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The Oslo Accords: More than Israel Deserves

John Quigley*

The agreements concluded between the Palestine Liberation Organization ("P.L.O.") and Israel beginning in 1993 hold the prospect of bringing resolution to the long-standing territorial dispute over Palestine. Commonly called Oslo 1, and based on negotiations in the capital city of Norway, the Declaration of Principles (1993) is the first such agreement. The Declaration called for future negotiation on the major outstanding issues after an interim period during which the P.L.O. would administer some of the Palestinian territory (Gaza Strip and West Bank of the Jordan River) occupied by Israel.¹

The two parties concluded additional agreements, none in Norway, but nonetheless carrying the "Oslo" name because of the location of the first set of negotiations. The name Oslo 2 attaches to a 1995 agreement defining the terms under which the P.L.O. carries out that partial administration.² The name Oslo 3 refers to a 1997 agreement on the terms of Israel's partial withdrawal from the town of Hebron. Oslo 3 also revised the timetable for Israeli withdrawal from additional areas, originally set forth in Oslo 2.³

The Oslo agreements offer the Palestinians much less than that to which they are legally entitled. For as long as history records, the Palestinians have been the majority population in Palestine. They descended from the ancient Canaanites who formed the majority population, even during the brief periods when the Hebrews controlled certain areas. After World War I, with Great Britain administering Palestine by arrangement with the League of Nations, Jews migrated to

* Professor of Law, Ohio State University. LL.B., M.A. 1966, Harvard Law School.

1. *Declaration of Principles on Interim Self-Government Arrangements*, Sept. 13, 1993, 32 I.L.M. 1525 (1993).

2. *Interim Agreement on the West Bank and Gaza Strip*, Sept. 28, 1995, Isr.-Pal. The 1995 interim agreement replaced a 1994 interim agreement under which the P.L.O. administered most of the Gaza Strip, plus the area around the town of Jericho in the West Bank, *see* *Agreement on the Gaza Strip and the Jericho Area*, Cairo, May 4, 1994, Isr.-Pal., *reprinted in* 7 *PALESTINE Y. B. INT'L L.* 243 (1992-94).

3. *Mideast Accord; Looking Ahead: Two U.S. Documents*, N.Y. *Times*, Jan. 17, 1997, at A12 (giving the text of a document headed *Notes for the Record* drafted at the request of Mr. Netanyahu and Mr. Arafat by a U.S. representative to summarize points agreed to between them).

Palestine in large numbers. After World War II, the major powers, acting through the United Nations General Assembly, proposed splitting Palestine into two states. Under this plan, most of Palestine would have gone to a Jewish state, even though Jews made up only 30% of Palestine's population.⁴

When the Palestinian Arabs objected to this plan, an army organized to establish a Jewish state in Palestine seized 80% of its territory in 1948, expelling most of the Palestinian Arabs from the sectors taken.⁵ The document declaring Jewish statehood cited the U.N. General Assembly's partition proposal as its primary legal base.⁶ That proposal, however, was not framed as a disposition of territory. Instead, the proposal was a recommendation to the two parties by the U.N. General Assembly, which, moreover, had no power to dispose of territory.⁷ The proposal was not generally regarded as having binding force.⁸

The document declaring Jewish statehood also cited Jewish historic rights in Palestine, a reference to control of part of Palestine by Hebrew rulers in ancient times, as an additional legal base for statehood.⁹ International law generally does

4. G.A. Res. 181, U.N. GAOR, 2d Sess., U.N. Doc. A/519 (1947); see also *Summary Records of Meetings 21 September-8 December 1948*, U.N. GAOR, 3d Sess., Part I, C.1, at 802, U.N. Doc. A/C.1/SR.226 (1948) (statement of Mr. Dihigo, Cuba,) (explaining eight reasons why Cuba had voted against res. 181 in November 1947: (1) that the resolution exceeded the General Assembly's powers of recommendation; (2) that it violated the clause in the U.K.'s interwar mandate over Palestine, specifically, that admission of Jews was not to infringe the rights of the Arabs; (3) that the majority of U.N. members had failed to respect the views of the nearly one-third minority that opposed the resolution; (4) that there had been no basis for the U.K.'s Balfour Declaration of 1917 that advocated a Jewish national home in Palestine; (5) that the Balfour Declaration did not promise a Jewish state but merely a national home provided that it did not affect the rights of the Arab majority; (6) that the resolution was unjust because it gave to a group of foreign Jewish immigrants a part of the territory of Palestine that belonged to the Arabs for centuries; (7) that partitioning Palestine would not solve the problem of the displaced Jews; (8) and that it was wrong to make the Arabs suffer to repair the wrongs that other nations had done to the Jews.)

5. JOHN QUIGLEY, *PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE* 3-93 (1990).

6. *Declaration of the Establishment of the State of Israel*, 1 LAWS OF THE STATE OF ISRAEL 3 (1948).

