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Genocide Tribunal Against Israel Fails Palestinian Victims

By Yoichi Shimatsu
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KUALA LUMPUR – *Anyone with the chutzpah to accuse Israel of genocide is going to bring on a preemptive strike. That is as guaranteed as cream cheese on a bagel.*

The word "genocide" is loaded, since many and probably most Jews believe themselves to have a monopoly on the term. Most often cited in reference to the Holocaust, the G word elicits an intense emotional reaction. "War crimes" is an acceptable term in international parlance, for even Israel's most vociferous citizens grudgingly admit to instances of unrestrained violence against Palestinians.

"Genocide", however, is in a class by itself, being the thermonuclear bomb of moral outrage. How dare supporters of Palestinian rights charge the Mideast 's "only democratic society" with systematic annihilation prompted by racial intolerance, economic greed, cultural chauvinism and religious bigotry?

Suspicion Mars Proceedings

The organizers of the Kuala Lumpur War Crimes Tribunal have brought on just such woe onto themselves by summoning a panel of international judges to rule on whether Israeli is guilty of genocide ever since its national birth in 1948.

The judicial proceedings got no further than the preliminary pretrial stage before it collapsed under acrimonious accusations ranging from prosecutors allegedly "poisoning minds" of Palestinian witnesses to outrage over a judge acting as "an agent of the Mossad."

The trigger for the heated denunciations between the prosecution team and the judicial panel was the prosecutors' request for Judge Eric David, a law professor with the Free University of Brussels, to recuse himself (to voluntararily withdraw from the panel of judges).

The prosecutors had raised the issue of his earlier legal opinion to the effect that the People's Mujaheedin (PMOI), an Iranian exile paramilitary which until recently was on the U.S. government's list of terrorist groupsshould not be categorized as a terrorist entity.

According to media reports, the PMOI was involved in assassinating nuclear scientists and bombing factories in Iran. The group, largely based in Iraq , was militarily trained by the Israel secret service Mossad during the U.S.-led invasion of Iraq and subsequent occupation.

Co-Prosecutor Francis Boyle, a New York-based law professor, stated that the favorable opinion on that terrorist group implies that Judge David is politically aligned with the foreign

policy of Israel , the defendant in the current tribunal on Palestinian rights. To this question of conflict of interest, Jurist David refused to give an answer, nor did the presiding judge demand him to respond.

Lead Prosecutor Gurdial Singh argued that the complainants, Palestinians who personally suffered war crimes by Israeli forces, had grounds for suspicion about Judge David's impartiality given his past approval of Mossad-linked forces.

Gurdjial pointed out:

> "This tribunal being a court of conscience, there must be not even a single blot on integrity."

After tension-packed deliberations behind closed doors, the panel ruled in favor of Judge David without examining his controversial opinion and unanimously affirmed that he should serve on the tribunal. That ruling provoked Prosecutor Boyle to call for a mistrial, and the panel responded by accusing him of contempt of court. The proceedings soon descended into chaos and many more back-rooms parleys, before both sides agreed to an indefinite adjournment, possibly of several months, before the start of trial. In total, the preliminary session lasted less than two days, August 21-22, before it whimpered to a halt.

Procedure Matters

After many reporting assignments, along with a long stint at jury duty, in San Francisco criminal trials and New York City gun court, my immediate observation was that the panel of judges in Malaysia overemphasized courtroom decorum while inexplicably failing to follow basic judicial proceedings.

The stress on style rather than the substance of law revealed a "cultural" difference in courtroom custom between the hard-ball rhetoric bandied in American trials versus the polite and deferential manners in wig-adorned chambers under the British tradition. As sadly shown in Kuala Lumpur , however, decorum can often serve as a cloak for institutional inertia and possibly hidden agendas.

Issues of etiquette aside, the most grievous mistake was the panel's opting for unanimous agreement as a group. Trials with more than one judge, these including tribunals and high courts, are organized for the exact opposite, that is to allow a divided opinion between the majority ruling and a minority dissent. At the Tokyo War Crimes Tribunal, whatever its merits and flaws, the guilty verdict of the majority of judges was famously opposed by the minority opinion of the Indian jurist Radhabinod Pal. In hindsight, that lone dissenting voice rings in our consciences to this day with its warning against victor's "justice" and lynch "law".

For a body of judges to act in unison in favor of one of their own profession is a gross violation of the principle of independence for each judge in a court of conscience. The disturbing thought that came to my mind was that insistence on acting as a group is completely out of place in a tribunal. Whether there was verbal manipulation in the judges' chamber is privy only to those inside, leaving those of us on the outside with nothing but doubt.

Code of Silence

Prosecutors have a right to protest a violation of judicial procedures as the basis for mistrial, as was done by the co-prosecutor. Normally, when a capital crime is at issue, a mistrial can lead to a change of venue and a new judge and jury. If a court cannot possibly render a verdict on the basis of fairness, then another fairer arena must be found.

There were other serious problems: for example, the failure of the presiding judge to order the prosecutors to rephrase aggressive accusations as questions, and his neglect to demand that judge Eric David explain his past opinion to the satisfaction of all in the courtroom.

Judge David, one of the drafters of Bertrand Russell Tribunal on Israeli war crimes against Palestinians, did not give a single word of explanation, much less a convincing argument, for his legal opinion and tacit support of a Mossad-trained terrorist group that was a combatant in the Iraq War and responsible for violent acts against Iranian civilians that are illegal under international law.

His silence smacks not only of delivering selective justice but also of harboring a hidden agenda. Instead of ethical clarity, he chose to the muddy waters. If genuinely in support of the tribunal, he would have recused himself as the source of doubt, even if his intentions were misunderstood.

