Defending Israel against Iranian Nuclear Aggression: War, Genocide, and International Law

by Louis René Beres (August 2015)

Under authoritative international law, aggressive war and genocide need not be mutually exclusive. On the contrary, war can intentionally create the conditions that would make genocide possible; it can also be the more direct or immediate instrument of closely related crimes against humanity. It follows then, as Iran comes ever closer to achieving a viable nuclear weapons capability,[1] that Israel has an especially good reason to fear future conflicts with such an aggression-prone Islamic republic.

Ultimately, any war launched by Iran could become genocidal.

Language has meaning. On July 23, 2014, Iran's Supreme Leader, Ali Khamenei, called openly for the annihilation of Israel.[2] For some time before that day, Iranian presidents, whether Hassan Rouhani or Mahmoud Ahmadinejad, had been proclaiming their desire to bring about Israel's "disappearance."[3]

What still needs to be examined, more seriously and systematically, is whether these Iranian leaders have been calling for literal genocide, and whether, in response, Israel still maintains any legal authority to strike first.[4]

Israel already has codified and customary rights to request a punitive General Assembly resolution, even one calling for Iran's expulsion from the United Nations. While such a diplomatic rejoinder to Iran's presumptively genocidal pleas could be entirely permissible and compliant with the law, it would also have little determinable effect upon Iran's planned or considered military intentions. Of course, any such request could also be rejected by UN member states.

Under international law, genocide has a very precise jurisprudential meaning. This identifiable content is most conspicuously and authoritatively defined in the "Convention on

the Prevention and Punishment of the Crime of Genocide." According to that 1948 treaty, which entered into force in 1951 and is also binding upon non-signatory states as customary international law, pertinent violations are not confined to any specifically enumerated acts committed with "intent to destroy…." They also include "conspiracy to commit genocide" and "incitement to commit genocide."

No state can ever be obliged to passively await an expected genocide. This principle, "peremptory" because it is fundamental and overriding (a *jus cogens* norm, identified at the 1969 Vienna Convention on the Law of Treaties), includes those more or less exterminatory belligerencies that masquerade as war.

Under both codified and customary legal rules, every state maintains an "inherent right" to individual or collective self-defense.

As express violations of the 1948 Genocide Convention, and its derivative norms, Iranian calls for Israel's "disappearance" are not simply calls for cartographic exterminations. Under law, they are also, quite literally, genocidal provocations. In view of its corollary unwillingness to abide by obligations under both the UN Charter and the 1968 Nuclear Nonproliferation Treaty (NPT), Iran has chosen to disregard the binding norms of general international human rights law. Moreover, these complementary *jus cogens* violations are enlarged by Iran's support of Hizbullah, and by its support for certain other kindred terrorist groups (both Shi'a and Sunni).

In the chaotic Middle East, the geostrategic axes of conflict are complex and sometimes overlap. This bewildering situation could sometime require Israel to choose between having to combat one genocidal terror group (e.g., Shi'a Hizbullah), or another (e.g., Sunni ISIS).

Undeterred by a patently impotent diplomacy of "sanctions," including even the P5+1 agreement of July 14, 2015, Iran is finalizing its preparations for nuclear weapons capability. The Tehran regime may still regard nuclear weapons as a potentially acceptable means with which to create "a world without Zionism." As for any sort of reconciliation with Israel, Iran's former president has already spoken quite frankly: "Anybody who recognizes Israel will burn in the fire of the Islamic nation's fury; any Islamic leader who recognizes the Zionist regime means [sic] he is acknowledging the surrender and defeat of the Islamic world."

Like it or not, Israel may still face a zero-sum "game" with Iran, a life-or-death contest in which one state's ultimate victory will plausibly require the other's total defeat. Very soon, therefore, Israel's leaders might have to make certain unprecedented existential decisions, *inter alia*, on launching defensive first strikes.

Operational and jurisprudential judgments on this urgent issue are discrete, and thus need to be appraised separately. Here, we are interested only in the second standard of assessment. In short, we must inquire: Could such strikes be legal? An informed answer requires both knowledge and nuance. Would the case for the legality of Israeli preemptive action be strengthened by Iran's willingness to go beyond aggression (another expressly codified crime under international law) to genocide? And does the Genocide Convention address the vital security issue of anticipatory self-defense?[5]

For Israel, size counts.[6] At less than half the area of a typical county in California, Israel's "wiggle room" in matters of strategic survival is woefully limited.

