Why "Palestine" Would Be a Dangerous Legal Fiction

by Louis René Beres (January 2015)

Many legal and practical problems are associated with the impending Palestinian "final demand" for statehood. Jurisprudentially, even if an expanding number of European states should jump on the "Palestine" bandwagon, and agree uniformly to recognize this 23rd Arab state, these actions would still have no authoritative legal effect. This is because, *inter alia*, the governing treaty on statehood – the *Convention on the Rights and Duties of States* (1934) stipulates a number of explicit criteria that always must be satisfied, irrespective of recognition.[i]

There are other substantial problems with the contrived Palestinian end-run around international law. In principle, declarations of support for Palestinian "self-determination"[ii] might not be unreasonable *per se* if the Palestinian side were authentically committed to a "Two-State Solution."[iii] Yet, both *Fatah* and *Hamas*, even as they periodically war on each other, somehow manage to agree on at least one overriding point. This is their unchanging annihilatory mantra: (1) Israel represents an abomination in the *Dar al-Islam* (the world of Islam), purely on irremediable religious grounds, and: (2) Israel is nothing more than "Occupied Palestine."

Ironically, European and other states searching (more-or-less) for Middle East peace, are effectively urging the creation of another terror state. Most recently, this destabilizing advocacy position stems from a diplomatic framework known generally as *The Road Map for Implementation of a Permanent Solution for Two States in the Israel-Palestinian Dispute*. Together with an openly insistent Palestinian refusal to reject the "Phased Plan" (Cairo) of June 1974, and an associated no-compromise *Jihad*[iv] to "liberate" all of "Occupied Palestine" in increments,[v] the *Road Map* reveals still another largely unforeseen or deliberately unacknowledged danger.

Lacking full understanding of pertinent international law, and of antecedent Natural Law,[vi] well-intentioned countries favoring "Palestine" are being misled by certain overly-optimistic expectations[vii] concerning Palestinian "*demilitarization*."

On Sunday, June 14, 2009, Israeli Prime Minister Benjamin Netanyahu first agreed to accept a Palestinian state, but then also made this agreement contingent upon prior Palestinian "demilitarization." Said the Prime Minister: "In any peace agreement, the territory under Palestinian control must be disarmed, with solid security guarantees for Israel."

Although this position represented a very considerable concession on his part, it never had any real chance of success. It is odd, therefore, that the Prime Minister repeated this unrealistic expectation in his UN General Assembly speech on September 27, 2012.

Under the very best assumptions for Israel, security could be suitably maintained if Palestine were demilitarized. But, in view of expected Palestinian manipulations of pertinent international law ("lawfare"), these assumptions are unpersuasive. Conveniently, at that point, it could be made to appear by "Palestine" that such law does not require Palestinian compliance with any "pre-state" agreements concerning the use of armed force.

Allegedly, as a now presumptively independent state, pre-independence compacts might not bind "Palestine," even if these agreements had included certain relevant U.N. or U.S. assurances to the contrary. This is the likely argument, moreover, even though Palestinian claims of statehood would never have actually met the four codified expectations of "Montevideo." Plausibly, this is the planned Palestinian argument, although "Palestine" would still have earned no proper legal entitlement to invoking any such authentically sovereign rights of abrogation.

There are antecedent legal problems here. Because true treaties can be binding only upon states,[viii] an agreement between a still non-state Palestinian Authority (PA), and an authentic sovereign state (Israel),[ix] would also have little real effectiveness.[x]

Any plan for accepting Palestinian demilitarization would be built upon sand. Nonetheless, what if the government of Palestine were somehow willing to consider itself bound by the pre-state, non-treaty agreement, *i.e.*, if it were willing to treat this agreement as if it were a real treaty? Even in these relatively favorable circumstances, the new Arab government would still have ample pretext to identify various grounds for *lawful* "treaty" termination. It could, for example, withdraw from the "treaty" because of what it would regard as a "material breach," an alleged violation by Israel that seemingly undermined the object or purpose of the agreement.

Or, it could point toward what international law calls a "fundamental change of circumstances" (*rebus sic stantibus*).[xi] In this connection, if a Palestinian state declared itself vulnerable

to previously unforeseen dangers, perhaps even from the forces of other Arab armies, it could "lawfully" end its sworn commitment to remain demilitarized.

There is another method by which a treaty-like arrangement obligating a new Palestinian state to accept demilitarization could quickly and *legally* be invalidated after independence. The usual grounds that may be invoked under domestic law to invalidate contracts also apply under international law to treaties. This means that the new state of Palestine could point to alleged *errors of fact,* or to *duress,* as perfectly appropriate grounds for terminating the agreement.

Moreover, any treaty is void if, at the time it was entered into, it conflicts with a "peremptory" rule of general international law (*jus cogens)* – a rule accepted and recognized by the international community of states as one from which "no derogation is permitted."[xii] Because the right of sovereign states to maintain military forces essential to "self-defense"[xiii] is certainly such a peremptory rule,[xiv] Palestine, depending upon its particular form of authority, could seemingly be within its right to abrogate any treaty that had compelled its demilitarization.