7. QUIGLEY, *supra* note 5, at 32-39.

8. See *Summary Records of Meetings 21 September-8 December 1948*, U.N. GAOR, 3d Sess., Pt. I, C.1, at 746, U.N. Doc. A/C.1/SR.226 (1948) (offering statements for the proposition that the petition proposal was merely a recommendation); Mr. Federspiel, Denmark: "From the legal point of view, the Assembly clearly could not establish any right for any group in Palestine, since it could only make recommendations and set up organs for the purpose of putting those recommendations into effect." *id.* at 746-47; Mr. El-Khoury, Syria, referring with approval to quoted remark of representative of Denmark, *id.* at 802; Mr. Dihigo, Cuba, stating, with reference to resolution 181 that General Assembly has right of recommendation only, *id.* at 808; Mr. Beeley, U.K., referring to resolution 181: "[W]hile the Assembly's resolutions constituted recommendations, and had moral weight, they certainly were not law." *id.*

9. *Declaration of the Establishment of the State of Israel*, *supra* note 6, at 3.

not recognize such a base where there has been intervening occupation and control by others for many centuries.¹⁰ Moreover, even if such a concept were accepted in law, a line of descent has not been established between the Hebrews of ancient Palestine and modern-day Jewry.¹¹

In 1967, Israel captured the remaining 20% of Palestine (Gaza Strip and West Bank), in hostilities initiated by Israel.¹² At the outset, Israel claimed falsely that Egypt started the hostilities, a claim Israel later withdrew after the fighting ended.¹³ In fact, several Israeli leaders later said that when the Israeli cabinet made the decision to invade Egypt, cabinet members understood that Israel faced no imminent invasion by Egypt.¹⁴ During the 1967 hostilities, Israel expelled thousands more Arabs, and in the following decades settled thousands of its own citizens in the West Bank and the Gaza Strip.¹⁵

Now, Israel and the Palestinians, represented by the P.L.O., are discussing the extent to which the Palestinians will control the 20% of Palestine that Israel took in 1967. The 80% taken by Israel in 1948 is not on the table. Israeli Prime Minister Benjamin Netanyahu asserts that the Palestinian entity will not be a state. Israel's stated positions on these issues are far from what is required by interna-

10. *Minquiers and Ecrehos Case (France v. U.K.)*, 1953 I.C.J. 47, at 56 (Nov. 17, 1953) (rejecting claim by France of "original feudal title" to territory subsequently occupied by Britain).

11. QUIGLEY, *supra* note 5, at 66-72.

12. RITCHIE OVENDALE, *THE ORIGINS OF THE ARAB-ISRAELI WARS* 180 (1984).

13. See U.N. SCOR, 22nd Sess., 1348th mtg., at 15, U.N. Doc. S/PV.1348 (1967) (detailing the escalation in the conflict between Egypt and Israel, according to Israel's perspective). Mr. Eban, Israel:

[O]n the morning of 5 June, when Egyptian forces engaged us by air and land, bombarding the villages of Kissufim, Nahal-Oz and Ein Hasheloshah we knew that our limit of safety had been reached, and perhaps passed. In accordance with its inherent right of self-defence as formulated in Article 51 of the United Nations Charter, Israel responded defensively in full strength . . .

Id. Mr. Eban further stated that "approaching Egyptian aircraft appeared on our radar screens." *Id.* See also *Admission on Attack*, *TIMES (LONDON)*, July 8, 1967, at 3, col. 7 (stating that Eshkol "buried the often-repeated statement that Egyptian [air] and land forces attacked Israel before she launched her devastating lightning offensive on June 5").

14. *Le général Rabin ne pense pas que Nasser voulait la guerre*, *LE MONDE*, Feb. 29, 1968, at 1 (quoting Chief of Staff General Itzhak Rabin as saying, "I do not believe that [Egyptian President Gamel Abdul] Nasser wanted war. The two divisions he sent into Sinai on May 14 would not have been enough to unleash an offensive against Israel. He knew it and we knew it."); Amnon Kapeliouk, *Israël était-il réellement menacé d'extermination?*, *LE MONDE*, June 3, 1972, at 4 (quoting General Matitiahu Peled, a member of the general staff, as saying that the "thesis according to which the danger of genocide weighed on us in June 1967, and that Israel struggled for its physical existence is only a bluff born and developed after the war."); *Excerpts from Begin Speech at National Defense College*, *N.Y. TIMES*, Aug. 21, 1982, at A6 (quoting Menachem Begin, who had been a cabinet minister in 1967, "In June 1967, we again had a choice. The Egyptian Army concentrations in the Sinai approaches do not prove that Nasser was really about to attack us. We must be honest with ourselves. We decided to attack him.").

