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COMMENTS AND OBSERVATIONS ON THE DRAFT ARTICLES ON IMMUNITY OF STATE OFFICIALS FROM FOREIGN CRIMINAL JURISDICTION BY THE INTERNATIONAL LAW COMMISSION

I. Introduction

The International Law Commission (the Commission or the ILC) is a subsidiary body of the UN General Assembly consisting of 34 members. According to its Statute, the Commission ‘shall have for its object the promotion of the progressive development of international law and its codification’.¹ The mandate has been performed since 1947 through the preparation of draft articles, guidelines or principles, some of which have led to conventions² or are true ‘pillars of international law’.³

The topic ‘Immunity of State officials from foreign criminal jurisdiction’ was included in the programme of work of the Commission in 2007. It is the topic which has stayed the longest on the current work program. The purpose of the topic has been described by one member of the Commission as ‘to clarify the legal nature and the personal, material, and procedural aspects of immunity of state officials from the criminal jurisdiction of another state’.⁴

Since 2007, the Commission appointed three special rapporteurs on the topic: Roman A. Kolodkin (Russian Federation) (2007-2012); Concepción Escobar Hernández (Spain) (2012-2023); and Claudio Grossman Guiloff (Chile) (2023-2027). The three special rapporteurs have submitted 13 reports on the topic in total, 12 of which have already been considered by the ILC.

In 2022, the ILC adopted, on first reading, a set of 18 draft articles on the subject matter, an annex (a list of treaties referred to in draft article 7, paragraph 2) and the commentaries to the draft articles.

In 2024, the second reading of the draft articles commenced by examining the first six. The text and titles of draft articles 1, 3, 4 and 5 (merged with article 6), relating to the scope of the draft

¹ Statute of the International Law Commission, article 1(1).

² Among others, the 1958 Convention on the High Seas; the 1961 Vienna Convention on Diplomatic Relations; the 1963 Vienna Convention on Consular Relations; the 1969 Vienna Convention on the Law of Treaties; the 1978 Vienna Convention on Succession of States in respect of Treaties; the 1998 Rome Statute of the International Criminal Court, etc.

³ Donald McRae, *The Work of the International Law Commission, 2007–2011: Progress and Prospects*, *American Journal of International Law*, 2012; 106(2):322-340, doi.org/10.5305/amerjintelaw.106.2.0322. See, for example, the 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; the 1954 Draft Code of Offences against the Peace and Security of Mankind; Draft Code of Crimes against the Peace and Security of Mankind; the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, etc.

⁴ Jalloh CC., *The International Law Commission’s Seventy-Fifth (2024) Session: Immunity of State Officials from Foreign Criminal Jurisdiction and Other Topics*, *American Journal of International Law*, 2025; 119(1):107-128. doi:10.1017/ajil.2024.67.

articles, persons enjoying immunity *ratione personae*, scope of immunity *ratione personae* and the scope of immunity *ratione materiae*, respectively, were provisionally adopted by the ILC's Drafting Committee in June 2024.⁵ Draft article 2, addressing definitional issues, has been reserved until the consideration of the special rapporteur's last report in 2025.

Governments were invited to submit comments and observations on draft articles 7 to 18 and the annex by 15 November 2024. Thirty-eight states have responded.⁶

A Second Report by the special rapporteur Claudio Grossman Guiloff, on draft articles 7 to 18, the annex and the commentaries, was recently submitted to the Commission for consideration during its 2025 session.⁷ The aim of the report, as stated by the special rapporteur, is 'to make proposals for the modification of the draft articles and commentaries, where necessary, on the basis of the comments made by States'.⁸

Since a second and final reading of draft articles 7-18, the annex and commentaries is likely to take place in 2025, Amnesty International wishes to provide some comments and observations regarding two issues for the Commission's consideration. However, such comments and observations are not meant to be an exhaustive account of Amnesty International's views on the Draft Articles overall.⁹

Firstly, the question of which crimes under international law should be excluded from the scope of functional immunities. The organization recommends adding a new subparagraph in draft article 7(1) permitting the application of the exception to immunity *ratione materiae* to new crimes under international law which could emerge in the future (section II below).

