62-63.

being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.³⁵

While conciliation commissions function to investigate disputes and suggest possible settlement terms, they emphasize legal issues and are more political than fact-finding commissions, depending on the circumstances and the sides involved.³⁶ The goal is not to illuminate the conflict, but to identify methods for conciliation.³⁷ As Merrills emphasizes, "its investigative powers are . . . a means to an end."³⁸ Thus, a line of investigation will not be pursued if its exposure will make conciliation more difficult.³⁹ As in fact-finding, the report from a conciliation commission is not necessarily binding on the parties.⁴⁰ Usually, the commission submits a draft to the parties for comments.⁴¹ If accepted, an agreement is drafted with the proposed terms.⁴² If rejected, the process is concluded with no further obligation.⁴³

Despite a wave of conciliation commission treaties signed just before World War II,⁴⁴ conciliation as a method of dispute resolution remains under-utilized for many of the same reasons as fact-finding.⁴⁵ Nevertheless, the United Nations continues to exhibit significant interest in the potential uses of conciliation.⁴⁶

A debate exists as to the appropriateness of extending the mandate of a fact-finding investigation to include offering recommendations for a dispute settlement.⁴⁷ In such instances, it may be possible to join fact-finding and conciliation

35. Regulation on the Procedure of International Conciliation, Art. 1., at 385-91, Ann. IDI 49-II (1961). During the pre-World War II period there was a larger role for bilateral conciliation. See MERRILLS, *supra* note 12, at 64-70. As with fact-finding, states are reluctant to voluntarily submit jurisdiction to a third party. See *id.* at 45. In multilateral treaties, however, such procedures are almost routine. See *id.* at 64-70.

36. MERRILLS, *supra* note 12, at 70-72.

37. *Id.* at 71.

38. *Id.*

39. *Id.*

40. *Id.* at 62.

41. See *id.* at 72.

42. See *id.*

43. See *id.* at 71.

44. See *id.* at 51-52.

45. See *id.* at 69-71.

46. See e.g., *United Nations Model Rules for the Conciliation of Disputes Between States*, G.A. Res. A/50/50, U.N. GAOR, 50th Sess., Supp. No. 49, at 313, U.N. Doc. A/50/49 (1995).

47. See BAR-YAACOV, *supra* note 21, at 1.

responsibilities.⁴⁸ Here, while the sides remain free to reject suggestions, there is a focus on resolution suggestions from both parties and in the final report.⁴⁹ While this alternative falls short of mediation or other legal methods of dispute resolution, it offers a judicial-like environment that compels both parties to submit to the “judgment” of a third party.

One interesting United Nations sponsored model of fact-finding or conciliation commission in the Middle East was the formation of the United Nations Special Committee on Palestine (UNSCOP).⁵⁰ UNSCOP visited Palestine and held hearings in Jerusalem during June and July of 1947 to recommend suggestions for the future of the region.⁵¹ Of course, this was neither fact-finding for a specific event nor a commission created by the parties to the conflict.⁵² The General Assembly gave UNSCOP “the widest powers to ascertain and record facts, and to investigate all questions and issues relevant to the problem of Palestine.”⁵³

The United Nations General Assembly Resolution 181 of November 29, 1947 adopted UNSCOP’s recommendations.⁵⁴ The Jewish community of Palestine accepted the plan. The Palestinian leadership and the Arab members of the United Nations, however, rejected UNSCOP’s plan to partition Palestine and Resolution 181.⁵⁵ Consequently, the proposals were not implemented.

48. See *id.* at 19. After much debate, the U.N. decided in 1967 to reject the combination of fact-finding and conciliation and not to adopt a proposal to create a permanent commission of inquiry available to states, organs of the U.N. and specialized agencies. MALANCZUK, *supra* note 14 at 278. The U.N., however, coordinates a listing of competent fact-finding experts to be available to parties choosing to use such a procedure. *Id.*

49. See MERRILLS, *supra* note 12, at 71-72.

50. Special Comm. on Palestine, *supra* note 13, at 192.

51. *Id.*

52. See *id.* at 192-93.

53. *Id.* at 192.

54. G.A. Res. 181, U.N. GAOR, 2nd Sess., U.N. Doc. A/519, at 132 (1947).

55. TRYGVE LIE, IN THE CAUSE OF PEACE: SEVEN YEARS WITH THE UNITED NATIONS 194 (MacMillan Co. 1954). The resolution was approved by a vote of thirty-three against thirteen, with ten abstentions. *Id.* Thirty-nine years later, in November 1988, the Palestine Liberation Organization declared its acceptance of Resolution 181. PALESTINE LIBERATION ORGANIZATION, A CRISIS OF FAITH: SECOND SUBMISSION OF THE PALESTINE LIBERATION ORGANIZATION TO THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE 12 (2000), available at <http://www.nad-plo/eye/A%crisis%20of%faith.pdf> (last visited, Feb. 16, 2002) [hereinafter SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION]. Even within the framework of the Mitchell Committee, the Palestinians presented this belated acceptance as their “historic compromise” in the Israeli-Palestinian conflict. *Id.*; MAKOVSKY, *supra* note 1, at 8-9.

These types of dispute resolution were also considered in the Egypt-Israel conflict over the borders in the Taba and other areas.⁵⁶ Article IV of the *Treaty of Peace* (1979) between Egypt and Israel called for the Joint Commission to demarcate the international border between the two parties.⁵⁷ As part of the work of the Joint Commission, a disagreement arose as to the precise locations of the boundary line in Taba and other areas.⁵⁸ Article VII of the *Treaty of Peace* states:

1. Disputes arising out of the application or interpretation of this treaty shall be resolved by negotiations.
2. Any such disputes which cannot be settled by negotiations shall be resolved by conciliation or submitted to arbitration.⁵⁹

Negotiations (with U.S. mediation) did not result in an agreement.⁶⁰ The parties agreed to submit their differences regarding the location of fourteen boundary pillars, including the Ras Taba area, in a joint process of conciliation and arbitration.⁶¹ As part of the arbitration agreement, there was an extensive attempt to reach a settlement via conciliation when arbitration was still in progress.⁶² No agreement was reached and the arbitration tribunal resolved the dispute in favor of Egypt.⁶³

Thus, neither attempt at dispute resolution was successful. The Arab countries rejected the UNSCOP findings.⁶⁴ The sides could not and/or would not reach a compromise in the Egypt-

56. Egypt-Israel Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront, 26 I.L.M. 1421 (1986) [hereinafter Egypt-Israel Agreement].

57. Egypt-Israel: Treaty of Peace, Mar. 26, 1979, 18 I.L.M. 362, 363-64. Annex I to the Treaty called for the Israeli withdrawal to the lines determined by the Joint Commission to be completed by April 25, 1982. *Id.* at 363. When the lines could not be agreed upon, the sides agreed to submit the remaining technical questions regarding the international boundary to an agreed procedure that achieves a final and complete resolution, in conformity with Article VII of the Treaty of Peace. *Id.* at 364.

58. Egypt-Israel Agreement, *supra* note 56, at 1430.

59. Egypt-Israel: Treaty of Peace, *supra* note 57, at 366.

60. Egypt-Israel Agreement, *supra* note 56, at 1430.

61. *Id.*

62. *Id.* Article IX of the Agreement to Arbitrate provides for the establishment of a three-member "chamber" of the Arbitration Tribunal to "explore the possibilities of a settlement of the dispute." *Id.* at 1432. Each side named its representative to the tribunal to serve in the chamber along with an agreed third member, Pierre Bellet from France. *Id.* The chamber, unable to reach an agreement or make a recommendation to the tribunal, required a determination by the Arbitration Tribunal. *Id.* at 1433.

63. Boundary Dispute Concerning the Taba Area, Arbitration Award, Egypt-Israel, 27 I.L.M. 1421, 1493-94 (1988) [hereinafter Arbitration Award].

64. See LIE, *supra* note 55, at 194.

Israel border issue.⁶⁵ In both cases, the concerns seemed to be too material to allow compromises proposed by a third party. The concept of bridging the gaps and compromising via these mechanisms failed. In the Egypt-Israel border issue, however, the sides allowed a final legal determination by the arbitration tribunal.⁶⁶ Perhaps the sides saw this as an action to promote the recently signed peace agreement, as well as a path to an ultimate resolution of the dilemma. The binding nature of the determination of the arbitration panel, however, differed from the process of fact-finding or conciliation that demanded a consideration of compromise.⁶⁷ Also, there might have been a cultural consideration regarding compromise in the Middle East. Difficulties in the region and political regimes in the majority of the states created situations that were not conducive to compromise. Two brave leaders who advocated compromise, Anwar Sadat and Yitzhak Rabin, paid with their lives.

III. BACKGROUND TO THE CONFLICT

Israel and the Palestinians had a history of negotiating and reaching agreements even before the memorable handshake between Yitzhak Rabin and Yasser Arafat on the U.S. White House lawn on September 13, 1993. That handshake signaled a mutual recognition and a shared goal to gradually end enmity in the region.⁶⁸ A series of agreements were signed, yet a number of setbacks challenged the attempt to foster a relationship.⁶⁹ Ehud Barak was elected Prime Minister of Israel in May 1999 on the platform that he would expedite the negotiation process between the parties.⁷⁰ In September 1999, the parties committed to a fifteen-month timeline for implementing agreements and working together to resolve remaining issues.⁷¹

65. See Arbitration Award, *supra* note 63, at 1430.

66. Egypt-Israel Agreement, *supra* note 56, at 10.

67. Miriam Shapiro, *Dispute Resolution: General Methods and CSCE Mechanisms*, ASIL NEWSLETTER, Sept. 1994.

68. See generally, Declaration of Principles, *supra* note 3.

69. See COMMITTEE REPORT, *supra* note 5, at 5, 8-18.

70. *Result Fuels Optimism in Middle East*, BBC NEWS (May 18, 1999), at http://news.bbc.co.uk/hi/english/world/middle_east/newsid_346000/34672.stm.

71. See The Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, Sept. 4, 1999, 38 I.L.M. 1465, 3-8 [hereinafter Memorandum of

In Spring 2000, Barak reached the conclusion that a summit meeting between the leaders was a necessary catalyst to reach a historic agreement.⁷² At the invitation of the United States, the parties met at Camp David, near Washington D.C. with U.S. representatives led by then-President William J. Clinton.⁷³ From July 11-25, 2000, for the first time, the parties openly discussed the most difficult "permanent status" issues of the Israeli-Palestinian conflict. These issues included Jerusalem, the refugees, settlements and recognition of an independent Palestinian state.⁷⁴ Despite the marathon meetings and twelve days of seclusion, the parties did not reach an agreement.⁷⁵

Tensions subsequently increased between Israel and the Palestinians.⁷⁶ The United States blamed the Palestinians for the failure to reach a successful resolution at Camp David.⁷⁷ In response to the conclusion of the summit, President Clinton said:

[T]he Palestinians changed their position; [they] moved forward. The Israelis moved more from the position they had. . . I was not condemning Arafat, I was praising Barak. But I would be making a mistake not to praise Barak because I think he took a big risk. And I think it sparked, already, in Israel a real debate, which is moving Israeli public opinion toward the conditions that will make peace. So I thought that was important, and I think it deserves to be acknowledged.⁷⁸

Implementation Timeline]. The Timeline set a goal of reaching "a comprehensive agreement on all Permanent Status issues." *Id.* at 1(d).

72. See Jane Perlez, *Impasse at Camp David: The Overview; Clinton Ends Deadlocked Peace Talks*, N.Y. TIMES, July 26, 2000, at A1.

73. Jane Perlez, *Camp Clinton Opens for the Summer*, N.Y. TIMES, July 9, 2000, § 4, at 2.

74. Jane Perlez, *supra* note 72.

75. President William J. Clinton, Statement on the Middle East Peace Talks at Camp David, (July 25, 2000)(transcript available at http://www.state.gov/www/regions/nea/00725_clinton_stmt.html) [hereinafter Statement by President Clinton].

76. *Barak: Time Running Out For Peace*, BBC NEWS, Sept. 5, 2000, available at http://news.bbc.co.uk/hi/english/world/middle_east/newsid_910000/910609.stm.

77. See Statement by President Clinton, *supra* note 75.

78. *Id.* Secretary of State Madeleine Albright and U.S. National Security Advisor Samuel Berger offered even stronger statements in the days following the end of the summit. See generally Interview by Margaret Warner with Madeleine Albright, Secretary of State of the United States, *NewsHour with Jim Lehrer*, PBS (July 25, 2000) (transcript available at http://www.pbs.org/newshour/bb/middle_east/july-dec2000/albright_7-25.html); see also Interview by Charlie Rose with Samuel Berger, United States National Security Advisor, *Timing was right for Camp David talks; gaps were narrowed* (July 27, 2000) (transcript available at http://www.usembassy.it/file2000_08/alia/a0080110.htm). For an

Prime Minister Barak announced that the proposals made at Camp David were void, and stated the Palestinians were responsible for their rejection of the Israeli offers.⁷⁹ In Israel, Barak was criticized for making such far-reaching offers without success.⁸⁰ Arafat embarked on a month-long international tour to discuss with world leaders the possibility of a unilateral Palestinian declaration of independence.⁸¹ At the end of his tour, Arafat realized the international community would not support a unilateral action by the Palestinians on the diplomatic front.⁸² Simultaneously, rhetoric regarding the threat of violence in the region increased as a result of the deadlock in the peace process.⁸³ Nevertheless, secret negotiations continued in the region and in Europe.⁸⁴

On September 27, 2000, violence erupted in the region when a roadside bomb exploded, wounding two Israeli soldiers at the Netzarim Junction in the Gaza Strip.⁸⁵ The next day, opposition leader Ariel Sharon visited the Temple Mount in Jerusalem.⁸⁶

alternative view on the causes of the failure of Camp David see R. Malley, *Fictions About the Failure At Camp David*, N.Y. TIMES, Jul. 8, 2001, § 4, at 11.

79. Prime Minister Ehud Barak, Statement by Prime Minister Barak at Press Conference Upon the Conclusion of Camp David Summit (July 26, 2000) (transcript available at <http://www.mfa.gov.il>).

80. See Deborah Sontag, *And Yet So Far: A special report: Quest for Mideast Peace: How and Why It Failed*, N.Y. TIMES, July 26, 2001, at A1.

81. See *id.*

82. See *id.*

83. See generally Interview by Gwen Ifill with George J. Mitchell, Committee Chairman, Sharm el-Sheikh Fact-Finding Committee, *NewsHour with Jim Lehrer*, PBS (May 7, 2001) (transcript available at http://www.pbs.org/newshour/bb/middle_east/jan-june01/mitchell_5-7.htm) [hereinafter Ifill Interview with Mitchell].

84. Sontag, *supra* note 80. This article offers a comprehensive description of the events from Camp David until the end of the Clinton administration including details regarding the attempts to continue negotiations following the failure at Camp David. *Id.*

85. GOVERNMENT OF ISRAEL, FIRST STATEMENT OF THE GOVERNMENT OF ISRAEL 72 (2000), available at <http://www.mfa.gov.il> [hereinafter FIRST STATEMENT OF ISRAEL].

86. *Id.* at 75. The Temple Mount, to Jews, or Haram el-Sharif (Noble Sanctuary) to Muslims, is a site holy to Jews and Muslims alike. For Jews, it was the site of the two ancient Temples, and for Muslims it was the site of the ascension to heaven of the prophet Muhammad. Today, both the Dome of the Rock and the Al Aqsa Mosque are situated on the Mount and the Western Wall, a remnant of the Second Temple, a holy site for Jews, is beneath it. Both the Israeli and Palestinian submissions to the Mitchell Committee deal significantly with Sharon's visit to the Temple Mount. See *id.*, at 75-80; see also SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 7-10. Interestingly, both take the position that the visit was not the root cause of the violence in the region. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 54-55; see also SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 10. In fact, there are no factual disputes of the Sharon visit itself. Twenty-eight Israeli policemen

Generally, in Israel, this action was considered to be a domestic challenge to Prime Minister Barak. On September 29, protests in the Temple Mount area occurred during and after Friday Muslim prayers. That afternoon, four Palestinians were killed and fourteen Israeli policemen were wounded. Violence reached the West Bank and Gaza.⁸⁷

Diplomatic efforts began in an attempt to quell the violence. On October 4, Prime Minister Barak and Chairman Arafat met in Paris with French President, Jacques Chirac, and U.S. Secretary of State, Madeline Albright.⁸⁸ The parties agreed upon some "Points of Understanding," which included a commitment by both sides "to reduce and eliminate friction and confrontation."⁸⁹ Additionally, the parties preliminarily agreed that the United States would develop with the Israelis and the Palestinians, as well as in consultation with the United Nations Secretary General, a committee of fact-finding on the events of the past several days.⁹⁰

Notwithstanding the promising nature of the agreement, Arafat refused to sign at the last moment.⁹¹

IV. FORMATION OF THE MITCHELL COMMITTEE

On October 16 and 17, the Israeli and Palestinian leaders met again at a summit in Sharm el-Sheikh, Egypt. Other summit participants included President Hosni Mubarak of Egypt, U.S. President Clinton, King Abdullah from Jordan, U.N. Secretary General Kofi Annan and Javier Solana, European Union High Representative for Common Foreign and Security Policy.⁹² The summit concluded with the parties agreeing to the establishment of

were injured that day while Palestinians reported no injuries or deaths on the day of the visit. FIRST STATEMENT OF ISRAEL, *supra* note 85, at 79. Sharon did not enter any religious shrine or deviate from the standard tourist path on the Temple Mount. *See id.* at 78-79. Of course, in the ensuing weeks, much propaganda was made of the visit—not incidentally, the Palestinians have referred to the continuing wave of violence as the *Al Aqsa Intifada*, invoking the Mosque as the source of the uprising. *See* SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 10.

87. FIRST STATEMENT OF ISRAEL, *supra* note 85, at 81-82.

88. *Id.* at 93.

89. *See id.* (quoting Paris Summit, draft *Points of Understanding*, 4 October 2000 (Annex I, Tab 27)).

90. *See Arafat and Barak*, *supra* note 8.

91. FIRST STATEMENT OF ISRAEL, *supra* note 85, at 93. *See also* Palestinian Cease Fire Compliance: Dilemmas for American Policy (Oct. 14, 2001), available at <http://www.jcpa.org/art/brief1-5.htm>.

92. White House Press Release, *supra* note 9.

a fact-finding committee.⁹³ The parties additionally agreed to issue public statements calling to end violence, renew security cooperation and work towards further negotiations.⁹⁴

Regarding the fact-finding committee, President Clinton said:

[T]he United States will develop with the Israelis and Palestinians, as well as in consultation with the United Nations Secretary-General, a committee of fact finding on the events of the past several weeks and how to prevent their recurrence. The committee's report will be shared by the U.S. President with the U.N. Secretary-General and the parties prior to publication. A final report shall be submitted under the auspices of the U.S. President for publication.⁹⁵

The parties later agreed the committee would be chaired by former U.S. Senator George J. Mitchell, and would include four additional members: former Turkish President Suleyman Demirel, Norwegian Foreign Minister Thorbjorn Jagland, former U.S. Senator Warren Rudman and Mr. Solana.⁹⁶

The Israelis and Palestinians manifested a willingness to play a role in determining the mandate for the Mitchell Committee.⁹⁷ The Committee, however, feared that such a focus would be counterproductive and impractical in light of the already tense atmosphere.⁹⁸ Further, the terms sought by the parties might encumber the Committee's flexibility and independence. The Committee instead focused its mandate on two letters sent by President Clinton to Senator Mitchell, which outlined goals and

93. *Id.*

94. *Id.*

95. *Id.*

96. *Mitchell Gets Middle East Role*, BBC NEWS, Nov. 8, 2000, available at http://www.bbc.co.uk/hi/english/uk/northern_ireland/newsid_1012000/1012306.stm.

97. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 9. On December 8, 2000, the Palestinians presented a preliminary submission to the Committee, which included a series of procedural suggestions. PALESTINE LIBERATION ORGANIZATION, PRELIMINARY SUBMISSION OF THE PALESTINE LIBERATION ORGANIZATION TO THE INTERNATIONAL COMMISSION OF INQUIRY 3-7, (2000), available at <http://www.nad-plo/eye/inception%20report.final.pdf> [hereinafter PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION]. The Israelis attempted to negotiate terms of reference regarding its activities with the committee. FIRST STATEMENT OF ISRAEL, *supra* note 85, at 10. This statement included details of Israel's views as to the appropriate role and procedures of the Committee. *Id.* at 10-11.

98. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 9-10.

working procedures for the Committee.⁹⁹ In the second letter, dated December 6, 2000, President Clinton wrote:

First, the Committee should ensure that it is, and is perceived to be, fair and impartial. Specifically, the Committee should operate in a transparent manner, allowing the parties to view material offered by the other party and to comment on one another's presentations. Also, as was agreed at Sharm, both sides should have an opportunity to review the report and give comments to the Committee before it becomes final.

Second, the Committee should seek to avoid any action that could further inflame the already very tense situation. . . . (T)he Committee should conduct its work in confidence rather than through hearings. . . . Finally, if the Committee chooses to retain professionals for assistance, they should conduct their work quietly outside the glare of publicity and should share the results only with the Committee. If these experts conduct individual interviews or gather materials in the region relevant to the Committee's mission, they should do so privately and inform the Committee of their work, which the Committee would bring to the attention of the parties for further comment.

Third, the Committee should strive to steer clear of any step that will intensify mutual blame and finger-pointing between the two parties. As I noted in my previous letter, 'the Committee should not become a divisive force or a focal point for blame and recrimination but rather should serve to forestall violence and confrontation and provide lessons for the future.' This should not be a tribunal whose purpose is to determine the guilt or innocence of individuals or of the parties; rather, it should be a fact-finding committee whose purpose is to determine what happened and how to avoid it recurring in the future. . . ."¹⁰⁰

99. See COMMITTEE REPORT, *supra* note 5, at 42-45. The letters, dated November 15, 2000 and December 6, 2000 respectively, were included in the Report of the Sharm el-Sheikh Fact-Finding Committee. *Id.*

100. Letter from William J. Clinton, President of the United States, to George Mitchell, Chairman, Sharm el-Sheikh Fact-Finding Committee (Dec. 6, 2000) (*reprinted in* COMMITTEE REPORT, *supra* note 5, at 44-45) [hereinafter Letter from President Clinton].

V. FACT-FINDING ACTIVITIES

In late November 2000, the parties assigned points of contact to work with the Mitchell Committee.¹⁰¹ Representatives of each side were invited to meet with the Committee members in New York for initial consultations. At that meeting, the participants were asked to submit a written presentation to the Committee by the end of December. Additionally, the parties were informed that Committee members would visit the region for introductory meetings on December 11 and 12.¹⁰² Further, the Committee would consider additional visits as deemed necessary. Both parties were expected to respond to the initial written presentations at a later date.

Despite the agreement reached at Sharm el-Sheikh, none of the terms written by President Clinton on October 17, 2000 were effective except for the development of the Mitchell Committee. At the conclusion of the summit, Prime Minister Barak publicly called for implementation of the terms of the agreement, including cessation of violence.¹⁰³ Chairman Arafat, however, did not make a similar declaration, although a statement was made on Palestinian television noting that “the Palestinian leadership” instructed the Palestinian forces to follow up on the activities agreed to at Sharm el-Sheikh.¹⁰⁴ Unfortunately, no security cooperation was initiated and the violence continued.¹⁰⁵

An additional diplomatic attempt to end the violence took place in Gaza at a meeting between Chairman Arafat and then

101. The Palestinians named Yasser Abed Rabbo as Palestinian Authority Minister for Culture and Information. See Letter from Yasser Abed Rabbo, Minister of Culture and Information, Palestine Liberation Organization, to Sen. George Mitchell and Members of the Sharm el-Sheikh Fact Finding Committee (May 15, 2001) (*reprinted in* COMMITTEE REPORT, *supra* note 5, at 58), available at <http://www.nad-plo.org/eye/news18.html> [hereinafter Letter from Yasser Abed-Rabbo]. Israel named as its contact, Moshe Kochanovsky, Deputy Director General for Special Projects at the Ministry of Defense. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 142.

102. See, e.g., Israel Ministry of Foreign Affairs, *PM Barak and Interministerial Team Meets With Former US Senator Mitchell's Fact-Finding Committee* (Dec. 11, 2000), available at <http://www.mfa.gov.il> (last visited Jan. 20, 2002). The visit included meetings with Israel and the Palestinians, as well as short visits to Egypt and Jordan, as those countries participated in the summit at Sharm el-Sheikh.

103. *Barak Says End of Violence Will Be True Test of Summit Agreement*, CNN, Oct. 17, 2000, available at <http://asia.cnn.com/2000/WORLD/meast/10/17/mideast.barak/index.html>.

104. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 96.

105. *Id.*

Israeli Minister for Regional Cooperation, Shimon Peres.¹⁰⁶ The parties agreed to issue a "Joint Statement on the Cessation of Violence" on November 2, 2000.¹⁰⁷ Before the statement was issued, however, a car bomb exploded in a Jerusalem market, killing two Israelis.¹⁰⁸

A. *Written Submissions*

Each party submitted two rounds of documents to the Committee. These documents offered subjective narratives of the prior events and the deteriorating relationship between the parties. The documents were similar to legal brief arguments on substantive and procedural issues. The parties presented their views by way of videos, maps and aerial photos.¹⁰⁹ Both sides also submitted views on how they saw the completion of work by the Committee including its recommendations as well as quickly publicizing their submissions through media sources including the Internet. They attempted to use the submissions to gain advantages in the diplomatic circles and the public opinion. Many meetings took place with both the Committee members and the technical staff including officials, victims of violence, NGO's and academia.¹¹⁰ The benefits of this process included providing a forum for venting their concerns and frustrations, as well as introducing the Committee and its staff to the nuances of the conflict. The presentations additionally enabled the Committee to direct its efforts towards pragmatic recommendations.¹¹¹

106. Jerusalem Center for Public Affairs, *Palestinian Cease-Fire Compliance: Dilemmas for American Policy*, Vol. 1, No. 5 (2001).

107. *Id.*

108. *Bomb Kills Two in Jerusalem*, BBC News, Nov. 2, 2000, available at http://news.bbc.co.uk/hi/english/world/middle_east/newsid_1004000/100499.stm.

109. PALESTINIAN LIBERATION ORGANIZATION, THIRD SUBMISSION OF PALESTINE LIBERATION ORGANIZATION TO THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE 11-12 (2001), available at <http://www.nad.plo.org/mitchel%20report%20documents.html> [hereinafter THIRD SUBMISSION OF PALESTINE LIBERATION ORGANIZATION]; FIRST STATEMENT OF ISRAEL, *supra* note 85, at Annexes.

110. See COMMITTEE REPORT, *supra* note 5, at 24-25. See also SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55.

111. Secretary of State Colin Powell, Remarks at a briefing in Washington D.C. on the Sharm el-Sheikh Fact-Finding Committee regarding the release of the Mitchell Report on Mideast Violence (May 21, 2001) (transcript available at <http://www.jordanembassyus.org/05212001003.htm>) [hereinafter Remarks by Colin Powell].

B. Palestinian Initial Submissions

In December 2000, the Palestinians presented two submissions to the Mitchell Committee.¹¹² On December 11, 2000, the Palestinians presented their *Preliminary Submission of the Palestine Liberation Organization to the International Commission of Inquiry* to the Committee members during their visit to the region.¹¹³ This submission primarily addressed procedural issues, but it also presented Palestinian claims regarding the conflict.¹¹⁴ Then on December 30, the Palestinians presented *A Crisis of Faith: Second Submission of the Palestine Liberation Organization*, which was their primary written presentation of facts.¹¹⁵ Together, these two presentations emphasized the central positions of the Palestinians in the Israel-Palestinian conflict far beyond the issues of violence during the previous three months, including the major historical issues between the sides.¹¹⁶

The Palestinian submissions offered a historical overview of the region.¹¹⁷ The papers detailed issues ranging from the U.N.'s partition plan of 1947 to the "dashed expectations" of the Palestinians as a result of the peace process.¹¹⁸ Although not expressly stated, the papers conveyed a message that the events were not a reaction to one specific event, but instead a combination of disappointments culminating over an extended period.¹¹⁹ As a result, the Palestinians saw no other option but to resort to violence in order to end the regional stalemate.¹²⁰ In other words, the Palestinians saw themselves as merely reacting to

112. All three Palestinian submissions to the Mitchell Committee and their response to the Mitchell Report may be found on the web site of the Negotiation Affairs Department of the Palestine Liberation Organization: www.nad-plo.org.

113. PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 97.

114. *Id.* at 11-12.

115. See SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55.

116. PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 97, at 9-10; SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 10-18.

117. PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 97, at 9-10.

118. *Id.* See also SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 13.

119. SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 13-15.

120. *Id.* at 10.

the Israeli violence—actual physical violence as well as political and economic threats.¹²¹ The authors noted that more than seven years after signing the Declaration of Principles,¹²² most Palestinians had come to the conclusion that this faith was misplaced.¹²³ The Palestinians viewed Israel's attitude towards the implementation of the signed agreement is perhaps best captured in late Prime Minister Rabin's assertion that 'no dates are sacred.'¹²⁴

The Palestinians' primary problems with the peace process included the continual building of settlements, and Israel's non-compliance with obligations taken as part of the various agreements already signed by Israel and the Palestinians. As for the settlement issue, the authors presented the Israelis' continued policy of a "military-enforced dual system, and the persistent infringement upon Palestinian civil, political and economic rights by Israeli occupation forces" as the basis of the *intifada* of 1987-1993.¹²⁵

Further, the bulk of the Palestinian presentation blamed Israel for the events of the three months following the eruption of violence.¹²⁶ The central issues detailed by the presentation were violence against civilians ("a one-sided war"), including a range of statistics regarding the number of dead and wounded, international principles regarding the illegal use of force by Israel and a detail of different methods allegedly used "to kill and injure Palestinians."¹²⁷ The submission also described the Palestinians' economic losses as a result of the violence.¹²⁸

The Palestinians emphasized the role of the international community, as envisaged by the Palestinians.¹²⁹ They saw the Mitchell Committee as an opportunity to internationalize the conflict. Disappointed with the results of the direct negotiations with the Israelis, the Palestinians presented the view that a greater involvement from the international community would be

121. *Id.*

122. *See* Declaration of Principles, *supra* note 3.

123. SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 14.

124. *Id.*

125. *Id.* at 12.

126. *Id.* at 3, 10, 20, 27-28, 42, 46, 60.

127. *Id.* at 19, 20-31.

128. *Id.* at 34-38.

129. *Id.* at 9.

helpful.¹³⁰ The Palestinians hoped that the Mitchell Committee, like other international fora such as the U.N. General Assembly and the Commission on Human Rights would be of use in promoting their position in the conflict.¹³¹ The Committee mandate itself was presented as resulting not only from the agreement reached between the parties at Sharm el-Sheikh, but also from the Fourth Geneva Convention and U.N. Security Council Resolution 1322 (2000).¹³² From the Palestinian perspective, Israel's violation of international laws and norms in recent violent attacks, in addition to the thirty-three years of occupation of the West Bank and Gaza, was the central reason for encouraging the involvement and shared responsibility of the international community.¹³³

The Palestinians concluded their presentation with eight recommendations to the Mitchell Committee. A majority of the recommendations emphasized the "root causes" of their conflict with the Israelis rather than the specific events.¹³⁴ The recommendations included: (1) a demand for compliance with the Fourth Geneva Convention, (2) an end to violence against the Palestinian civilian population, (3) a lift on restrictions on freedom of movement of persons, vehicles and goods, (4) a freeze on settlement construction and expansion, (5) a gun control imposed on Israeli settlers, (6) a call for Israeli compliance with the past agreements, (7) a deployment of an international monitoring and implementation mission and (8) an end to further attacks in the Palestinian controlled areas.¹³⁵

130. See PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 97, at 6. The title of the preliminary Palestinian submission offered an alternate name to the Sharm el-Sheikh Fact-finding Committee, "Mandate of the International Commission of Inquiry," which invoked the spirit of internationalization. *Id.* at 4.

131. *See id.* at 5-6.

132. *Id.* at 4. On Oct. 7, 2000, the U.N. Security Council approved Resolution 1322, which addressed the violence of the previous week. S.C. Res. 1322, U.N. SCOR, 4205th mtg., U.N. Doc. S/RES/1322 (2000). The resolution indicates the need for a "speedy and objective inquiry" into these events. *Id.*

133. See PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 97, at 9-10.

134. *See id.* at 5.

135. SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 53-59.

C. Israel's Initial Submission

Israel submitted the *First Statement of the Government of Israel* on December 29, 2000.¹³⁶ The presentation emphasized that the Palestinian leadership strategically encouraged violence after being perceived by the international community as the cause of the Camp David Summit failure.¹³⁷ The Israelis claimed that the Palestinians blatantly violated their commitment to a peaceful dispute resolution by choosing violent confrontation instead of continued diplomatic dialogue.¹³⁸ The goal was to provide the Palestinians with an opportunity to reestablish their historical position as the underdogs in the conflict.¹³⁹ The presentation detailed the history of agreements reached between the Israelis and the Palestinians.¹⁴⁰ It stressed the repeated and comprehensive obligations that were ignored by the Palestinian Authority to work towards preventing incitement, violence and continually fighting terror.¹⁴¹ There is a detailed attempt to respond to a claim raised against Israel relating to the disproportionate use of force.¹⁴²

The summary of Israel's position regarding the violence was stated as:

Israel did not seek the present confrontation. It was, and continues to be, imposed upon Israel by the Palestinian side. Within the severe constraints of the events of recent weeks, Israel's actions have been directed towards containing the confrontation, protecting persons not directly involved in the conflict and their property, and avoiding casualties to its military and police personnel in the performance of their task. Israel has also been concerned to minimize serious injury to those actively engaged on the Palestinian side.

While it has not always been possible, in the extreme circumstances of the on-going violence, to meet all of these objectives, Israel firmly maintains that it has acted in a measured and responsible fashion in the circumstances."¹⁴³

136. FIRST STATEMENT OF ISRAEL, *supra* note 85, at 2.

137. *Id.* at 4.

138. *Id.* at 13.

139. *See id.* at 52-81.

140. *See id.* at 21-46.

141. *See id.*

142. *See id.* at 118-37.

143. *Id.* at 12.

Israel detailed its concerns regarding the practice and policies of the Palestinians including the exploitation of children by sending them to participate in violent protests, promoting acts of violence and terror directed at the Israeli civilians, specific acts of barbarism, official and religious incitements, the release of terrorist detainees from prisons, and the failure of the Palestinian Authority to confiscate illegal weapons.¹⁴⁴ In a significant number of incidents, the Palestinian snipers hid in crowds of civilians and opened fire.¹⁴⁵ Additionally, the torture and lynching of two Israeli reservist soldiers in Ramallah, and the destruction of the Jewish holy site of Joseph's Tomb, were cited as examples of the nature of the threat towards any Israeli national who fell into the hands of the Palestinians.¹⁴⁶

The authors of the report compared the Palestinian riots to "armed conflict short of war," thus mandating the application of the rules of engagement of the Israeli military within the context of these events.¹⁴⁷ The nature and methods employed by the Israeli military were described in detail to refute any claim of excessive use of force.¹⁴⁸ The paper detailed the various types of non-lethal weapons available to Israel, but claimed that since the violence initiated by the Palestinians involved live-fire, non-lethal weapons were often not a viable option.¹⁴⁹

The submission included a long series of quotes taken from articles by the international media citing public statements made by the Palestinian leaders addressing these points.¹⁵⁰ A series of aerial photos, maps and even a collection of video clips were included with the Israeli document.¹⁵¹

The Israelis recommended that the Palestinians stop the violence and return to the terms of the previous agreements reached between the parties in an effort to ensure security for the

144. *Id.* at 14-16.

145. *Id.* at 12.

146. *Id.* at 15.

147. *Id.* at 133.

148. *Id.* at 132-33.

149. *Id.* at 127-28.

150. *Id.* at 70-75.

151. *Id.* at Appendix. The report entitled "A Crisis of Faith: Second Submission of the Palestine Liberation Organization" also included a video and a large collection of international reports and documentation. See SECOND SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 55, at 6.

citizens of the region.¹⁵² The Israelis further proposed concrete measures, such as ending Palestinian incitement, returning terrorists to prison and renewing security cooperation.¹⁵³ Israel also proffered a number of confidence building measures it would be disposed to undertake in an effort to "build the feeling of security and progress on all sides."¹⁵⁴

D. Activities of Technical Staff

After the parties submitted their presentations to the Committee at the end of December 2000, the Mitchell Committee sent a delegation of approximately twelve aides, described as a technical staff, to gather evidence and meet with the parties to assist the five principal members of the Committee in their fact-finding task. This diverse group included nationals from various countries appointed by the Committee.

The Palestinians welcomed the technical staff and organized a wide series of meetings and presentations.¹⁵⁵ They also submitted two additional documents on specific issues of interest regarding the conflict, in addition to a relatively large number of documents prepared by a variety of Palestinian and international organizations.¹⁵⁶

The Israelis, on the other hand, already frustrated by the shortcomings of the Sharm el-Sheikh Summit's failure to end violence, were preparing for elections in early February 2001. They deemed activities of the technical staff as extensions of the ambiguous mandate promulgated by the Mitchell Committee,¹⁵⁷ and continued to be concerned by a lack of agreement on the

152. FIRST STATEMENT OF ISRAEL, *supra* note 85, at 17.

153. *Id.* at 140.

154. *Id.* at 141.

155. Palestine Liberation Organization Negotiations Affairs Dept., *Minister Yasser Abed Rabbo meets with the technical staff of the Sharm El-Sheikh Fact-Finding Committee*, Jan. 14, 2001, available at <http://www.nad-plo.org/press/nad/nad16.html> (last visited Mar. 1, 2002).

156. See Letter from Yasser Abed Rabbo to Senator George Mitchell and Members of Sharm el-Sheikh Fact Finding Committee (Jan. 12, 2001), available at <http://www.nad-plo.org/eye/news18.html>.

157. As noted above, President Clinton recognized in his letter of December 6, 2000 to Senator Mitchell, that experts could assist the Committee in its efforts. Israel had already raised these concerns before the Committee. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 10-11; Letter from President Clinton, *supra* note 100. The role of the staff and its authority, however, was not described. See *id.*

terms of reference for the Mitchell Committee.¹⁵⁸ After the technical staff visited the Temple Mount on January 13, 2001, without coordinating the visit with the Israeli officials, Israel decided to temporarily suspend its cooperation with the Mitchell Committee.¹⁵⁹

Newly elected Prime Minister Ariel Sharon renewed ties with the Committee.¹⁶⁰ He noted that while he believed “the setting up of the Committee was a mistake of the previous government. . . Israel would cooperate with the Committee and extend it any necessary assistance to find out the truth [as] Israel does not fear an examination of the facts.”¹⁶¹ One reason for this decision was the active involvement of Shimon Peres, the Minister of Foreign Affairs in Sharon’s government. This surprising new partnership was a key component in Sharon’s formation of a unified national government. Peres argued that for a new government to build international credibility, it would be counterproductive to be perceived as being responsible for the dissolution of the Mitchell Committee.¹⁶²

Prime Minister Sharon welcomed a second visit of the Committee members on March 21, 2001.¹⁶³ During the four-day visit to Israel and the Palestinian areas, the Committee members held discussions with Sharon, Peres, Arafat and other political and military leaders, as well as meeting with victims of violence from

158. See A. Ben, *Israel Boycotts Mitchell Inquiry*, HA’ARETZ (English Edition), Jan. 22, 2001, at 1.

159. See *id.* The technical staff and the Israelis began discussing modalities of such a visit, but had not reached a conclusion when the technical staff visited the area in coordination with the Palestinian Wakf, the religious authority that managed the area of the Temple Mount. *Id.* The staff met with Wakf representatives during the visit. *Id.* Later, members of the technical staff explained they had not coordinated the visit with the Israelis after receiving advice that, due to the unique nature of the Temple Mount area, diplomatic practice did not demand coordination for such a visit with Israel. *Id.* They also explained that they hoped a low-key visit would allow the members of the Committee to avoid such a visit adding to tensions. *Id.*

160. Janine Zacharia & Melissa Radler, *Peres Fights International Force Plan at U.N.*, JERUSALEM POST, Mar. 16, 2001, at 2A.

161. Embassy of Israel Press Releases, PM Sharon Meets with Mitchell Committee, Mar. 21, 2001, available at <http://www.israelemb.org/chicago/Israel%20update/IsraelUpdate3-26-01.htm> (last visited Mar. 4, 2002).

162. See also Harvey Morris, *Peres Meets Palestinians to Spur Talks*, FINANCIAL TIMES (London), Apr. 5, 2001, at 10.

163. Memorandum of Implementation Timeline, *supra* note 71; Embassy of Israel Press Releases, PM Sharon Meets with Mitchell Committee, *supra* note 161.

both sides.¹⁶⁴ Following this second visit, members of the technical staff remained in the region for four more days for further meetings with the Israeli officials to complete the fact-finding efforts of the Committee.¹⁶⁵

E. Written Responses of the Sides

Both parties responded to the other party's submissions. Israel and the Palestinians submitted their responses around the time the Committee members made their second visit to the region.¹⁶⁶

1. Palestinian Response

In the *Third Submission of the Palestinian Liberation Organization to the Sharm el-Sheikh Fact-finding Committee*, the Palestinians responded to the Israeli claims regarding the root of the violence, the Israeli characterization of the situation in the region as an "armed conflict" and other specific points raised in the Israeli submission.¹⁶⁷

Regarding the root causes of the violence, the Palestinians reemphasized their dashed expectations from the peace process.¹⁶⁸ According to the Palestinians, the interim period had to be viewed comprehensively, not only the short period since Camp David.¹⁶⁹ The Palestinians noted that despite the Israeli assertions to the contrary in their presentation, the Palestinian efforts to promote peace and security during the interim period were significant.¹⁷⁰ The authors noted that the Israeli "allegation is belied by the Palestinian Authority's significant accomplishments in preventing violence during the Interim Period and overlooks the legal constraints imposed on its law enforcement efforts."¹⁷¹

164. Embassy of Israel Press Releases, PM Sharon Meets with Mitchell Committee, *supra* note 161.

165. *Id.*

166. GOVERNMENT OF ISRAEL, SECOND STATEMENT OF THE GOVERNMENT OF ISRAEL (Mar. 20, 2001), at <http://www.mfa.gov.il> [hereinafter SECOND STATEMENT OF ISRAEL]. Israel submitted its second statement on Mar. 20, 2001. *Id.* The Palestinians submitted their third submission on Apr. 3, 2001 (*see* THIRD SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 109).

167. THIRD SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 109, at 5, 51-54, 59-64.

168. *Id.* at 7-10.

169. *Id.*

170. *Id.* at 14-16.

171. *Id.* at 14.

The document detailed Palestinian efforts to prevent violence, including actions against illegal possession of weapons.¹⁷² The document also presented the efforts of the Palestinian Authority to educate people in order to fight incitement.¹⁷³ At the same time, it was argued that the acts of Israeli provocation, such as settlement activities, broken deadlines and economic and personal restrictions on Palestinians, were part of the frustration and disappointment felt by the Palestinians throughout the peace process.¹⁷⁴ Counterclaims about the Israeli statements and actions in connection with incitement, such as claims of hate speech by Israeli politicians and religious leaders, were presented to rebut Israeli claims regarding the Palestinian incitement created by textbooks.¹⁷⁵ Finally, the Palestinians characterized the Israeli proposals at Camp David as a dramatic departure from the principles agreed to between the parties as modalities for making peace, and thus falling short of the Palestinians' requirements regarding a peace agreement.¹⁷⁶ According to the Palestinians, Barak's offer did not meet the Palestinians' need regarding Palestinian refugees, the final status of Jerusalem and other central issues.¹⁷⁷

As for the Israeli use of force, the Palestinians noted a distinction in international law between an uprising and an armed conflict.¹⁷⁸ Furthermore, the Israelis' obligations and legal standards, as an occupying force, within internationally recognized frameworks, remain unchanged.¹⁷⁹ Thus, the Palestinians claimed that if the occupation ended, so would the uprising.¹⁸⁰ The Palestinians emphasized:

[t]he elements necessary for establishing an 'armed conflict' as a matter of international law are not present; that demonstrations are resistance to occupation; and that Israel, as an occupying power has a *duty* to ensure that the Palestinian people are

172. THIRD SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 109, at 16-19.

173. *See id.* at 19-24.

174. PRELIMINARY SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 97, at 9-10.

175. THIRD SUBMISSION OF PALESTINE LIBERATION ORGANIZATION, *supra* note 109, at 20-22.

176. *Id.* at 46-47.

177. *Id.* at 46.

178. *Id.* at 52.

179. *Id.* at 54.

180. *Id.* at 53.

protected. Rather, Israel's classification of the current uprising as an 'armed conflict' is predicated simply on the presence of firearms at some, and not all, demonstrations. And, it is a means by which Israel attempts to derogate from its obligations as set out in international law.¹⁸¹

In concluding the legal aspects of the conflict, the authors of the Palestinian presentation stated that the key to understanding the events was not as claimed by the Israelis:

The link between settlements and the present intifada is clear: many of the acts of violence carried out by Israeli soldiers and settlers, that have resulted in Palestinian deaths and injuries, have taken place on the heavily defended roads leading to the settlements or in the proximity of the settlements. Israel is not under threat—the Palestinians are. And they will continue to be unless and until the international community puts an end to Israel's goal of separating the Palestinian people from its land—and controlling the former while annexing the latter.¹⁸²

2. Israeli Response

In its response, Israel reiterated its overall view of the continuing conflict and addressed specific allegations raised by the Palestinians.¹⁸³ The Israelis discussed what they considered to be a series of factual and legal misrepresentations in the Palestinian submissions, particularly regarding claims of the use of excessive force and alleged assassinations by the Israel Defense Forces.¹⁸⁴

At the beginning of the statement, the Israeli authors commented on the nature of the Palestinian presentations:

The Palestinian submissions are notable for what they leave out. Nothing is said—not a single word—of Palestinian policies and practices over the past five-and-a-half months. Nothing is said about attacks on Israeli civilians, about the on-going incitement to hatred and violence, about the release of terrorist detainees, about the calculated exploitation of children, about the use of illegal weapons, about the destruction of Jewish Holy Sites. . . Above all, nothing is said about ending the violence. It is quite extraordinary that in four Palestinian submissions to the Committee there is not a single word about the ending of the

181. *Id.* at 51.

182. *Id.* at 58.

183. See SECOND STATEMENT OF ISRAEL, *supra* note 166.

184. *Id.* para. 24-42.

bloodshed; about stopping the attacks. The omission is telling. The message is clear. It has even been expressed by senior Palestinian officials. Palestinian attacks against Israelis will not end until Israel accepts Palestinian demands.¹⁸⁵

As for Israel's use of force, the authors reemphasized their position that Israel acted in a measured and proportional manner in response to the Palestinian violence.¹⁸⁶ Additionally, they noted that the Israeli civilians and armed forces have come under violent attacks by persons who do not wear uniforms, often in crowded civilian areas.¹⁸⁷ The Israelis argued that these individuals cannot claim to be civilians or receive the protection afforded to civilians.¹⁸⁸ Thus, those who took part in the attacks cannot claim immunity,¹⁸⁹ and therefore it is permissible, in accordance with international law, to target those who directly take part in hostilities.¹⁹⁰

As to the issue of economic damages, Israel posited that despite shared Israeli and Palestinian interests in economic cooperation, the Palestinians have no inherent right to work in Israel or to receive automatic economic benefits.¹⁹¹ In the Israelis' opinion, economic cooperation and commercial interaction must be viewed as byproducts of peaceful interaction between people.¹⁹² Israel enacted restrictive measures for security reasons.¹⁹³ Similarly, allegations of environmental damage and collective punishment were rejected.¹⁹⁴ In conclusion, Israel emphasized its interest in ending violence and ensuring security for its citizens.¹⁹⁵

VI. CONCLUSIONS OF THE COMMITTEE – THE MITCHELL REPORT

Prior to publication, during the first week of May 2001, the Sharm el-Sheikh Fact-Finding Committee Report was presented to U.S. President George W. Bush, to Israel and the Palestinians, and

185. *Id.* at Section A, para. 3.

186. *Id.* at 21-23.

187. *Id.* at 18.

188. *Id.*

189. *Id.* para. 45, at 17.

190. *Id.* at 17.

191. *Id.* at 29.

192. *Id.*

193. *Id.*

194. *See id.* at 31-34.

195. *Id.* at 10, 35.

to the Secretary General of the United Nations.¹⁹⁶ Upon presentation, the sides were asked to offer comments to be appended to the final published report.¹⁹⁷ While official publication waited for the parties' comments, the media immediately and widely documented the details of the report.¹⁹⁸ On May 21, 2001, the full report, including the comments, was publicly released.¹⁹⁹

A. Details of Report

Despite the Mitchell Committee's mandate "to determine what happened and how to avoid it recurring in the future,"²⁰⁰ the Report predominantly emphasized the future.²⁰¹ In fact, the Report purposely did not answer many central fact-finding questions within the mandate.²⁰² The Report's authors appeared to believe that any detailed fact-finding into such a tense atmosphere would not only challenge the Report's credibility and its chance for acceptance, but might even exacerbate the problems in the region.²⁰³

Instead, the Report included proposals to assist the parties in stopping the violence, rebuilding confidence and returning to the

196. See Ifill Interview with Mitchell, *supra* note 83. The Committee saw this as a politically viable interpretation of the terms set out by President Clinton in the concluding statement at Sharm el-Sheikh and the letter to Senator Mitchell dated December 6, 2000. See COMMITTEE REPORT, *supra* note 5, at 9. President Clinton stated that "both sides should have an opportunity to review the report and give comments to the Committee before it becomes final." *Id.* at 40. However, it seemed the Committee members were concerned that allowing the parties to comment on a draft version would not facilitate a quick release, or an independent document. *Id.* at 67-69. Thus, while the sides were offered the opportunity to comment, and the comments were appended to the published report, they had no chance to influence a final version of the document. *Id.* Interestingly, U. S. Central Intelligence Agency Director George Tenet adopted a similar strategy in the June 2001 cease-fire negotiations. *A Plan to Curtail the Violence*, HA'ARETZ (English Edition), June 14, 2001.

197. Ifill Interview with Mitchell, *supra* note 83.

198. See, e.g., *id.*; Alan Sipress, *Mitchell Philosophical About Report on Mideast Tension*, WASH. POST, May 13, 2001, at A2.

199. Remarks by Colin Powell, May 21, 2001, *supra* note 111.

200. Letter from President Clinton, *supra* note 100.

201. See generally COMMITTEE REPORT, *supra* note 5.

202. See *id.*

203. This has been understood as a "limitation" of fact-finding ever since the 1899 Hague Convention, which proposed use of the tool in cases "involving neither honor nor essential interests." Convention for the Pacific Settlement of International Disputes, *supra* note 18. Such limitations may have been a strong argument for the inappropriateness for "fact-finding" as a method of conflict resolution between the Israelis and Palestinians.

negotiating process.²⁰⁴ The Committee noted that its mandate was not a solution to the conflict or a determination of the scope of the negotiations, but rather a strategy to address the previous eight months of crisis.²⁰⁵ The Report set forth a modest goal. It recommended a path for stopping the violence and returning the parties to the negotiating table.²⁰⁶ In that context, the Report was a valuable success.

The Report offered some analysis of the events, primarily by presenting each party's positions, in many cases without comment or resolution.²⁰⁷ In presenting the facts and making the recommendations, the Report scrupulously attempted to avoid placing blame on either party.²⁰⁸ This political balancing act sometimes went too far, blurring one side's unique responsibility within a specific issue. For example, the uniquely Palestinian responsibility to prevent the use of illegal weapons was presented in the Report's Recommendations by stating, "the parties should abide by the provisions of the Wye River Agreement prohibiting illegal weapons."²⁰⁹ Similarly, incitement was noted with equal measure.²¹⁰

The bulk of the Report, however, discussed the proposal's prospective impact.²¹¹ The Report's conciliatory tone offered a path towards a return to the peace process.²¹² The recommendations emphasized three distinct stages: (1) an end to the violence; (2) the rebuilding of confidence; and (3) resuming negotiations.²¹³ The "principal recommendation" urged each side to recommit themselves to the spirit of Sharm el-Sheikh and to implement the decisions made there in 1999 and 2000.²¹⁴ This

204. See generally COMMITTEE REPORT, *supra* note 5, at 4-5.

205. *Id.* at 8.

206. *Id.* at 4-5.

207. *Id.* at 10-13.

208. *Id.* at 10.

209. *Id.* at 36.

210. *Id.* at 34.

211. *Id.* at 33-38.

212. *Id.*

213. *Id.*

214. *Id.* at 4, 33. The reference was to the Sharm el-Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations, *supra* note 71, which offered an agreed framework for the resumption of permanent status negotiations and the Statement of President Clinton at the conclusion of the Sharm El-Sheikh Summit, Oct. 17, 2000. White House Press Release, *supra* note 9.

quasi-philosophical observation expressed a need for the two sides to return to bilateral cooperation.

In its opening words, the Report emphasized that the sides “must act swiftly and decisively to halt the violence.”²¹⁵ Also, the sides must rebuild trust, which can be accomplished by implementing a series of proposed confidence-building measures.²¹⁶ The proposals covered a range of subjects such as halting incitement, the issue of Israeli settlements, rejecting and combating terror, a renewal of economic cooperation, protection of holy sites, as well as responsibilities and procedures of security forces by both parties.²¹⁷ These actions were important to resume “full and meaningful negotiations” based upon “mutual agreements and understandings” reached between the parties.²¹⁸ This method was wise, as it offered small, incremental steps away from violence, while moving towards building faith and achieving the ultimate interest of all concerned—peace negotiations. It also offered political benefits to both sides, which could assist in domestic marketing for the adherence to the plan terms.²¹⁹

While the recommendations addressed most of the major issues regarding current violence, some key issues were apparently intentionally omitted from the operative portion of the Report. Key examples include: (1) the conclusion that an international presence would not be appropriate without the agreement of the two sides; (2) lack of determination regarding the Palestinian allegation of “assassinations;” (3) the Israeli claim as to the Palestinian Authority’s role in the planning and coordination of the start of violence; (4) the extent to which Ariel Sharon’s visit was responsible for the outbreak of violence;²²⁰ and (5) any determination about the legality of positions or accountability of either party in international law.²²¹ The decision to omit these issues further underscored the Report’s emphasis on conciliation as opposed to traditional fact-finding. The Committee’s goal to present a politically acceptable report to both parties prevented conclusions on any of these central fact-finding issues.

215. COMMITTEE REPORT, *supra* note 5, at 4.

216. *Id.* at 4-5.

217. *See id.* at 33-37.

218. *Id.* at 32.

219. *See id.* at 8-9.

220. *See id.* at 13. In fact, the Report expressly rejects the claims of both sides regarding the outbreak of the violence without offering any alternative explanations. *Id.*

221. *See id.* at 10.

B. The Parties' Responses – Differing Interpretations

Both parties quickly announced a general acceptance of the Mitchell Committee findings.²²² In the introduction letter to the parties' responses, the Committee noted: "We are grateful for the generally positive tone of all of the comments, and we are struck by the convergence of the parties' views on our report."²²³ In fact, in the weeks following its publication, the acceptance of the Mitchell Report had become a central aspect of the parties' diplomatic posture. Nevertheless, in their official responses, the two parties offered widely differing interpretations of the Report and some criticism to many of its findings.²²⁴ Senator Mitchell anticipated such a reaction when he commented, before the submission of the responses, "[l]ook, it's human nature. They're going to say they like the parts that agree with their positions and they dislike the parts that don't agree with their positions. That's what I fully expect will occur."²²⁵

1. Israeli Response

A key aspect of the Israelis' response to the Mitchell Report was the understanding of the Report's recommendations as four distinct stages.²²⁶ The Israelis regard the fulfillment of each stage as a necessary precursor to proceed with the process.²²⁷ Thus, the first stage of ending the violence needs to be achieved before enacting the other steps and recommendations. A "cooling-off" period would follow, which would allow for the enactment of

222. See generally Letter from Dan Naveh, Minister in the Prime Minister's Office, to Senator George J. Mitchell, Chairman of the Sharm el-Sheikh Fact-Finding Committee (May 15, 2001), reprinted in COMMITTEE REPORT, *supra* note 5, at 50. See also Letter from Yasser Abed Rabbo, *supra* note 101.

223. Letter from the members of the Sharm el-Sheikh Fact-Finding Committee to Colin L. Powell, Secretary of State, United States Department of State (May 16, 2001) reprinted in COMMITTEE REPORT, *supra* note 5, at 46.

224. Compare GOVERNMENT OF ISRAEL, COMMENT OF THE GOVERNMENT OF ISRAEL ON THE REPORT OF THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE (May 15, 2001) reprinted in COMMITTEE REPORT, *supra* note 5, at 51-57 [hereinafter COMMENT OF ISRAEL], available at <http://www.mfa.gov.il>, with PALESTINE LIBERATION ORGANIZATION, OFFICIAL RESPONSE OF THE PALESTINE LIBERTATION ORGANIZATION TO THE FINAL REPORT OF THE SHARM EL-SHEIKH FACT-FINDING COMMITTEE (2001), reprinted in COMMITTEE REPORT, *supra* note 5, at 59 [hereinafter RESPONSE OF PALESTINE LIBERATION ORGANIZATION].

225. Ifill Interview with Mitchell, *supra* note 83.

226. COMMENT OF ISRAEL, *supra* note 224, at 51-57.

227. See *id.*

confidence building measures so that negotiations could finally resume.²²⁸ In its written response, Israel noted its dispute with the findings regarding the settlement issue,²²⁹ as well as the Report's criticism of actions taken by Israeli Defense Forces.²³⁰

2. Palestinian Response

Conversely, the Palestinians determined that the Mitchell Report's findings and recommendations should be accepted and implemented concurrently.²³¹ Without Israel directing an immobilization of settlement activity, as the Report recommended, there would neither be an end to violence nor acceptance of any other terms of the proposal.²³² To deal with the implementation issues, the Palestinians urged the involvement of the international participants from the Sharm el-Sheikh Conference of October 2000.²³³ The Palestinians expressed disappointment with the non-legal nature of the findings, as well as the Report's failure to accept the Palestinian demand regarding an international presence in the region.²³⁴

C. Diplomatic Efforts

In May 2001, despite the release of the Mitchell Report, violence continued in the region.²³⁵ The killing continued during the days following the release of the Report.²³⁶

One hour after the release of the Report, Secretary of State Colin Powell expressed the United States' support for the Report, tendering an interpretation that could be seen as consistent with both the Israeli and the Palestinian interests.²³⁷ Powell, however, noted that the Report should be interpreted within a framework of

228. *Id.* at 54, 56.

229. *Id.* at 55. Israel saw this issue as beyond the mandate of the Mitchell Committee since it was agreed by the sides that settlements was one of the issues to be determined as part of the permanent status negotiations. It cited the Declaration of Principles, *supra* note 3.

230. *See id.* at 53-54. Israel questioned the factual analysis in COMMITTEE REPORT, *supra* note 5, at 13.

231. *See* RESPONSE OF PALESTINE LIBERATION ORGANIZATION, *supra* note 224, at 60.

232. *See id.* at 61-62.

233. *Id.* at 61.

234. *Id.* at 64-67.

235. *See* Remarks by Colin Powell, *supra* note 111.

236. *See id.*

237. *See id.*

a timeline leading to direct negotiations.²³⁸ He additionally emphasized the importance of various confidence-building measures, including the need to halt settlement activity.²³⁹ Finally, Powell announced plans for increased U.S. diplomatic involvement in the region.²⁴⁰

The international community overwhelmingly approved and supported the findings of the Report.²⁴¹ Many regarded the stature of the Committee members coupled with the pragmatic nature of the document as a positive instrument for the region.²⁴² Active participation from European Mitchell Committee members Javier Solana and Thorbjorn Jagland were incentives for support from other European nations. Any achieved success would strengthen Europe's desire to be a "player" and not merely a "payer" in Middle East diplomacy.²⁴³ The Bush Administration, wary of its increased involvement in the Israeli-Palestinian conflict, viewed the Report as a "lifeline" for both parties, and a way to bolster America's regional presence.²⁴⁴

Around the time of publication of the Mitchell Report, Israel implemented a unilateral cease-fire, overcoming the first obstacle proffered by the recommendations.²⁴⁵ Nevertheless, Palestinian violence ensued with the murder of twenty-one Israeli youths by a terrorist suicide bomber outside a discothèque in Tel Aviv on June 1, 2001.²⁴⁶ In the face of these deaths, Yasser Arafat was under extreme diplomatic pressure to move towards a fragile ceasefire agreement.²⁴⁷ On June 13, 2001, George Tenet, Director of the

238. *Id.*

239. *Id.*

240. *Id.*

241. See Letter from Kofi A. Annan, U.N. Secretary General, to George J. Mitchell, Committee Chairman, Sharm El-Sheikh Fact-Finding Committee (May 14, 2001), reprinted in COMMITTEE REPORT, *supra* note 5, at 48-49.

242. *Id.*

243. Committee on Foreign Affairs, Human Rights, Common Security and Defense Policy, EUR. PARL. DOC. (PE 302.047) 11 (2001), available at <http://www.europarl.eu.int/meetdocs/committees/afet/20011008/441968en.pdf>.

244. See Remarks by Colin Powell, *supra* note 111.

245. Prime Minister Ariel Sharon, Statement at the Knesset Session (May 30, 2001) available at <http://www.pmo.gov.il/english/ts.exe?tsurl=0.41.2299.0.0>; Prime Minister Ariel Sharon, Statement (May 22, 2001) (available at <http://www.pmo.gov.il/english/ts.exe?tsurl=0.41.2185.0.0>).

246. Israel Ministry of Foreign Affairs, *Tel-Aviv suicide bombing at the Dolphin disco*, June 1, 2001, at <http://www.mfa.gov.il> (last visited Mar. 1, 2002).

247. *Israel begins burying bombing victims*, CNN, June 3, 2001, at <http://www.cnn.com/2001/WORLD/meast/06/03/israel.ceasefire> (last visited Mar. 1, 2002).

