

PART TWO

## Decolonizing beyond Partition



# Transitional Justice in Palestine/Israel

## *Whose Justice? Which Transition?*

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This chapter examines the significance of transitional justice in Palestine/Israel.<sup>1</sup> Transitional justice is the process of dealing with past wrongs in order to shift towards a new democratic regime. While the concept has gained little attention in mainstream debates on Palestine/Israel, it touches upon crucial aspects to ending the conflict, such as dealing with historical injustices, decolonization, and the proposed one-state and two-state solutions. The chapter makes two claims. First, it argues that transitional justice has gained appeal within the Palestinian camp as a way to devise political alternatives to the Oslo peace process. In this case, it is a tool used to counter the fragmentation of the Palestinian people, reckon with past wrongs, and provide venues for political reconciliation with Israeli Jews. Transitional justice, however, can further a variety of political ends or solutions. After examining the various ways in which transitional justice is discussed in Palestine/Israel, the chapter identifies deep disagreements over key issues, including what counts as a historical injustice; what mechanisms we should employ to deal with historical injustices; what are the goals we are transitioning to; and what is the nature of the transition that is supposed to take place. Disagreement over these issues means that transitional justice can serve a range of ends: to devise alternatives to the Oslo agreements, to justify measures that are in line with them, or even to negate Palestinian demands for justice. The chapter concludes with a precautionary note. In the context of Palestine/Israel, transitional justice is a deeply contested concept and its potential as a tool to devise real alternatives to the failed peace process depends on whether or not it is incorporated into a larger political project that seeks to establish equality and justice for all Palestinians.

## WHAT IS TRANSITIONAL JUSTICE?

According to the United Nations, transitional justice is “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>2</sup> The definition is wordy, but it is comprehensive. Transitional justice occurs when societies transition away from regimes responsible for large-scale abuses (e.g., dictatorship, apartheid) and move towards establishing accountable democratic regimes. These transitions rely on a variety of mechanisms, such as truth commissions, criminal trials, and apologies, whose purpose is to enable political reconciliation among competing parties in order to create a peaceful present and future.

Transitions rely on two kinds of justice: retributive and restorative.<sup>3</sup> Retributive transitional justice grants legitimacy to new democratic regimes by *punishing* the perpetrators of the old regime. Germany after WWII is good example in this regard, as the criminal trials at Nuremberg punished the leaders of the old regime, established a new jurisprudence, and created an official record of Nazi horrors. Nationally, these trials enabled a transition towards a new and democratic (West) Germany, and internationally they laid the basis of our contemporary international criminal justice system on which retributive transitional justice relies (with legal frameworks such as crimes against humanity, genocide convention, international tribunals, etc.).<sup>4</sup>

Retribution, however, is not a one-size-fits-all recipe. In the case of South Africa, for example, retribution would have hindered a peaceful transition towards democracy, as Thabo Mbeki acknowledges: “Within the ANC [African National Congress], the cry was to ‘catch the bastards and hang them.’ But we realized that you could not simultaneously prepare for a peaceful transition while saying we want to catch and hang people. So we paid a price for the peaceful transition. If we had not taken this route, I do not know where the country would have been today. Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment we would never have undergone the peaceful change.”<sup>5</sup>

The price that South Africa paid was indeed costly. The perpetrators were not punished but offered amnesty in exchange for the public acknowledgment of their crimes. Not all South Africans were happy with this decision, but the ANC deemed it necessary to guarantee a peaceful transition out of the apartheid regime. Therefore, it privileged truth commissions rather than criminal trials to pave the way towards a democratic South Africa. Truth commissions are government-appointed bodies mandated to unearth large-scale human rights abuses. Unlike criminal courts, they are extrajudicial and cannot pass sentences.<sup>6</sup> More fundamentally, they rely on a restorative conception of justice that is premised on public mediation between victims and perpetrators. In truth commissions, victims are given ample space to voice their narratives, receive validation for their stories, and demand reparations. This is unlike in criminal courts where victims are heard only

to testify and provide evidence. Truth commissions, moreover, do not punish the perpetrators, but give them the opportunity to acknowledge their crimes, so that they can be restored as “active, full and creative members of the new order.”<sup>7</sup> In South Africa, the work of restorative justice was colossal. Over a period of seven years, the Truth and Reconciliation Commission gathered the testimony of 21,000 victims and received 7,112 amnesty applications—849 of these were granted while 5,392 were denied.

The aim of both modes of transitional justice (retributive and restorative) and the variety of mechanisms they employ (criminal trials, truth commissions, apologies, commemoration, reparations, etc.) is political reconciliation.<sup>8</sup> In the context of the Israeli-Palestinian conflict, and international politics more generally, the term reconciliation has remained vague and confusing, especially given the reluctance of some peace negotiators to deal with the historical roots of conflict. In this regard, Nadim Rouhana calls for making a clear distinction between conflict settlement, conflict resolution, and reconciliation.<sup>9</sup> Conflict settlement, he argues, is a negative peace that is geared towards stopping conflict rather than seeking justice between the warring parties. It is used interchangeably with a victor’s peace because it results from a military victory and serves to consolidate the interests of the victor. This limits peace negotiations to technical and military issues that are addressed by high officials and excludes the rest of society. Unlike conflict settlement, conflict resolution seeks to resolve conflict rather than contain it. The goal is a sustainable peace grounded in a principled solution that promotes reciprocity and formal equality between the fighting entities.<sup>10</sup> The cooperation it fosters, moreover, is not limited to foreign policy and military officials, but includes other strata of society such as business elites and civil society actors—what is usually referred to as track-two diplomacy.

