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## Implications of a Palestinian State for Israeli Security and Nuclear War: A Jurisprudential Assessment

Louis René Beres

### I. Introduction

Normally, students of international law approach the question of a Palestinian State from the standpoints of terrorism,<sup>1</sup> self-

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1. For current conventions in force concerning terrorism, *see generally* CONVENTION ON THE PREVENTION AND PUNISHMENT OF CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS, INCLUDING DIPLOMATIC AGENTS. Adopted by the, 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); *see generally* VIENNA CONVENTION ON DIPLOMATIC RELATIONS, Apr. 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 OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT (TOKYO CONVENTION), Sept. 14, 1963, entered into force for the United States on Dec. 4, 1969, 704 U.N.T.S. 219, 20 U.S.T. 2941; *see generally* CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT (HAGUE CONVENTION) of Dec. 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 Sept. 23, 1971, entered into force for the United States on Jan. 26, 1973. 24 U.S.T. 564; *see generally* INTERNATIONAL CONVENTION AGAINST THE TAKING OF HOSTAGES, Adopted by GAOR 34/146 of Dec. 17, 1979. U.N. GAOR 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 Dec. 7, 1984; *see generally* EUROPEAN CONVENTION ON THE SUPPRESSION OF TERRORISM OF JAN. 27, 1977, entered into force on August 4, 1978, E.T.S. 90; On

determination<sup>2</sup> and human rights. Although such an approach is altogether reasonable, it is also purposeful to examine the question of Palestinian statehood from the perspectives of Israel's national security, nuclear strategy, and regional nuclear war. With this in mind, the following article undertakes this second form of examination, thereby adding an essential jurisprudential component to a timely and urgent issue in world politics.

Whether or not a State of Palestine<sup>3</sup> will come into existence in the next several years is no longer problematic.<sup>4</sup> When it does

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December 9, 1985, the U.N. General Assembly unanimously adopted a resolution condemning all acts of terrorism as "criminal." See UNITED NATIONS RESOLUTION ON TERRORISM, U.N. GAOR 40/61 of Dec. 9, 1985, U.N. GAOR 40th Sess., Supp. No. 53 (A/40/53), p. 301. Never before had the General Assembly adopted such a comprehensive resolution on this question. See *id.* 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 *id.*

2. See Declaration on THE GRANTING OF INDEPENDENCE TO COLONIAL PEOPLES AND COUNTRIES (1960) G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960); see also PRINCIPLES WHICH SHOULD GUIDE THE MEMBERS IN DETERMINING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT THE INFORMATION CALLED FOR UNDER ARTICLE 73E OF THE CHARTER (1960) U.N. GAOR 1541 (XV), 15 U.N. GAOR, Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960); see also DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS (1970) (The Principle of Equal Rights and Self-Determination of Peoples) U.N. GAOR 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

3. Although the question of Palestinian statehood had become especially public in late Spring 1999, a Palestinian "Declaration of Independence had been issued more than ten years earlier—on November 15, 1988. This Declaration, by the Palestine National Council, ". . . in the name of God, and in the name of the Palestinian Arab people, hereby proclaims the establishment of the State of Palestine on our Palestinian territory with its capital Holy Jerusalem (*Al-Quds Ash-Sharif*)." PALESTINE NATIONAL COUNCIL: DECLARATION OF INDEPENDENCE (Nov. 15, 1988), in WALTER LAQUEUR AND BARRY RUBIN, eds., THE ISRAEL-ARAB READER; New York, Penguin Books, 1995, Fifth ed., pp. 542-546.

4. It is arguable, of course, that Jordan is already a Palestinian state. In fact, it is the Arab state in Palestine, having been created in 1946 out of 78% of the territory of the Palestinian Mandate. Jordan was, and remains, Eastern Palestine (Israel is Western Palestine). British authorities suspended the Jewish National Home Provisions of The Mandate for Palestine of the League of Nations in 1922, but until 1946 Transjordan remained the Eastern province of Palestine, ruled by Abdullah, Emir of the Hejaz, reporting to the High Commissioner in Jerusalem. These authorities sought to separate Transjordan from Western Palestine, but they could not do so legally until 1946, when Transjordan became an independent sovereign state. From this standpoint, the issue is not whether Palestinians deserve a state (because they already have Jordan), but whether they deserve *two* states.

come into being,<sup>5</sup> Israel's nuclear strategy<sup>6</sup> will surely be affected.

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5. The PLO had announced its intention to declare a Palestinian state in early May 1999—an intention that was not actualized. Addressing a rally in Nablus on November 14, 1998, Arafat declared, “[we] will declare our independent state on May 4, 1999, with Jerusalem as its capital.” The National Unity Coalition for Israel, “Arafat Again Calls for Palestinian State,” Washington D.C., Nov. 16, 1998. According to the Israel Government Press Office, such a unilateral declaration would violate the Oslo Accords and the implementing Wye River Memorandum. In the Press Office’s statement of 15 November 1998, “[T]he Agreement under the Oslo Accords and the Wye River Memorandum mandates the Palestinian Authority (PA) to negotiate with Israel the permanent status of Judea, Samaria, and Gaza.” The September 28, 1995 Interim Agreement (Oslo 2) states, “[n]either side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.” See *id.* at Article XXXI(7). This article prohibits unilateral measures that would alter the legal status of the areas (such as annexation or declaration of statehood). A Palestinian declaration of statehood could also fail to satisfy the generally-accepted criteria for statehood identified under international law: control over a fixed and clearly defined territory, a population, a government, and the capacity to engage in diplomatic and foreign relations. See, e.g. CONVENTION ON RIGHTS AND DUTIES OF STATES, done at Montevideo, Dec. 26, 1988. 49 Stat. 3097, T.S. No. 881, 3 Bevens 145, 165 L.N.T.S. 19, Article 1.

6. There is now a substantial body of literature that deals with Israel’s nuclear weapons status and strategy. See, e.g. Louis Rene Beres, *Israeli Nuclear Weapons After Indian and Pakistani Nuclear Tests*, SECURITY DIALOGUE, Vol. 29., No. 3., pp. 377-384; see, e.g. Louis Rene Beres, *In Support of Anticipatory Self-Defence: Israel, Osiraq and International Law*, CONTEM. SECURITY POL’Y, Vol. 19, No. 2., Aug. 1998, pp. 111-114; see, e.g. Louis Rene Beres, *Israel’s Nuclear Strategy: Ambiguity, Disclosure, Doctrine*, DENV. J. INT’L L. & POL’Y, Vol. 26., No. 2., 209-233 (Winter 1998); see, e.g. Louis Rene Beres, *The Iranian Threat to Israel*, MIDSTREAM, Vol. 44, No. 6., 2-5 (Sept./Oct. 1998); see, e.g. Louis Rene Beres, *Israel, the ‘Peace Process,’ and Nuclear Terrorism: Recognizing the Linkages*, STUDIES IN CONFLICTS AND TERRORISM, Vol. 21, No. 1., 59-86 (Jan. 1998); see, e.g. Louis Rene Beres, *Limits of Nuclear Deterrence: The Strategic Risks and Dangers to Israel of False Hope*, ARMED FORCES AND SOC’Y, Vol. 23, No. 4., 539-568 (Summer 1997); see, e.g. Louis Rene Beres, *On Living in a Bad Neighborhood: The Informed Argument for Israeli Nuclear Weapons*, POL. CROSSROADS, Vol. 5., Nos 1/2, 143-157 (1997); see, e.g. Louis Rene Beres, *Where the Shadow Really Falls: Why Israel Must Have Nuclear Weapons*, BROWN J. OF WORLD AFF., Vol. IV, Issue 1, 127-138 (Winter/Spring 1997); see, e.g. Louis Rene Beres, *Attrition, Annihilation and the End of Israel: A Strategic and Jurisprudential View*, U. DET. MERCY L. REV., Vol. 73, Issue 3., 479-498 (Spring 1996); see, e.g. Louis Rene Beres, *The Oslo Accords and Israel’s Nuclear Strategy*, THE GEO. COMPASS, Vol. V., No. 1., 74-81 (Winter 1996); see, e.g. Louis Rene Beres, *Israel, Iran and Nuclear War: A Jurisprudential Assessment*, UCLA J. INT’L L. & FOREIGN AFF., Vol. 1., No. 1., 65-97 (Spring 1996); see, e.g. Louis Rene Beres, *Israel, Iran and Preemption: Choosing the Least Unattractive Option Under International Law*, DICK. J. INT’L L., Vol. 14, No. 2., 187-206; see, e.g. Louis Rene Beres, *The Iranian Threat to Israel: Capabilities and Intentions*, INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE, Vol. 9., No. 1., 51-62 (Spring 1996); see, e.g. Louis Rene Beres, *Power and Survival: Why Israel Needs Nuclear Weapons*, INT’L J. GROUP TENSIONS, Vol. 26, No. 1., 21-60 (Spring 1996); see, e.g. Louis Rene Beres, *Israel’s Bomb in the Basement: A Revisiting of ‘Deliberate Ambiguity,’ vs. Disclosure*, ISRAEL AFF., Vol.

And this strategy, in turn, will affect the probability of nuclear war

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2., No. 1., 112-136 (Autumn 1995); see, e.g. Louis Rene Beres, *The 'Peace Process' and Israel's Nuclear Strategy*, STRATEGIC REV., 35-47 (Winter 1995); Warren H. Donnelly, Senior Specialist, ENR, ISRAEL AND NUCLEAR WEAPONS, CRS Issue Brief, 14 (Updated Mar. 13, 1989); see, e.g. Yair Evron, *The Relevance and Irrelevance of Nuclear Options in Conventional Wars: The 1973 October War*, JERUSALEM J. INT'L REL., 7, Nos. 1-2 (1984); see, e.g. SHAI FELDMAN, ISRAELI NUCLEAR DETERRENCE: A STRATEGY FOR THE 1980S (New York: Columbia University Press, 1982); see, e.g. Uri Bar-Joseph, *The Hidden Debate: The Formation of Nuclear Doctrines in the Middle East*, J. STRATEGIC STUD., 5, No. 2 (June 1982); see, e.g. RODNEY W. JONES, SMALL NUCLEAR FORCES (Washington Papers, No. 103: New York: Praeger, 1984); see, e.g. ROBERT HARKAVY, SPECTER OF A MIDDLE EASTERN HOLOCAUST: THE STRATEGIC AND DIPLOMATIC IMPLICATIONS OF THE ISRAELI NUCLEAR WEAPONS PROGRAM, Monograph Series in World Affairs: Denver, (University of Denver Press, 1977); see, e.g. FUAD JABBER, ISRAEL AND NUCLEAR WEAPONS: PRESENT OPTIONS AND FUTURE STRATEGIES (London: Chatto and Windus, 1971); see, e.g. Alan Dowty, "Israel and Nuclear Weapons," MIDSTREAM 22 (Nov. 1976); see, e.g. Alan Dowty, *Nuclear Proliferation: The Israeli Case*, INT'L STUD. Q. 22 (Mar. 1978); see, e.g. Efraim Inbar, *The Israeli Basement - With Bombs or Without?*, CROSSROADS 8 (Winter/Spring 1982); see, e.g. Shlomo Aronson, *Nuclearization of the Middle East*, JERUSALEM Q. 2 (Winter 1977); see, e.g. Steven J. Rosen, *Nuclearization and Stability in the Middle East*, JERUSALEM J. INT'L REL. 1 (Spring 1976); see, e.g. LOUIS RENÉ BERES, ED., SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY (Lexington, MA: Lexington Books, 1986); see, e.g. PETER PRY, ISRAEL'S NUCLEAR ARSENAL (Boulder, CO: Westview, 1984); see, e.g. PIERRE PEAN, LES DEUX BOMBES (Paris: Fayard, 1982); see, e.g. David Twersky, *Is Silence Golden? Vanunu and Nuclear Israel*, TIKKUN, (Jan./Feb. 1988); AVNER YANIV, DETERRENCE WITHOUT THE BOMB: THE POLITICS OF ISRAELI STRATEGY (Lexington, MA: Lexington Books, 1987); see, e.g. SHYAM BHATIA, NUCLEAR RIVAL IN THE MIDDLE EAST (New York and London: Routledge, 1988); see, e.g. MITCHELL REISS, WITHOUT THE BOMB: THE POLITICS OF NUCLEAR NONPROLIFERATION (New York: Columbia University Press, 1988). Three important books on the subject, published in Hebrew, are: YAIR EVRON, ISRAEL'S NUCLEAR DILEMMA, (Tel Aviv: Yad Tabenkin, Hakibbutz Hameuchad, 1987); and DAVID ISH SHALOM, HORROR AND HOPE (Jerusalem: Keshet, 1987). Additional useful bibliography can be found in Donnelly, *op cit.*, pp. 13-14. Donnelly also provides a very informative chronology, beginning with Israel's bombing of the Iraqi reactor on June 7, 1981, and concluding with Israeli-Norwegian consultation on Norwegian heavy water supplied to Israel on December 15, 1988.

in the Middle East.<sup>7</sup> What, precisely, are the pertinent connections?<sup>8</sup>

Interestingly, an ironic connection exists between Israel's posture on Judea/Samaria vs. Palestine and its nuclear strategy, i.e., a "hawkish" position on maintaining control over the remaining territories (the position of Oslo<sup>9</sup> opponents) is normally associated

7. Any such war could suffer termination difficulties because of the expansion of information warfare capabilities. Important requirements for ending a nuclear war would include: accurate and timely communication of a willingness to cease fire; military compliance with settlement; stable command and control during war; and verification of behavior expected in armistice. Information warfare, part of the revolution in military affairs concerning computer, communications and electronics technologies, has been identified by Stephen J. Cimbala as: "(1) a set of techniques and technologies potentially capable of making qualitative changes in the way that wars are fought; or (2) a way of thinking about the relationship between technology and warfare, or about warfare in general, emphasizing the brain and nervous system of the state and its armed forces." Stephen J. Cimbala, *INFORMATION WARFARE AND NUCLEAR WEAPONS SPREAD: IMPLICATIONS FOR CONFLICT TERMINATION*, (1998) (unpublished paper).

8. For early discussions of such pertinent connections by this author, see, e.g. Louis René Beres, *Israel's Destruction of Iraq's Nuclear Reactor*, *MIDSTREAM*, Vol. XXXVII, No. 8, 8-9 (Nov. 1991); see, e.g. Louis René Beres, *After the Gulf War: Israel, Palestine and the Risk of Nuclear War in the Middle East*, *STRATEGIC REV.*, Vol. XIX, No. 4, 48-55 (Fall 1991); see, e.g. Louis René Beres, *The Question of Palestine and Israel's Nuclear Strategy*, *POL. Q.*, Vol. 62, No. 4, 451-460 (Oct. - Dec. 1991); see, e.g. Louis René Beres, *A Palestine State and Israel's Nuclear Strategy*, *CROSSROADS: AN INT'L SOC.-POL. J.*, No. 31, 97-104 (1991); see, e.g. Louis René Beres, *Israel, Palestine and Regional Nuclear War*, *BULL. PEACE PROPOSALS*, Vol. 22 (2), 227-234 (1991); see, e.g. Louis René Beres, *A Palestinian State—Implications for Israel's Security and the Possibility of Nuclear War*, *BULL. OF THE JERUSALEM INSTITUTE FOR WESTERN DEFENCE*, Vol. 4, No. 3, 3-10 (Oct. 1991); see, e.g. Louis René Beres, *Israeli Security in a Changing World*, *STRATEGIC REV.*, Vol. XVIII, No. 4, 11-22 (Fall 1990); see, e.g. Louis René Beres, *Palestine and Nuclear War*, *JERUSALEM REP.*, 45 (Aug. 1, 1991); see, e.g. Louis René Beres, *Israeli Nuclear Strategy*, *INT'L STUD. NOTES*, Spring 1990; see, e.g. Louis René Beres, *The Growing Threat of Nuclear War in the Middle East*, *JERUSALEM J. INT'L REL.*, Vol. 12, No. 1, 1-27 (1990); see, e.g. Louis René Beres, *Staring Down the Specter of Nuclear War*, *ISRAELI DEMOCRACY*, Vol. 2, No. 2/3, 44-48 (Summer, Fall 1988); see, e.g. Louis René Beres, *Perils of Nuclearism*, *PRESENT TENSE*, Vol. 15, No. 6, 60 (Sept./Oct. 1988); see, e.g. Louis René Beres, *Nuclear Weapons and Nuclear War in the Middle East*, *TRANSNAT'L PERSP.*, Vol. 12, No. 1, 8-13 (1986); see, e.g. Louis René Beres, *Israel, Force and International Law: Assessing Anticipatory Self-Defense*, *JERUSALEM J. INT'L REL.*, Vol. 13, No. 2, 1-14 (June 1991); see, e.g. Louis René Beres, *ISRAELI SECURITY AND NUCLEAR WEAPONS*, *PSIS Occasional Papers*, Number 1/1990, Programme For Strategic and International Security Studies, Graduate Institute of International Studies, Geneva, Switzerland, 40.

9. "Oslo" is used here as a shorthand for the Middle East Peace Process. This Israel-Palestinian process consists of five agreements: (1) Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, Isr-P.L.O., 32 ILM 1525; (2) Israel-Palestine Liberation Organization Agreement on the Gaza

with a “dovish” position on nuclear strategy (because, *inter alia*, Israel has substantially greater strategic depth<sup>10</sup> under extant conditions). Hence, an expected victory for the Israeli Left (the position of Oslo supporters) on Palestine (originally a declining population following Iraq’s invasion of Kuwait<sup>11</sup> and the resultant Gulf War<sup>12</sup>) would suggest an expanded reliance by Israel on

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Strip and the Jericho Area, Isr.-PLO, 33 ILM 622 (May 4, 1994) (signed in Cairo); (3) Agreement on Preparatory Powers and Responsibilities, Isr.-PLO, 34 ILM, 455 (Aug. 29, 1994); (4) Protocol on Further Transfer of Powers and Responsibilities, Isr.-PLO., 34 ILM 455 (Aug. 27, 1995); and (5) Interim Agreement on the West Bank and Gaza Strip, Isr.-PLO, (Sept. 28, 1995) (signed in Washington D.C.).

10. Israeli security is endangered by a lack of “strategic depth.” Requiring substantial distance between its own forces and those of its enemies, Israel has—already—precious little room for maneuver. At the same time, the Arab confrontation states, especially Syria and Iraq, enjoy so large a numerical troop advantage that they could begin large-scale attacks which would catch Israel by surprise. Moreover, because of Israel’s massive dependence on a reserve system, Syria or Iraq would have to deal with only a relatively small IDF (Israeli) force for many long hours.

