Top US Nazi hunter tells ‘Post’: Israel is obligated to stop Hamas's genocide

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By MICHAEL STARR MAY 17, 2024 07:10

Israel and much of the world have a legal obligation under international law to stop the genocidal intent of Hamas in the wake of the October 7 massacre, former United States Justice Department Office of Special Investigations director Eli Rosenbaum told The Jerusalem Post in an interview on Wednesday, in which he also decried the abuse of international criminal law to attack Israel and rejected the allegations of genocide against the Jewish state.

Rosenbaum, whose 38-year career with different incarnations of Department of Justice war crimes investigatory departments saw him prosecute Rwandan génocidaires, Russian war
criminals, and more World War II Nazi criminals than the rest of the world combined, explained that not only does Israel have a right to pursue the destruction of the Hamas terrorist entity if it can, “but Israel has a legal obligation under international law as a signatory of the Genocide Convention [1948, the Convention on the Prevention and Punishment of the Crime of Genocide].

“The treaty obligates all signatory nations not just not to commit genocide and punish it, but to prevent it,” said Rosenbaum.

**Hamas proves that it is committed to genocide**

On October 7 Hamas proved that it was committed to its genocidal founding charter, and its spokesmen promised to commit further Operation Al-Aqsa Floods until Israel’s destruction, said Rosenbaum. The indiscriminate targeting of civilians regardless of age or gender during the pogrom, and the nature of the murders, were indicative not just of genocidal intent, but of genocidal acts.

“Hamas intentionally carried out an attack that was so gruesome, so far beyond what anyone could have imagined in terms of cruelty, attacks that rivaled and even exceeded the cruelty seen at the hands of Nazi forces in World War II,” said Rosenbaum. “And I feel fairly well qualified to opine on that, having studied and investigated and prosecuted Nazi cases for some 40 years.”

HAMAS PROVED that it was committed to its genocidal founding charter on October 7, Eli Rosenbaum told the ‘Post’. Seen here are the remnants of a home in Kibbutz Be’eri. (credit: MARC ISRAEL SELLEM/THE JERUSALEM POST)
Israel is not alone in its legal obligation to ensure that Hamas’s genocidal aspirations do not reach fruition.

“Every country that signed the Genocide Convention, which is the vast majority of the countries of the world and that has the capability to act, has a treaty obligation that is an obligation under international law,” said Rosenbaum. “To quote the International Court of Justice, if they’re aware or should normally have been aware of the serious danger that acts of genocide would be committed, those countries are obligated to employ all means reasonably available to them to prevent genocide within the limits permitted by international law.

“And I would say that a few countries, in addition to Israel, have taken this obligation seriously, most notably the United States – initially through President [Joe] Biden sending naval power, closing in on the Mediterranean [Sea] and reportedly warning off both Hezbollah and Iran. “But there are other countries that are well resourced and well positioned to help prevent genocide and that are signatories to the convention.”

Turkey is also a signatory to the convention, “so rather than spewing outrageously false accusations about Israeli genocide, countries like Turkey have a legal obligation to do what they can to help prevent renewed genocide by Hamas.”

While there was not much jurisprudence or International Criminal Court (ICC) litigation on support for genocidal actors, Rosenbaum’s view is that “providing weapons to an entity that you are aware or should have been aware is carrying out or applying a genocide would be a violation of both the Genocide Convention and the Rome Statute on the ICC. It would be a criminal offense, basically, in rendering that state or other entity complicit, as one might say, an accessory to genocide or something of that nature.”

The accusation of genocide by Israel during the Israel-Hamas war is an "obscene falsehood", according to Rosenbaum. The crime of genocide requires not just an outcome of mass death over the course of war but the intent “to destroy a population in whole or in part.”

"It is not simply a matter of casualty numbers." He noted that, in any event, it has been proven by the research of Professor Abraham Wyner of the University of Pennsylvania, among others, that Hamas has “faked and exaggerated” the civilian death toll numbers, including those involving women and children.

Even if one accepts Hamas-sanctioned casualty numbers often cited by activists accusing Israel of genocide – which the anti-Nazi prosecutor noted did not detail Gazan combatants, those slain by Palestinian rocket misfires or booby-traps, or even deaths that occurred of natural causes – the death of 35,000 people during a war is not alone indicative of genocidal intent.

“Genocide is not a crime that is based on numbers,” said Rosenbaum. “If it were, then the allies would have committed genocide in the Battle of Manila with over 100,000 civilian deaths in World War II. We would have committed genocide in Germany, where, just to speak of aerial bombing, not ground operations, by the British Royal Air Force and the then US Army Air Force, that combined bombing killed somewhere between 300,000 and 500,000 people. No one would say that the Allies committed genocide against Germans. That’s just absurd. Germany
started a war. It was also a genocidal war, particularly against Jews and Roma, and they killed millions of people. The Allied military campaign is what brought an end to genocide.”

