Iran's Unhidden Plan For Genocide: Israel's Decision

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In the post-Holocaust and post-Nuremberg international system, the right of individual states to defend themselves against genocide is overriding, and thoroughly 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 (1) the precise legal language of anticipatory self-defense, including an 1837 case known as The Caroline; and (2) 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 Vienna Convention on the Law of Treaties, and, more generally, from the confluence of persistently anarchic international relations with now-obligatory norms of basic human rights.

Should Israeli decision-makers finally determine they do have a compelling right to act first against Iran to prevent genocidal aggression, any resultant Israeli resorts to preemptive force would still have to be consistent with the laws of war of international law, or the law of armed conflict. In detail, this would mean, for Israel, respecting the

always indisputable primary belligerent requirements of “distinction” (avoiding injury to noncombatants), “proportionality,” and “military necessity.”

What about the future? What happens next concerning a steadily nuclearizing Iran? What about 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. Where it is understood as anticipatory self-defense, the customary right to preempt has its modern origins in an incident known in appropriate jurisprudence as The Caroline. During the unsuccessful rebellion of 1837 in Upper Canada against British rule, The Caroline had 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 United States and Great Britain, then-U.S. Secretary of State Daniel Webster outlined a framework for self-defense which did not require a prior attack. Here, 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.”

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 time available to any vulnerable state under attack could be only a matter of minutes. From the special standpoint of Israel, soon to face an Iran armed with nuclear weapons, an appropriately hard-target resort to anticipatory self-defense could be both lawful and law-enforcing.

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 genocide. Today, however, the conceivable fusion of nuclear weapons capacity with aggression could transform war into 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 rooted, inter alia, in The Caroline.

After all, if it was already legal, long before nuclear weapons, to strike preemptively in order to prevent entirely conventional aggressions, how much more permissible must it be to strike preemptively to defend against a potentially genocidal nuclear war?

Nonetheless, some legal scholars argue that the right of anticipatory self-defense expressed by The Caroline has been overridden by the more limiting language of the United Nations Charter. In this view, Article 51 of the Charter offers a far more restrictive statement on self-defense, one that relies on the strict qualification of a prior armed attack. This very narrowly technical interpretation ignores the larger antecedent point, that international law is never a suicide pact.

Sensibly, law can never 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 openly insisted on by Baghdad – the UN didcondemn Israel for Operation Opera in 1981. Of course, this legally incorrect condemnation was the direct result of regionally recurrent circumstances, conditions wherein an exterminatory power politics or geopolitics trumps law.

Present-day Israel is engaged in a condition of protracted belligerency with Iran. Again and again, Tehran has declared unambiguously that there exists a formal state of war with Israel. Once Iran is allowed to cross much publicized “red lines” of uranium enrichment, and become fully nuclear, Israel’s realistic options for anticipatory self-defense will likely have been removed.

In such eleventh-hour circumstances, Jerusalem’s only remaining strategic options would center on some still-practicable combination of active ballistic missile defense, and nuclear deterrence. The resulting condition of mutual nuclear vulnerability could resemble earlier Cold War images of two scorpions in a bottle, the metaphoric description originally offered by physicist J. Robert Oppenheimer. It would likely become a “fusion” of mutual uncertainty and radical instability, an explosive posture considerably more unpredictable than earlier U.S.-Soviet conditions of Mutual Assured Destruction (MAD).

Above all, this is because of the possibility of Iranian leadership irrationality, a fearful prospect that could immobilize 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. This includes the right to anticipatory self-defense.

In the end, Israeli calculations of genocide prevention from Iran would have to display pragmatic as well as legal components. Any Israeli decision to preempt against Iran would have to be based not only on a due conformance with the rules of applicable law, but also on overriding strategic and operational expectations. Even if Israel were to fully accept the lawfulness of anticipatory self-defense against Iran, it would act accordingly only if such a complex defense were also expected to work.