

The Principle and Practice of Universal Jurisdiction: PCHR's Work in the occupied Palestinian territory



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Executive Summary

'The Principle and Practice of Universal Jurisdiction' is released by the Palestinian Centre for Human Rights (PCHR) at a time when world attention is focused on the Gaza Strip. Israel's conduct of hostilities during 'Operation Cast Lead' (27 December 2008 - 18 January 2009) provoked global shock and outrage, and drew international condemnation, while the subsequent report of the UN Fact Finding Mission (the Goldstone Report) focused international attention. PCHR and numerous other human rights organizations have documented and publicized Israel's alleged violations of international humanitarian law (IHL); many of which amount to war crimes and grave breaches of the Geneva Conventions. The widespread and systematic nature of these violations raise suspicion that Israel committed crimes against humanity in the Gaza Strip; an allegation not lightly made.

Yet despite this level of international attention, the State of Israel and suspected Israeli war criminals have not been held to account. Regrettably, this lack of accountability, and the resultant climate of impunity, has been a long-standing feature of Israel's occupation of Palestinian territory. Since the occupation began in 1967, neither the State of Israel, nor individuals suspected of committing war crimes, have been brought before a court and prosecuted in accordance with the norms of international law. Israel has been allowed to act as a State above the law; a reality illustrated by the reaction of powerful States - lead by the U.S. - to the publication of the Goldstone Report. PCHR firmly believe that this lack of accountability serves to encourage continued violations of international law and to undermine respect for the rule of law itself. It is Palestinian civilians - the protected persons of IHL - who pay the price for this impunity, as they continue to suffer at the hands of a brutal and illegal occupation.

Judicial regulation is an essential component in ensuring respect for the rule of law and protecting victims: in order for the law to be relevant, it must be enforced. Those accused of violating international law must be investigated and prosecuted. This judicial process is essential, both to ensure victims' rights to an effective judicial remedy, and to combat impunity and promote deterrence. However, there are limited judicial mechanisms available to Palestinian victims of Israeli violations of international law.

According to the terms of the 1995 Israel-Palestine Interim Agreement on the West Bank and the Gaza Strip, the Palestinian National Authority (PNA) does not have jurisdiction over Israelis. This explicitly removes Israeli citizens, and members of its armed forces, from the jurisdiction of the PNA; no Israeli may be brought before a Palestinian court. This legally binding restriction effectively removes the Palestinian judicial system from the ambit of legal options available to victims.

The State of Israel is legally bound to investigate and prosecute Israeli citizens accused of committing international crimes. To date, however, Israel's investigations have proved inadequate, while prosecutions - particularly at the command level - have not been forthcoming. In this respect, Israel must be regarded as shirking its legal obligations, and denying its victims effective judicial remedy. 'The Principle and Practice of Universal Jurisdiction' outlines the inadequacies of the Israeli judicial system. It is presented that this system - as it relates to Palestinian victims of Israeli violations - does not meet necessary international standards with respect to the effective administration of justice. The Israeli authorities' presumption that all Palestinians are 'enemy aliens' or 'potential terrorists' has evident implications regarding the impartiality of the judiciary, the presumption of innocence, and the right to a fair trial. The hierarchical nature of the military, the ineffective manner in which investigations are conducted, and the lack of civilian oversight - as epitomised by the wide margin of discretion awarded by the Israeli Supreme Court - all combine to fundamentally frustrate the pursuit of justice.

Justice for Palestinians is not attainable within this system.

In order to overcome the PNA's lack of jurisdiction, and the State of Israel's unwillingness to genuinely investigate and prosecute individuals suspected of committing war crimes, PCHR has turned to the principle of universal jurisdiction.

Universal jurisdiction is a legal principle which has evolved in order to overcome jurisdictional gaps in the international legal order. It is intended to ensure that those responsible for international crimes - which include genocide, crimes against humanity, grave breaches of the Geneva Conventions, and torture - are brought to justice. Universal jurisdiction is primarily enacted when States with a more traditional jurisdictional nexus to the crime (related, *inter alia*, to the place of commission, or the perpetrator's nationality) prove unable or unwilling to genuinely investigate and prosecute: when their legal system is inadequate, or when it is used to shield the accused from justice. As such universal jurisdiction does not represent an attempt to interfere with the legitimate affairs of the State; it is enacted as a last resort. Significantly, it is the horrific nature of international crimes which establish the basis of universal jurisdiction. These crimes are considered so grave that they offend the international community as a whole; as such, it is in the interest of each and every State that those accused of such crimes be investigated and prosecuted.

'The Principle and Practice of Universal Jurisdiction' traces the evolution of universal jurisdiction, analyzing its underlying motivation, and the relevant post-Second World War jurisprudence. It highlights the goals associated with international criminal prosecutions, particularly as these relate to combating impunity, promoting deterrence, and ensuring victims' rights to an effective judicial remedy. It is concluded that universal jurisdiction constitutes an essential, long-established component of international law. The underlying elements of those crimes which form the basis of universal jurisdiction are presented and analysed.

In light of the widespread requirement that States prove themselves unable or unwilling genuinely to investigate and prosecute those suspected of international crimes prior to resort to universal jurisdiction, the requirements of international law with respect to the effective administration of justice are presented and analyzed.

PCHR's universal jurisdiction case history, and the Centre's efforts aimed at promoting awareness of universal jurisdiction issues are also highlighted. This information is presented as a resource, in order to highlight how cases are taken, and the practical and political problems surrounding the pursuit of universal jurisdiction.

'The Principle and Practice of Universal Jurisdiction' concludes that universal jurisdiction is the only available legal mechanism capable of ensuring Palestinian victims right to an effective judicial remedy. In the broader context, universal jurisdiction is also an essential tool in the fight against impunity. As long as individuals and State are granted impunity, they will continue to violate international law: civilians will continue to suffer the often horrific consequences.

Universal jurisdiction is presented as stepping stone on the road to universal justice, whereby the protections of international law may be extend to all individuals without discrimination.