11. For documentation of Iraqi crimes, see: Amnesty International News Release, *Iraqi Forces Killings (sic) and Torturing in Kuwait, Says Amnesty International Fact-Finding Team*, AI Index: MDE 14/15/90. Distr. SC/PO (Oct. 3, 1990), a preliminary report on widespread charges of Iraqi torture, willful killing, rape, pillage and collective reprisals. See Amnesty International Report, *Iraq/Occupied Kuwait Human Rights Violations Since 2 August*, AI Index MDE 14/16/90. Distr. SC/CO/GR (Dec. 19, 1990). For personal testimonies of Iraqi brutalities, see N.Y. TIMES, at A17, col. 1 (Jan. 14, 1991); and Shafeeq Ghabra, *The Iraqi Occupation of Kuwait: An Eyewitness Account*, J. PALESTINE STUD., Vol. XX, No. 2, Issue 78, 112-125 (Winter 1991). Further documentation can be found at: CIVIL WAR IN IRAQ, A staff report, Committee on Foreign Relations, Senate, 102nd Cong., 1st Sess., Washington, 28 (May 1991) (Com. Print); CRISIS IN THE PERSIAN GULF: SANCTIONS, DIPLOMACY AND WAR. Hearings. Committee on Armed Services, House, Washington, 1991. 920 (Dec. 4-20, 1990) (H.A.S.C. No. 101-57); HUMAN RIGHTS ABUSES IN KUWAIT AND IRAQ, Hearing, Committee on Foreign Affairs, House, 102nd Cong., 1st Sess., Washington, 192 (Jan. 9, 1991); THE PERSIAN GULF CRISIS, Joint Hearings, Subcommittees on Arms Control, International Security and Science, Europe and the Middle East, and on International Operations, Committee on Foreign Affairs and the Joint Economic Committee, Washington, 576 (Aug. 8 - Dec. 11, 1990).

12. Coalition military action against Iraqi forces commenced on January 16, 1991. This collective resort to force represented a last attempt to remove Iraqi military forces from Kuwait, which had been occupied since Saddam Hussein’s invasion of August 2, 1990. On the very same day of the Iraqi invasion, U.N. SCOR 660: (1) Condemned the Iraqi invasion of Kuwait; (2) Demanded that Iraq withdraw immediately and unconditionally all its forces to the positions in which they were located on August 1, 1990; (3) Called upon Iraq and Kuwait to begin immediately intensive negotiations for the resolutions of their differences and support all efforts in this regard, especially those of the League of Arab States. The war ended when Iraq formally accepted all of the United States-led coalition’s terms for a permanent ceasefire on March 3, 1991. Significantly, although elimination of all Iraqi nonconventional force capabilities was an integral part of

nuclear deterrence. We will, therefore, examine the precise forms such an expanded reliance might take. But first let us consider why, exactly, Palestine would represent new and significant danger to Israel.

## II. The Regional Danger From Palestine

When—as a result of the Oslo Accords<sup>13</sup>—West Bank (Judea/Samaria) and Gaza become Palestine, Israel's vulnerability to armed attack by Arab neighbors would increase markedly. Recognizing an “improved” balance of forces vis-à-vis Israel,<sup>14</sup> a larger number of Arab states would calculate that they now confront a smaller, more beleaguered adversary—one deprived of former strategic depth and one whose military forces are more preoccupied with Palestine than they ever were with the *intifada*. Fearing even total defeat—the End of the Third Temple Commonwealth<sup>15</sup>—Israel could find itself resorting for the first time to

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the ceasefire agreement, Iraq continued after the war to seek a thermonuclear weapons capacity and to disguise this effort from UN inspectors.

13. Oslo 1, known generally as the Declaration of Principles, was concluded and signed in Oslo on August 19, 1993, and resigned in Washington D.C. on September 13, 1993. Oslo 2 was signed in Washington on September 28, 1995. For a complete compendium of the documentary record, up to the signing of Oslo 2, cf. Institute for Palestine Studies: *The Palestinian-Israeli Peace Agreement* (Rev. 2d ed., 1994); cf. Institute for Palestine Studies: *The Palestinian-Israeli Peace Agreement*, 306 (Rev. 2nd ed., 1994). See also B'TZEDEK (Israel), Vol. 1., No. 1., 105-144 (Spring 1997).

14. Regarding this balance of forces, the reader should consider the following broad context of pertinent military balance: The Arab world is presently comprised of twenty-two states of nearly five million square miles and 144 million people. The Islamic world contains forty-four states with one *billion* people. The Islamic states comprise an area 672 times the size of Israel. Israel, with a population of fewer than five million Jews, is, together with Judea/Samaria and Gaza, 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 State of Israel. See: Louis Rene Beres, *Response to John Quigley*, AM. U. J. INT'L L. & POL'Y, Vol. 12., No. 3., 514 (1997).

15. There is, of course, nothing new about such “Third Temple” views concerning Israel's very existence. From the first, Arab states have regarded Israel as the institutionalized manifestation of multiple crimes, particularly colonialism, imperialism and aggression. Indeed, often denounced as “an instrument of evil,” constructed “on a foundation of evil,” Israel is taken to be immutably criminal, irremediable, fit only for liquidation/extermination. See, e.g. the discussion of *The External Aspect: Aggression, Intrigues, Exploitation*, in YEHOSHAFAT HARKABI, ARAB ATTITUDES TO ISRAEL, Jerusalem: Keter Publishing House Ltd., 307-310 (1972). Regarding undisguised expressions of approval for liquidation or extermination, Yehoshafat Harkabi undertook a linguistic analysis of Arab statements. Here is what he discovered:



threats of nuclear deterrence and, should the threats not be taken

“Liquidation” or “ending” (*qadā’alā*), the expression with the highest frequency; “wiping out” (*mahq, mahū*), “purification” or “cleansing” (*tasfiya*); “removal” (*izāla, izāha*); “throwing into the sea”; “death sentence”; “throttling”; “crushing” (*sahq*); “destruction”; “ruination” (*tadmīr*); “pulling up by the root” (*isti’sāl*); “eradication”; “overthrow” (*isqāt*); “sweeping out” (*iktisāh*); “bringing to an end” (*inhā*); “elimination” (*fanā*) and the like. All these terms emphasize action to implement the liquidation.

Here are a few examples:

“Arab unity means the liquidation (*al-qadā’alā*) of Israel and the expansionist dreams of Zionism.” (Nasser at the Festival of Unity, Feb. 22, 1965).

The Arab people will pronounce the death sentence against criminal Israel, namely disappearance.”

“Israel is the cancer, the malignant wound, in the body of Arabism, for which there is no cure but eradication. There is no need to emphasize that the liquidation of Israel and the restoration of the plundered Palestine Arab land are at the head of our national objectives.” (Commentator on Cairo Radio, Apr. 20, 1963 at 20:55 hrs.).

“The victory over the power of colonialism in Algeria was a brilliant step for the overthrow of the base in the Maghreb, so that it should be a prelude to the overthrow of another base for colonialism in the East—I refer to Israel.” (Nasser, July 3, 1962).

Direct expressions may be divided into two sub-groups: in the first, which covers the majority, the active, liquidating factor is specified, or at least the action necessitates an active factor, and it is clear that it will be the Arabs who will initiate the operation, or at least participate in it. For instance: “Israel is a plague which must be liquidated” implies that the Arabs must act for the achievement of this goal.

In the second group, the liquidation is presented in somewhat more elegant terms as a process that will take place itself, without the initiating factor being specified.

Such formulae include expressions like: “disappearance,” “Israel will disappear” (*takhtaftī*), “collapse” (*inhiyār*); “clearing out” (*zawāl*), “downfall” (*suqūt*); “Israel will not escape her inevitable fate,” “Israel will die” or “the end of Israel” (*nihāyat Isrā’īl*); “non-survival” or “non-existence” (*lā baqā’*).

According to *al-Ahrām*, for instance, Ben Bella declared on May 1, 1965:

“There is a need for Israel to disappear, for it is an artificial creation and it is necessary to put an end to it” (*wa-yanbaghī al-qadā’ alayhā*) (May 2, 1965). “No Arab Unity Without the Disappearance of Israel” (name of pamphlet issued by Arab Higher Committee, Cairo, Nov. 1958).

“The fate of this State is extinction, for it was born dead” (*al-Mahlāwī* in *EGYPTIAN POL. SCI. R.*, Jan.-Mar. 1959, 1.118).

Even where the process is described as taking place of its own accord, the meaning may be more active, e.g.:

“The collapse of Israel, this is the hope in which we live. The time has come for us to consider it, to discuss and map out the road to this collapse.” (Ahmad Sa’id, the Director of Cairo Radio (*Sawt al-‘Arab*), in his introduction to Sabrī Abu al-Majd’s book, *The End of Israel*, 1960).

seriously, the actual retaliatory use of nuclear weapons.<sup>16</sup>

Of course, one must compare the risks to Israel of a neighboring state of Palestine with those of continuing control over the remaining territories. Should Israel have maintained possession of these lands, a combined attack by several Arab states could have benefitted from the anti-Israel exploits of a new *intifada*, exploits that might have escalated under such conditions. Diverted from the central effort to resist Arab armies, Israel—because of its still precarious rule over hostile Palestinian populations—could have been weakened considerably. Yet, its overall position would

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16. For assessments of nuclear weapons under international law, cf. Burns H. Weston, *Nuclear Weapons and the World Court: Ambiguity's Consensus*, TRANSNAT'L L. & CONTEMP. PROBS., Vol. 7., No. 2., 371-399 (Fall 1997); *The Illegality of Nuclear Weapons: Statement of the Lawyer's Committee on Nuclear Policy*, ALTERNATIVES: A J. WORLD POL'Y, Vol. VIII, No. 2, 291-296 (Fall 1982); see also RICHARD FALK, ELLIOTT MEYROWITZ AND JACK SANDERSON, NUCLEAR WEAPONS AND INTERNATIONAL LAW Center of International Studies, Princeton University, World Order Studies Monograph, (1981); see also John H.E. Fried, *First Use of Nuclear Weapons—Existing Prohibitions in International Law*, BULL. OF PEACE PROPOSALS, 21-29 (Jan. 1981); see also Matthew Lippman, *Nuclear Weapons and International Law: Towards A Declaration on the Prevention and Punishment of the Crime of Nuclear Humancide*, LOY.L.A. INT'L & COMP. L.J., Vol. 8, No. 2, 183-234 (1986); see also Burns Weston, *Nuclear Weapons and International Law: Illegality in Context*, DENV. J. INT'L L. & POL'Y, (1983); see also I. Brownlie, *Some Legal Aspects of the Use of Nuclear Weapons*, INT'L & COMP. L.Q., Vol. 14, (1965); see also Francis A. Boyle, *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, NW. U. L. REV., Vol. 80, No. 6, 1407-1448 (Summer 1986); see also James A. Stegenga, *Nuclearism and International Law*, PUB. AFF. Q., Vol. 4, No. 1, 69-80 (Jan. 1990); see also GEOFFREY BEST, HUMANITY IN WARFARE (New York: Columbia University Press, 1980); see also JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR (Princeton: Princeton University Press, 1981); see also ISTVAN POGANY, ed., NUCLEAR WEAPONS AND INTERNATIONAL LAW (New York: St. Martin's Press, 1987); see also Daniel J. Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?* MCGILL L. J., Vol. 30, 89-142 (1984); see also E.D. Thomas, *Atomic Bombs in International Society*, AM. J. INT'L L., Vol. 39, 736-744 (Oct. 1945); see also E.C. Stowell, *Laws of War and the Atomic Bomb*, AM. J. INT'L L., Vol. 39, 784-788 (Oct. 1945); see also John Norton Moore, *Nuclear Weapons and the Law: Enhancing Strategic Stability*, BROOK. J. INT'L L., Vol. 9, No. 2, 263-268 (Summer 1983); see also Eugene V. Rostow, *The Great Nuclear Debate*, YALE J. WORLD PUB. ORD., Vol. 8, 87-102 (1981); see also Elliott L. Meyrowitz, *The Opinions of Legal Scholars on the Legal Status of Nuclear Weapons*, STAN. J. INT'L L., Vol. 24, Issue 1, 111-177; see also Burns H. Weston, *Nuclear Weapons Versus International Law: A Contextual Reassessment*, MCGILL L. J., Vol. 28, No. 3, 543-590 (July 1983); see also John H.E. Fried, *The Nuclear Collision Course: Can International Law Be of Help*, DENV. J. INT'L L. & POL'Y, Vol. 14, No. 1, 97-120 (Spring/Summer 1985); see also FRANCIS A. BOYLE, THE CRIMINALITY OF NUCLEAR WEAPONS, Nuclear Age Peace Foundation, Booklet #27, Waging Peace Series, 13 (Santa Barbara, CA: Apr. 1991).

have been weakened less by such rebellion than it will be weakened by another hostile *state* on its eastern borders. Therefore, Israel would have been less inclined to threaten or to use nuclear weapons if Jerusalem had maintained jurisdiction over the territories.

A two-state solution to the Palestinian problem<sup>17</sup> will not reduce the incentive of present Arab governments to war against Israel.<sup>18</sup> Indeed, it may well increase this incentive, probably via

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17. For the Palestinian Authority, acceptance of the "Two-State solution" is merely part of the broader strategy of ultimate incorporation of Israel itself into Palestine. This complete removal of Israel has doctrinal roots in the PLO's "Phased Plan" of June 9, 1974. Here, in its 12th Session, the PLO's highest body, the Palestinian National Council, reiterated the PLO's aim as being to achieve "their rights to return and to self-determination on the whole of their homeland." However, departing from its previous strategy which called for the *immediate* elimination of Israel and the establishment of a Palestinian state over all of "Palestine," the Phased Plan was adopted as follows: "FIRST, to establish a combatant national authority over every part of Palestinian territory that is liberated" (Art. 2); SECOND, to use that territory to continue the fight against Israel (Art. 4); and THIRD, to start a pan-Arab War to complete the liberation of all Palestinian territory, i.e., to eliminate Israel (Art. 8)." For full text of the Phased Plan, as drawn up in Cairo, see B'TZEDEK, Appendix. *Significantly*, the official maps of the Palestinian Authority identify all of Israel as "Palestine." See Morton A. Klein, *Arafat's Maps Still Show All of Israel as 'Palestine,'* THE JEWISH PRESS, 11 (Mar. 26, 1999).

18. The agreements that put an end to the first Arab-Israeli War (1947-1949) were general armistice agreements negotiated bilaterally between Israel and Egypt on February 24, 1949 (42 U.N.T.S. 251-70, 1949); Israel and Lebanon on Mar. 23, 1949 (42 U.N.T.S. 287-98, 1949); Israel and Jordan on April 3, 1949 (42 U.N.T.S. Apr. 303-20, 1949); and between Israel and Syria on July 20, 1949 (42 U.N.T.S. 327-40, 1949). Pursuant to these agreements, the Security Council, on August 11, 1949, issued a Resolution which, *inter alia*, "noted with satisfaction the several Armistice Agreements," and "Finds that the Armistice Agreements constitute an important step toward the establishment of permanent peace in Palestine and considers that these agreements supersede the truce provided for in Security Council resolutions 50 (1948) of 29 May and 54 (1948) of 15 July 1948. See SECURITY COUNCIL RESOLUTION NOTING THE ARMISTICE AGREEMENTS AND REAFFIRMING THE ORDER TO OBSERVE AN UNCONDITIONAL CEASE FIRE PENDING A FINAL PEACE SETTLEMENT, Aug. 11, 1949, SCOR 73, 1949, 4 U.N. SCOR, Resolutions and Decisions of the Security Council 1949, at 8, 1965, U.N. Doc. S/1376, II, 1949. With the exceptions of Egypt and Jordan, none of the aforesaid armistice agreements has been superseded by an authentic peace treaty. A general armistice is a war convention, an agreement or contract concluded *between belligerents*. Such an agreement *does not result in the termination of a state of war*. The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, stipulates, at the Annex to the Convention, that "An armistice suspends military operations by mutual agreement *between the belligerent parties*." See CONVENTION NO. IV RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, WITH ANNEX OF REGULATIONS. Done at The Hague (Oct. 18, 1907) (emphasis added). Entered into force, Jan. 26, 1910. 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, at Chapter V, Art. 36.). The courts of individual states have also

an attrition/annihilation strategy.<sup>19</sup> This means that the critical factor in determining probable Israeli recourse to nuclear deterrence and/or nuclear weapons is the perceived effect of Palestine upon Israel's vulnerability. Because this effect will almost certainly be greater than that of even persistent and expanded uprising in the territories, transforming the territories into an independent state will enlarge the risk of nuclear war in the region.

Let me be more precise. When an independent Palestine is declared,<sup>20</sup> its president will be Yasir Arafat, and its principal

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affirmed the principle that an armistice does not end a war. See, e.g. *Kahn v. Anderson*, Warden, 255 U.S. 1 (1921). Indeed, throughout history, armistices have normally envisaged a resumption of hostilities. It follows from this that since no treaties of peace obtain between Israel and the Arab states with which it negotiated armistice agreements in 1949 (again, with the prominent exceptions of Egypt and Jordan), a condition of belligerency continues to exist between these states and Israel. (For pertinent documents and commentary on Israel-Arab agreements, see Rosalyn Higgins, *UNITED NATIONS PEACEKEEPING 1946-1967*, I., The Middle East, New York: Oxford University Press, 1969, a study issued under the auspices of the Royal Institute of International Affairs.) For pertinent commentary and documents on the historic status of relations between the Arab states and Israel, see COLONEL TREVOR N. DUPUY (US ARMY, RET.), *ELUSIVE VICTORY: THE ARAB-ISRAELI WARS, 1947 - 1974* (New York: Harper & Row, 1978) especially Chapter 12; see also JOHN NORTON MOORE, ED., *THE ARAB-ISRAELI CONFLICT, VOLUME III, DOCUMENTS* (Princeton, New Jersey: Princeton University Press, 1974), especially Part II.

19. Traditionally, attrition is designed to wear down an enemy by constant pressure in order to weaken, exhaust or destroy that enemy's forces. The word "attrition" derives from the Latin *attere* (to weaken) that comes from *terrere* (to rub). In the particular sense of current Arab/Islamic war against Israel, the strategy of exhausting or destroying Israel's armed forces (IDF) is only an intermediate goal. The overriding objective of this war is *annihilation* of the State of Israel. For more specialized treatment of the concept, *war of attrition*, see Dermot Bradley, *War of Attrition*, in 6 INT'L MIL. AND DEF. ENCYCLOPEDIA, 2902-06 (Trevor N. Dupuy, ed., 1993). In the traditional military sense, the term *annihilation* "is not synonymous with its nonmilitary sense of complete destruction." Rather, it means "to take action that causes an enemy force to be totally incapable of further resistance." See *id.* at 2902. In the particular context of Arab/Islamic war against Israel, however, *annihilation* is synonymous with the nonmilitary meaning of complete and utter devastation. It is such devastation, not "merely" the incapacitation of Israel's armed forces, that Israel's enemies (state and nonstate) seek.