15. QUIGLEY, *supra* note 5, at 161-173.

tional norms to make the Palestinians whole. Regarding Israeli settlements, Israel says it will not remove them. Regarding Jerusalem, over which Israel has no claim beyond naked control,¹⁶ Israel says it will not give any role in governance to the Palestinians. Regarding the return of the Palestinian refugees, Israel does not plan to repatriate any of them.

According to Professor Louis René Beres, writing in this journal issue,¹⁷ the Oslo bargain is not good enough for Israel. He would have Israel keep all of Palestine. Professor Beres adduces legal postulates to substantiate his position. He argues that Israel not only should, but legally must, abrogate the Oslo agreements. Professor Beres' primary contention is that the P.L.O. is a terrorist organization, and that states have an obligation to punish terrorists. Given this obligation, it was unlawful for Israel to enter into an agreement that rewards, instead of punishes, those who committed terrorist acts. To prove his thesis that Israel must abrogate the Oslo agreements, Professor Beres relies on a number of legal doctrines that he uses in conjunction with certain factual assumptions.

1. THE LEGAL CHARACTER OF THE OSLO AGREEMENTS

In support of Israel's abrogation of the Oslo agreements, Professor Beres first contends that the agreements are not instruments that have standing in international law.¹⁸ According to Beres, the Oslo agreements are not treaties, hence not binding, because the P.L.O. does not represent a state. He writes, "According to the Vienna Convention on the Law of Treaties, a treaty is always an international agreement 'concluded between States'."¹⁹ This is an apparent reference to Article 2 of the Vienna Convention, which defines "treaty," for purposes of the Convention, as an agreement between states.²⁰ Professor Beres ignores Article 3 of the Vienna Convention, which says, "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law ... shall not affect the legal force of such agreements."²¹ Thus, according to the Vienna Convention, one may have a binding international agreement between a state party and a non-state party, so long as the latter qualifies as a subject of international law.

An organization representing a people entitled to self-determination is a subject of international law.²² In the words of one noted writer on the topic, "national liberation movements are given international status on account of their political

16. John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 765-780 (1996).

17. Louis René Beres, *Why the Oslo Accords Should Be Abrogated by Israel*, 12 AM U. J. INT'L L. & POL'Y 267 (1997).

18. *Id.* at 267.

19. *Id.* n.2.

20. Vienna Convention on the Law of Treaties, art. 2, 1155 U.N.T.S. 331.

21. *Id.* art. 3.

22. H. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 117-123 (1988).

goals: their struggle to free themselves from colonial domination, a racist regime or alien occupation."²³ The P.L.O. opposes the "alien occupation" of the Gaza Strip and West Bank. The U.N. General Assembly has recognized the Palestinian people as entitled to self-determination,²⁴ and the P.L.O. as its representative in that regard.²⁵

National liberation movements have concluded treaties with states.²⁶ Beyond the P.L.O.'s recognition as a national liberation movement, Palestine has a history of concluding treaties. During the interwar period, Palestine was administered by Great Britain as a mandate territory under a system established by the League of Nations.²⁷ Populations of mandate territories were regarded as subjects of international law. "Communities under mandate," according to a 1931 statement of the Institute of International Law, were "subjects of international law," since they held "a patrimony distinct from that of the Mandatory State."²⁸ The Institute said that mandate communities could acquire rights and be held to their obligations.²⁹ Palestine, while administered by Great Britain, concluded a variety of multilateral and bilateral treaties.³⁰

Professor Beres writes that the Oslo agreements are invalid under international law, and therefore that the Palestinian party "cannot be held jurisprudentially to the same standard of accountability as the State of Israel."³¹ If Professor Beres were correct that the agreements are invalid, then neither side would be bound under international law. Whatever binding force the agreements may have applies equally to the two parties. Since both parties are subjects of international law, and since the agreements reflect an intent to be bound, both are bound.

Professor Beres assumes without discussion that the Palestinian party is not a

23. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 91 (1986).

24. G.A. Res. 3236, U.N. GAOR, 29th Sess., Supp. No. 31 at 4, U.N. Doc. A/9631 (1974).

25. G.A. Res. 3237, U.N. GAOR, 29th Sess., Supp. No. 31 at 4, U.N. Doc. A/9631 (1974). Professor Beres incorrectly refers to "the Palestine Authority (PA) that is the non-state party to Oslo I and II." As he correctly states elsewhere, the Palestinian party was the P.L.O. When Oslo I was signed, the Palestinian Authority did not exist. It was established only after Oslo I, to administer the areas over which Israel was ceding partial control.

26. Julio A. Barberis, *Nouvelles questions concernant la personnalité juridique internationale*, 179 *Recueil des cours* (Hague Academy of International Law) 145, 259-64 (1983).

