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Why the Oslo Accords Should be Abrogated by Israel

Louis René Beres*

The Oslo Accords between Israel and the Palestine Liberation Organization ("PLO") violate international law.¹ Israel, therefore, is now obligated to abrogate these nontreaty agreements.² A comparable argument could be made regarding PLO obligations, but this would make little jurisprudential sense in light of that nonstate party's intrinsic incapacity to enter into a legal arrangement with Israel.³

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1. Oslo I is generally known as the Declaration of Principles. Israel and the PLO concluded and signed Oslo I on August 19, 1993 and resigned it in Washington, D.C. on September 13, 1993. Declaration of Principles on Interim Self-Government Agreements, Sept. 13, 1993, Isr.-Palestine, 32 LL.M. 1525. The parties signed Oslo II, the Interim Agreement, in Washington on September 28, 1995. For a complete compendium of the documentary record, up to the signing of Oslo II, see INSTITUTE FOR PALESTINE STUDIES, *THE PALESTINIAN-ISRAELI PEACE AGREEMENT* (rev. 2d ed. 1994). An integral part of the Oslo Accords now includes the Protocol Concerning the Redeployment in Hebron, which the parties initialed on January 15, 1997. Protocol Concerning the Redeployment in Hebron, Jan. 15, 1997, Isr.-PLO <<http://www.jpost.com/archive/15.Jan.1997/news/article-8.shtml>> (in accordance with the provisions of the Interim Agreement and, in particular, Article VII of Annex I to the Interim Agreement, both parties agreed on this Protocol for the implementation of the redeployment in Hebron).

2. Even if these agreements were authentic treaties, they would not be valid or binding. According to the Vienna Convention on the Law of Treaties, a treaty is always subject to peremptory expectations: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344 [hereinafter Vienna Convention]. According to Article 53 of this Convention, "A peremptory norm of general international law is a norm recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* This article goes on to consider *why* the Oslo Accords are in violation of pertinent peremptory norms.

3. Augmenting this incapacity is a related problem: the unequal obligations imposed

Taken by itself, the fact that the Oslo accords do not constitute authentic treaties under the Vienna Convention⁴ — because they link a state with a nonstate party — does not call for abrogation. But as the nonstate party in this case just happens to be a terrorist organization⁵ whose leaders *must be punished*⁶ for their

by law on nonstate parties to agreements. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). In *Tel-Oren*, the plaintiffs were Israeli survivors and representatives of persons murdered in a terrorist bus attack in Israel in 1978. *Id.* at 775. In a concurring opinion, 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." *Id.* at 776. This suit for compensatory and punitive damages named the PLO, as well as the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America as defendants. *Id.* at 775. What this means, for the subject at hand - the lack of validity of the Oslo Accords under international law - is that the Palestine Authority ("PA") that is the nonstate party to Oslo I and II *cannot be held jurisprudentially to the same standards of accountability as the State of Israel.*

4. According to article 2(a) of the Vienna Convention on the Law of Treaties, a treaty is always an international agreement "concluded between States." See Vienna Convention, *supra* note 3, art. 2(a), at 681.

5. See REPORT OF THE COMMITTEE ON INTERNATIONAL RELATIONS HOUSE OF REPRESENTATIVES ON H.R. 1561 TOGETHER WITH MINORITY AND ADDITIONAL VIEWS, H.R. REP. NO. 104-128(I), at 403 (1995) (reaffirming the United States policy that no officer or employee of the United States Government shall negotiate with the PLO until the PLO renounces the use of terrorism). Regarding the criminal responsibility of this terrorist organization for crimes committed under the direction of Yasser Arafat, the legal principle is established unambiguously that orders pursuant to "domestic law" (in this case, by analogy, to PLO "law") are no defense to violations of international law. See Vienna Convention, *supra* note 3, art. 27, at 339 (noting that a party may not invoke the provisions of internal law as a justification for its failure to perform a treaty). See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 3.2 (1965) (observing the domestic law of a state is not a defense to a violation of international law). On the principle of command responsibility (*respondeat superior*) as it pertains to Arafat and the PLO terrorist organization, see *in re Yamashita*, 327 U.S. 1, 14-16 (1945), High Command Case, 10th Trials of War Criminals Before the Nuremberg Military Tribunals under Control Law No. 10, at 3 (Oct. 27-28, 1948), William V. O'Brien, *The Law of War, Command Responsibility and Vietnam*, 60 GEO. L.J. 605, 619-29 (1971), and Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973). The direct legal responsibility of Yasser Arafat for crimes of his terrorist organization is altogether clear. See, e.g., OFFICE OF THE JUDGE ADVOCATE GENERAL, DEP. OF ARMY, REPORT ON IRAQ, WAR CRIMES (DESERT SHIELD/DESERT STORM) 13 (1992) [hereinafter ARMY WAR CRIMES REPORT] (holding Saddam Hussein responsible for war crimes due to the widespread and methodical nature of Iraqi violations of international law).

6. See *Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th sess., Supp. No. 30, at 78. U.N. Doc. A/9030 (1973). Another resolution affirms that a refusal to cooperate in the arrest, extradition, trial and punishment of persons guilty of war crimes is contrary to the United Nations Charter "and to generally recognized norms of international law." G.A. Res. 2840, U.N. GAOR, 26th sess.,

egregious crimes,⁷ any agreement with this party that offers rewards rather than punishments is entirely null and void. Significantly, in view of the *peremptory* expectation known in law as *Nullum crimen sine poena* ("No crime without a punishment"),⁸ the state party in such an agreement — here the State of Israel — violates international law by honoring the agreement.

According to Principle I of the binding Nuremberg Principles: "Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment."⁹ It is from this principle, which applies

Supp. No. 29, at 88, U.N. Doc. A/8429 (1971). As to the responsibility of states toward Geneva Law in particular, common Article 1 of the Geneva Conventions addresses the obligation of all signatories "to respect and to ensure respect for the Conventions in all circumstances." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 1, 6 U.S.T. 3516, 3578, 75 U.N.T.S. 287, 288. Common Article 146 of the Geneva Civilian Convention recognizes that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches . . ." *Id.* art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386. *See also* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, U.N. GAOR, 23d sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

7. International law presumes solidarity between all states in the fight against egregious crimes. *See* THE INSTITUTES OF GAIVS AND JUSTINIAN, THE TWELVE TABLES AND CXVIII AND CXXVII AND NOVELS C.T. (Lambert Mears trans., Wm. W. Gaunt & Sons, Inc. 1994) (1882); 2 HUGONIS GROTII, DE JURE BELLI ET PACIS LIBRE TRES, 238-338 (William Whetwell trans., Cambridge Univ. Press n.d.) (1855); E. De Vattel, *Le Droit Des Gens*, reprinted in CLASSICS OF INTERNATIONAL LAW 197-212 (James Brown Scott ed., 1910). The case for universal jurisdiction over egregious crimes, which derives from the presumption of solidarity, is found in the four Geneva Conventions of August 12, 1949. *See* ARMY WAR CRIMES REPORT, *supra* note 6, at 1 (listing the four Geneva Conventions of August 12, 1949 as: Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War). These Conventions unambiguously impose upon the High Contracting Parties the obligation to punish certain "grave breaches" of their rules. The term "grave breaches" applies to certain infractions of the Geneva Conventions of 1949 and Protocol I of 1977. *See* Protocols Additional to the Geneva Convention of 12 August 1949, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocols].