Thomas Jefferson, an American President who had read Epicurus, Cicero and Seneca, as well as Voltaire, Montesquieu, Holbach, Helvetius and Beccaria, wrote interestingly about obligation and international law. While affirming that "Compacts between nation and nation are obligatory upon them by the same moral law which obliges individuals to observe their compacts…," he also acknowledged the following: "There are circumstances which sometimes excuse the nonperformance of contracts between man and man; so are there also between nation and nation." Very specifically, Jefferson continued, if performance of contractual obligation becomes "self-destructive" to a party, "…the law of self-preservation overrules the law of obligation to others."[xv]

Here it must be remembered that, historically, demilitarization is a principle applied to various "zones,"[xvi] not to the entirety of emergent states. Hence, a new state of Palestine might have yet another legal ground upon which to evade compliance with preindependence commitments to demilitarization. It could be alleged, *inter alia*, that these commitments are inconsistent with traditional or Westphalian[xvii] bases of authoritative international law – bases found in treaties and conventions, international custom,[xviii] and the general principles of law recognized by "civilized nations"[xix] – and that therefore they are commitments of no binding character.

Israel should draw no comfort from the purportedly l*egal* promise of Palestinian demilitarization.[xx] Indeed, should the government of a new state of Palestine choose to invite foreign armies and/or terrorists[xxi] onto its territory (possibly after the original government authority is displaced or overthrown by even more militantly Islamic, anti-Israel forces), it could do so without practical difficulties, and without apparently violating international law.

Strangely, the plan for Palestinian statehood is still built upon the patently moribund *Oslo Accords*, ill-founded agreements unambiguously destroyed by persistent and egregious Arab violations. The basic problem with the *Oslo Accords* that underlies these violations should now be obvious. On the Arab side, Oslo-mandated expectations were never anything more than an optimally cost-effective method of dismantling Israel. On the Israeli side, these expectations were taken, more or less, as an unavoidable way of averting further Palestinian terrorism,[xxii] and catastrophic Arab aggressions.[xxiii]

The resultant asymmetry in expectations, never acknowledged by the U.N., has generally enhanced Arab power, while it has systematically weakened and degraded Israel. Even now, even after "Operation Iraqi Freedom" and the war in Afghanistan – even after the rise of ISIS, and the ongoing Syrian genocide – undisguised Palestinian calls to "Slaughter the Jews"[xxiv] have failed to dampen international enthusiasm for what amounts to creating another terrorist state. Even now, when the "international community" plans to midwife the birth of such a refractory state, its representatives refuse to understand that only a gravedigger could wield the forceps.[xxv]

What does all of this mean, for the alleged demilitarization "remedy," and for Israeli security in general? Above all, it demands that Israel make rapid and far-reaching changes in the manner in which it conceptualizes the critical continuum of cooperation and conflict. Israel, ridding itself of wishful thinking, of always hoping, and hoping too much, should recognize immediately the zero-sum calculations of its enemies, and must finally begin to recognize that the struggle in the Middle East will still be fought at the conflict end of the range.[xxvi]

The enemy-sustained struggle, in other words, must generally be conducted, however reluctantly and painfully, in zero-sum terms. Understood in terms of international law and world order,[xxvii] this could mean, *inter alia*, a recurrent willingness in Jerusalem to accept the right,[xxviii] and corollary obligations of "*anticipatory self-defense.*"[xxix]

The Arab world and Iran[xxx] still have only a "One-State Solution" for the Middle East. It is a "solution" that eliminates Israel altogether, a physical solution, a "Final Solution."[xxxi] The official PA maps of "Palestine" still show the new Arab state comprising all of the West Bank (Judea/Samaria), all of Gaza, and *all of the State of Israel*.

Additionally, they exclude any reference to a Jewish population, and list holy sites of Christians and Muslims only. One official cartographer, Khalil Tufakji, was commissioned by the Palestine National Authority to design and to locate a proposed Capitol Building. This was drawn to be located on the Mount of Olives in Jerusalem, directly on top of an ancient Jewish cemetery.

On September 1, 1993, Yasser Arafat loudly reaffirmed that the then new *Oslo Accords* would remain an intrinsic part of the PLO's 1974 *Phased Plan* for Israel's destruction: "The agreement will be a basis for an independent Palestinian State, in accordance with the Palestinian National Council Resolution issued in 1974…The PNC Resolution issued in 1974 calls for the establishment of a national authority on any part of Palestinian soil from which Israel withdraws or which is liberated." Later, on May 29, 1994, Rashid Abu Shbak, then a senior PNA security official, remarked: "The light which has shone over Gaza and Jericho will also reach the Negev and the Galilee."

Since these declarations, nothing has changed in Palestinian definitions of Israel and Palestine. This is true for the current leadership of both *Hamas* and *Fatah*. It makes no difference which group is more-or-less in power.[xxxii]

In his sermon, presented on official PA Television on December 12, 2014 – and in the presence of PA President Mahmoud Abbas – Mahmoud- Al-Habbash, the PA Supreme Shari'ah Judge, and President Abbas' Advisor on Religious and Islamic Affairs, stated unambiguously: "All of this land will return to us, all our occupied land, all our rights in Palestine – our state, our peoples' heritage, our ancestors' legacy – all of it will return to us, even if it takes time."

