

LAWYERS FOR PALESTINIAN
HUMAN RIGHTS



Lawyers for Palestinian Human Rights' briefing on Universal Jurisdiction

March 2021



About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a lawyer-based charity in the UK that works on projects to protect and promote Palestinian human rights. We distinctly provide a legal and human rights perspective on issues affecting Palestinians. Our trustees include leading human rights lawyers, Sir Geoffrey Bindman QC, Fiona McKay and Tessa Gregory.

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Introduction

1. The formal opening on 3 March 2021 of an [investigation into the Situation in Palestine](#) by the Office of the Prosecutor of the International Criminal Court, has placed a spotlight on the critical issue of the need for genuine legal accountability for the alleged commission of serious international crimes.
2. In this specific context, it is important to have awareness of a further international accountability mechanism that can be utilised to hold individuals criminally responsible for the commission of serious international crimes: Universal Jurisdiction.
3. This briefing provides a brief overview of the principle of Universal Jurisdiction (**UJ**), followed by a specific focus on its operation in the UK and material limitations on practical application. This is illustrated by reference to five cases, three of which relate to alleged serious international crimes committed by individuals in the occupied Palestinian territory.

The Principle of Universal Jurisdiction

4. The principle of UJ allows (and indeed often obliges) States to prosecute crimes that have been allegedly committed in another territory, through their own national criminal jurisdictions. This is an international convention preserved for only the most heinous crimes, including war crimes and torture. Prosecutions brought under UJ enable States to comply with their own international obligations under various treaties.
5. The precise definition of UJ, and the manner in which it is implemented, varies somewhat between different States. However, the fundamental purposive approach is that in the case of the gravest crimes under international law, accountability (in the form of individual criminal responsibility) should be provided for, regardless of the territory in which the offences were committed in or the nationality of the alleged offender. The UK gives effect to the principle of UJ through statutory law. [Section 1\(1\) of the Geneva Conventions Act 1957](#) provides:

*“Any person, whatever his nationality, who, **whether in or outside the United Kingdom**, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the scheduled conventions, the first protocol or the third protocol shall be guilty of an offence”. (emphasis added)*

6. Similar wording in relation to the offence of torture is found in [S134 of the Criminal Justice Act 1988](#) which provides that:



*“A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture **if in the United Kingdom or elsewhere** he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties”. (emphasis added)*

7. Pursuing a prosecution under UJ does not require an exercise akin to determining whether the ‘gravity threshold’ has been met as is necessary with the International Criminal Court (ICC). Given the dates of the respective statutes which apply, it is also possible to bring a prosecution for alleged international crimes which occurred before 13 June 2014 (the commencement of the ICC’s retroactive jurisdiction in the occupied Palestinian territory).
8. Under [section 51 of the International Criminal Court Act 2001](#), it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime. This section applies to acts committed in England and Wales, but also in some circumstances to those committed outside of the UK (if by a UK national, resident or a person subject to UK service jurisdiction). Notably the Geneva Conventions Act and the Criminal Justice Act do not have the same restriction, and operate so that the UK can exercise jurisdiction over an individual “*whatever his nationality*”.
9. A general principle which underpins UJ is the presumption in favour of territoriality. The general position is that criminal offences are most likely to be effectively investigated and prosecuted in the territory where they have been allegedly committed. This is owing to the geographical constraints that may sometimes exist with conducting an investigation, bringing a prosecution and attempting to secure a conviction at trial in a country many miles away, with potential language and cultural differences. However, the need for UJ arises out of an acknowledgement that without such a mechanism there would be a large and unacceptable risk of impunity for international crimes in circumstances where States may demonstrate a reticence to pursue justice and legal accountability.

Universal Jurisdiction at work in the UK

10. Whilst these types of cases are exceptional, there have been some occasions of UJ arrests and prosecutions in the UK. On 18 July 2005, an Afghan warlord named [Faryadi Sarwar Zardad](#) was found guilty of torture and hostage taking in what was thought to be the first successful conviction in the UK for a crime committed abroad. These offences were committed at Afghan checkpoints between 1991 and 1996. The trial followed an investigation which involved UK police officers visiting Afghanistan to identify and take accounts from victims. Witnesses gave evidence at the trial at the Old Bailey via video link from the UK embassy in Kabul. Upon conviction Mr Zardad was sentenced to a 20



year custodial sentence. As explained by the then Attorney General [Lord Goldsmith](#), the offences alleged were so “*merciless*” and such an “*affront to justice*” that they could be tried in any country.