8. THE HAMMURABI CODE (Chilperiz Edwards trans., Kennikat Press 1971) (1904) and REUVEN YARON, THE LAWS OF ESHNUNNA (1969) contain the earliest expressions of *Nullum crimen sine poena*, although there also exists the even-earlier Code of Ur-Nammu (c. 2100 BCE) and, of course, the law of exact retaliation or *Lex Talionis* presented in three separate passages of the Torah. It follows that the Rabin/Peres/Netanyahu governments' willful indifference to binding legal expectations of "No crime without a punishment" is ironic because that peremptory principle has prominent Jewish origins.

9. The U.N. General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal. *See Affirmation of the Principles of International Law Recognized by The Charter of the Nurem-*

with particular relevance to *Hostes humani generis*¹⁰ ("Common enemies of humankind") and originates in three separate passages of the Jewish Torah, that each state derives its obligation to pursue and prosecute terrorists. Hence, for Israel to honor agreements with terrorists, requiring the release of thousands of terrorists, is to dishonor the very meaning of international law.

Is Yasser Arafat personally a terrorist? In the United States case of *Klinghoffer v. S.N.C. Achille Lauro*,¹¹ the court answered in the affirmative.¹² In the Israeli courts, Shimon Prachick, an officer in the Israel Defense Forces ("IDF") reserves, and Moshe Lorberaum, who was injured in a 1978 PLO bus bombing, filed a petition in May 1994 to charge Yasser Arafat with terrorism. The petition, calling for Arafat's arrest, noted that Arafat, *prima facie*, was responsible for numerous terrorist attacks in Israel and abroad. These acts included murder, airplane hijacking, hostage-taking, letter-bombing and hijacking of ships on the high seas. Dr. Ahmad Tibi, Arafat's most senior advisor, confirmed the petitioners' allegation of Arafat's direct personal responsibility for terrorism. On July 13, 1994, Dr. Tibi stated that "[t]he person responsible on behalf of the Palestinian people for everything that was done in the Israeli-Palestinian conflict is Yasser Arafat . . . and this man shook hands with Yitzhak Rabin."¹³

Terrorism¹⁴ is not the only crime in which Arafat and many of the released Palestinian prisoners are complicit. Arafat and the released prisoners committed other related Nuremberg-category crimes, including crimes of war¹⁵ and crimes

berg Tribunal, G.A. Res. U.N. GAOR, 6th Comm., 1st Sess., 46th plen. mtg. at 1144, U.N. Doc. A/236 (1946). General Assembly Resolution 177 (II) followed this affirmation of 1946. G.A. Res. 177(II), U.N. GAOR, 2d Sess., 123d plen. mtg. at 111-12, U.N. Doc. A/519 (1947). Resolution 177(II) directed 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." *Id.* The principles formulated are known as the *Principles of International Law Recognized in the Charter of Nuremberg and in the Judgment of the Tribunal*. U.N. GAOR, 5th sess., Supp. No. 12, at 11, U.N. Doc. A/1316 (1950).

10. See *Research in International Law: Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 439, 566 (1935) ("a pirate est hostes humani generis") (quoting *King v. Marsh*, 3 Bulstr. 27, 81 E.R. 23 (1615)).

11. *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990).

12. See *id.* at 857 (noting that the United States does not give diplomatic relations to the PLO).

13. See Joel Greenberg, *Israel Bars Palestinian officials From Gaza*, N.Y. TIMES, July 14, 1994, at A7.

14. For those readers who wish to probe the authoritative inventory of particular offenses that comprise the crime of terrorism, see European Convention on the Suppression of Terrorism, Nov. 10, 1976, Europ. T.S. No. 90, 15 I.L.M. 1272 (1976).

15. 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 all belligerent calculations. See Hague Convention (No. IV) Respecting Laws and Customs of War on

against humanity.¹⁶ In this connection, the reader should recall that units of the Palestine Liberation Army ("PLA") served with Saddam Hussein's forces in occupied Kuwait. Under the legal principle of *respondeat superior* ("Let the Master Answer"),¹⁷ the PLA and Yassar Arafat are personally responsible for multiple crimes of extraordinary horror and ferocity.¹⁸ Not only were these offenses an affront to international law, but many of the terrorists whom Israel is now releasing from its jails in furtherance of the Oslo Accords are immediately accepting high positions in the Palestine Authority's security forces.

Even if the PLO was *not* a terrorist organization, the Oslo Accords would still represent an agreement of unequal obligations, where the PLO, a nonstate party, would not be held to the same standards of accountability under international law.

Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force, Jan. 26, 1910) (emphasis added).

16. For authoritative definition of crimes against humanity, see Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279.

17. This principle is the converse of the doctrine of "superior orders," and is designed to ensure that proper obedience to authority by subordinates entails no criminal consequences. The superior's responsibility extends to situations where no affirmative orders to commit crimes have been issued. *Respondeat Superior* is defined as follows:

Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. Under this doctrine master is responsible for want of care on servant's part toward those to whom the master owes duty to use care