Ironically, over several years, although Israel has never actually threatened Rouhani or Ahmadinejhad with preemption, Tehran has somehow managed to extrapolate just such a threat from an introspective awareness of its own first-strike intentions. Quite strategically, perhaps, knowing that Israel has the most to fear from Tehran's unhindered nuclear program, Iranian leaders habitually complain that it is the "Zionists" who are preparing for aggression.

From time to time, Iran hints obliquely at its presumed right to attack Israel first, in permissible self-defense. In this regard, Iran has essentially been threatening to preempt an Israeli preemption. Although unlikely, Israel could still decide to fulfill Iran's own contrived warnings. Any such authentically lawful preemption, assuredly non-nuclear, will have been mandated by the Tehran-induced strategic spiral of "escalation dominance."

In this context, history may be relevant. Facing formidable Arab attacks in June 1967, the Jewish State opted to strike first. From the standpoint of international law, this preemption against enemy military targets was a classic example of anticipatory self-defense.

On June 7, 1981, Israel launched Operation Opera against Saddam Hussein's then-developing nuclear reactor outside Baghdad. Officially, this preemptive attack on Osiraq—an attack that ultimately saved a great many American and other lives ten years later, during the first Gulf War, or Desert Storm—was also an expression of anticipatory self-defense. Interestingly, however, because Iraq had always considered itself to be formally "at war" with Israel,[7] the Jewish State could just as easily and correctly have regarded this essential act of protection as something else. More precisely, back in 1981, taking an alternative legal position, Prime Minister Menachem Begin could also have justified Operation Opera as a permissible action, one taken tactically in the wider context of already ongoing belligerency.

It is notable also that legally, Begin chose to link Operation Opera to the prevention of "another Holocaust." The core rationale of including anticipatory self-defense under customary international law has been the prevention of aggression, not the prevention of genocide. Logically, it was not until 1951, when the Genocide Convention first entered into force, that the legal question of defensive first strikes to forestall such enumerated crimes against humanity could even have been raised.

After the Holocaust, and the subsequent Nuremberg Trials, it became clear that the traditional prerogatives of sovereignty in world law could no longer remain absolute, and that the once-legitimate cover of "domestic jurisdiction" would now have to exclude certain egregious violations of human rights. With this fundamental transformation, individual human life was to be held sacred everywhere, and individual states were no longer automatically precluded from entering into the "territorial sphere of validity" of other states. On the contrary, from then on, the traditional norm of "non-intervention" would sometimes have to yield to compelling obligations of "international concern."

In principle, at least, it became a reasonable expectation that all states, either individually or collectively, would acknowledge a distinct and overriding legal obligation to prevent Nuremberg-category crimes (after 1951, crimes of genocide) being committed in other states, even to the point of sometimes undertaking appropriate interventions within those sovereign states. This critical obligation was strongly reinforced at Articles 55 and 56 of the United Nations Charter, a key international law document, which has the formal status of a multilateral treaty. Today, we speak of all such permissible interventions as "humanitarian." Alternatively, diplomats and scholars may prefer the closely related term, the "Responsibility to Protect," or "R2P."

Whichever term is preferred, the international legal order now expects all states to demonstrate responsibility toward one another (in effect, to be their "brothers' keepers"),[8] and take necessary action to prevent genocide and certain corollary crimes against humanity. Examples of this collaborative expectation, a concept that makes unassailably good sense in our anarchic system of world law—a fractionated balance-of-power system that first came into being in 1648, when the Treaty of Westphalia ended the Thirty Years' War,[9] and one that has yet to be replaced with genuinely effective supra-national legal institutions—can be found in at least four prominent post-Holocaust cases:

- the Tanzania-led invasion of Uganda in 1979, which put an end to Idi Amin's almost decade-long genocide against the Acholi and Langi tribes;

- the Vietnamese invasion of Cambodia in 1979, which put an end to the Khmer Rouge mass murder of almost 2,000,000 people, a genocide that targeted several diverse populations along many different ethnic, cultural, and tribal lines;

- the 1971 genocide against Bengali people, the "Bangladesh Genocide," which covered an area originally known as "East Pakistan," and that was finally stopped by massive Indian military intervention; and

- the 1994 invasion of Rwanda by Tutsi rebels who had been "hosted" in neighboring Burundi, and also in the Democratic Republic of the Congo. This genocide, perpetrated largely by Hutu extremists (the Interahamwe), led to nearly 1,000,000 Tutsi deaths in ninety-days, making it the "swiftest" genocidal mass murder in human history. It is also infamous because the European powers, the United States, and the UN abandoned every shred of compelling legal responsibility for humanitarian intervention, or the responsibility to protect.