Earlier, on October 22, 2014, Al-Habbash had already reaffirmed that any acceptance of Israel's physical existence is firmly forbidden under Islamic law: "The entire land of Palestine (i.e., territory that includes all of Israel) is *waqf* (an inalienable religious endowment under Islamic law), and is a blessed land. It is prohibited to sell, bestow ownership, or facilitate the occupation of even a millimeter of it."[xxxiii]

Those who are concerned with Palestinian demilitarization and Israeli security ought to also

consider the following: The Arab world is presently comprised of 22 states of nearly five million square miles and more than 150,000,000 people. The Islamic world generally contains 50 states with more than *one billion people*. The Islamic states comprise an area 672 times the size of Israel. Israel, with a population of around five million Jews, is, *together with Judea/Samaria,* less than half the size of San Bernardino County in California. The Sinai Desert alone, which Israel transferred to Egypt in the 1979 Treaty, is three times larger than the entire State of Israel.[xxxiv]

A presumptively sovereign Palestinian state could *lawfully* abrogate its pre-independence commitments to demilitarize. The Palestine Authority is guilty of multiple material breaches of Oslo,[xxxv] and also of certain "grave breaches" of the law of war.[xxxvi] Further, both *Fatah* and *Hamas* still remain unwilling to rescind genocidal[xxxvii] calls for Israel's literal annihilation.

Any plan for accepting Palestinian demilitarization would be built upon sand; Israel should never base its geo-strategic assessments of Palestinian statehood upon any such illusory foundations.[xxxviii]

No doubt, Prime Minister Benjamin Netanyahu, with his earlier announced acceptance of a demilitarized Palestinian state, felt that he had taken a decisive and concessionary step toward reconciliation with the Palestinians. Yet, the Palestinian leadership will never accept the idea of a "limited" form of statehood, particularly one lacking even the core right of national self-defense. It follows that if Israel should ever be willing to acknowledge a Palestinian state, it would have to welcome an enemy that arrives fully endowed with "normal" and "legally" unhindered military rights.

Sources:

[i] According to the *Convention on the Rights and Duties of States*, Art. 1: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." See *Convention on the Rights and Duties of States*, concluded at Montevideo, 26 December 1933. Entered into Force, 26 December 1934, 165 L.N.T.S. 19, P.A.U.L.T.S. 37; 137 B.F.S.P. 282; U.S.T.S. 881, 49 Stat. 3097.

[ii] See, by this author: Louis René Beres, "Self-Determination, International Law and

Survival on Planet Earth," ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, Vol. 11, No. 1. 1994, pp. 1-26. See also: *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance With the Charter of the United Nations (The Principle of Equal Rights and Self-Determination of Peoples*), G.A. Res. 2625, U.N. GAOR, 25th Sess., and Supp. No. 28 at 121, U.N. Doc. A/8028 (1970), reprinted in 9 I.L.M. 1292; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called For Under Article 73e of the Charter,* G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

[iii] Nonetheless, from the standpoint of genuinely still-binding international law that was codified during the British Mandatory period, West Bank (Judea/Samaria) are an altogether integral part of the State of Israel. Hence, both the prior Oslo Agreements and the current "Road Map" – which identify Judea/Samaria as "Palestinian Territories") – were constructed upon wholly opportunistic and geopolitical (rather than properly jurisprudential) foundations.

[iv] Note, above, core "pacific settlement" expectations at Article 10 of the *Convention on the Rights and Duties of States.* For best current discussions of *Jihad,* see: Andrew G. Bostom, ed., THE LEGACY OF JIHAD: ISLAMIC HOLY WAR AND THE FATE OF NON-MUSLIMS (New York: Prometheus Books, 2005, 759 pp. This magisterial collection, using extensive primary and secondary source materials, reveals that for centuries, *jihad* sought to expand Islamic dominance by massacre, pillage, enslavement and deportation. The argument reproduces extensive quotations from the *Qu'ran* and the *Hadith*, along with *Qu'ranic* exegeses by the best-known classical and modern commentators.

[v] An expressly codified expectation of the *Convention on the Rights and Duties of States* is identified at Art. 10: "The primary interest of states is the conservation of peace. Differences of any nature which arise between them should be settled by recognized pacific methods."

[vi] Antecedent Natural Law is based upon acceptance of certain principles of right and justice that prevail because of their own intrinsic merit. Eternal and immutable, they are external to all acts of human will and interpenetrate all human reason. This notion and its attendant tradition of human civility runs almost continuously from Mosaic Law and the ancient Greeks and Romans to the present day. The Stoics regarded nature itself as the supreme legislator in a moral order where man, through his divinely granted capacity to reason, can commune directly with the gods. As set forth in *De Republica* and *De Legibus*, Cicero's

classical concept of natural law underscores a principle that is now very much a part of the United States Constitutional foundation: that is, the imperative quality of the civil law is always contingent upon being in perfect harmony with reason. According to Cicero, justice is not – as the Epicureans claimed – a mere matter of utility. Rather, it is a distinct institution of nature that always transcends expediency and that *must* be embodied by positive law before such normative obligations can ever claim any proper human loyalties.

