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Trying to Try Sharon

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The concept of universal jurisdiction in international law is undergoing a historic test in Belgium. On November 28, a Belgian court will decide whether Israeli Prime Minister Ariel Sharon can be tried for his alleged role in the slaughter by Lebanese militiamen of untold numbers of Palestinian and Lebanese civilians in the Sabra and Shatila refugee camps in West Beirut in 1982. At the time, Sharon was in charge of Israel's invasion and occupation of Lebanon. On October 3, an appellate court grand jury convened in Brussels to begin determining whether Belgium can invoke the mechanisms of international law to prosecute a sitting head of state from another country.

Historic Suit

On June 18, survivors of the Sabra and Shatila massacres filed two civil lawsuits against Sharon in a Belgian court. The complaints describe the events leading up to the September 15, 1982 sealing of Sabra and Shatila by the Israeli army during the invasion of Lebanon, followed by authorization from Sharon, then Israeli Defense Minister, for a unit of 150 Phalangists—a right-wing Lebanese Christian militia—to enter the camps. In what Sharon has termed a "mopping up" of the camps, for the next two days the Phalangists proceeded to rape, kill and injure thousands of unarmed citizens within the camps. The presentation of facts in the complaint is supplemented with testimonials from 22 of the plaintiffs and 12 witnesses who survived the massacres but lost family members and suffered injuries.

The complaint alleges Sharon is responsible for crimes against humanity, genocide and war crimes for his role in the massacres. Under Belgian legislation passed in 1993 and amended in 1999, international law has been incorporated into Belgian law to remove restrictions on such suits from statutes of limitations, jurisdictional constraints and sovereign immunity. The complaint invokes universal jurisdiction for violations of international humanitarian law, and relies upon this customary international law as jus cogens—fundamental international law norms to which there can be no exceptions—incorporated into the Belgian law to validate the Belgian court's jurisdiction.

Since the Israeli Kahan Commission in 1983 found Sharon personally but "indirectly responsible" for the Sabra and Shatila massacres, there has been no legal action against the Israeli leader. The Kahan Commission found that only those who actually committed the killings could be found "directly" responsible. As a result of the commission's report, Sharon resigned from his position as Minister of Defense, although he remained in the cabinet without a portfolio. He has served in subsequent governments, and in February 2001 was elected prime minister of Israel.

"Indirectly Responsible"

The Belgian complaint names Ariel Sharon as the central Israeli figure in the planning, preparation and commission of the Sabra and Shatila massacres. To demonstrate these claims, massacre survivors are relying upon the findings of Israel's Kahan Report.

The Kahan Commission was established by the Israeli cabinet on September 26, 1982 to investigate state and individual responsibility for the massacres. Israel's Commission of Inquiry Law of 1968 empowers the government to set up a commission of inquiry regarding any matter of "vital public importance...which requires clarification." During its investigation, the commission issued notices of potential harm from the commission's findings to nine people, including Sharon.

The Commission of Inquiry Law provides no standards by which a commission is to determine questions of responsibility. The commission devised two levels of responsibility—direct, for those who actually perpetrated the massacres, and indirect. Based on this delineation, the commission necessarily did not find that Israel or any of the nine Israelis issued notices of harm were "directly" responsible for the massacres. Under international law, however, legal responsibility for international crimes is not limited to the actual perpetrators. Accomplices, co-conspirators and individuals responsible under the law of command responsibility for forces within their control can also be found culpable.

Although finding Sharon "indirectly" responsible, the commission reserved its strongest finding of personal responsibility for Sharon, coming very close to saying that he sent in the Phalangists anticipating a massacre: "If in fact the Defense Minister, when he decided that the Phalangists would enter the camps without the IDF taking part in the operation, did not think that that decision could bring about the very disaster that in fact occurred, the only possible explanation for this is that he disregarded any apprehensions about what was to be expected..." In other words, the commission concluded that, at the very least, Sharon acted with extremely reckless disregard of the possibility of a massacre.

The Kahan Report also faulted Sharon for having failed to impose any restrictions on the Phalangists before sending them into the camps. These critical findings of failure to act and mens rea (the intentional element) strongly support a legal determination that Sharon was responsible for grave breaches of the laws of war under the law of command responsibility. Under those principles of law, a commander who knows, or should have known, that forces within his control are about to commit war crimes is legally responsible for those crimes if he fails to take steps to prevent those crimes. The commission concluded that Sharon, along with four other high military officials, knew or should have known that extensive killings would result from the entry of the Phalangists. According to the report, numerous Israeli officers and officials, including Sharon, received reports of killings in the camps during the Phalangist occupation. All failed to take any steps to halt the violence.