Political reconciliation departs both from conflict settlement and conflict resolution, because it is a more transformative enterprise: “Reconciliation is defined as a process that brings about a genuine end to the existential conflict between the parties and transforms the nature of the relationship between the societies through a course of action that is intertwined with psychological, social, and political change.”<sup>11</sup> Reconciliation does not mean that everybody will be *reconciled*. No political program can achieve such a goal, not in stable societies or in divided ones. Rather, the goal is to live *in reconciliation*—that is, to create structural and objective conditions that have the capacity to transform people’s subjective and psychological predispositions towards one another while ensuring their political equality. Dealing with historical injustices is central to creating such conditions, and it is one important factor that distinguishes reconciliation from conflict settlement and conflict resolution. Moreover, reconciliation seeks the involvement of more than officials and social elites. It encourages the participation of victims, perpetrators, and the affected members of both communities.<sup>12</sup> The focus on victims is particularly noteworthy.<sup>13</sup> The guiding principles of the United Nation’s

approach to transitional justice, for example, stress “the centrality of victims in the design and implementation of transitional justice processes and mechanisms.”<sup>14</sup> In theory, this means that political reconciliation is more of a victims’ rather than victor’s peace. In practice, however, things are far from being so clear-cut, as is evidenced by the mixed record of transitional justice over the last thirty years.

#### TRANSITIONAL JUSTICE AND THE OSLO PEACE PROCESS

The Israeli-Palestinian peace process contains elements of both conflict resolution and conflict settlement. Aspects of conflict resolution are evidenced in nominal references to international law, as well as attempts to set up democratic institutions and foster economic cooperation between Israel and the Palestinian authority. The terms and conditions of the peace process, however, were set by the stronger party, which is why the process is much closer to the *realpolitik* of conflict settlement.<sup>15</sup> What is clear is that the Oslo peace process did not qualify as a process of political reconciliation, especially since there was no serious engagement with the past. “Both leaderships eschewed discussions of the past,” argues Ron Dudai, “and transitional justice mechanisms were never proposed.”<sup>16</sup>

Avoiding the past was a deliberate policy on both sides, especially in the early stages of the negotiations. “We decided not to deal with past accounts,” Yitzhak Rabin told the Israeli Knesset on April 18th, 1994, but “to try and create a new and better future for both peoples.”<sup>17</sup> Israeli negotiator Uri Savir put it more bluntly: “never again would we argue about the past . . . Discussing the future would mean reconciling two rights, not readdressing ancient wrongs.”<sup>18</sup> “We focused our attention on the present and the future,” writes Palestinian negotiator Ahmed Qurei, “trying to gauge the extent to which we had a common ground.”<sup>19</sup> The focus was therefore given to “immediate” issues such as mutual recognition, the creation of a Palestinian authority, and a progressive withdrawal of Israeli occupying forces. It left the final-status issues, namely the status of Jerusalem, borders, and Palestinian refugees, to a later stage.

The negotiations at Camp David in 2000 were supposed to address these final-status issues, but they failed to bring about any resolution. One year later in Taba, the refugee issue made some progress and a consensus emerged around monetary compensation as the primary response to the problem of Palestinian refugees.<sup>20</sup> Disagreements remained, however, regarding what losses would be compensated, the amount for which they would be compensated, the party who would bear the costs of such compensation, as well as how the refugee issue would be narrated. Compensation, of course, was not a new solution. United Nations General Assembly Resolution 194, issued in December 1948, already offered refugees the option of monetary compensation if they decided not to return to their homes in what became Israel. The novelty at the Taba negotiations was to delink compensation from return, leaving Palestinian refugees with compensation as their only option.

And this option itself quickly disappeared with the collapse of the peace process that followed the Second Intifada and the election of Sharon as head of the Israeli government in Spring 2001. The short-lived revivals of the peace process in 2007 and 2008 could not bring the refugee question back to the negotiation table, let alone other forms of reparations.

This failure to grapple with the historical and ongoing injustice of the Nakba, from which the issue of refugees emerged, did not occur by accident but by design. The peace process was not meant to solve the refugee problem, but to dissolve it—that is, to undermine the framework that had made it a problem in the first place.<sup>21</sup> This occurred primarily by framing the refugees issue as a humanitarian one, a trend that goes back to 1948 when the entire question of Palestine was treated as a humanitarian question, rather than a question of justice and national self-determination. With the peace process, only parts of the West Bank and Gaza became subject to potential self-determination, further constraining the 1948 refugee issue to a humanitarian framework. For example, if one looks at the proceedings of the Refugee Working Group at the 1991 Madrid Multilateral conference, one notices a strong emphasis on humanitarian solutions. There, the multilateral negotiations were focused on discussing databases, family reunification, human resources development, public health, child welfare, job creation, and social infrastructure.<sup>22</sup> No doubt, these are important issues. However, when these become the *only* issues, they reduce the refugee question to a humanitarian problem. Israeli negotiators have systematically insisted on this humanitarian approach, which purposely sets aside issues of justice. Even when they accepted the return of a limited number of refugees at the Camp David Summit in 2000, they did so solely on humanitarian grounds (family reunification), not reparatory ones (historical injustice).<sup>23</sup>

The peace process also dissolved the refugee issue by imposing a new temporality to the conflict that blocked the Palestinian memory of 1948. By erecting the Green Line as a potential future border, the peace process delineated the field of territorial *and* historical negotiations. Only the land conquered in 1967 and the history that followed it were open to negotiations. What occurred before 1967 was placed off-limits and, therefore, off-memory.<sup>24</sup> “The Palestinian leadership knows that they have to forget Ramle and Lod and Jaffa,” wrote the Israeli journalist Danny Rubinstein, referring to cities ethnically cleansed in 1948 and currently located in Israel. “If I was a Palestinian politician,” he continued, “I would say that you don’t have to remember. You have to forget.”<sup>25</sup> Rubinstein’s demand to forget is not coincidental but integral to the compromise signed in Oslo. Within the mindset of territorial partition, there is no place for a narrative of Palestinian ethnic cleansing, but only a narrative of Jewish rebirth; no Nakba (catastrophe), only *geula* (redemption).

Not only does partition erase the memory of the Nakba, it also displaces the issue of historical responsibility, deferring it to a future Palestinian state. “The basis for the creation of the state of Israel is that it was created for the Jewish people,” Tzipi

Livni told Palestinian negotiators, and “your state will be the answer to all Palestinians including refugees.”<sup>26</sup> According to Livni therefore, only a future Palestinian state, not Israel, will be responsible for the issue of Palestinian refugees. Such a state would offer them a country to “return” to, and in the process, wash Israel’s hands clean of its past crimes. Surely, Livni was not alone in endorsing this position. At the negotiating table, she was representing a liberal Zionist consensus and negotiating with a Palestinian leadership that had accepted the principle of partition in 1988. Many within the Palestinian leadership hoped that partition would not entirely sacrifice justice for the refugees. This was naively optimistic, especially since Israel systematically denied its responsibility for the refugee problem. Even at the height of the process in the Taba negotiations in 2001, Israel rejected legal, historical, and moral responsibility. This is why Israeli negotiators insisted that monetary compensation payments for Palestinian refugees be *indirect*—that is, paid by an international fund and administered by an international commission.<sup>27</sup> The insistence is important, since direct compensations imply responsibility for the past (we are responsible, therefore we pay), while indirect ones do not (others pay, because we are not responsible).

#### THE PROMISE OF TRANSITIONAL JUSTICE

In light of these in-built problems and the inability of the Oslo peace process to deal with the past, many in the Palestinian camp have turned their attention to the issue of transitional justice. “As long as historical truth is denied or excluded,” writes Nur Masalha, “there can be no peace, no reconciliation in the Middle East.”<sup>28</sup> Palestinians and Israelis should therefore learn from countries such as Guatemala and South Africa that have relied on transitional justice mechanisms. As Masalha and a host of intellectuals, as well as NGOs such as the Israeli Zochrot and the Palestinian BADIL, have concluded, transitional justice is appealing for the following reasons.<sup>29</sup> First, it prescribes a wide range of legal and symbolic mechanisms to deal with the Nakba. Second, it supports integrative solutions to the conflict (variants of the one-state solution) that maintain the unity of all Palestinians. Finally, it allows for a swift transition away from the status quo. As I argue in the section that follows, however, transitional justice does not necessarily support these goals, for it depends on how its proponents are using it and for what political agenda or project.

#### *Reparations for the Nakba*

The primary appeal of applying transitional justice mechanisms to Palestine/Israel lies in their capacity to deal with historical and enduring injustices. To appreciate how this differs from the approach of the Oslo peace process, one could contrast the monetary compensation offered to the refugees at the Taba negotiations in 2001 to the reparations that transitional justice could potentially offer in the future.

Compensations are sometimes confused with reparations, but they are different since reparations cover a wider spectrum of remedies to past wrongs. According to the UN, reparations also include restituting original property to refugees, aiding their return, ending ongoing violations, holding perpetrators accountable, commemorating the victims, acknowledging wrongs, issuing a public apology, and implementing a variety of measures to prevent the reoccurrence of injustice.<sup>30</sup>

Israel and its allies have systematically rejected this wider understanding of reparations. When Palestinian negotiators brought up the issue of reparations they were met with disapproval and censure. The US Secretary of State Condoleezza Rice deemed Israeli reparations for Palestinian refugees “backward-looking” rather than “forward-looking,”—an attempt to halt the peace process rather than move it in the right direction.<sup>31</sup> Proponents of transitional justice disagree. The only way forward, they insist, is for Israel to reckon with its past through a host of transitional justice mechanisms. These include material remedies such as return, restitution, and compensation, as well as symbolic reparations like apologies. Had Israel issued an apology when it recognized the Palestine Liberation Organization (PLO), notes Meron Benvenisti, the peace process would have been placed on an entirely different footing.<sup>32</sup> “A sincere Israeli apology,” writes George Bisharat, “would be a milestone toward reconciliation that no Palestinian could ignore.”<sup>33</sup> Both recommend that Israel follow the example of other governments that have issued apologies for crimes of mass violence, such as ethnic cleansing, internment, slavery, and apartheid. Of course, apologies can be cheap. However, if they acknowledge responsibility, expresses remorse, and are supported by a host of legal and material remedies, they can be meaningful and consequential.<sup>34</sup>

Besides apologies, truth commissions are another way of acknowledging past crimes. For proponents of transitional justice in Palestine/Israel—especially NGOs such as Zochrot and BADIL—they figure high on the list of mechanisms to deal with the Nakba. Truth commissions can expose perpetrators of ethnic cleansing and provide a platform for its victims. This puts them at odds with a peace process that has protected the former and silenced the latter. Surely, Palestinian refugees were the objects of heated negotiations since 1991. They were debated, studied, quantified, and measured. However, they were never heard and were purposely cast aside from the peace process.<sup>35</sup> Truth commissions can potentially bring them back to the center, providing them and their descendants a space to voice their stories and demand acknowledgment. Putting theory into practice, the Israeli NGO Zochrot already set up its own truth commissions to expose Israeli crimes committed in the Negev between 1948 and 1960. It has also engaged in other transitional justice work such as commemorating the Nakba, obtaining testimonies from 1948 Jewish fighters, and educating the Israeli public on what happened in 1948. Israeli public officials have responded aggressively to the work of Zochrot and other Palestinian NGOs commemorating the Nakba, issuing a series of memory laws (“Nakba laws”) that criminalizes their activism.<sup>36</sup>

It is worth noting that, in most cases, proponents of transitional justice in Palestine/Israel emphasize restorative mechanisms such as reparations and truth commissions over retributive ones.<sup>37</sup> There could be many reasons for this, but the primary one is power. Criminal trials punishing Israeli perpetrators will most likely never see the day, because Israel is the stronger party. This is why restorative mechanisms are privileged, with the understanding that they can offer a relative kind of justice. “No one gets absolute justice,” writes Edward Said, “but there are steps that must be taken, like the ones taken at the end of apartheid.”<sup>38</sup>

These limits notwithstanding, transitional justice offers a discourse that allows many in the Palestinian camp to demand justice for the Nakba, and this is its primary appeal. This discourse is novel, and it differs from the Palestinian revolutionary discourse through which the Nakba was originally (and in some cases still is) narrated. The early revolutionary discourse promised a solution to the plight of refugees in a Palestine that was fully liberated from Zionist colonization. It sought absolute justice. Transitional justice, on the other hand, promises reconciliation between Jews and Arabs in living in historic Palestine. It seeks relative justice. The revolutionary discourse was pan-Arabist and excluded Israel. Transitional justice challenges the Arab-Jewish binary and calls for new forms of Jewish and Arab engagement; for example, by linking the memories of the Holocaust and the Nakba.<sup>39</sup> Finally, historical responsibility in the revolutionary discourse was framed in internal terms: How did we, Arabs, allow this tragedy to happen?<sup>40</sup> In the transitional justice discourse, historical responsibility is framed in external terms: How can Israelis take responsibility for the Nakba?

### *Integrative Solutions and Decolonization*

Transitional justice is also appealing for critics of the Oslo peace process because, by returning to the Nakba, it reframes the entire land of historic Palestine as one political unit and Palestinians as one people.<sup>41</sup> This counters the fragmentation codified by the Oslo Accords, which divided Palestinians into separate entities: Palestinian citizens of Israel, refugees, members of the diaspora, East Jerusalemites, West Bankers, and Gazans. Transitional justice also supports integrative solutions to the Israeli-Palestinian conflict, such as a one-state democracy, because the paradigmatic cases of transitional justice, like South Africa, have all occurred within a single state. This does not mean, however, that transitional justice prescribes specific institutional arrangements, whether one or two states. In fact, the mechanisms of transitional justice can go either way. Restitution, for example, is premised on reversing the consequences of conflict and returning to the status quo ante. As such, it pushes against a two-state solution that formalizes the results of war and displacement.<sup>42</sup> Mechanisms such as apologies and compensation, on the other hand, could satisfy either a one-state or a two-state solution.<sup>43</sup>

Besides supporting integrative solutions to the conflict, transitional justice is appealing because it promises a uni-directional journey that is drastic, uniform,

and absolute. As Fionnuala Ní Aoláin and Colm Campbell note, “there was a specific point at which the Berlin Wall came down, and at which the apartheid government and the Argentinean military relinquished power.”<sup>44</sup> This is unlike the slow and incremental transition of the Oslo Accords where addressing the most contentious issues (sovereignty, refugees, borders, settlements, and Jerusalem) was constantly delayed, and interim arrangements halted and reversed.<sup>45</sup>

As a result of this promise of radical and absolute transitions—dealing with past injustices, supporting integrative solutions, and promising radical transitions—transitional justice in Palestine/Israel is sometimes associated with decolonization. Reconciliation, argues Nadim Rouhana, could be framed as decolonization, especially when it acknowledges the power asymmetry between colonized and colonizer and offers to overturn this asymmetry in a new, democratic political order.<sup>46</sup> The link between the two might come as a surprise, especially since decolonization is usually associated with armed resistance and the ousting of colonial power. This was the case with early Palestinian calls for decolonization, but not with recent ones. Increasingly, decolonization is discussed in nonviolent rather than violent terms, as a vehicle for civil equality rather than mutually exclusive self-determination and as grounded in universal human rights rather than particular national rights.<sup>47</sup> These new understandings bring decolonization and transitional justice closer, rather than further apart.

These new understandings of decolonization draw on the South African experience, which Palestinian academics and activists often point to when discussing alternatives to the Oslo peace process. “The ideological collapse of the two-state solution,” writes Ali Abunimah, “leaves no alternative but to shift our discourse and practice toward democratic and decolonizing alternatives [such as] South Africa.”<sup>48</sup> As in South Africa, transitional justice in Palestine/Israel would lead to one state and hinges on dealing with the crimes of the past. And as in South Africa, the transition would be a drastic shift towards a new democratic regime. This does not mean that South Africa was a success story in which transitional justice completely dismantled the apartheid system. It did not, especially not in the socioeconomic sphere. References to South Africa are meant to rethink the terms and conditions of a just peace in Palestine/Israel, rather than to idealize the South African experiment.

#### THE LIMITS OF TRANSITIONAL JUSTICE

Transitional justice has its promises, but it also its limits. While it can offer a viable way to decolonization, as Nadim Rouhana suggests, it can also pave roads similar to the Oslo peace process, or even paths that run against Palestinian demands for justice. Transitional justice can serve these divergent ends because it leaves open crucial questions, namely: What counts as a historical injustice? When does a historical justice begin and end? What are we transitioning to and from? And how do we transition?

*What Historical Injustice? Whose Historical Injustice?*

In current discussions on transitional justice in Palestine/Israel, the Nakba figures high on the list of past wrongs to be remedied. However, it is not the only one to be addressed. Ron Dudai, for example, argues that dealing with past injustices also means dealing with Palestinian acts of violence against Israeli citizens, some of which qualify as war crimes according to international law. It also means addressing intra-Palestinian violence such as the assassination of real or alleged collaborators, the violence committed between Palestinian factions in Gaza, and the human rights violations committed by the Palestinian Authority against its own people. This would be similar to the way the South African truth commissions addressed the issue of “black-on-black” violence between the Inkatha Freedom Party and the ANC. Applying transitional justice in Palestine/Israel would require a similar reckoning with intra-Palestinian violence, namely the split between Fatah and Hamas. Israelis, Dudai argues, would have to deal with “intra-Israeli violence, by which he means violence committed by the state of Israel against Palestinians with Israeli citizenship.<sup>49</sup> Details aside, the point is that transitional justice will be demanding on Israelis, but also on Palestinians. This, in itself, should not be surprising. Reconciliation is costly for both victim and perpetrator. The question, however, is how demanding and what demands can be made on Palestinians in the name of transitional justice? And for what purpose?

