

Tribunal Issues Landmark Verdict against Israel for Genocide

Analysis and Opinion

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Theme: [Crimes against Humanity](#), [History](#),
[Law and Justice](#)

In the light of recent developments, it is important to establish to record regarding war crimes. Lest we forget, the State of Israel was condemned last November on charges of genocide by the Kuala Lumpur War Crimes Tribunal (M.Ch, GR Editor)

To a crowded courtroom on the late afternoon of November 25, presiding Judge Lamin Mohd Yunus announced the verdict by an international panel of seven jurists:

“The Tribunal is satisfied, beyond reasonable doubt, that the first defendant, (General) Amos Yaron, is guilty of crimes against humanity and genocide, and the second defendant, the State of Israel, is guilty of genocide.”

—

The landmark ruling against Israel for its genocide against the Palestinian people rendered by the Kuala Lumpur War Crimes Tribunal is significant for several reasons:

- In contrast to other non-official courts of conscience on Palestinian rights, for example, the Russell Tribunal on Palestine (New York 2012), the prosecution in Kuala Lumpur took a step beyond war crimes and crimes against humanity to the higher and broader charge of genocide.
- The decision was rendered during the ongoing commission of the alleged crime by the defendant, rather than after the fact as in earlier genocide cases.
- Instead of limiting its ruling to individuals who ordered genocidal actions, the jurists also charged the state as a defendant.
- As a consequence, this case breaks the tradition of immunity of nation-states from criminal prosecution under international law.
- The decision introduces a legal basis for international action to protect minorities from genocide as a lawful alternative to the current response of so-called humanitarian intervention, invasion, occupation and regime change, which have often been as illegitimate and more destructive, and in some cases as genocidal as the original violation being punished.

The Kuala Lumpur Tribunal based its momentous decision on the 1948 Genocide Convention, which prohibits and punishes the killing, causing of harm and deliberate infliction of conditions of life calculated to bring about the physical destruction of a group of

people, targeted for their ethnicity, religion or race. In instances of genocide, these criminal acts are done with the specific intent of destroying as a part or in whole of the targeted group, as in this plight the Palestinian people.

The defendants, Gen. Yaron and the Israeli State , through its representatives, refused to accept the Tribunal summons and appear in court.

Prominent Israeli legal scholars also refused invitations to serve as defense counsel. The Tribunal therefore appointed an Amicus Curae (defense counsel, referred to by the Latin term for “friends of the court”), including attorneys Jason Kay Kit Leon, Larissa Cadd, Dr. Rohimi Shapiee and Matthew Witbrodt, to defend the accused. Even absent Israeli participation, the defense proved to be forceful and often made heated remarks in Israel’s defense, especially during the cross-examinations of expert witnesses.

Why Not New York , London , Paris or Berlin

One point to note is that the sponsoring Kuala Lumpur Commission on War Crimes and its associated international Tribunal is unrelated to Malaysia and its legal system, aside from the participation of some Malaysian jurists and citizens in its proceedings. Malaysian laws are in many areas quite different from and sometimes in diametric opposition to the legal opinions of the international Tribunal. The independence of this “court of conscience” allows an approach to international law unconstrained by local norms, but this also means that the Tribunal lacks an enforcement capability.

That the first-ever Tribunal to prosecute Israel for genocide was initiated in Southeast Asia offers some indication of the continuing sensitivity within the traditional “center” of international law, Western Europe and North America, toward the circumstances behind Israel’s creation.

The Kuala Lumpur proceedings are bound to raise controversy and discomfort, especially among a reluctant West, since the historical motive behind creating a modern Jewish state in 1948 was largely a response to the abandonment of European Jewry to the pogroms and extermination program of the Third Reich, which in its early stages went unopposed by Western governments and prominent opinion leaders in the Atlantic community.

The courage to finally confront Israel after nearly seven decades of eviction and merciless brutality against the Palestinian people was summoned not by the Atlantic community but in faraway Southeast Asia , where a law case could be pursued with critical distance, logical dispassion and an absence of historical complicity. In short, an evidence-based fair trial found Israel to be guilty of genocide.

Why Israel

Why then was Israel singled out by the Kuala Lumpur War Crimes Commission on genocide charges before its Tribunal, when many other states have gone unpunished? Chief prosecutor Gurdial Singh explained:

“Other settler states, for example Australia, have offered compensation and apologized for the dispossession and harm to their indigenous populations, while Israel remains unapologetic and continues its campaign of destruction against Palestinians and to make their conditions unlivable inside and outside its borders.”