20. This declaration, of course, will include a statement that *Jerusalem* is the capital of Palestine. Yet, Jerusalem has long been a Jewish city. For Muslims, it is not Jerusalem, but Mecca, that is of paramount importance. It is Mecca, not Jerusalem, to which Muslims must pilgrimage at least once in a lifetime. Jews at prayer anywhere in the world face toward the Temple Mount in Jerusalem. Muslims, even those praying *on* the Mount, face *away* from it, and toward Mecca. When they pray on the Mount, Muslims have their backs toward the Dome of the Rock, while those praying in the Al-Asqa mosque also look away from Jerusalem and toward Mecca. In the Hebrew Bible, Jerusalem is mentioned 656 times; Jerusalem's well-being is central to all Jewish prayer. In the Koran, Jerusalem is

leaders will be drawn from the PLO chairman's faction, Al Fatah.<sup>21</sup> Probably within hours of the new state's effective beginnings, its government and its ruling elite will be targeted by PLO radicals and by Palestinian parties opposed to PLO. Among the radicals, some (e.g., Popular Front for the Liberation of Palestine and Democratic Front for the Liberation of Palestine) might represent Syrian interests and others (e.g., Arab Liberation Front and Palestine Liberation Front) might front for Iraq.<sup>22</sup>

Among the anti-PLO parties, most (e.g., Popular Front for the Liberation of Palestine—General Command; Popular Struggle Front; the Abu Musa organization and Saiqa) are tied intimately to Syria and one (Fatah Revolutionary Council)—known popularly as the Abu Nidal group—is linked to Libya. Samir Gosheh's Popular Struggle Front currently displays more independence from Syria than Ahmed Jibril's Popular Front for the Liberation of Palestine—General Command, and Saiqa is essentially an integral Syrian force with only nominal Palestinian identity.

We see that many factions will contend for control over the new state of Palestine<sup>23</sup> and that virtually all of these factions will

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never mentioned, not even once. See MARTIN GILBERT, *JERUSALEM: PAST AND FUTURE* (Institute of the World Jewish Congress, Policy Forum 1., Nov. 1994). See also Louis Rene Beres, *Response to John Quigley*, AM. U. J. INT'L L. & POL'Y, Vol. 12, No. 3., 513 (1997).

21. Regarding the criminal responsibility of the individual *Fatah* perpetrators of terrorist crimes committed under Arafat's direction, the principle is well-established that orders pursuant to "domestic law" (in these cases, by analogy, *Fatah* "law") are no defense to violations of international law. See VIENNA CONVENTION ON THE LAW OF TREATIES, ART. 27, U.N. CONFERENCE ON LAW OF TREATIES, Doc. A/CONF. 39/27, (May 23, 1969), reprinted in 8 I.L.M. 679 (1969); see also FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX (Fr. v. Switz), 1932 P.C.I.J. (ser. A/B), No. 46, at 167; see also TREATMENT OF POLISH NATIONALS IN DANZIG (parties abbreviated), 1932 P.C.I.J. (ser. A/B) No. 46, at 24; see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Sec. 3.2 (collected in: Legal Advisor, U.S. Dept of State, Memorandum on the Application of International Law to Iranian Exchange Regulations (Feb. 15, 1984), reprinted in 130 CONG. REC.S. 1679, 1682 (1984).

22. Iraq had been an aggressor against Israel from the start. Baghdad sent significant numbers of expeditionary forces in the 1948 War of Independence, the Six Day (1967) War, and the Yom Kippur (1973) War. During the 1948 War, Iraqi forces entered Trans-Jordan and engaged Israeli forces in Western Samaria. In the aftermath of the 1967 War, Iraqi forces, which were again deployed in Jordan, remained there for more than two years. During the 1973 War, Baghdad committed about one-third of its then 95,000 man armed forces to assist Syria in its campaign against the IDF on the Golan Heights.

23. For a comprehensive scholarly treatment of fragmented authority within the Palestinian community, see Rashid Khalidi, *Policymaking Within the Palestinian Polity*, in JUDITH KIPPER AND HAROLD H. SAUNDERS, *THE MIDDLE EAST IN GLOBAL PERSPECTIVE*, 59-81 (Boulder, CO: Westview Press, 1991).

resort, unhesitatingly, to high levels of violence.<sup>24</sup> Before long, the resident Palestinian population will suffer far more than it has under Israeli rule and anarchy will pose a real threat to Jordan. Over time, it is likely that Jordan will be undermined altogether and that Syria will gain control over Palestine as a “peacemaker.” Of course, Iraq, too, could gain a controlling position in Palestine, but this would depend upon the power of its Palestinian surrogates vis-à-vis those of the regime in Damascus. Ironically, the result of these events—of another Lebanon—would be enormously tragic for both Palestinians who seek a homeland and for Israelis who seek secure frontiers.

It follows from all of this that Palestine could pose a serious security risk to Israel, and that this risk may be far greater than that of maintaining/regaining possession of Judea/Samaria. This does not mean that Israel and the Palestinians should steer clear of meaningful negotiations or that Israel should avoid concerning itself with protecting the essential human rights of any non-citizen Arab populations under its control.<sup>25</sup> But it does mean that reasonable

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24. Significantly, as is obvious from recent events, inter-Arab violence has always been endemic in the Middle East and would surely undermine regional stability *whatever* Israel agreed to concerning the “Palestinian problem.” Long before the recent Gulf War, Egypt occupied Yemen for eight years. Morocco and Algeria were routinely in armed confrontations. Libya clashed with Egypt, Tunisia and the Sudan. And Saudi Arabia, which has recently purchased CSS2-class surface-to-surface missiles from China (that could reach any part of the Middle East from Riyadh) financed Syrian arms acquisitions. Moreover, Arab states have been in conflict with non-Arab states in the region other than Israel. Libya launched invasions against Chad; Syria vowed to annex portions of Turkey (“as soon as we settle the score with the Zionist enemy”) and Iraq, of course, began the prior Gulf War with post-revolutionary Iran.

25. See UNIVERSAL DECLARATION OF HUMAN RIGHTS, Dec. 10, 1948, U.N. GAOR 217 A (III), U.N. Doc. A/810, at 71 (1948); see also EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Done at Rome (Nov. 4., 1950). Entered into force, Sept. 3, 1953, Europe T.S. No. 5., CONVENTION RELATING TO THE STATUS OF REFUGEES. Done at Geneva, July 28, 1951. Entered into force, Apr. 22, 1954. 189 U.N.T.S. 137 (This Convention should be read in conjunction with the Protocol Relating to the Status of Refugees, adopted by the General Assembly on Dec. 16, 1966, and entered into force, Oct. 4, 1967); see also CONVENTION ON THE POLITICAL RIGHTS OF WOMEN, done at New York, Mar. 31, 1953. Entered into force for the United States, July 7, 1976. 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135; see also DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, Dec. 14, 1960, U.N. GAOR 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1961); see also INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, opened for signature, Mar. 7, 1966. Entered into force, Jan. 4, 1969. 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966); see also INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, opened for signature, Dec. 19, 1966.

assessments of Israel's security *compare* the expected costs of terminating Oslo with that of Palestinian independence. In the absence of such a comparison, Israel could go from bad to worse, from a situation that is debilitating and demoralizing to one that is altogether intolerable.

### III. The Dangers of Demilitarization

The hidden dangers of demilitarization are clear and compelling. The threat of Palestine to Israel will lie not only in the presence or absence of a national armed force, but also in the many other Arab armies and terrorists that will inevitably compete for power in the new country.

But there is another reason why a "demilitarized" Palestine would present Israel with a substantial security threat: International law would not necessarily expect Palestinian compliance with pre-state agreements concerning military deployments and armed force. From the standpoint of international law, enforcing demilitarization upon an independent state of Palestine would be *exceedingly* problematic. As a sovereign state, Palestine might not even be bound by any pre-independence compacts that were secured by U.S. guarantees. In this connection, international law imposes unequal obligations on state and nonstate parties to agreements. In a concurring statement in the case of *Tel-Oren v. Libyan Arab Republic*, a 1981 civil suit in U.S. federal courts (where plaintiffs were Israeli survivors and representatives of persons murdered in a terrorist bus attack in Israel in 1978), Circuit Judge Harry T. Edwards stated:

I do not believe the law of nations imposes the same responsibility or liability on nonstate actors, such as the PLO, as it does on states and persons acting under color of state law.

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Entered into force, Jan. 3, 1976. U.N. GAOR 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 360 (1967), INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, opened for signature, Dec. 19, 1966. Entered into force, Mar. 23, 1976. U.N.G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N.Doc. A/6316 (1967), reprinted in I.L.M. 368 (1967); *see also* AMERICAN CONVENTION ON HUMAN RIGHTS, done at San Jose, Nov. 22, 1969. Entered into force, July 18, 1978. O.A.S. Treaty Series No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II. 23 doc. 21 rev. 6 (1979), reprinted in 9 I.L.M. 673 (1970). The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights (together with its Optional Protocol of 1976), and the International Covenant on Economic, Social and Cultural Rights—known collectively as the International Bill of Rights—serve as the touchstone for the normative protection of human rights.

Regarding the validity of Oslo under international law, this statement reveals that the Palestinian Authority (PA) that is the nonstate party to Oslo and Wye cannot be held jurisprudentially to the same standards of accountability as the State of Israel. *This is a most important point to keep in mind when assessing the prospective viability of plans for Palestinian demilitarization.*

Because treaties can be binding only upon states,<sup>26</sup> an agreement between a non-state Palestine Authority (PA)<sup>27</sup> and one or more states would be of no real authority and little real effectiveness.<sup>28</sup> Technically, an agreement on demilitarization under international law must always be "between states." Hence, any agreement on demilitarization that would include a nonstate party would be *prima facie* null and void.

But what if the government of Palestine *were* willing to consider itself bound by the pre-state, non-treaty agreement, i.e., to treat this agreement as if it were an authentic treaty? Even in these relatively favorable circumstances, the new Arab government would have ample pretext to identify various grounds for lawful treaty termination. It could, for example, withdraw from the agreement because of what it regarded as a "material breach" (an alleged violation by Israel that undermined the object or purpose of the treaty). Or it could point toward what international law calls

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

27. See CONVENTION ON THE RIGHTS AND DUTIES OF STATES, *supra*, n.26; see also *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990). Here, in seeking favorable classification for litigation, the P.L.O. requested the court to accept its self-description as a state. See *id.* at 857. More precisely, the P.L.O. characterized itself as "the nationhood and sovereignty of the Palestinian people . . ." *Id.* The court, however, found the P.L.O. to be an "unincorporated association." *Id.* at 858. It determined that the P.L.O. lacked the key elements of statehood as articulated by long-settled norms of international law. *Id.* (citing *National Petrochemical Co. of Iran v. M.T. Stolt Sheaf*, 860 F. 2d 551, 553 (2d Cir. 1988), *cert. denied*, 489 U.S. 1091 (1989) and quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 201 (1987).

28. International law does recognize that insurgent organizations are not *per se* ineligible from entering into agreements with states. In certain residual circumstances, such agreements may be valid. See also H. LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS, VOL. II, 1975, pp. 494-495; I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 4TH ED., 1990, PART II, pp. 65-66; and CHEN, RECOGNITION, 1951. See also: CASSESE, INTERNATIONAL LAW IN A DIVIDED WORKD, 1986, p. 81.



a “fundamental change of circumstances” (*rebus sic stantibus*). In this connection, should a small but expanding Palestine declare itself vulnerable to previously unforeseen dangers —perhaps from the forces of other Arab armies—it could *lawfully* end its codified commitment to remain demilitarized.

*Rebus sic stantibus* means, literally, “so long as conditions remain the same.” It is a legal doctrine with a long history. In the traditional view, the obligation of a treaty terminates when a change occurs in those circumstances that exist at the effective date of the agreement and whose continuance forms a tacit condition of the ongoing validity of the treaty. The function of the doctrine, therefore, is to execute the shared intentions of the parties. *Rebus sic stantibus* becomes operative when there is a change in the circumstances that formed the cause, motive or rationale of consent.<sup>29</sup>

There is another factor that explains why 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 “Palestine” could point to *errors of fact* or to *duress* as perfectly appropriate grounds for termination.

Moreover, any treaty is void if, at the time it was entered into, it was in conflict 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.”<sup>30</sup> Because the right of sovereign states to maintain military forces essential to “self defense”<sup>31</sup> is certainly such a rule, Palestine could (depending upon its particular form of authority)

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29. For an informed scholarly treatment of this doctrine, see ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION*, 3-55 (New Haven: Yale University Press, 1975).

30. See VIENNA CONVENTION, *supra*, at 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.*

31. 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 has been absorbed before embarking upon self-defense. Rather, where the threat is sufficiently imminent in point of time, they can choose to strike first, providing, of course, that the strike is within the parameters of discrimination, proportionality and military necessity. Regarding the codified right of post-attack self defense, see CHARTER OF THE UNITED NATIONS, done at San Francisco, June 26, 1945. Entered into force, Oct. 24, 1945; for the United States, Oct. 24, 1945. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043; at art. 51.

be entirely within its right to abrogate any treaty that had compelled its demilitarization.

A theory, following Hegelian ideas, is 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. These rights have been summarized in law as "rights of necessity."<sup>32</sup>

Thomas Jefferson, who had read Epicurus, Cicero and Seneca, as well as Voltaire, Montesquieu, Holbach, Helvetius and Beccaria (and who became something of a *philosopher* himself) wrote as follows about obligation and international law:

The Moral duties which exist between individual and individual in a state of nature, accompany them into a state of society and the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other, so that between society and society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation. Compacts then between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts. There are circumstances however which sometimes excuse the non-performance of contracts between man and man; so are there also between nation and nation. When performance, for instance, becomes *impossible*, non-performance is not immoral. So if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others.<sup>33</sup>

Later, Jefferson concludes:

As every treaty ought to be made by a sufficient power, a treaty pernicious to the state is null, and not at all obligatory; no governor of a nation having power to engage things capable of *destroying* the state, for the safety of which the empire is trusted to him. The nation itself, bound necessarily to whatever

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32. See: ARIE E. DAVID, THE STRATEGY OF TREATY TERMINATION *supra* at 19; and Harvard Research, *Law of Treaties*, 29 AM. J. INT'L L., 666, 1100 (Supp., 1935).

33. See Jefferson's, *Opinion on the French Treaties* (Apr. 28, 1793) in MERRILL D. PETERSON, ED., THE POLITICAL WRITINGS OF THOMAS JEFFERSON, 113 - 114 (Thomas Jefferson Memorial Foundation: 1993).

its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations.”<sup>34</sup>

Here it must also be remembered that, historically, demilitarization is a principle applied to various “zones,”<sup>35</sup> not to still-emergent states in their entirety. For some examples of demilitarized zones, consider the following: In 348 B.C., a treaty between Rome and Carthage included a provision for the neutralization of Corsica, a neutral zone “in the middle” (*Corsica esset media inter Romanos et Carthaginenses.*) The Treaty of Radzin in 1681 between the Russian and Ottoman Empires created a vast buffer zone between both parties south of Kiev. More modern forms of demilitarization were developed in the nineteenth century from measures that prohibited fortifications in designated areas, normally imposed by the victor upon the vanquished.

After World War I, Germany, as a consequence of the Versailles Treaty, had to demilitarize the Rhineland. Permanent demilitarized zones have been created in the Straits of Magellan (by the border treaty of 1881 between Argentina and Chile); in the Aaland Islands belonging to Finland (according to the Aaland Islands Convention of 1921 between Finland, Sweden and other European powers); and in Norway’s Svalbard Archipelago and Bear Island (by terms of the Svalbard (Spitsbergen) Treaty of 1920 between Norway, the United States and the former Soviet Union. The Outer Space Treaty of 27 January 1967 demilitarizes the moon and other celestial bodies (prohibiting the stationing of nuclear weapons and other mass destruction weapons) while Antarctica has been demilitarized by the Antarctic Treaty of 1 December 1959.

From these examples, we see that a new state of Palestine might have yet another legal reason *not to comply* with pre-independence commitments to demilitarization. As it could be alleged, *inter alia*, that these commitments are inconsistent with traditional bases of authoritative international law - bases found in treaties and conventions; international custom;<sup>36</sup> the general

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34. *See id.* at 115.

35. The Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I) contains detailed provisions on demilitarized zones.

36. 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.” Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, 1060 (July 26, 1945). Norms of customary international law bind all states regardless of whether or not a state has ratified pertinent codifying instruments or conventions. International law compartmentalizes apparently identical rights and obligations

principles of law recognized by "civilized nations;" etc.<sup>37</sup> - they are commitments of no binding character.

Now, it is certainly possible (albeit unnecessary) that a state of Palestine *would* act contrary to its legal commitments on demilitarization. Here the demilitarization "remedy" could prove no less injurious to Israel. One can easily imagine what would happen if - following a clear breach of the Palestinian demilitarization commitment - Israel would be compelled to act militarily. In such circumstances, the entire global community, including the United States,<sup>38</sup> would likely respond to imperative Israeli self-defense/law enforcement actions with both private pressures and public denunciations of Israel in the U.N. Security Council. The term "law enforcement" applies here because of the persistently Westphalian (*decentralized*) nature of international law and its derivation from underlying natural law. According to Blackstone, the Law of Nations (International Law) is deducible from natural law and is therefore binding upon all individuals and states. Each state is expected "to aid and enforce the law of nations, as part of the common law; by inflicting an adequate punishment upon offenses against that universal law . . . ."<sup>39</sup>

Additionally, there would be a great deal of internal pressure *within* Israel, with the Israeli Left claiming yet again that this or that Palestinian violation<sup>40</sup> is not a clear and present danger to

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arising both out of customary law and of treaty law: "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 that of customary international law, these norms retain a separate existence." *Military and Paramilitary Activities (Nicar. v. U.S.)*, I.C.J. 14, 95 (June 27, 1986).

37. These authoritative bases of international law are drawn, of course, from Article 38 of the Statute of the International Court of Justice. *See* Statute, done at San Francisco, June 26, 1945. Entered into force, Oct. 24, 1945; for the United States, Oct. 24, 1945. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1052.

38. Under the Supremacy Clause of the United States Constitution, international law forms part of the law of the United States. (U.S. Constitution, art. VI). This incorporation is reaffirmed and broadened by various U.S. Supreme Court decisions. *See* *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d, 774, 781, 788 (D.C. Cir. 1984).

39. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book 4, *Of Public Wrongs*.

40. The documentation of PLO violations of Oslo Accords is now extensive and exhaustive. An especially egregious violation concerns persistent PLO/PA refusal to comply with Israeli Government requests for transfer of terror suspects (many of whom are now serving in the Palestinian Security Forces). The Interim Agreement (Oslo II) states that Israel may request from the Palestinian Authority (PA) the transfer ("extradition") of any individual located in the autonomous

Israel's survival. If further evidence is needed of the plausibility of this scenario, one need only recall that although Gaza and certain portions of Judea/Samaria already under Palestinian control do not yet fall under Palestinian *sovereign* authority, Israel has not had *effective* capacity since Oslo to combat violence and terrorism from these areas.

It follows from all this that Israel should take little comfort from the *legal* promise of Palestinian demilitarization,<sup>41</sup> and that such a promise would pose absolutely no problems for Yasir Arafat. Indeed, should the government of the new Palestinian state choose to invite foreign armies or terrorists on to its territory (possibly after the original government authority had been displaced or overthrown by more militantly Islamic anti-Israel forces), it could do so not only without practical difficulties but also without necessarily violating international law. Ironically, if the original PA/Fatah government of Palestine saw itself threatened by aggression<sup>42</sup> from outside Arab forces, demilitarization could even produce a Palestinian invitation to Israel, an invitation to protect Palestine from mutual enemies.

