Responding to Cries of Genocide: The Yemenite Children Affair

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By: Bay Jaber

Introduction

Amongst the noise of the Israel-Palestine conflict, Israeli domestic tensions often go unheard. A meeting point of different ethnicities, origins and religions, Israel is far from the unified Zionist state

envisioned by the founding fathers. The Yemenite Children Affair is a strong example of this fragmented identity and internal conflict. The Yemenite Children Affair refers to a situation in the first decade following Israeli independence where the Israeli government was allegedly complicit in the abduction of Arab Jewish, also known as Mizrahi, children. The Mizrahi children were removed from their families without the consent of their biological parents and placed with families of Ashkenazi origins. The 'adoptions' took place through aid organizations affiliated with the State and outside the confines of the law. As concerns surrounding the disappearing Mizrahi children grew, the Israeli public demanded the State regulate these 'adoptions' but the call fell on deaf ears.

Decades following the Affair, victims of the abductions are demanding answers from their government and calling for recognition of the Affair as an act of genocide under Article 6(e) of the Rome Statute. The sentiment among the Mizrahi peoples and their allies that the Israeli government was complicit in genocide is the subject of this paper.

This paper explores this issue in the context of the Yemenite Children Affair within the context of International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) jurisprudence. It ultimately finds that while the transfers of children was inhumane, the statutory requirements to establish genocide by the forcible transfer of Mizrahi children under Article 6(e) is not met because there was no attempt to destroy the Mizrahi Jewish people in whole or in part.

While the Affair may not amount to genocide, recognition of the complicity of the Israeli State in the alleged abduction of thousands of Jewish babies may be the necessary stepping-stone to recognize the systemic discrimination that continues to underlie Israeli society, affecting Mizrahi Jews, Ethiopian Jews, African refugees as well as Arab Muslims and Christians.

The Yemenite Children Affair

Roughly half of the 680,000 immigrants that entered the state of Israel between 1948 and 1951 were Mizrahi Jews originating from neighboring Arab States (Zvi Zameret, "The Integration of Yemenites in Israeli Schools", (2001), 6(3) Israel Studies at 2). The newly established Israeli state did not look fondly on the Mizrahi Jews, often suspicious of their Arab origins and features, use of the Arabic language as well as their religious devotion (Rachel Shabi, *We Look Like the Enemy: The Hidden Story of Israel's Jews from Arab Lands*, 2008 at chapter 9). Often relegated to the peripheries of society in transitory camps, the Mizrahi Jews experienced hardships of a newly developing state including poor sanitary conditions, degrading healthcare, lack of housing, poor food quality and nutrition (Meira Weiss, *The Children of Yemen: Bodies, Medicalization, and Nation-Building*, 2001 at 213).

The Yemenite Children Affair developed in these conditions. State-sponsored organizations that received new immigrants worked to develop a national ethos and fashion immigrants into a monolithic identity of the ideal Zionist-citizen. A product of this undertaking was the alleged state-lead abduction

of thousands of Mizrahi children and their placement with, and in some instances sale to, white European Jewish families also known as Ashkenazi Jews (Ida J. Jiggetts, *A Study of the Absorption and Integration of the Yemenite Jew in the State of Israel*, 1957).

Roughly eighteen years after the abductions took place, the same Mizrahi families received letters from the Israeli Defence Forces requesting their children appear for mandatory military service (Vincent Calvetti-Wolf, *Remembering the Thousands of Children who Disappeared in the Yemenite Babies Affair*, 2019). It was often these letters that confirmed what families already knew to be true – their children were still alive. This spurred Mizrahi Jews to demand that the Israeli government investigate the disappearance of thousands of newborn and young Mizrahi children.

The Israeli government established three official commissions to investigate the disappearance of Mizrahi children: the Bahalul-Minkovsky Commission, the Shalgi Commission, and the Cohen-Kedmi Commission. All three commissions dismissed allegations of nation-wide kidnappings of Mizrahi children. However, in 2016, Prime Minister Benjamin Netanyahu recognized the shortcomings of the previous three commissions and appointed Tzachi Hanegbi, a member of his cabinet, to review the evidence (Nadav G. Molchadsky, *From "Missing" to "Kidnapped"*, 2018 at 87).

Despite Netanyahu's efforts, there is ongoing distrust in Israel's handling of the Yemenite Children Affair. Organizations such as the Amram Association continue to protest for official recognition of the Affair, recognition of the systemic racism that underlies it, for state-funded community healing initiatives and for recognition that the forcible removal of children from their families was an act of genocide.