In contrast with previous special courts involving genocide charges, this Tribunal left the time frame of events open-ended, by starting just before the creation of the State of Israel until the present and, presumably, into the future until Israel ceases its expansionist campaign against the Palestinians and offers instead justice and reconciliation. By comparison in prior cases invoking the Genocide Convention, including those against former Yugoslavia, Rwanda, Cambodia and Sierra Leone, the mass killings of civilians were perpetrated within a short time-frame by political leaders of the then-governing regime or by a major political faction.

The Kuala Lumpur Tribunal asserted that the modern Jewish state, in contrast to other cases, had since even before its inception pursued a genocidal program as a consistent feature and indeed a foundation of state policy. Therefore, genocide in the Israeli case cannot be solely attributed as the isolated action of a leader, political party or elected government but remains the responsibility of the state itself.

Genocide as Response

The specific intent of Israeli state policy, since even before the founding of Israel, was discussed in a live-video transmission by expert witness Ilan Pappé, an Israeli historian at University of Exeter in the UK and the director of the European Centre for Palestine Studies. His research has revealed that a planning group of top-ranking Jewish military leaders in the Haganah militia, led by David Ben Gurion (who later became Israel's first prime minister) devised an ethnic-cleansing program to rid the future Israel of its Arab predecessors. Called Plan Dalet (the letter "D" indicating the fourth plan of a colonialist agenda) was to be activated as soon as the British suspended the Palestine Mandate.

With the declaration of Israeli statehood in 1948, a coordinated armed campaign by Israeli military forces and paramilitary units against hundreds of Palestinian urban neighborhoods and rural villages led to the flight of an estimated 700,000 refugees from Palestine and parts of neighboring Trans-Jordan, including Jerusalem. Although the Israeli intent was intended to intimidate the Palestinians into relocating outside the borders, but before long village populations that refused to flee were mass murdered.

The forcible deportation of indigenous inhabitants from their homes and land was a criminal act of ethnic cleansing, Pappé said. That policy, however, soon metamorphosed into a systematic campaign to destroy Palestinians, that is, genocide. Under cross-examination by defense team, the historian explained, that as an Israeli citizen and son of Jewish refugees who escaped Nazi-ruled Germany, it is morally, ethically and historically inconsistent to condemn the genocide against Jews while endorsing a new one against Palestinians.

Cumulative Record of Crimes

The Israeli record of massacres, extrajudicial killings and daily harassment of Palestinian comprises a continuum of criminal behavior over the past 67 years. Given the overwhelming evidence, the prosecution team therefore decided to focus on key cases, which were extensively reported in the news media and/or were subject of investigations. These included:

- the September 1982 massacre of Palestinians, mainly women and children, at the Sabra and Shatilla refugee camps in a southwest district of Beirut, Lebanon;

- lethal firing of teargas canisters and “rubber” bullets by Israeli Defense Forces that resulted in the deaths of unarmed civilians during the Intifada campaigns and subsequent protests; and
- intensive and indiscriminate aerial bombing and artillery shelling of civilian quarters in the Gaza Strip in 2008.

Among the witnesses who testified in person or via video transmission included:

- a former university student who was shot without warning at a peaceful protest by an Israeli sniper firing a fragmentary bullet that caused extensive and permanent damage to his internal organs;
- a Christian resident of the West Bank who was repeatedly imprisoned and tortured on grounds of subversion;
- a female resident of Nablus who suffered mental anxiety due to her imprisonment and subsequent social ostracism; and
- two men from the Al Sammouni clan of Gaza, which lost 21 family members, mainly children and women, in an Israeli commando raid on their home.
- a Palestinian physician who conducted studies on the psychological trauma inflicted, particularly on children, as result of constant intimidation, massive violence and state terror during and following the second Intifada;
- Expert witness Paola Manduca, an Italian chemist and toxicologist, who found extreme levels of toxic contamination of the soil and water across the Gaza Strip caused by Israeli weapons made of heavy metals and cancer-causing compounds.

Killing Fields

Professor Pappé said that the mass killing of defenseless civilians trapped without avenues of escape within a cordon or enclosure is clear evidence of genocidal policy, as happened inside the Beirut refugee camps surrounded by Israeli tanks and hostile Phalangist militiamen and inside Gaza cities that are ringed by a wall-fence.