The prospect of such an invitation is not as strange as it seems. And as acceptance would likely be seen to be in Israel's own best interests, Jerusalem's requested military involvement in Palestine could surely happen. Significantly, this involvement could bring

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areas who is suspected of an offense that falls under Israeli criminal jurisdiction (Annex IV, Art. 2., Par. 7b). The PA is obligated to comply with all formal requests and to arrest and transfer the suspect to Israel (Annex IV, Art. 2., par. 7f(1)). On March 31, 1997, Israel submitted a total of 31 formal requests to the PA for the transfer of terror suspects, including eleven new requests and twenty requests that had been submitted previously. The PA did not respond to a single Israeli request, except for two cases in December 1994, when the PA explicitly *rejected* Israel's requests. See Communication by the Israel Government Press Office, May 13, 1997; in imra@netvision.net.il. For more informed and authoritative inventories of PLO/PA violations, see *Incitement to Violence Against Israel by Palestinian Officials*, Israel Foreign Ministry, reprinted in THE MACCABEAN, Vol. 5., No. 5., 27-29; *Palestinian Violations of the 'Interim Agreement'*, THE MACCABEAN, Vol. 4., No. 12, 12-15; and Dan Nimrod, *Arafat's Non-Compliance with the Oslo Accords*, THE MACCABEAN, Vol. 5., No. 4., 25-32.

41. A related demilitarization issue concerns disposition of the Golan. Israel could decide to return the strategically important heights on condition of Syrian demilitarization. Here the legal meaning of "demilitarization" would be more traditional than in its use regarding concessions by a still-nonexistent state (Palestine), but the consequences of a Golan demilitarization could be no less injurious to Israel.

42. See RESOLUTION ON THE DEFINITION OF AGGRESSION, U.N. GAOR 3314, 29th Sess., Supp. No. 31 at 142, U.N. Doc. A/9631 (1975) reprinted in 13 I.L.M. 710 (1974).

Israel into a much wider and potentially catastrophic war, into exactly the intolerably dangerous kinds of conditions that a demilitarized Palestinian state was intended to prevent in the first place. That such an outcome could be the result of an Israeli attempt to stabilize a new and demilitarized Arab neighbor would add yet another irony to tragedy, a tragedy based in part upon misunderstanding of pertinent international law.

Of course, the overriding danger to Israel of Palestinian demilitarization, more practical than jurisprudential, would stem from Israel's self-inflicted abrogation of its own essential security role. In the final analysis, this Oslo-driven abrogation derives from a profound and possibly wilful misunderstanding of Palestinian goals and expectations. While Israeli supporters of Oslo II continue to believe in a "Two State Solution"<sup>43</sup> and in an associated mutuality of interest in coexistence, the PA has other beliefs.<sup>44</sup> Significantly, these beliefs, which are essentially genocidal<sup>45</sup> with respect to Israel, are often stated openly and unambiguously.

Here are some pertinent examples of statements by Palestinian officials that are not only in obvious violation of the Oslo Accords,

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43. Regarding the one-sided acceptance of a "Two State Solution," the Palestinian Minister of Justice, Freh Abu Medejn - in a May 1997 televised statement - spoke in support of killing *Israeli Arabs* who sell land to Jews. What this reveals, *prima facie*, is that the PLO/PA *openly* considers Israel as part of "Palestine."

44. Here it is relevant to note that the Palestinian National Covenant was adopted in 1964 - three years before the Six Day War. Hence, the PLO's guiding document was first published, with all of its references to the annihilation of Israel, three years before Israel even came into possession of the so-called "occupied territories." This means that the Israel the PLO seeks to destroy was and still remains *Green Line Israel*.

45. The PLO is obligated under Oslo and the Wye River Memorandum to cancel the articles in its Covenant calling for the annihilation of Israel. Yet, even after Wye River, there is evidence that this abrogation has not taken place. At its meeting on April 24, 1996, the only resolutions passed were about "amending the National Covenant by cancelling the articles that contradict the exchange of letters between the PLO and the Israeli Government on 9 and 10 September 1993." What the resolutions accomplished is as follows: "The Palestinian National Council charges the legal committee with redrafting the National Covenant and bringing the new text to the central council at its first meeting." No redrafting has ever taken place, and no text delivered to the central council. See Yehoshua Porat, *The Covenant Was Not Canceled*, MA'ARIV, B7 (May 7, 1997). Moreover, what the PLO Covenant says in words the official PLO map of "Palestine" says in symbols. This map - *which includes the area of the entire State of Israel* - is not only an explicit rejection of Oslo expectations, but also an implicit incitement to genocide. According to the map and description taken from the Welcome to Palestine Home Page on the World Wide Web: "Palestine, currently under occupation, is located on the East coast of the Mediterranean Sea, West of Jordan and to the South of Lebanon." <http://www.palestine-net.com/geography/gifs/palmap.gif>.

but are also illustrative of sentiments which exclude mutuality of interest in peace with Israel:

O our beautiful land imprisoned in a cage and surrounded by wolves, My shaded garden, the tormentors have destroyed you, and the dogs have settled in you, O Jerusalem, O my city, With my notebook and pencil and the fire of my rifle I will shatter the cage, I will kill the wolves and plant the flag, The dogs will not bark in the heroic cities.<sup>46</sup>

I now see the walls of Jerusalem, the mosques of Jerusalem, the churches of Jerusalem. My brothers! With blood and with spirit we will redeem you, Palestine! Yes, with blood and with spirit we will redeem you, Palestine!<sup>47</sup>

Israel is attempting to obstruct peace. If Israel continues to succeed in this approach, then she is destroying the peace process. The only option remaining for us will be an alternative option . . . . war. Allow me to say that it takes only one side to start a war. At the end of the path on which Israel is proceeding, a declaration of war awaits.<sup>48</sup>

We shall always stand against them, threaten their future, and not permit them to expand. We shall stand with all our might against any attempted settlement effort. If they do not implement the agreement, we shall determine what the essential locations are in each settlement, and we will turn the lives of the settlers into hell.<sup>49</sup>

All options are open for defending the land of the Palestinian people.<sup>50</sup>

The Zionist entity exists on seized land. The Jews remain enemies because they expropriate lands, build settlements and

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46. Poem read on the Voice of Palestine, official radio station of the Palestinian Authority, on May 22, 1997, during the morning news program "A New Day." It was read as part of a series of "Songs of the Homeland." The same poem was read on the Voice of Palestine during the September 1996 riots, in which 85 Israelis and Palestinian Arabs were killed.

47. PA Chairman Yasser Arafat, addressing a crowd in Tulkarem; Voice of Palestine, Apr. 28, 1997.

48. PA Minister for Jerusalem Affairs Feisal Hussein; in a newspaper interview (AL-ITTIHAD) on May 18, 1997.

49. Imad Mazen Izz al-Din, the PA's Political Instructor for National Guidance (AL-HAYAT AL-JADEEDA, Apr. 30, 1997).

50. PA Planning Minister Nabil Shaath, at a forum in Khan Yunis (AL-HAYAT AL-JADEEDA, Apr. 30, 1997).

pay high sums to buy properties. They are the greatest enemies of us Muslims.<sup>51</sup>

The struggle we are waging is an ideological struggle and the question is: where has the Islamic land of Palestine gone? Where is Haifa and Jaffa, Lod and Ramle, Acre, Safed and Tiberias? Where is Hebron and Jerusalem?<sup>52</sup>

We did not pay with the dear blood of thousands of martyrs so that the Israeli government could establish settlements on our land in the name of peace. We have sacrificed in the past and we will be ready to sacrifice again in the future for the sake of liberating our land and returning it to the bosom of the Palestinian nation and for the sake of establishing an independent Palestinian state whose capital is Jerusalem.<sup>53</sup>

In the strict Islamic view, the Jewish State is always the individual Jew in macrocosm. This Jewish State must be despised *because* of this relationship, because of the allegedly innate “evil” of the individual Jew. This is a far cry from the view that Jews should be despised because they are associated with the State of Israel. Exactly the opposite view prevails. Hence, the Israeli must be despised not because he is an “occupier” or because of his “expansionist” policies (these traits are seen as merely *epiphenomenal*), but because he is a Jew. Period!

In an article published in *al-Ahram*, on September 27, 1982, Dr. Lufti Abd al-Azim wrote: “The first thing that we have to make clear is that no distinction must be made between the Jew and the Israeli, which they themselves deny. The Jew is a Jew, through the millennia . . . in spurning all moral values, devouring the living and drinking his blood for the sake of a few coins. The Jew, the Merchant of Venice, does not differ from the killer of Deir Yasin or the killer of the camps. They are equal examples of human degradation. Let us therefore put aside such distinctions, and talk about Jews.”<sup>54</sup>

51. PA Mufti Ikrama Sabri in an interview with N.Y. TIMES, May 18, 1997.

52. Yusuf Abu Sneineh, preacher at Al-Aqsa Mosque, Friday prayer sermon; Voice of Palestine, May 23, 1997.

53. From statement issued by the PA cabinet in Nablus on May 16, 1997 (Voice of Palestine, May 17, 1997). All of the above quotations are also cited by a May 29, 1997 communication from the Israel Government Press Office, “Senior Palestinian Officials Continue to Incite Against Israel in Violation of Oslo,” [imra@netvision.net.il](mailto:imra@netvision.net.il).

54. See Bernard Lewis, SEMITES AND ANTISEMITES: AN INQUIRY INTO CONFLICT AND PREJUDICE, p. 195 (1999).



In an Egyptian textbook of "Arab Islamic history," used in teacher training colleges, we may discover the following: "The Jews are always the same, every time and everywhere. They will not live save in darkness. They contrive their evils clandestinely. They fight only when they are hidden, because they are cowards . . . . The Prophet enlightened us about the right way to treat them, and succeeded finally in crushing the plots that they had planned. We today must follow this way and purify Palestine from their filth."<sup>55</sup>

Ayatollah Khomeini, in the Foreword to his book on Islamic Government, remarked: "The Islamic Movement was afflicted by the Jews from its very beginnings, when they began their hostile activity by distorting the reputation of Islam, and by defaming and maligning it. This has continued to the present day."<sup>56</sup> And again, on the "Zionist Problem" as a mere manifestation of the underlying "Jewish Problem," Dr. Yahya al-Rakhawi remarked on July 19, 1982, in *al-Ahram*: ". . . we are all - once again - face to face with the Jewish Problem, not just the Zionist Problem; and we must reassess all those studies which make a distinction between "the Jew" and "the Israeli" . . . . and we must redefine the meaning of the word "Jew," so that we do not imagine that we are speaking of a divinely revealed religion or a minority persecuted by mankind. Every word has an origin, a development and a history, and it seems that the word "Jew" has changed its content and meaning. We thus find ourselves face to face with the essence of a problem which has recently donned the gown of religion and concentrated itself on a piece of land. In this confrontation, we cannot help but see before us the figure of the great man Hitler, may God have mercy on him, who was the wisest of those who confronted this problem . . . . and who, out of compassion for humanity, tried to exterminate every Jew, but despaired of curing this cancerous growth on the body of mankind."<sup>57</sup>

Conventional wisdom often maintains that PLO/PA opposes Hamas, and that the two organizations are entirely separate and discrete. This "wisdom," however, is contradicted by considerable available evidence. According to the September 1995 PLO/Hamas Understanding, Hamas commits itself to refrain from terrorism only in PLO/PA controlled areas. Arafat, in turn, recognizes Hamas, Islamic Jihad, the PFLP and DFLP as legitimate, reaffirming the

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55. *See id.*, at 218-219.

56. *Id.*

57. *See id.*, at 231-232.

predominance of inter-Palestinian solidarity over PLO/PA Israel relations.<sup>58</sup>

According to the Charter of Hamas: "Peace initiatives, the so-called peaceful solutions, and the international conferences to resolve the Palestinian problem, are all contrary to the beliefs of the Islamic Resistance Movement. For renouncing any part of Palestine means renouncing part of the religion; the nationalism of the Islamic Resistance Movement is part of its faith, the movement educates its members to adhere to its principles and to raise the banner of Allah over their homeland as they fight their Jihad<sup>59</sup> - . . . . There is no solution to the Palestinian problem except by Jihad . . . . In order to face the usurpation of Palestine by the Jews, we have no escape from raising the banner of Jihad . . . . We must imprint on the minds of generations of Muslims that the Palestinian problem is a religious one, to be dealt with on this premise . . . ." I swear by that (sic) who holds in His Hands the Soul of Muhammad! I indeed wish to go to war for the sake of Allah! I will assault and kill! assault and kill, assault and kill . . . ."<sup>60</sup>

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58. See Yoram Ettinger, *The PLO-Hamas Connection*, JEWISH POL. CHRON., 17(Mar./Apr. 1996). See also Oct. 14, 1998 interview with Farouq Qadoumi, Head of the PLO's Political Bureau (and frequently mentioned possible successor to Arafat) in the PA daily, *Al-Hayat*. Here, Qadoumi commented on Hamas/PLO relations, saying that the Hamas Movement was a part of the Palestinian National Movement, and that its differences with the PLO were of a "tactical rather than a strategic nature." See MEMRI, The Middle East Media and Research Institute, *Special Dispatch*, No. 8. Washington, D.C. (Oct. 16, 1998).

59. *Jihad*, or holy war, is discussed authoritatively by ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED (New York: Pantheon Books, 1991), especially Chapter 16 ("Conspiracies and Holy Wars"). For fundamentalist Muslims, says Wistrich, ". . . peace with Israel was and still remains nothing less than a poison threatening the life-blood of Islam, a symptom of its profound malaise, weakness and decadence." *Id.* at 227. According to Islamic orthodoxy, the Prophet is said to have predicted a final war to annihilate the Jews. See D.F. GREEN, ED., ARAB THEOLOGIANS ON JEWS AND ISRAEL: EXTRACTS FROM THE PROCEEDING OF THE FOURTH CONFERENCE OF THE ACADEMY OF ISLAMIC RESEARCH, 9 (Geneva: 1976) (cited in WISTRICH, ANTISEMITISM, at 230). Mohammed, it is reported, had stated: "The hour (i.e., salvation) will not come until you fight against the Jews; and the stone would say, 'O Muslim! There is a Jew behind me: come and kill him.'" (GREEN, at 51; WISTRICH, at 230).

60. See THE CHARTER OF ALLAH: THE PLATFORM OF THE ISLAMIC RESISTANCE MOVEMENT (HAMAS) (tr. by Raphael Israeli, Harry Truman Research Institute, The Hebrew University of Jerusalem), ISRAEL AFFAIRS, Vol. 2., No. 1., 273-293 (Autumn 1995). Hamas is the acronym for the Islamic Resistance Movement - *Harakat Muqawama Islamiyya* - meaning literally, "enthusiasm," "zeal," "fanaticism." The quoted references concerning the Hamas imperative to "assault and Kill" Jews is taken from Bukhari and Muslim, authors of the two most authoritative and widely accepted collections of Hadith (traditions of the

Regarding relationships with the Palestine Liberation Organization (PLO), the Hamas Charter instructs: "The PLO is among the closest to the Hamas, for it constitutes a father, a brother, a relative, a friend. Can a Muslim turn away from his father, his brother, his relative or his friend? Our homeland is one, our calamity is one, our destiny is one and our enemy is common to both of us . . . ." <sup>61</sup> Finally, on the primacy of hatred toward *Jews*, not Israel, the Hamas Charter states as follows: "Israel, by virtue of its being Jewish and of having a Jewish population, defies Islam and the Muslims. 'Let the eyes of the cowards not fall asleep.'" <sup>62</sup>

Both Palestinian organizations are now preparing for war against Israel, and war need not be exclusive of genocide under international law. Rather, war may be the means whereby genocide is efficiently operationalized. According to Articles II and III of the Genocide Convention, which entered into force on January 12, 1951, genocide includes any of several listed acts that are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such . . . ." <sup>63</sup> This means that where Israel is recognized as the institutionalized expression of the Jewish People (an expression that includes national, ethnical, racial and religious components), acts of war intended to destroy the Jewish State could assuredly *be* genocidal. The internet website of Yasir Arafat's Fatah Movement recently released a constitution that calls openly for the "eradication" of Israel. <sup>64</sup>

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). Although this has never actually been done, the United States should consider very seriously taking this step while there is still time.

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Prophet).

61. *Id.* at 287.

62. *Id.* at 288.

63. See CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Done at New York, Dec. 9, 1948. Entered into force, 78 U.N.T.S. (277 Jan. 12, 1951).

64. See [www.fatah.org](http://www.fatah.org).

Israel, too, should be an obvious co-participant in this call, but it is hardly likely that a Government that does not even insist upon its basic rights under Oslo<sup>65</sup> will now seek redress under much broader multilateral conventions.

The Genocide Convention is not the only authoritative criminalization that should be invoked against ongoing and illegal Palestinian calls for mass murder of Jews. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination could also be brought productively into play. This treaty condemns "all propaganda and all organizations which attempt to justify or promote racial hatred and discrimination in any form," obliging - at Article 4(a) - State parties to declare as "an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons." Article 4(b) affirms that State parties "Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law." Further authority for curtailing and punishing Yasir Arafat's and other Palestinian calls for genocidal destruction of Jews<sup>66</sup> can be found at Article 20 (2) of the International Covenant on Civil and Political Rights: "Any advocacy of national, racial or religious

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65. In this connection, there is a corollary failure on the part of the Government of the United States. As of April 2, 1999, at least seven terrorists responsible for killing Americans were free in PA territory. They are: (1) Ibrahim Ghneimat, member of the Tzurif terror cell; (2) Nafez Mahmoud Sabih, involved in planning attacks that killed American citizens Matthew Eisenfeld, Sara Duker and Ira Weinstein; (3) Mohammad Dief, senior Hamas terrorist responsible, *inter alia*, for kidnap/murder of Nachshon Wachsman, a dual American-Israeli citizen; (4) Nasser Mahmoud Hindawi, Islamic Jihad terrorist involved in the April 9, 1995, suicide bomb attack near Kfar Darom, in which seven Israelis and American Alisa Flatow were killed; (5) Hassan Said Hamadan, Islamic Jihad terrorist involved in the Kfar Darom attack; (6) Yusuf Samiri, Islamic Jihad terrorist involved in the Kfar Darom attack; and (7) Adnan Mahmoud al-Ghol, Islamic Jihad terrorist involved in Kfar Darom attack. See Israel Government Press Office, *Seven Terrorists Involved in Killing Americans Are Free in PA Territory; Three Are In Detention*, THE JEWISH PRESS, 12 (Apr. 2, 1999).

66. Technically, such calls qualify Arafat and certain other Palestinian leaders as *Hostes humani generis*, or "Common enemies of humankind." See *Harvard Research in International Law: Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 566 (Supp. 1935) (quoting Coke, C.J. in *King v. Marsh*, 3 Bulstr. 27, 81 E.R. 23 (1615) ("*a pirate est hostes humani generis*")).

hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

At its heart, the problem of Israel’s survival now lies in the Jewish State’s basic assumptions concerning war, peace and genocide. While Israel’s regional enemies, including PLO/PA and Hamas, believe that any power gains for Israel represent a power loss for them - that is, that they coexist with Israel in a condition of pure conflict - Israel assumes something else. For Israel, relations with Arab/Islamic states and organizations are not, as these enemies believe, zero-sum relations. Rather, they are a mutual-dependence connection, a nonzero-sum relation where conflict is mixed with cooperation. Israel, unlike its enemies, believes that any gain for these enemies is not necessarily a loss for itself. Indeed, since Oslo, Israel is unwilling even to identify its enemies as enemies.

