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War With Iran: Israel's Legal Obligation to Prevent Iranian Nuclear Weapons

Louis René Beres



Mideast Security and Policy Studies No. 206

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EXECUTIVE SUMMARY

For the most part, Israel's no-choice Gaza War has been fought against sub-state terrorist adversary Hamas. But on April 13, 2024, Iran launched a first-ever direct missile and drone attack upon Israel. Though Tehran claimed the attack was permissible retaliation for Israel's prior targeting of Iranian diplomats in Syria, the victims were in fact senior terrorist operators and the shielding consulate was being used perfidiously by Iran. Moreover, the Iranian attack was intentionally indiscriminate (displaying *mens rea*, or criminal intent) and thus a violation of humanitarian international law. The critical question for Israel is now this: *What forms of lawful reaction should be launched against Iran, and when?*

The single most important standard of operational choice should center on Israel's long-term survival, especially its necessary protection from a prospective Iranian nuclear attack. Iran is still pre-nuclear, but that limitation could disappear in the next year and make any residual security options less effective for Israel. Accordingly, Israel should base its military decisions regarding war with Iran upon the requirements of national survival, not on secondary bases of vengeance, political advantage or Jewish justice. Recalling Roman philosopher Cicero, "The safety of the People shall be the highest law."

Prof. Louis René Beres was educated at Princeton (Ph.D., 1971) and is the author of many books and scholarly articles dealing with international law, nuclear strategy, nuclear war, and terrorism. In Israel, Prof. Beres was Chair of Project Daniel (PM Sharon). His 12th and latest book is Surviving Amid Chaos: Israel's Nuclear Strategy (Rowman & Littlefield, 2016; 2nd ed., 2018).

Background of an obligatory war: Israel, Iran and the “state of nature”

For Israel, a war to prevent Iran from reaching nuclear weapons status is not merely an opportunity. It is an incomparable (some would even say sacred) obligation, not only for Israel, but for all other states that could be inadvertently caught up in an Iran-sparked nuclear maelstrom. Ordinarily, it would be in each adversary’s interest to avoid such an unpredictable war at all costs, but in the uniquely perilous case at hand, military engagement could prove indispensable for Israel. In more legal terms, because Israel must do whatever it can to prevent its openly genocidal enemy in Tehran from becoming nuclear, a lawful war could offer Israel a time-urgent opportunity for anticipatory self-defense.

Israel is now obliged to examine the lawfulness and rationality of an impending war with Iran. To be sure, the human and material costs to Israel of such an existential conflict would be very high, but these costs could not reasonably be compared to the expected consequences of a war with a nuclear Iran. *Ipsa facto*, fighting a pre-nuclear terror-sponsoring state that initiated the current cycle of Iranian aggression and Israeli self-defense would represent Israel’s best chance of avoiding an eventual nuclear war. During any crisis-provoked search for escalation dominance by an already nuclear Israel and a not-yet-nuclear Iran, competitive risk-taking would still favor the former.

In making its plans, Israel will have to include a variety of intersecting prospects and problems. Jerusalem will need to render its operational decisions against Iran with a view to ongoing battles with Iranian surrogate Hezbollah and to potential regional cooperation via the good offices of Jordan and/or Saudi Arabia. *Prima facie*, Jerusalem should take advantage of all opportunities to reinforce warfare operations with applicable elements of cyber-war.

In all these complex considerations, context will deserve pride of place. Israel’s existential concerns about Iranian nuclear weapons did not arise *ex nihilo*, or out of nothing. The way Jerusalem decides to handle such grave threats will depend in part on overlapping elements of background. By examining critical connections between strategic

decision-making and global authority structures, Jerusalem could best prepare itself to counter the unprecedented problem of an Iranian bomb from jurisprudential and military standpoints.

Israel's inquiries should have a *conceptual* beginning. Current world politics remain in a "state of nature." This phrase describes the "everyone for himself" condition that political philosophers once called a "state of war." Within any such anarchical context – a *bellum omnium contra omnes*, or "war of all against all" – international law must ultimately operate in "vigilante" forms. This Westphalian dynamic identifies a refractory self-help system of national security and global power management, one that defines the opaque context of present-day Israel-Iran relations.

This self-help system is dense, bewildering and unpredictable. There will always be caveats and nuances to be analyzed by Israeli analysts and defense planners. Though codified legal norms don't usually allow states to strike first in self-protection, the law of nations does permit certain residual acts of anticipatory self-defense under customary jurisprudential norms.

Under binding law, defensive first strikes or acts of preemption could be considered permissible in several security-threatening circumstances. But even if resorts to anticipatory self-defense could occasionally be deemed lawful or law-enforcing, they might still prove unreasonably dangerous, strategically misconceived, tangibly ineffectual and/or manifestly irrational. Israel, therefore, should evaluate all anticipatory self-defense options along two discrete but still overlapping standards of evaluation: *law* and *strategy*.

