

LPHR Student Network Event: ICC and Accountability

Wednesday 11th March 2015

Somerset House, Kings College London

Chair: Dan D'Ambrosio

Student Director LPHR (SN)

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The LPHR Student Network event on the International Criminal Court and Accountability was organised following Palestine's accession to the Rome Statute in January of this year.

SIMON REYNOLDS

Simon Reynolds began by emphasising the importance of legal rather than political mechanisms to ensure accountability. Mr Reynolds used a case study of Israel's forced population transfer of Bedouin tribes in the West Bank as an example of where intervention by the ICC is necessary. Forced population transfer is defined as the forced transfer of protected populations within the borders of a state. As the Israeli occupation of Gaza, East Jerusalem and the West Bank is defined as an international armed conflict under international law, the actions committed by Israel in the forced transfer of populations constitutes a war crime. Whilst reminding us that the control and domination of land remains a central issue to the Israel-Palestine conflict, Mr Reynolds spoke about the struggle of the Bedouin tribes whose buildings are often subject to demolition orders, against a backdrop in which Israeli settlements are growing.

Mr Reynolds discussed two major elements which contribute to the forced population transfer of the Bedouin tribes. The first element is the fact that the presence of the Bedouin tribes is effectively criminalised through a discriminatory legal system. The second element concerns the fact that an "unliveable" living environment is purposefully created, in which systematic suffering is inflicted upon the Bedouin tribes to coerce them to leave their land. Mr Reynolds explained that there is a

clear motive for this forced population transfer, one which has been explained very clearly by the Israeli Housing Minister who has spoken of an intention to create substantial infrastructure, including housing and a municipal police station in the E1 zone, a policy that would naturally require the removal of the Bedouin population first. This policy intends to move the Bedouin population into “urban townships” in order to aid the modernisation of the Bedouin population. However Mr Reynolds notes the patronising tone of such a policy and the practical difficulties which will be encountered in the efforts to put different tribes together in close proximity of urban townships. An occupying power moving a protected population is illegal under international law, and so legal accountability is necessary.

Within this case study Mr Reynolds considered the option of legal accountability through the Israeli Court system and referred to cases which were taken to the Israeli courts in order to stay a forced relocation. Difficulties with this option are that it is costly, proceedings are in Hebrew (a language not widely spoken by Bedouin tribes), and the legal system itself seems geared toward legalising the inherently unlawful situation rather than providing accountability. In a context where the presence of Bedouin tribes is effectively criminalised, it is difficult to turn to the Israeli courts for redress. Mr Reynolds noted the fact that there has in effect been a legalisation of war crimes through the Israeli legal system, and it is these shortcomings which make involvement from the ICC necessary. Mr Reynolds explained Badil's policy of refusing to engage with the Israeli legal court system in order to avoid legitimising a discriminatory dual legal system. However, he noted that for the local population (including members of the Bedouin tribe) this is currently their only option.

When considering the test of jurisdiction of the ICC, namely whether it considers Israel to be ‘unable or unwilling’ to investigate alleged crimes, Mr Reynolds emphasised that Israel does not believe it is committing war crimes, an important factor which makes the involvement of the ICC incredibly necessary. In assessing Israeli internal investigative practices, an examination of the investigations launched after Operation Cast Lead in 2009 provides a good example of the scope and sincerity of Israel’s actions in assessing whether crimes have been committed. Following Operation Cast Lead, the Palestinian Centre for Human Rights (PCHR) issued 490 complaints to the Israeli authorities, in which it received only 44 responses of acknowledgement. Looking at the statistics in which thousands were killed and over 400 complaints were issued, it was shocking that there were so few indictments. Of the three indictments issued, one related to the theft of a credit card. As the IDF review looks only at IDF individual soldiers and not policies, it is increasingly difficult to obtain any real accountability through Israeli investigative measures. The policies of “roof knocking” and extending buffer zones are not subject to any scrutiny by the IDF, and it is only the actions of individual soldiers that is examined, however lightly so. Mr Reynolds regards this as a demonstrable failure in the Israeli review system, and adds that this lack of credibility is further emphasised by the refusal of Israeli NGO B’Tselem to assist the Israeli Military in investigating abuses in the aftermath of Operation Protective Edge. Previous experience suggests that investigations led by the Military Advocate General do not promote accountability or truth. It is with these issues in mind that Mr Reynolds considers the ICC to be a necessary legal mechanism to seek justice and accountability.

