

Al-Haq Position Paper on the Threat to Universal Jurisdiction in the Wake of the UK Arrest Warrant Against Tzipi Livni

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Introduction

1. As a Palestinian human rights organisation that has consistently advocated for all state and non-state actors to abide by their rights and obligations under the law of armed conflict, Al-Haq welcomes the issuance of an arrest warrant on 13 December 2009 by the Westminster magistrates' court in the UK against former Israeli Foreign Minister and senior politician Tzipi Livni. As a member of the troika with Ehud Olmert (then Prime Minister) and Ehud Barak (then Defence Minister), which one year ago oversaw 'Operation Cast Lead', Livni bears special responsibility for the war crimes and possible crimes against humanity that characterized Israel's actions during the assault on Gaza.
2. The Report of the UN Fact Finding Mission to Gaza (the Goldstone Report), published in September 2009, concluded that:

what occurred in just over three weeks at the end of 2008 and the beginning of 2009 was a deliberately disproportionate attack designed to punish, humiliate and terrorize a civilian population, radically diminish its local economic capacity both to work and to provide for itself, and to force upon it an ever increasing sense of dependency and vulnerability.¹

The Report, which has been endorsed by both the UN Human Rights Council and the UN General Assembly, further asserted that:

Whatever violations of international humanitarian and human rights law may have been committed, the systematic and deliberate nature of the activities described in this report leave the Mission in no doubt

¹ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 September 2009, para 1690.

that responsibility lies in the first place with those who designed, planned, ordered and oversaw the operations.²

3. The issuance of the arrest warrant against an individual allegedly responsible for the crimes committed throughout ‘Operation Cast Lead’ represented a significant step forward in the international struggle against impunity for those responsible for war crimes and other violations of the law of armed conflict. As political considerations have come to the fore following the withdrawal of the warrant, Al-Haq is seriously concerned that the British government will bend to the criticisms being aired by Israeli officials over the ‘loophole’ in UK law which allows for the arrest and prosecution of war criminals in UK courts.

The UK's legal obligation to prosecute war crimes

4. In the first instance it is imperative to stress that the ability of the UK courts to issue arrest warrants against suspected war criminals on the basis of universal jurisdiction is not a ‘loophole’ but rather a legitimate mechanism that gives effect to the UK’s obligations under the Geneva Conventions. The arrest warrant was issued under the UK Geneva Conventions Act 1957 (as amended). Article 1 provides that:

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 [four Geneva Conventions of 1949] or the first protocol shall be guilty of an offence (para 1)

In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefore in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place. (para 2)

5. These legislative provisions give effect to the obligation set forth in Article 146 of the Fourth Geneva Convention requiring the United Kingdom, as a

² Report of UN Fact-Finding Mission, para 1692.

High Contracting Party to the Four Geneva Conventions, ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.’

6. The UK has long celebrated its engagement with international humanitarian law and the Geneva Conventions. On 1 April 2009, while moving a Bill in the House of Commons to amend the 1957 Act to allow for incorporation of the Third Protocol Additional to the Geneva Conventions into UK domestic law, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs (Gillian Merron) stated that:

This is a fitting moment to seek support for improvements to the Geneva conventions as it is this year that the conventions celebrate their 60th anniversary. They are universally recognised as enshrining the main principles of international humanitarian law. They oblige every state in the world to abide by the rules of war in order to limit the effects of armed conflict [...] The UK has, of course, always been at the forefront of developing and promoting the rules in the Geneva conventions and, by enacting this Bill, we will show the UK’s support for the latest improvements to these rules and our continuing commitment to the development of international humanitarian law.³

7. The speedy adoption of the Geneva Conventions Act by parliament in 1957 (four days through both Houses) had been prompted by the fears of the British Red Cross who wished to avoid the embarrassment of attending that year’s International Red Cross Conference in Delhi without the UK having ratified the Geneva Conventions.⁴ It is clear therefore, that over the decades, adherence to and support for the obligations and duties set forth in the Geneva Conventions has been, and remains, a matter of significant moral and legal principal for successive UK governments.

³ House of Commons Hansard Debates 1 April 2009: Column 924.

⁴ Peter Rowe & Michael A Meyer *The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach* 45 ICLQ 2 (1996) 476.