The mass death of civilians is part of the tragedy of war, said Rosenbaum, which is why it was so important to avoid launching armed conflict. He noted that during the First Chechen War in the 1990s over 50,000 civilians were killed by Russian forces, representing “5% of a population of 1.1 million, a population that’s half the size of Gaza,” and in Syria, Bashar Assad had overseen a civil war in which at least 300,000 civilians were killed since 2013, but Rosenbaum had not seen major student demonstrations against Russia, Syria, or Hamas’s October 7 massacre. “So there’s been some loss of moral authority there.”

Rosenbaum, who delayed his retirement in 2022 to serve as the Justice Department’s first-ever counselor for war crimes accountability and to head the agency’s newly created War Crimes Accountability Team to investigate atrocities committed during the Russian invasion of Ukraine, said that in contrast to the conduct of the Nazis and Russians, Israel did not target civilians. On the contrary, genocidal intent was disproven “because of the extensive measures they’ve taken to try to protect civilians, despite the best efforts of Hamas to maximize civilian casualties in Gaza.

“Israel is taking measures to protect civilian life in Gaza that no military has ever taken in any war,” said Rosenbaum. “It causes Israeli casualties. Israel has willingly paid that price. They drop leaflets. They make thousands upon thousands of phone calls to try to get people to leave the area. Hamas sometimes impedes the efforts of civilians to leave. And they [Hamas] also don’t share the vast storehouses of food, water, and fuel that they’ve stored underground. It’s almost beyond human imagination, the level of cruelty on the part of Hamas and its allies.”

The charge of genocide is all the more obscene due to “not only all the efforts that Israel has made to protect civilians in Gaza, but also the impossible situation created by the fact that Hamas hides behind and underneath civilians, and actually has been working to maximize the civilian death toll in Gaza.

“What Hamas is doing is a new paradigm in the history of warfare,” said Rosenbaum, “one that, in some ways, international criminal law is inadequately positioned to address, because none of the lawyers, scholars, and courts that have developed international criminal law over the years could have imagined what Hamas has done.”
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Student activists who charged Israel with genocide and compared Israelis to Nazis were incorrect, said Rosenbaum, who successfully brought cases against actual Nazis such as John Demjanjuk, Jakob Reimer, Arthur Rudolph, Aleksandras Lileikis, and Michael Kolnhofer. He questioned the failure of critical thinking skills and commitment to research among what he said is a radical minority engaging in disruptive protest and occupation of academic institutions across the United States.

“In addition to the fact that the accusations are fundamentally false, I think they’re also racist,” said Rosenbaum. The failure to seriously protest what Hamas did on October 7, and every day since then, holding hostages, which is a war crime, under appalling conditions, in addition to being immoral and amoral, it’s racist “an example of what is called the soft racism of low expectations.”

The unstated assumption is that thousands of men in Gaza who took part in these attacks, for some reason can't be held to even minimal standards of decent and humane conduct with respect to other innocent human beings.”

The student activists ignored actual genocide, crimes against humanity, and war crimes, and were facilitating Hamas’s pursuit of its goals.

“Hamas has been tragically successful in its effort to ensure that a large number of Palestinians die in order to gain world sympathy,” said the lawyer. “But every single death in Gaza of Palestinians and hostages is the doing of Hamas. They are responsible, morally and legally, for all of those deaths.”

The states that leveled the charge of genocide against Israel were engaged in “a blatant abuse of international criminal law.”

Rosenbaum said that South Africa, which was at the forefront of filing genocide accusations against Israel, demonstrated the “height of hypocrisy,” as it had previously ignored its responsibility as a state party to the Rome Statute to arrest former Sudanese President Omar al-Bashir for the outstanding ICC warrant against him for genocide, crimes against humanity, and war crimes in Darfur. The state had also sought to shield Russian President Vladimir Putin, for whom the ICC also issued an arrest warrant for unlawful deportation and transfer of children during the Ukraine-Russia War.

