



Legal Q&A: Immunities and Gaza Accountability

“Under UK and international law, visiting heads of foreign governments, such as Prime Minister Netanyahu, have immunity from legal process, and cannot be arrested or detained. The British Government has invited Prime Minister Benjamin Netanyahu, as head of the Israeli Government, to visit the UK in September. Under UK and international law, certain holders of high-ranking office in a State, including Heads of State, Heads of Government and Ministers for Foreign Affairs are entitled to immunity, which includes inviolability and complete immunity from criminal jurisdiction.”

British government response to a public petition calling for the arrest of Israel's Prime Minister, Benjamin Netanyahu – September 2015.

Does international law provide for immunities for serious crimes?

International law does provide for immunities for specific classes of state officials in regards to crimes including genocide, crimes against humanity, war crimes and torture. These immunities covers any form of legal process, including immunity from arrest, detention and prosecution. The primary justification for such immunities is that they ensure the smooth conduct of international relations.

Why are immunities currently receiving public attention?

The availability of legal immunities is under the spotlight due to the visit this week to the United Kingdom of Israel's Prime Minister, Benjamin Netanyahu. A public petition calling for Mr Netanyahu's arrest 'for war crimes upon arrival in the U.K for the massacre of over 2000 civilians in 2014', has collected over 100,000 signatures. The petition has elicited a formal response from the British government, stating that Mr Netanyahu has 'complete immunity from criminal jurisdiction' under international law due to his status as 'head of the Israeli government'.

Why is Mr Netanyahu being accused of war crimes?

Mr Netanyahu was Prime Minister of Israel during last summer's large-scale Israeli military offensive on Gaza. Israel's military attacks on Gaza caused massive civilian loss of life and pervasive destruction and damage to civilian homes and infrastructure.



In June 2015, the UN Commission of Inquiry on the Gaza Conflict 2014 (Commission) published its considered findings concerning serious violations of international humanitarian law and human rights law, including the possible commission of war crimes. Its report¹ carefully states:

“[T]he commission was able to gather substantial information pointing to serious violations of international humanitarian law and international human rights law by Israel and by Palestinian armed groups. In some cases, these violations may amount to war crimes.” (Paragraph 668)

What did the UN Commission of Inquiry's report say in relation to Israel's political leadership?

Key excerpts of the Commission's report raises very serious questions concerning the role of Israel's political leadership in suspected serious international law violations that 'may amount to war crimes':

- “The commission’s investigations also raise the issue of why the ***political and military leadership*** did not revise their policies or change their course of action, despite considerable information regarding massive death and destruction in Gaza, ***which in turn raises questions as to potential violations of international humanitarian law and criminal law by these officials.***” (Paragraph 640 – bolded and italicised for emphasis)
- “The commission is concerned that impunity prevails across the board for violations of international humanitarian and human rights law allegedly committed by Israeli forces, whether it be in the context of active hostilities in Gaza or killings, torture, and ill-treatment in the West Bank. Israel must break with its recent lamentable track record in holding wrong-doers accountable, not only as a means to secure justice for victims but also to ensure the necessary guarantees for non-repetition. ***Those responsible for suspected violations of international law at all levels of the political and military establishments must be brought to justice.***” (Paragraph 664 – bolded and italicised for emphasis)
- “The commission’s investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, ***the fact that the political and military leadership did not change its course of action, despite considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes.***”

1 <http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx#report>



Current accountability mechanisms may not be adequate to address this issue.

(Paragraph 672 – bolded and italicised for emphasis)

These excerpts, individually and cumulatively, underscore the Commission's considered concern that Israel's political leadership be investigated, and potentially held accountable, for suspected violations of international law during Israel's military offensive on Gaza last summer. The last excerpt pointedly also expresses the Commission's concern that Israel's current mechanism for providing accountability 'may not be adequate' to address the issue of the significant role of Israel's political leadership.

This latter concern focuses attention on whether international justice mechanisms may properly have to be utilised against Israel's political leadership, including Mr Netanyahu, in relation to examining their role in the suspected commission of international crimes.

What is universal jurisdiction and how does it relate to immunities?

All states may assert universal jurisdiction to investigate and prosecute crimes under international law. This is the most wide-reaching form of jurisdiction, and one that is recognised as necessary to close the impunity gap that continues to exist for crimes under international law².

A significant limitation against the application of universal jurisdiction is the availability of immunities to protect specific individuals from legal process, including arrest, detention and prosecution. Of particular relevance to Mr Netanyahu's planned visit to the UK is the availability of 'personal immunity'.

What is 'personal immunity'?