From the inception of this tribunal on Palestinian rights more than a year ago, the prosecution strategy has been to seek a genocide verdict against Israel , while the defense tactic is, logically, to water-down the ruling to less onerous guilt of war crimes falling far short of genocidal state policy.

Unfortunately, the reluctance of the unified panel to accept transparency and open debate in the proceedings reinforced the perception of judicial bias among the aggrieved complainants from Palestine . That some and possibly many of the jurists were either hesitant or predisposed to reject a verdict of genocide would be understandable in an Israeli courtroom. That such has happened in a predominantly Muslim country is simply astounding.

Perversion of Justice

Unfortunately, and to their eternal shame, many pro-Israeli legal professionals are not up to ethical par, as was shown in a major investigation at The Hague during the mid-1990s. I served as one of a handful of reporters on the case involving a weapons-loaded El Al cargo jet that crashed into an apartment building in Biljmeer district of Amsterdam, killing residents in an intense fire and harming emergency crews with toxic releases. The legal case was criminally undermined by massive amounts of Israeli bribery of witnesses (guised as unofficial out-of-court settlements), interference by the Israeli security team at Schipol Airport and the eventual silencing of the Dutch team that investigated the air traffic maneuvers of the plane.

That Israeli-subverted case never got to trial in The Hague , and I cannot but now fear that the same fate could await the Kuala Lumpur War Crimes Tribunal.

There are undoubtedly external factors aligned against the tribunal, other than the Israeli opposition to an undesirable verdict on Palestinian rights. Google, which cooperates with Israeli interests, posted warning signs on the website of the Kuala Lumpur foundation in its

earlier tribunal hearings against the U.S. government for the illegal war on Iraq .

Closer to home, U.S. and allied intelligence agencies have actively promoted protests, similar to their Arab Spring sponsorship, to weaken the Malaysia government. Under the White House strategic pivot to Asia policy and the Pentagon's Air-Sea Battle Concept, Malaysia is perceived as a potential foe of American geopolitical intervention. Is the pressure on from Tel Aviv and Washington to crack the Kuala Lumpur tribunal?

In Bad Faith

Laymen tend to perceive judges as men and women of ethical principle, non-partiality and free of preconceived biases. Sadly, the vast majority are not. One must remember that for every drone strike against a family home in a remote outland, a judge in a big city signs a writ of execution with not a whit of credible evidence. Constitutional guarantees have been reduced to a scrap of paper, and along with them so goes judicial standards.

For these very reasons, the tribunal in Kuala Lumpur must proceed and in accordance with the highest standard of international law. It is not a predetermined show trial nor a mock court, for this tribunal offers the legal strategy, the arguments and the precedent for the Palestinian Authority to press its long-overdue case in the International Court of Justice.

The Palestinian people have suffered prolonged and inexcusable violations of every human right under a state policy of eviction, banishment, imprisonment, torture and murder, repeatedly in an indiscriminate and cruel manner. If those who speak of the Rule of Law, for those who preside over our courts of law, cannot act, much less decide, against these inhumane practices and policies against a long-standing community, then there exists no law in Israel or at The Hague worthy of our respect and obedience.

The case of the Palestinian people versus the State of Israel is, in fact, a test of conscience for each and every one of us and proof of whether our global civilization is anything more than a facade for brute barbarism.

The Jewish people pride themselves at a moral lamp to humanity in darkness, but with only a few brave and notable exceptions in the cause of Palestinian rights, the dominant reaction of supporters of Israel has been toward obstruction of justice and outright injustice. The outcome can only be tragic for both peoples.

According to the Law Giver

The Hebrew term "Shoah" or calamity, which is also used to describe the Nazi policy against Jews, is the exclusive intellectual property of the Jewish people. "Genocide", in contrast, is universal, applying to any nationality that faces systematic elimination.

To give credit where it is due, a Polish Jew coined the hybrid word "genocide", which combines "genus", Latin for family or breed, with "cide", which translates as killing. A prosecutor in prewar Poland , before it was divided by German and Soviet forces, devised this word to describe the ultimate crime while drafting his book "Axis Rule in Occupied Europe" (published in 1944 by the Carnagie Foundation for International Peace). After immigrating to the United States , Lemkin joined the faculty of Rutgers Law School and drafted a genocide treaty adopted by the newly formed United Nations in 1948.

The Convention on the Prevention and Punishment of the Crime of Genocide, to summarize,

forbids the killing, maiming and deliberate inflicting on a targeted group those conditions of life calculated to bring about its physical destruction in whole or in part.

This lawgiver made very clear that the genocide is applicable to any group threatened with "a coordinated plan" for the destruction of "essential foundations of the life of national groups, with the aim of annihilating the groups themselves" with objectives including disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even their lives."

Genocide does not necessarily mean the killing of every single member of a group since total extermination is often not feasible even with brutal efficiency.

Lemkin cited many genocide cases from our troubled world history, including "Christians of various denominations, Moslems and Jews, Armenians and Slavs, Greeks and Russians, dark-skinned Hereros in Africa and white-skinned Poles perished by millions from this crime." The law must protect not just individuals but also groups of people, and by all accounts, the Palestinians are a group suffering most and probably all of the abuses cited.

Now 65 years after Lemkin formulated the rules of conduct, it becomes painfully apparent that yesterday's victims can too easily become today's perpetrators. What has anyone learned from their own suffering?

Yoichi Shimatsu is a Hong Kong-based journalist, is former editor with The Japan Times group in Tokyo and Pacific News Service in San Francisco .