Because transitional justice can open the Pandora’s box of historical injustices, it could potentially heighten competition over victimhood between Israelis and Palestinians, rather than pave the way to political reconciliation. This is already happening with the issue of Arab Jewish refugees and Palestinian refugees. For a long time, Israel has equated the exile of Arab Jews with the exile of Palestinians refugees, claiming that what happened in 1948 was not ethnic cleansing but population exchange, a practice that was legal in the beginning of the twentieth century. In this view, Palestinian Arabs were “moved” to neighboring Arab countries and Jews from these same countries were “moved” to Israel, much as Greeks and Turks were in 1923.<sup>50</sup> Today, Israel has upgraded this argument and turned it into public diplomacy campaign by using the discourse of transitional justice. The Israeli foreign ministry’s website, for example, notes that “a true solution to the issues of refugees will only be possible when the Arab League will take *historic responsibility* for its role in creating the Jewish and Palestinian refugee problem.”<sup>51</sup> Similarly, advocacy organizations such as Justice for Jews from Arab Countries demand that Arabs and Palestinians take historical responsibility, issue apologies, and offer reparations, in the name of a future reconciliation. Even the term Nakba, whose use is a long-standing taboo in Israeli society, is employed to highlight the exile of Arab Jews. “The Palestinian Nakba narrative must be seen in direct parallel to the Jewish Nakba,” reads an editorial published by *The Jerusalem Post*. “The basic facts of the history of this conflict must become known so that the world recognizes that two peoples suffered and were uprooted.”<sup>52</sup> The article also decries

the Palestinian “refugee industry” in the Arab world, contrasting it with the successful assimilation of Jewish Arab refugees in Israel. Like the foreign ministry and advocacy organizations, it also holds Palestinians and Arabs directly responsible for causing the Palestinian and Jewish refugee problems.

Discursively, these public diplomacy campaigns are weaponizing the language of transitional justice against Palestinians. In the process, they are erasing the racism Sephardi Jews suffered at the hands of their Ashkenazi counterparts. In *The Human Right to Dominate*, Nicola Perugini and Neve Gordon show how Israeli settler groups mimic, invert, and co-opt the discourse of human rights to legitimize their colonization of Palestinian land.<sup>53</sup> A similar dynamic is happening with the discourse of transitional justice, which draws heavily on human rights. Pitting a “Jewish Nakba” against a Palestinian one is one example of such inversions. Rather than bridge the experience of Arab Jews and Palestinians, it creates competing claims with the sole purpose of adding more chips to the negotiating table.<sup>54</sup> If these strategies were to succeed, the Palestinian Authority and Arab states would be the ones apologizing for past wrongs, not Israel.

#### *The Mechanisms and Temporal Scope of Historical Injustice*

Even if the historical injustice of the Nakba eventually becomes the focus of transitional justice work in Palestine/Israel, there will still be contestation over its temporal scope—that is, when the Nakba began and when it ended. Disagreements over the temporal scope of historical injustices are common and can be found in other settler-colonial states. For example, in 2008, Canada employed transitional justice mechanisms to address the forced removal of First Nations, Métis, and Inuit children and their relocation to residential schools. Indigenous leaders and activists welcomed the government’s decision to deal with a crime that affected more than 150,000 children in the nineteenth century. However, they disagreed with the government’s understanding of when these injustices began and when they ended.

For the Canadian government, the injustice of the residential schools referred to a specific event in time, and employing mechanisms of transitional justice meant moving “to an even playing field in which the government can no longer be held accountable for past wrongs.”<sup>55</sup> For indigenous peoples, however, transitional justice meant another thing. As Courtney Jung argues, the “interest in using apologies, compensation and truth commissions is to draw history into the present, and to draw connections between past policy, present policy and present injustices . . . . The ‘transition’ is to a relationship in which connections between pasts and present are firmly acknowledged, and in which the past guides present conceptions of obligation.”<sup>56</sup> Indigenous leaders, writes Jung, wanted to use transitional justice as a bridge to connect past with present injustices, linking what was happening today to a larger history of settler-colonialism. The Canadian government, however, wanted to use it as a wall, separating historical injustices inflicted on indigenous people from current ones.

Similar disagreements will most likely arise should Israel employ transitional justice mechanisms. Israel, for example, can acknowledge the Nakba as a historical injustice that occurred between 1948 and 1949. This, however, would clash with the way Palestinians see the Nakba as a historical and ongoing injustice (*al Nakba al mustimirriah*).<sup>57</sup> To paraphrase Patrick Wolfe, the Nakba is a structure, not a single event.<sup>58</sup> The expulsions of Tantura in 1948 and the assaults on Gaza in 2021 form a long chain of injustices that cannot be severed. A transitional justice approach, however, does not have to treat them as such. It can accommodate both interpretations, thus creating opportunities for contestation.