Courts have held that individuals can claim personal immunity, which covers any act that some classes of state officials perform while in office, including acts carried out in a private capacity. It is based on the justification that the activities of high-ranking officials be immune from foreign jurisdiction to avoid foreign states either infringing the sovereign prerogatives of states or interfering with the official functions of their agents.

In relation to serious international crimes, the International Court of Justice (ICJ) held in the Arrest Warrant case in 2002, that this type of immunity may only be available to a very limited

2 Page 19, Extraterritorial jurisdiction in the European Union: a study of the laws and practice in the 27 member states of the European Union, December 2010
https://www.fidh.org/IMG/pdf/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union_FINAL.pdf



category of high-ranking officials who are serving in an official position (and does not apply to former officials). The ICJ held that this can include current heads of state, heads of government and foreign ministers. The decision was controversial, with some pointing out that the Court's consideration of personal immunities should have been led by the nature of the crime as opposed to the nature of level of the court in which prosecution was sought³.

It is on this legal basis that the UK government has unequivocally stated that Mr Netanyahu has immunity for legal process and cannot be arrested or detained.

Are any other immunities potentially relevant?

Special mission immunity is another form of immunity claim that may be invoked to protect certain officials from the criminal and civil jurisdiction of another state. This form of immunity was controversially granted by the UK government to Israel's former Foreign Minister, Tzipi Livni, when she visited the UK in 2011 and 2014. The Crown Prosecution Service confirmed at the time of Mrs Livni's visit in 2014 that the granting of special immunity status 'means that a magistrates court would be bound to refuse any application for an arrest and as such the Director of Public Prosecutions is not able to consider any application in relation to this individual.'⁴

A 'special mission' is defined as a temporary mission sent by one state to another with the consent of the host state to deal with specific matters or issues that are agreed in advance. The UN Convention on Special Missions limits the application of immunities to specified individuals who are members of such missions. Only 38 states – less than 20 per cent of all UN member states - have ratified the UN Convention and are therefore bound by its provisions.⁵ In interpreting the law of special mission immunity, courts in the United Kingdom, Germany and Austria have emphasised that the consent of the host state must be obtained prior to receiving a foreign official on a special mission, and that the host state has the right to object to the inclusion of individual members in the special mission.⁶

The granting of special mission immunity raises serious concerns about its incompatibility with state's international law obligations to ensure individuals do not enjoy impunity for serious crimes.

3 Amnesty International, *Bringing Power to Justice: Absence of Immunity for Heads of State before the International Criminal Court*, IOR 53/017/2010, pp. 25-30

4 <http://www.theguardian.com/world/2014/may/13/israel-tzipi-livni-diplomatic-immunity-uk>

5 <http://www.redress.org/downloads/statement-to-the-eu-network-of-contact-points-final.pdf>

6 Ibid.



Are immunities available to prevent the prosecution of individuals before the International Criminal Court?

The short answer is no. Article 27 of the Rome Statute of the International Criminal Court provides that “official capacity.. shall in no case exempt a person from criminal responsibility under this Statute.”⁷

What is LPHR's position on accountability and Gaza?

LPHR has extensively worked on the crucial issue of legal accountability for Israel's military offensive on Gaza last year. In partnership with the Al Mezan Center for Human Rights (based in Gaza), we submitted two comprehensive complaints to the UN Commission of Inquiry. Both our complaints can be seen [here](#).

Our first complaint focused on the critical issue of the deliberate and pervasive military targeting of civilian homes in Gaza that resulted in massive loss of civilian life. This extremely serious issue raised very significant legal questions regarding the targeting of civilian infrastructure. We presented our legal analysis in our complaint and subsequently had the valuable opportunity to present it in person with staff of the Commission in Geneva. Our critical legal analysis was shared by the Commission in its report.

Our second complaint focused on the deliberate or reckless military targeting of medical infrastructure and personnel. We were joined on this complaint with Medical Aid for Palestinians, and co-produced a public report version of our complaint which can be seen [here](#).

Both our complaints presented evidence and legal analysis indicating that serious violations of international humanitarian and human rights law were committed which may amount to war crimes, and in respect of the widespread targeting of family homes, may also amount to crimes against humanity.

LPHR has subsequently written and met with the UK Foreign Office to request their necessary action in ensuring that legal accountability is fully and credibly pursued for alleged serious violations of international humanitarian law. It is our grave concern that continued impunity and absence of effective deterrence for the perpetration of alleged serious international crimes will only serve to encourage the horrific recurrence of a large-scale Israeli military offensive on Gaza.

⁷ Article 27, Rome Statute of the International Criminal Court, http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf