



The International Law Commission should reaffirm that state officials do not enjoy functional immunity (immunity *ratione materiae*) from foreign criminal jurisdictions with regard to genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial execution

Public statement

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On the eve of a new session of the International Law Commission (ILC), where the item 'Immunity of State officials from foreign criminal jurisdiction' shall be discussed again, Amnesty International calls on the members of this subsidiary organ of the General Assembly to confirm the customary international law position that functional immunity (immunity *ratione materiae*) does not protect state officials from foreign criminal jurisdiction in respect of crimes under international law (genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial execution).

As decided by the Nuremberg Tribunal in 1946, '[t]he principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings'. The General Assembly unanimously affirmed that decision in its resolution 'Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal' in 1946 (A/RES/95(1)).

Likewise, the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (1950), the Draft Code of Offences against the Peace and Security of Mankind (1954) and the Draft Code of Crimes against the Peace and Security of Mankind (1996), all adopted by the ILC, confirm that state officials do not enjoy immunity from foreign criminal jurisdiction when suspected of criminal responsibility for genocide, crimes against humanity or war crimes.

In addition, in 1997 the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, in the *Prosecutor v. Blaškić* case, held that: "The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). The few exceptions relate to one particular consequence of the rule. These exceptions arise from the norms of international criminal law



prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity,” (*Prosecutor v. Tihomir Blaškić*, Appeals Chamber, Judgement on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, 29 October 1997, para.41.).

In present times, state practice is demonstrated by the numerous ongoing proceedings of foreign state officials suspected of criminal responsibility for crimes under international law, on basis of universal jurisdiction and other extraterritorial jurisdiction, in a number of states, including Argentina, Austria, Belgium, Canada, Finland, France, Ghana, Hungary, Italy, Lithuania, Senegal, Spain, Sweden, Switzerland, Netherlands, the United Kingdom and the United States.¹ And in two cases national courts have explicitly rejected functional immunities for crimes under international law. In 2012 the *Tribunal pénal fédéral* of Switzerland found that former Algerian minister of defense, Khaled Nezzar, did not enjoy functional immunity for torture and crimes against humanity.² And more recently, on 28 January 2021, the Federal Court of Justice of Germany found that state officials do not enjoy functional immunity under customary international law from foreign criminal jurisdictions for war crimes or certain other crimes of concern to the international community as a whole.

As the ILC concluded in 1996: “It would be paradoxical to allow the individuals who are, in some respects, the most responsible for the crimes covered by the Code [of Crimes against the Peace and Security of Mankind] to invoke the sovereignty of the State and to hide behind the immunity that is conferred on them by virtue of their positions particularly since these heinous crimes shock the conscience of mankind, violate some of the most fundamental rules of international law and threaten international peace and security”.

Amnesty International appeals to the ILC members to reiterate that functional immunities does not apply to state officials before foreign criminal jurisdiction in proceedings for crimes under international law.

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¹ See Trial International, *Universal Jurisdiction Annual Review 2021*, available at <https://trialinternational.org/latest-post/ujar-2021/>

² Tribunal pénal fédéral, *Décision du 25 juillet 2012, Cour des plaintes*, 5.4.3: « Or, il serait à la fois contradictoire et vain si, d'un côté, on affirmait vouloir lutter contre ces violations graves aux valeurs fondamentales de l'humanité, et, d'un autre côté, l'on admettait une interprétation large des règles de l'immunité fonctionnelle (*ratione materiae*) pouvant bénéficier aux anciens potentats ou officiels dont le résultat concret empêcherait, ab initio, toute ouverture d'enquête. S'il en était ainsi, il deviendrait difficile d'admettre qu'une conduite qui lèse les valeurs fondamentales de l'ordre juridique international puisse être protégée par des règles de ce même ordre juridique. Une telle situation serait paradoxale et la politique criminelle voulue par le législateur vouée à rester lettre morte dans la quasi-totalité des cas. Ce n'est pas ce qu'il a voulu. Il en découle qu'en l'espèce le recourant ne saurait se prévaloir d'aucune immunité *ratione materiae* ».