For the Beirut atrocity, Israeli Defense Force commander General Amos Yaron was charged in absentia for crimes against humanity and genocide. Among the witnesses who testified in person on the Camps Sabra and Shatilla events were:

- Chahira Abouardini, a widow whose husband and three children were murdered by Israeli-allied militiamen at Camp Shatilla, provided a graphic account of the carnage, describing piles of bullet-riddled bodies and, in one case, of a pregnant women whose belly had been slit open and with her dead unborn child left on top of her corpse. She recounted how refugees were rounded up from their homes and lined against walls for summary execution by automatic weapons fire.-
- Dr. Ang Swee Chai, a London-based Singaporean surgeon and medical volunteer at the time at a hospital run by the Palestinian Red Crescent Society, with the aid of the International Committee of the Red Cross, testified that another Beirut hospital had

been bombed by Israeli jets, all Palestinian facilities including schools and hospitals were deliberately destroyed by artillery barrages and explosive charges, and ambulances were intercepted and their drivers shot dead. She stated that an Israeli observation post positioned in the 7-storey Kuwaiti Embassy, located on a hilltop, had an unobstructed view of the refugee camp, indicating that the Israeli forces were directing a joint operation to exterminate the refugees left behind under the international plan to withdraw the PLO from Lebanon . In her forensic investigation of the bullet wound that injured a male nurse at her hospital, Dr. Ang determined that the sniper fire had come from the Israeli-occupied Embassy building

Considering the Israeli checkpoints on roads and its vantage points, Brigadier General Amos Yaron as field commander of the Beirut incursion and occupation, had effective control over the camps. His close liaison with the local militia leader meant that Yaron had condoned the 36-hour rampage by militiamen, which led to an estimated 3,500 civilian deaths. No orders were issued to prevent the one-sided violence, prosecutor Aziz Rahman argued before the Tribunal. A 1983 special commission report, under its chairman Nobel Laureate Sean MacBride, concluded that Israel had “complicity in genocide”. Research findings gathered since then indicate that Yaron was not merely complicit but held personal responsibility for the massacre.

A point contested by the Amicus Curae defense team was that then Israeli Defense Minister Ariel Sharon, an official of superior rank, should have been prosecuted instead of Gen. Yaron. (The prosecution had earlier declined to serve notice on Sharon, who has been in a coma for many years and is unable to testify in his own defense. Moreover, Yaron had wide sway of authority as field commander in a battle zone outside the borders of Israel .) Prosecutor Gurdial Singh pointed out that Israel not only failed to file criminal charges against Yaron and his subordinates but subsequently awarded and repeatedly promoted the general and his circle. Yaron was therefore found guilty as accused.

Responsibility of the State

International law has traditionally taken for granted the immunity of states from prosecution by a court in another country. There are several reasons for immunity of states, even for high crimes such as genocide and serious violations of various humanitarian codes.

- International law and the treaty system are based on the principle of equality among states, which are parties to and enforcers of international agreements. The criminal conviction of a state for serious crimes would automatically weigh against the accused party, thereby causing an imbalance in relations and introducing unfairness to the international system.

- The sovereignty of states is a fundamental protection against aggression or undue interference by a foreign state or alliance of nation-states.

- As argued by defense counsel Matthew Witbrodt, prosecution of and penalties imposed on a state would result in collective punishment of all of its citizens. (Since the Treaty of Versailles that ended World War I, the international community has tried to avoid forms of collective punishment, including heavy war reparations.)

On the other side of the coin, total immunity for the state can encourage violations of international law by dictatorial, racist and/or bigoted regimes. The absence of legal

challenge by foreign courts therefore leaves few legitimate means to pressure the offending state. The more “peaceful” methods include economic sanctions, which can be interpreted as a type of collective punishment against a victimized citizenry.

With no legal recourse to counter mass atrocities, other states then must launch interventions through extralegal and often illegal strategies of covert warfare, proxy insurgencies or biased peacekeeping operations. The subsequent invasion and occupation by self-appointed saviors can be more harmful to the people, and to the principles of law, than the original violations of the offending regime.