BLACK'S LAW DICTIONARY 1311-12 (6th ed. 1990). Understood in terms of pertinent international law, the general principle is this: A superior officer is normally liable for war crimes committed by persons under his command provided that he gave the relevant order or that he knew of a planned violation and failed to prevent it. Moreover, a commanding officer may be personally liable for war crimes after the events if he knew of the committed acts but failed to institute proceedings against the perpetrators. See Geneva Protocols, *supra* note 8, art. 86-87; *In re Yamashita*, 327 U.S. 1, 14-16 (1945); INGRID DETTER DE LUPIS, *THE LAW OF WAR* 359 (1987). Paragraph 501 of the *Field Manual* issued by the United States Department of the Army, based on the judgment of Japanese General Tomayuki Yamashita, stipulates that any commander who had actual knowledge, or should have had knowledge, that troops or other persons under his control were complicit in war crimes and failed to take necessary steps to protect the laws of war *was guilty of a war crime*. DEP'T OF ARMY, *FIELD MANUAL* 27-10, *THE LAW OF LAND AND WARFARE* §§ 501, 510 (July 18, 1956) [hereinafter FM 27-10] (emphasis added). See JOHN ALAN APPLEMAN, *MILITARY TRIBUNALS AND INTERNATIONAL CRIMES* 349-51 (1954). Paragraph 510 denies the "act of state" defense to such alleged criminals. It provides that, although a person who committed an act constituting an international crime may have acted as head of state or as a responsible government official, he is not relieved, thereby, from responsibility for that act. FM 27-10, *supra*, ¶ 510. This paragraph is drawn from Principle III of the Nuremberg Principles, *supra* note 10, and in the formulation of these principles by the International Law Commission. See *Incorporation of the Principles of the Nurnberg Charter into International Penal Law*, 1946-47 U.N.Y.B. 254, 260-61, U.N. Sales No. 1947.L18.

18. Cf. ARMY WAR CRIMES REPORT, *supra* note 6, at 13 (attributing liability for atrocities committed by Iraq to Saddam Hussein).

A recent federal court decision in the United States reaffirmed the premise that agreements between nonstate and state parties impose asymmetrical compliance expectations.¹⁹

Since the PLO *is* a terrorist organization,²⁰ Israel has no right to honor the Oslo Accords' requirement to release convicted PLO members. *No* government, in fact, has the right to lawfully pardon or grant immunity to terrorists who commit criminally sanctionable violations of international law. This limitation derives from a broader prohibition of pertinent peremptory rules, stemming from Higher Law or the Law of Nature, which binds *all* states, including Israel. These claims are identified in Blackstone's *Commentaries*,²¹ which acknowledge that all law "results from those principles of natural justice, in which all the learned of every nation agree . . ."²²

In apprehending and incarcerating terrorists, Israel acted not only for itself, but on behalf of the entire community of states. Moreover, because some of the jailed terrorists committed crimes against other states as well as against Israel, the government in Jerusalem cannot possibly pardon these offenses against other sovereigns. The Jewish State, therefore, possesses absolutely no right to grant immunity for terrorist violations of international law. No matter what is permissible under its own Basic Law and the Oslo Accords, freeing of terrorists is legally incorrect. By freeing terrorists, Israel is guilty of participating in a "denial of justice."

Israel's obligation to abrogate the Oslo Accords, as we have seen, stems from certain peremptory expectations of international law. Apart from such expectations, however, Israel has substantial rights of abrogation. These rights derive from the doctrine of *Rebus sic stantibus*.²³ Defined literally as "So long as conditions remain the same,"²⁴ this *doctrine of changed circumstances* now augments Israel's obligations to cease compliance with Oslo. Under this doctrine, Israel's traditional obligations to the Accords ended promptly when a fundamental change occurred in those circumstances, existing at the effective dates of the accords, which formed a tacit condition of the Accord's ongoing validity.²⁵ This change, of course, involved multiple material breaches by the PLO,²⁶ especially those con-

19. See *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 776 (D.C. Cir. 1984).

20. See *supra* note 6.

21. See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND, OF PUBLIC WRONGS* (William Draper ed., 1900).

22. *Id.* at 66-67.

23. See ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION* 3-55 (1975).

24. See *id.* at 49 n.84 (defining *rebus sic stantibus* as a theory that states in economic terms if changes in conditions are introduced into an optimum arrangement by a constraint which violates one or more of the optimum conditions the other conditions while attainable, are no longer desirable).

25. See Vienna Convention, *supra* note 3, art. 62, at 347.

26. See Justus Weiner, *Hard Facts Meet Soft Law - The Israel-PLO Declaration of Principles and the Prospects for Peace: A Response to Katherine W. Meighan*, 35 VA. J. INT'L L. 931, 949 (1995) (listing PLO violations as failing to amend its charter to take out portions calling for the destruction of Israel, prosecuting Palestinians accused of cooperat-

cerning control of anti-Israel terrorism and extradition of terrorists. In short, because of the profound changes created by the PLO in the very circumstances that formed the cause, motive and rationale for consent, *Rebus sic stantibus* warrants Israeli abrogation of the Accords.

According to Oslo expectations, Arafat should be actively committed to control of anti-Israel terrorism. Yet, as *The Jerusalem Post* correctly pointed out in a mid-March 1996 editorial, "Arafat not only shelters terrorists; he lets them incite, recruit, organize, train, arm, raise funds, and launch operations from areas under his control. This is now indisputable."²⁷

The "head of the snake," admitted former Prime Minister Shimon Peres, "is in Gaza."²⁸ It is in PLO-controlled Gaza that Hamas, allegedly at odds with PLO, is fomenting its terror campaign against Israel.²⁹ Furthermore, the Palestinian security services sustain this Hamas campaign. According to *The Jerusalem Post*:

It was the Hamas leadership in Gaza which decided on terrorist strikes and issued operational orders for the bus bombings. It was in Gaza that the Hamas military organization trained suicide bombers and assembled explosives. It was in Gaza that "the engineer" Yihye Ayyash found shelter until he was killed, and where his successor Mohammed Dief has been living openly. It was in Gaza that Arafat's Preventive Security chief was negotiating with Dief — a close friend — both before and after the first bus bombing. He knew of Dief's involvement in the bombing and did nothing either to detain him or prevent the next outrage.³⁰

Israel's obligation to terminate the Oslo Accords also stems from a related principle of national self-preservation. Under this peremptory norm, a state may unilaterally terminate any agreement following changes in conditions that make performance of the agreement injurious to fundamental rights, especially the rights of existence and independence. Known in law as "rights of necessity,"³¹ this norm was explained with particular lucidity by Thomas Jefferson. In *Opinion*

ing with Israel, establishing PA offices in Jerusalem, failing to confiscate weapons held by Hamas, ignoring prior legislation enacted by Israel in Gaza and Jericho, and enlisting approximately twice the number of police allowed by the Cairo Agreement).

27. *Arafat's "No-Lose" Game*, JERUSALEMPOST, March 14, 1996, at 6.

28. *Id.*

29. In the future, such terrorist campaigns could even take *nuclear* forms. Former Prime Minister Shimon Peres publicly acknowledged this danger when he addressed a Joint Session of the United States Congress on December 23, 1995. Peres stated that "fundamentalism with a nuclear bomb is the nightmare of our age." 141 CONG. REC. H14257 (daily ed. Dec. 12, 1995) (statement of Prime Minister Peres).