27. Mandate for Palestine, Permanent Mandates Commission no. 466, League of Nations Doc. C.529.M.314.1922.VI and C.667.M.396.1922.VI (1922), 8 LEAGUE OF NATIONS, OFFICIAL JOURNAL 1007 (1922), reprinted in *Terms of League of Nations Mandates: Republished by the United Nations*, U.N. Doc. A/70 (1946).

28. James Brown Scott, *The Two Institutes of International Law*, 26 *AM. J. INT'L L.* 87, 91 (1932) (giving text of Institute's resolution on mandates).

29. *Id.*

30. See Richard Wilner, *Nationalist Movements and the Middle East Peace Process: Exercises in Self-Determination*, 1 *U.C. DAVIS J. INT'L L. & POL'Y* 297, 313 (1995).

31. Beres, *supra* note 17, at 268 n.3.

state. That issue, however, requires discussion. The West Bank and Gaza Strip are under Israel's belligerent occupation. Territory under belligerent occupation is not under the sovereignty of the occupying power, and Israel has not claimed sovereignty in the West Bank, with the exception of the sector of Jerusalem it occupied, and the Golan Heights.³² Egypt held the Gaza Strip from 1948 until Israel took it in 1967, but Egypt deemed the Gaza Strip to be part of Palestine.³³ Egypt considered that it was holding Gaza pending the emergence of a Palestine state.³⁴

Jordan held the West Bank from 1948 to 1967 and incorporated it in 1950, claiming sovereignty subject to the future emergence of a Palestine state.³⁵ In 1988, the Palestine National Council (P.N.C.) declared statehood for Palestine, at which point Jordan renounced its 1950 claim.³⁶ Given the P.N.C.'s declaration of statehood and substantial international recognition thereof, and given that none of the other states claim sovereignty, sovereignty must reside in a Palestine state. A state whose territory is occupied by a foreign army is nonetheless a state.

2. VIOLATION OF A PEREMPTORY NORM

Professor Beres writes that even if the P.L.O. were proper as a treaty partner, the Oslo agreements would still be invalid, because they conflict with a peremptory norm of international law. He refers to the Vienna Convention on the Law of Treaties, which says that a treaty is void if, at the time of its conclusion, it con-

32. These claims have been condemned by the international community as violations of the legal regime of belligerent occupation. *See, e.g.*, S.C. Res. 252, U.N. SCOR, 23d Sess., *Res. & Decs.* 9, U.N. Doc. S/INF/23/Rev.1 (1968) (condemning Israeli measures affecting Jerusalem as tantamount to annexation, which the resolution found unlawful for a belligerent occupant); S.C. Res. 478, U.N. SCOR, 35th Sess., *Res. & Decs.* 14, U.N. Doc. S/RES/478 (1980), and G.A. Res. 35/169(E), U.N. GAOR, 35th Sess., *Res.* 28, U.N. Doc. A/35/48 (1980) (both condemning a 1980 Israeli statute that proclaimed both sectors of Jerusalem to be Israel's capital).

33. Carol Farhi, *On the Legal Status of the Gaza Strip, in* 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL: THE LEGAL ASPECTS 1967-1980 61, 75 (1982).

34. *Republican Decree Announcing Constitutional System of Gaza Sector*, 17 MIDDLE EAST J. 156 (1963) (March 9, 1962, art. 1) (constitution adopted for Gaza by Egypt in 1962 stated: "The Gaza Strip is an indivisible part of the land of Palestine."; *see also id.* art. 73 (stating "This constitution shall continue to be observed in the Gaza Strip until a permanent constitution for the state of Palestine is issued."))

35. Albion Ross, *Amman Parliament Vote Unites Arab Palestine and Transjordan*, N.Y. TIMES, April 25, 1950, at A1 (stating that Jordan's parliament specified that in incorporating the West Bank into Jordan, it acted "without prejudicing the final settlement of Palestine's just case within the sphere of national aspirations, inter-Arab co-operation and international justice.").

36. John Kifner, *Hussein Surrenders Claims on West Bank to the P.L.O.*, N.Y. TIMES, Aug. 1, 1988, at A1; *Excerpts from Hussein's address on abandoning claims to the West Bank*, N.Y. TIMES, Aug. 1, 1988, at A4 (stating "The independent Palestinian state will be established on the occupied Palestinian land after its liberation.").

flicts with a norm accepted as one from which no derogation is permitted.³⁷ Professor Beres' basis for concluding that the Oslo agreements violate such a peremptory norm is as follows:

[A]s the nonstate party in this case just happens to be a terrorist organization whose leaders *must be punished* for their egregious crimes, 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," the state party in such an agreement - here the State of Israel - violates international law by honoring the agreement.³⁸

