

# **THE KUALA LUMPUR WAR CRIMES TRIBUNAL**

## **Case No. 3 - CHG - 2013**

### **The Kuala Lumpur War Crimes Commission Against Amos Yaron**

## **Case No. 4 - CHG - 2013**

### **The Kuala Lumpur War Crimes Commission Against The State of Israel**

- Coram : Judge Tan Sri Dato' Haji Lamin bin Haji Mohd Yunus  
Judge Alfred Lambremont Webre  
Judge Salleh Buang  
Judge Eric David  
Judge Tunku Sofiah Jewa  
Judge Shad Saleem Faruqi  
Judge Michael Hourigan
- Prosecution Team : Prof. Gurdial Singh Nijar  
Mr. Francis Boyle  
Mr. Avtaran Singh  
Ms. Gan Pei Fern
- Defence Team : Mr. Jason Kay Kit Leon  
Ms. Larissa Jane Cadd  
Dr. Abbas Hardani  
Ms. Galoh Nursafinas Samsudin

These proceedings have been scheduled for four days from 21<sup>st</sup> to 24<sup>th</sup> August 2013 to hear two sets of charges filed by the Chief Prosecutor of the Kuala Lumpur War Crimes Commission with the Registrar of the Kuala Lumpur War Crimes Tribunal (KLWCC) consisting of *Case No. 3 CHG 2013 the KLWCC v Amos Yaron* and *Case No. No. 4 CHG 2013 the KLWCC v the State of Israel* ('the charges').

On the first day of the hearing, the Prosecution, without prior notice, made a surprise application in Chambers to have Judge Eric David recused from being a member of the panel of seven (7) Judges hearing this case. In support of its application the Prosecution tendered two documents – the first being a photocopy of a legal opinion given an earlier time by Judge David (in his private capacity) to the People's Mujahedin of Iran ('PMOI') undated and the second being a photocopy of a news report from the Daily Mail (UK) dated 10 February, 2012 ('the supporting documents') ('the Application').

The main thrust of the Prosecution's application was their view that because of his relationship with the POMI, he will not be able to discharge his duties in an unbiased manner as befitting an impartial Judge of this Tribunal. Further they stressed that unless Judge David recused himself in Chambers they would repeat the Application in open Court.

The Tribunal considered the Application and supporting materials and then unanimously ruled that there was no basis to the Application requiring Judge David to recuse himself and dismissed the application.

The Court then convened and the Prosecution made a formal Application in open Court for Judge David to be recused. The Court formally dismissed the Application and directed the proceedings commence.

Instead of respectfully abiding by the ruling of the Tribunal and proceeding with the trial as scheduled, Mr. Francis Boyle co-counsel for the Prosecution then addressed the Tribunal in open court and made a series of further unfounded and malicious allegations against Judge David. He offered no credible and cogent supporting evidence (or any at all) for what the Tribunal considered to be scandalous allegations. The Tribunal considered Mr. Boyles' conduct to be improper and an abuse of the court process.

The allegations from Mr. Boyle were very serious accusations made to the Tribunal without due regard for proper decorum and respect owed by a member of the bar to the Tribunal and constituted contempt towards the Bench. The President patiently reminded Mr. Boyle to cease making these unfounded allegations as the Application had already been heard and a Tribunal order made. Notwithstanding this Mr. Boyle ignored the directions of the President and continued to address the Tribunal repeating the allegations over and over.

The President then ordered that these unsubstantiated allegations by Mr. Boyle, the co-counsel for the Prosecution be expunged from the record of the Tribunal proceedings.

The President once again directed that the proceedings begin.

The Prosecutor Prof. Gurdial Singh Nijar then informed the Tribunal that the Prosecution was not prepared to proceed because its witnesses were not willing to give their testimony in the presence of Judge Eric David. The Tribunal noted that this information had not formed a part of the Prosecution Application and that it should have.

When both the Chief Prosecutor and the *Amici Curiae* later appeared in Chambers at the request of the President, the Chief Prosecutor was again asked that if his witnesses were not prepared to give oral evidence was he prepared to proceed with the case on the basis of tendering witness evidence in documentary form thus avoiding the necessity for the witnesses to appear in person.