30. *Arafat's "No-Lose" Game*, *supra* note 28, at 6.

31. See DAVID, *supra* note 24, at 19 (noting that there is a legal theory, following Hegel, observing that any treaty obligation may be terminated unilaterally following changes in conditions that make performance of the treaty injurious to basic rights). These rights have been summarized in law as "rights of necessity." See *Research in International Law: Law of Treaties*, 29 AM. J. INT'L. L. 666, 1100 (Supp. 1935) (listing additional references regarding rights of necessity and the doctrine of *rebus sic stantibus*).

on the *French Treaties*, written on April 28, 1793, Jefferson stated that when performance, in international agreements, "becomes impossible, nonperformance is not immoral. So if performance becomes self-destructive to the party, the law of self-preservation overrules the laws of obligation to others."³² In that same document, Jefferson also wrote: "The nation itself, bound necessarily to whatever its preservation and safety require, cannot enter into engagements contrary to its indispensable obligations."³³ Israel, the reader should recall, has an "indispensable obligation" to endure.³⁴

How, exactly, do the Oslo accords impair this obligation?³⁵ *The Jerusalem Post* commented on the expected consequences of Oslo II:

[T]he implementation of Oslo II signals the relinquishment of Israel's security control over the territories and the assumption of such control by the PLO. For

32. Thomas Jefferson, *Opinion on the French Treaties*, in THOMAS JEFFERSON WRITINGS 423 (Merrill D. Peterson ed., 1984).

33. *Id.* at 429.

34. Under international law, this obligation may even extend to preemptive use of force against certain enemy states, a use known formally as "anticipatory self-defense." See generally Louis René Beres, *Striking Preemptively: Israel's Post Gulf War Options Under International Law*, in ARMS CONTROL WITHOUT GLASNOST: BUILDING CONFIDENCE IN THE MIDDLE EAST 129 (Israel Council on Foreign Relations 1993); Louis René Beres, *After the Gulf War: Israel, Preemption, and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259 (1991); Louis René Beres, *After the Scud Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L. L. REV. 71 (1992); Louis René Beres, *Israel, Force, and International Law: Assessing Anticipatory Self-Defense*, 13 JERUSALEM J. INT'L. REL. 1 (1991); Louis René Beres, *Israel and Anticipatory Self-Defense*, 8 ARIZ. J. INT'L. & COMP. L. 89 (1991); Louis René Beres and Col. Yoash Tsiddon-Chatto, *Open Forum: Reconsidering Israel's Destruction of Iraq's Osiraq Nuclear Reactor*, 9 TEMP. INT'L. & COMP. L.J. 437 (1995); Louis René Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L. L. 111 (1993); Louis René Beres, *Striking "First": Israel's Post-Gulf War Options Under International Law*, 14 LOY. L.A. INT'L. & COMP. L.J. 1 (1991). For an examination by this author of assassination as a potentially permissible form of anticipatory self-defense by Israel, see Louis René Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321 (1991).

35. It is this writer's judgment that the Oslo Accords are leading not to peace, but to expanded anti-Israel terrorism and to catastrophic (possibly unconventional) regional war. For a fuller account of these views, see Louis René Beres, *Opposing the "Peace Process": Israel, Civil Disobedience, and the Principle of a Higher Law*, 13 ARIZ. J. INT'L. & COMP. L. 117 (1996); Louis René Beres and Zalman Shoval, *On Demilitarizing a Palestinian "Entity" and the Golan Heights: An International Law Perspective*, 28 VAND. J. TRANSNAT'L. L. 959 (1995) [hereinafter Beres and Shoval, *Demilitarizing a Palestinian "Entity"*]; Louis René Beres, *The "Peace Process" and Israel's Nuclear Strategy*, STRATEGIC REV., Winter 1995, at 35; Louis René Beres and Shlomo Gazit, *The Security and Future of Israel: An Exchange*, MIDSTREAM, June/July 1995, at 15; and Louis René Beres and Zalman Shoval, *Why a Demilitarized Palestinian "Entity" Would Not Remain Demilitarized*, STRATEGIC REV., Summer 1995, at 73.

the first time, there will be a large PLO army on the outskirts of Israel's major population centers, and it will be in control of strategic areas which dominate Israel's heartland. Soon, Israel will be able to control neither the influx of Palestinians from refugee camps in neighboring countries nor the importation of arms. To expect such an arrangement to bring anything but unrest, terrorism and ultimately war, is to live in a world of make believe.³⁶

To better understand this "world of make believe," it is instructive to consider the Charter of Hamas, another terrorist organization that is central to current difficulties in implementing "peace." According to this Charter:

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 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 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.³⁷

Regarding relationships with the PLO, the Hamas Charter offers the following:

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 us³⁸

On the primacy of hatred toward *Judaism*, not Israel (i.e., Israel is despised *because it is Jewish*), the Hamas Charter states: "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.'³⁹

After the assassination of terrorist Yechya Ayyash, known widely as "The Engineer," Yasser Arafat delivered a eulogy in Dura, near Hebron. Speaking before a large crowd of Hamas supporters, Arafat praised all Palestinian "martyrs,"⁴⁰ in-

36. See *A Palestinian State*, JERUSALEMPOST, Sept. 27, 1995, at 10.

37. Hamas Charter (Aug. 18, 1988) in *ARAB-ISRAELI CONFLICT AND CONCILIATION* 203, 206-07 (Bernard Reich ed., 1995). Hamas is the acronym for the Islamic Resistance Movement, *Harakat Muqawama Islamiyaa*, meaning, literally, "enthusiasm," "zeal," "fanaticism." *Id.* at 203.

38. *Id.* at 209.

39. *Id.* at 210.