11. In January 2013, a Nepalese Colonel, [Kumar Lama](#) was arrested in East Sussex and charged with two counts of torture under section 134 of the Criminal Justice Act 1988 relating to incidents that had allegedly occurred in 2005. A description which sums up some of the potential limitations in respect of how consistently the principle of UJ can be applied, is found in the words of Associate Professor of Public International Law, [Devika Hovell](#), who referred to this arrest as “*the result of a sensible wager on the UK’s part, bargaining relatively low diplomatic cost for diplomatic credit in fulfilling its obligation under the Torture Convention*”. This arrest and prosecution did not ultimately lead to a conviction. In August 2016 a jury acquitted Colonel Lama in respect of one of the counts on the indictment, and a hung jury was returned for the second count on the indictment. In respect of the second count, the Crown Prosecution Service could have sought to prosecute Colonel Lama a second time, but decided instead to [offer no evidence](#) in respect of this case on the basis that there was no realistic prospect of conviction.

Actual and potential limitations on application of Universal Jurisdiction

12. Whilst the examples above demonstrate that UJ can be applied by States to seek accountability for crimes committed in the occupied Palestinian territory, the implementation of UJ in the UK (and in other States) is undoubtedly influenced by political considerations.
13. In the UK, in cases of State prosecutions, a decision to prosecute offences under UJ is made by the Crown Prosecution Service, applying the ordinary two-part test of whether (i) there is a realistic prospect of conviction based on the prosecutor’s assessment of the evidence and (ii) whether it is in the public interest to prosecute. If this test is satisfied, in most cases of UJ, the Attorney General’s involvement then becomes necessary. The ‘consent’ of the Attorney General is required before proceedings can be instituted. In evaluating whether or not to provide consent, the Attorney General may undertake the ‘[Shawcross exercise](#)’, which is a consultation with Government Ministers on public interest issues. These public interest issues include matters of international relations and national security. Whilst the Attorney General makes a decision independently of the Government, the requirement of consent, and the operation of the Shawcross principle, undoubtedly has the effect of rendering UJ a blunter instrument than it otherwise could be.
14. Notwithstanding this structural layer of potential political obstruction, even in cases where the process is adhered to and an arrest is sought, political interference of other forms has prevailed. This reality is best illustrated through the following three UJ cases



that relate to alleged serious international crimes committed by individuals in the occupied Palestinian territory:

- i) The frustration of an attempt to arrest Israeli General Doron Almog in 2005
- ii) The reflexive response of the UK Government in restricting the circumstances in which private prosecutions can be pursued, following the attempted arrest of then former Israeli Minister Tzipi Livni in 2009
- iii) The impromptu and recurrent granting of special mission immunity to then former Israeli Minister Tzipi Livni in 2016.

15. In [September 2005 an arrest warrant](#) was issued at Bow Street Magistrates Court in London, for former General Doron Almog, in connection with alleged war crimes committed in Gaza in 2002. The alleged offences related to a time in which he was the Commanding Officer of the Israeli Defence Force's Southern Command. The allegations included that he ordered the destruction of 59 homes in revenge for the death of Israeli soldiers. Mr Almog was attending the UK in September 2005 in order to speak at an event at Solihull Synagogue. He was not covered by any form of immunity. British police officers awaited Mr Almog's plane to land at Heathrow Airport where they intended to arrest him in accordance with the lawful warrant. Mr Almog appears to have been informed of the intention to arrest him, and as a result he did not leave the plane and enter British territory in order for a lawful arrest to be effected. Mr Almog remained on the plane until its return to Israel. Despite the legal mechanisms being implemented according to the appropriate standards and processes, it appears that political interference ultimately prevented an arrest.