While many cite the January International Court of Justice opinion on the South African allegation of Israeli genocide as having adjudicated it to be credible, Rosenbaum said that the Court merely ruled that it possessed jurisdiction was, not that the allegation of genocide was credible.
The Nazi hunter said that he hoped that the ICC would continue to act professionally and responsibly and not rush to issue warrants against Israeli leaders and officers, but he said that he and the US government believed, contrary to the court, that it could exercise jurisdiction over Palestinians, since the Palestinian territories are not a recognized state and lacked the legal power to join the Rome Statute, and also because Israel, like the United States, has not signed onto the ICC treaty. He also said that the ICC is required to operate under the principle of complementarity, which means that they are “a court of last resort that is empowered power to take action when the state concerned, in this case Israel, demonstrates neither the ability nor willingness to investigate in good faith and prosecute where the facts and the law are in place.

“Israel has laws covering all of the offenses that various parties have alleged,” said Rosenbaum. “And as even the flawed report that the US State Department submitted to Congress on Friday under the National Security Memo demonstrates, there are numerous official Israeli investigations into various alleged acts of misconduct and even alleged crimes. And I would hope that the ICC would let that process play out and see what happens before they take steps to potentially act on their own.”

Rosenbaum was critical of the State Department report on Israel's and other countries’ use of American weaponry and provision of aid in accordance with international law, which was presented to Congress last Friday. He said it was “poorly done,” not “entirely internally consistent,” and employed double standards as to Israel.

The accusation made in the report that Israel doesn’t follow best practices for avoiding civilian deaths made Rosenbaum wonder whether the US military and NATO forces could follow them, given the lengths to which the IDF has already gone to avoid collateral damage.

“It’s a double standard,” said Rosenbaum. “And it isn’t fully clear in any event what ‘best practices’ are in an unprecedented situation like this one. This document looks to me like a State Department draft that the Defense Department read and inserted changes into because of a concern that standards set forth there would be applied to our own military. I can’t prove that, but it just has that feel to me. I’ve seen a lot of State Department drafts over the years on war crimes law that DoD has pushed back on. The Defense Department has a proper interest in ensuring that its own conduct is fairly appraised, and if conduct of other countries is not fairly appraised by the US government, that can end up biting the DoD in the future.”

He continued, saying that the 15-page report was imbalanced, with the atrocities of October 7 relegated to only a quarter of a page, and didn’t explain the context of Israel fighting an existential war against “a credible threat of renewed genocide,” by Hamas and its allies, especially Hezbollah.

He said that the report states that it did not have direct indication of Israel intentionally targeting civilians, then assesses that Israel could do more to avoid civilian harm, without explaining that Israel is dealing with an enemy that is “hiding, using civilians as human shields, hiding behind them and underneath them and not wearing uniforms. So it's to avoid civilian casualties in all instances.”
The report came on the heels of Biden stating on May 9 that he would withhold weaponry from Israel over concern about the impact that American weaponry would have on the civilian population in a Rafah military operation. Rosenbaum said that he believes that “the disagreement between the United States government and Israeli government will be resolved.

“I think the significance of this lack of agreement has been exaggerated,” said Rosenbaum. “This is also a political season in the United States. It’s election season, and I think the president is in a difficult position, given the widespread misunderstanding among certain parts of the base of his party regarding events in Israel and Gaza.”

Rosenbaum credited “The president’s extraordinarily fast and powerful intervention almost immediately after October 7, particularly by projecting naval power close in in the Mediterranean, arguably preventing a ruinous war. There are some who believe that the president saved Israel. He’s been strongly supportive of Israel for his entire political career, going back to his earliest days in the Congress.”

Regardless of the US position on Rafah, Rosenbaum said, a “so-called permanent ceasefire will not, in fact, end the war.

“A permanent ceasefire that leaves Hamas in power and with battalions of armed killers, and with its commitment to destroying Israel in place, is not an end to the war. It’s only an end to this chapter awaiting the next attack by Hamas.

Referencing the four armed battalions that Hamas is widely believed to retain in the stronghold of Rafah, Rosenbaum added, “The Allies did not say to the Germans in January of 1945, ‘Well, this is a very destructive war, a lot of people are dying on both sides. We’ll call it off now. You all can stay in power in Berlin, and you can have four battalions of SS mobile killing units, and we’ll just see what happens down the road.’”

Instead, he noted, World War II came to an end in Europe only when the Nazis acceded to the same demand that he says Israel should keep making of Hamas as it wages its own genocidal war of aggression: “Surrender unconditionally, come out with your hands up, release your prisoners, and relinquish your weapons.”

The Allies had, as the Israelis have now, a moral obligation to finish the fight in the face of the supreme crime of genocide, Rosenbaum said.

“Hamas had said publicly, they’re going to repeat October 7, again and again, until Israel is destroyed. So a ceasefire is simply delaying the next genocidal attack. It does not end the war.

“Only Hamas can end this war, unless they want to wait and let the Israelis destroy them. There are only two alternatives for Hamas, surrender or destruction.”

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