[vii] An earlier example of erroneous legal assumptions by Israel can be found in the Israel-Egypt Peace Treaty of 1979. (See: Treaty of Peace, March 26, 1979, Egypt-Israel, 18 I.L.M.). When vast portions of the worldwide Islamic community criticized then-President Sadat for his "traitorous" agreements with "*the Jews*," Sadat reassured them that the Treaty was merely a tactical expedient to buy time until Egypt could fight another war against Israel. This was done when he stated, openly, that the Egypt-Israel Peace Treaty "is founded on Islamic rules, because it arises from a position of strength, after the holy war and victory Egypt achieved on 10th Ramadan 1393" (October 1973). See: Robert S. Wistrich, *Anti-Semitism: The Longest Hatred* (New York: Pantheon Books, 1991), p. 231.

[viii] A treaty is always an international agreement "concluded between states…." Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 8 I.L.M. 679. For the requirements of statehood under international law, see: Convention on the Rights and Duties of States, Dec. 26, 1933, art. [viii]1, 49 Stat. 3097, 165 L.N.T.S. 19.

[ix] On the State of Israel and Jewish sovereignty, see: Theodore Herzl, THE JEWISH STATE (Dover Publications, 1988). This Dover edition is an unabridged reproduction of the work published in 1946 by the American Zionist Emergency Council, which was, in turn, based on the first English-language edition. A JEWISH STATE, published in London, England, in 1896. The Herzl text was originally published in Vienna, in 1896, under the title: *Der Judenstaat*. Recognizing that "the nations in whose midst Jews live are all either covertly or openly anti-Semitic," Herzl put the Jewish Question in the briefest possible form: "Are we to `get out' now, and where to? Or, may we yet remain? And, how long?" Herzl, *supra*, at 86.

[x] Technically, an agreement on demilitarization under international law must always be "between states." Hence, any agreement on demilitarization that would include a non-state party would be *prima facie* null and void. See: e.g., Karl Liko, DEMILITARIZED ZONE, in 2 INTERNATIONAL MILITARY AND DEFENSE ENCYCLOPEDIA 736, 736 (Trevor N. Dupuy, ed., 1993)(defining "demilitarized zone" as "a term used in international law to designate an area in which, according to a formal treaty or an informal agreement *between states,* the maintenance of military forces and installations is prohibited."

[xi] Defined literally as “so long as conditions remain the same,” the doctrine of *rebus sic stantibus* has a long history. For an informed scholarly treatment of this doctrine, see generally; Arie E. David, THE STRATEGY OF TREATY TERMINATION 3-55 (1975). In the traditional view, the obligation of a treaty terminates when a change occurs in those circumstances that existed at the effective date of the agreement and the continuance of which formed a tacit condition of the ongoing validity of the treaty. *Id.* The function of the doctrine therefore is to execute the shared intentions of the parties. *Id. Rebus sic stantibus* becomes operative when there is a change in the circumstances that formed the cause, motive or rationale of consent. *Id.*

[xii] See: *Vienna Convention*, *supra*, art. 53. Even a treaty is subordinate to peremptory expectations: “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” *Id.*

[xiii] This right extends to both the customary right of anticipatory self-defense and to the codified right of post-attack self-defense. Regarding the right of anticipatory self-defense, states do not always have to wait until after an attack is absorbed before embarking upon self-defense. Rather, where the threat is sufficiently imminent in point of time, they can choose to strike first, provided, of course, that the strike falls within the parameters of discrimination, proportionality and military necessity. Regarding the codified right of post-attack self-defense, see: *U.N. Charter,* art. 51.

[xiv] One theory stipulates that any treaty obligation may be terminated unilaterally following changes in conditions that make performance of the treaty injurious to fundamental rights, especially the rights of existence, self-preservation and independence. Some areas of law summarize these rights as “rights of necessity.” See David, *supra*, at 19. See generally: LAW OF TREATIES, art. 28, Doctrine section in 29 AM.J.INT’L L. 653, 1100-02 (Supp. 1935)(presenting the doctrinal background for article 28, entitled “*Rebus Sic Stantibus*,” in this draft convention prepared for the codification of international law.

[xv] See Jefferson’s “Opinion on the French Treaties” (April 28, 1793) in Merrill D. Peterson, ed., THE POLITICAL WRITINGS OF THOMAS JEFFERSON (Thomas Jefferson Memorial Foundation: 1993), pp. 113-114.

[xvi] For a source containing detailed provisions on demilitarized zones, see: *Protocol Additional to the Geneva Conventions* of 12 August 1949, and *relating to the Protection of Victims of International Armed Conflicts*, *opened for signature,* Dec. 12, 1977, 1125 U.N.T.S. 3, 16, I.L.M. 1391 (Protocol I).

[xvii] After the Peace of Westphalia, which ended the Thirty Years War and consecrated the still-extant state system. See: *Treaty of Peace of Munster,* Oct. 1648, 1 Consol. T.S. 271; *Treaty of Peace of Osnabruck*, Oct. 1648, 1 Consol. T.S. 119. Together, these two treaties comprise the "Treaty of Westphalia."

