



After the Gaza War: Why Palestine Would Be a Lawless and Militarized State

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EXECUTIVE SUMMARY: Despite compelling logical and historical arguments against a two-state solution, louder and louder demands for a Palestinian state are being voiced worldwide. In response, Israel and its allies should remind global governments and populations that “Palestine” has no intention of ever living peacefully alongside Israel, but intends instead to replace the Jewish State in orchestrated and increasingly violent increments. Any pre-independence Palestinian commitments to remain demilitarized could quickly and even legally be undermined.

Once again, disparate voices are urging a “two-state solution” to the Israel-Palestinian conflict. For the most part, these urgings are either manipulative or naive, but the danger they pose for Israel is existential: *Palestine would not coexist with the sovereign State of Israel, but would plan to replace Israel.* In essence, the two-state position advocates that an Arab state of Palestine be constructed upon the ruins of Israel.

It is a position that openly displays criminal intent or *mens rea* toward Israel. It is unambiguously a one-state solution. It is a “final solution.”

Other legal and practical difficulties are associated with Palestinian statehood. A core difficulty would lie in deliberate Palestinian disregard of all pertinent jurisprudential standards. Even if an expanding number of existing states argue for an “official” recognition of “Palestine,” these approvals would not be legally

binding. According to the *Convention on the Rights and Duties of States* (1934) – aka the governing “Montevideo” treaty on statehood – specific criteria must be met by nascent or aspiring states. For the case at hand, the case of “Palestine,” these standards do not include recognition.

In principle, declarations of support for Palestinian self-determination might not be unreasonable if the Palestinian side were sincerely committed to a two-state solution. But while Fatah and Hamas are very much at odds, they agree on one fundamental point. That is the long-ritualized mantra that Israel’s existence represents an intolerable abomination to *Dar al-Islam* (the world of Islam) and can never be anything more than “Occupied Palestine.”

The states in world politics that seek a two-state solution are effectively urging the creation of an irredentist terror state. This advocacy position – one oriented towards Israel’s violent replacement by a protracted criminal insurgency – originally stemmed from a diplomatic framework known as the *Road Map for Implementation of a Permanent Solution for Two States in the Israel-Palestinian Dispute*. Together with a Palestinian refusal to reject the “Phased Plan” (Cairo) of June 1974 and an associated no-compromise jihad to “liberate” all of “Occupied Palestine” in increments, the Road Map exposed an overlooked danger to Israel: Those well-intentioned states favoring statehood were misled by overly optimistic or flagrantly contrived hopes for Palestinian “demilitarization.”

On June 14, 2009, Israeli Prime Minister Benjamin Netanyahu agreed to accept a Palestinian state, but made any such agreement contingent on Palestinian “demilitarization.” He said: “In any peace agreement, the territory under Palestinian control must be disarmed, with solid security guarantees for Israel.” What Netanyahu failed to note was that there can be no “solid security guarantees for Israel.” A new state of Palestine could 1) easily evade any pre-independence promises made to Israel with impunity; or 2) fatally undermine such promises lawfully. Understandably, following the October 7, 2023 barbarisms, Netanyahu (restored to the premiership) no longer has any faith in Palestinian “security guarantees.”

Furthermore, as a fully sovereign state, Palestine might not be bound by pre-independence agreements even if the compacts were to include UN and/or US

reassurances to the contrary. This argument applies even though unrestricted Palestinian claims of statehood could never satisfy the amply codified expectations of authoritative international law. It would be the likely Palestinian argument even though Palestine would have garnered no legal entitlement to any rights of treaty termination.

There would be additional legal problems. Because authentic treaties can be binding only upon states, any agreement between a non-state Palestinian authority and the sovereign State of Israel can have little tangible effectiveness. But what if the government of Palestine were willing to adhere to "peremptory" (fundamental) legal expectations for states – that is, to consider itself bound by its pre-state, non-treaty agreements?

Even in such relatively favorable circumstances, the government of Palestine could retain ample legal pretext to identify grounds for lawful treaty termination. It could, for example, withdraw from the agreement because of what it would regard as a "material breach." This would be an alleged violation by Israel that credibly undermined the object and/or purpose of the agreement.

Other Palestinian manipulation options could arise. To wit, Palestine could point towards what international law calls a "fundamental change of circumstances" (*rebus sic stantibus*). If a Palestinian state were to declare itself vulnerable to previously unforeseen dangers, perhaps from forces of other Arab armies, it could lawfully end its previously binding commitment to remain demilitarized.

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

Any treaty or treaty-like agreement is void if, at the time it was entered into, it conflicts with a "peremptory" rule of general international law - a *jus cogens* rule accepted and recognized by the international community of states as one from which no derogation is permitted. Because the right of all sovereign states to maintain

military forces essential to self-defense is certainly such a rule, Palestine, depending upon its particular form of constitutive authority, could arguably be within its right to abrogate any arrangement that had "forced" its demilitarization.

Thomas Jefferson wrote about obligation and international law. While affirming that "Compacts between nation and nation are obligatory upon them by the same moral law which obliges individuals to observe their compacts...", he also acknowledged that "There are circumstances which sometimes excuse the nonperformance of contracts between man and man; so are there also between nation and nation." Specifically, Jefferson said that if performance of contractual obligation becomes "self-destructive" to a party, "...the law of self-preservation overrules the law of obligation to others."