Israel believes that its enemies also reject zero-sum assumptions about the strategy of conflict. Israel’s enemies, however, do not make such erroneous judgments about conformance with Israeli calculations. These enemies know that Israel is wrong in its belief that Arab/Islamic states and organizations also reject the zero-sum assumption, but they pretend otherwise. There is, therefore, a dramatic and most serious disparity between Israel and its multiple enemies. Israel’s strategy of conflict is founded upon miscalculations and false assumptions, and upon an extraordinary unawareness of, or indifference to, enemy manipulations. The pertinent strategic policies of Israel’s enemies, on the other hand, are grounded upon correct calculations and assumptions, and upon an astute awareness of Israeli errors.

What does all of this mean, for the demilitarization “remedy” and for Israeli security in general? Above all, it positively demands that Israel make far-reaching changes in the manner in which it conceptualizes the continuum of cooperation and conflict. Israel, ridding itself of wishful thinking, of always hoping, hoping too much, should immediately recognize the zero-sum calculations of its enemies, and should begin to recognize itself that the struggle in the Middle East must still be fought overwhelmingly at the *conflict* end of the continuum. The struggle, in other words, must be fought, however reluctantly and painfully, in zero-sum terms.

Israel should immediately acknowledge that its support for Oslo is fully inconsistent with both the zero-sum calculations of its enemies and with its own newly-recognized imperative to relate on the basis of zero-sum assumptions. By continuing to sustain Oslo, Israel, in effect, rejects correct zero-sum notions of Middle East

conflict and accepts the starkly incorrect idea that its enemies also reject these notions. By rejecting Oslo, Israel would accept correct zero-sum notions of Middle East conflict and accept the correct idea that its enemies base their policies upon exactly these notions. By such rejection, Israel would also be acting in support of international law.

Enemy commitments to zero-sum notions of conflict with Israel are augmented by the Jewish State's overwhelming military liabilities. With only a dozen air bases that can handle aircraft, and with Syria now deploying hundreds of *advanced* SCUDs which could hit these bases and Israeli mobilization centers early during war - Israel's capacity for self-defense is *seriously* limited. Even Israel's vaunted armor corps has only 2210 tanks of high-quality. The IDF still maintains forty-year old Centurions, antique M-48s and captured Russian T-62s.<sup>67</sup>

A good summary of Israel's current overall military condition/preparedness is offered by Morris J. Amitay:

Israel's "huge army" has been holding steady at 187,000, and it is still basically a citizens army with 444,000 reserves. The number of divisions, 16, has been the same since 1993. Meanwhile, Israel's potential foes have not been sitting still - and some - particularly Saudi Arabia and Egypt - are increasingly getting more top of the line U.S. equipment. The numbers help to tell the story. Egypt counts 440,000 regular troops and 254,000 reserves, along with 3390 tanks and 505 aircraft to Israel's 613 planes. Iraq numbers 382,000 regular, 650,000 reserves, 2700 tanks and 330 aircraft. Iran's 750,000 troops are less important than its long-range missiles which can hit Israel. Syria has 421,000 regulars, 500,000 reserves, 4600 tanks and 520 aircraft, and Saudi Arabia with 105,000 regulars, 57,000 reserves and 1055 tanks has 322 modern aircraft - including over 100 F-15s. Besides the recently announced U.S. arms sales to Egypt, openly-hostile Syria will soon be re-armed with the latest Russian S-300 air defense system, SU-27 fighter bombers and T-80 tanks, and it has been amassing a large arsenal of ground to ground missiles. Iraq has now been more than eight months without even non-intrusive inspections. And no one thinks that Saddam has been busy in the meantime with public works and welfare projects. The Saudis, thankfully, had to cut back on buying the latest American weapons because of

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67. See Morris J. Amitay, *Israel's Alleged Military Superiority*, THE MACCABEAN, Vol. 7., No. 4., Houston, Texas, Freeman Center for Strategic Studies, 22 (May 1999).

lower oil prices, but they will soon be getting U.S. AMRAAM long-range air to air missiles. Iran is devoting much of its resources to acquiring long-range missiles and nuclear weapons, not only with Russia's help - but also with Chinese and North Korean aid. As for Iran acquiring nuclear weapons, the CIA has been saying 5-10 years - but it seems they have been saying this the last 5 - 10 years.<sup>68</sup>

In confronting these military threats, Israel should also now remind the world about the authentic history of "Palestine." It should remind the world that a sovereign state of Palestine did not exist before 1967 or 1948; that a state of Palestine was not promised by authoritative U.N. Security Council Resolution # 242; that, indeed, a state of Palestine had *never* existed. As a nonstate legal entity, Palestine ceased to exist in 1948, when Great Britain relinquished its League of Nations mandate. When during the 1948-49 War of Independence,<sup>69</sup> Judea/Samaria and Gaza came under the illegal control of Jordan and Egypt respectively, these aggressor states did not put an end to an already-existing state.

From the Biblical Period (ca. 1350 BCE to 586 BCE) to the British Mandate (1918-1948), the land named by the Romans after the ancient Philistines (a naming intended to punish and to demean the Jews) was controlled exclusively by non-Palestinian elements. Significantly, however, a continuous chain of Jewish possession of the land was legally recognized after World War I at the San Remo Conference of April 1920. There, a binding treaty was signed in which Great Britain was granted mandatory authority over Palestine (the area had been ruled by the Ottoman Turks since

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68. *Id.* at 22.

69. Regarding this first war, on February 16, 1948, the U.N. Palestine Commission reported to the Security Council: "Powerful Arab interests, both inside and outside Palestine, are defying the resolution of the General Assembly and are engaged in a deliberate effort to alter by force the settlement envisaged therein." U.N. SCOR, 3d Sess., Supp. No. 2., at 10, U.N. Doc. Supp. (1948). The Arabs themselves were unambiguous in accepting responsibility for starting the war. Jamal Husseini informed the Security Council on April 16, 1948: "The representatives of the Jewish Agency told us yesterday they were not the attackers; that the Arabs had begun the fighting. We did not deny this. We told the whole world that we were going to fight." (See U.N. SCOR, 3d Sess., 283d mtg. at 19 (1948). The British commander of Jordan's Arab Legion, Lieutenant General John Bagot Glubb, remarked candidly: "Early in January, the first detachments of the Arab Liberation Army began to infiltrate into Palestine from Syria. Some came through Jordan and even through Amman . . . . They were, in reality, to strike the first blow in the ruin of the Arabs of Palestine." JOHN BAGOT GLUBB, *A SOLDIER WITH THE ARABS*, 79 (1957) (cited in Louis Rene Beres, *Response to Quigley*, AM. U. J. INT'L L. & POL'Y, Vol. 12, No. 3., 511 (1997)).

1516) to prepare it to become the "national home for the Jewish People." Palestine, according to the treaty, comprised lands encompassing what are now the states of Jordan and Israel, including Judea/Samaria and Gaza. *Present day Israel, including Judea/Samaria and Gaza, comprises only twenty-two percent of Palestine as defined and ratified at the San Remo Peace Conference.*

In 1922, Great Britain unilaterally and illegally split off 78 percent of the lands promised to the Jews - all of Palestine east of the Jordan River - and gave them to Abdullah, the non-Palestinian son of the Sharif of Mecca. Eastern Palestine now took the name Transjordan, which it retained until April 1949, when it was renamed as Jordan. From the first moment of its creation, Transjordan was closed to all Jewish migration and settlement, a clear betrayal of the British promise in the Balfour Declaration of 1917 and a contravention of its Mandatory obligations.

On July 20, 1951, a Palestinian assassinated King Abdullah for his hostility to Palestinian nationalist aspirations. Several years prior to Abdullah's killing, in 1947, the newly-formed United Nations, rather than designate the entire land west of the Jordan River as the Jewish National Homeland, enacted a second partition. Ironically, because this second fission again gave unfair advantage to the Arabs, Jewish leaders accepted the painful judgment while the Arab states did not. On May 15, 1948, exactly one day after the State of Israel came into existence, Azzam Pasha, Secretary General of the Arab League, declared to the new tiny nation founded upon ashes of the Holocaust: "This will be a war of extermination and a momentous massacre . . ." *This declaration, as we have just seen, remains at the very heart of all Arab policies toward Israel.*<sup>70</sup>

In 1967, almost twenty years after Israel's entry into the community of nations, the Jewish State - as a result of its stunning military victory over Arab aggressor states - gained unintended

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70. Significantly, this attitude was oriented toward Jews generally during the Holocaust. Haj Amin al Husaini, the most influential leader of Palestinian Arabs, lived in Nazi Germany during World War II. On several occasions he met personally with Hitler, Ribbentrop and others to coordinate Nazi and Arab policies toward Jews and the Middle East. For the exact record of the conversation between Adolph Hitler and the Grand Mufti of Jerusalem on November 28, 1941, in Berlin, see: *Adolph Hitler, Zionism and the Arab Cause*, WALTER LAQUEUR AND BARRY RUBIN, EDs., *THE ISRAEL - ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT* (Penguin Books) (1995), Fifth Ed., pp. 68-72. The text is drawn from *DOCUMENTS ON GERMAN FOREIGN POLICY 1918-45*, Series D., Vol. XIII, London, 1964, pp. 881 ff.



control over Judea/Samaria and Gaza. Although the idea of the inadmissibility of the acquisition of territory by war is enshrined in the U.N. Charter, there existed no authoritative sovereign to whom the territories could be "returned." Israel could hardly have been expected to transfer these territories back to Jordan and Egypt, which had exercised unauthorized and cruel control since the Arab-initiated war of extermination in 1948-1949. Moreover, the idea of Palestinian "self-determination" was only just beginning to emerge after the Six Day War, and was not even codified in U.N. Security Council Resolution #242, which was adopted on November 22, 1967.<sup>71</sup> For their part, the Arab states convened a summit in Khartoum, in August 1967, which concluded with the cry: "No peace with Israel, no recognition of Israel, no negotiations with it . . . ."

We have come full circle. A Palestinian state is now being erected by an authority that will ultimately brook no serious form of demilitarization and that will reject altogether a two-state solution. The Palestinian Authority is committed to a strategy founded upon unhindered control over the instruments of violence. This means that if Israeli government leaders prepare to accept the Oslo-driven Palestinian state because such a state would presumably be *demilitarized*, they would be making an uninformed and fatal mistake.

Although Security Council Resolution 242 links the establishment of peace with Israeli withdrawal from the territories, no insistence on direct negotiations among the hostile parties is mandated by the text. Resolution 242 does not require Israel to withdraw from *each* of the territories it came to control in 1967—control stemming not from a war of aggression (the sort of control deemed inadmissible in the preamble to 242)—but from a legiti-

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71. For text of SC Resolution 242, see: *Security Council Resolution on the Middle East (Nov. 22, 1967)*, WALTER LAQUEUR AND BARRY RUBIN, EDs., *THE ISRAEL-ARAB READER: A DOCUMENTARY HISTORY OF THE MIDDLE EAST CONFLICT*, 217-218 (Penguin Books) (1995). In late Spring 1999, the Palestine Authority began to base its claims for statehood more on the UN Partition Resolution of 1947 (# 181) and the Resolution calling for the "right of return" for Palestinian refugees (#194). Also disregarded currently is UN Security Council Resolution 338 (Oct. 22, 1973) (see Laqueur and Rubin, *supra*, at 310). The UN Human Rights Commission in Geneva even passed a resolution, on April 27, 1999, calling for Palestinian self-determination on the basis of #s 181 and 194. This new focus represents an attempt to shrink Israel to an area smaller than even its 1967 borders. See David Makovsky, *Israel Fails to Block UN Vote on Partition and Right of Return*, HA'ARETZ, (Apr. 28, 1999), reprinted in *THE MACCABEAN*, Vol. 7., No. 4., 7 (May 1999).

mate war of self-defense. When, in 1979, Egypt made peace with Israel, it received the whole of the Sinai in return, land constituting over 90 percent of the territory taken by Israel in 1967.

Resolution 242 has been generally misinterpreted. The formula envisioned by the Resolution is one of “peace for land,” not “land for peace.” The Resolution grants to every state in the Middle East “the right to live in peace within secure and recognized boundaries.” It point, therefore, to peace *before* territorial withdrawal to “recognized boundaries.”

The 1978 Camp David Accords stipulated that negotiations on the final status of the West Bank and Gaza Strip must address the “legitimate rights” of its Arab inhabitants. But these legitimate rights do *not* include the right to establish another Arab *state*—especially as that state would likely be established upon the intended ruins of the State of Israel.

Security Council Resolution 242 is “a balanced whole,” according to Lord Caradon of Great Britain, its sponsor. “To add to it, or to detract from it would destroy the balance . . . . It must be considered as a whole and as it stands.” Considering the text, the “right of self-determination of the Palestinians” does not appear in the Resolution; an international conference is never mentioned; the parties referred to include only states; and the phrase “territories occupied” is neither preceded by “the,” nor is it followed by “on all fronts.” Finally, 242 specifically mentions withdrawal only of Israel’s armed forces, not its administrative apparatus or sovereign control.

Israel’s current (albeit unexercised) right to reject the idea of the territories as “occupied” also stems from its incontrovertible right to security. Because transformation of these lands into an Arab state of Palestine would threaten the very existence of the Third Temple, Israel is under no obligation to transfer West Bank and Gaza to another sovereign authority, especially as the extant

Arab states, together with Iran,<sup>72</sup> persistently call for “elimination” or “liquidation” of the “Zionist entity.”

#### IV. Palestine and Israel's Nuclear Strategy

Now, let us return to the question of Palestine and Israeli reliance on nuclear deterrence. What are the forms such expanded reliance might take? A number of possibilities come immediately to mind. First, it is likely that Israel, feeling more threatened by its

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72. Iran is now a particularly great danger to Israel. This is the case because that revolutionary Islamic state displays both the requisite capabilities (including unconventional weapons) and intentions vis-à-vis the Jewish State. Regarding capabilities, a number of authoritative sources state that Iran already has in place a number of nuclear weapons and is now acquiring new delivery systems ranging from ballistic missiles to nuclear-capable artillery. See Task Force on Terrorism and Unconventional Warfare, House Republican Research Committee, U.S. House of Representatives *Iran's Nuclear Weapons: Update II*, (Apr. 30, 1992). See also *The Fate of Nuclear Weapons in the Former Soviet Union*, CARNEGIE Q., Vol. XXXVII/Nos. 1, 2, 15 (Winter/Spring 1992); see also PROLIFERATION WATCH, Vol. 3, No. 1, Jan./Feb. 1992, a publication of the U.S. Senate Committee on Governmental Affairs, Washington D.C., 12; see also ACTIVITIES TO PREVENT NUCLEAR PROLIFERATION, Communication from the President of the United States Transmitting His Annual Report Reviewing All Activities of U.S. Government Departments and Agencies During Calendar Year 1990 Relating to the Prevention of Nuclear Proliferation, Pursuant to 22 U.S.C. 3281, House Document 102-135, (Sept. 11, 1991); see also Warren H. Donnelly and Zachary S. Davis, IRAN'S NUCLEAR ACTIVITIES AND THE CONGRESSIONAL RESPONSE, Congressional Research Service, The Library of Congress, Washington D.C., 13 (June 28, 1992). Iran is currently receiving several billion dollars worth of arms from North Korea, China and Czechoslovakia. In March 1992, the U.S. CIA confirmed that Iran had spent \$2 billion on arms during the single fiscal year ending March 20, 1992. Prior arms deals were made by Iran and the Soviet Union. Among Iran's major purchases from the USSR were two squadrons of MIG-29 combat aircraft; T-27 tanks and three diesel-powered submarines. Presently, Iran is buying new generation weapons from Russia, which is honoring agreements signed in June 1989, between Iranian President Hashemi Rafsanjani and Mikhail Gorbachev. See Claude van England, *Iran Steps Up Arms Purchases to Prop Military*, THE CHRISTIAN SCIENCE MONITOR, 1, 4 (Apr. 20, 1992). Regarding intentions, Iran expresses an overriding obligation to destroy Israel altogether, an obligation that is founded not in political differences (which are merely epiphenomenal) but on a theological anti-Judaism. See, e.g. Ayatollah Khomeini's, *Program for the Establishment of an Islamic Government*, 1970, which is still very much valid today: ISLAM AND REVOLUTION: WRITINGS AND DECLARATIONS OF IMAM KHOMEINI, Berkeley, 127 (1981); see also ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED, 219 (Pantheon Books) (1991). As for peace with Israel, this can be nothing less than a poison threatening the life-blood of Islam. According to *al-Da'wa* (the Mission), a fundamentalist publication, the status of the Jew, and therefore of Israel, is clear and unambiguous: “The race (sic.) is corrupt at the root, full of duplicity, and the Muslims have everything to lose in seeking to deal with them; they must be exterminated.” GILLES KEPEL, THE PROPHET AND PHARAOH: MUSLIM EXTREMISM IN EGYPT, London, 112 (1985).

loss of buffer territory, would feel increasingly compelled to bring its bomb out of the "basement."<sup>73</sup> Here, fearing that its expanded need for a credible deterrent were no longer served by the nuclear posture of "deliberate ambiguity," Israel would probably move to some form of explicit declaration of nuclear capability. Such disclosure could be full or partial and could be carried out with or without appropriate public demonstrations or tests.

Whether or not such a shift from ambiguity to disclosure would actually enhance Israeli deterrence would depend upon several complex factors, including the types of weapons involved, the reciprocal calculations of Arab and Iranian leaders,<sup>74</sup> the effects upon rational decision-making processes by these Arab leaders and the effects upon both Israeli and Arab command/control/communications operations. If, for example, bringing the Israeli bomb out of the basement were to result in Arab pre-delegations of launch authority and/or new launch-on-warning procedures, the likelihood of unauthorized and/or accidental wars (including in the future, nuclear wars)<sup>75</sup> would be increased.<sup>76</sup>

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73. The question of Israel's "bomb in the basement" is the central theme of LOUIS RENÉ BERES, ED., *SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY* (Lexington Books) (1986).

74. Regarding Iran, the public declarations of war with Israel create a legal state of war between the two countries irrespective of the presence or absence of ongoing hostilities between national armed forces. The principle affirming that the existence of a legal state of war depends upon the intentions of one or more of the states involved, and not on "objective" phenomena, is known variously as the "state of war" doctrine, "de jure war," "war in the legal sense," and "war in the sense of international law." See, e.g. BARRY E. CARTER AND PHILLIP R. TRIMBLE, *INTERNATIONAL LAW*, Boston: Little Brown & Co., 1216-1218 (1991). Moreover, Iran is effectively engaged in a protracted surrogate war with Israel, involving actual armed conflict, via Hezbollah activities in the Bekaa. Direct subsidies from Iran enable Hezbollah to pay its fighters and maintain the war. (For current information on this active terror arm of Iran, which persistently and openly affirms the path of "armed struggle," see Yosef Yaakov, *Hezbollah's Rising Threat Will Not Go Unanswered*, THE JERUSALEM POST INT'L EDITION, 2 (Apr. 18, 1992).