Subsidiary questions will need to be raised. What are the implications of such considerations for Israel, an already nuclear state increasingly imperiled by a rapidly nuclearizing Iran? Before Israel could decide rationally to invoke a carefully calculated strategy of preemption vis-à-vis Iran, its policy makers and strategists would first need to assess this strategy according to the two above-identified standards of evaluation.

What does this mean for effective national security decision-making in Jerusalem? At some point, Israel could reason that a considered

preemptive strike against selected Iranian hard targets (i.e., extant weapons and nuclear weapon-system infrastructures) would be legal – but would also not “work.” Alternatively, Jerusalem could conclude that such a strike would be promising or gainful in operational terms, but more-or-less illegal.

What then?

There are other interrelated questions. One evident danger to Israel of waiting too long is that Tehran could more easily implement protective measures that pose serious hazards. Designed to guard against Israeli preemption, such measures could involve the attachment of hair-trigger launch mechanisms to Iranian nuclear weapons systems and/or the Iranian adoption of launch-on-warning policies, possibly coupled with disassembling pre-delegations of nuclear launch authority. But Iran’s “retaliation” against Israel for Jerusalem’s targeting of an Iranian terrorist leader in Damascus could slow down or eliminate Tehran’s anticipated protective measures. In this scenario, any Iranian escalation to inter-state warfare launched in retaliation for an Israeli counter-terrorism assassination would be manifestly disproportionate and illegal.

What would constitute a lawful preemption?

Optimally, Israel would do everything possible to prevent such destabilizing Iranian measures, especially because of the corollary risks of accidental or unauthorized attacks against its armaments and/or populations. But if such measures were to become a *fait accompli*, Jerusalem could still calculate correctly that a preemptive strike would be both lawful and necessary. Such a judgment would have this reasoning: *The expected Iranian retaliation, however damaging, would still be more tolerable than the expected consequences of Iranian first strikes.*

In its present jurisprudential form, Israel, which “began” in 1948, will last only as long as its leaders remain attentive to Cicero’s warning about national safety. Such attentiveness could be entirely consistent with the universally binding expectations of both codified and customary international law. Law is never a suicide pact. Accordingly, Israel’s basic security problems with Iran could at some point compel

Jerusalem to decide between waiting for that enemy to strike first and striking first itself. At some point, moreover, when judged from a strategic and tactical perspective, the choice of a preemption option could appear rational and cost-effective.

From the vital standpoint of international law, preemption could represent a fully permissible option. Though subject to important constraints and conditions, the right of anticipatory self-defense is already well established under international law. And while a “bolt from the blue” Israeli preemption against Iran could involve assorted difficulties of national security policy, such difficulties are unlikely to arise in an already ongoing conventional war. In this connection, Iran has repeatedly declared its intention to strike Israel as “punishment,” an unambiguous declaration of *mens rea* or criminal intent.

An Israeli decision to preempt

What does the convergence of strategic and jurisprudential assessments of preemption say about Israel’s calculations on striking first? It suggests, among other things, that Israel need not be deterred from undertaking security-maximizing forms of preemption out of fear that its actions would be described as criminal. Although many states would condemn Israel for “aggression” under any circumstances, this particular charge - so long as Israel’s preemptive strikes met the expectations of *jus ad bellum* (justice of war) and *jus in bello* (justice in war) - could be countered authoritatively by informed references to the law of nations.

In jurisprudence, as in other realms, history deserves pride of place. The right of self-defense by forestalling an attack appears in Book II of Hugo Grotius’s *The Law of War and Peace* in 1625. Recognizing “present danger” and threatening behavior that is “imminent in a point of time,” Grotius indicates that self-defense is to be permitted not only after an attack has been suffered, but also in advance; that is, “where the deed may be anticipated.” Or, as he explains a bit further on in the same chapter, “It be lawful to kill him who is preparing to kill.”

A similar position was taken by Emmerich de Vattel. In Book II of *The Law of Nations* (1758), Vattel argues: “The safest plan is to

prevent evil, where that is possible. A Nation has the right to resist the injury another seeks to inflict upon it, and to use force and every other just means of resistance against the aggressor. It may even anticipate the other's design, being careful, however, not to act upon vague and doubtful suspicions, lest it should run the risk of becoming itself the aggressor."

Grotius and Vattel draw upon and parallel the early Jewish interpreters, although the latter speak more generally of interpersonal relations than about international relations. Additionally, the *Torah* contains a prominent provision exonerating from guilt a potential victim of robbery with possible violence if, in self-defense, he struck down and even killed the attacker *before he had committed any crime* (*Ex. 22:1*). In the words of the rabbis, "If a man comes to slay you, forestall by slaying him!" (*Rashi; Sanhedrin 72a*).

