

ISIS, Jordan, and 'Palestine' – The Limits of Israeli Security Under International Law

The current controversy concerning Prime Minister Benjamin Netanyahu's upcoming speech to the US Congress is immaterial to anything of real importance. What should really matter most to both countries, is whether or not Israeli security can ever coexist meaningfully with a new Arab state of "Palestine." In this connection, any informed strategic answer will depend, in part, upon the legal promise of Palestinian "demilitarization," and also, on the newly expanding armed conflict between ISIS and Jordan.

From the beginning, the state of nations has been the state of nature. Long before ISIS and Jihadist terror, states and empires have enthusiastically assumed various postures for war and insurgency. Normally, in order to best secure themselves within this dreadful condition of protracted peril, these states and empires have fashioned assorted agreements under international law. The most expressly formal of such codifications, known as treaties, have sought to smooth over the conspicuously ragged edges of an always more-or-less chaotic world politics.

Insistently, on this still-fragmenting planet, law follows power. Nothing could be more obvious. Indeed, throughout history, grievous problems have arisen whenever certain signatories had determined that lawful compliance was no longer in their own presumed "national interest."

The overriding "takeaway" here is that legal agreements can be

potentially useful where there is a discernible mutuality of interest, but that they can also be rendered worthless whenever such mutuality is apt to disappear.

For the moment, the 1979 Egypt-Israel Peace Treaty remains in place. But, should there be another rotation of power between the current president, General Abdel al-Sisi, and the not-yet-moribund Muslim Brotherhood, this could quickly change. While any willful abrogation of treaty obligations by the Egyptian side would almost certainly be in violation of 1969 The Vienna Convention on the Law of Treaties, there is little that the United Nations or the wider “international community” could ever do about it.

For Israel, this termination prospect should raise a corollary warning about certain related issues of Palestinian statehood. Already, back in June 2009, Prime Minister Benjamin Netanyahu had agreed to the creation of a Palestinian state. Yet, with an apparent nod to presumptively prudent diplomacy, he had also conditioned this reluctant acceptance upon Palestinian “demilitarization.” More specifically, said the prime minister: “In any peace agreement, the territory under Palestinian control must be disarmed, with solid security guarantees for Israel.”

This was, to be sure, a very daunting condition. On the surface, any such contingent agreement seemed a manifestly “smart” concession, but only, of course, if there could also be some reasonable expectations of Palestinian compliance. In fact, however, such expectations were manifestly implausible. This is not only because virtually all treaties and treaty-like agreements can readily be broken – an incontestable and generally uniform historical inference – but also because any post-independence Palestinian insistence upon militarization would likely be lawful.

Jurisprudentially, at least, international lawyers seeking to

discover "Palestine-friendly" sources of legal confirmation would have little to worry about. They could conveniently cherry-pick pertinent provisions of the 1934 Convention on the Rights and Duties of States, the governing treaty on statehood. Moreover, they could comfortably apply the same strategy of selective interpretation to the 1969 Vienna Convention on the Law of Treaties.

Indisputably, under law, Israel has a "peremptory" or incontrovertible right to remain "alive." Originally, it was entirely reasonable for Prime Minister Netanyahu to strenuously oppose a Palestinian state in any form, whether militarized or demilitarized. After all, the leaders of both Hamas and Fatah stubbornly regard all of Israel as "occupied Palestine." They still say this routinely, without reluctance, and without any decipherable reservation or obfuscation.

They say this almost by rote, almost as if it were a religiously-ritual incantation.

In essence, international law would not necessarily support Mr. Netanyahu's well-intentioned insistence upon Palestinian demilitarization. Such law could not automatically expect Palestinian compliance with any pre-state agreements concerning armed force. This sobering conclusion remains visibly binding, even if these agreements were somehow to include impressively compelling US security guarantees to Israel.