Central Intelligence Agency, brokered a ceasefire agreement based on the central points of the Mitchell Report.²⁴⁸ Despite these attempts to quell the violence, tensions have escalated in the months that followed. Nevertheless, both sides continued to publicly emphasize their continued commitment to the Mitchell Report and to the Tenet workplan. For months after their publication, these two documents were the only peacekeeping guidelines accepted by the parties and the international community.²⁴⁹

VII. RELEVANCE FOR THE PEACE PROCESS AND CONFLICT RESOLUTION

In most ways, the experience and results in forming a fact-finding committee regarding the violence in the Middle East were far from successful. As detailed above, the primary goal of the October 2000 Sharm el-Sheikh Summit was to implement a ceasefire, however, violence continued and evolved for months.²⁵⁰ The Committee also failed in nearly all of the other terms of cooperation set forth in the agreed Presidential Statement.²⁵¹ In fact, the only term that took force was the formation of the Mitchell Committee.²⁵² The Committee's original goals were an introspective attempt to analyze the recent violence and to find a solution to prevent its recurrence.²⁵³ When it became readily apparent that the violence would continue, the Committee and the parties involved realized that an immediate end to the violence was now their paramount objective.²⁵⁴

From a purely legal standpoint, in terms of fact-finding, this material change in circumstances might have warranted a stop to the work of the Committee in that the terms and agenda set out and agreed upon between the parties had markedly changed. It is doubtful whether Israel would have agreed to such a mandate at the outset. At the same time, Israel made a conscious decision to continue its involvement with the Committee, perhaps to avoid

248. *A Plan to Curtail Violence*, HA'ARETZ (English Edition), June 14, 2001.

249. S.C. Res. 1397, U.N. SCOR, 4489th mtg., U.N. Doc. S/RES/1397 (2002).

250. See COMMITTEE REPORT, *supra* note 5, at 4.

251. See *id.* at 7.

252. See *id.* at 42.

253. White House Press Release, *supra* note 9.

254. Letter from the members of the Sharm el-Sheikh Fact-Finding Committee to Colin Powell, Secretary of State, United States Department of State, *supra* note 223, at 46.

being perceived in the international community as the party that rejected a potential solution to the conflict.²⁵⁵

From the Palestinian perspective, the goal of internationalizing the conflict and the search for negotiating forums outside the "Oslo agreements" were equally attainable by conciliation as by fact-finding. The Palestinians had not achieved any tangible diplomatic gain from the months of violence and held out hope that the Mitchell Committee would offer it some sort of diplomatic victory. Therefore, despite the material changes, the parties continued their cooperation. This tacit agreement officially changed the essence of the mission from one of fact-finding to one of conciliation.

In its desire to reach a politically viable solution, the Committee avoided certain facts and determinations. The Committee instead emphasized solutions that would allow both sides to either willingly or reluctantly accept its terms. While the Committee achieved that goal, it alone did not create the necessary leverage to induce the sides into carrying out the recommendations of the Report.

While the Report received much respect and was widely lauded both regionally and internationally, it failed to induce the parties to end the violence. Despite being widely supported and the fact that no other viable proposal exists,²⁵⁶ its long-term effect is unclear. Despite the fact that both sides continue to profess their "acceptance" of the terms of the Mitchell Report, it is

255. Other considerations may have included Israel's displeasure with the findings of other independent observers in the region such as Amnesty International and a committee sent to the region by the Commission on Human Rights, and the concern that a lacuna created by the dissolution of the Mitchell Committee might breed a stronger and less favorable diplomatic effort toward internationalization of the conflict. See FIRST STATEMENT OF ISRAEL, *supra* note 85, at 118-20. For example, the Palestinians initiated two discussions in the U.N. Security Council during the time of the work of the Mitchell Committee, as well as the convening of the Security Council in October 2000 that led to Resolution 1322. See S.C. Res. 1322, U.N. SCOR, 4205th mtg., U.N. Doc. S/RES/1322 (2000). At the same time, significant efforts were made, both by members of the Committee and its technical staff, to ease Israel's concerns as to the goals and intent of the Committee. See Ifill Interview with Mitchell, *supra* note 83.

256. See A. Ben, *Israel and PA seen clambering back to dialogue*, HA'ARETZ (English Edition), Apr. 16, 2001, at 1. A joint Egyptian-Jordanian proposal put forward during April 2001 was quickly accepted by the Palestinians. The Israelis, however, did not take part in the drafting of the proposal and its comments on the draft received no response from either the Jordanians or the Egyptians. *Id.* In June 2001, the Egyptians formally withdrew the proposal noting that the internationally accepted model for ending the violence and returning the sides to negotiations was the Mitchell Report.

questionable that there is either the political will or the proper environment conducive to implementing the terms of the Report. In fact, the violence continued for months after the publication of the Report. As with any other fact-finding committee, the acceptance of its findings ultimately depends on the interests of the sides. While those interests may come in time, and the method may in fact be laid out in the Mitchell Report, it was certainly not the strength or influence of the legal mechanism of fact-finding or conciliation that will influence the parties.

It is unclear that either "fact-finding" or conciliation is the focus of the parties today. Even the terms of the Mitchell Report may not have true support from the parties. The Palestinians, interested at the beginning of the process, and certainly continue to have a strategic interest in increased international involvement, it is not clear that they have an interest in paying a price, such as returning to negotiations under the original conditions of the Oslo peace process that may be required by truly adapting the findings of the Mitchell Committee.²⁵⁷ Perhaps the continuing discussions regarding the use of international observers²⁵⁸ to enforce the Report, despite the express findings of the Committee, are an effort to disregard the findings, freeing the Palestinians to continue to search for a more favorable forum.²⁵⁹ Israel, though uninterested in the mission at its inception, now has a stake in requiring an implementation of the cease-fire. Some in Israel,

257. COMMITTEE REPORT, *supra* note 5, at 69.

258. A statement of the participants at the Meeting of G-8 Foreign Ministers on July 18-19, 2001, regarding the situation in the Middle East, concluded: "We believe that in these circumstances third-party monitoring accepted by both parties would serve their interests in implementing the Mitchell Report." G-8 Foreign Ministers' Statement on the Middle East, at <http://www.usinfo.state.gov/econ/group8/summit01/www190701a.html> (last visited Apr. 13, 2002). During August and December 2001, the United Nations Security Council dealt yet again with this issue, at the request of the Palestinians. To the disappointment of the Palestinians, no resolution was reached by the Security Council.

259. This search would continue at a variety of fora in the second half of 2001 and into 2002. Some prominent examples include the *World Conference Against Racism* in Durban, South Africa in early September 2001; the *Conference of High Contracting Parties to the Forth Geneva Convention* in Geneva on December 5, 2001 and the reconvening of the *10th Emergency Session of the United Nations General Assembly* in New York on December 20, 2001. In the latter, the Palestinians presented a proposal to pursue another new track—the request of an advisory opinion from the International Court of Justice on questions regarding Israel's actions in the territories. In the Resolution that passed at the General Assembly, this proposal was removed. See U.N. Doc. A/RES/ES-10/9. Despite this Palestinian strategy, when the Security Council eventually approved a U.S. brokered Resolution regarding the conflict, it supported the Mitchell Report. See S.C. Res. 1397, U.N. SCOR, 4489 th mtg., U.N. Doc. S/RES/1397 (2002).

however, may also be less interested in the price it may have to pay, domestically, for a settlement freeze. This point is yet to be tested, and it remains dependent upon a true cessation of violence by the Palestinian side.

Most states are unwilling to adopt fact-finding measures for comparatively mundane issues.²⁶⁰ In fact, there is no successful precedent in recent history for a use of fact-finding or a conciliation commission in a case of such existential importance as the Israeli-Palestinian conflict.²⁶¹ It is possible that the Mitchell Committee may contribute to the negotiation process that would ultimately end violence between the parties. This will happen when both sides are ready to not only hear proposals, but also to make difficult compromises. The fact-finding element of the Mitchell Committee, however, did not achieve this result. Rather, local concerns and decision making prodded by international pressure, could one day reach this goal without a fancy “blue ribbon panel.”

Thus, while the Report was an earnest effort by the individuals who seemed interested in bringing this chapter of violence between the Israelis and the Palestinians to an end, it is doubtful that the Report served as a turning point in the conflict. It was unlikely that it had the possibility of doing so in the first place. Other attempts to inject an international presence, such as observers or monitors, will have a similar fate. Ultimately, for a breakthrough to occur, the political and popular leadership within the Israeli and the Palestinian communities must demonstrate a desire to support a non-violent breakthrough that will demand an openness to co-exist. External intervention efforts, such as the Mitchell Committee, cannot serve as a replacement for local decisions and actions of dialogue and peacemaking between the sides.

260. See BAR-YAACOV, *supra* note 21, at 1.

261. Nevertheless, on April 19, 2002, the Security Council unanimously approved “an initiative of the Secretary General to develop accurate information regarding recent events in the Jenin refugee camp through a fact-finding team.” S.C. Res. 1405, U.N. SCOR, 4516th mtg., U.N. Doc. S/RES/1405 (2002). This team never was able to achieve agreement about its mandate and was disbanded by the Secretary General on May 1, 2002. See Letter from Secretary General Kofi A. Annan to Kishore Mahbubani, President of the Security Council, May 1, 2002.