Thus, quoting its opinion upon the verdict, a “reason the Tribunal wishes to reject the doctrine of absolute state immunity from prosecution in matters of genocide, war crimes and crimes against humanity is that the existing international law on war and peace, and humanitarianism, is being enforced in a grossly inequitable manner. Small, weak nations, mostly in Africa and Asia, are periodically subjected to devastating sanctions, military interventions and regime changes. At the same time, unbearable atrocities and brutalities are inflicted on the military weak nations of Latin America, Africa and Asia by powerful nations in the North Atlantic and their allies go unscrutinized and unpunished.”

The alternative to the law of the jungle applied by self-appointed unilateral powers or coalitions of the willing is the reform of international law to balance sovereignty with the responsibility of the state for high crimes such as genocide.

Restricting Sovereignty

In its opinion on the ruling, the Tribunal therefore offered a rational method for limiting sovereignty in cases of gross crimes: “Where there is a conflict between two principles of law, the one hierarchically higher in importance should prevail. To our mind, the international law doctrine against impleading (suing) a foreign state, being lower than that of the prohibition against genocide, resulted in the charge against the State of Israel.”

The Tribunal did not spell out how a genocide ruling can be enforced or provide a model for a reconstitution of state. Presumably and theoretically, the general effect of genocide-based restrictions on sovereignty would be to dissuade and deter state administrations from perpetrating mass atrocities with impunity. Under a legal standard for common action to stop genocide, a preventive intervention could then proceed under accepted rules of engagement and with safeguards against unwarranted violence by peacekeepers. When an inherently extreme policy is embedded in the constitution or state regulations, a lawfully grounded international authority could then abolish that state structure and reconstitute a legitimate state subject to a referendum. A legal process for constitutional change is far preferable to the current method of arbitrary regime change favorable to the interests of and politically subservient to an occupation authority. This remains hypothetical, showing only that the international community is yet to seriously consider the alternative to the present unlawful model.

Restriction of state sovereignty, as the Tribunal noted, is a new and evolving trend in international law. The U.S. permits its citizens to file lawsuits in federal court against states that harbor terrorists, and although this is covered under tort law, such cases inherently restrict the sovereignty of foreign countries. The European Union has also constrained the sovereignty of member states. Under the 1978 State Immunity Act, the British privy council ruled that vessels owned by foreign governments are subject to the same liability laws as

commercial vessels.

As argued by the Tribunal panel in their opinion, “We find it rather mind-boggling when some courts can consider commercial disputes as a reason for not allowing a state to be shielded by the state immunity principle and yet strenuously protect such a state in cases of genocide or other war crimes. Human lives cannot be less important than financial gain.”

The vigorous and often well-founded arguments by the Amicus Curae team in defense of Israel were constructive criticism that greatly helped to focus the Tribunal on the complexities of international law. In heated courtroom debate, defense counsel Jason Kay Kit Leon opined that “the elephant in the room” was Palestinian terrorism against Israeli civilians, for instance, the launching of unguided rockets at settlements, and that Israeli forces have acted in self-defense. The thrust of his claim was based on “In Defense of Israel” by Harvard law scholar and attorney Alan Dershowitz.

The jurists, however, accepted the prosecution argument. “It is our finding that much of the Palestinian-generated violence is not on Israel’s own territory, but from and on Israeli-occupied Palestinian land. Much of the violence perpetrated by Palestinians in a reaction to the brutalities of the vicious racism and genocide that is a tragic feature of Palestinian life.”

The opinion went further, by stating: “We also hold that the force of the IDF is excessive, totally disproportionate and a violation of international humanitarian law. The methods used are unspeakably inhumane and amount to war crimes.”

Internal Disputes

Earlier disputes within the Commission had led to a two-month adjournment of trial proceedings due to harsh and sometimes bitter accusations between participants. In the conflicted process, several judges recused themselves or were absent due to schedule conflicts and one prominent prosecutor resigned in protest of suspected tampering of the judicial panel. These controversies fortunately served to clarify rather than muddy the legal issues and court procedures, resulting in stronger arguments on both sides. Taking Israel to task is never an easy proposition.

Thereby, a stunning precedent in international law was achieved with the Tribunal’s unanimous decision to charge a state for the high crime of genocide. The arguments and verdict against the State of Israel will undoubtedly be a hotly debated test case for legal scholars over years to come. Since its Charter does not allow an appeal process, the case of “The Kuala Lumpur War Crimes Commission Against the State of Israel” will stand as the nub of controversy for human-rights law and the principle of sovereignty for nation-states.