Israel's efforts to delegitimize the use of universal jurisdiction

8. In 2005 an arrest warrant was issued in London against a former Major General in the Israeli army, Doron Almog.⁵ He avoided arrest by remaining on an El Al flight that had arrived at London Heathrow from Tel Aviv, after a tip off from the Israeli military attache in London that British police were waiting for him at the airport.⁶ In September 2009, an arrest warrant against Israeli Defence Minister Ehud Barak who was visiting the UK, was applied for but not issued on the basis that, as a serving senior government minister, he enjoyed immunity from arrest under UK law.⁷ These events have led to considerable ruction between the UK and Israel, and British officials confirmed that changes to the law were being considered.⁸ A Home Office spokeswoman, denying any contact with US officials over the matter but confirming meetings with Israeli officials, was reported as saying that the government was considering a range of matters relating to the issuing of arrest warrants in international cases, 'but has not yet concluded what changes, if any, are required'.⁹
9. While no changes have yet been made to the laws or procedures relating to prosecution for the most serious international crimes, the arrest warrant against as senior a politician as Livni, and the increasing inevitability that an Israeli national will be arrested and charged under British legislation, has seen Israeli criticism of the law in the UK intensify. President of Israel, Shimon Peres, said the arrest warrant was one of Britain's biggest political mistakes in recent years;¹⁰ Binyamin Netanyahu, Israel's prime minister, labelled it an 'absurdity';¹¹ Ron Prosor, Israel's ambassador to Britain,

⁵ Vikram Dodd *Terror police feared gun battle with Israeli general* The Guardian, 19 February 2008. Available at: <http://www.guardian.co.uk/uk/2008/feb/19/uksecurity.israelandthepalestinians>

⁶ Hagit Kleiman *Almog better get a good lawyer* Israel News, 13 September 2005. Available at: <http://www.ynet.co.il/english/articles/0,7340,L-3141664,00.html>; Vikram Dodd *UK considers curbing citizens' right to arrest alleged war criminals* The Guardian, 3 February 2006. Available at: <http://www.guardian.co.uk/uk/2006/feb/03/humanrights.foreignpolicy/print>.

⁷ Jessica Elgot *Barak arrest warrant is rejected by judge* The Jewish Chronicle, 30 September 2009. Available at: <http://www.thejc.com/news/uk-news/20459/barak-arrest-warrant-rejected-judge>.

⁸ Vikram Dodd *UK considers curbing citizens' right to arrest alleged war criminals* The Guardian, 3 February 2006. Available at: <http://www.guardian.co.uk/uk/2006/feb/03/humanrights.foreignpolicy/print>.

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¹⁰ Barak Ravid *Brown tells Livni: You're always welcome in Britain* Haaretz, 16 December 2009. Available at: <http://www.haaretz.com/hasen/spages/1135497.html>

¹¹ Ian Black *Gordon Brown reassures Israel over Tzipi Livni arrest warrant* The Guardian, 16 December 2009. Available at: <http://www.guardian.co.uk/world/2009/dec/16/tzipi-livni-israel-arrest-warrant>

referred to the British courts as ‘a playground for anti-Israel extremists’;¹² and Israel’s Foreign Ministry criticised the ‘cynical legal move’ taken ‘at the behest of radical elements’.¹³

10. Such language is not accidental. Over recent years, as efforts to ensure the enforcement of international law against Israel’s military and political leadership have gained ground, a concerted effort towards delegitimizing human rights activists and of reducing the protections accorded to civilians living under military occupation has been adopted by Israeli officials. Israel has sought to cast those who rely upon international law in domestic or international courts as terrorists who threaten democracy. The essence of the argument is that the rule of law and the fundamental principle of accountability must be sidelined in order to allow democracies to fight against terror: Palestinians cannot be trusted to engage with international law since their only purpose is to attack Israel.¹⁴ In this vein Colonel Liebman, head of the Israeli military’s international law department, stated in February 2009 that ‘war crimes charges brought abroad against Israeli soldiers and officers involved in Operation Cast Lead are nothing but “legal terrorism.”’¹⁵
11. Furthermore, after ‘Operation Cast Lead’, there were indications of a concerted effort by Israeli officials and military lawyers to promote changes in international law to ensure a reduction in the protections afforded to civilians in armed conflicts. For instance Colonel (res.) Daniel Reisner, former director of the Israeli army’s international law department has stated:

What we are seeing now is a revision of international law [...] If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries [...] International law progresses through violations.¹⁶

¹² Ian Black *UK to review war crimes warrants after Tzipi Livni arrest row* The Guardian, 15 December 2009. Available at: <http://www.guardian.co.uk/world/2009/dec/15/israel-tzipi-livni-arrest-warrant>

¹³ Ma’an News Agency *Israel, UK confirm Livni arrest warrant* 15 December 2009. Available at: <http://www.maannews.net/eng/ViewDetails.aspx?ID=247030>