40. Jon Immanuel, *Arafat: Israel Responsible for Yihye Ayyash's Liquidation*,

cluding those who had murdered Israeli women and children in schools, buses and homes. Referring to the imminent takeover of Jerusalem from the Jews, Arafat was quoted at a meeting of Arab dignitaries as saying, "You understand that we plan to eliminate the State of Israel and establish a purely Palestinian state. I have no use for Jews; they are and remain Jews."⁴¹ Arafat further announced in an appearance before Palestinian forces on September 24, 1996, that, "[t]hey will fight for Allah, and they will kill and be killed Palestine is our land and Jerusalem is our capital."⁴²

At a eulogy delivered on June 15, 1995, for Abed Al Karim Al Aklok, a former PLO official, Arafat remarked, "We are all seekers of martyrdom in the path of truth and right toward Jerusalem the capital of the State of Palestine We will continue this difficult *Jihad*, this long *Jihad*, this arduous *Jihad*,⁴³ in the path of martyrs — via death — the path of sacrifice"⁴⁴ On January 30, 1996, at the Grand Hotel in Stockholm, Sweden, Arafat delivered a speech to forty Arab diplomats on "The Impending Total Collapse of Israel." Said Arafat, "We Palestinians will take over everything, including all of Jerusalem All the rich Jews who will get compensation will travel to America." Arafat continued, "We of the PLO will now concentrate all our efforts on splitting Israel psychologically into two camps. Within five years we will have six to seven million Arabs living on the West Bank and in Jerusalem *You understand that we plan to eliminate the State of Israel and establish a purely Palestinian State I have no use for Jews; they are and remain Jews. We now need all the help we can get from you in our battle for a united Palestine under total Arab-Moslem domination.*"⁴⁵

JERUSALEM POST, Jan. 8, 1996, at 1.

41. Alan Bergstein, *Arafat Does Not Deserve Peace Prize*, SUN-SENTINEL (FT. LAUDERDALE, FL.), April 22, 1996, at 10A.

42. State of Israel, *Prime Minister's Office Issues List of Major PLO Violations* (Oct. 24, 1996) (citing MAARIV, Oct. 4, 1996) (on file with the *American University Journal of International Law and Policy*). This on-line report additionally asserts that Arafat "has repeatedly called for *jihad* (holy war) against Israel, praised prominent terrorists . . . and encouraged acts of violence against Israelis." *Id.*

43. See ROBERT S. WISTRICH, ANTISEMITISM: THE LONGEST HATRED 222-39 (1991) (discussing *Jihad* ("holy war")). 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 ARAB THEOLOGICALS ON JEWS AND ISRAEL: EXTRACTS FROM THE PROCEEDINGS OF THE FOURTH CONFERENCE OF THE ACADEMY OF ISLAMIC RESEARCH 9 (D.F. Green ed., 3d ed. 1976) [hereinafter EXTRACTS], cited in WISTRICH, *supra*, 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.'" See EXTRACTS, *supra*, at 51.

44. See *Arafat Speaks to the Arabs*, CAUCUS CURRENT, Oct. 1995, at 16.

45. See *Arafat Predicts Destruction of Israel*, HEBRON TODAY, Feb. 14, 1996 (emphasis added). See also Avrohom Shmuel Lewin, *Arafat Urges "Destroy Israel"*, JEWISH PRESS, Feb. 9-Feb. 15, 1996, at 1.

Regarding the Oslo Accords and Israel's vulnerability to war,⁴⁶ Israeli security is now increasingly dependent upon nuclear weapons and strategy.⁴⁷ Faced with a codified and substantial loss of territories — a loss that might still be enlarged by transfer of the Golan Heights to Syria⁴⁸ — the Jewish State will have to decide on how to compensate for its diminished strategic depth.⁴⁹ While this shrinkage does not necessarily increase Israel's existential vulnerability to unconventional missile attack, it certainly does increase that state's susceptibility to attacking ground forces and to subsequent enemy occupation. Moreover, enemy states will almost certainly interpret the loss of strategic depth⁵⁰ as a significant weakening of Is-

46. It should be understood that this vulnerability strongly correlates with a vulnerability to *genocide*. War and genocide need not be mutually exclusive. Rather, war might well be the means whereby genocide is operationalized. According to Article II of the Genocide Convention, 1951, genocide includes any of several acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" See Convention on the Prevention and Punishment of the Crime of Genocide, art II, Dec. 9, 1948, *entered into force* Jan. 12, 1951, 78 U.N.T.S. 277, 280 (1951). It follows 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.

47. See Louis René Beres, *The Argument for Israeli Nuclear Weapons*, 41 MIDSTREAM, May 1995, at 2-6. See also Louis René Beres, *Power and Survival: Why Israel Needs Nuclear Weapons*, 26 INT'L. J. STUDY OF GROUP TENSIONS 21, 21-59 (1996) (noting the reaction and comment by Brigadier General (Res.) Aharon Levran, former Deputy Chief, IDF Intelligence Branch).

48. See Beres and Shoval, *Demilitarizing a Palestinian "Entity"*, *supra* note 36, at 959-71. Zalman Shoval is Israel's former Ambassador to the United States.

49. Regarding the concept of *strategic depth*, this critical issue was addressed as early as June 29, 1967, when a United States Joint Chiefs of Staff ("JCS") Memorandum specified that returning Israel to pre-1967 boundaries would drastically increase its vulnerability. The then Chairman of the JCS, General Earl Wheeler, concluded that for *minimal* deterrence and defense, Israel should retain Sharm el Sheikh and Wadi El Giralí in the Sinai; the entire Gaza Strip; the high ground and plateaus of the mountains in Judea and Samaria (West Bank); and the Golan Heights east of Quneitra. In October 1988, almost ten years ago, 100 retired United States generals and admirals, seven of four-star rank, issued a statement urging Israel not to withdraw from Judea and Samaria. The statement read, in part, as follows:

[T]he Samaritan and Judean high ridges cannot be effectively demilitarized or adequately inspected. If Israel loses its extensive early warning line, it would have virtually no warning of attack To remain strong, Israel must retain the Jordan River as its eastern border. Pressing Israel to withdraw from this line will bring neither peace nor serve America's interests.

See Gail Winston, *Israel's Chief of Staff Cites U.S. Joint Chiefs of Staff on Israel's Defensible Borders*, CAUCUS CURRENT, Sept. 1993, at 25 (quoting the signed, full-page advertisement that appeared in the *Washington Times*).

50. For assessments of strategic depth and Israeli security, see HIRSH GOODMAN & W. SETH CARUS, *THE FUTURE BATTLEFIELD AND THE ARAB ISRAELI CONFLICT* (1990); Yohanan Ramati & Shlomo Baum, *Can Israel Survive the Loss of Judea and Samaria?*, 38 MIDSTREAM, Aug.-Sept. 1992, at 19-21; Edward Saar, *The West Bank and Modern Arms*, 1 NATIV 3, 3-16 (1990); David Bar-Illan, *Why a Palestinian State is Still a Mortal Threat*,

rael's overall defense posture, an interpretation that could lead to great incentives for an enemy to strike first.

