

LPHR SEMINAR: THE RULE OF LAW, ACCOUNTABILITY AND GAZA

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Garden Court Chambers

Chair: Andrea Becker

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This LPHR seminar follows in the wake of the Israeli military action, "Operation Protective Edge", in Gaza between 7 July 2014 and 26 August 2014.

Dr Janina Dill opened the seminar by stating that to determine whether the law has been breached within the conflict we would need to separately examine individual military attacks. An opening observation made by Dr Dill is that what the law permits in war may not meet with our moral understanding and in fact may strike us as morally abhorrent, as it makes a pact with the devil of "military necessity".

Dr Dill considered the definition of "legitimate targets" in the context of the recent Israeli military operation in Gaza where family houses were specifically and pervasively targeted. To determine whether a target may be construed as "legitimate" under international law there are three major legal principles to consider: (i) Distinction; (ii) Proportionality and (iii) Precaution.

We were invited to consider on what basis the Israeli military considered family homes, which ought to be protected pursuant to Article 52 of the Additional Protocol to the Geneva Conventions of 12 August 1949), to be legitimate military targets. The Israeli military appeared to have three reasons for identifying family homes as legitimate targets: (i) Hamas hid weapons in the location; (ii) the Israeli military was engaged from these houses and/or (iii) these were the homes of members of armed groups. The first two apparent reasons, if proven, can legally convert the family home from a civilian object protected from attack into a military object which could be legitimately attacked. This is because the home could be providing an effective military contribution. However, Dr Dill emphasised that the third apparent reason - that a home could be attacked because it belonged to a member of an armed group - is not a legitimate basis for converting a family home into a military object under international law.

Assuming that a family home was providing an effective military contribution which would permit the Israeli military to designate it as a military object, Dr Dill then considered whether the proportionality principle was violated by the Israeli military in attacking civilian homes in Gaza. Dr Dill explained that it's not possible to draw a definitive answer to this question without first examining the evidence of the full circumstances surrounding each individual attack on a family home. Dr Dill then explained the difficult balance that must be weighed between the expected military advantage to be gained from destroying a family home, with the anticipated harm caused to civilians. Dr Dill clarified that the International Criminal Tribunal for the Former Yugoslavia has applied an objective test when deciding this difficult question. Dr Dill recognised that proportionality arguments can fuel controversy as we may not be able to determine accurately what is legally proportionate in terms of

loss of life, and furthermore that a legal opinion determining what is proportionate may be deemed to be morally reprehensible.

Dr Dill finally considered the warnings that were given in some cases by the Israeli military before attacking a family home. Dr Dill emphasised that civilians have no duty to flee once warned, so the issuing of a warning clearly does not have the effect of converting a family home into a legitimate military target under international law. The only obligation on a civilian is not to directly participate in hostilities.

Nuriya Oswald spoke about the obstacles for seeking legal redress through the Israeli Court system. Ms Oswald introduced her segment by playing a short video [‘Waiting for Justice’](#), which concerned the struggle for justice for the Abu Is'ayid family home following an Israeli military attack on their family home in Gaza in 2010. Ms Oswald explained the work of Al Mezan which tries to help people navigate the barriers in place and access justice.

Ms Oswald explained the various hurdles that a claimant must overcome in a civil claim. First, there is the shortened 'statute of limitation' period which was previously seven years but is now two years. In addition to this short time to lodge a claim, any claimant who intends to bring a claim must send a notice to the Minister of Defence in Israel within 60 days of the incident. Ms Oswald noted this brief 60 day period is particularly problematic if one considers that “Operation Protective Edge” lasted 50 days.

The second barrier to access to justice is court fees. It costs 20,000 – 30,000 shekels (approximately £5,000 – £6,000) to lodge a claim. The court fee may be based per case or by claimant.

Another barrier to access to justice is caused by the restriction of movement for Palestinian residents from Gaza. Claimants in Gaza are not able to attend court in Israel, which therefore necessitates Powers of Attorney (POA). The POA must be signed in the presence of an Israeli diplomat, but given the restrictions on travel this is not feasible. This issue was recently brought before a judge in Israel who rather unsympathetically suggested that claimants from Gaza could travel and see a diplomat in Cairo. The restriction on travel also prevents claimants from being able to meet their lawyers in Israel (who also experience difficulty in getting into Gaza).

A further barrier to access to justice is language. The paperwork from the Court is in Hebrew and most claimants are only able to speak Arabic.

A significant further barrier to access to justice is ‘Amendment No. 8’ which came into effect in 2012 and is retroactive. This amendment exempts the state of Israel from any civil liability for damage caused to a resident of an enemy territory during a 'combat action'. The effect of this legal provision is that most claims from 2005 onwards from Palestinian residents of Gaza have now been thrown out.

In the criminal law context, there is a six months statute of limitation period to lodge a complaint. Most criminal complaints are rejected outright by the Israeli military. For the remaining cases there are difficulties caused by delay and lack of transparency. Investigations are often closed and no reason is provided to the lawyers (or claimants). It is very rare that the claimant is able to give their version of events. The investigations are not impartial as they are carried out by the Military Advocate General, and there is a general refusal by the Military Advocate General to share information (even in civil cases) with the claimant and the judge.

Ms Oswald concluded by stating that if the Israeli legal system worked there would be no need to seek international accountability, and that legal accountability is the only credible process that will bring justice to victims of Israeli military attacks in Gaza and prevent recurrence of serious violations of international law.

Finally, Daniel Machover spoke about the duty of Israel to investigate itself, emphasising that every national legal system has to provide an adequate system of accountability for human rights violations. There is no double standard applied to Israel as every nation is held to the same standards.

Mr Machover then discussed the Flotilla case and in particular the [Turkel Commission](#) recommendations made in their report in February 2013 which Israel are obliged to adhere to in order to satisfy international standards. Amongst the recommendations was there should be a prompt and urgent investigation by a sufficiently independent body. Israel falls short at this hurdle. In relation to time frame, currently there is a protracted period of waiting whilst decisions are made whether or not to open an investigation and a such passage of time impairs the quality of testimony.

Mr Machover made the important observation that war crimes legislation does not exist in Israel. Israel has been aware of the action it needs to take, by virtue of its own Prime Ministerial Commission's recommendations issued in February 2013, but has singularly failed to take any action thus rendering the system broken and ineffective.

Mr Machover recommends reading the [statement](#) by Yesh Din and B'Tselem issued on 4th September 2014, concerning the criminal accountability of Israeli military authorities. After Operation Cast Lead there were some 400 incidents of suspected legal violations looked at by the Israeli military which led to only 52 investigations and three indictments. Illustrating the difficulty in obtaining justice through this system, the harshest sentence given was to an Israeli soldier who had stolen a credit card.

Mr Machover asked what is left for us to do to assist Palestinians access justice. He suggested that legal assistance to those on the ground in Palestine is essential. He further suggested that we need to promote recourse to universal jurisdiction and the International Criminal Court (ICC). For those lawyers outside Palestine, he stated all efforts should be made to have suspects arrested when they arrive within their jurisdictions.