¹⁴ Tzipi Livni *This is an attack on democracy* The Jewish Chronicle, 17 December 2009. Available at <http://www.thejc.com/comment/comment/25184/this-attack-democracy>

¹⁵ Tomer Zarchin *IDF: war crimes charges over Gaza offensive are legal terror* Haaretz 19 February 2009. Available at: <http://www.haaretz.co.il/hasen/spages/1065338.html>

¹⁶ Yotam Feldman and Uri Blau *Consent and advise* Haaretz, 5 February 2009. Available at: <http://www.haaretz.com/hasen/spages/1059925.html>

Similarly, after the Human Rights Council's endorsement of the Goldstone Report, Netanyahu's office stated that Netanyahu had 'instructed the relevant government bodies to examine a worldwide campaign to amend the international laws of war to adapt them to the spread of global terrorism',¹⁷ a move described by Israeli FM Barak as being necessary 'in order to facilitate the war on terrorism'.¹⁸

The undermining of the rule of law

12. In response to Israeli criticism of the Livni arrest warrant, senior British ministers, rather than defending the independence of the judiciary that was applying the law of the country, rushed to placate Israeli politicians, promising that they would strive to ensure that there could be no such warrants issued against Israelis in the future. Thus, the UK's Foreign Minister David Miliband met with Israel's ambassador to Britain on 15 December and indicated that UK legislation 'permitting judges to issue arrest warrants against foreign dignitaries without any prior knowledge or advice by a prosecutor must be reviewed and reformed.'¹⁹ He confirmed that the UK government 'is looking urgently at ways in which the UK system might be changed in order to avoid this sort of situation arising again.'²⁰ British PM Gordon Brown also threw his weight behind moves to change the law, telephoning Tzipi Livni, to say he 'completely opposed' the issuance of the arrest warrant,²¹ and that she was welcome in the UK at any time.
13. Furthermore, the UK's Attorney General, Baroness Scotland, spoke at the Hebrew University of Jerusalem in January 2010 during a visit intended to reassure Israeli officials of the steps being taken in the UK to ensure the protection of Israeli visiting officials from arrest. She said that Israeli leaders should not face arrest for war crimes under the law of universal jurisdiction

¹⁷ *Israel push to change laws of war* 21 October 2009. Available at

<http://english.aljazeera.net/news/middleeast/2009/10/2009102122137152596.html>.

¹⁸ Ron Bousso *Israel wants law of war changed after damning UN Gaza report* AFP, 20 October 2009. Available at:

<http://www.google.com/hostednews/afp/article/ALeqM5jzYm9qJsFN5hXTCqOKrraGa6NgWQ>

¹⁹ Barak Ravid *Brown tells Livni: You're always welcome in Britain* Haaretz, 16 December 2009. Available at:

<http://www.haaretz.com/hasen/pages/1135497.html>

²⁰ Ian Black *UK to review war crimes warrants after Tzipi Livni arrest row* The Guardian, 15 December 2009.

Available at: <http://www.guardian.co.uk/world/2009/dec/15/israel-tzipi-livni-arrest-warrant>

²¹ Afua Hirsch & Ian Black *Outcry over plan to give attorney general veto on war crimes warrants* The Guardian,

16 December 2009. Available at: <http://www.guardian.co.uk/uk/2009/dec/16/attorney-general-veto-warrants>

and that the British government is ‘looking urgently at ways in which the UK system might be changed to avoid this situation arising again’.²²

14. More troubling still, are the indications that there has been an active effort by the British government to frustrate arrest warrant applications in the past. The execution of the arrest warrant issued against Doron Almog was prevented by a tip off likely to have emanated from sources within the British establishment. David Miliband has stated with regards to Livni that ‘I agree that in this instance the measures we have taken did not work,’²³ implying that 'measures' have been taken by the government in the past in relation to arrest warrant applications.
15. These revelations do not bode well for the newly proposed amendments to UK law that appear to be aimed at revoking the ability of magistrates' courts to issue arrest warrants until such time as the Attorney General has approved the course of action. Al-Haq's concern is that since the government's current stated position is that Israeli officials should not be subject to arrest for war crimes, the ability of the Attorney General to work independently and free from political interference cannot be guaranteed and the UK, in contravention of its legal obligations, will become a safe haven for war criminals.
16. No matter how British and Israeli officials attempt to frame the proposed changes to British law, the emphasis on political self-interest over legal obligations is blatant, both in terms of the content of the statements issued, as well as the failure by the government at any stage to address the substantive legal issues raised by the arrest warrant application, including the mass of evidence pointing to the commission of crimes during ‘Operation Cast Lead’ at the highest levels of the Israeli establishment.