DANIEL MACHOVER

Daniel Machover began by discussing the principle of universal jurisdiction. Mr Machover disagreed with the contention that international criminal law is uniquely political when compared to domestic law. Whilst international criminal law deals with powerful states and so may seem more nakedly political, it is not jurisprudentially any more political than the domestic law that is shaped by politicians. The concept of universal jurisdiction was envisioned to allow (and in some cases require) a state to bring criminal proceedings for certain grievous crimes, regardless of traditional concerns of territorial integrity. Universal jurisdiction is premised on the fact that there is a common interest in countries prosecuting crimes such as genocide, war crimes and torture (even torture committed during peace time).

Mr Machover outlined the implementation of universal jurisdiction into UK domestic law, under the Geneva Conventions Act 1957 and the Criminal Justice Act 1988. There are obstacles with regard to universal jurisdiction, due in part to the role of the Attorney General in approving or preventing the prosecution of international crimes in the UK. He highlighted the impact of the Shawcross principle in allowing for political considerations to influence the decision, based on the need to take 'public interest' into account. Allowing prosecutorial discretion to be a political rather than legal decision is an uncomfortable situation which allows for considerations of trade, business or politics to play a dominant role. Mr Machover explored a strategy of obtaining an arrest warrant for a private individual in the UK courts, by showing a strong prima facie case to a District Judge. These routes to justice are important, and universal jurisdiction should continue to be pursued, as the role of the ICC has not diminished the impact that universal jurisdiction can have. Importantly, it is likely to take a long time before arrest warrants are issued by the ICC, and this is particularly problematic as victims are in need of access to justice. The ad hoc declaration submitted by Palestine to the ICC provides jurisdiction for crimes committed from June 2014, however there are victims of abuses from long before this date hence why other legal mechanisms are also important.

The bombing of the Arafat police station on the first day of Israel's military operation "Cast Lead" in Gaza on 27 December 2008 provides an example of where an application was made to a District Judge in the UK to obtain an arrest warrant for an individual involved and responsible for the grave breach of wilful killing. The justifications given for the attack on the Arafat police station were that the police officers were Hamas police officers, however Mr Machover notes that this is a descriptive statement and not a legal one. The police officers are civilian in nature and so therefore were not a legitimate target under the principle of distinction in international humanitarian law. Notwithstanding this, any attack on a legitimate target must be proportionate to the military advantage gained, and so if it were the case that belligerent actors were within the crowds which gathered at the Arafat police station, the careful and considerate weighing up of the military advantage versus the collateral civilian damage was necessary. An argument that the police officers were civilians 'directly participating in hostilities' would require a careful consideration of whether such officers fulfilled the requirements under international humanitarian law, namely that they carried arms openly, wore fixed and distinctive emblems, and carried out their actions according to the rules of IHL. Naming all police officers as 'Hamas' police officers falls short of the requirement to apply the principle of distinction. Indeed the 'Goldstone' commission report found the bombing to be disproportionate and unlawful as the police officers did not lose their civilian immunity. Importantly Israel has not investigated this crime. The three criminal cases opened after Operation Cast Lead involve the theft of a credit card, the use of a human shield and the shooting of women walking under a white flag.

The Turkel Commission decided to issue recommendations to advise Israel on how to conduct investigations in accordance with international standards. However there are doubts as to whether these recommendations provide a full and clear account of what is required by international standards. Notwithstanding this, the Israeli human rights organisation, 'Adalah', has recently concluded that there have been no material changes to the Israeli investigative practices since the Turkel Commission's recommendations.

Mr Machover emphasised the dual importance for both universal jurisdiction and the ICC as important mechanisms for seeking truth and securing justice and accountability in the future.