[xviii] Article 38(1)(b) of the *STATUTE OF THE INTERNATIONAL COURT OF JUSTICE* describes international custom as "evidence of a general practice accepted as law." The essential significance of a norm's customary character is that the norms bind even those states that are not parties to the pertinent codification. Even where a customary norm and a norm restated in treaty form are apparently identical, these norms are treated as jurisprudentially discrete. During the merits phase of MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA, the International Court of Justice (ICJ) stated: "Even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence." See: MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA, Nicar. V. US., Merits, 1986 ICJ, Rep. 14 (Judgment of 27 June).

[xix] These authoritative bases of international law are drawn from art. 38 of the *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, T.S. 993.

[xx] A similar point may be concluded about any prospective demilitarization of the Golan. Here the meaning of "demilitarization" would be more traditional than its use regarding concessions by a still emerging state (Palestine), but the consequences of Golan demilitarization could be no less injurious to Israel. For more on Golan demilitarization, see: Louis René Beres and (AMB.) Zalman Shoval, "On Demilitarizing a Palestinian `Entity' and the Golan Heights: An International Law Perspective," VANDERBILT JOURNAL OF TRANSNATIONAL LAW, Vol. 28, No. 5. November 1995, pp. 959 – 971. Zalman Shoval was a prior Israeli Ambassador to the United States on two occasions.

[xxi] Here there would even be a danger of WMD terrorism, especially nuclear terrorism. For earlier writings by this author on nuclear terrorism in particular, see: Louis René Beres, "The Threat of Palestinian Nuclear Terrorism in the Middle East," 15 INT'L PROBS. 48 (1976); Louis Rene Beres, "Is Nuclear Terrorism Plausible?' in NUCLEAR TERRORISM: DEFINING THE THREAT 45 (Paul Leventhal and Yonah Alexander, eds, 1986); Louis René Beres, "Preventing Nuclear Terrorism: Responses to Terrorist Grievances," in PREVENTING NUCLEAR TERRORISM: THE REPORT AND PAPERS OF THE INTERNATIONAL TASK FORCE ON PREVENTION OF NUCLEAR TERRORISM 146 (Paul Leventhal and Yonah Alexander, eds, 1987); Louis René Beres, "Responding to the Threat of Nuclear Terrorism," in INTERNATIONAL TERRORISM: CHARACTERISTICS, CAUSES, CONTROLS 228 (Charles W.

Kegley, Jr., ed, 1990); Louis René Beres, “Terrorism and International Law,” 3 FLA. INT’L L.J., 291 (1988); Louis René Beres, “International Terrorism and World Order: The Nuclear Threat,” 12 STAN. J. INT’L STUD. 131 (1977); Louis René Beres, “Terrorism and International Security: The Nuclear Threat,” 26 CHITTY’S L.J., 73 (1978); Louis René Beres, “*Hic Sunt Dracones*: The Nuclear Threat of International Terrorism,” PARAMETERS: J. U.S. ARMY WAR C., June 1979, at 11; Louis René Beres, “International Terrorism and World Order: The Nuclear Threat,” in STUDIES IN NUCLEAR TERRORISM 360 (Augustus R. Norton and Martin H. Greenberg, eds., 1979); Louis René Beres, TERRORISM AND GLOBAL SECURITY: THE NUCLEAR THREAT (Boulder and London: Westview Special Studies in National and International Terrorism, 1987), 2nd edition, 156 pp; Louis René Beres, APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS (Chicago and London: The University of Chicago Press, 1980), 315 pp; Louis René Beres, “Confronting Nuclear Terrorism,” 14 HASTINGS INT’L & COMP. L. REV 129 (1990); Louis René Beres, “On International Law and Nuclear Terrorism,” 24 GA. J. INT’L & COMP. L 1 (1994); Louis René Beres, “Israel, the `Peace Process,’ and Nuclear Terrorism: A Jurisprudential Perspective,” 18 LOY. L.A. INT’L &, “The United States and Nuclear Terrorism in a Changing World: A Jurisprudential View,” 12 DICK. J. INT’L L. 327 (1994). COMP. L.J. 767 (1996); Louis René Beres, “Preventing the `Blood-Dimmed Tide: How To Avoid Nuclear Terrorism Against the United States,” 24 STRATEGIC REV. 76 (1996).

[xxii].For core conventions in force concerning terrorism, see especially CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS, INCLUDING DIPLOMATIC AGENTS. Adopted by the U.N. General Assembly, Dec. 14, 1973. Entered into force for the United States, Feb. 20, 1977. 28 U.S.T. 1975, T.I.A.S., No. 8532. Reprinted in 13 I.L.M. 43 (1974); VIENNA CONVENTION ON DIPLOMATIC RELATIONS. Done at Vienna, April 18, 1961. Entered into force for the United States., Dec. 13, 1972. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT (TOKYO CONVENTION), September 14, 1963, entered into force for the United States on December 4, 1969, 704 U.N.T.S. 219, 20 U.S.T. 2941; CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT (Hague Convention) of December 16, 1970, entered into force for the United States on Oct. 14, 1971, 22 U.S.T. 1641; CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION (MONTREAL CONVENTION) of September 23, 1971, entered into force for the United States on Jan. 26, 1973. 24 U.S.T. 564; INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES, Adopted by General Assembly Resolution 34/146 of December 17, 1979. U.N. Gen. Assbly. Off. Rec. 34th Sess. Supp. No. 46 (A/34/46), p. 245;entered into force on June 3, 1983, entered into force for the United States on December 7, 1984; EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM OF JANUARY 27, 1977, entered into force on August 4, 1978, E.T.S. 90. On December 9, 1985, the U.N. General Assembly unanimously adopted a resolution