In the Rwanda case, perhaps more conspicuously than anywhere else in the past half-century, crude geopolitics easily trumped both human rights and corresponding international law.

There are other glaring examples of post-Holocaust genocides, all of which further underscore how little progress has actually been made in compliance with world law. These examples include the Indonesian Genocide (1965–66) and the Darfur Genocide, which began in 2003. Additionally, there are more recent examples of humanitarian intervention in domestic war zones, such as the multilateral Libya operation several years back to shield Muammar Qadhafi's domestic noncombatant targets from indiscriminate attacks.

Still, there have been no recognized examples of anticipatory self-defense as a specifically preventative anti-genocide measure under international law. The anti-genocide interventions in the above cases were directed toward the protection of imperiled human populations in other states. They were not the preemptive expressions of any imperiled state seeking to protect itself, "in whole or in part," from an anticipated genocide.

The relentless fighting in Iraq and Afghanistan provides an example of American preemption strategy for national self-defense against terrorism, but not against any expected genocide. From the standpoint of permissibility under international law, even this restricted example of preemption is exceedingly problematic. Today, the pertinent history of fabrication and contrivance in this particular theatre of conflict is widely known.

Early on, the George W. Bush administration went on record in favor of a substantially broadened concept of anticipatory self-defense. This very sweeping American doctrine asserted that traditional notions of deterrence could not be expected to work against a new kind of enemy. "We must," according to *The National Security Strategy for the United States of America* (as published on September 20, 2002), "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries." In this connection, it should be recalled that the 1837 incident from which the modern legal concept of anticipatory self-defense is drawn (the *Caroline),* related to a threat that is "imminent in point of time."

In actual practice, this "adaptation" meant nothing less than striking first against presumptively dangerous adversaries, whenever deemed necessary. In any plausible comparison to Israel's current dangers from Tehran, however, the alleged risks to the US from Saddam Hussein's Baghdad reactor in the wake of 9/11 must appear vague and uncertain. In other words, when it is finally understood, in terms of Israel's present concerns about an overtly genocidal Iran, any Israeli strategy of anticipatory self-defense should be substantially less subject to any proper jurisprudential doubt than was America's Operation Iraqi Freedom.

In the post-Holocaust and post-Nuremberg international system, the right of individual states to defend themselves against genocide is reasonably overriding, and also beyond legal question. This right does not stem directly from the language of the Genocide Convention, which does not explicitly link genocide to aggressive war, but it can still be extrapolated from the precise legal language of anticipatory self-defense, including the 1837 case of the *Caroline* and all subsequent authoritative reaffirmations of law identifiable at Article 38 of the Statute of the International Court of Justice. The right of anticipatory self-defense to prevent genocide can also be deduced from certain basic principles of self-protection codified at the 1969 Vienna Convention on the Law of Treaties, and, more generally, from the confluence of persistently anarchic international relations[10] with now-obligatory legal norms of basic human rights.

Should Israeli decision makers ultimately determine that they do have a compelling right to act first against Iran to prevent genocidal aggression, any resultant preemptive Israeli action would still have to be consistent with the laws of war in international law, or the law of armed conflict. In detail, this means that Israel would have to respect the always indisputable primary belligerent requirements of "distinction" (avoiding injury to noncombatants); "proportionality;"[11] and "military necessity."[12]

What about the future? What happens next concerning a steadily nuclearizing Iran? What about

invoking anticipatory self-defense in this particular case?

International custom is one of several proper sources of international law listed at Article 38 of the Statute of the International Court of Justice. During the unsuccessful rebellion of 1837 in Upper Canada against British rule, the *Caroline* incident established that even a serious threat of armed attack may justify militarily defensive action.

In an exchange of diplomatic notes between the governments of the US and Great Britain, then-US Secretary of State Daniel Webster outlined a framework for self-defense that did not require a prior attack. Here, a military response to a threat was judged permissible, but only so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment of deliberation."[13]

Strategic circumstances and the consequences of strategic surprise have changed a great deal since the *Caroline,* thereby greatly and sensibly expanding legal grounds for anticipatory self-defense. Today, in an age of chemical/biological/ nuclear weaponry, the reaction time available to any vulnerable state under attack could be a matter of mere minutes. From the special standpoint of Israel, perhaps about to face a literally annihilatory Iran armed with nuclear weapons, an appropriately hard-target resort to anticipatory self-defense could be both lawful and law-enforcing.

Of course, whether any such eleventh-hour preemption would also make operational or tactical sense is another question entirely.