Is the Yemenite Children Affair a Case of Genocide?

Genocide as Defined in the Rome Statute of the ICC

Article 6 of the Rome Statute of the International Criminal Court states the crime of genocide is committed when a person commits a prohibited act with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. The prohibited act under Article 6(e), forcibly transferring children of the group to another group, will be the focus of this paper.

(1) Are the Mizrahi Jews of Israel a "Protected Group"?

Under Article II of the Genocide Convention and Article 6 of the Rome Statute, a protected group is defined as a national, ethnical, racial or religious group, as such. The list of protected groups under the Genocide Convention and the Rome Statute is exhaustive. The term "as such" has been interpreted to mean that the prohibited act must be committed against a person based on that person's membership to a specific group, such that the target victim is not the individual but the group itself (*The Prosecutor v Mikaeli Muhimana, 28 April 2005*).

There is no internationally accepted definition of a national, ethnical, racial or religious group. Each case is assessed based on the particular political, social and cultural context (Agnieszka Szpak, *"National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals"* 2012 at 163). The ICTR first discussed the subjective approach to the concept of protected groups in *Rutaganda* (*The Prosecutor v Rutaganda*, 26 May 2003). Here, the Chamber recognized that membership in any of the four protected groups was subjective rather than objective (Szpak, 2012). This interpretation was reiterated in *Bagilishema* (*The Prosecutor v Bagilishema*, 7 June 2001). The subjective approach expands the application of genocide to those perceived to be members of the four protected groups.

Subjective interpretation of whether the Mizrahi Jews are a separate ethnic or religious group is dependent on the group's sense of belonging to that ethnic group and how they are perceived within Israeli society (*The Prosecutor v Jean Paul Akayesu*, 2 September 1998). The Mizrahi identity was present across the Middle East, North Africa and was used by Jewish people in Palestine prior to the establishment of the Israeli state (Yehouda Shenhava & Hannan Heverb, *'Arab Jews' after structuralism: Zionist discourse and the (de)formation of an ethnic identity*, 2012 at 104). Despite Israeli hostility towards Arab Jews, Mizrahi Jews who immigrated to Israel from their Arab homelands continued to identify with their Arab roots, Arabic language and Arab culture.

The Mizrahi people had a clear sense of identity as a separate ethnic group, which persisted, notably in popular culture, despite their integration into Israeli society. Mizrahi author Shimon Ballas, an Arab Jew from Iraq, commented that despite his move to Israel, he remained in "constant colloquy with my Arab environment" (Shenhava & Heverb, 2012 at 104). Author Sami Michael stated that just as there were Arab Christians, Iraqi immigrants to Israel continued to perceive themselves as Arabs of Jewish decent (Shenhava & Heverb, 2012 at 104). Other Mizrahi authors have made similar statements and do not shy from claiming Arabic as their first language.

The organizations that directly received and integrated the Mizrahi people into Israel had a clear conception of the Mizrahi people as a separate ethnic group. If perpetrators of a crime identify their targets based on a specific national, ethnic, religious or racial group, that type of identification can be used as a basis for establishing the victims as a "protected group" (*The Prosecutor v Laurent Semanza*, 15 May 2003). Zionist emissaries visiting neighbouring Arab countries, notably Iraq, to recruit Jewish immigrants for the new state, identified the local population as "Arab Jews", commenting on the stark difference between European Jewry and the Mizrahi who resembled the local Arab populations in culture and appearance (Shenhava & Heverb, 2012 at 106). Additionally, statements identifying Mizrahi Jews as a separate ethnic group were common amongst the Knesset and popularized by the founding father and first Prime Minister of Israel, David Ben Gurion, who openly identified the Mizrahi people as uncivilized, uneducated and "human dust without a language" (Nadav Davidovich & Shifra Shvarts, *Health and Hegemony: Preventative Medicine, Immigration and the Israeli Melting Pot*, 2004 at 152).

Despite the complex and hybrid nature of Mizrahi Jews as both Arab and Jewish, there is a clear distinction in Israeli society, the Middle East and North Africa that Mizrahi Jews are a distinct ethnic group and therefore a “protected” group under the definition set out in Article 6 of the Rome Statute.

(2) Did the Israeli state commit the prohibited act of forcibly transferring children of the group to another group?

