

LPHR SEMINAR: PALESTINE AND THE INTERNATIONAL CRIMINAL COURT

1 May 2013

Garden Court Chambers

Chair: Andrea Becker

PROFESSOR WILLIAM A. SCHABAS

Professor of International Law at Middlesex University in London

MAHMOUD ABURAHMA

Director of Communications at Al-Mezan Centre for Human Rights based in Gaza

The event commenced with Professor Schabas discussing the International Criminal Court (ICC). The hopes for the ICC were that it would be independent of the United Nations Security Council but it remains strongly influenced by political pressures particularly from the United States. Therefore, the problem with getting Palestine before the ICC becomes a political one.

There are three ways in which the ICC can have jurisdiction. Firstly, the ICC has jurisdiction over States which have joined the court, neither Palestine nor Israel have. Secondly, the ICC has jurisdiction if the Security Council asks the ICC to open an investigation, which has happened with Libya and Sudan, and it is at the Prosecutor's discretion whether to pursue it. Thirdly, a State that is not a member can say that the ICC has jurisdiction, which is what Palestine did in January 2009. The Prosecutor seemed to be considering it but Professor Schabas reported that Wikileaks revealed that the Prosecutor assured the United States that they would not be bothered about Palestine. The Prosecutor then left office saying 'it was not for me to decide' which is legally wrong, and left it for the UN General Assembly.

The fact that the ICC has jurisdiction is not enough for an investigation, there must also be a trigger. The triggers can be at the request of one of the Member States, at the request of the Security Council or by the Prosecutor, but this last trigger must be authorised by a panel of three judges.

Assuming that there is jurisdiction, based on the Palestine 2009 declaration and the General Assembly resolution, the next step would be to find a trigger for investigation. One of the Member States could have done this and there were informal talks about encouraging this perhaps from a Latin American country, but politically no State wants to trigger jurisdiction over another State. Palestine could join the court to trigger the investigation, which would be a simple process but would still leave them in the hands of the Prosecutor who always has a veto. Professor Schabas expressed that whilst it is ultimately about the politics of the Prosecutor, it is still worth trying.

There are concerns that the ICC itself is not healthy, after a decade there have only been two trials with one conviction and an acquittal. Six out of 14 cases pursued have flopped, another is flopping, and one is faltering. Yet it is possible that Palestine would be good for the Court. All States are in principle equal before the court which would mean the scrutiny would be on both Palestine and Israel. Yet the question remains as to whether the court would dare to deal with a case like Palestine. Diplomats have expressed concern that it would destroy the Court to tackle such a politically sensitive issue, politicising the court and risking alienating the United States as an ally of the Court.

Professor Schabas closed with asserting that under the Rome Statute it is a war crime to move civilians into settlements and therefore Israel would have a case to answer to the ICC. There is a hope that the Prosecutor will take it up, but ultimately politics will decide.

The second speaker of the evening was Mahmoud Aburahma who introduced himself as a human rights practitioner. He reported that when Palestine was first thinking of approaching the UN there was some uncertainty amongst human rights organisations; but they want Palestine to join human rights instruments for both the actions of Israel and to provide a remedy for the treatment of Palestinians by Palestinians. Currently the Israeli justice system is simply not working for Palestinian victims.

When the Israeli High Court is used they are quick to dismiss cases and make it impossible to pursue cases particularly with legislation changing all the time. Whilst it may seem that there is no point in even trying it is still worth asking Israel to investigate itself as this is politically powerful and supports the case for the need for Palestinians to look elsewhere for justice. Furthermore the Rome Statute requires that a State be given the chance to prosecute the crimes themselves.

The Israeli justice system includes a duty to investigate criminal liability and whilst there is the ability there is also unwillingness. There is not enough political pressure on Israel to take this seriously and they repeatedly close cases very quickly. With regards to civil liability it is basically impossible as there is automatic dismissal on the grounds of military operation. Pursuing matters through the Israeli justice system can also lead to punishment of the victim which was the case with the Salha family who were asked to pay a significant sum for costs of the Israeli defence counsel.

Even when cases are pursued there are no meaningful remedies available at the State level. For example, when a soldier used a child as a human shield they were given a sentence of just three months suspension. There are also procedural issues with having 60 days to complain to the Israeli Ministry of Defence and then two years to bring an action, and whilst a criminal case is pursued first the delay takes so long that they are forced to focus on the civil case before the time limit expires.

One of the concerns in Palestine is that they are a much softer target than Israel and that as a product of American and European pressure we may only see Palestinians, and not Israelis, before the court. However, Mahmoud Aburahma said there is still some hope that the Court will have some impact in the future to provide justice for Palestinians.

The talk closed on a series of questions addressed to both speakers. Professor Schabas responded to a question on the Prosecutor's veto by saying that if the Prosecutor refuses to act it would still be subject to judicial review before three judges which could be very interesting in itself. Mahmoud Aburahma responded that Palestine is not worried about the veto but about when the jurisdiction will begin.

There was also a question on the hypocrisy of the UK in criticising the ICC excuse of not investigating due to the search for peace when it suits them politically to see an investigation, but invoking this excuse for not investigating Palestine. Professor Schabas felt that more justice would contribute to peace in the Middle East and that it is good to remember the hypocrisy. He did think that UK was a weaker voice within the ICC.

On the importance of the ICC in Palestine beyond human rights organisations, Mahmoud Aburahma responded that there really is a growing interest in international law and how this can help the fight for justice. He also pointed out that Hamas is publicly supporting the role of the ICC but privately

some worry is being voiced. However, Hamas is changing all the time and their behaviour and attitudes has changed radically in the past few years.

A question on whether Palestine could join the court just for the issue of settlements was answered by Professor Schabas that it would not be possible as it would be inconsistent with equal justice. It could be possible just to refer a crime but it is very unlikely as the US tried to remedy this gap. A further advantage of Palestine actually joining the court is that they could themselves then nominate a prosecutor which has the potential to dramatically change their position.