75. There is now a huge literature that deals with the expected consequences of a nuclear war. For works by this author. See, e.g. *APOCALYPSE: NUCLEAR CATASTROPHE IN WORLD POLITICS* (The University of Chicago Press) (1980); see, e.g. *MIMICKING SISYPHUS: AMERICA'S COUNTERVAILING NUCLEAR STRATEGY* (Lexington Books, 1983); see, e.g. *REASON AND REALPOLITIK: U.S. FOREIGN POLICY AND WORLD ORDER* (Lexington Books) (1984); see, e.g. *SECURITY OR ARMAGEDDON: ISRAEL'S NUCLEAR STRATEGY* (Lexington, MA: Lexington Books, 1986).

76. See Antarctic Treaty, 12 U.S.T. 794, T.I.A.S. no. 4780, 402 U.N.T.S. 71 (Dec. 1, 1959); Memorandum of Understanding Between the United States and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communication Link ("The Hot Line Agreement"), 14 U.S.T. 825, T.I.A.S. No.

It is also clear that merely acknowledging what one's adversaries have already believed need not necessarily enhance Israeli

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5362, 472 U.N.T.S. 163 (June 20, 1963); *see also* Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water ("Partial Test Ban Treaty"), 14 U.S.T. 1313, T.I.A.S. no. 5433, 480 U.N.T.S. 43 (Aug. 5, 1963); *see also* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("Outer Space Treaty"), 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (opened for signature Jan. 27, 1967); *see also* Treaty for the Prohibition of Nuclear Weapons in Latin America ("Treaty of Tlateloco"), 634 U.N.T.S. 326 (Feb. 14, 1967); *see also* Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"), 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (opened for signature July 1, 1968); *see also* Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof ("Seabed Arms Control Treaty"), 23 U.S.T. 701, T.I.A.S. No. 7337, 955 U.N.T.S. 115 (opened for signature Feb. 11, 1971); *see also* Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between the United States and the Union of Soviet Socialist Republics ("Accident Measures Agreement"), 22 U.S.T. 1590, T.I.A.S. No. 7186, 807 U.N.T.S. 57 (Sept. 30, 1971); *see also* Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the USA-USSR Direct Communications Link ("Hot Line Modernization Agreement"), 22 U.S.T. 1598, T.I.A.S. No. 7187, 806 U.N.T.S. 402 (Sept. 30, 1971); *see also* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems ("ABM Treaty"), 23 U.S.T. 3435, T.I.A.S. No. 7503, 944 U.N.T.S. 13 (May 26, 1972); *see also* Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, 23 U.S.T. 3462, T.I.A.S. No. 7504, 94 U.N.T.S. 3 (May 26, 1972); *see also* Declaration of Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics, 66 DEP'T ST. BULL. 898 (May 29, 1972); *see also* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, 71 DEP'T ST. BULL. 217 (July 12, 1974); *see also* Limitation on Anti-Ballistic Missile Systems Treaty Protocol, United States-Union of Soviet Socialist Republics, 27 U.S.T. 1645, T.I.A.S. No. 8276 (July 3, 1974); *see also* Joint Statement on the Limitation of Strategic Offensive Arms ("the Vladivostok Agreement"), 70 DEP'T ST. BULL. 677 (Apr. 29, 1974); *see also* Final Act of the Conference on Security and Cooperation in Europe ("Helsinki Accords"), DEP'T ST. PUB. No. 8826 (Aug. 1, 1975) (Gen'l For. Pol. Ser. 298); *see also* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies ("Moon Treaty"), Report of the Committee on the Peaceful Uses of Outer Space, 34 U.N. GAOR, Supp. (No. 20) 33, U.N. Doc. A/34/20 Annex II (1979); *see also* South Pacific Nuclear-Free Zone Treaty, 24 I.L.M. 1440 (Aug. 6, 1985); *see also* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles ("INF Treaty"), Dec. 8, 1987, 88 DEP'T ST. BULL. 24 (Feb. 1988). *See also* the US-USSR Treaty and Protocol on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 74 DEP'T ST. BULL. 802 (1976). *See also* Treaty Between the United States of America and the Union of Soviet Socialist Republics, the SALT II Treaty, June 18, 1979, S. Exec. Doc. Y, 96th Cong., 1st Sess. 37 (1979).

deterrence. Even if Israel should move from its position of ambiguity to disclosure (full or partial), Arab enemies of the Jewish state might still not believe the nuclear threat. Or, perhaps even more ominously for Israel, disclosure could prod Arab leaders to preempt in the near term, a decision that would flow from their presumption that (1) war with Israel is inevitable; and (2) Israel's vulnerability to aggression will only diminish.<sup>77</sup>

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77. See Resolution on the Definition of Aggression. Adopted by the U.N. General Assembly, Dec. 14, 1974, 29 U.N. GAOR 3314 (XXIX), (Supp. No. 31) 142, U.N. Doc. A/9631 (1975), *reprinted in* 13 I.L.M. 710 (1974). For pertinent codifications of the criminalization of aggression; see also The 1928 Kellogg-Briand Pact (Pact of Paris), Treaty Providing for the Renunciation of War as an Instrument of National Policy, 46 Stat. 2343, T.S. No. 796, 94 U.N.T.S. 57 (Aug. 27, 1928); see also U.N. Charter Article 2 (4), Charter of the United Nations, done at San Francisco, entered into force, Oct. 24, 1945. 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, 1976 Y.B.U.N. 1043 (June 26, 1945.); see also the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 20 U.N. GAOR 2131 (XX), (Supp. No. 14) 11, U.N. Doc. A/6014, (1966), *reprinted in* 5 I.L.M. 374 (1966); see also the 1970 U.N. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, 25 U.N. GAOR 2625 (XXV), (Supp. No. 28) at 121, U.N. Doc. A/8028 (1971); see also the 1972 Declaration on the Non-use of Force in International Relations and Permanent Prohibition on the Use of Nuclear Weapons, 27 U.N. GAOR 2936, (Supp. No. 30) at 5, U.N. Doc. A/8730 (1972); see also the Charter of the International Military Tribunal, annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 (Aug. 8, 1945); see also Resolution Affirming the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, U.N. GAOR 95 (1), 1 U.N. GAOR at 1144, U.N. Doc. A/236 (1946); see also Convention on the Rights and Duties of States, arts. 8, 10-11, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19 (Dec. 26, 1933) (known generally as the "Montevideo Convention"); see also the Pact of the League of Arab States, art. 5, 70 U.N.T.S. 237; Charter of the Organization of American States, Apr. 30, 1948, chs. II, IV, V, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 and Protocol of Amendment, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 (March 22, 1945) (known generally as the "Protocol of Buenos Aires"); see also the Inter-American Treaty of Reciprocal Assistance, 62 Stat. 1681., T.I.A.S. No. 1838, 121 U.N.T.S. 77 (Sept. 2, 1947) (known generally as the "Rio Pact"); see also the American Treaty on Pacific Settlement, 30 U.N.T.S. 55 (April 30, 1948) (known generally as the "Pact of Bogota"); see also the Charter of the Organization of African Unity, arts. II, III, 479 U.N.T.S. 39 (May 25, 1963). For more on aggression, see Draft Code of Crimes Against the Peace and Security of Mankind. Adopted by the U.N. International Law Commission in 1954, 2 Y.B. INT'L L. COMM. 150 (1954), revised in 1987, 1988 and 1989. U.N. Doc. A/42/420 (1987), U.N. Doc. A/CN.4/404 (1987), U.N. Doc. A/43/539 (1988), U.N. Doc. A/CN.4/419 (1989), and U.N. Doc. A/44/150 (1989). See also Declaration on the Right of Peoples to Peace. Adopted by the U.N. General Assembly, Nov. 12, 1984. 39 U.N. GAOR 39/11/ Annex, (Supp. No. 51) 22, U.N. Doc. A/39/L.14 (1984).

The creation of Palestine from the territories could also affect Israel's inclination to preempt.<sup>78</sup> But how? One argument suggests that because of Israel's diminished size, its inclination to strike first at enemy hard targets would be especially high. After all, now deprived of strategic depth, it could not hold out for as long as was possible when Palestine was still the territories. In this connection, it is possible that a shift from deliberate ambiguity to disclosure after Palestine came into existence would reduce the Israeli incentive to preempt, but only if Jerusalem were made to believe that its nuclear threat, as a result of this shift, were being taken more seriously by the Arabs.<sup>79</sup>

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78. Pre-emption has often figured importantly in Israeli strategic calculations. This is especially apparent in the wars of 1956 and 1967, and in the destruction of the Iraqi nuclear reactor in 1981. Significantly, it was essentially the failure to preempt in October 1973 that contributed to heavy Israeli losses on the Egyptian and Syrian fronts during the Yom Kippur war, and—indeed—almost brought about Israeli defeat. Efraim Inbar has introduced a further strategic refinement into the issue of preemption, distinguishing between a “preemptive strike” and a “preventive strike.” According to Inbar, who argues that the 1956 war was “preventive” while the 1967 war was “preemptive,” the distinction is this: “A preventive strike is launched to destroy the potential threat of the enemy, while a preemptive strike is launched in anticipation of immediate enemy aggression.” See Efraim Inbar, *The 'No Choice War' Debate in Israel*, J. STRATEGIC STUD., 35 (Mar. 1989). For more on Israel's commitment to preemption/prevention, see Gerald M. Steinberg, *The Middle East in the Missile Age*, ISSUES SCI. & TECH., Vol. V., Number 4, 35-40 (Summer 1989); see also (MAJOR-GENERAL) AVRAHAM TAMIR, *A SOLDIER IN SEARCH OF PEACE: AN INSIDE LOOK AT ISRAEL'S STRATEGY*, (New York: Harper and Row) (1988). Recalling the fateful decision of Golda Meir not to preempt against enemy force concentrations and other vital targets on Yom Kippur day in 1973 (Chief of Staff Dan Elazar, Tamir reports, had requested permission for a preemptive attack), Tamir explains the problem correctly as one of tension between strategic requirements and political sensitivities. “The decision to strike first,” he says, “is always a difficult and risky one, involving a delicate balance between military and political factors.” Nevertheless, it is a decision that Israel, will continue to make: “A small country like Israel, lacking in strategic depth and surrounded by enemies, can never forego the possibility of a pre-emptive strike against an imminent threat.” *Id.* at 197.

79. Let us recall, here, Pufendorf's argument in *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW*: “. . . where it is quite clear that the other is already planning an attack upon me, even though he has not yet fully revealed his intentions, it will be permitted at once to begin forcible self-defense, and to anticipate him who is preparing mischief, provided there be no hope that, when admonished in a friendly spirit, he may put off his hostile temper; or if such admonition be likely to injure our cause. Hence, he is to be regarded as the aggressor, who first conceived the wish to injure, and prepared himself to carry it out. But the excuse of self-defense will be his, who by quickness shall overpower his slower assailant. And for defense, it is not required that one receive the first blow, or merely avoid and parry those aimed at him.” See SAMUEL PUFENDORF *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW*, VOL. II, TR., BY FRANK GARDNER MOORE, New York: Oceana Publications, Inc., 32

Here, several problems must be considered. First, how would Israel's leadership actually *know* that taking the bomb out of the basement had improved its deterrence posture? To a certain extent, the credibility of Jerusalem's nuclear threats would be contingent upon the severity of different provocations. For example, it might be believable if Israel were to threaten nuclear reprisals for provocations that endanger the very survival of the Jewish state, but it would almost certainly be unbelievable to threaten such reprisals for relatively minor territorial infringements or incursions.<sup>80</sup>

In view of what is now generally believed about Israel throughout the Middle East, and—indeed—all over the world, there is every reason to assume that Israel's nuclear arsenal does exist, and that Israel's enemies share this assumption. The most critical question about Israel's nuclear deterrent, therefore, is not one of capability, but one of *willingness*. How likely is it that Israel, after launching non-nuclear preemptive strikes against enemy hard targets,<sup>81</sup> would respond to Arab reprisals with

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(1964).

80. In the aftermath of the 1991 Gulf War, Israel—intrawar threats notwithstanding—decided *not* to respond to Iraq's 39 missile attacks against the Jewish State with *any* sort of reprisal. Yet, if Israel had decided to respond, presumably against Baghdad's military assets, this response could have been characterized by Jerusalem as one of the following: (1) reprisal; (2) self-defense; or (3) anticipatory self-defense. Alternatively, Israel could have argued persuasively that: (4) a condition of war had existed between the Jewish State and Iraq since 1948 at Iraq's insistence, and that Israel's latest military strikes were *not* measures of self-help short of war (i.e., *not* instances of reprisal, self-defense or anticipatory self-defense), but rather just one more legitimate use of force in an ongoing conflict. In the final analysis, the lawfulness of Israel's counterstrike and the reasonableness of its characterization would have depended upon such facts as general moves toward peace underway in the region, amount of elapsed time between Iraq's aggression and Israel's response and level of continuing danger to Israel from the Baghdad regime. Significantly, if Jerusalem should have opted for number 4 (above), unless a formal peace settlement were already being negotiated between Israel and Iraq (highly improbable) its military counterstrike would have been *prima facie* lawful so long as it fulfilled the settled peremptory criteria of the laws of war—namely, the expectations of discrimination, proportionality and military necessity.

81. In this connection, it is conceivable, perhaps even likely, that an Israeli non-nuclear preemption would be the best way to reduce the risk of regional nuclear war. (This follows from the assumption that if Israel waits for its enemies to strike first, these enemies may launch nuclear attacks, or—even if they strike first with conventional weapons—Israel will have no choice but to resort to nuclear retaliation.) To the extent that this is indeed the case, the reasonableness/legality of Israeli non-nuclear preemption would be enhanced. Here, Jerusalem's commitment to anticipatory self-defense would be distinctly law-enforcing. No such defense, of course, could be mustered on behalf of an Israeli nuclear preemption,



nuclear counterretaliation? This is perhaps the single most important question to be raised in connection with the general issue examined here.

To answer *this* question, Israel's decision-makers will have to put themselves into the shoes of various Arab leaders. Will these leaders calculate that they can afford to retaliate against Israel, i.e., that such retaliation would not produce nuclear counterretaliation? In asking this question, they will assume, of course, a non-nuclear retaliation against Israel. A nuclear retaliation, should it become technically possible, would assuredly invite a nuclear counterretaliatory blow.

What will they conclude? This depends, in turn, upon their view of Arab reciprocal judgments about Israel's pertinent leaders. Do these judgments suggest a leadership that believes it can gain the upper-hand with nuclear counterretaliation? Or do they suggest a leadership that believes such counterretaliation would bring upon Israel intolerable levels of harm and destruction? Depending upon the way in which the Arab decision-makers interpret Israel's authoritative perceptions, they will accept or reject the cost-effectiveness of a non-nuclear retaliation against Israel. This means that it is in Israel's interest to communicate the following strategic assumption to its enemies: that Israel would be acting rationally by responding to Arab non-nuclear reprisals<sup>82</sup> to

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which would, in all circumstances, be in violation of international law. Moreover, should Israel feel compelled to actually resort to nuclear war-fighting at some point, either after (1) Arab reprisals for Israel's conventional preemption cause the Jewish State to escalate to nuclear weapons; or (2) Arab chemical/biological/conventional first-strikes cause Israel to escalate to nuclear weapons, it would confront substantial problems under international law. Should certain Arab states launch nuclear first-strikes against Israel, Jerusalem's retaliatory use of nuclear weapons would be far less problematic jurisprudentially, but matters of law in such circumstances would assuredly be moot.

82. The right of self-defense should not be confused with *reprisal*. Although both are commonly known as measures of self-help short of war, an essential difference lies in their respective purpose. Taking place *after* the harm has already been experienced, reprisals are punitive in character and cannot be undertaken for protection. Self-defense, on the other hand, is by its very nature intended to mitigate harm. The problem of reprisal as a rationale for the permissible use of force by states is identified in the U.N. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States: "States have a duty to refrain from acts of reprisal involving the use of force." See U.N. Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States. Adopted by the U.N. General Assembly, Oct. 24, 1970. 25 U.N. GAOR 2625 (XXV), (Supp. No. 28) 121, U.N. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292 (1970). For the most part, the prohibition of reprisal can be deduced from the broad regulation of force found at Article 2(4), the

Israeli preemptive attacks with nuclear counterretaliation. The plausibility of this assumption would be enhanced considerably if Arab reprisals were to involve chemical and/or biological weapons.<sup>83</sup>

All of these calculations, of course, assume rationality.<sup>84</sup> In the absence of calculations that compare the costs and benefits of strategic alternatives, what will happen in the Middle East is only a matter of conjecture. Significantly, the prospect of non-rational judgments in the region is increasingly likely, especially as the influence of Islamic fundamentalism<sup>85</sup> spreads to Arab leadership elites.<sup>86</sup> To the extent that Israel might one day believe itself

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obligation to settle disputes peacefully at Article 2(3) and the general limiting of permissible force by states to self-defense.

83. The prospect of such reprisals calls to mind the laws of war. Today, the laws of war, the rules of *jus in bello*, comprise: (1) laws on weapons; (2) laws on warfare; and (3) humanitarian rules. Codified primarily at the Hague and Geneva Conventions, and known thereby as the law of the Hague and the law of Geneva, these rules attempt to bring discrimination, proportionality and military necessity into belligerent calculations. On the main corpus of *jus in bello*, see: Convention No. IV Respecting the Laws and Customs of War on Land, With Annex of Regulations, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (Oct. 8, 1907) (known commonly as the "Hague Regulations"); see also Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Done at Geneva, Entered into force, Oct. 21, 1950. 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (Aug. 12, 1949); see also Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Entered into force, Oct. 21, 1950. 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (done at Geneva, Aug. 12, 1949); see also Convention Relative to the Treatment of Prisoners of War, Entered into force, Oct. 21, 1950. 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (done at Geneva, Aug. 12, 1949); see also Convention Relative to the Protection of Civilian Persons in Time of War, Entered into force, Oct. 21, 1950. 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (done at Geneva, Aug. 12, 1949).

84. The rational actor is defined as a unitary, value-maximizing decision-maker with one set of specified goals, one set of perceived options and a single estimate of the consequences that ensue from each alternative.

85. Islam has historically sought to establish a world public order based on divine legislation and to enforce it by the *jihad*. The *jihad* is the Islamic *bellum justum* and is the very basis of Islam's relationships with other nations. For an authoritative study of Islam and international law, see: SHATBANI'S SIYAR: THE ISLAMIC LAW OF NATIONS, tr. with an introduction, by Majid Khadduri (The Johns Hopkins Press) (1966).