Because authentic treaties can only be binding upon states, a non-treaty agreement between Palestinian decision-makers and Israel could prove to be of little authentic authority. This is to say nothing of the prominent and potentially synergistic connections between Hamas, aka the Islamic Resistance Movement, and the perhaps-not-yet-finally-defeated Egyptian Muslim Brotherhood. Moreover, now, in the plainly uncertain aftermath of Jordan's expanded war against ISIS, there are additional risks to King Abdullah II's fragile Sunni monarchy in the region.

A determined ISIS drive west across the Jordan River could bring these Sunni Jihadist fighters to the West Bank (Judea/Samaria) borders of "Palestine." To thwart any such existentially threatening movement, the Jordanian security services, among other things, would first have to deal with an already-growing ISIS fifth column in the kingdom. Worth noting, in this regard, is that any widening of Jordan's hardened belligerency against ISIS would put the king on the same side as those hated Shia forces now warring against Sunnis in Syria and Iraq, including Hezbollah and adversarial forces in Iran. Over time, this de facto Hashemite collaboration with Shia elements could generate additional Sunni defections within Jordan, to ISIS cells, and/or to active ISIS military-terror operations.

What about "next door?" What would happen next in neighboring "Palestine"? What if, in the best-case scenario for Israel, the government of this new Palestinian state were somehow willing to consider itself bound by its pre-state, non-treaty demilitarization agreement?

Significantly, even in these seemingly auspicious circumstances, the new Palestinian Arab government could still have ample pretext and opportunity for implementing a lawful termination of its agreement with Israel. Palestine could withdraw from the agreement because of what it regarded as a "material breach," a purported violation by Israel that had allegedly undermined the object or purpose of the agreement. Or it could point toward what international law calls *Rebus sic stantibus*, in English, the termination doctrine known as a "fundamental change of circumstances." In this plausible case, if Palestine should choose to declare itself vulnerable to previously unforeseen dangers, perhaps even from the interventionary or prospectively occupying forces of other Arab armies or militias, it could lawfully end its earlier commitment to remain demilitarized.

There is another factor that explains why Prime Minister

Netanyahu's alleged hope for Palestinian demilitarization remains misconceived. After declaring independence, a new Palestinian state government could point to any pre-independence errors of fact, or to duress, as perfectly appropriate grounds for agreement termination. In other words, the usual grounds that may be invoked under domestic law to invalidate contracts can also be applied under international law, whether to actual treaties, or to merely treaty-like agreements.

Any treaty is void if, at the time of entry, it conflicts with a "peremptory" rule of international law, a rule accepted by the community of states as one from which "no derogation is permitted." Because the right of sovereign states to maintain military forces for self-defense is always such a rule, "Palestine" could be fully within its lawful right to abrogate any pre-independence agreement that had previously compelled its demilitarization.

It follows from all this that Mr. Netanyahu should take no geo-strategic comfort from any ostensibly legal promises of Palestinian demilitarization. Indeed, should the government of any future Palestinian state choose to invite ISIS terrorists on to its territory, possibly even after the original Palestinian government had been overthrown by more militantly indigenous, pro-ISIS, Jihadist forces, it could do so without evident practical difficulties, and without necessarily violating relevant international law. Ironically, the worst case for Israel could be one wherein a new Palestinian government had somehow decided to actually abide by its pre-independence agreement to remain demilitarized. This is the case because a demilitarized Palestine could make an effective ISIS conquest of West Bank (Judea/Samaria) much easier.

In the end, for Israel, the problem is Palestine in any conceivable form.

Palestine would represent a mortal danger to Israel, whether

or not it had adhered to any of its pre-independence agreements to demilitarize. This lethal peril would likely be greatest in those particular circumstances in which ISIS had previously succeeded with armed penetrations of Jordan. As for Jordan's own express legal obligations to Israel regarding security and joint cooperation against terrorism – responsibilities codified primarily at the 1994 Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan – these duties would have no useful impact upon ISIS aggressions.

Here, too, Israel would need to look far beyond any once-optimistic promises of international law.

Here, too, law would follow power.

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