This reasoning is questionable on several grounds. First, Professor Beres uses the personal acts of leadership individuals to conclude that their state is not a fit treaty partner. He confuses the personal responsibility of individuals with the status of the entity, whether the entity be a state or a national liberation movement. If individuals commit unlawful acts in the course of a military conflict, they can be prosecuted, yet treaties can be concluded with the party they represented, in order to terminate the conflict.³⁹ Otherwise, conflicts during which individuals commit criminal conduct could never be ended by a treaty.⁴⁰

As to the type of peremptory norm involved, Professor Beres says it is a norm of international law that all criminal offenses must be punished by a state capable of doing so.⁴¹ States must prosecute persons guilty of serious atrocities, at least those qualifying as grave breaches of the laws of warfare,⁴² and these might cover some of the acts Professor Beres has in mind. There is, however, no norm requiring states to punish acts qualifying as "terrorist," a term that, in any event, has no internationally accepted definition.

Professor Beres apparently finds an agreement with a terrorist organization unlawful only if the agreement offers a "reward."⁴³ This approach is not found in existing international law, and Professor Beres provides no grounding for it. He does not make clear whether he means rewards to the state (or nonstate entity) or rewards to the individuals responsible for criminal acts. "Reward," moreover, is a questionable criterion. Are the agreements with Germany and Japan ending the

37. Vienna Convention on the Law of Treaties, *supra* note 20, art. 53. Beres, *supra* note 17, at n.2.

38. *Id.* at 2.

39. *Id.*

40. Croatia - Federal Republic of Yugoslavia Agreement on the Normalization of Relations, Aug. 23, 1996, 35 I.L.M. 1219, 1221.

41. Beres, *supra* note 17, at 268-69.

42. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287, 386 ("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, and shall bring such persons, regardless of their nationality, before its own courts."); *see also id.* at 318, art. 47 (defining "grave breaches").

43. Beres, *supra* note 17, at 269.

Second World War unlawful because, as it turned out, the fact that they did not compete militarily in the postwar period allowed them to become economic giants?⁴⁴ One person's reward is another's detriment. The rule Professor Beres proposes would result in endless debate about whether a particular agreement was beneficial to a particular party.

The Oslo agreements are a case in point. Professor Beres makes the bald statement quoted above that the Oslo agreements offered "rewards" to a terrorist organization.⁴⁵ This "reward" is a matter of interpretation.⁴⁶ Professor Beres does not define "terrorist organization" or discuss what types of force by an organization like the P.L.O. would be prohibited. As an organization internationally recognized as representing a people entitled to self-determination, the P.L.O. may lawfully direct force against military targets in pursuit of self-determination. Only those instances of force directed against civilians would remain unlawful. It is unclear how much unlawful force Professor Beres would require before affixing the "terrorist" label.

Moreover, if one were to deny validity to an agreement of an entity whose leaders committed criminal acts, one would have to ask whether that might not be true of the Israeli party as well. In his autobiography, Mr. Rabin acknowledged his central role as an officer of the Israel Defense Force in expelling the inhabitants of the central Palestine towns of Lydda and Ramleh in July 1948, sending approximately 60,000 onto the roads virtually at gunpoint with what they could carry.⁴⁷ At the Nuremberg trials, acts of expulsion were charged as crimes against humanity. Indeed, when Israel tried Adolf Eichmann, it alleged acts of expulsion of civilian populations as "war crimes" and "crimes against humanity."⁴⁸ In 1948,

44. See Daniel S. Greenberg, *Too Much for Pentagon Research*, WASH. POST, Oct. 10, 1995, at A13.

45. Beres, *supra* note 17, at 269.

46. Even if one could say that the P.L.O. is being rewarded, the groups that operated under the P.L.O. umbrella that most frequently employed unlawful force opposed the Oslo agreements and thus would probably not qualify as being "rewarded." The P.L.O. that negotiated the Oslo agreements was effectively the FATAH organization.

47. Benny Morris, 1948 AND AFTER: ISRAEL AND THE PALESTINIANS 2 (1990) (reporting order issued July 12, 1948, by Lt.-Col. Yitzhak Rabin: "The inhabitants of Lydda must be expelled quickly without attention to age. They should be directed towards Beit Nabala.... Implement immediately," and a similar simultaneous order relating to adjacent town of Ramleh); David K. Shipler, *Israel bars Rabin from relating '48 eviction of Arabs*, N.Y. TIMES, Oct. 23, 1979, at A23 (stating that in Rabin's draft of autobiography he wrote that before expelling the inhabitants he asked David Ben-Gurion whether it should really be done, and that Ben-Gurion by a wave of the hand signaled that he wanted the inhabitants out; stating also that this passage was removed from the draft by Israeli censors); see also Benny Morris, *Operation Dani and the Palestinian Exodus from Lydda and Ramle in 1948*, 40 MIDDLE EAST J. 82, 96 (1986); FOUZI EL-ASMAR, TO BE AN ARAB IN ISRAEL 4-13 (1978); EDGAR O'BALLANCE, THE ARAB-ISRAELI WAR, 1948 147 (1956).