Grotius and Vattel both caution against abusing the right of anticipatory self-defense as a pretext for aggression, but this is an abuse that Israel, in its current relationship with Iran, cannot commit. Iran considers itself in a state of war with Israel, so an Israeli act of preemption against that nuclearizing adversary represent not an act of anticipatory self-defense but rather just one more military operation in an ongoing war. In such circumstances, the Israeli military operation's legality would have to be appraised in terms of its apparent conformance or nonconformance with relevant international laws of war (*jus in bello*).

Jurisprudentially, to identify any such operation as an act of aggression against another state that already considers itself at war with Israel would be nonsense.

Background of permissible preemption in law

Even if Iran were not in a condition of belligerence with the Jewish state, a condition regularly amplified by Tehran's open calls for Israel's annihilation, an Israeli preemptive action could still be law-enforcing. Israel, in the fashion of every state under world law, is peremptorily entitled to existential self-defense. Today, in an age of uniquely destructive weaponry, international law does not require Israel or any other state to expose its citizens to atomic destruction.

Inter alia, especially in circumstances where active hostilities already obtain (i.e., in times of conventional warfighting), Israel's license to attack Iranian nuclear facilities could be unassailable.

The right of self-defense, we learn from Emmerich de Vattel, gives rise to the "right to resist injustice." According to the Swiss scholar's argument in Chapter V of the *Law of Nations, or the Principles of Natural Law* (1758), "On the Observance of Justice between Nations":

Justice is the foundation of all social life and the secure bond of all civil intercourse. Human society, instead of being an interchange of friendly assistance, would be no more than a vast system of robbery if no respect were shown for the virtue which gives to each his own. Its observance is even more necessary between Nations than between individuals, because injustice between Nations may be followed by the terrible consequences involved in an affray between powerful political bodies, and because it is more difficult to obtain redress. An intentional act of injustice is certainly an *injury*. A Nation has, therefore, the right to punish it.... The right to resist injustice is derived from the right of self-protection.

The right of anticipatory self-defense has its modern origins in the *Caroline* incident, an event that concerned the 1837 unsuccessful rebellion of Upper Canada against British rule (a rebellion that aroused sympathy and support in the American border states). Following this landmark event, the serious *threat* of armed attack has generally been taken to justify a state's militarily defensive action. In an exchange of diplomatic notes between the governments of the United States and Great Britain, then US Secretary of State Daniel Webster outlined a framework for self-defense that did not require an actual attack. Here, military response to a threat was judged permissible so long as the danger posed was "instant, overwhelming, leaving no choice of means and no moment for deliberation."

In certain residual circumstances, permissible forms of anticipatory self-defense could be expressed via assassination/targeted killing (although classical philosophical and jurisprudential arguments supporting assassination are usually cast more narrowly in terms of a

tyrannicide motif). Representing an alternative or addition to standard military forms of preemption, such targeted killing, in order to be consistent with appropriate international legal expectations, would need to be undertaken when the danger posed to Israel actually met the specific test of the *Caroline*. If the targeted killing were undertaken only to destroy the *potential* threat of an enemy; i.e., as a *preventive* action, it would not qualify as permissible in law.

If, however, the assassination were undertaken in anticipation of an immediate or credibly expected enemy aggression, it could still qualify as anticipatory self-defense.

To be sure, there are antecedent problems. First, in the “real world,” judgments concerning the immediacy of anticipated aggression are exceedingly difficult to make. Second, even where such judgments are ventured, it can never be altogether clear whether the degree of immediacy is sufficient to invoke preemption rather than prevention. Third, in meeting the legal requirements of defensive intent, a state may have to act preventively rather than preemptively, because waiting to allow a threat to become more immediate could have intolerably negative strategic/tactical consequences. And fourth, the state-preserving benefits that might accrue from the assassination of enemy leaders are apt to be contingent upon *not waiting* until the danger posed is “instant, overwhelming, leaving no choice of means and no moment for deliberation.”

Some scholars argue that the customary right of anticipatory self-defense articulated by the *Caroline* has been overridden by Article 51 of the UN Charter. In this view, Article 51 fashions a new and more restrictive statement of self-defense, one that relies on the qualification “...if an armed attack occurs.” Still, this interpretation ignores the fact that international law cannot compel a state to wait until it absorbs a devastating or lethal first strike before acting to protect itself.

Again, recalling Cicero: “The safety of the People shall be the highest law.”

It must be noted that the argument against a more restrictive view of self-defense is reinforced by the evident weaknesses and partisan inclinations of the UN Security Council in offering collective security

against an aggressor state. Both the Security Council and the General Assembly refused to censure Israel for its 1967 preemptive attack against certain belligerent Arab states. This refusal signified implicit approval by the United Nations of Israel's resort in 1967 to anticipatory self-defense.