Disagreements on the temporal scope of historical injustices will influence another important issue, that of the mechanisms used to deal with the Nakba. Do we deploy the full breadth of legal and symbolic mechanisms, or do we take a more limited approach? Since Palestinians see the Nakba as a historical and ongoing injustice, they could demand compensation and restitution to provide refugees with material justice; apologies and truth commissions to provide them with symbolic justice; constitutional and institutional reforms to overturn a system designed to exclude them. Israel, on the other hand, could opt for much less. Delimiting the Nakba to a specific event in time, Israeli negotiators could acknowledge it, offer some compensations, and stop there. This acknowledgment would “act as a no-further-claims clause, vaccinating Israel against further Palestinian demands, foremost among them the right of return.”<sup>59</sup> This targeted approach would do more to absolve the consciousness of Israelis than provide justice for Palestinians, but it would still be consistent with a transitional justice approach.

#### *Transition to What? Which Transition?*

Earlier, I argued that most advocates of transitional justice are also supporters of integrative solutions to the Israeli-Palestinian conflict.<sup>60</sup> Paradigmatic cases of transitional justices have all occurred within one state, not between states, thus lending support to their position. Transitional justice, however, can justify alternative positions. “In Israel/Palestine,” writes Ron Dudai, “reconciliation would be between two states, not in a single society. It would thus entail not ‘learning to live together’ but ‘learning to live side by side.’ Perhaps a less ambitious task.”<sup>61</sup> Dudai suggests a three-strand approach to transitional justice. The process would be Israeli-Palestinian, intra-Israeli, and intra-Palestinian. Reconciliation would take place primarily among Palestinians in the West Bank and Gaza, Israeli Jews, and Israeli Arabs, and later between the state of Israel and a future state of Palestine. And rather than a drastic transition away from the status quo, there would be an incremental transition that would not fully break with current institutional arrangements: “The potential for transitional justice programs lies in an incremental process of narrow mechanisms and small steps through a long process of transition, rather than in one high-profile and all-encompassing mechanism in the post-conflict state, as in the case of the South African Truth and Reconciliation

Commission.”<sup>62</sup> Transitional justice, in this view, would work as a corrective to the Oslo peace process, not as an alternative. It would not change the incremental nature of the process, but only add extra steps to the process. Such a proposal maintains continuity with the status quo, rather than a break with the current regime. Edward Kaufman and Ibrahim Bisharat defend a similar position. While dealing with the past is typically undertaken by a new regime, they argue, in Israel/Palestine “there will be two sovereign governments, each representing more continuity than change and both with a history of involvement in individual, group and state terror.”<sup>63</sup>

This is surely not what advocates of the one-state solution have in mind when advocating for transitional justice. And while the above-mentioned proposals are not paradigmatic, they are in line with the current broadening of transitional justice and its application to a wide array of contexts. In the case of Canada, mentioned above, for example, there was simply no transition. Mechanisms of transitional justice were employed in an ad hoc manner to address specific historical injustices. They did not move Canada towards a new regime but reinstated the moral legitimacy of the state and its basic structures. The larger point is this: transitional justice per se does not offer guidance on what we are transitioning to (one state or two states) nor how we transition (incrementally or drastically). Rather, it can support all these solutions.

## CONCLUSION

This chapter defended two arguments. The first highlighted the promise of transitional justice in Palestine/Israel, the second, its limits. The promise of transitional justice, I argued, hinges on dealing with past injustices, offering reconciliation, and guaranteeing equality from the river to the sea. Its pitfalls, however, are the multiple meanings of “past injustices,” “reconciliation,” and “equality.” While both arguments push against one another, they essentially boil down to one. In Palestine/Israel, transitional justice is an essentially contested concept, for while there is some broad agreement on what transitional justice means, there remain deep disagreements on whose historical injustice we should address, with what mechanisms, and towards what ends. As such, transitional justice can be used for divergent political projects and goals.

Should one draw a conclusion from this analysis, it is a cautionary one. Avoiding the pitfalls and harnessing the promises of transitional justice depends on a larger political project that sets clear goals and strategies. Absent such a political project, transitional justice is but a means, one that can be mobilized to serve a variety of ends. If the future after apartheid is reconciliation, we should learn from three decades of transitional justice and formulate a Palestinian approach to it. The task is demanding, but important. If we do not do it, someone else is bound to do it for us.

## NOTES

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2. United Nations, "Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice," 2010, [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).
3. While the distinction between retribution and restoration is central to debates on transitional justice, it is not absolute. In fact, proponents of transitional justice are increasingly arguing for a combination of both, rather than an either-or approach. The distinction is also problematic because some transitional justice mechanisms can be both punitive and restorative. Reparations, for example, were originally conceived as a punitive measure imposed on the losers of a war, as in the case of Germany after the Treaty of Versailles in 1919. After the Second World War, however, reparations took on a more restorative dimension. See Elazar Barkan, "Restitution and Amending Historical Injustices in International Morality," in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey, 91–102 (Lanham: Rowman and Littlefield, 2003).
4. Pierre Hazen, *Judging War, Judging History: Behind Truth and Reconciliation* (Stanford, CA: Stanford University Press, 2010), 1.
5. Thabo Mbeki, *Africa: The Time Has Come: Selected Speeches* (Cape Town: Tafelberg Publishers, 1998), 29.
6. Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2001).
7. Charles Villa-Vicencio and Erik Doxtader, *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* (Cape Town: Institute for Justice and Reconciliation, 2004), 33.
8. It is important to note that not all definitions of transitional justice include reconciliation. Opting for a definition that includes reconciliation is motivated by the way transitional justice is used in Palestine/Israel, where references to the South African Truth and Reconciliation Commission abound.
9. Nadim Rouhana, "Group Identity and Power Asymmetry in Reconciliation Processes: The Israeli-Palestinian Case," *Peace and Conflict: Journal of Peace Psychology* 10, no. 1 (2004): 33–52.
10. Rouhana, "Group Identity and Power Asymmetry," 35.
11. Rouhana, "Group Identity and Power Asymmetry," 35.
12. Erin Daly and Jeremy Sarkin, "Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies," *Columbia Human Rights Law Review* 35, no. 3 (2004): 101–64.
13. Michael Humphrey, "From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing," *Australian Journal of Anthropology* 14, no. 2 (2003): 171–87.
14. United Nations, "Guidance Note of the Secretary-General."
15. Sara Roy, "Why Peace Failed: An Oslo Autopsy," *Current History* 100, no. 651 (2002): 8–16; Edward Said, "The Morning After," *London Review of Books* 15, no. 20 (1993); Hilde Waage, "The 'Minnow' and the 'Whale': Norway and the United States in the Peace Process in the Middle East," *British Journal of Middle Eastern Studies* 34, no. 2 (2007): 157–76.
16. Ron Duda, "A Model for Dealing with the Past in the Israeli-Palestinian Context," *International Journal of Transitional Justice* 1, no. 2 (2007): 249–67, 252.
17. Yitzhak Rabin, "Speech to the Knesset, April 18th, 1994," in *The Israel-Arab Reader*, eds. Walter Laquer and Barry Rubin (London: Penguin Books, 2008), 461.
18. Uri Savir, *The Process* (New York: Vintage Books, 1998), 15.
19. Ahmed Qurei, *From Oslo to Jerusalem: The Palestinian Story of the Secret Negotiations* (London: I.B. Tauris, 2006), 58.
20. Rex Brynen and Roula El-Rifai, "Introduction," in *Compensation to Palestinian Refugees and the Search for Palestinian-Israeli Peace*, eds. Rex Brynen and Roula El-Rifai, 1–18 (London: Pluto Press, 2013), 6.

