Iran's Unhidden Plan for Genocide: A Legal Assessment (Second of Three Parts)

March 25, 2013
By Louis Rene Beres
Jewish Press
http://www.jewishpress.com/indepth/columns/louis-bene-beres/irans-unhidden-plan-for-genocide-a-legal-assessment-second-of-three-parts/2013/03/25/

On June 7, 1981, Israel launched Operation Opera against Saddam Hussein's nuclear reactor outside Baghdad. Officially, this preemptive attack on Osiraq – which ultimately saved a great many American and other lives ten years later, during the first Gulf War, was an expression of anticipatory self-defense. Interestingly, however, because Iraq had always considered itself to be formally at war with Israel, the Jewish state could just as easily and correctly have regarded this essential act of preemptive self-defense as something else.

Back in 1981, taking an alternative legal position, Prime Minister Menachem Begin could have justified Operation Opera as a permissible tactical action in the wider context of a longstanding and ongoing belligerency. Had he done so, Israel could then have pointed out that *both* of the pertinent legal obligations applying here had also been fully satisfied. These are the always twin obligations of "just cause" (facing an existential threat), and "*just means*" (minimizing collateral harms). To be acceptable, *any* act of anticipatory self-defense would have to fulfill classic law of war expectations that the means used to injure an enemy are not unlimited.

Jurisprudentially, it is significant that Begin chose, explicitly, to link Operation Opera to preventing, in his words, "another Holocaust." Historically, of course, the rationale of including anticipatory self-defense under customary international law had been the prevention of *aggression,* not 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 crimes against humanity could even have been raised.

After the Holocaust, and subsequent Nuremberg Trials, it became plain that the 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 crimes against human rights. With this very 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 need to yield to indisputably compelling judgments of "international concern."

It was now the 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) in other states, even to the extent of undertaking active intervention within those sovereign states.

This critical obligation was strongly reinforced at Articles 55 and 56 of the United Nations Charter, a core document that has the formal status of a multilateral treaty. Today we speak of all such permissible interventions as "humanitarian." Sometimes diplomats and scholars prefer the closely related term "The Responsibility to Protect."

Whichever term is preferred, the international legal order now accepts and expects that all states will feel co-responsible for each other, including the prevention of genocide and certain corollary crimes against humanity. Examples of this collaborative expectation, a concept that makes incontestably good sense in our still-anarchic system of world law – a system that first came into being in 1648, when the Treaty of Westphalia ended the Thirty Years' War and that has yet to be replaced with genuinely effective supra-national legal institutions – can be found in at least four prominent post-Holocaust cases:

(1) 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;

(2) 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 had targeted several diverse populations along many different ethnic, cultural, and tribal lines;

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

(4) 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*) produced almost 1,000,000 deaths in ninety-days, making it the "fastest" genocidal mass murder in human history. It is also infamously noteworthy because the European powers, the United States, and the United

Nations had all abandoned every shred of responsibility for humanitarian intervention or the responsibility to protect.

In this case, perhaps more conspicuously than anywhere else in the past half-century, bloodless 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 civilizational progress has actually been made in world law. These examples include the Indonesian Genocide (1965-66), and the Darfur Genocide, which began in 2003. Additionally, there are, of course, more recent examples of humanitarian intervention in domestic war zones, such as last year's multilateral Libya operation to shield Muammar Khaddafi'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 state seeking to protect itself in whole or in part from anticipated genocide.

The recently-ended Iraq war provides an example of an American preemption for national self-defense against terrorism, but not against n expected genocide. Moreover, 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 theatre is widely-known.

Early on, the George W. Bush administration had gone on record in favor of a substantially broadened concept of anticipatory self-defense. This very sweeping American doctrine had asserted that traditional notions of deterrence could not be expected to work against a new kind of enemy. "We must," stated The National Security Strategy for the United States of America (September 20, 2002), "adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."

Across the board, this adaptation meant nothing less than striking first against presumptively dangerous adversaries whenever necessary. In any reasonable comparison to Israel's current dangers from Tehran, however, the alleged risks from Saddam Hussein's Baghdad in the wake of 9/11 must always appear vague and uncertain. In other words, when it is understood in terms of Israel's present concerns about an overtly

genocidal Iran, any Israeli strategy of anticipatory self-defense should now be less subject to proper jurisprudential doubt than was America's Operation Iraqi Freedom.