Before Israel could persuasively argue any future instances of anticipatory self-defense under international law, however, a verifiable case would have to be made that Jerusalem had first sought to exhaust all available means of peaceful settlement. Even a very broad view of anticipatory self-defense cannot relieve a state of this obligation, codified *inter alia* at Article 1 and at Article 2(3) of the UN Charter. Strictly speaking, these obligations should not necessarily be binding upon Israel because of the *de facto* condition of belligerency created and sustained by Iran, but the global community generally seems to have ignored these conditions. It follows that Israel, should it ever decide to exercise preemption against Iran, would be well advised to remind all concerned of its own consistent and comprehensive efforts at peaceful settlement.

Jewish-historical background and future genocide against Israel

The origins of such advice would have deep roots in ancient Israel. According to Grotius, citing *Deuteronomy* in *The Law of Prize and Booty*, the Israelites were exempted from the issuance of warning announcements when dealing with previous enemies (what we might today call an ongoing or protracted war, precisely the condition that currently obtains between Israel and Iran.) The Israelites, recounts Grotius, had been commanded by God to “refrain from making an armed attack against any people without first inviting that people, by formal notification, to establish peaceful relations.” “Yet,” he continues,

“the Israelites thought this prohibition was inapplicable to many of the Canaanite tribes, inasmuch as they themselves had previously been attacked in war by the Canaanites.”

“Hence,” says Grotius, “we arrive at the following deduction”:

Once the formality of *rerum repetitio* has been observed, and a decree on the case in question has been issued,

no further proclamation or sentence is required for the establishment of that right which arises in the actual process of execution. For [and this is especially relevant to *modern* Israel] in such circumstances, one is not undertaking a new war but merely carrying forward a war already undertaken. Thus, the fact that justice has once been demanded and not obtained suffices to justify a return to natural law.

Genocide is a word with very precise jurisprudential meaning. Codified at the *Genocide Convention*, a treaty that entered into force on January 12, 1951, it means any of a series of stipulated acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such....” The key to understanding and identifying genocide lies in the phrase, “intent to destroy.” *Ipsa facto*, identifying Israeli warfare against terrorist infrastructures in Gaza as “genocidal” is entirely propagandistic. By meaningful legal standards, any such identifications are falsehoods. And because these identifications are often made by openly “perfidious” adversaries (state, sub-state or “hybrid”), egregious Iranian falsity is reinforced by unhidden Iranian violations of humanitarian international law.

Genocide has a long and not so complicated history. Active support, not only in Iran but in many parts of the Arab world, for genocide against the Jews is a matter of long historical record. Even before creation of the State of Israel, such support was displayed openly and enthusiastically during the Holocaust. On November 28, 1941, the Grand Mufti of Jerusalem, Haj Amin, met in Berlin with Adolf Hitler. The purpose of this meeting, which followed Haj Amin’s organization of SS troops in Bosnia, was to ensure cooperation on “The Jewish Question.” It was necessary, Haj Amin insisted, that all Jews be sent to countries “where they would find themselves under active control, for example, in Poland, in order thereby to protect oneself from their menace and avoid the consequent damage.”

Neither Palestine as a UN “Non-Member Observer State” nor any already sovereign Arab state has ever publicly criticized the Mufti’s strong support for the Nazi Holocaust. During the 1950s and 1960s, Adolf Hitler remained an enormously popular figure in the Arab world,

a popularity now being reignited in Iran. Unsurprisingly, responses in this region to the Eichmann trial in Jerusalem (1961) generally treated the mass murderer as a “martyr,” and congratulated the Nazi war criminal for having “conferred a real blessing on humanity” by enacting a “final solution.” Looking ahead, Iran’s intended “solution” for Israel is a second “Final Solution.”

“Palestine” and Iran

Before Israel can begin to move seriously toward Palestinian sovereignty and independence, toward a “two-state solution,” any Iranian regime preparing for major war against Israel would have to reverse such preparations. This is because Israel cannot possibly afford to confront the existential risks of another hostile Islamic state on its borders.

In the absence of any such policy reversal in Iran, the creation of Palestine would affect Israel’s inclination to preempt. Because of Israel’s small size and corresponding lack of “strategic depth” (the Jewish State is smaller than America’s Lake Michigan), its inclination to strike first at Iranian hard targets would become especially high. Deprived of strategic depth, Israel could not hold out for as long as was possible when Palestine was still merely a pre-state “authority.”

It is conceivable that a post-Palestine shift in Israeli nuclear strategy from deliberate ambiguity to disclosure could reduce Israel’s incentive to preempt, but only if Jerusalem had first been convinced that its nuclear deterrent threat was being taken with sufficient seriousness by Iran.

Several corollary problems need to be considered. First, how would Israel’s leadership *know* that taking the bomb out of the “basement” had improved its deterrence posture? To a certain extent, the credibility of Jerusalem’s nuclear threats would be contingent upon the severity of different provocations. It might be believable if Israel were to threaten nuclear reprisals for provocations that endanger the physical survival of the state, but it would almost certainly be less believable to threaten such reprisals for relatively minor territorial infringements or incursions. One “grey area” provocation could involve a growing Iranian threat to use radiation dispersal weapons, a quasi-nuclear option that might be combined with Iranian rocket attacks on Israel’s nuclear reactor at Dimona.