86. Throughout the Islamic world, fundamentalists are challenging incumbent regimes, competing for power and calling for a new assertiveness. Unlike more moderate Moslems, these fundamentalists are disinterested in political compromise and are willing, in many cases, to place the obligations of "submission" (Islam in Arabic means submission to the will of God) above the requirements of personal or collective survival. Moreover, their power grows daily as a number of Arab states are increasingly unable to surmount substantial social, medical and economic problems. In Egypt, the palpable reassertion of Muslim piety is directed toward

confronted with nonrational enemies, particularly ones with highly destructive weapons in their arsenals, its incentive to preempt would become overwhelming. In fact, should such enemies be believed to hold nuclear weapons, Israel might even decide (*rationally*) to launch a *nuclear* preemption against these weapons. This would appear to be the only circumstance in which a rational Israeli preemptive strike could be nuclear.<sup>87</sup>

There are other problems. To function successfully, Israel's deterrent, even after being removed from the "basement," would have to be secure from Arab preemptive strikes. Moreover, Israel must also be wary of "decapitation," of losing the "head" of its military command and control system because of enemy first strikes. Should Israel's enemies be unpersuaded by Jerusalem's move away from deliberate ambiguity they might direct such strikes as could effectively immobilize Israel's order of battle.

The prospect of Israeli preemption will likely increase also because rival states that acquire nuclear weapons will be unwilling or unable to create the essential infrastructure to safely manage these weapons. Inadequate investment in nuclear weapons systems survivability, for example, could generate dangerous incentives to preempt. With Israel's enemies unlikely to possess a second-strike capability—the capacity to retaliate after absorbing an Israeli attack—these states may calculate a substantial military advantage to striking first. Recognizing this calculation, Israel will confront

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a day when all irreligious leaders are deposed and the *Ummah* (total community of Muslims) is united under a universal Caliphate, a fully legitimate government ruled by an elected leader of irreproachable integrity. Whereas Iran's faith is drawn primarily from the minority Shi'a branch of Islam, Egypt's fundamentalists look forward to an alliance with over 130 million Sunni Muslims in the rest of the Middle East and North Africa (there are now nearly one *billion* Muslims in the world). Such an alliance, led by the so-called *Jaamat Islamiya* (Islamic societies) and including *Al-Jihad* (Holy War) could lead to a position of "no compromise" with infidels, especially if it is heavily informed by the Manichean type dualism of Sayyid Qutb (1906-66), a leading ideologue of the Brotherhood who was hanged by Nasser.

87. Even as we approach year 2000, repeated crises center on problems of U.N. inspections and persistent Iraqi cheating. On October 7, 1991, more than seven months after conclusion of hostilities, United Nations inspectors discovered a complex of buildings that served as the nerve center of Saddam Hussein's covert nuclear weapons program, but had escaped allied attack during the war. It was here, at an installation called Al Atheer about 40 miles south of Baghdad, that Iraq planned—according to the report—"to design and produce a nuclear device." See Paul Lewis, "U.N. Aides Discover Atom Arms Center Concealed by Iraq," *The N.Y. TIMES*, A1, A7 (Oct. 8, 1991). Further, according to Hans Blix, director of the International Atomic Energy Agency, Iraq was working on thermonuclear weapons as well as simpler fission arms. See *Id.*

an overwhelming incentive to strike first itself. Even in the best case scenario, wherein Israel receives credible assurances from its enemies concerning rejection of first-strike options, Jerusalem will inevitably understand that such assurances could become meaningless in the wake of political upheaval, coup d'état, etc. Faced with enemy states characterized by weak and authoritarian political institutions, fragile civil-military relations, and competing factions representing numerous ethnic and religious groupings, Jerusalem will no doubt recognize the danger posed by alienated elements within enemy societies—a danger for which Israel's only reasonable antidote is apt to be preemption.<sup>88</sup>

A contrary argument about the effects of Palestine on Israel's inclination to preempt suggests that because of Israel's newly expanded vulnerability its nuclear deterrent would be more credible than ever before. As a result, Jerusalem could better afford not to strike first than when it still administered the territories. In this situation the principal benefit of shifting from ambiguity to disclosure would seem to lie in an explicitly-identified escalation ladder revealing a broad array of intended Israeli reprisals, ranging from limited conventional responses to measured nuclear strikes. Such reprisals, of course, would be subject to the codified and

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88. The major surface-to-surface (SSM) missile threat to Israel is from missiles equipped with chemical or nuclear warheads. Until it becomes possible to reliably intercept SSMs in flight, the Jewish State will have to focus on destroying them while they are still on the ground. Should this preemption option be undertaken in the near term, it could not be complemented by effective anti-tactical ballistic missile (ATBM) defenses. If, however, it could be undertaken more than two or three years from now, it could be reinforced by "Arrow" missiles that are integrated into a multi-stage system for in-flight interception. Nevertheless, recalling the extraordinary destructiveness of even a single nuclear missile that would defy interception, it is unlikely that an Israeli deferral of preemption would be cost-effective. Unless the Arrow were judged nearly 100% effective (an inconceivable judgment) and unless Israel's enemies judged *certain* not to attack until Jerusalem's ATBM deployment were complete (an *impossible* determination), near-term preemption (for all of its political and military costs) would appear to be more rational.

customary restraints of the laws of war,<sup>89</sup> especially the rules of proportionality.<sup>90</sup>

In weighing the different arguments concerning the effect of Palestine upon Israeli preemption, particular attention must be directed toward Israel's presumptions about the inevitability of war and the long-term expectations for Arab vulnerability. Should Israel's leaders conclude that the creation of Palestine would make another major war inevitable and that, over time, Arab vulnerability to Israel would diminish, Jerusalem's inclination to strike first would be increased.

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89. See Samuel Pufendorf, *ON THE DUTY OF MAN AND CITIZEN*, for an early expression of limits under the law of war: "As for the force employed in war against the enemy and his property, we should distinguish between what an enemy can suffer without injustice, and what we cannot bring to bear against him, without violating humanity. For he who has declared himself our enemy, inasmuch as this involves the express threat to bring the worst of evils upon us, by that very act, so far as in him lies, gives us a free hand against himself, without restriction. Humanity, however, commands that, so far as the clash of arms permits, we do not inflict more mischief upon the enemy than defense, or the vindication of our right, and security for the future, require." *ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW (De Officio Homonis et Civis Juxta Legem Naturalem Libri Duo)*, (Vol. II) (tr. by Frank Gardner Moore, Oceana Publications, Inc.) 139 (1964).

90. The principle of proportionality, has its origins in the biblical *Lex Talionis*, (law of exact retaliation). The "eye for eye, tooth for tooth" expression is found in three separate passages of the Jewish Torah, or biblical Pentateuch. These Torah rules are likely related to the Code of Hammurabi (c. 1728-1686 B.C.)—the first written evidence for penalizing wrongdoing with exact retaliation. In matters concerning personal injury, the code prescribes an eye for an eye (#196), breaking bone for bone (#197) and extracting tooth for tooth (#199). Among the ancient Hebrews, we should speak not of *the lex talionis*, but of several. The *lex talionis* appears in only three passages of the Torah. In their sequence of probable antiquity, they are as follows: Exod. 21:22-25; Deut. 19:19-21; and Lev. 24:17-21. (All have affinities to other Near Eastern codes.) These three passages address specific concerns: hurting a pregnant woman, perjury, and guarding Yahweh's altar against defilement. In contemporary international law, the principle of proportionality can be found in the traditional view that a state offended by another state's use of force can, if the offending state refuses to make amends, take "proportionate" reprisals. See *Naulilaa Arbitration*, 1928, 2 RIAA 1013; *Air Services Agreement Arbitration*, 1963, 16 RIAA 5; cited by Ingrid Detter De Lupis, *THE LAW OF WAR* 75 (Cambridge University Press) (1987). Evidence of the rule of proportionality can also be found in the United Nations Covenant on Civil and Political Rights of 1966 (Article 4). Similarly, the European Convention on Human Rights provides at Article 15 that in time of war or other public emergency, contracting parties may derogate from the provisions, on the condition of rules of proportionality. And the American Convention on Human Rights allows at Article 27(1) such derogations in "time of war, public danger or other emergency which threatens the independence or security of a party" on condition of proportionality.

Are such presumptions reasonable? Regarding the inevitability of war, current Arab rearmament efforts and associated preparations for conflict certainly suggest little else. As for Arab vulnerability to Israel's military forces, this will depend primarily on relative adaptation to the changing technologies of war, a process that cannot be accurately evaluated at this time. It follows that unless Israel's leadership believes that shifting from ambiguity to disclosure would greatly inhibit all or virtually all enemy Arab forces (i.e., to the extent that war would become not inevitable, but decreasingly probable), Palestine would make Israeli preemptive attacks more likely.

Does this mean that the creation of Palestine would make Israeli nuclear deterrence irrelevant? Not at all! Although nuclear weapons might not serve Israel as an assured means of deterring enemy first strikes, they could function to support Israeli preemptions. Here, Israel's adversaries—having suffered Israeli attacks on various hard targets and military installations—would be deterred from retaliation against the Jewish State by the threat (implicit or explicit) of Israeli nuclear counterretaliation. It is conceivable, of course, that this nuclear strategy could fail and that Israel's nuclear weapons would then have to be used for actual warfighting. The only military strategy capable of preventing this prospect altogether lies in Israeli preemptive strikes involving nuclear weapons, a strategy that would appear altogether inconceivable.

There appears to be only one contingency in which nuclear warfighting options might appear cost-effective to Israel: to prevent imminent destruction of the Third Temple. Faced with this contingency, Israel would very likely threaten to use whatever nuclear capability it had with the intention of carrying out the threat. Should such threats be ignored, however, the resultant nuclear destruction and societal disintegration in the region could jeopardize Israel's continuance as a state, even though it had used nuclear weapons only to stave off total annihilation.

Should Israel use nuclear weapons against non-nuclear adversaries to prevent such annihilation, its continuance as a state would also be jeopardized, in this case for political reasons. To assess the credibility of an Israeli nuclear threat under conditions of expected annihilation, one needs to understand the special perspectives of Jewish history. Plainly, virtually all of Jewish Israel would view any concerted effort to annihilate their country as more than war. Rather, they would view such an effort as part of an

ongoing process of genocide, and this in spite of the historical variation in perpetrators.<sup>91</sup>

When the territories become Palestine, will Israel be more or less inclined to preparations for nuclear warfighting? Extrapolating from what we have already assumed, namely that the creation of another hostile Arab state and another "hot" border would heighten the prospect of catastrophic war against the Jewish state,<sup>92</sup> it is almost certain that Israel would be substantially more dependent upon its nuclear capabilities. Whether such capabilities would be put to better use as part of an "assured destruction"

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91. Jurisprudentially, we are also speaking here of "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, Entered into force, August 8, 1945. For the United States, Sept. 10, 1945. 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945). 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. GAOR 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 . . ." U.N. Doc. A/519 at 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 U.N. GAOR 5th session (Supp. No. 12), A/1316, 11 (1950).

92. Although it is generally believed that the peace treaty in force with Egypt constrains that state from joining with other Arab forces against Israel, this belief is problematic. A Minute to Article VI, paragraph 5 of the Israel-Egyptian Peace Treaty provides that it is agreed by the parties that there is no assertion that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. This means that the treaty with Israel does not prevail over the defense treaties that Egypt has concluded with Syria, and that Cairo—should *it* determine that Israel has undertaken aggression against Syria—could enter into belligerency against Israel on behalf of Damascus. Indeed, there is reason to believe that even if Syria were to commence hostilities against Israel to recover the Golan Heights, Egypt might abrogate its agreement with Israel and offer military assistance to Syria. Shortly after the Israeli-Egyptian Peace Treaty was signed, then Egyptian Prime Minister Khalil stated that he would regard any attempt by Syria to recover the Golan Heights as a defensive war, one that would bring into play the Egyptian-Syrian defense treaty despite the existence of the Israel-Egyptian Peace Treaty. For terms of the pertinent treaties, see Treaty of Peace, March 26, 1979, Egypt-Israel, Minute to Art. VI(5), 18 I.L.M. 362, 392; and Joint Defense Agreement Between Syria and Egypt, Oct. 20, 1955, 227 U.N.T.S., 126.

strategy (MAD) or a “counterforce” (warfighting) strategy remains to be calculated.

All things considered, Israel—if confronted by a new state of Palestine—would be well-advised to do everything possible to prevent the appearance of Arab nuclear powers, including pertinent non-nuclear preemptions. Bringing its own bomb out of the basement is unlikely to serve any serious purpose unless Jerusalem were to conclude that Arab intractability toward the Jewish state had become overt and overwhelming and that preparations for nuclearization in particular Arab states could no longer be stopped, even by Israeli preemptive strikes.<sup>93</sup> Under these very portentous conditions, Israel would require a very believable (and hence usable) nuclear deterrent,<sup>94</sup> one that could be employed without

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93. Because the entire Arab world, excepting Egypt and Jordan, still considers itself at war with Israel, a strong case can be made that any Israeli preemption against its Arab enemies would not be an act of anticipatory self-defense, but rather only one more military operation in an ongoing and protracted war. It follows that such an operation's legality would have to be appraised exclusively in terms of its conformance with the laws of war of international law (*jus in bello*). Here, to identify such an operation as an act of aggression against another state that had already declared itself at war with Israel would be nonsense. The laws of war, the rules of *jus in bello*, comprise: (1) laws on weapons; (2) laws on warfare; and (3) humanitarian rules. Codified primarily at the Hague and Geneva Conventions, and known thereby as the law of the Hague and the law of Geneva, these rules attempt to bring discrimination, proportionality and military necessity into belligerent calculations.

94. In assessing the reasonableness of nuclear weapons use, it is essential to consider the variety of possible nuclear options. For example, although it is highly unlikely that Israel would choose to use high-yield nuclear explosives that would produce horrendously indiscriminate casualties and fatalities throughout the region (including perhaps radioactive fallout within Israel itself), it may be reasonably likely to use low-yield, “small” nuclear explosives. In this connection, Israel might choose to use enhanced-radiation weapons rather than nuclear explosives (weapons that have been referred to by the strategic community as the “neutron bomb”) because these weapons would destroy people without destroying structures. The neutron bomb, or ER warhead, (deliverable by artillery shells or missile warheads) is a relatively small thermonuclear weapon that is designed to minimize the fraction of energy going into blast and heat. Upon detonating, large quantities of radioactive neutrons would be released, killing people but leaving buildings and other structures unaffected. Because such a weapon could be used with less “Armageddon potential” than other kinds of nuclear weapons, it may appear more reasonable to use. At the same time, because the “spillover” effects upon the using state could be harmful as those of other nuclear weapons, the reasonableness of using the neutron bomb may be contingent, in the final analysis, on prevailing winds and weather conditions. Enhanced radiation warheads would produce appreciable fallout from the fission trigger (the neutron bomb is triggered by a minimum-yield fission explosion) and their critical effect would be death spawned by intense radiation.



igniting Armageddon for all regional belligerents and one that could serve some damage-limiting military purpose (whatever the collateral effects) against Arab weapons (nuclear and non-nuclear) should deterrence fail.

In his article in *THE BROWN JOURNAL OF WORLD AFFAIRS*, "In the Shadow of the Israeli Nuclear Bombs: Egyptian Threat Perceptions," Abdel Monem Said Aly - Director of the Al-Ahram Center for Political and Strategic Studies in Cairo - presents a prevailing Arab (specifically Egyptian) view of Israel's undeclared "nuclear bombs." Acknowledging his country's persistent pressure upon Israel to sign the NPT, Professor Said Aly seemingly forgets that Israel's strategic policies are fashioned *in context*. These policies are not created in a geopolitical vacuum. Although, as the author argues, "Both geography and history . . . have defined the constants of the Egyptian perception of national security," it is remarkably ironic to conclude that it was creation of the State of Israel in 1948 that "constituted a major security threat to Egypt." Even today, when a formal condition of peace obtains between Egypt and Israel, the Egyptian side has ensured that the peace remains an altogether *cold* one,<sup>95</sup> and one that endures in the midst of almost frenetic Egyptian militarization.

Professor Said Aly worries that Egypt is endangered from Israel because the Jewish State "continues to possess a fanatic, fundamentalist right wing . . ." Yet, the Netanyahu Government had refused to abrogate the enormously debilitating (to Israel) surrenders compelled by Oslo and remained committed altogether to *defensive* military policies. At the same time, authentically fanatic, fundamentalist Islamic forces could topple the Mubarak government at any moment, instituting a new regime in Cairo that

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The destructive effects of the neutron bomb are due to the ionizing effects of neutrons colliding with protons inside living cells. Ionization breaks down chromosomes, swells cell nuclei, increases the viscosity of cell fluid, enhances cell-membrane permeability, and destroys cells of all kinds, particularly those of the central nervous system. Exposure to ionizing radiation also delays or destroys the process of mitosis, a long-term genetic effect that inhibits normal cell replacement.

95. In *AL AHRAM WEEKLY*, Brig. Gen. (Ret.) Mohammed Muawad Gad El-Moula, founder of a new party to revive the "victorious spirit" of the October 1973 War, said: "Israel is not prepared to give up its ambitions. This is clearly reflected in the declaration made by its leaders - and not only Binyamin Netanyahu . . . We have no choice but to adopt a platform for rebuilding a strong Egypt and preparing a new generation capable of fighting any attackers . . . We have to prepare for a fresh confrontation with Israel." (24 - 30 Oct. 1996); see Aaron Lerner, IMRA (Independent Media Review and Analysis) *Views From Egypt* (3 Nov. 1996).

would likely terminate the Egypt-Israel Peace Treaty and move - perhaps collaboratively - toward aggressive war. In this connection, it is also worth noting that the Egypt-Israel Peace Treaty of 1979 does not necessarily constrain Egypt from joining other Arab states in a war against the Jewish State. A minute to Article VI, paragraph 5, of the Treaty provides: "It is agreed to by the Parties that there is no assertion that this Treaty prevails over other treaties or agreements or that other Treaties or agreements prevail over this Treaty."

An uninformed reader, considering Prof. Said Aly's article, would conclude that the history of Middle East conflict after 1948 was largely the result of persistent Israeli aggressions, several through the Sinai. Of course, on May 17, 1967, President Nasser demanded U.N. withdrawal from the Sinai in preparation for *Egyptian* attack. By May 20, approximately 100,000 Egyptian troops, organized in seven divisions, together with 1,000 tanks, were concentrated along Israel's southwestern border.

After the withdrawal of the U.N. Emergency Force demanded by Egypt, THE VOICE OF THE ARABS proclaimed: "As of today, there no longer exists an international emergency force to protect Israel. We shall exercise patience no more. We shall not complain any more to the U.N. about Israel. The *sole* method we shall apply against Israel is total war, which will result in the extermination of Zionist existence."<sup>96</sup> Two days later, an enthusiastic echo came from Hafez Assad, then Syria's Defense Minister: "Our forces are now entirely ready . . . to initiate the act of liberation itself, and to explode the Zionist presence in the Arab homeland . . . . The time has come to enter into a battle of *annihilation*."<sup>97</sup>

With these facts in mind, Professor Said Aly claims to remain concerned about an *Israeli* "surprise attack," and insists that Israel's resort to anticipatory self-defense in June 1967 was merely aggression. Looking to the future of the region, he insists further that: "Militarily, Israel has secured for itself a position of superiority in both conventional and non-conventional weapons." Nothing could be further from the truth. No other country in the Middle East today is as effectively susceptible to catastrophic war as is Israel. Deprived of its nuclear weapons, as Professor Said Aly would recommend, Israel would not survive another year.