The current law should not be changed

17. Several factors suggest that the law as it currently stands should not be changed. Contrary to the assertions that the court system is somehow hijacked at the 'behest of radical elements' the present legislation has a

²² Rory McCarthy and Afua Hirsch *British government will fight legal attempts to indict Israeli leaders in UK* The Guardian 5 January 2010. Available at: <http://www.guardian.co.uk/world/2010/jan/05/israel-war-crimes-warrants-britain>.

²³ Martin Bright *Livni arrest warrant will be last, insists Miliband* The Jewish Chronicle, 17 December 2009. Available at: <http://www.thejc.com/news/uk-news/25083/livni-arrest-warrant-will-be-last-insists-miliband>

respectable record in practice. Magistrates have consistently refused to entertain frivolous or vexatious applications, and have required exacting legal and evidential standards to be met before the issuance of a warrant. Furthermore, the courts have generally interpreted international law in a way that favours Israel, and not the opposite. For instance, the decision by Bow Street magistrates' court that then serving defence minister, Shaul Mofaz, was accorded immunity, along with a similar decision of Westminster magistrates' court with respect to Ehud Barak, arguably constituted an expansion of the law of immunities to cover serving defence ministers. As a result only two arrest warrants have ever been issued against Israelis under this procedure in the UK, namely against Almog and Livni.

18. Any change in the law to ensure the Attorney General's involvement at the arrest warrant stage would be detrimental to the effective application of universal jurisdiction. The ability to apply for arrest warrants without the consent of members of the government is a crucial aspect of the right to bring private prosecutions - an important safeguard for victims of crime against the state, which may for any reason be unwilling to prosecute. The present procedure also permits the courts to act quickly to ensure the enforcement of the law. Requiring the Attorney General to consider each application at the arrest stage not only allows for political prejudices to impact upon the decision, but delays proceedings, and will inevitably hamper the work of the police in executing an effective arrest.
19. The argument that the courts' ability to issue warrants without the Attorney General's consent is 'anomalous' because such consent is needed to prosecute, is misconceived. It fails to take into account the real anomaly, which is the fact that the Attorney General's consent is needed to bring individual prosecutions of international crimes at all. The Director of Public Prosecutions - who is independent of the government - is normally the one required to take decisions over whether to bring prosecutions in sensitive cases. The DDP is not only perfectly able to, but is in fact obligated to take into account the public interest when deciding whether or not to pursue prosecutions. The requirement for the Attorney General's additional consent is therefore likely to amount to nothing more than the ability of the government to take politically-motivated decisions about whether individual prosecutions should be brought, and effectively to veto prosecutions which are politically inconvenient. Any change in the law which requires the Attorney General's consent to be given at an even earlier stage in the proceedings, as is being proposed, will only strengthen the government's

ability to interfere with what should be the independent decisions of the Crown Prosecution Service and the courts.

20. There is also a concern that the Attorney General is best placed to take into account the wider impact of an arrest warrant on international relations, and therefore should be the one to authorize prosecutions in war crimes cases. It is unclear why such considerations would have to be taken into account as early as the arrest stage. In any event, any consideration about the impact on international relations should go no further than those concerning the ability of sovereign states to conduct their international affairs which is already provided for in the granting of immunity to certain actors, including serving presidents and foreign ministers.
21. Finally any requirement that the Attorney General should be able to intervene in the judicial decision to issue an arrest warrant clearly has serious implications for the separation of powers. Respect for the rule of law requires non-interference by the executive in the affairs of the judiciary.

Wider implications of any change in the law

22. For the past decade the Middle East has seen increased violence, wars and instability, a result of the consolidation of Israel's occupation of Palestinian territory, widespread violations of the prohibitions of torture and of detention without trial, as well as massive violations of the law of armed conflict. All of this has occurred in a context where the rule of law – both nationally and internationally – has been run roughshod over in the name of democracy fighting against terror.
23. In Israel, it has long been the case that the rule of law is undermined to the extent that High Court rulings upholding Palestinian rights are often not implemented. The situation is such that the President of the Supreme Court, Dorit Beinisch, had to assert in 2009 that 'rulings of this court are not mere recommendations'²⁴ The UK should not risk a similar outcome for its commitment to the rule of law in relation to war crimes cases. It is imperative, particularly in light of the Goldstone Report, that individuals of all nationalities suspected of violations of international humanitarian and human rights law be held to account for their actions.