There will be other problems and complexities. To function successfully, Israel's deterrent, even after being removed from the "basement," would have to be rendered secure from Iranian preemptive strikes. Israel must also remain wary of "decapitation" – that is, of losing the "head" of its military command and control system – through enemy first-strike aggressions. Should Israel's enemies be unpersuaded by Jerusalem's move away from deliberate ambiguity - a move intended to enhance Israel's nuclear deterrent - they might then initiate such strikes as could immobilize Israel's order of battle.

What then?

A contrary argument about the effects of Palestine on Israel's inclination to preempt suggests that because of Israel's newly expanded vulnerability, its nuclear deterrent could become more credible than ever before. As a result, Jerusalem could now better afford not to strike first than when it still administered disputed Palestinian territories. In this situation, the principal benefit of shifting from ambiguity to disclosure would seem to lie in an explicitly identified escalation ladder, revealing a broad array of intended Israeli reprisals, ranging from limited conventional responses to measured or calibrated nuclear strikes.

In weighing the different arguments concerning the effect of Palestine upon an Israeli preemption, particular attention must be directed toward Israel's presumptions about the inevitability of war with Iran and its long-term expectations for Iranian vulnerability. Should Israel's leaders conclude that the creation of Palestine would make major war with Iran more-or-less inevitable, and that, over time, Iranian vulnerability to Israel would likely diminish, Jerusalem's inclination to strike first could be increased. To a certain extent, Israel's tactical judgments on preemption will be affected by antecedent decisions on nuclear strategy, namely decisions concerning "countervalue" vs. "counterforce" objectives.

In making its nuclear choices, Israel will confront a paradox. Credible nuclear deterrence, essential to security and survival in a world made more dangerous by the creation of Palestine, would require "usable" nuclear weapons. If these weapons were obviously inappropriate for any reasonable objective, they would not deter.

All things considered, Israel, if confronted by a new state of Palestine, would be well-advised to do everything possible to prevent the appearance of a nuclear Iran, possibly including non-nuclear preemptions. Under these conditions, Israel would require a believable (and hence usable) nuclear deterrent, one that could be employed without igniting Armageddon for regional belligerents and that could serve some damage-limiting military purpose (whatever the collateral effects) against Iranian weapons (nuclear and non-nuclear) should deterrence fail.

Creation of a fully sovereign Palestine could have a dramatic effect on Jerusalem's decisions concerning anticipatory self-defense. Israel's extant nuclear weapons status and strategy would impact and influence this vital decision. More precisely, should Israeli decision-makers determine that the country's nuclear weapons could support preemption by deterring Iran from retaliating, this "atomic factor" could encourage Israeli defensive first strikes. If, on the other hand, Jerusalem were to calculate that Iran or (in the future) other prospective target states would be unimpressed by any threats of an Israeli nuclear counterretaliation, this variable would likely not encourage defensive first strikes.

Israel's nuclear strategy and law-based preemptions

Could the precise form of Israel's nuclear strategy make a difference in shaping these circumstances? Relying upon nuclear weapons not to deter Iranian first strikes but to support its own preemptive attacks, Israel would have to choose between continued nuclear ambiguity (implicit threats) and nuclear disclosure (explicit threats). How should it choose?

More than anywhere else, the answer lies in Jerusalem's confidence that its adversaries acknowledge Israel's calibrated nuclear capability. Should this confidence be high, there could be compelling reasons to take the bomb out of the "basement." If such confidence were low, the move to disclosure would likely be even more purposeful, because any critical reactions by the US would be less worrisome for Israel in the "Cold War II" strategic environment.

What about Afghanistan? On its face, the fall of that "graveyard of empires" revealed no direct connections to Israel's national

security. Still, the overwhelming defeat of its American patron in that volatile region could have spillover effects for Israel. Most realistic, in this regard, would be emboldened sub-national Islamist adversaries (e.g., Sunni Hamas, Shiite Hezbollah, Shiite Houthi, ISIS-K); expanded strife between enemies and unstable states (e.g., Taliban vs. ISIS-K); and additional geostrategic influence for the already nuclear Islamic state of Pakistan). This last result would likely elicit countervailing reactions from India and/or China, reactions that could not be ignored by Russia.

In view of what is now generally believed throughout the Middle East and the wider world, there is good reason to assume that Israel's ambiguous nuclear arsenal could be nuanced to meet strategic particularities of any specific threat. Israel's enemies already share this key assumption and likely need no further convincing about Jerusalem's basic nuclear capacities. The most critical questions about Israel's nuclear deterrent would not be about *capability* but about *willingness*. How likely is it that Israel, after launching non-nuclear preemptive strikes against Iranian hard targets, would respond to enemy reprisals with any sort of nuclear counterretaliation?