16. In 2009, at Westminster Magistrates court in London, an arrest warrant was issued for Israel's then former Foreign Minister Tzipi Livni. This arrest warrant was not issued as part of a State prosecution, but as a result of a private prosecution brought about by individuals, as was the case for the issuing of the arrest warrant for former General Doron Almog. The arrest warrant was issued in relation to alleged serious offences committed during Israel's 'Operation Cast Lead' in Gaza in December 2008-January 2009, when Ms Livni was a member of the war cabinet in the position of foreign minister. The arrest warrant was subsequently cancelled when Ms Livni did not arrive in the UK. As a result of this arrest warrant having been issued, the [UK government sought to change the law](#) in order to place restrictions on private persons (as opposed to the State) obtaining arrest warrants for UJ crimes, by now [requiring the consent of the Director Of Public Prosecutions](#), before an arrest warrant can be issued. The consequences of this change of law, which came into effect in September 2011, are best demonstrated by an attempted application of a private arrest warrant against Ms Livni



in October 2011 when she visited the United Kingdom. A private arrest warrant for Ms Livni had prior been issued by a senior district judge in London in December 2009, and was extant at the time of her October 2011 visit. The Director of Public Prosecutions was invited by legal representatives of the private individual to consent to Ms Livni's arrest. However, the matter was taken out of his hands by a retrospective grant of diplomatic immunity from the UK government, on the grounds that Ms Livni was on a 'Special Mission'. This controversial practice stymying the application of universal jurisdiction has since been repeated by the UK Government, as noted immediately below and in [LPHR's legal Q&A on Immunities and Gaza Accountability](#).

17. In 2016 Ms Livni visited the UK in a private capacity to participate in a conference organised by an Israeli newspaper. In the week preceding this visit, the War Crimes Unit of the Metropolitan Police provided a letter to the Israeli Embassy inviting Ms Livni to attend a [\(voluntary\) police interview](#) under caution in relation to her role in alleged offences committed during Operation Cast Lead. Media reports state that upon receiving this interview, senior Israeli officials contacted their British counterparts in an attempt to classify Ms Livni's visit as a 'Special Mission' involving diplomatic contacts. This was sought notwithstanding the fact that Ms Livni at this time was not a holder of an official position other than being a member of the Israeli Parliament. The British Foreign and Commonwealth Office acceded and made a decision to recognise Ms Livni's visit as a [Special Mission](#). A meeting was scheduled with Government officials in the UK only after Ms Livni was invited to the police interview. The granting of special mission immunity prevented any arrest from being able to take place in circumstances where Ms Livni refused to attend the police interview voluntarily.
18. Whilst the principle of UJ indeed has promise in terms of the steps that can be taken to pursue accountability for alleged international crimes, there is no doubt that in practice its success has been stymied by political influences. This is incredibly problematic for the UK in the context of the legal obligations that it clearly has under the Geneva Conventions and Associated Protocols, and the United Nations Convention Against Torture.
19. The UK is not alone in having imposed certain obstructions to the effectiveness of the principle of UJ. In [March 2014](#), Spain passed a law reforming the principle of UJ, effectively making it harder to pursue such cases. This followed what had been a significant period in which Spain appeared to be demonstrating extremely strong leadership in this area. The shrinking of the application of UJ within Spain was and is regrettable.
20. On the other hand, it is apparent that Germany is taking its obligations in the area of UJ particularly seriously. Just weeks ago, on 24 February 2021, a [German Court convicted a Syrian former intelligence officer](#) (Eyad al-Gharib) for aiding crimes against humanity



committed in Damascus in 2011. Gharib was convicted of accompanying the transportation of 30 detained demonstrators, despite knowing about the systematic torture in the prison the detainees were being sent to, according to the prosecutors. This is a landmark UJ case as it is the first time there has been a conviction relating to serious crimes committed in Syria during this period.

21. Regrettably, the demonstrable political influence which arises within the UK context of application of UJ has the effect of undermining the international rule of law and allows legal accountability and justice to be accessible only to some, in a discriminatory fashion.
22. This situation is noted despite the fact that the UK Government has affirmed a commitment to UK prosecutions in the [HM Government's note on the investigation and prosecution of crimes of universal jurisdiction](#), stating:

"The United Kingdom is committed to upholding international law and holding those who commit the most serious crimes accountable for their actions. It is UK Government policy that the United Kingdom should not provide a safe haven for war criminals or those who commit other serious violations of international law. We are committed to ending impunity for such crimes, and will encourage action to be taken to bring such individuals to justice wherever possible, within the rule of law and depending on the sufficiency of the available evidence."

23. In line with the action being taken in Germany, and the position expressed by the UK, States should be encouraged to show courage and leadership in upholding these critical legal obligations, by pursuing UJ prosecutions where possible and appropriate, without fear or favour.

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