Despite three state commissions and renewed inquiry into the Affair, fundamental questions remain unanswered. The Israeli state has been relatively silent and dismissive of the claims that state-instituted kidnappings took place in the 1950s but the Israeli public has not accepted this conclusion (Molchadsky, 2018). In a 2016 survey, 82% of the adult Jewish population in Israel believed that the kidnappings of the 1950s did in fact take place (Molchadsky, 2018). Testimonies by state nurses, who were inadvertently complicit in the separation of babies from their children, substantiate the finding that Israel had a policy of forcibly removing Mizrahi children from their families (Shoshana Madmoni-Gerber, *Israeli Media and the Framing of Internal Conflict: The Yemenite Babies Affair*, 2009 at 37.

Testimonies from state nurses state that they were provided clear instructions to remove newborn babies from their mothers in the first few hours following birth and relocate them to children’s homes. Testimony of Yemeni nurse Tsviah Cohen explained that separation was justified due to belief of the disease-prone nature of Mizrahi peoples (Weiss, 2001 at 213). The separation of mother and child facilitated state kidnappings as children routinely went missing or were claimed to be dead despite the lack of documentation or body. Roza Kuzinsky who worked as a nurse trainee in Ein Shemer explains how “we would take the babies healthy and whole, and we would come back with nothing, as if nothing happened” (The Amram Association). Aviva Bibi a nurse who worked for an organization linked with facilitating the kidnappings, Hadassah, testified that there were hardly any instances of infant deaths but that unidentified children from immigrant camps were often handed over to the Women’s International Zionist Organization (WIZO).

The adoption practices in Israel during this period supported the forcible transfer of Mizrahi children. There are many concerns around the adoption practice around the time the events of the Affair took place and in subsequent years when the Israeli government attempted to cover up the disappearances of Mizrahi children. Hanna Gibori, a social worker and head of adoption services in the Northern District between 1948 and 1954 testified before the Cohen-Kedmi Commission that children that were placed in her care were often placed with families without a formal adoption process (Shlomi Hatuka, *The Tragedy of the Lost Yemenite Children: In the Footsteps of the Adoptees*, 2014). Head Physician Dr. Yosef Yisraeli also testified to his observance of a policy of transferring hundreds of children from hospitals to group homes far from their place of residence and then giving them up for adoption (Hatuka, 2014).

The Israeli legal system assisted in ensuring that traces of illegal adoptions were covered up. In the 1950s there were no laws governing adoption in Israel despite Israeli’s demanding a codifying and monitoring of adoption. In a May 1955 decision, High Court Justice Shneur Zalman Cheshin brought

attention to this issue when he stated “To our embarrassment, fictitious adoption orders and custodial orders are issued weekly, indeed daily, using methods of tenuous routes, bypassing and sneaking past the authorities, …dubious interpretations [of the law], convoluted arguments, and sleight of hand […] Even the rabbinate has begun issuing adoption orders.“ However, Justice Cheshin’s attempts at advocating for proper legislative and legal protections for adoptees fell on deaf ears. A reported 6,000 to 10,000 adoptions took place between 1948 and 1960 with only a minority of adoptions claimed to be legitimate (Hatuka, 2014).

Adoption case law from this period reiterated the sentiment of the Zionist state, that biological parents were not always the best fit for their children: "Neither the mother nor her relatives nor the father's relatives can hinder the court from appointing as guardian any one whom it considers fit." (Hershkovitz v Greenberger, 18 May 1955). Around the same time period, a law was passed containing a clause that stated parents of an adopted baby or child need not be present in court to consent to the adoption permit’s issuance, nor could they appeal the decision (Hatuka, 2014). The lack of regulation surrounding adoption, despite knowledge that illegal adoptions were taking place at significant rates, permitted the state to continue to forcibly remove children from the care of their Mizrahi parents.

The forcible removal and subsequent cover up, supported by Israeli law, intended to remove the Mizrahi children from their community in an effort to civilize them in the image of the ideal Israeli citizen. The Israeli state believed this was best achieved by placing these children with Ashkenazi families from birth. There was clear attempt to eliminate any transfer of Arab language, culture and religious devotion in the new generation.

(3) Were the prohibited acts committed with the intent to destroy in whole or in part, the Mizrahi people of Israel?

For a finding of genocide, the Israeli state must have committed one of the prohibited acts listed in Article II of the Genocide Convention, and replicated in Article 6 of the Rome Statute, with the intent that its acts result in the destruction, in whole or in part, of the Mizrahi Jews. Considering the gravity of the offence, convictions for genocide are only successful where intent has been indisputably established (Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 2005).