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96. See Louis Rene Beres and (AMB) Zalman Shoval, *On Demilitarizing a Palestinian 'Entity' and the Golan Heights: An International Law Perspective*, 28 VAND. J. TRANSNAT'L L., 968 (Nov. 1995).

97. *Id.*

But isn't this a contradiction? If Israel retains its nuclear weapons, why should it be vulnerable to catastrophic war? The answer has to do with the delicate nature of nuclear deterrence, with the incapacity of nuclear weapons to stave off most forms of conventional war and with the destructive synergy that might come to exist between war and terrorism. Israeli does indeed have nuclear superiority in the region - a superiority that is likely to obtain for a very long time - but this condition does not necessarily imply *superior power*. Recall, in this connection, the incapacity of another major nuclear power - the United States of America - to achieve power against a third world adversary then called North Vietnam.

Reduced to its essential contours, Israel's existential problem is this: A tiny state, indeed a microstate, surrounded by much larger, steadily militarizing enemy states and by increasingly hostile insurgent forces, seeks safety via credible deterrence. Yet, because deterrence can be immobilized by various factors - for example, by enemy perceptions of an Israeli unwillingness or incapacity to retaliate; by irrationality of enemy leadership - Jerusalem must once again plan for various forms of preemption. But defensive first-strikes by Israel would be fraught with strategic and diplomatic risks, and may in fact already be infeasible. Naturally, if any realistic hopes could be placed in the so-called "Peace Process," the bleakness of Israel's security options would certainly be improved. But no such hopes are reasonable. Rather, the Oslo Accords with the P.L.O. remain entirely injurious to Israel's survival requirements.<sup>98</sup>

What about active defenses, e.g., the Arrow ABM to which Prof. Said Aly refers? If Israel could soon deploy effective defensive systems, couldn't Jerusalem forego any preemption imperatives? After all, able to intercept incoming missiles, Israel would have no tactical reason to strike first.

Here, a number of critical problems surface. First, in the very best of all possible worlds, Israel's ABM deployments are at least two to four years away. Hence, in the interim, Israeli vulnerability to enemy attack will be especially high. Second, because even a

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98. See, by this author: Louis Rene Beres, *The 'Peace Process' and Israel's Nuclear Strategy*, STRATEGIC REV., 35-47 (Winter 1995); See also Louis Rene Beres, *The Security and Future of Israel: An Exchange*, MIDSTREAM, 15-23 (June/July 1995), a debate with Maj. Gen. (IDF/Res.) Shlomo Gazit, former Chief of the IDF Intelligence Branch; and Louis Rene Beres, *The Oslo Accords and Israel's Nuclear Strategy*, GEO. COMPASS, 74-81 (Winter 1995/1996).

single unintercepted nuclear or other unconventional warhead could produce unacceptable damage, successful active defense will require a near-perfect interception capability - a capability well beyond realization.

Professor Said Aly, in the fashion of most scholars - Arab and Israeli - examines Israel's nuclear strategy and the Oslo Peace Process as if they were essentially unrelated.<sup>99</sup> There is nothing in Prof. Said Aly's argument to suggest that what happens to Israel as a result of Oslo concessions will impact its decisions on nuclear strategy and nuclear weapons. Yet, depending upon the precise configuration of these ongoing concessions - which will in any event be a more-or-less truncated Jewish State with greatly reduced strategic depth - Jerusalem's reliance upon nuclear weapons and strategy will vary considerably.<sup>100</sup>

There are important connections between territorial vulnerabilities, creation of a Palestinian state and removal of the nuclear bomb from Israel's "basement."<sup>101</sup> For now, still buffered from a "hot" eastern border by West Bank/Judea/Samaria, Israel can reasonably afford to maintain its posture of deliberate ambiguity. When, however, the Peace Process produces "Palestine," Israel will likely feel compelled to move from ambiguity to disclosure, a shift that would substantially increase reliance upon nuclear strategies of various sorts.

Israeli nuclear weapons are not the problem. In the persistently bad neighborhood called the Middle East, the real problem is a very far-reaching and entirely unreconstructed Arab/Iranian commitment to "excise the Jewish cancer." Faced with this commitment, the government in Jerusalem should understand that the Peace Process is little more than a temporary enemy expedient,

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99. But Gamil Mattar, Director of the Arab Center for Development and Futuristic Research said, in AL AHRAM WEEKLY - 24-30 Oct. 1996: "Supporters of peace in Israel should also declare themselves opposed to Israel's nuclear weapons program . . . . How can an honest dialogue, conducted in an atmosphere of good will, take place in the *shadow of the Israeli nuclear arsenal*" (emphasis added; to highlight similarity to language of Prof. Said Aly). See Aaron Lerner, IMRA (Independent Media Review and Analysis) *Views From Egypt*, (3 Nov. 1996).

100. See, by this author: Louis Rene Beres, *The 'Peace Process' and Israel's Nuclear Strategy*, STRATEGIC REV., Vol. XXIII, No. 1., 35-47 (Winter 1995); see also Louis Rene Beres, *The Oslo Accords and Israel's Nuclear Strategy*, GEO. COMPASS, Vol. V., No. 1, 74-81 (Winter 1995/1996).

101. See, by this author: Louis Rene Beres, *Israel's Bomb in the Basement: A Second Look*, ISRAEL AFFAIRS, Vol. 2, No. 1, 112-136 (Autumn 1995).

a carefully contrived stratagem to eliminate Israel from the neighborhood.

Israeli nuclear weapons are crucial to Israel's survival and to regional stability. With such weapons, Israel could deter enemy unconventional attacks and most large conventional ones. Moreover, with nuclear weapons, Jerusalem could launch non-nuclear preemptive strikes against enemy state military targets that threaten Israel's annihilation. Without these weapons, such strikes would likely represent the onset of a much wider war because there would be no compelling threat of Israeli counterretaliation. Thus, Israel's nuclear weapons are an *impediment* to the actual use of such weapons and, *inter alia*, to the commencement of regional nuclear war.

Professor Said Aly, of course, does not agree. He argues, for example, that because of Israel's nuclear capability, "Egypt must be totally dependent on Israel's good intentions." But why? Do these Israeli weapons permit Jerusalem to demand certain political and/or military concessions from Cairo? Certainly not. The Israeli nuclear weapons can serve to prevent transformation of Egypt's cold peace into another Egypt-led hot war, but they can assuredly not be used to extort any forms of Egyptian surrender. Does Professor Said Aly expect either an Israeli "bolt-from-the-blue" nuclear attack or an Israeli threat to initiate nuclear warfare? How could he? What would Israel have to gain?

Professor Said Aly is concerned about "a clear imbalance in nuclear power relations." Fearing that Israel's "nuclear monopoly" precludes genuine nuclear deterrence in the region, he chooses to ignore altogether Egyptian and other Arab chemical and biological weapons - *counterdeterrent* weapons that could pose a very effective inhibitor of any Israeli nuclear retaliations. This means that Israel's nuclear monopoly notwithstanding (a monopoly that is, incidentally, a very temporary phenomenon), Jerusalem's nuclear deterrent is increasingly subject to immobilization by enemy state threats of chemical and/or biological counter-retaliations.

Professor Said Aly is worried that Israel's nuclear arsenal prompts regional nuclear proliferation. This is an especially curious argument because it places blame for the expected spread of nuclear weapons not upon the actual proliferants, but upon their intended victim. Moreover, while the author is correct that "nuclear proliferation in the Middle East can be very destabilizing for the entire region," the source of that prospective destabilization is not Israel, a country - unlike certain of its neighbors - that has

never issued genocidal threats or launched missile attacks upon civilian populations.

Professor Said Aly remarks on the alleged “discrepancy between Israel’s maximum needs and its actual nuclear capabilities,” concluding that this discrepancy “raises serious doubts about the credibility of Israeli intentions.” His point, it would seem, is that Israel’s nuclear weapons are presumptively for more than minimum deterrence and may even be for aggression and/or war-waging. Here, Professor Said Aly ignores many pertinent nuances of nuclear strategy, especially the precise *kinds* of nuclear weapons involved (not all such weapons are the same), the question of countervalue vs. counterforce targeting, and the requirements of national survival if nuclear deterrence should fail.

Professor Said Aly wonders about Israel’s development of tactical nuclear weapons, and perhaps nuclear mines. In this regard, he worries that the decision to use such weapons might be made more easily than a decision to use larger, strategic weapons. Indeed, his worry is entirely well-founded. Israeli nuclear deterrence, to function successfully, requires nuclear weapons that are perceptibly *usable*. This does not mean weapons that would increase the risk of war; on the contrary, it means weapons that would be decidedly *stabilizing*.

Professor Said Aly claims that Israel has actually deployed some of its nuclear weapons in times of grave national emergency. Although we have no way of knowing whether this claim is plausible (neither, of course, does Professor Said Aly), the author’s fear - that “under conditions of crisis, when the use or the threat of chemical weapons or conventional missiles in massive quantities is real, Israel might use its nuclear weapons” - is certainly *correct*. If Israel’s Arab/Islamic neighbors do not want to witness such a defensive Israeli use of nuclear weapons, all they need do is refrain from chemical or massive conventional aggressions against the Jewish State.

Professor Said Aly laments that “Israeli nuclear capability is one of the ways for Israel to extract further means of *conventional superiority* (emphasis in original) from the United States . . . .” Yet, should Israel actually be able to achieve or maintain such conventional superiority, Jerusalem’s reliance upon nuclear weapons could be expected to *diminish*.

Professor Said Aly comments upon the ambiguities surrounding Israeli command authority over nuclear weapons, conditions which he fears, “in times of tension, uncertainty or national crisis,” would exacerbate the prospect of “accidental use.” Here we

observe a rather clear *non sequitur*, as there exists no observable relationship between clarity of authority structure and nuclear weapons accident probability. Perhaps the author really means *unauthorized use* rather than accidental use, but even this kind of hypothesis would be *prima facie* incorrect. Knowing in advance exactly *who* has the authority to order the use of Israeli nuclear weapons could serve to identify unauthorized uses after the fact (who would care?) but it would have no bearing on the possible prevention of unauthorized uses by neighboring states. Further, does Professor Said Aly really expect us to believe that any *Arab* nuclear power in the region would disclose *its* relevant authority structures?

Finally, Professor Said Aly faults Israel for “still refusing to give Palestinians their statehood” and for its ostensible insistence “on occupying Arab territories, including Jerusalem . . . .” Ironically, it has been successive *Israeli* governments that have accorded legitimacy to the idea of Judea and Samaria as “occupied Arab territories” and that have allowed the notion of Jerusalem as a negotiable issue to be placed on the diplomatic table. Instead of insisting upon maintenance of essential strategic depth and upon the utter non-negotiability of Jerusalem - insistence necessary for national survival - *Israeli* governments have persistently surrendered to annihilatory Arab demands.

Israel has a great deal to fear. Facing a growing number of adversaries with ballistic missiles and with aggressive nuclear development programs, Jerusalem should now understand that transformation of Judea/Samaria/Gaza into Palestine will not stabilize the region, but rather will provide Israel’s enemies with the means and incentives to destroy the Jewish State once and for all. Deprived of territorial margins of safety, Israel could become seriously vulnerable to total defeat. It follows that however loudly Arab scholars and leaders might protest about Israeli “stalling” on the territories, the matter of Palestinian statehood could have existential consequences for Israel. Once such statehood is accepted, Palestine, looking first very much like Lebanon, could wind up as Armageddon, a metamorphosis that would favor neither Israeli nor Arab in an always explosive region.

## V. Preemption and Anticipatory Self-Defense

Preemption may be appraised not only from the tactical perspective, but also from the standpoint of international law. What, exactly, is the status of preemption under these important

rules and procedures? Where it is understood as “anticipatory self defense,”<sup>102</sup> this customary right has its modern origins in the *Caroline* incident, which concerned the unsuccessful rebellion of 1837 in Upper Canada against British rule. Following this incident, the serious *threat* of armed attack has generally been taken to justify 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 which did not require an actual attack. Here, military response to a threat was judged permissible so long as the danger posed was “instant, overwhelming, leaving no choice of means and no moment of deliberation.” It goes without saying that Israel would likely act upon precisely this kind of “danger posed.”

Today, some scholars argue that the right of anticipatory self defense articulated by the *Caroline* has been overridden by the specific language of Article 51 of the UN Charter. In this view, Article 51 (which is the pertinent codification of the law) fashions a new and more restrictive statement on self defense, one that relies on the literal qualification of a prior “armed attack.” This narrowly technical interpretation ignores that international law cannot compel a state to wait until it absorbs a devastating or even lethal first strike before acting to protect itself. Significantly, both the Security Council and the General Assembly refused to condemn Israel for its 1967 preemptive attacks against certain Arab states, signifying implicit approval by the United Nations of Israel’s lawful resort to anticipatory self defense.

The right of self defense by forestalling an attack<sup>103</sup> is well

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102. For more by this author on anticipatory self defense under international law, with particular reference to Israel, see: Louis René Beres, *After the Gulf War: Israel, Preemption and Anticipatory Self Defense*, HOUS. J. INT’L L., Vol. 13, No. 2, 259-280 (Spring 1991); see also Louis René Beres, *Striking ‘First’: Israel’s Post-Gulf War Options Under International Law*, LOY. L.A. INT’L & COMP. L.J., Vol. 14, No. 1, 1-24 (Nov. 1991); see also Louis René Beres, *Israel and Anticipatory Self Defense*, ARIZ. J. INT’L & COMP. L., Vol. 8, 89-99 (1991); see also Louis René Beres, *After the Scud Attacks: Israel, ‘Palestine’, and Anticipatory Self Defense*, EMORY INT’L L. REV., Vol. 6, No. 1, 71-104 (Spring 1992). For an examination of assassination as a permissible form of anticipatory self-defense by Israel, see Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, HOFSTRA L. REV., Vol. 20, No. 2, 321-340 (Winter 1991).

103. Under certain very residual and carefully constrained circumstances, this right of self-defense may even include assassination. See, e.g. Louis René Beres, *On Assassination as Anticipatory Self-Defense: Is it Permissible?*, U. DET. MERCY L. REV., 701-723 (Winter 1992); see also Louis René Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, TEMPLE INT’L & COMP. L.



established in classical international law. As long ago as 1625, Hugo Grotius, in Book II of *The Law of War and Peace*, indicates that self defense is to be permitted not only after an attack has already been suffered but also in advance, where “the deed may be anticipated.” Or as he says a bit later on, “It be lawful to kill him who is preparing to kill . . . .” Similarly, in his text of 1758 known as *The Law of Nations*, Emmerich de Vattel asserts that “The safest plan is to *prevent* evil,” and that to do so a nation may even “anticipate the other’s design . . . .”

Appropriately, because we are here concerned with the prospect of Israel’s preemptive strikes, both Grotius and Vattel - “founding fathers” of international law - parallel the traditional Jewish interpreters. The *Torah* contains a provision exonerating from guilt a potential victim of robbery with possible violence if, in self defense, he struck down and, if necessary, even killed the attacker *before he committed any crime* (Ex. 22:1). In the words of the rabbis, “If a man comes to slay you, forestall by slaying him!” (*Rashi: Sanhedrin 72a*). Although these arguments speak more generally of interpersonal relations than of international relations in particular, they are valid for the latter by extrapolation.

Israel’s right to preempt under international law is strengthened further by the *ongoing* nature of war with enemy states. According to Grotius, citing to Deuteronomy in his *THE LAW OF PRIZE AND BOOTY*, the Israelites, however, were exempted from the issuance of warning announcements when dealing with previous enemies (what we might call today ongoing or protracted war; precisely the condition that currently obtains between Israel and all Arab states except Egypt and Jordan). The Israelites, recounts Grotius, had been commanded by God to “refrain from making an armed attack against any people without first inviting that people, by formal notifications,<sup>104</sup> to establish peaceful relations . . . .” Yet, he continues, the Israelites . . . .

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J., Vol. 5, No. 2, 231-249 (1991).

104. On the argument that war need not be formally recognized, see J. Pictet, *IV Commentary, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 20-1* (1958) (“no need for formal declaration of war, or for recognition of the existence of a state of war”); *see also* U.S. Dept. of Army FM 27-10, *The Law of Land Warfare 7-8, paras. 8-9* (1956) (instances of armed conflict without declaration of war; law of war applies); *see also The Prize Cases*, 67 U.S. (2 Black) at 668 (“war may exist without a declaration on either side”); *see also* M. MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER*, 97-113 (1961) (legal status of war may be brought about by use of armed force).

thought that this prohibition was inapplicable to many of the Canaanite tribes, inasmuch as they themselves had previously been attacked in war by the Canaanites.

Hence, says Grotius, "we arrive at the following deduction":

Once the formality of *rerum repetitio* has been observed and a decree on the case in question has been issued, no further proclamation or sentence is required for the establishment of that right which arises in the actual process of execution. For [and this is especially relevant to *modern* Israel] in such circumstances, one is not undertaking a new war but merely carrying forward a war already undertaken. Thus the fact that justice has once been demanded and not obtained, suffices to justify a return to natural law . . . .<sup>105</sup>

## VI. Conclusion

A Palestinian State could do nothing to end the "war already undertaken" between Israel and its existing state enemies. Rather, as we have just seen, it would enlarge this category of enemies by one, undermine Israel's security further by reducing strategic depth and allowable mobilization time, and heighten the chances of Israeli preemptive strikes and/or regional nuclear war. Although this does not suggest that "world order"<sup>106</sup> considerations in the Middle

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105. See COMMENTARY ON THE LAW OF PRIZE AND BOOTY, *supra*, at 102. The idea of natural law is based upon the 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 idea and its attendant tradition of human civility runs continuously from Mosaic Law and the ancient Greeks and Romans to the present day. For a comprehensive and far-reaching assessment of the natural law origins of international law, see Louis René Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, AM. J. JURIS., Vol. 33, 123-159 (1988). This article was adapted from a presentation at the International Conference on the Holocaust and Genocide, Tel-Aviv, Israel, June 1982.

106. Brought into fashion by the Bush administration, the concept of "world order" as an organizing dimension of inquiry and as a normative goal of global 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* (Harvard University Press) (1966) and the large body of writings of Richard A. Falk and Saul H. Medlovitz. For works by this author, who was an original participant in the World Law Fund's World Order Models Project, see LOUIS RENÉ BERES AND HARRY R. TARG, *CONSTRUCTING ALTERNATIVE WORLD FUTURES: REORDERING THE PLANET* (Cambridge, MA: Schenkman Publishing Co., 1977); see also LOUIS RENÉ BERES AND HARRY R. TARG, EDS., *PLANNING ALTERNATIVE WORLD FUTURES: VALUES, METHODS AND MODELS* (Prager Publisher) (1975); see also LOUIS RENÉ

East be determined without regard for Palestinian claims regarding human rights and self-determination, it *does* suggest that these claims be balanced against comparably important expectations for area-wide peace and stability. In this connection, it must also be recalled that such expectations would impact all pertinent populations, Palestinians as well as Israelis; that the consequences of diminished regional security (including nuclear war) could harm everyone, perhaps even irretrievably.