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Israelis Fear Spread Of War Crimes Cases

Laws passed in wake of Nuremberg trials now being pressed in Europe against Israeli generals.

Liel Leibovitz - Staff Writer

On Sept. 10, 2005, Doron Almog, the former commander of the Israel Defense Forces' Southern Command, was on board an El Al flight to London to raise money for brain-damaged children. But as the plane landed at Heathrow and other passengers began to disembark, a flight attendant approached Almog with a cryptic message.



"The pilot asked that I disembark last," Almog later told Israeli Radio, repeating the flight attendant's message. "After some time, the chief steward said that the Israeli military attache was on his way and wanted to speak to me. I phoned him, and he told me not to get off the plane."

The reason, he soon learned, was an arrest warrant, issued that day by a senior London magistrate charging Almog, as the army's top commander in the Gaza Strip, with overseeing the bulldozing of 59 Palestinian homes in the Rafah refugee camp in January of 2002 — acts that violate the Geneva Conventions.

Under British law, ordinary citizens are free to file criminal complaints against individuals suspected of war crimes, even if the accused are not British citizens and the alleged crimes were not committed on British soil. The threshold such complaints must meet to justify an arrest warrant are substantial. But in this case, Senior District Judge Timothy Workman ruled that the plaintiff — a resident of one the bulldozed homes — had met the bar.

Almog never got off the plane. He returned to Israel the same day. And with Almog's departure from his jurisdiction, Workman withdrew his arrest warrant, as per the requirements of British law.

The problem, however, was far from solved: A few months later, Israel's military advocate general advised the current Gaza commander, Brig. Gen. Aviv Kochavi, to decline an official British invitation to spend the summer at the Royal College of Defense Studies, fearing that he, too, would be greeted at the airport by police officers.

Neither is the problem confined to Britain. Other European nations, such as France, Spain, Sweden and Denmark, have similar laws, all guided by the principle known as universal justice. These statutes allow lawsuits against alleged perpetrators of war crimes and crimes against humanity to be prosecuted even if neither the complainant nor the defendant are citizens of the country in which they are filed, and even if the alleged crime took place somewhere else.

With cases similar to Almog's already brought against Israeli officials in Belgium, Israeli diplomats and legal experts fear that the procedures in England might herald an onslaught of lawsuits against Israeli officers in courts the world over. Ironically, the laws in question were first put into place in the wake of the Nuremberg trials of Nazi war criminals to ensure such crimes could not be perpetrated without prosecution.

Chandra Sriram, professor of human rights at the University of East London and one of the leading experts in the field, cautioned that universal justice cases face tough tests.

"The threshold is relatively high," she said. As a practical matter, courts "are not willing to assert jurisdiction unless they think there is a reasonable case and a reasonable chance of managing it."

Usually, there must be strong evidence that the individual or individuals in question were personally responsible for specific gross violations of international law, such as genocide or torture, explained Sriram. And the evidence must support clear intent to commit the violations, she said, not just that they occurred as byproducts of other actions.

Still, on a strictly legal level in Great Britain, a judge technically need only find that the facts alleged, if proven, would constitute a violation of international law under the principle of universal justice, said Sriram.

It is hard to know Workman's exact legal reasoning for issuing Almog's arrest warrant. Alongside the warrant, Workman issued a still-sealed document explaining his decision.

Kate Maynard, the solicitor who brought the charges against Almog, said the magistrate stated there was sufficient evidence to open up a case against Almog, as his responsibility for the house demolitions was in breach of the Fourth Geneva Convention, a violation criminalized in the UK.

Sriram noted that another common yardstick in such cases was whether the country whose citizens were being charged had a functioning judicial system capable of pursuing its own challenges. "You can," she added, "characterize the Israeli legal system as such."

Yet, Israel's judicial system has been reluctant to address most accusations concerning the behavior of army officers in the West Bank and Gaza. According to a 2005 Human Rights Watch report, more than 1,600 Palestinians — including at least 500 children — were killed by Israeli security forces between Sept. 29, 2000 and Nov. 30, 2004. Thousands more were seriously injured.

The Israel Defense Forces informed Human Rights Watch that as of May 10, 2004, it had launched criminal investigations of just 74 alleged cases of unlawful use of lethal force — less than 5 percent of the civilian deaths in nearly four years of the second intifada.

Maynard, the British solicitor who filed the suit against Almog, stressed it was the evidence, not the Israeli judicial system's failure to deal with that case, that most influenced the magistrate's decision to issue an arrest warrant. Documenting such a failure was not, in any event, a formal requirement of the British statute in question, she said.

But Maynard added, "In all cases we've put together, we've always sought to show a chain of impunity in Israel. In all of the cases we've been able to show that local lawyers have petitioned the courts to try and obtain justice in Israel, and couldn't."