Considering the discourse surrounding Mizrahi Jews during the founding years of the Israeli State, the forcible removal of thousands of Mizrahi children from their families had some indication of genocidal intent. The perception of Jewish-Arab immigrants as possessing a “primitive soul” was widespread in newspapers, Knesset debates and even early Israeli scientific writing (sociological, psychological, medical) (Davidovich & Shvarts, 2004 at 152). The founding father of the State of Israel and the first Prime Minister of Israel, David Ben Gurion, often commented on the status of the Mizrahi people as “human dust without a language, without education” and did not hide his intention to transform “the human dust into a cultured, independent nation with a vision” (Davidovich & Shvarts, 2004 at 153).

However, other elements are more indicative that the intent to destroy the Mizrahi people in whole or in part does not meet the threshold of special intent required for a finding of genocide.

First, the estimates of the number of kidnapped Mizrahi children between 1948 and 1960 compared to the total population of Mizrahi children present in Israel at the time is unlikely to result in a finding there was intent to destroy a substantial part of the Mizrahi people. The destruction of a substantial part of a particular group means a reasonably significant number relative to the total number of the group or a significant section of the group, such as their leadership (*The Prosecutor v Clément Kayishema*, 21 May 1999). There were roughly half a million Mizrahi Jews that immigrated to Israel during the peak immigration years of 1948 to 1951. Estimates claim anywhere between a few thousand up to 10,000 Mizrahi children were kidnapped during this time, a fraction of the total population.

Furthermore, the families who were targets of the forcible removal of children were families that were located in transitory camps and often already had several children of their own. This indicates less intent to destroy the Mizrahi people as a whole or in part as much as it is an intention to remove children the state believed would not be “missed”. Mizrahi families continued to bear and raise children: their biological reproduction was not halted. Undeniably, the forced removal of children violates international standards of human rights but does not amount to genocidal intent to annihilate in part or in whole the Mizrahi peoples.

Second, intent is a mental factor, which may by difficult or even impossible to determine short of a confession. The Appeals Chamber in *Jelisi?* noted that “as to proof of specific intent, it may in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as general context… or the repetition of destructive and discriminatory acts” (Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 2005). Mizrahi transit camps that were the targets of forcible removal of children did not experience any outright violence that intended to eradicate the group in whole or in part. Despite the inhumane forcible removal of their children, many of the families remained in the transitory camps or their villages and did not report any threat of extermination.

The high threshold for establishing genocide rests in the intent of the crime. This is clear in the UN Report on Darfur, which was reluctant to accept the conflict in Darfur as a crime of genocide despite widespread atrocities because specific genocidal intent could not be established. The UN Report states “this case clearly shows the intent of the attackers was not to destroy an ethnic group as such, or part of the group” but rather “to murder all those they considered as rebels”. In the case of the Yemenite Children Affair, the intention of the State was more akin to the commodification of Mizrahi women’s bodies that could provide children to infertile Ashkenazi families. Statements from nurses point to the lack of genocidal intent, claiming that Mizrahi women often had many children and so the loss of one child would not be felt (Weiss, 2001 at 215).

Conclusion

While deeply disturbing and unquestionably caused rifts in Israeli society, the Yemenite Children Affair is unlikely to constitute a case of genocide. The Mizrahi people are a distinct ethnic group and the forcible removal of their children was a result of targeted policy by the Israeli State but these acts were not committed with the intention of destroying the Mizrahi people in part or as a whole.

Attempts to fit the Yemenite Children Affair within the narrow and rigid legal definition of genocide detracts from coverage of the injustice caused to the Mizrahi people (See also: Joseph Rikhof "*The National Inquiry into Missing and Murdered Indigenous Women Final Report and Genocide"* and "The MMIWG Final Report and Genocide"). Lack of genocidal intent does not spare states from their moral responsibility to victims. In Kambanda, genocide was recognized as the "crime of crimes" (*The Prosecutor v Kambanda*, 4 September 1998) but in subsequent cases judges were quick to clarify that no crime committed on this scale is lesser than the other. Full state recognition and transparency surrounding the Affair will allow for open discussion about systemic racism that persists in Israeli society as a whole and only then can we hope for renewed relations.

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Image: Yemenite children in Aden.jpg. Five hundred children eagerly await Channukah gifts in "Hashed Camp" near Aden, Yemen, Wikimedia Commons, author: David Eldan/GPO, Public Domain.