Implementation of the Oslo Accords would most certainly sacrifice Israel's strategic depth and result in a Palestinian state. Furthermore, the geostrategic victory of the Islamic world would lead to an Arab and Iranian⁵¹ perception of an ongoing and unstoppable momentum against the Jewish State, a *jihad* -centered perception of military inevitability that would reiterate the policies of war. Recognizing such perceptions, Israel could be forced to take its bomb out of the "basement,"⁵² and/or it could have to accept a greater willingness to launch preemptive strikes against enemy hard targets.⁵³

For their part, certain Arab states⁵⁴ and/or Iran would respond to such Israeli decisions. Made aware of Israel's policy shifts — shifts that would stem from both Israel's Oslo-generated territorial vulnerabilities and from its awareness of enemy perceptions spawned by the Oslo-generated creation of Palestine — these enemy states could respond in more or less parallel fashion. Here, preparing openly for

COMMENTARY, Nov. 1993, at 27-31. See also Beres & Gazit, *supra* note 36, at 15-23 (noting this author's debate with Major General (Res.) Shlomo Gazit, former Chief of the Israel Defense Forces Intelligence Branch).

51. For detailed consideration of the Iranian threat to Israel by this author, see Louis René Beres, *Israel, Iran and Prospects for Nuclear War in the Middle East*, 21 STRATEGIC REV., Spring 1993, at 52-60, Louis René Beres, *Israel, Iran and Nuclear War: A Tactical and Legal Assessment*, SURVEY OF ARAB AFF. (Jerusalem Center for Public Affairs Nov. 1993), and Louis René Beres, *The Iranian Threat to Israel: Capabilities and Intentions: Preliminary Sketches for a Strategic Dialectic*, INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE, Dec. 1995, at 51-61.

52. See Louis René Beres, *Israel's Bomb in the Basement: A Revisiting of "Deliberate Ambiguity" vs. "Disclosure"*, ISRAEL AFF., Autumn 1995, at 112-36.

53. For earlier writings by this author on the impact of a Palestinian state on Israel's nuclear strategy, see Louis René Beres, *The Oslo Accords and Israel's Nuclear Strategy*, GEORGETOWN COMPASS, Winter 1995, at 74, Louis René Beres, *A Palestinian State and Israel's Nuclear Strategy*, CROSSROADS: AN INT'L SOC.-POL. J., at 97-104 (1991), Louis René Beres, *The Question of Palestine and Israel's Nuclear Strategy*, POL. Q., Oct.-Dec. 1991, at 451-60, Louis René Beres, *Israel, Palestine and Regional Nuclear War*, BULL. PEACE PROPOSALS, June 1991, at 227-34, Louis René Beres, *A Palestinian State: Implications for Israel's Security and the Possibility of Nuclear War*, BULL. JERUSALEM INST. W. DEF., Oct. 1991, at 3-10, Louis René Beres, *Israeli Security and Nuclear Weapons*, PSIS OCCASIONAL PAPERS (Graduate Institute of International Studies), 1990, at 400, and Louis René Beres, *After the Gulf War: Israel, Palestine and the Risk of Nuclear War in the Middle East*, 19 STRATEGIC REV., Fall 1991, at 48-55.

54. *Iraq* remains among these enemy states. Iraq has been an active enemy of Israel since the Jewish State's initial drive for independence. That country sent substantial expeditionary forces against Israel in the 1948 War of Independence, the Six Day War (1967) and the Yom Kippur War (1973). During the 1948 War, Iraqi forces entered Transjordan and engaged Israeli forces in Western Samaria. In the aftermath of the 1967 War, Iraqi forces, 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.

nuclearization and aggression against Israel, these states would illustrate certain far-reaching effects of the Oslo Accords. These effects, which are still generally unrecognized, together with other above-listed rationales, provide a fully authoritative basis for permissible abrogation.

For Israel, nuclear weapons are necessary for a variety of interrelated purposes (all of which serve to *prevent* nuclear war). These weapons, however, do not imply that Israeli territorial surrenders are reasonable.⁵⁵ This is largely because Israel could not make effective use of its nuclear weapons in response to the entire range of military threats that might ensue from an Oslo-mandated loss of strategic depth.

Since "ordinary" conventional war would be more probable after its territorial surrenders, the Jewish State would likely need to confine its defensive reactions to conventional forces. As Israel's enemies are aware of this, they could have heightened incentives to initiate belligerency. Here, it is sobering to recall that many of Israel's enemies continue to deny Israel's very existence.⁵⁶ Indeed, even Israel's "friends" in the Middle East, i.e., Egypt and Jordan — states with which it is formally "at peace" — do not include Israel on any of their maps. On these maps, all of the territory from the Jordan River to the Mediterranean Sea is called "Palestine."

Ultimately, even if Palestine does not supplant Israel, the Oslo-mandated creation of a Palestinian state will weaken the Jewish state beyond repair. With such creation, various enemy states, including Iran, could place weapons and launchers in areas very close to Israel's major cities. Recognizing the strategic advantages of such placement, enemy states and their terrorist surrogates could forge formal and informal alignments against the Jewish state, stipulating joint and collaborative actions.

55. See Brig. General (Res.) Aharon Levran, *Nuclear Deterrence at Any Cost*, 9 NATIV 30, 30-36 (1996) (in Hebrew only).

56. The agreements that put an end to the first Arab-Israeli War (1947-1949) were not peace settlements, but 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 March 23, 1949, 42 U.N.T.S. 287 (1949), Israel and Jordan on April 23, 1949, 42 U.N.T.S. 303 (1949), and between Israel and Syria on July 20, 1949, 42 U.N.T.S. 327 (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 the resolutions of the Security Council of 29 May and 15 July 1948." RESOLUTIONS OF THE PALESTINE QUESTION ADOPTED AT THE 437TH MEETING OF THE SECURITY COUNCIL ON 11 AUGUST 1949, U.N. Doc. S/1376, at II (1949). With the exceptions of Egypt and Jordan, an authentic peace treaty has not superseded any of the aforelisted armistice agreements.

AN AFTERWARD ON ISRAELI CITIZEN INVOLVEMENT IN ABROGATING OSLO

Citizens of Israel, in the fashion of citizens of any democratic state, have the right and the obligation to oppose the Oslo Accords with appropriate forms of civil disobedience. Significantly, such right and obligation have prominent roots in the ancient Jewish tradition of a Higher Law.⁵⁷ In this tradition, God is unambiguously the source of all law. Here, law is an aspect of the divine order of the cosmos. The Torah reflects both God's transcendence and immanence. The basis of obligation, which concerns us presently in the context of civil disobedience, inheres in the law's transcendent character.⁵⁸

The right to civil disobedience is well-established in democratic legal theory. Derived from the idea of a Higher Law, this right is more compelling when the state's very survival is being placed at risk by government. Moreover, the right of civil disobedience can become an outright obligation when a government's actions run counter to the Nuremberg Principles.