For all the efforts by some to use the principle of universal justice against Israeli actions in the occupied territories, Sriram stressed that the concept remained problematic in legal terms.

"It's murky," she said. "If anyone can assert it anywhere in the world, how could you resolve competing claims? And how do you establish who has a legitimate claim?"

As a result of such issues, she said, courts the world over think carefully before translating principle into action. Courts, she stressed, "are only going to entertain a case where a case has been made of a clear international crime. They exercise a pretty significant degree of caution."

Israel Fights Back

Tzipi Livni, Israel's minister of foreign affairs, has denounced the cases filed against Israel as politically motivated.

"England is turning into an address for lawsuits that do not deal with its own citizens," she said in a recent statement. "This may undermine its war on terrorism."

Working behind the scenes, Israeli diplomats are trying to convince other European countries to amend their legislation. Its negotiators conduct their talks, for the most part, without publicity.

Belgium is a case in point: In 1993, the country passed an

unprecedented law that allowed citizens to press criminal charges against anyone suspected of crimes against humanity, with few restrictions. Unlike Britain, for example, Belgium allowed for arrest warrants to be issued against accused individuals even if they were outside the country and had never entered into its jurisdiction.

Using this law, 23 survivors of the 1982 massacre in the Lebanese Sabra and Shatila refugee camps filed a complaint in 2001 accusing Israel's then-Prime Minister Ariel Sharon and other Israeli officials, of war crimes and crimes against humanity. A tense debate ensued, with Israeli and American diplomats arguing the law's flaws. In 2003, the law was changed, stating that Belgian courts will only have jurisdiction over international crimes if the accused or the victim is Belgian or a Belgian resident, or if Belgium is required by treaty to exercise jurisdiction over the case.

More recently, Livni met last month with British Foreign Office Minister Kim Howells to discuss the problems British law posed for IDF officers. Howells acknowledged that the problem burdened both countries, and pledged to try and resolve the situation rapidly.

But not all countries are revising their laws. Spain's Supreme Court, for example, last year overturned a 2003 decision that blocked the country from prosecuting the perpetrators of human rights violations in Guatemala, affirming the need to bring international criminals to justice, regardless of their citizenship or where they committed their crimes.

Israeli legal experts agree that the lawsuits are harmful in the long term. But, in an apparent indication of the issue's sensitivity, no official could be found in the Foreign Ministry or the army who was willing to comment on the record.

"While no immediate threat is evident," said an Israeli official who would speak only on condition of anonymity, "the damage, in the long run, accumulates. Such lawsuits deeply embarrass us, and they create a false impression that Israel is a singularly unlawful state."

The irony of this wave of legal challenges, said Israeli officials, is that they rely on aspects of international law originally devised, in part, as a response to the Holocaust. During the Nuremberg trials, a concept of International Jurisdiction began to take shape, according to which states may claim criminal jurisdiction over persons suspected of crimes against humanity regardless of the perpetrator's nationality or the location of the crime itself. One of the most famous international cases invoking this principle was Israel's prosecution, in 1961, of Nazi criminal Adolf Eichmann.

The United States does not allow citizens to file such criminal complaints. But U.S. law does allow for civil suits. A class-action suit was brought last December in the U.S. District Court for the District of Columbia by a group of Lebanese nationals charging Moshe Ya'alon, the Israeli army's former chief of staff, and Avi Dichter, the former head of the Shin Bet, with war crimes for their roles in the 1996 bombing of the Lebanese village Kafar Qana, an incident that caused the death of more than 100 civilians. Ya'alon is currently serving as a research fellow at the Washington Institute for Near East Policy.

The plaintiffs sued under the Alien Torts Claims Act of 1789, which grants jurisdiction to U.S. federal courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The act has been invoked many times, albeit with scant success, in cases involving everything from a Holocaust survivor suing the National French Railroad Company for the deportation of Jews to Nazi death camps to a suit filed against Texaco for disposing of waste in the Ecuadorian Amazon.

The complaint against Ya'alon, filed on November 4, 2005, accuses the former head of army intelligence of having "command responsibility" in the 1996 attack.

The case, said Judith Chomsky of the Center for Constitutional Rights, an organization that helped bring the lawsuit against Ya'alon, stands a good chance.

A recent Supreme Court decision has recognized that the statute provides that an alien can bring a claim if the claim is based on violations of the law of nations, or customary law, which is universal, obligatory and specific," she said. "For example, you can't torture people, and no nation has the right to say, 'I'm staying out of this rule; I'm going to torture people anyway.'" The complaint, she said, with its meticulous description of the attack's damage to lives and property, falls within that realm.

Israeli officials declined to comment on the Ya'alon case. n

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