These are all bewildering matters. What will Israeli planners conclude? The answer depends in part upon their view of Iran's reciprocal judgments concerning Israel's leaders. Do these judgments suggest a leadership that believes it can gain the upper hand with nuclear counterretaliation? Or do they suggest a leadership that believes such counterretaliation would bring upon Israel intolerable levels of adversarial harm and destruction?

Depending upon the way in which the Iranian decision-makers interpret Israel's authoritative perceptions, they will accept or reject the cost-effectiveness of a non-nuclear retaliation against Israel. This implies that it is in Israel's best interest to communicate the following strategic assumption to its enemies: *Israel would be acting rationally by responding to enemy non-nuclear reprisals to Israeli preemptive attacks with a nuclear counterretaliation.* The plausibility of this assumption could be enhanced if the Iranian enemy reprisals were to involve chemical and/or biological weapons.

All these calculations assume rationality. In the absence of calculations that compare the costs and benefits of strategic alternatives, what will happen in the Middle East must always remain a matter of conjecture. Non-rational judgments in the region are always a possibility, especially as the influence of Islamist/jihadist ideology remains strongly determinative among Iranian decision-making elites.

To the extent that Israel might one day believe itself confronted with non-rational state enemies, particularly ones with highly destructive weapons in their arsenals, its incentive to preempt could become overwhelming. In fact, should such enemies ever be believed to hold nuclear weapons, Israel could even decide rationally to launch a nuclear preemption against those enemy arsenals. This would appear to be the only calculable circumstance in which a rational Israeli preemptive strike could ever be nuclear.

Iran should understand from all this that there are foreseeable conditions wherein Jerusalem might decide to use its nuclear weapons. These conditions would concern the staggering prospect of total military defeat. Faced with imminent destruction of the state, Israel's leaders would almost certainly do whatever is needed to survive, including a resort to nuclear retaliation, nuclear counterretaliation, nuclear preemption, or (most "residual" of all) nuclear war-fighting.

Nuclear retaliation

Israel's overriding purpose in any conventional war with Iran should be to preemptively destroy that enemy country's advancing nuclear infrastructures. If this legitimate purpose is not met, Israel could find itself facing a nuclear Iranian foe. In such perilous and unprecedented circumstances, if Iran chose to launch a nuclear first strike against Israel, Jerusalem would expectedly respond, to whatever extent deemed possible and necessary, with a nuclear retaliatory strike. If Iran's first strikes were to involve other forms of unconventional weapons; i.e., chemical and/or biological weapons, Israel might still launch a measured nuclear reprisal, depending in large but ambiguous measure upon Jerusalem's expectations of follow-on aggression and its associated calculations of damage limitation.

If Israel were to absorb a massive conventional attack, a nuclear retaliation could not automatically be ruled out, especially (but not exclusively) if: a) the Iranian aggressor were perceived to hold nuclear and/or other unconventional weapons in reserve; and/or b) Israel's leaders were to believe that non-nuclear retaliations could not prevent genocidal destruction of the Jewish state. A nuclear retaliation by Israel could be ruled out only in those circumstances wherein Iranian aggressions were clearly conventional, "typical" (i.e., consistent with previous instances of enemy attack, in both degree and intent), and hard-target directed.

Nuclear counterretaliation

Should Israel feel compelled to preempt Iranian aggressions with conventional weapons, the Iranian response would largely determine Jerusalem's next moves. If this response were in any way nuclear (not yet possible), Israel would assuredly resort to nuclear counterretaliation. If this retaliation were to involve chemical and/or biological weapons, Israel might feel pressed to take the escalatory initiative - again, depending upon Jerusalem's judgments of Iranian intent and informed calculations of damage limitation.

Should the Iranian response to Israel's preemption be limited to hard-target conventional strikes, it is unlikely that Jerusalem would move on to nuclear counterretaliation. If, however, the Iranian conventional retaliation was all-out and directed toward civilian populations as well as to military targets, an Israeli nuclear counterretaliation could not be ruled out *ipso facto*. It would appear that such a counterretaliation could be ruled out only if the enemy conventional retaliation were ascertainably proportionate to Israel's preemption, confined exclusively to Israeli hard targets, circumscribed by the jurisprudential limits of "military necessity" and accompanied by believable assurances of non-escalatory intent.

Nuclear preemption

It is highly unlikely (perhaps even inconceivable) that Israel would ever decide to launch a preemptive nuclear strike against Iran. Though strategic circumstances could arise wherein such a strike would still

be determinably rational (i.e., the calculated prospective benefits of the strike would outweigh prospective costs), it is unrealistic that Israel would ever allow itself to reach such “end-of-the-line” alternatives. Moreover, unless the nuclear weapons involved were used in a fashion consistent with authoritative expectations of the laws of war - the limits of “distinction,” “proportionality” and “military necessity” - this form of preemption would represent an egregious violation of international law.