American history provides an analogous situation. In the years before the Civil War, thousands of American citizens organized an Underground Railroad to assist those fleeing from slavery. At that time, the federal government judged those who took part in this movement as lawbreakers, and often imprisoned them under terms of the Fugitive Slave Act.⁵⁹ Today, however, it is authoritatively recognized that the true lawbreakers of the period were those who had sustained a slavery system, and that every individual who acted correctly to oppose this system had been genuinely law-enforcing. Similar patterns of recognition should now emerge regarding the anti-Oslo movement within Israel.

57. Jewish Law (*Halakhah*) rests upon twin principles: the sovereignty of God and the derivative sacredness of the Person. Both principles, intertwined and interdependent, underlie the argument for civil disobedience in Israel against Oslo. On the importance of the dignity of the Person to the Talmudic conception of law, see SAMUEL BELKIN, *IN HIS IMAGE: THE JEWISH PHILOSOPHY OF MAN AS EXPRESSED IN RABBINIC TRADITION* (1960). From the sacredness of the Person, which derives from each individual's resemblance to divinity, flows the human freedom to choose. The failure to exercise this freedom, which is evident wherever response to political authority is automatic, represents a betrayal of legal responsibility. For a discussion on the human freedom to choose good over evil, see JOSEPH B. SOLOVEITCHIK, *THOUGHTS AND VISIONS: THE MAN OF LAW 725* (1944-45). Jewish Law is also democratic in the sense that the law belongs to all of the people, a principle reflected in the Talmudic position that each individual can approach God and pray without priestly intercession. This points toward a fundamental goal of law to be creative, to improve society and the state, a goal to be taken seriously in current evaluations of the permissibility of civil disobedience in Israel.

58. See generally AARON M. SCHREIBER, *JEWISH LAW AND DECISION-MAKING: A STUDY OF THROUGH TIME 191-225* (1979) (illustrating the transcendental character of law in relation to Talmudic law).

59. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850) (amending Act of Feb. 12, 1793, ch. 7, 1 Stat. 302) (repealed 1864). Congress passed the Fugitive Slave Act to regulate the surrender and deportation of escaped slaves who fled into another territory or "free" state.

In addition to a right to civil disobedience, Israel should also recognize its citizens' inherent right to *civil resistance*. Acts of nonviolent civil resistance—acts specifically intended for the purpose of preventing or impeding ongoing criminal policies on the part of a government (e.g., acts intended to stop illegal terrorist releases in Israel)—*are not crimes*. In contrast to classic instances of nonviolent civil disobedience, where the persons committing such acts traditionally accept punishment as a demonstration of commitment to law, civil resistance is *essentially* law enforcing. Hence, because those engaging in civil resistance act in compliance with incontrovertible human rights, they do not warrant punishment in any form, but acquittal and broad public approval.⁶⁰

Israeli citizens may now take note of certain remedies available to citizens of the United States, which should also be available to them since both countries remain committed to international law. Two pertinent criminal cases in United States courts are *New York v. Jarka*⁶¹ and *Streeter v. Chicago Transit Authority*.⁶² Here, the defendants were acquitted by invoking the traditional common law defense known as "necessity." This defense, which erases criminal liability for conduct that would otherwise be an offense (if the accused were without blame in creating the situation and reasonably believed that such conduct was *necessary* to avoid a public or private injury greater than that which might reasonably result from his/her own conduct) has broad applicability concerning egregious crimes.

Under the Oslo Accords, the Government of Israel has released *thousands* of terrorists from imprisonment. Yet, as we have already seen, *no* government has the right to pardon in a lawful manner or to grant immunity to terrorists. In the United States, it is clear that the constitutionally granted Presidential power to pardon does not encompass violations of international law and is rather limited to "offenses against the United States."⁶³ This limitation, as was noted earlier, derives from a broader prohibition that binds *all* states to the overriding claims of pertinent peremptory norms derived from Higher Law or the Law of Nature.⁶⁴

When it was still apprehending and punishing terrorists, rather than releasing them in compliance with an illegal agreement, Israel acted on behalf of all states. When it began to release terrorists, some of whom had committed crimes against other states, Israel acted against all states by illegally pardoning offenses com-

60. See generally FRANCIS ANTHONY BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* (1987) (noting the distinction between civil disobedience and civil resistance).

61. Nos. 002170, 002196-212, 00214, 002238 (Cir. Ct., Lake City, Ill., Apr. 1985).

62. Nos. 85-108644, 48, 49, 51, 52, 120323, 26, 27 (Cir. Ct. Cook City, Ill., May 1985).

63. See Jordan J. Paust, *Contragate and the Invalidity of Pardons for Violations of International Law*, 10 Hous. J. INT'L L. 51, 52-3 (1987).

64. See *id.* at 51-52 n.4 (citing *Ex Parte Wells*, 59 U.S. 307, 312 (1856) as standing for the proposition that a "pardon regarding things against the law of nature, or so far against the public good as to be indictable at common law would be 'void,' including, presumably, offenses against the law of nations indictable at common law").

mitted against other sovereigns.⁶⁵ For Israel, the legal "bottom line" is that it possesses absolutely no right to grant any sort of immunity for any violations of international law,⁶⁶ especially for the egregious violations created by acts of terror. Regardless of what might be permissible under the Oslo Accords, any freeing of terrorists is legally impermissible. In fact, the principle is now well-established that such freeing brings to the lawless state (in this case, the State of Israel) responsibility for past criminal acts and for future acts of criminality.⁶⁷

Under international law, Israel's Oslo-directed freeing of terrorists amounts to an Israeli denial of justice. Such an implication has very serious operational consequences. Although it is unclear that punishment, which is integral to justice, deters future acts of terror, the far-reaching freeing of terrorists certainly undermines the legal obligation to incapacitate these particular criminals from the commission of further acts of terrorism. Such freeing may also encourage others to commit terrorist offenses in the future, whether against Israel or against other states.

Should we choose to reject the peremptory expectations of *Nullum crimen sine poena*⁶⁸ and the intrinsic rationality of straight retributivism, it is clear that the law must function to prevent future crimes. Here we may recall the well-known

65. See *id.* at 53 n.9 (citing authority that recognizes "an absence of power to pardon offenses against other sovereigns" such as: *United States v. Barnhart*, 22 F. 285, 292 (C.C.D. Ore. 1884); *In re Bocchiaro*, 49 F. Supp. 37, 38 (W.D.N.Y. 1943); *Carlesi v. New York*, 233 U.S. 51, 57 (1914); *Fox v. Ohio*, 46 U.S. 410, 420, 430 (1987)).