48. Attorney-General of the Government of Israel v. Adolf Eichmann, 36 I.L.R. 5, 8-9 (Cr.C. (Jm.) 1961) (counts 3, 5, 8, 9, 10, 11, 12 of the indictment); see also *id.* at 95-102 (reciting facts of expulsions found to have been carried out or planned by Eichmann).

the Central Intelligence Agency, reporting from Palestine, used the term "terrorist" to describe the tactics of Jewish militia aimed at intimidating Palestinian civilians into fleeing from the country.⁴⁹ In 1988, Rabin, as head of the Israeli military forces opposing an uprising by the Palestinian civilian population, put into practice a policy of breaking the bones of Palestinian youths caught for stone throwing.⁵⁰ This policy, which probably constituted a grave breach of the Geneva Civilians Convention, is also an internationally cognizable crime.⁵¹ By Professor Beres' analysis, then, if Israel is getting a "reward" from the Oslo agreements, as it is, the P.L.O. must abrogate them in order to avoid profiting an unworthy treaty partner.

3. CHANGED CIRCUMSTANCES AS A BASIS FOR ABROGATION

Professor Beres further argues that even if the Oslo agreements were initially lawful, circumstances have changed since their signing, giving Israel "substantial rights of abrogation,"⁵² and "augment[ing] Israel's obligations to cease compliance with Oslo."⁵³ He writes that Israel's obligation to comply "ended promptly when a fundamental change occurred in those circumstances that existed at the effective dates of the accord and whose continuance formed a tacit condition of the accords' ongoing validity. This change, of course, involved multiple material breaches by the P.L.O., especially those concerning control of anti-Israel terrorism

49. Report by the Central Intelligence Agency: Secret: Possible Developments in Palestine, Feb. 28, 1948, 5 *For. Rel. U.S. 1948* at 666, 672 (1976) (describing attacks by the Haganah on Arab villages as "terrorist raids against the Arabs similar in tactics to those of the Irgun Zvai Leumi and the Stern Gang [LEHI].") The latter two groups were other Jewish militia, whose tactics the C.I.A. is also here characterizing as terrorist. When Israeli statehood was declared, the three militia merged to form Israel's army, the Israeli Defense Force. Under principles of state responsibility, a new state is liable for acts of militia whose activity led to its creation; IAN BROWNLEE, *STATE RESPONSIBILITY, PART I* 178 (1983) (finding "a categorical imposition of responsibility for all acts of the insurgent forces").

50. John Kifner, *Israeli Officers Ordered to Watch Tape of 4 Soldiers Beating Arabs*, N.Y. TIMES, Feb. 29, 1988, at A1, col. 4. See also U.S. Dept. of State, *Country Reports on Human Rights Practices for 1988* 1377 (1989); *The Casualties of Conflict: Medical Care and Human Rights in the West Bank and Gaza Strip: Report of a Medical Fact Finding Mission by Physicians for Human Rights* 11 (Somerville, Mass., Mar. 30, 1988) (discussing the U.S. medical team examination of 58 hospital patients who claimed injury from IDF beatings reported that most of the injuries resulted from blows carefully aimed to fracture a bone); Yitzhak Rebihiyeh, *They Yelled at Me: Say 'Givati Has Gaza by the Balls,' Yediot Aharonot*, Feb. 23, 1988, in Israeli League for Human and Civil Rights, *Report on the Violations of Human Rights in the Territories during the Uprising, 1988* 53 (1988) (IDF soldiers reported that the IDF instructed soldiers to beat so as to fracture bones).

51. Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 75 U.N.T.S. 287 (defining "grave breach" as including "torture or inhuman treatment").

52. Beres, *supra* note 17, at 272.

53. *Id.*

and extradition of terrorists.”⁵⁴

The doctrine of changed circumstances, or, as Professor Beres calls it in Latin, the *clausula rebus sic stantibus*, allows a state to cease complying with a treaty if circumstances have changed, but does not require it to do so.⁵⁵ Thus, Professor Beres' attempt to use the doctrine as requiring Israel to cease compliance is groundless.

Further, his use of the doctrine to give Israel even a right of abrogation is dubious. The doctrine is recognized by the Vienna Convention on the Law of Treaties (Article 62) and despite the lack of unanimity on the point, probably exists as a doctrine of the customary law of treaties. According to the doctrine, a party is entitled to cease compliance with a treaty if the context existing at the time of the agreement changes so radically that continued compliance seriously injures the position of the party.⁵⁶ Circumstances that give rise to a right to cease compliance have never been clearly defined, however, and the doctrine rarely has been applied in practice.