Even if such consistency were possible, the psychological/political impact of this activity on the world community would be negative and far-reaching. It follows that an Israeli nuclear preemption could be expected only: a) where Israel’s Iranian enemies had acquired nuclear and/or other unconventional weapons judged capable of destroying the Jewish State; b) where these enemies had made clear that their intentions paralleled their capabilities; c) where these enemies were believed ready to begin a “countdown to launch;” and d) where Jerusalem believed that Israeli non-nuclear preemptions could not achieve the needed minimum levels of damage limitation; i.e., levels consistent with physical preservation of the polity.

Nuclear warfighting

Should nuclear weapons ever be introduced into conflict between Israel and Iran, either by the Jewish State or by Iran, nuclear warfighting, at one level or another, would ensue. This would hold true as long as: a) Iranian first strikes against Israel would not destroy Jerusalem’s second-strike nuclear capability; b) enemy retaliations for Israeli conventional preemption would not destroy Jerusalem’s nuclear counter-retaliatory capability; c) Israeli preemptive strikes involving nuclear weapons would not destroy Iranian second-strike nuclear capabilities; and d) Israeli retaliation for enemy conventional first strikes would not destroy Iranian nuclear counter-retaliatory capability.

It follows from Israel’s strategic requirements that Jerusalem should do whatever is needed to ensure the likelihood of a) and b) above, and the unlikelihood of c) and d). This means, among other things, strengthening the hard-target kill capacity of its survivable and penetration-capable nuclear forces.

What, exactly, would a nuclear war with Iran “mean”? Even the most limited nuclear conflict would signal genuine catastrophe. Merely the immediate effects of the explosions – thermal radiation, nuclear radiation, and blast damage – could cause intolerably wide swaths of death and devastation.

None of this is intended to suggest that an Israeli conventional defensive first strike would raise the likelihood of a nuclear war. To the contrary, Israel’s resort to a non-nuclear preemption could represent the optimal way to prevent a nuclear war, especially if such resort were part of an ongoing conventional war. Nothing could be worse for Israel (and possibly its Arab neighbor states as well) than delaying an essential preemption until Iran is already nuclear. The best-case scenario for Israel and its Arab neighbors would be to neutralize the impending Iranian nuclear threat without having to launch any preemption, even one undertaken during a pre-nuclear conflict initiated by Iranian “retaliation.” At present, however, there is little or no reasonable cause to ever expect such a scenario.

The more things change....

Plus ça change, plus c’est la même chose. The more things change, the more they stay the same. Despite constant efforts to preserve the state and the “safety of the People,” Israel remains subject to credible threats of existential harm. The “Jewish State,” notwithstanding the country’s extraordinarily high levels of military technology and international law’s longstanding presumption of juridical solidarity between all states, could soon face a literal risk of annihilation. To prevent such an unimaginable prospect, Israel could resort to the legal protections afforded by anticipatory self-defense. As we have seen, it would be best for Israel to seek such protections during an ongoing conventional war with Iran.

As long as Israel’s expression of a permissible preemption had been prompted by imminent attack dangers and was executed in verifiable compliance with relevant expectations of *distinction*, *proportionality*, and *military necessity*, the defensive first-strike option could remain lawful. Such lawfulness would not automatically imply corresponding strategic benefits. Analytically, reliable Israeli judgments of *legality* and *efficacy*, though overlapping, would remain distinct.

With a rapidly approaching “eleventh hour,” Jerusalem will need to clarify and enhance its nuclear deterrence policy vis-à-vis Iran. Here, special attention will need to be directed toward codifying and maintaining a *survivable* and *penetration-capable* strategic nuclear force. The nuclear options included in this more conspicuous force would need to range along different points of a well-defined continuum of military destructiveness. Looking forward, Israel requires not an all-or-nothing nuclear deterrent capacity but a capacity subject to calibration.

It will be important for Israel to continuously enhance its ballistic missile defenses, and to convincingly communicate that its diversified nuclear forces are usable and employable as a complement (not as an alternative) to well-planned BMD interceptions. Above all, this communication should include an incremental replacement of Israel’s outdated “deliberate nuclear ambiguity” posture with up-to-date policies of “selective nuclear disclosure.”

Israeli nuclear deterrence: More than just a game of chance

Nuclear deterrence is a game that sane national leaders may have to play in the Middle East, but it should always be approached by Israel as a *game of strategy*, not of chance. In Jerusalem, this means a continuing willingness to respect the full range of doctrinal complexity - both its own military doctrines and those of enemies such as Iran - and a corresponding determination to forge ahead with reciprocally complex security policies. To successfully influence the choices Iran would make regarding Israel, Jerusalem will need to clarify that its conventional and nuclear deterrence seamlessly intersect and that Israel stands ready to counter enemy attacks at every level of possible confrontation.

There remain two final but vital points to be made in this analysis of Israel, preemption and anticipatory self-defense during conventional war with Iran.