Before the start of the atomic age, any justification of anticipatory self-defense would have to have been limited to expected threats of aggression from other states, not threats of genocide. Today, however, the conceivable fusion of nuclear weapons capacity with aggression could, *ipso facto,* transform certain wars into an opportunity to commit genocide. Although there are no true precedents of resorting to preemption as a law-enforcing means of preventing genocide or "conspiracy to commit genocide" by one state against another, the pertinent right to such pre-attack self-defense is firmly rooted, *inter alia*, in the case of the *Caroline*.

If it was already legal, long before nuclear weapons, to strike preemptively to prevent conventional aggression, how much more permissible must it be to strike preemptively to defend against a potentially genocidal nuclear war?

Some legal scholars argue that the lawful right of anticipatory self-defense first expressed in the *Caroline* incident has now been overridden by the more limiting language of the UN

Charter. In this view, Article 51 of the Charter offers a much more measurably restrictive statement on self-defense, one that relies on the strict and tangible qualification of prior "armed attack." Nonetheless, this narrowly technical interpretation ignores a much larger antecedent point, that is, that international law is never a suicide pact.[14]

Sensibly, no law can ever compel a state to wait until it has absorbed a devastating or even genocidal first strike before acting to protect itself. Both the Security Council and the General Assembly correctly refused to condemn Israel for its 1967 preemptive attacks. Incorrectly, however, whether or not it had then accepted the existence of a formal state of war between Israel and Iraq—a condition of belligerency that was openly insisted upon by Baghdad—the UN did condemn Israel for Operation Opera in 1981. This decidedly wrongful condemnation was the direct result of regionally recurrent geopolitical circumstances, familiar conditions wherein exterminatory power politics easily trumped pertinent law.

Present-day Israel is engaged in a state of protracted belligerency with Iran. Again and again, Tehran has implied that a "state of war" exists with Israel.

If faced with an Iran in control of a nuclear arsenal, Jerusalem's only remaining strategic options would center upon some still-practicable combination of active ballistic missile defense[15] and nuclear deterrence.[16] In the best case, the resulting condition of mutual nuclear vulnerability could resemble the earlier Cold War dynamics of "two scorpions in a bottle," the famous metaphoric description first created by physicist J. Robert Oppenheimer. In the worst case, however, it could become an institutionalized "fusion" of mutual uncertainty and radical instability, a potentially explosive posture more unpredictable than earlier US–Soviet conditions of Mutual Assured Destruction (MAD). In part, this would be because of the heightened probability of Iranian leadership irrationality, a fearful prospect that could very quickly immobilize operational nuclear deterrence.

Under all relevant criteria of international law, Iran's ongoing stance toward Israel remains unequivocally genocidal. Because international law is not a suicide pact, Jerusalem, now facing a fusion of enemy nuclear capacity with enemy criminal intent, reserves every reciprocal right of national self-protection. In principle, at least, this includes even the undeniable right to anticipatory self-defense.

Still, Israeli calculations of genocide prevention will have to display recognizably pragmatic as well as legal components. To be sure, any rational Israeli decision to preempt genocidal actions by Iran would have to be based not only upon due conformance with the rules of applicable law, but also on absolutely overriding strategic and tactical

expectations.[17] Understandably, therefore, even if Israel were to accept the lawfulness of anticipatory self-defense against Iran, it would act accordingly only if such a complex defense plan could also be expected to work.

In the end, Israel, already facing a nearly-nuclear Iran that could potentially transform war into genocide, will likely forego any eleventh-hour preemptions, and rely instead upon some expectedly optimal combination of active defense and long-term nuclear deterrence.[18] With such a more-or-less prudential reliance, Jerusalem would pay appropriate heed to Sun-Tzu. In *The Art of War*, the ancient Chinese military strategist reminds us still that "subjugating the enemy's army without fighting is the true pinnacle of excellence."[19]

Notes

1 This trajectory of Iranian nuclearization will not be meaningfully slowed by the agreement, announced formally on July 14, 2015.

2 See Y. Mansharof, E. Kharrazi, Y. Lehat, and A. Savyon, "Quds Day in Iran: Calls for Annihilation of Israel and Arming the West Bank," MEMRI, July 25, 2014, *Inquiry and Analysis Series Report* No. 1107. More recently, Brig. Gen. Mohammad Reza Naqdi, commander of the Basij Militia of Iran's Revolutionary Guards, said in an interview, "Erasing Israel off the map is nonnegotiable," *Times of Israel* and *Newsmax*, April 1, 2015.

