

War Crimes Convictions after Gaza?

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As the UN and human rights groups demand independent investigations into the conduct of Israel's offensive in the Gaza Strip, the world's attention is focusing on whether Israeli or Hamas officials could face prosecution for war crimes. ()

There is a world of difference between establishing that war crimes have been committed, and then holding those responsible to account, says Mark S Ellis, the executive director of the International Bar Association (IBA).

"Often, people view these as the same, but they are not under international law. There is a gap ... regarding the issue of accountability," Ellis said. Even if independent inquiries do establish that gross violations of the laws of armed conflict have taken place during the war in Gaza, the mechanisms to ensure those responsible on either side are brought to justice "simply don't exist", he said.

Four options

There are four main options open to states, groups or individuals seeking to launch legal proceedings against suspects should investigators find war crimes have been committed during the 22-day assault on the Strip, Ellis says.

All four routes are fraught with complexities, particularly in relation to the Gaza conflict.

First, individual war crime cases would ordinarily be referred to the International Criminal Court (ICC).

"The ICC simply doesn't have jurisdiction over this conflict," says Ellis, "because Israel has not signed up to the Rome Statute [that enshrined the ICC]."

As the ICC requires states to adopt the court's jurisdiction, it is unable to bring any actions against non-signatories itself, unless the UN Security Council votes to refer specific cases for potential prosecution. While that happened when ICC prosecutors accused Omar al-Bashir, the president of Sudan - another non-signatory state - of committing war crimes in Darfur, it is unlikely to occur in relation to the Israel-Gaza conflict. Gaza is not formally recognised as a state by the UN and "the US, and perhaps other [security council] member states, would veto any resolution that would ask for the ICC to investigate Israel," says Ellis. ()

The second route would be for the UN General Assembly to request an advisory opinion from the International Court of Justice (ICJ), also based in The Hague, on the legality of specific actions taken by states. However, the ICJ has no enforcement powers, as was witnessed by its inability to act following its ruling that Israel's construction of a separation barrier breached aspects of international law. The ICJ requested Israel rectify elements of the construction, which Tel Aviv ignored - something any state can choose to do, Ellis notes. ()

The third option involves states trying their own citizens or soldiers for war crimes a requirement under the Geneva Conventions. "That's unlikely to happen on both sides, but that is still a responsibility of the state, body, or entity that's responsible for, or has authority over, the individuals who have committed these crimes," says Ellis.

Finally, Ellis points to a legal concept referred to as "universal jurisdiction", where any state can choose to launch legal proceedings against any person, anywhere in the world, who is suspected of committing crimes such as genocide, torture, and other grave breaches of international law. But states have already proven themselves reluctant to take responsibility for holding individuals to account for crimes committed in other countries and Ellis believes it is "highly unlikely that a third party is going to step up and bring actions against Israeli or Palestinian individuals". ()

'Pursuing all options'

While Hamas is regarded as a "terrorist group" by many western governments, the Palestinian faction came to power after democratic elections in 2006 that were deemed fair and free by international observers. Hamas says not only are Palestinians the victims of war crimes perpetrated by Israelis, but they are left without recourse to international justice.

Going back to Ellis' "accountability gap", the IBA chief puts the blame squarely on nation states - including the US - for failing to accept the legitimacy of the ICC. "The ICC is probably the most important body with regard to individual responsibility for these crimes ... it is the responsibility of all civilised nations to agree that if these types of crimes have been committed, they should be brought to justice. Ultimately, that's where we want to be and we are a long way from that today," he says.

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