condemning all acts of terrorism as “criminal.” Never before had the General Assembly adopted such a comprehensive resolution on this question. Yet, the issue of particular acts that actually constitute terrorism was left largely unaddressed, except for acts such as hijacking, hostage taking and attacks on internationally protected persons that were criminalized by previous custom and conventions. See UNITED NATIONS RESOLUTION ON TERRORISM, General Assembly Resolution 40/61 of December 9, 1985, and U.N. Gen. Assbly. Off. Rec 40th Sess., Supp. No. 53 (A/40/53), p. 301.

[xxiii] See: *RESOLUTION ON THE DEFINITION OF AGGRESSION*, Dec. 14, 1974, U.N.G.A. Res. 3314 (XXIX), 29 U.N. GAOR, Supp. (No. 31) 142, and U.N. Doc. A/9631, 1975, *reprinted in* 13 I.L.M. 710, 1974; and *CHARTER OF THE UNITED NATIONS,* Art. 51.. Done at San Francisco, June 26, 1945. Entered into force for the United States, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993, Bevans 1153, 1976, and Y.B.U.N. 1043.

[xxiv] For a discussion of authoritative international law criteria to distinguish permissible insurgencies from impermissible ones, see: Louis René Beres, “The Legal Meaning of Terrorism for the Military Commander,” CONNECTICUT JOURNAL OF INTERNATIONAL LAW, Vol. 11, No. 1., Fall 1995, pp. 1-27.

[xxv] This refusal to understand calls to mind the continuing relevance of Natural Law, and of Emmerich de Vattel’s classic argument on the obligation of each nation to every other nation. THE LAW OF NATIONS (1758) gave important emphasis to the natural law origins of all international law, and reasoned that nations are no less subject to the laws of nature than are individuals. He concluded that what one man owes to other men, one nation, in turn, owes to all other nations: “Since Nations are bound mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require.” With this in mind, Vattel proceeded to advance a permanent standard by which we can distinguish between lawful and unlawful practices in global affairs: “Since, therefore, the necessary Law of Nations consists in applying the natural law to States, and since the natural law is not subject to change, being founded on the nature of things and particularly upon the nature of man, it follows that the necessary Law of Nations is not subject to change. Since this law is not subject to change, and the obligations, which it imposes, are necessary and indispensable, Nations cannot alter it by agreement, nor individually or mutually release themselves from it.” (See: Vattel, THE LAW OF NATIONS (1758), Introduction to Book I, p. 4.)

[xxvi] On this point, see: Louis René Beres, “Understanding the `Correlation of Forces’ in the Middle East: Israel’s Urgent Strategic Imperative,” *Israel Journal of Foreign Affairs*, Vol. IV, No. 1., 2010, pp. 77-88; and Louis René Beres, “Staying Strong: Enhancing Israel’s

Essential Strategic Options," *Harvard National Security Journal,* Harvard Law School, June 13, 2014.

[xxvii] The concept of "world order" as both an organizing dimension of scholarship and as a normative goal of international affairs has its contemporary intellectual origins in the work of Harold Lasswell and Myres McDougal at the Yale Law School, Grenville Clark and Louis Sohn's WORLD PEACE THROUGH WORLD LAW (1966) and the body of writings by Richard A. Falk and Saul H. Mendlovitz. For early works by this author, who was an original participant in the World Law Fund's World Order Models Project (WOMP), see especially: Louis René Beres and Harry R. Targ, CONSTRUCTING ALTERNATIVE WORLD FUTURES: REORDERING THE PLANET (1977); Louis René Beres and Harry R. Targ., eds., PLANNING ALTERNATIVE WORLD FUTURES: VALUES, METHODS AND MODELS (1975); Louis René Beres, PEOPLE, STATES AND WORLD ORDER (1981); Louis René Beres, REASON AND REALPOLITIK: US FOREIGN POLICY AND WORLD ORDER (1984); and Louis René Beres, AMERICA OUTSIDE THE WORLD: THE COLLAPSE OF US FOREIGN POLICY (1987).

[xxviii] The customary right of anticipatory self-defense, which is the legal expression of preemption, has its modern origins in the *Caroline Incident.* This was part of the unsuccessful rebellion of 1837 in Upper Canada against British rule. (See: Beth Polebau, "National Self-Defense in International Law: An Emerging Standard for a Nuclear Age," 59 N.Y.U. L. REV. 187, 190-191 (noting that the *Caroline Incident* transformed the right of self-defense from an excuse for armed intervention into a customary legal doctrine). Following the *Caroline*, even the t*hreat* of an armed attack has generally been accepted as justification for a militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then-U.S. Secretary of State Daniel Webster outlined a framework for self-defense that does not actually require a prior armed attack. (See Polebau, op. cit., citing to Jennings, "The Caroline and McLeod Cases," 32 AM. J. INT'L L., 82, 90 (1938).) Here, a defensive military response to a threat was judged permissible as long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation." (See Polebau. *supra*, 61).