21. Nadim Khoury, "National Narratives and the Oslo Peace Process: How Peacebuilding Paradigms Affect Conflicts over History," *Nations and Nationalism* 22, no. 3 (2016): 465–83; Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* (London: Pluto Press, 2003); Rosemary Sayigh, "Dis/Solving the 'Refugee Problem,'" *Middle East Report*, no. 207 (1998): 19–23.
22. Masalha, *Politics of Denial*; Shahira Samy, *Reparations to Palestinian Refugees: A Comparative Perspective* (Oxon: Routledge, 2010).
23. Rex Brynen and Jill Tansely, "The Refugee Working Group of the Middle East Multilateral Peace Negotiations," *Palestine-Israel Journal* 2, no. 4 (1995).
24. Khoury, "National Narratives and Oslo"; Ilan Pappé, "Historophobia or the Enslavement of History: The Role of the 1948 Ethnic Cleansing in the Contemporary Israeli-Palestinian Peace Process," in *Partisan Histories: The Past in Contemporary Global Politics*, eds. Max Friedman and Padraic Kenney, 127–44 (New York: Palgrave Macmillan, 2005); Yehouda Shenhav, *Beyond the Two State Solution: A Jewish Political Essay* (Cambridge: Polity, 2012).
25. Danny Rubinstein, quoted in Ian Black, "Remembering the Nakba: Israeli Groups Puts 1948 Palestine Back on the Map," *The Guardian*, May 2, 2014, <https://www.theguardian.com/world/2014/may/02/nakba-israel-palestine-zochrot-history>.
26. Tzipi Livni, quoted in Gregg Carlstrom, "Qurei to Livni: I'll Vote for You," *Al-Jazeera*, January 24, 2011, <http://www.aljazeera.com/palestinepapers/2011/01/20111241517890936>.
27. Brynen and El-Rifai, "Introduction," 6.
28. Nur Masalha, "Remembering the Palestinian Nakba: Commemoration, Oral History and Narratives of Memory," *Holy Land Studies* 7, no. 2 (2008): 123–56, 151.
29. Ali Abunimah, *The Battle for Justice in Palestine* (Chicago: Haymarket Books, 2014); Bashir Bashir, "The Strengths and Weaknesses of Integrative Solutions for the Israeli-Palestinian Conflict," *Middle East Journal* 70, no. 4 (2016): 560–78; Meron Benvenisti, *Sacred Landscape: The Buried History of the Holy Land since 1948*, trans. Maxine Kaufman-Lacusta (Berkeley: University of California Press, 2000); George Bisharat, "The Power of Apology," *Haaretz*, January 2, 2004; Rashid Khalidi, "Truth, Justice and Reconciliation: Elements of a Solution to the Palestinian Refugee Issue," in *The Palestinian Exodus 1948–1998*, eds. Ghada Karmi and Eugene Cotran, 221–41 (Reading, UK: Ithaca Press, 1999); Yoav Peled and Nadim Rouhana, "Transitional Justice and the Right of Return of the Palestinian Refugees," *Theoretical Inquiries in Law* 5, no. 2 (2004): 317–32; Pappé, "Historophobia or the Enslavement of History"; Munir Nuseibah, *Forced Displacement in the Palestinian-Israeli Conflict, International Law and Transitional Justice* (London: University of Westminster, 2013); Edward Said, "Truth and Reconciliation," *Al-Ahram Weekly*, January 14, 1999.
30. United Nations Office of the High Commissioner on Human Rights, "General Assembly Resolution 60/147: UN Basic Principles and Guidelines on the Right to Remedy and Reparation of Victims of Gross Violations on International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147," December 16, 2005, <https://www.un.org/ruleoflaw/files/BASICP~1.PDF>.
31. "Palestine Papers," *Al Jazeera*, July 16, 2008, <http://transparency.aljazeera.net/files/2942.PDF>.
32. Benvenisti, *Sacred Landscape*, 330.
33. Bisharat, "Power of Apology."
34. Melissa Nobles, *The Politics of Official Apologies* (New York: Cambridge University Press, 2008), 3.
35. Sayigh, "Dis/Solving the 'Refugee Problem.'"
36. Yifat Gutman, *Memory Activism: Reimagining the Past for the Future in Israel-Palestine* (Nashville: Vanderbilt University Press, 2017).
37. Criminal courts have become an essential battleground between Israelis and Palestinians, especially since the Palestinian Authority joined the International Criminal Court in 2015. The proceedings the PA has issued against Israel in the ICC, however, only qualify as ad hoc transitional justice

measures. They are not part of a larger transition meant to move Palestinians and Israelis away from the conditions of colonial conflict. See Brendan Browne, "Transitional Justice: The Case of Palestine," in *The International Handbook on Transitional Justice*, eds. Cheryl Lawther, Luke Moffett, and Dov Jacobs, 488–507 (Cheltenham: Edward Elgar Publishing, 2017).