²⁴ Akiva Eldar *Israel sees court rulings on Palestinian land as mere 'recommendations'* Haaretz, 13 October 2009. Available at <http://www.haaretz.com/hasen/spages/1120661.html>

24. Yuli Edelstein, an Israeli cabinet minister, in responding to the arrest warrant, stated that ‘By a very small change of legislation, the issue could be at least controlled, if not totally wiped off the map. I think that it’s high time that the British parliament does something about it.’²⁵ This ‘very small’ change would however amount to a significant legal and policy departure for the UK. It would indicate that the UK government is willing to interfere in the independence of its courts, to negate its obligations under international law, and to promote impunity for the most serious international crimes. The UK government must not turn its back on the principles it claims to hold dear by excluding war criminals from ‘friendly countries’ from the rule of law and by legislating to ensure their impunity.
25. It is, furthermore, clear that Israel fears most its delegitimization in the international arena. Livni has stated that: ‘We are part of the free world. The problem starts when they equate terrorists and Israeli soldiers.’²⁶ Similarly, after the Human Rights Council’s endorsement of the Goldstone Report, Netanyahu stated that efforts to adapt the laws of armed conflict would be one element of a legal and diplomatic ‘battle’ wherein ‘The delegitimization [of Israel] must be delegitimized’.²⁷
26. Al-Haq considers legitimacy to stem from respect for and promotion of human rights, of adherence to the rule of law, and the fundamental principles of non-discrimination and accountability. There is no ‘right’ to legitimacy. All individuals accused of criminal behaviour are to be treated without distinction. The assumption of a position of power does not mean an individual is free to act without regard for the commonly held and legally binding principles outlawing war crimes. Thus the militant who targets civilians and the politician who orders the targeting of civilians are, and must remain, subject to the same legal standards with regards the commission of the most serious international crimes. It is now the responsibility of the British public, British parliamentarians and civil society, and all concerned with peace and justice to ensure that the UK does

²⁵ Adrian Blomfield *Tzipi Livni arrest warrant provokes Britain-Israel diplomatic row* The Daily Telegraph, 18 December 2009. Available at: <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/6819275/Tzipi-Livni-arrest-warrant-provokes-Britain-Israel-diplomatic-row.html>

²⁶ Barak Ravid *Israel confirms U.K. arrest warrant against Livni* Haaretz, 16 December 2009. Available at: <http://www.haaretz.com/hasen/spages/1135207.html>

²⁷ Barak Ravid *Delegitimization of Israel must be delegitimized* Haaretz 18 October 2009. Available at <http://www.haaretz.com/hasen/spages/1121614.html>

not revise its laws to permit politicians to decide whom they wish to see prosecuted and whom they wish to see protected.

Arrest warrant applications and 'the peace process'

27. Much has been made by Israel of the damage the arrest warrant has had on Britain's ability to influence the 'peace process'. For Palestinians the peace process however has amounted to the expansion of illegal settlements, continued arrests and detentions without trials, harassment of human rights defenders, killings and torture, the continued blockade of Gaza, the continued construction of the Wall, further house demolitions, clashes in the Holy Sites of Jerusalem, and continued and egregious restrictions on freedom of movement. A peace process which disregards the fundamental rights of the Palestinian people, which considers itself above the rule of law, and which shields war criminals will not be successful. In this context the UK can play a positive role in securing peace for the region by ensuring the continued ability of its legal system to arrest and to prosecute anyone suspected of grave international crimes.
28. The Goldstone Report, conscious of the exclusion of Palestinians from the framework of international criminal law, stressed in its recommendations:

that States Parties to the Geneva Conventions of 1949 start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949. Where so warranted following investigation, alleged perpetrators should be arrested and prosecuted in accordance with internationally recognised standards of justice.²⁸
29. All those responsible for war crimes must be held to account either in their national courts, before international courts, or on the basis of universal jurisdiction, in the courts of third states such as the UK. Those Israeli political leaders proud of their participation in 'Operation Cast Lead' and dismissive of the rule of law are unlikely to make any positive contribution to a peace process. There are voices in Israel other than those who have perpetuated conflict. If Israel wants its representatives to travel abroad to take part in bona fide negotiations, it will always remain open for them to delegate such duties to individuals who are not suspected of having

²⁸ Report of UN Fact-Finding Mission, para 1772.

committed grave breaches of the Geneva Conventions, war crimes, or crimes against humanity. If the UK truly wants to play its part in bringing peace to the region therefore, it must advocate for accountability and fight against impunity by adopting this particular recommendation of the Fact Finding Mission and protecting, not denying, the principle of universal jurisdiction.