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The Limits of Recognition: "Palestine", History, and International Law

by Prof. Louis René Beres

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EXECUTIVE SUMMARY: Though an increasing number of states plan to recognize a Palestinian state, no such action—even in large numbers—can confer sovereignty. Under international law, statehood is "independent of recognition by the other states." Such juridical status is based on *Montevideo Convention* (1933) requirements of (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states. In the specific matter of Israel, recognizing a Palestinian state would undermine a core provision of the Oslo Accords and corollary Arafat-Rabin commitments not to alter the status of territory prior to formal agreement on permanent status. Such premature recognition would also be at odds with the status of the EU and other states as witnesses to the Oslo Accords, and with the multiple endorsements of those Accords expressed in UN resolutions. Acts of recognition in this matter would prejudge the outcome of negotiations that were never completed because of relentless Palestinian terrorism, and would violate the Natural Law origins of international law.

All state recognitions of "Palestine" to date have failed to meet even a single one of the four *Montevideo Convention* requirements. Those national governments now expressing their support for the sovereignty for "Palestine" are effectively welcoming a lawless aggressor state into the community of nations. Over time, this terror-state could become an existential hazard for Israel, directly and/or in

collaboration with other irredentist states. *Ipso facto,* it could also undermine international law generally.

Leaders of every ideological stripe of the "nonmember observer state" of Palestine have long displayed and continue to display "criminal intent" (*mens rea*) toward Israel. Would this lawless behavior be reduced or better controlled in a Palestinian state? What if the new Arab sovereignty were "demilitarized?"

There is a clear answer to this question. *A fully sovereign state of "Palestine" could evade any pre-independence security promises made to Israel, including those made in alleged good faith.* Because treaties are binding only on states, any agreement between a non-state Palestinian authority and a sovereign State of Israel would have no foreseeable effectiveness.

This would be the case even if the "government of Palestine" were willing to consider itself bound by its own pre-state assurances. Even in such circumstances, the government of Palestine could retain legal grounds to terminate the agreement. For example, it could withdraw from the pact on account of a supposed "material breach." In all likelihood, such withdrawal would stem from a supposed violation by Israel that had "undermined the object and/or purpose of the agreement."

Multiple opportunities for Palestinian manipulation would arise. Palestinian decision-makers could point toward 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 even to forces of other Arab armies or jihadist insurgencies, it could lawfully end its original commitment to remain demilitarized. A new state of Palestine could also point to "errors of fact" or "duress" as permissible grounds for agreement termination.

On its face, any treaty or treaty-like agreement is void if, at the time of entry into force, 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 sovereign states to maintain military forces essential to self-defense is precisely such a rule, Palestine could credibly argue its right to abrogate any arrangement that had "forced its demilitarization."

In the 18th century, US president 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 simultaneously 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 continued, if performance of contractual obligation becomes "self-destructive" to a party, "...the law of self-preservation overrules the law of obligation to others."

A presumptive Palestinian state could lawfully abrogate any pre-independence commitments to Israel to demilitarize. Recent declarations of recognition by France, the UK and other major states have no legal bearing on the creation of such a state. On the contrary, these declarations directly undermine the authority of law-based international relations, both generally and with particular reference to Israel.

In the final analysis, Jerusalem needs to assess the existential threat of Palestinian statehood as part of a much larger strategic whole; that is, in tandem with the continuously intersecting perils of conventional and unconventional war. This points to a comprehensive analytic focus on potential synergies between enemy state aggressions and Israel's nuclear doctrine. Notwithstanding Israel's recent victories over Iran, Hamas and Hezbollah, Israeli leaders need to calibrate incremental shifts from "deliberate nuclear ambiguity" to "selective nuclear disclosure." Though recent declarations of national support for Palestinian statehood can be countered on a legal level, even a non-state "Palestine" would remain intolerable.

International law is not a suicide pact. Israel has no legal obligation to carve a new enemy state aggressor from its own still-living body. Despite being expressed in stirring rhythms of high moral authority, the recent recognitions of "Palestine" by major states avoid larger justice issues altogether.

Assigning formal statehood to a violence-based entity that openly seeks the total destruction of an existing state violates both justice and logic. In the case of Israel and the Palestinians, such assignment is wrongheaded on several levels and signals an evident contradiction in terms. Instead of accepting *ad hoc* policy prescriptions drawn from non-legal sources, the community of states will need to

display good faith (a basic expectation of the *Vienna Convention on the Law of Treaties*) by upholding law-based rules.

Under the British Mandate, in confirmation of decisions made at the San Remo peace conference of April 1920, all of Palestine was reserved for the establishment of a "Jewish national home." In 1922, though no part of mandatory Palestine had ever been designated for the creation of another Arab state, Britain illegally carved Transjordan out of 78% of its mandatory territory. Transjordan became Jordan in 1949, one year after the declaration of the State of Israel. On May 15, 1948, one day after the State of Israel was declared by David Ben-Gurion in Tel-Aviv, Azzam Pasha, Secretary General of the Arab League, forecast the war being planned by combined Arab forces: "This will be a war of extermination and a momentous massacre."

The later UN partition resolution (1947) included only 22% of the lands originally pledged to establish a Jewish national home. In the interests of a peaceful start, Jewish national authorities accepted the illegally reduced land mass (essentially half of the residual one-fifth) in exchange for establishing a Jewish state. From the beginning, this immediately beleaguered state, less than half the size of America's Lake Michigan, had to endure with virtually no strategic depth.

There is one last critical observation. In view of continuing misinformation suggesting Israel's alleged displacement of a pre-existing Arab state, current issues concerning Palestinian statehood and the disposition of Gaza should be understood in an accurate historical context. At absolutely no time in history has there been a Palestinian state.

Prof. Louis René Beres was educated at Princeton (Ph.D., 1971) and is the author of many books and scholarly articles dealing with international law, nuclear strategy, nuclear war, and terrorism. In Israel, Prof. Beres was Chair of Project Daniel (PM Sharon). His 12th and latest book is Surviving Amid Chaos: Israel's Nuclear Strategy *(Rowman & Littlefield, 2016; 2nd ed., 2018).*