One aspect of the doctrine is clear. The doctrine relates to changes in the factual context, not to acts by one of the parties.⁵⁷ Thus, the doctrine has no applicability in the situation posited by Professor Beres, namely, breaches by the P.L.O. The doctrine Professor Beres should be invoking, and which he does refer to in passing in the quoted language, is that of material breach. A state may cease compliance with a bilateral treaty if the other party violates a provision essential to the accomplishment of the object or purpose of the treaty.⁵⁸ As to this point, Professor Beres' argument is weakened by the facts he cites.

Professor Beres regards the P.L.O.'s failure to do enough to control anti-Israeli terrorism as a material breach. In a controversial claim, he says that the P.L.O. promotes terrorism by allowing the Hamas organization to operate freely in the Gaza Strip.⁵⁹

Professor Beres' factual sources consist of opinion statements quoted from an Israeli newspaper, the Jerusalem Post, a newspaper which shares Professor Beres' perspective. He ignores the fact that the P.L.O. has carried out arrests so aggressive in the wake of acts of violence against Jewish civilians, that it has been criti-

54. *Id.*

55. Edwin M. Smith, *Understanding Dynamic Obligations: Arms, Control, Agreements*, 64 S. CAL. L. REV. 1549, 1606 (1991).

56. Vienna Convention on the Law of Treaties, *supra* note 20, art. 62:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

57. *See* Smith, *supra* note 55, at 1606.

58. *Id.* art. 60.

59. Beres, *supra* note 17, at 273.

cized by international human rights organizations.⁶⁰ The information cited by Professor Beres falls short of breach at a level of materiality that would allow Israel to cease compliance.

4. NATIONAL SELF-PRESERVATION AS A BASIS FOR ABROGATION

Professor Beres argues that "Israel's obligation to terminate the Oslo accords"⁶¹ derives also from a principle he calls "national self-preservation." "Under this peremptory norm," he writes, "any agreement may be terminated unilaterally following changes in conditions that make performance of the agreement injurious to fundamental rights, especially the rights of existence and independence."⁶² Here again, Professor Beres has confused a condition that might allow withdrawal with one that would mandate withdrawal. He refers to "national self-preservation," as indicated, as obliging Israel to cease compliance with the Oslo agreements.⁶³ If there exists a principle of national self-preservation in the law of treaties, it would at most allow a state to cease compliance.⁶⁴

Further confusing the issue, Professor Beres refers to the supposed principle of national self-preservation as a "peremptory norm."⁶⁵ The law of treaties does, to be sure, include the idea of peremptory norms. The Vienna Convention on the Law of Treaties defines a peremptory norm as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."⁶⁶

Thus, the doctrine operates with reference to initial validity of a treaty, not with respect to subsequent experience with performance. Professor Beres appears to be using it for the latter, because he speaks about continued performance *becoming* self-destructive.⁶⁷ On this basis, his reference to the concept of a peremptory norm is misplaced.

Additionally, as one sees from the quoted definition of a peremptory norm, it is a concept aimed at preventing a state from doing harm, not one aimed at allowing it to protect itself.⁶⁸ On this basis as well, Professor Beres' invocation of the concept is misplaced. Beyond these difficulties, it is not clear that a doctrine of self-

60. *Arafat's Dilemma*, *ECONOMIST*, Mar. 2, 1996, at 40.

61. Beres, *supra* note 17, at 273.

62. *Id.*

63. *Id.*

64. See BURLEIGH CUSHING RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* 44 (1928) (noting that self-preservation and development of a nation are the core duties of every state and if treaty obligations are in conflict with the necessary development of a state the former must give way).

65. Beres, *supra* note 17, at 273.

66. Vienna Convention on the Law of Treaties, *supra* note 20, art. 53.

67. Beres, *supra* note 17, at 274.

68. See T.O. ELIAS, *MODERN LAW OF TREATIES* 170-74, 177-87 (1974).

preservation exists in the law of treaties as a ground for ceasing compliance. It is not mentioned in the Vienna Convention on the Law of Treaties, nor in its subsection on grounds for termination.

Finally, Professor Beres employs a weak factual basis for invoking this supposed doctrine. His idea is that the Oslo agreements jeopardize Israel's security to such an extent that either permits or obligates Israel to terminate participation in the agreements. Again, the only source he uses is an opinion piece from the Jerusalem Post.⁶⁹ Other writers have argued with much plausibility that the Oslo agreements enhance Israel's security.⁷⁰ Israel has had problems trying to hold the Gaza Strip and West Bank, so giving them up does not take Israel from an obviously stronger to an obviously weaker position. As long as Israel occupies these two areas, it cannot expect peace with its neighbors. Peace with the Palestinians is the only way in which Israel can hope to maintain decent relations in the long term, not only with its immediate neighbors, but with the rest of the world.