38. Edward Said, *Power, Politics and Culture* (New York: Vintage, 2001), 449–50.
39. Bashir Bashir and Amos Goldberg, "Deliberating the Holocaust and the Nakba: Disruptive Empathy and Binationalism in Israel/Palestine," *Journal of Genocide Research* 16, no. 1 (2014): 77–99; Ilan Gur-Ze'ev and Ilan Pappé, "Beyond the Destruction of the Other's Collective Memory: Blueprints for a Palestinian/Israeli Dialogue," *Theory, Culture and Society* 20, no. 1 (2003): 93–108; Nadim Khoury, "Postnational Memory: Narrating the Holocaust and the Nakba," *Philosophy and Social Criticism* 46, no. 1 (April 2019): 91–110; Edward Said, "Israel-Palestine: The Third Way," *Le Monde Diplomatique*, September 1998.
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41. Bashir, "Strengths and Weaknesses of Integrative Solutions;" Tom Hill, "1948 after Oslo: Truth and Reconciliation in Palestinian Discourse," *Mediterranean Politics* 13, no. 2 (2008): 151–70.
42. Leila Hilal, *Transitional Justice Responses to Palestinian Dispossession: Focus on Restitution* (New York: International Center for Transitional Justice, 2012).
43. Peled and Rouhana, "Transitional Justice and Right of Return."
44. Fionnuala Ní Aoláin and Colm Campbell, "The Paradox of Transition in Conflicted Democracies," *Human Rights Quarterly* 27, no. 1 (2005): 172–213, 181.
45. Waage, "The 'Minnow' and the 'Whale,'" 166.
46. Nadim Rouhana, "Decolonization as Reconciliation: Rethinking the National Conflict Paradigm in the Israeli-Palestinian Conflict," *Ethnic and Racial Studies* 41, no. 4 (2018): 643–62. Zochrot makes a similar link between decolonization and transitional justice.
47. Omar Barghouti, "Organizing for Self-Determination, Ethical Decolonization and Resisting Apartheid," *Contemporary Arab Affairs* 4, no. 4 (2009): 576–86. Hunaida Ghanim, "Between Two 'One-State' Solutions: The Dialectics of Liberation and Defeat in the Palestinian National Enterprise," *Constellations* 23, no. 3 (2016): 340–50. Bashir Bashir and Rachel Busbridge, "The Politics of Decolonization and Bi-Nationalism in Israel/Palestine," *Political Studies* 67, no. 2 (2019): 388–405.
48. Abunimah, *Battle for Justice*, 47.
49. Dudai, "Model for Dealing with the Past." The problem with such arguments is that they risk equating the violence committed by Israel against "Israeli-Palestinians" and the violence committed among Palestinians themselves. They thus conflate the violence of the colonizer and the violence of the colonized. This reproduces the mindset of the existing peace process, which creates a false symmetry between the parties, rather than breaks away from it.
50. Masalha, *Politics of Denial*.
51. Raphael Ahren, "Changing Tack, Foreign Ministry to Bring 'Jewish Refugees' to Fore," *Times of Israel*, April 3, 2012, <https://www.timesofisrael.com/foreign-ministry-promotes-the-jewish-refugee-problem/>. My emphasis.
52. JPost Editorial, "The Jewish Nakba," *Jerusalem Post*, December 9, 2015, <https://www.jpost.com/Opinion/The-Jewish-Nakba-436834>.
53. In *The Human Right to Dominate*, Nicola Perugini and Neve Gordon explore how Israeli settler groups mimic, invert, and co-opt the discourse of human rights to legitimize their colonization of Palestinian land. Nicola Perugini and Neve Gordon, *The Human Right to Dominate* (New York: Oxford University Press, 2005).
54. Michael Fischbach, "Linking Palestinian Compensation Claims with Jewish Property Claims against Arab Countries," in *Compensation to Palestinian Refugees and the Search for Palestinian-Israeli Peace*, eds. Rex Brynen and Roula El-Rifai, 69–88 (London: Pluto Press, 2013).

55. Courtney Jung, "Transitional Justice for Indigenous People in a Non-Transitional Society," International Center for Transitional Justice, 2009, p. 2.
56. Jung, "Transitional Justice for Indigenous People," 3.
57. Yara Hawari, "Palestine Sine Tempore?" *Rethinking History* 22, no. 2 (2018): 165–83.
58. Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 387–409.
59. Hill, "1948 after Oslo," 163.
60. See also Cherine Hussein, *The Re-emergence of the Single State Solution in Palestine/Israel: Countering an Illusion* (Oxon: Routledge, 2015).
61. Dudai, "Model for Dealing with the Past," 254; see also Daphna Golan-Agnon, "Between Human Rights and Hope: What Israelis Might Learn from the Truth and Reconciliation Process in South Africa," *International Review of Victimology* 17, no. 1 (2010): 31–48.
62. Dudai, "Model for Dealing with the Past," 250.
63. Edward Kaufman and Ibrahim Bisharat, "Introducing Human Rights into Conflict Resolution: The Relevance for the Israel-Palestinian Peace Process," *Journal of Human Rights* 1, no. 1 (2002): 71–91, 84.

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