[xxix] See, especially, Louis René Beres, "On Assassination, Preemption and Counterterrorism: The View from International Law," INTERNATIONAL JOURNAL OF INTELLIGENCE AND COUNTERINTELLIGENCE, Vol. 21. Issue 4. December 2008, pp. 694-725. For earlier writings by this author on anticipatory self-defense under international law, see: Louis René Beres, Chair, The Project Daniel Group, ISRAEL'S STRATEGIC FUTURE: PROJECT DANIEL, ACPR Policy Paper No. 155, ACPR (Israel), May 2004, 64pp (this paper was prepared for presentation to then Israeli Prime Minister Ariel Sharon, and transmitted by hand on January 16, 2003); Louis René Beres, SECURITY THREATS AND EFFECTIVE REMEDIES: ISRAEL'S STRATEGIC, TACTICAL AND LEGAL

OPTIONS, ACPR Policy Paper No. 102, ACPR (Israel), April 2000, 110 pp; Louis René Beres, ISRAEL'S SURVIVAL IMPERATIVES: THE OSLO AGREEMENTS IN INTERNATIONAL LAW AND NATIONAL STRATEGY, ACPR Policy Paper No. 25, ACPR (Israel), April 1998, 74 pp; Louis René Beres, "Assassinating Saddam Hussein: The View From International Law," INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW, Vol. 13, No. 3, 2003, pp. 847- 869; Louis René Beres, "The Newly Expanded American Doctrine of Preemption: Can It Include Assassination," DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY, Vol. 31, No. 2., Winter 2002, pp. 157-177; Louis René Beres and (Col/IDF/Ret.), Yoash Tsiddon-Chatto, "Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor," TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL, Vol. 9, No. 2., 1995, pp. 437-449; Louis René Beres, "Striking `First': Israel's Post Gulf War Options Under International Law," LOYOLA OF LOS ANGELES INTERNATIONAL AND COMPARATIVE LAW JOURNAL, Vol. 14, Nov. 1991, pp. 10-24; Louis René Beres, "On Assassination as Anticipatory Self-Defense: Is It Permissible?" 70 U. DET. MERCY L. REV. U., 13 (1992); Louis René Beres, "On Assassination as Self-Defense: The Case of Israel," 20 HOFSTRA L. REV 321 (1991); Louis René Beres, "Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law," 26 VAND. J. TRANSNAT'L L. 111 (1993); Louis René Beres, "After the Gulf War: Israel, Preemption and Anticipatory Self-Defense," 13 HOUS. J. INT'L L. 259 (1991); Louis René Beres, "Israel and Anticipatory Self-Defense," 8 ARIZ J. INT'L & COMP. L. REV. 89 (1991); Louis René Beres, "After the Scud Attacks: Israel, `Palestine,' and Anticipatory Self-Defense," 6 EMORY INT'L L. REV. 71 (1992); and Louis René Beres, "Israel, Force and International Law: Assessing Anticipatory Self-Defense," THE JERUSALEM JOURNAL OF INTERNATIONAL RELATIONS, Vol. 13, No. 2., 1991, pp. 1-14.

[xxx] On July 23, 2014, Iran's Supreme Leader, Ali Khamenei, called openly for the annihilation of Israel. See: Y. Mansharof, E. Kharrazi, Y. Lahat, and A. Savyon, "Quds Day in Iran: Calls for Annihilation of Israel and Arming the West Bank," MEMRI, July 25, 2014, Inquiry and Analysis Series Report, No. 1107. See also, by this author: Louis René Beres "Like Two Scorpions in a Bottle: Could Israel and a Nuclear Iran Coexist in the Middle East," *The Israel Journal of Foreign Affairs*, Vol. 8., No. 1., 2014; and Louis René Beres, "Facing Myriad Enemies: Core Elements of Israeli Nuclear Deterrence," *The Brown Journal of World Affairs*, Fall/Winter 2013, Vol. XX., Issue 1., pp. 17-30.

[xxxi].Jurisprudentially, these "solutions" represent "Crimes against humanity." For definition of such crimes, *See* AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS POWERS AND CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL. Done at London, August 8, 1945. Entered into force, August 8, 1945. For the United States, Sept. 10, 1945. 59 Stat. 1544, 82 U.N.T.S. 279. The principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal were

affirmed by the U.N. General Assembly as AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NUREMBERG TRIBUNAL. Adopted by the U.N. General Assembly, Dec. 11, 1946. U.N.G.A. Res. 95 (I), U.N. Doc. A/236 (1946), at 1144. This AFFIRMATION OF THE PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED BY THE CHARTER OF THE NUREMBERG TRIBUNAL (1946) was followed by General Assembly Resolution 177 (II), adopted November 21, 1947, directing the U.N. International Law Commission to "(a) Formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft code of offenses against the peace and security of mankind…." (See U.N. Doc. A/519, p. 112). The principles formulated are known as the PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER AND JUDGMENT OF THE NUREMBERG TRIBUNAL. Report of the International Law Commission, 2nd session, 1950, U.N. G.A.O.R. 5th session, Supp. No. 12, A/1316, p. 11.