5. RELEASE OF PRISONERS

A particular provision in the Oslo agreements that Professor Beres finds unlawful is Israel's commitment, undertaken in the 1994 interim agreement, to release five thousand Palestinian prisoners.⁷¹ The 1994 agreement referred to these prisoner releases as a "confidence building measure." Professor Beres says that Israel violated international law by carrying the provisions out "because some of the jailed terrorists had committed crimes against other states as well as against Israel, and 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 might be permissible under its own Basic Law and the Oslo accords, any freeing of terrorists is legally incorrect. By its freeing of terrorists, Israel is guilty of what is known in law as a 'denial of justice.'"⁷²

Professor Beres misconceives the nature of the releases. In the quoted language he calls them on one occasion pardons, on another a grant of immunity. In fact the releases were neither. Israel did not pardon these prisoners, i.e., declare their innocence. Nor did it grant immunity, which would have meant a decision not to sanction them in the first place. What Israel did was release these prisoners prior to the expiration of their sentences, which is more in the nature of a commutation.⁷³

69. Beres, *supra* note 17, at 274.

70. John V. Whitbeck, *Israeli security requires a Palestinian state*, MIDDLE EAST INTL., Oct. 25, 1996, at 19.

71. Beres, *supra* note 17, at 272.

72. *Id.* Professor Beres here misuses the term "denial of justice," which refers to a failure by a government to accord due process to an alien in criminal proceedings. 1 OPPENHEIM'S INTERNATIONAL LAW 543-45 (R. Jennings & A. Watts eds. 1992).

73. See Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?* 52 OHIO ST. L. J. 655, 661 (1991) (discussing limited nature of commutation as merely imposing a

Even if a state is obliged to try persons who have committed terrorism offenses, it would not necessarily violate that obligation by releasing them before the end of their sentence. Early release is practiced in many states, either on the basis of the rehabilitation of the individual, or for a variety of other reasons.

Professor Beres' broad brush characterization of the released prisoners as terrorists is dubious. He provides no information on the types of offenses for which these prisoners were convicted. To the extent that the offenses involved violence, he does not distinguish between violence aimed at civilians, and violence directed at military targets. The latter might qualify as lawful activity in pursuit of national liberation, while the former might violate the norms of humanitarian law, but would not necessarily be terrorist.

Further, Professor Beres assumes without discussion that the released prisoners were in fact guilty of the crimes of which they were convicted. This assumption is doubtful, given the serious criticism of the military courts in which they were tried.⁷⁴ Particular criticism has focused on interrogation practices, inasmuch as a major item of evidence in most of the trials leading to conviction of Palestinians on security-related offenses is a confession. Israel has authorized its interrogators to use physical force in interrogating Palestinians on security-related charges, and while it denies that such force constitutes torture as internationally defined, its position in that regard is incorrect.⁷⁵ Israel has a formal policy that condones practices that are defined under international standards as torture.⁷⁶ Even if the physical force were to fall short of torture, a confession gained would not necessarily be voluntary. The questionable character of the convictions further weakens Professor Beres' unlawful release argument.

6. THE ISRAELI-P.L.O. NEGOTIATIONS ON A FINAL STATUS

For Israel, the Oslo agreements do not represent a bad bargain. Israel keeps the territory it took in 1948 and reaps the rewards of the ethnic cleansing it carried out at that time. The accommodation with the Palestinians opens the way to peace treaties with Syria and Lebanon, which, along with peace treaties already signed with Egypt and Jordan, will leave Israel in a state of peace with all its immediate neighbors for the first time.

Even if Israel were to accede to the maximal Palestinian position on all the final status issues, Israel would still be in a better position than that to which it is legally entitled. If Israel gave Jerusalem (east and west) to the Palestine state, if it withdrew all its settlers, and if it repatriated all the displaced Palestinians, it

lesser penalty in substitution for the original punishment).

74. Jordan J. Paust et al., *Report of the ICJ Mission of Inquiry into the Military Court System in the Occupied West Bank and Gaza*, 14 HASTINGS INT'L & COMP. L. REV. 1 (1990).

75. John Quigley, *International Limits on Use of Force to Elicit Confessions: A Critique of Israel's Policy on Interrogation*, 14 BROOKLYN J. INT'L L. 485-502 (1988).

76. B'TSELEM, *LEGITIMIZING TORTURE: THE ISRAELI HIGH COURT OF JUSTICE RULINGS IN THE BILBEISI, HAMDAN AND MUBARAK CASES: AN ANNOTATED SOURCEBOOK* (1997).

would still not have restored the *status quo* prior to its unlawful actions of 1948. The question is not whether Israel must or should abrogate the Oslo agreements. The question is whether the Oslo agreements and, more importantly, the agreement that emerges from the final status negotiations, protect the rights of the Palestinians. This is what the international community must ensure, given the preponderance of power on the Israeli side. If Palestinian rights are not protected, U.N. organs may be forced to carry the Palestine question on their agendas for another half century.