66. See *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (regarding "an offence [sic] against the universal law of society . . . no nation can rightfully permit its subjects to carry it on, or exempt them . . ."). See also *Jordan J. Paust, Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 284-85 (1986) (stating that violators of international law are subject to universal jurisdiction and exempt from attempted grants of immunity).

67. *In re Janes*, 4 R. INT'L ARB. AWARDS 82, 87 (1991). Here, the arbitrators recognized the "well-established principle . . . that, by pardoning a criminal, a nation assumes the responsibility for his past acts." *Id.* at 96 (quoting *In re Cotesworth & Powell*, 2 INT'L ARB. 2050, 2083, 2085 (1898)). See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 (Tentative Draft No. 67, 1985) (citing *In re West, Decisions of Claims Commissions: Mexico-United States (1926-27)* (supporting a rule that obligates a state to act to punish crimes against aliens) (amnesty and pardon unduly granted)).

68. It is worth noting here that the "extradite or prosecute" formula under international law — a formula now being violated daily by the Palestinian Authority's refusal to extradite or punish terrorists — derives from expectations of *Nullum crimen sine poena*. Developed in antiquity, this formula has roots in both natural law and in positive law. See generally JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALTH* (Kenneth D. MacRae ed., Richard Knolles trans., 1962) (1576); HUGO GROTTIUS, *DE JURE BELLI AC PACIS LIBRE TRES* (Francis W. Kelley trans., 1925) (1751); EMMERICH DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (Charles G. Fenwick trans., Carnegie Institute 1916) (1758).

argument of Plato's *Protagoras*:

No one punishes those who have been guilty of injustice solely because they have committed injustice When anyone makes use of his reason in inflicting punishment, he punishes not on account of the fault that is past, for no one can bring it about that what has been done may not have been done, but on account of a fault to come in order that the person punished may not again commit the fault, that his punishment may restrain from similar acts those persons who witness the punishment.⁶⁹

In lawfully opposing Oslo, citizens of Israel can also resort to a remedy that United States law provides to foreign nationals. Known as the Alien Tort Statute,⁷⁰ this 18th century legislation passed by the First Congress in 1789, provides that federal district courts shall have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations, or a treaty of the United States."⁷¹

Two plaintiffs identified only as Jane Doe 1 and Jane Doe 2 are currently using the Alien Tort Statute to bring a civil suit against Dr. Radovan Karadzic, leader of the Bosnian Serbs. Endorsed by the Clinton Administration, this suit uses courts in the United States to enforce peremptory standards under international law.⁷² The federal courts of the United States could now also be used to enforce these standards in the matter of Yasser Arafat, a known terrorist. Although there is certainly a negative precedent for such a civil suit in the case of *Tel-Oren v. Libyan Arab Republic*⁷³ — a case in which the plaintiffs, mostly Israeli citizens, were survivors and representatives of persons murdered in an armed attack on an Is-

69. See PLATO, *Protagoras*, in PLATONIC DIALOGS § 324. See also PLATO, *Gorgias*, in THE DIALOGUES OF PLATO § 525 (Benjamin Jowett, M.A. trans., Random House 1937) [hereinafter DIALOGUES]; *Republic*, in DIALOGUES §§ 380, 615; *Phaedo*, in DIALOGUES, *supra*, § 113; PLATO, *Laws*, in PLATO §§ 854, 862, 934, 957 (Lane Cooper trans., Oxford Univ. Press 1938).

70. 28 U.S.C. § 1350 (1994). This statute authorizes the United States federal courts to adjudicate civil claims by aliens alleging acts committed "in violation of the law of nations or a treaty of the United States" when the alleged wrongdoers can be found in the United States. Understood in terms of United States obligations, this means that terrorists, when within the territorial jurisdiction of the United States, can be brought into our federal courts for civil remediation of their crimes.

71. *Id.*

72. See Neil A. Lewis, *U.S. Backs War - Crimes Lawsuit Against Bosnian Serb Leader*, N.Y. TIMES, Sept. 27, 1995, at A10. The two plaintiffs contend that Karadzic is responsible for harms they suffered in the Balkans, namely rape, mutilation and murder. *Id.* The United States Court of Appeals for the Second Circuit, which is now considering the case, has a history of favoring such lawsuits. It has ruled in the past that torturers and dictators may be sued in United States federal courts for acts that occurred abroad and that a judgment may be enforced if the subjects come to the United States or their assets are located in this country. Dr. Karadzic was served with papers as he walked outside his hotel room in New York City in February 1993.

73. 726 F. 2d 774 (D.C. 1984).

raeli civilian bus in March 1978 — there are substantial differences between *Tel-Oren* and the proposed civil action against Yasser Arafat. Moreover, the *Filartiga* case⁷⁴ provides positive precedent for use of the Alien Tort Statute. Although *Filartiga* deals with torture rather than with terrorism, it did not end ultimately in dismissal.

The decision of the Second Circuit in *Filartiga* established, *inter alia*, that Section 1350 opens the federal courts of the United States for adjudication of the rights recognized and established by international law. Although international law does not itself determine when a wrongful deed is actionable, it does necessarily presume — in our decentralized, Westphalian system of world legal authority — that individual states will make such necessary determinations and will act accordingly. While it is true that international law, in the absence of a specific treaty or agreement, can not require any particular actions by particular states,⁷⁵ the incorporation of international law into domestic law in the United States is well-established and unquestionable.⁷⁶ With these facts in mind, Israeli citizens may now use the Alien Tort statute of the United States, in conjunction with other proper avenues of political and jurisprudential action, to oppose the very considerable existential harms generated by the illegal Oslo Accords.

74. *Filartiga v. Peña-Irala*, 40 F.2d 876 (2d Cir. 1980).

75. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 224 (1972); LOUIS HENKIN, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 116 (1980); CHARLES CHENEY HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 729 n.5 (2d rev. ed. 1945).

76. Under the Supremacy Clause of the United States Constitution, international law forms part of the law of the United States. U.S. CONST. art. VI, § 2. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (asserting that United States law incorporates international law); *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246, 254 (D.D.C. 1985) (stating that the “concept of extraordinary judicial jurisdiction over acts in violation of significant international standards has also been embodied in the principle of ‘universal’ violations of international law”).