While citing several precedents, the strongest argument for implication of the state is outlined in the 2007 genocide case of *Bosnia and Herzegovina v. Yugoslavia*, which covered the Srebrenica massacre of Bosnian Muslims by Serb-dominated federal armed forces. As Canadian jurist John Philpot, who earlier served on the Rwanda Tribunal, pointed out following the reading of the verdict “Bosnia/Herzegovina clearly laid out the culpability of the state and thus served as the precedent for our judgment against Israel .”

According to the *Bosnia/Herzegovina* ruling, “Genocide is a international crime entailing national and international responsibility on the part of individuals and states” and “if an organ of the state, or a person or group whose acts are legally attributable to the state,

commits any of the acts proscribed by Article 3 of the (Genocide) Convention, the international responsibility of that state is incurred.

A point to note: The Rwanda and Yugoslavia genocide cases, are considered by some legal experts to be flawed by the underlying covert and illegal factor of great-power interference. These cases were cited infrequently and judiciously by the Kuala Lumpur Tribunal, which exercised proper care in selection of appropriate passages, while relying on a much wider range of legal precedents in regard to liability of the state.

Critique: Going Beyond Reparations

Until this genocide ruling by the Kuala Lumpur Tribunal, offending states and their foreign sponsors have evaded responsibility while the entire burden of guilt has been placed on the individual agents of weak nation-states. Under the Tribunal ruling, both the core state apparatus - including the executive office, military command, intelligence agencies, supportive ministries and, in many cases, the judiciary and police - bear as much and, in some cases, more criminal responsibility for genocide as individual leaders or military officers.

Yet that is still insufficient when the primary responsibility should rest on powerful sponsor states that move from supporting the offending regime toward punishing its rebellious hubris. The nexus of powerful and ruthless states and global elites, with their machinery for war-making and arms production, creates the political state of siege, the economic strangulation and the covert weapons trade that prompt weaker states to perpetrate genocide.

Barely addressed in just one paragraph of the Tribunal opinion is the reality that powerful states oppose any dilution of their absolute state immunity with the unspoken objective of preserving their war-making powers. The dominant Atlantic allies have cited genocide solely as a pretext to expand their global domain through invasions under a broad and vague "responsibility to protect" principle and have imposed new constitutions on defeated adversaries authored by foreign legal scholars while disguised as the ideals of domestic political revolutions. Meanwhile, their own genocidal state structures, centered in the national-security structure and military command, categorically reject any international controls over extralegal interventions operated under the cover of humanitarian operations.

Also, in limiting its call for remedial action to reparations from Israel, the Tribunal wasted a precious opportunity to demand full justice for the Palestinian nation. What is realistically required is an international peacekeeping force to guarantee the withdrawal of the Israeli military and police force from Palestinian territory until a domestic law-enforcement and security force can take over; the elimination of wall-fences, checkpoints and other barriers to the free movement of citizens; the return of occupied land in Palestine; financial restitution for the loss of lands and property inside the boundaries of Israel; and an official apology for the countless crimes committed.

Furthermore, the continuity of genocide perpetrated by the core state structure and abetted by the complicity of much of the Israeli population demands that the offending state must be reorganized under a new constitution free of religious bias and racial discrimination to ensure legal norms that prevent a repetition of genocide. This objective should require an international occupation of Israel in event that powerful elements in Israeli society refuse to comply with international law. Israel should be spared the violence unleashed against the

Third Reich, but stern justice and strong rule of law are nonetheless required in situations of ideological conformity based on the goals of genocide.

Courage and Wisdom

Whatever its few shortcomings, the Kuala Lumpur Tribunal demonstrated immense courage, foresight and wisdom in leveling the long-overdue charge of genocide against the State of Israel. The Tribunal correctly framed genocide in the context of international law rather than merely as a localized violation. The verdict along with the sophisticated judicial opinion provides an important initiative toward deterring the great powers from promoting and exploiting genocides among weaker nations and victimized peoples.

The Tribunal verdict raised not only a legal challenge to supporters of the Zionist cause in the United States and Europe but also appealed to universal moral principles in the tradition of high-minded rhetoric. "Much as we condemn violence and pray for peace, it must be stated that no power on Earth can douse the flame of freedom from the human spirit. As long as there is suppression, there will always be people prepared to die on their feet rather than live on their knees."

The precedent-setting decision by the Kuala Lumpur Tribunal is a giant step forward not only for dispossessed Palestinians but also for humanity as a whole.

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