Hidden Legal Flaws in the Iran Nuclear Deal

There exist major jurisprudential flaws in the new Iran nuclear agreement, still-hidden legal shortcomings that President Obama and Secretary John Kerry have yet to acknowledge. The associated risks have most to do with permitting Iran to enrich uranium after 15 years. Indeed, this stunningly ironic allowance openly contradicts the 1968 Non-Proliferation Treaty (NPT), especially those key provisions that obligate Iran to remain non-nuclear for a period of "indefinite duration."

Significantly, such international law is also part of the law of the United States. It follows, according to Article 6 of the U.S. Constitution, the so-called Supremacy Clause, that any U.S. entry into the new Iran agreement must (by definition) violate American law, specifically, the "supreme law of the land."

A second overwhelming legal contradiction concerns the Obama administration's expressed unwillingness to abide by the 1948 Genocide Convention. From the start, this American president refused to base his country's negotiations with Iran upon a duly contingent expectation that Tehran's leadership first abrogate unambiguously genocidal statements. These conspicuous Iranian declarations regarding Israel, a country smaller than America's Lake Michigan, are impermissible in jurisprudence. They reveal a thoroughly egregious violation of both international and national law.

The Genocide Convention criminalizes not only genocide per se, but also "conspiracy to commit genocide," and "direct and public incitement to commit genocide."

Does the United States have any recognizable obligation to

enforce such treaty prohibitions in its nuclear diplomacy with Iran? Although the language of the Genocide Convention does not explicitly require such precise enforcement, absolutely all treaties are premised upon the "peremptory" doctrine of pacta sunt servanda (Latin for "agreements must be honored"). Further, a binding U.S. obligation is manifestly deducible from Article V of the Convention, which calls for international cooperation in providing "effective penalties" for those who have engaged in "incitement to commit genocide," and also from Article VIII, which requires "any contracting party" to bring all unlawful behavior before "competent organs of the United Nations."

Once again, there exists a meaningful intersection of U.S. constitutional law and international law. Because of the Supremacy Clause and assorted Supreme Court decisions, especially the Paquete Habana case (1900), this president's unapologetic failure to enforce anti-genocide norms in its nuclear dealings with Iran constitutes a serious violation of U.S. law. On purely moral grounds, moreover, this failure is similarly inexcusable.

A third problem with the new Iran agreement is less a matter of contradictory agreements than of "naive legalism." In essence, there is no good reason to suppose that Iran would ever feel any genuine obligations toward compliance. Over time, rather, Iran's cadre of international lawyers will surely embark on an already-calculated strategy of unilateral "treaty" termination.

Looking ahead, there are several strategies of unilateral termination that Iran could and most likely would invoke. One of these conveniently malleable grounds, identified at Article 48 of the Vienna Convention, affirms that "A State may invoke an error … as invalidating its consent … ." Another, codified at Article 52, indicates that any formal international agreement is void "if its conclusion has been procured by the threat or use of force … ." Still another predictable ground

for future Iranian legal manipulation can be found at Article 53, the so-called “Jus Cogens” or peremptory norm section of the Vienna Convention on the Law of Treaties (1969). This all-too pertinent article states, “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” In this case, Iran could claim, however unfairly, that the agreement had impaired its incontestable sovereignty.

To be sure, Iran could sometime decide that it would be better to remain in the new 2015 pact, at least in principle, but to simultaneously quit the NPT. The expected rationale of any such alternative strategy would be that the newer pact would allow full nuclearization after the 15-year agreement duration, while the NPT could never make any such allowance. Per Article X of the NPT, Iran’s withdrawal could then rest on the presumptively acceptable argument that any continued agreement membership would jeopardize its “supreme interests.”

It could do this very easily, of course, merely by giving “three-months notice.”

Blatant military and strategic failings of the new Iran agreement should be granted pride-of-place in any identification of prospective risks. At the same time, the United States is normally represented as a law-abiding nation, and this pact’s crude subversion of both international and national law should not simply be ignored. To be sure, the new pact would have altogether devastating security consequences for both the United States and Israel, but this should not stand in the way of simultaneously recognizing its utterly overwhelming illegality.

In the best of all possible worlds – a world perhaps not yet governed by hideously small-minded political trickery – such a corollary recognition could help restore America’s now badly damaged international reputation and moral stature.

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