First: Whether Israel’s intersecting and overlapping deterrent processes are geared primarily toward conventional or nuclear threats, their success will ultimately depend upon the expected rationality

of the Iranian enemy. In cases where such rationality would appear implausible or improbable, Jerusalem could find itself under irresistible pressure to strike promptly, preemptively and comprehensively. For Israel's survival, regional conflict prospects should always be curtailed at the lowest possible levels of controlled engagement. If at all possible, Israel should avoid ever having to preempt against an already nuclear Iranian adversary.

Second: Even the most meticulous plans for preventing a deliberately inflicted nuclear conflict would not automatically remove attendant dangers of an inadvertent or accidental nuclear war. While an accidental nuclear war would necessarily be inadvertent, there are types of inadvertent nuclear war that need not be caused by mechanical, electrical or computer accident. Unintentional nuclear conflict could be the unexpected result of misjudgment or simple miscalculation, whether created by 1) error on one or both sides of an Israel-Iran nuclear crisis escalation; or by 2) unforeseen “synergies” arising between discrete decisional miscalculations.

Growing strategic and legal uncertainties for Israel

Israel, severely injured by the Hamas terror attacks of October 7, 2023 and alarmed by the Iranian rocket attacks of April 13, 2024, is entering a period of cascading strategic uncertainties. Even if an American president were to succeed in bringing the US and Iran back into viable negotiations, the cumulative harms of Iranian nuclearization are unlikely to be halted or reversed. Considered together with inauspicious strategic developments elsewhere; e.g., Lebanon, Yemen or Ukraine, this conclusion signifies a basic obligation for Jerusalem to fashion a refined national strategy of nuclear deterrence and nuclear war avoidance.

In the end, the truest forms of Israeli military power, whether expressed as anticipatory self-defense or as some more comprehensive form of nuclear deterrence, should reflect a triumph of mind over mind, not just mind over matter. Ultimately, Israel's most compelling forms of influence will need to derive not from a gun, rocket or missile, but from the less dramatic advantages of intellectual power. In Jerusalem, these advantages should now be explored according to the twin criteria

of law and strategy. These complex standards would not necessarily be in sync with each other. They could even be starkly contradictory or even opposed.

For Israel, what will be required for long-term survival is a deep appreciation of decisional complexity and a corresponding willingness to approach all intersecting legal issues from the standpoint of science-based (intellect-driven) inquiry. In the best of all possible worlds, there would be no need for any national considerations of preemption/anticipatory self-defense, but such a world remains a long way off. For the moment, Israel's best efforts should be preemptive military operations against a still pre-nuclear Iran.

National defense and national security will always have their own specific grammar and syntax. For Israel, confronted by an ever-growing nuclear threat from Iran, the prospect of a significant military preemption is no longer inconceivable. As recognized in May 2013 by then-IDF Chief of General Staff Herzl Halevi, there can come a point wherein even the riskiest defensive first strikes would be cost-effective and perfectly rational. The correlative question for Israel is how to determine when such a critical decision point had been reached and what specific harms should be threatened (deterrence) and (if necessary) carried out.

One conclusion is already clear. In the existential matter of a nuclearizing Iran, the outcome of a new war with Israel could be determined before the opening salvo of actual military engagement. The first battle of any war, especially an unprecedented nuclear war, must be waged as a dialectical competition of adversarial ideas. This signifies a theory-based struggle acknowledging vast complexities but also more-or-less understating the pitfalls of "friction." By definition, whatever the changing particularities of any Israel-Iran military confrontation, these pitfalls would concern the gap between war on paper and war as it actually is. Accordingly, though a conventional war with Iran would likely offer the best possible context for a cost-effective Israeli preemption, the predictability of such a conflict's operational trajectory could be limited.

For Israel, per Cicero, “The safety of the People shall be the highest law.” In the matter of impending war and accelerating Iranian nuclearization, the safety of the People of Israel could best be served by waging a just war against Iran while that enemy is pre-nuclear. Though a not-yet-nuclear Iran could still wage catastrophic war against the Jewish State, it would be markedly less catastrophic than any war between two regional nuclear powers. This is the case even if an Iran that had just crossed the nuclear threshold were “less powerful” than an already nuclear Israel. In any such nuclear conflict, even a “weaker” Iran (assuming its nuclear weapons were “penetration-capable”) could still wreak unacceptable harm on Israel.

All things considered, if war between Israel and Iran is expected, it would be more rational for Jerusalem to enter such belligerency as the sole nuclear combatant and to wage this war such that that asymmetry could continue. Nonetheless, even during a conventional war with Iran, Israel could decide that the expectations of “escalation dominance” had become overwhelming, and that an Israeli escalation to nuclear combat would still be rational. An example could involve an Iranian non-nuclear missile attack upon Israel’s Dimona nuclear reactor, Iranian resort to radiation-dispersal weapons (dirty bombs), and/or the combat involvement of already nuclear North Korea on the side of Iran.

In all such complex scenarios, Cicero’s counsel would remain primary and incontestable:

“The safety of the People is the highest law.”

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