Prof. Gurdial Singh Nijar replied that the Prosecution would not proceed in way without Judge David leaving the bench. Prof. Gurdial Singh Nijar did request for further time to speak with his the witnesses which was granted. The *Amici Curiae* asked for leave to make a statement to the Tribunal in Chambers the following morning. Permission to do so was granted.

On the morning of the second day, the *Amici Curiae* made his statement in Chambers to the Bench. Having heard both the Prosecution Team, as well as, the *Amici Curiae* and the proceedings continued.

Prof. Gurdial Singh Nijar then sought leave from the Tribunal for a victim representative of the victims group to address the Tribunal. Leave was granted.

An adult male victim then addressed the Tribunal and repeated the concerns expressed by his counsel Prof. Gurdial Singh Nijar that the victims were concerned as to their safety from appearing before the Tribunal in its form and, further, that they were distressed at some of the remarks of the Tribunal panel made the previous day to their counsel.

The Tribunal noted that no evidence was tendered detailing the safety concerns of the victim.



Prof. Gurdial Singh Nijar then made a formal application for these proceedings to be adjourned *sine die* (the new Application).

Before giving its decision on the new Application to suspend these proceedings the Tribunals feels it important to state the following for the record –

- (1) The Judges observe with deep concern and regret that there has been a serious breach of decorum and improper conduct on the part of Mr. Boyle, co-counsel for the Prosecution in the matters already mentioned above. At this moment there has been no attempt by the said co-counsel to tender his unreserved apologies to the Bench and, in particular, to Judge Eric David;
- (2) Whilst the Tribunal take note of the Chief Prosecutor's statement to the bench, both in open proceedings as well as in Chambers, that his witnesses are very concerned for their safety should they give their testimony in the presence of Judge Eric David, the Tribunal finds their conduct in insisting to be present in court even when though all witnesses were ordered from the court to be in defiance of the clear directions of the full panel of Judges.
- (3) The Judges are unanimous in their Opinion that the witnesses' continuous refusal to give their testimony in these proceedings until and unless Judge Eric David recuses himself, despite the ruling made by the bench is in contempt of the Tribunal order and amounts to an improper ultimatum being given to the bench. The witnesses would have the Tribunal believe that if they were to give their testimony in open proceedings in front of the six Judges (with Judge Eric David not on the Bench) they will be safe from harm upon their return to their homeland. In the absence of any evidence to support these alleged concerns the Tribunal is of the view that Judge Eric David's presence on the bench will have no impact on their safety.
- (4) It is ironic that whilst KLFCW has at great cost and effort given the witnesses their day in court to seek justice for the war crimes committed against them the witnesses (led by the Prosecution team) have instead chosen to refuse to appear before the Tribunal. The witnesses have effectively squandered an invaluable opportunity. The Tribunal is also disappointed that while it made numerous overtures to the Prosecution counsel to find ways to give the witnesses confidence in the Tribunal process each and every offer was dismissed out of hand. The Tribunal could only conclude that the Prosecution team was committed to bringing these proceedings to an end.
- (5) Finally, the Judges also wish to put on record their sorrow and regret that despite all the preparatory work being carried out by so many people under the leadership of the Honourable President of the Kuala Lumpur Foundation to Criminalise War (KLFCW), for which this Tribunal is its organ, as well as substantial expenses which are largely provided by generous donors from amongst the general public, everything has now come to nought. The Tribunal believes the Prosecution team, despite asserting that it will abide by the decision of the Tribunal, has itself single handedly brought these proceedings to a dead lock unless and until their demands are met. That is an intolerable situation that the Tribunal just cannot condone.
- (6) The Tribunal wishes to point out that notwithstanding Judge Eric David's firm position that there was no merit in the Prosecution Application for him to recuse himself he did volunteer to withdraw himself from the proceedings. However the other Judges unanimously would not support such a decision. The Tribunal reaffirms its earlier ruling that Judge Eric David will not recuse himself from these proceedings.

Consequently, it is with great reluctance and regret that the Tribunal now orders that these proceedings stand adjourned *sine die*.

Dated this 22<sup>nd</sup> day of August 2013.

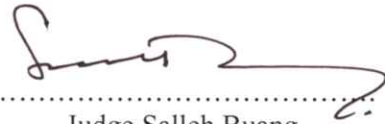
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