[xxxii] Here we must recall that criminal responsibility of leaders under international law is not limited to direct personal action nor is it limited by official position. On the principle of command responsibility, or *respondeat superior*, see: In re Yamashita, 327 U.S. 1 (1945); The High Command Case (The Trial of Wilhelm von Leeb), 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (United Nations War Crimes Commission Comp. 1949); see Parks, COMMAND RESPONSIBILITY FOR WAR CRIMES, 62 MIL.L. REV. 1 (1973); O'Brien, THE LAW OF WAR, COMMAND RESPONSIBILITY AND VIETNAM, 60 GEO. L.J. 605 (1972); U S DEPT OF THE ARMY, ARMY SUBJECT SCHEDULE No. 27 – 1 (Geneva Conventions of 1949 and Hague Convention No. IV of 1907), 10 (1970). The direct individual responsibility of leaders is also unambiguous in view of the London Agreement, which denies defendants the protection of the act of state defense. See AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF THE MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279, art. 7.

[xxxiii] See Palestinian Media Watch, *Bulletin*, Itamar Marcus and Nan Jacques Zilberdik, December 16, 2014.

[xxxiv] In this connection, Israel's leaders must always assess the threat of Palestinian statehood as part of a larger strategic whole; that is, in conjunction with steadily expanding threats of regional war, and, as corollary, Israel's core nuclear doctrine. See, on this indispensably broader perspective: Louis René Beres, "Changing Direction? Updating Israel's Nuclear Doctrine," *Strategic Assessment*, The Institute for National Security Studies, Israel, Vol. 17, No. 3, October 2014, pp. 93-106.

[xxxv] These breaches include various forms of "*perfidy*." Deception can certainly be legal under the law of armed conflict, but the Hague Regulations clearly disallow any placement of

military assets or personnel in populated civilian areas. Prohibition of perfidy is codified at *Protocol 1* of 1977, additional to the Geneva Conventions of 1949, and at Geneva IV, Art. 28. It is widely recognized that these rules are also binding on the basis of customary international law. Perfidy represents an especially serious violation of the law of war, one that is identified as a "Grave Breach" at Article 147 of *Geneva Convention IV*. Significantly, in our current context, the legal effect of perfidious behavior is always to immunize the preempting state from any unavoidable harm done to the perfidious party's noncombatant populations. See, by this author, Louis René Beres, "Religious Extremism and International Legal Norms: Perfidy, Preemption and Irrationality," CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW, Vol. 39, No. 3., 2007-2008, pp. 709-730.

[xxxvi] The term "Grave Breaches" applies to certain infractions of the Geneva Conventions of 1949 and Protocol I of 1977. The actions defined, as "Grave Breaches" in the four Conventions must be performed willfully or intentionally, and against the different groups of "protected person" identified by each Convention. The High Contracting Parties to the Geneva Conventions are under obligation "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed," a grave breach of the Convention. As defined at Art. 147 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (6 U.S.T. 3516, signed on Aug. 12 1949, at Geneva), Grave Breaches "shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Reference to Grave Breaches can also be found in the *INTERIM REPORT OF THE COMMISSION OF EXPERTS, UNITED NATIONS DOCUMENT,* S/25274, and January 2, 1993, at Sec. 3., Art. 47.

[xxxvii] This term is used here in the most literal jurisprudential sense. (See: *Convention on the Prevention and Punishment of the Crime of Genocide*, Done at New York: December 9, 1948. Entered into force, January 12, 1951. 78 U.N.T.S. 277.) The *Genocide Convention* criminalizes not only the various stipulated *acts* of genocide, but also (Article III) *conspiracy to commit genocide* and *direct and public incitement to commit genocide.* Articles II, III and IV of the *Genocide Convention* are fully applicable in all cases of direct and public incitement to commit genocide. For the *Convention* to be invoked, it is sufficient that any one of the State

parties call for a meeting, through the United Nations, of all the State parties (Article VIII).

[xxxviii] Significantly, any meaningful geo-strategic assessments of Palestinian statehood by Israel should factor in the broader threat of Iranian nuclear attack. This is the case because the Palestinian threat and the Iranian threat are not entirely separate or discrete perils; rather, they are potentially interpenetrating or "synergistic." See, in this connection, recent author writings dealing with the enhanced security and invulnerability of Israel's nuclear deterrent forces: Louis René Beres and Admiral (USN/ret.) Leon "Bud" Edney, "Israel's Nuclear Strategy: A Larger Role for Submarine Basing," *The Jerusalem Post,* August 17, 2014; and Professor Beres and Admiral Edney, "A Sea-Based Nuclear Deterrent for Israel," *Washington Times*, September 5, 2014. Admiral Edney served as NATO Supreme Allied Commander, Atlantic.

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