The Case

On September 19, 1982, the UN Security Council condemned the massacres. A December 16, 1982 General Assembly resolution characterized the massacres as an act of genocide. The Belgian complaint relies upon the definition of genocide in the 1948 Convention on Genocide, reproduced in Article 6 of the International Criminal Court (ICC) Statute and in the Belgian law of June 16, 1993. Utilizing survivor testimony, journalists' accounts and Sharon's autobiography, the plaintiffs contend that the massacre deliberately targeted Palestinians living in Sabra and Shatila because of their national origin.

The plaintiffs cite the Rome Statute of the ICC, international customary law and jus cogens as for their definition of crimes against humanity. Following the definition of the ICC, the complaint sets forth the criteria as "a widespread or systematic attack directed against any civilian population, with knowledge of the attack." According to the complaint, the massacres involved the rape, murder and abduction of hundreds of civilians with "highly efficient cooperation" between the Phalangist forces and the Israeli army, with the Israeli commander's full knowledge that the camps contained civilians. The complaint states that recognition of the massacres as genocide

automatically satisfies the criteria for crimes against humanity in these factual circumstances.

Relying on the provisions of the Fourth Geneva Convention as well as Article 8 of the ICC Statute to define grave breaches of the laws of war, the complaint specifically notes "intentional homicide, torture or other inhumane treatment; destruction of property without military necessity;" attacks on civilians; and attacks on undefended locations. All of these crimes are alleged to have been committed in Sabra and Shatila by the Phalangist militia, with the full support and aid of the Israeli army.

The findings of the Kahan Report would appear to give the plaintiffs a strong case for the war crimes charge. Sharon's responsibility for genocide will depend in large part upon proof that he intended to destroy the Palestinians as a group. His responsibility for a crime against humanity, on the other hand, will be dependent upon demonstrating that the massacres were part of a larger policy or systematic course of conduct against the Palestinians.

Universal Jurisdiction?

In September, Sharon's attorneys postponed the court's ruling by challenging the concept that Israel's prime minister is subject to investigation by a Belgian court. The validity of the Belgian law's invocation of universal jurisdiction for genocide is supported in the complaint by reference to jus cogens and the 1948 Convention on Genocide. The plaintiffs cite decisions from the International Court of Justice and the UN Tribunal for Yugoslovia Appeals Chamber, which held that all parties to the Convention on Genocide assume the obligation to punish the crime and that such obligation includes the power to "extradite the persons presumed responsible for grave violations of international humanitarian law."

Crimes against humanity are similarly premised jurisdictionally on jus cogens. Citing the Pinochet and the Demjanjuk decisions, the complaint states that under the universality principle "any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses." Based on jus cogens drawn from the Geneva conventions, the Belgian law and the complaint assert universal jurisdiction for the punishment of war crimes which constitute grave breaches of the conventions.

Outlook

Sharon can be tried in the civil suit in absentia. If the Belgian government issues an indictment, he can also be arrested upon his arrival in the country, or extradition can be sought.

The most critical amendment in the 1999 Belgian law is the removal of official immunity for the commission of the crimes enumerated under the law. This provision states that sovereign immunity does not prevent "application of the present law." Broadly stated, this provision can be read to preclude sovereign immunity as a defense, regardless of whether the individual was acting in an official capacity at the time of commission of the acts, or is acting in an official capacity at the time of the suit, or both. However difficult it might be to overcome a defense of immunity for a sitting head of state in most domestic courts, the Belgian law and a growing body of international law indicate that there should be no sovereign immunity from grievous crimes such as genocide, crimes against humanity and grave breaches of the laws of war. At the very least, given the prospects of similar suits in Great Britain, Spain and the US, Ariel Sharon may find himself increasingly isolated and cut off from travel to several major world powers and centers of diplomacy.

Sharon may be the worst enemy of his own image. While the appellate court grand jury was convening in Brussels, the Israeli leader gave a speech berating the US government for pressuring him to engage in talks with the Palestinian leadership. In it, he compared George W. Bush to Neville Chamberlain, who tried to appease Nazi Germany by allowing it to seize parts of Eastern Europe. The US response was quick and sharp. Already criticized by Secretary of State Colin Powell for taking advantage of the September 11 tragedies in the US to engage in more offensive operations against the Palestinians, Ariel Sharon may have alienated the government—other than his own—most likely to defend him in his Belgian troubles.

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