3 For a comprehensive and authoritative assessment of genocidal antisemitism in Shi'a Iran, see Andrew G. Bostom, *Iran's Final Solution for Israel: The Legacy of Jihad and Shi'ite Islamic Jew-Hatred in Iran* (Washington, DC, 2014). See also Andrew G. Bostom (ed.), *The Legacy of Islamic Anti-Semitism* (Amherst, 2008).

4 The right of self-defense is a peremptory or *jus cogens* norm under international law.

5 On anticipatory self-defense under international law, see Louis René Beres, Chair, The Project Daniel Group, "Israel's Strategic Future: Project Daniel," *ACPR Policy Paper* No. 155, May 2004. This policy guideline on the Iranian nuclear threat was prepared especially for Israeli Prime Minister Ariel Sharon, and presented, by hand, on January 16, 2003.

6 A great deal has been written about the importance of mass or "strategic depth" to Israel. The heart of this issue was addressed as early as June 29, 1967, when a US Joint Chiefs of Staff memorandum specified that returning Israel to pre-1967 boundaries would

drastically increase its existential vulnerability.

7 Under traditional international law, the question of whether or not a state of war actually exists between states is now often ambiguous. Also unclear, *inter alia,* is the legal status of belligerency between states and sub-state terror organizations.

8 Strictly speaking, recalling that the right to self-defense is peremptory, and also deducible from antecedent natural law, each state should cooperate *in the protection of Israel* from the effects of any planned Iranian aggression, and/or genocide.

9 See *Treaty of Peace of Munster*, Oct. 1648, 1 Consol. T.S. 271; *Treaty of Peace of Osnabruck*, Oct. 1648, 1 Consol. T.S. 119. Together, these two treaties comprise the Treaty of Westphalia.

10 "For what can be done against force, without force?" inquires Cicero, even after Rome tries to put an end to an earlier anarchy. See Marcus Tullius Cicero, *Cicero's Letters to His Friends* 78, trans. D.R. Shackleton Baley (London, 1978).

11 The principle of proportionality has its jurisprudential and philosophic origins in the Biblical *Lex Talionis,* or the "law of exact retaliation." The "eye for an eye, tooth for a tooth" code can be found in three separate passages of the Torah, or Biblical Pentateuch.

12 The principle of "military necessity" has been defined as follows: "Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied." See United States, Department of the Navy, *The Commander's Handbook on the Law of Naval Operations,* NWP 1-14M, (Norfolk, 1995), p. 5-1.

13 Support for appropriate resorts to anticipatory self-defense are not restricted to conventions and customs. Rather, the right of self-defense by forestalling an attack is already well established in classical international law. In 1625, Hugo Grotius, in *The Law of War and Peace,* declared that any ordinary prohibitions of Israelite attack were inapplicable in the particular case of certain Canaanite tribes, inasmuch as the Israelites had previously been attacked in a war by the Canaanites.

14 Although the customary legal right of anticipatory self-defense can be abused, any indiscriminate or across-the-board rejection of preemption could also carry intolerable risks. In fact, in the nuclear age, waiting passively to absorb an enemy attack could

represent the *reductio ad absurdum* of legalism in international law.

15 See Louis René Beres and Isaac Ben-Israel, "Think Anticipatory Self-Defense," *The Jerusalem Post,* October 22, 2007.

16 See Louis René Beres and John T. Chain, "Could Israel Safely Deter a Nuclear Iran?" *The Atlantic*, August 2012; Louis René Beres, "Ensuring Israel's Survival: Targeted Threats and Remedies," *The Jerusalem Post,* August 19, 2013; Louis René Beres and Leon "Bud" Edney, "Reconsidering Israel's Nuclear Posture," *The Jerusalem Post*, October 15, 2013; and Louis René Beres and John T. Chain, "Living With Iran: Israel's Strategic Imperative," BESA Center for Strategic Studies, *BESA Center Perspectives Paper*, No. 249, May 28, 2014, Israel.

17 In clarifying such diverse expectations, Israel's leadership would have to examine the Iranian nuclear threat together with a variety of concurrent threats from other sources, including even the growing prospect of Palestinian statehood. This is because such seemingly discrete threats could intersect, creating disruptive synergies that are "mathematically" more than the simple sum of their parts.

18 Regarding long-term nuclear deterrence with Iran, Israel would very likely have to consider ending its traditional policy of "deliberate nuclear ambiguity," or "the bomb in the basement."

19 See Louis René Beres, "Lessons for Israel from Ancient Chinese Military Thought: Facing Iranian Nuclearization with Sun-Tzu," *Harvard Law School National Security Journal,* October 24, 2013.

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which comments are welcome.