Historically, demilitarization has been a legal remedy applicable to "zones," not to whole states. This could offer a new state of Palestine yet another legal ground upon which to evade compliance with its pre-independence commitments to demilitarization. It could simply be alleged that these commitments are inconsistent with traditional or Westphalian bases of authoritative international law, rudiments found in treaties and conventions, international custom, and the "general principles of law recognized by civilized nations." These commitments, the argument would stipulate, would not be legally binding.

In making its strategic and legal choices, Israel should draw no comfort from any purportedly legal promise of Palestinian demilitarization. If the government of a new state of Palestine should choose to invite foreign armies and/or terrorists onto its territory (possibly after the original government authority is displaced or overthrown by even more militantly Islamic, anti-Israel forces), it could do so without practical difficulties and without violating international law.

Prevailing plans for Palestinian statehood are still built upon the moribund Oslo Accords, ill-founded agreements that were undermined and destroyed by persistently egregious violations by the Arab side. The basic problem with the Oslo Accords that underpinned those violations should now be apparent. On the Arab side, Oslo-mandated expectations were never anything more than a cost-effective step toward the dismantling of Israel. On the Israeli side, these expectations were

taken, more or less, as a promising way to avert Palestinian terrorism and prevent catastrophic Arab state aggressions.

This asymmetry in expectations, never acknowledged by the UN, enhanced Arab power while it weakened and degraded Israel. Even now, genocidal Palestinian calls to "slaughter the Jews" (more recently phrased as calls for "Palestine from the river to the sea") have failed to dampen international enthusiasm for a new criminal state. Much of the "international community" hopes to midwife the birth of such a state while refusing to acknowledge that state's openly declared genocidal intentions.

What does this mean for any alleged Palestinian demilitarization "remedy" and for Israeli security? Above all, it signals that Israel should make rapid and far-reaching changes in the manner by which it conceptualizes the policy continuum of cooperation and conflict. Israel must desist in wishful thinking and recognize the zero-sum calculations of its enemies. After the Gaza War, this means acknowledging the force-multiplying calculations of Hamas and Iran.

Understood more specifically in terms of international law and world order, this could also mean an Israeli willingness to accept the preemptory right and obligation of "*anticipatory self-defense*."

The Arab world and Iran still have only a "one-state solution" in mind for the Middle East. It is a "solution" that incrementally eliminates Israel altogether. Corroboratively, "official" maps of "Palestine" show an already extant Arab state in all of the West Bank (Judea/Samaria), all of Gaza, and all of Israel.

These maps exclude references to any indigenous Jewish population and include the holy sites of only Christians and Muslims. An official cartographer, Khalil Takauji, was commissioned by the Palestinian Authority (PA) to design and locate a Palestinian Capitol Building. This was drawn by Takauji on the Mount of Olives in Jerusalem, directly on top of an ancient Jewish cemetery.

On September 1, 1993, Yasser Arafat clearly affirmed that the Oslo Accords would be an intrinsic part of the PLO's 1974 Phased Plan for Israel's destruction: "The agreement will be a basis for an independent Palestinian State, in accordance with the Palestinian National Council Resolution issued in 1974. This PNC Resolution calls for "the establishment of a national authority on any part of Palestinian soil from

which Israel withdraws or is liberated." On May 29, 1994, Rashid Abu Shbak, then a senior PA security official, remarked ominously: "The light which has shone over Gaza and Jericho will also reach the Negev and the Galilee."

Since these declarations, nothing has changed in Palestinian definitions of Israel and "Palestine." This is true for the current leadership of both Hamas and the Palestinian Authority. It should make no difference to Israel whether one terror group or the other is in power.

In a sermon presented on PA Television on December 12, 2014, and in the presence of PA President Mahmoud Abbas, Mahmoud al-Habbash, the Supreme Sharia Judge and Abbas's advisor on Religious and Islamic Affairs, said: "All of this land will return to us, all our occupied land, all our rights in Palestine - our state, our peoples' heritage, our ancestors' legacy - all of it will return to us, even if it takes time."

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

But back to basics. A presumptively sovereign Palestinian state could lawfully abrogate its pre-independence commitments to demilitarize. The Palestinian Authority has been guilty of multiple material breaches of Oslo and of "grave breaches" of the law of war. Both the PA and Hamas remain unwilling to rescind their genocidal calls for Israel's annihilation.

When he accepted the idea of a Palestinian state that had formally agreed to its own demilitarization, Benjamin Netanyahu believed he had taken a reasonable step towards reconciliation. But the Palestinian leadership and their allies in Iran will never accept or even consider any Israel-proposed idea of "limited" Palestinian statehood, particularly a state that would lack the core prerogatives of national self-defense. Whether Jerusalem likes it or not, this means that if Israel ever accepts a Palestinian state, it will be accepting an intransigent enemy endowed with all the normally unhindered military rights of sovereignty.

This does not mean Israel will have no choice but to surrender to a future "Palestine," but that Jerusalem should fashion its post-Gaza War security policies with fact-based expectations. Among other things, this means Israel's leaders will need to assess the existential threat of Palestinian statehood as part of a larger strategic whole; that is, in tandem with the rapidly expanding perils of catastrophic conventional or unconventional war. More precisely, this means a comprehensive analytic focus on plausible synergies between Hamas/Iranian aggressions and Israel's problematic nuclear doctrine. To do anything else would be to seek justification for the immutably discredited promises of Palestinian "demilitarization."

International law is not a suicide pact. Rather than pass from one untenable position to another, Israel must understand that a two-state solution can quickly become a final solution. Israel has no moral or legal obligation to carve an irredentist enemy state out of its own still-living body.

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