Secondly, the question of preventive obligation of notification to the state of the official who is subject to foreign criminal proceedings.

Amnesty International respectfully submits that that no such notification should be required *before* criminal proceedings are initiated or coercive measures are adopted against a suspect by the forum state and that, instead, the obligation of notification to the state of the official *after* such measures have been taken constitutes established state practice (section III below).

As will be shown below, Amnesty International's recommendation on the latter issue is in part, on the views expressed by the Commission in the commentaries to the Draft Articles on the prevention and punishment of crimes against humanity, adopted in 2019.

II. Functional immunities - immunity *ratione materiae*

II.1. Draft article 5 (former draft articles 5 and 6)

Draft article 5¹⁰ was already provisionally adopted by the Drafting Committee in June 2024.

⁵ UN Doc., A/CN.4/L.1001, 23 June 2024, <https://documents.un.org/doc/undoc/ltd/g24/128/51/pdf/g2412851.pdf>

⁶ Comments and observations of states are available at https://legal.un.org/ilc/guide/4_2.shtml#govcoms

⁷ UN Doc., A/CN.4/780, 29 January 2025, <https://documents.un.org/doc/undoc/gen/g25/012/32/pdf/g2501232.pdf>

⁸ *Supra* 7, para.8.

⁹ In particular, Amnesty International has serious reservations on the issue of personal immunities (immunity *ratione personae*), based on past ILC positions and recent state practice.

¹⁰ 'Draft article 5 [6] Scope of immunity *ratione materiae*.

1. State officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity.
2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist

However, it is intrinsically linked to the draft articles now subject to the ILC's second reading.

Draft article 5 provides that state officials enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction with respect to acts performed in an official capacity. Such immunity *ratione materiae* (or functional immunity) applies with respect to all acts performed in an official capacity and continues to apply after the individuals concerned have ceased to be state officials.

Moreover, draft article 5 provides that individuals who enjoyed immunity *ratione personae* (the so-called troika, meaning heads of state, heads of government and ministers of foreign affairs), and whose period of office has come to an end, continue to enjoy immunity *ratione materiae* with respect to acts performed in an official capacity during such period of office. In other words, while this specific group of state officials may have enjoyed two bases of immunity during their term of office – immunities *ratione materiae* and *ratione personae* – only the former continues to apply after the term of office has expired.

II.2. 'Draft article 7. Crimes under international law in respect of which immunity *ratione materiae* shall not apply'

An exception to the application of immunity *ratione materiae*, as laid down in draft Article 5, is found in draft article 7. This provision sets out that this base of immunity (whether during or after the term of office) does not apply to specific crimes under international law. At present, the enumerated list of crimes in draft article 7 encapsulates most, but not all, crimes recognized as such under international law.

This draft article was initially adopted by recorded vote in 2017 and later provisionally adopted on first reading in 2022 with the following text:

'Article 7. Crimes under international law in respect of which immunity *ratione materiae* shall not apply.

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

- (a) crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) crime of apartheid;
- (e) torture;
- (f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.'

Both with regard to the principle of excluding immunity and the list of crimes enumerated, Amnesty International supported in the principle the proposal made by the special rapporteur.¹¹

However, bearing in mind the numerous comments made by states in 2024, the special

after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose period of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such period of office.'

¹¹ See, Amnesty International, International Law Commission should reaffirm that state officials do not enjoy functional immunity from foreign criminal jurisdictions with regard to genocide, crimes against humanity, war crimes, torture, enforced disappearance & extrajudicial execution, <https://www.amnesty.org/en/documents/ior40/4028/2021/en/>

rapporteur's Second Report stressed that 'there have been significant developments in the practice of States in the form of judicial decisions and adoption of new legislation' since the adoption of the draft articles on first reading in 2022.¹² He thus proposed to amend draft article 7 by adding three further crimes: aggression, slavery and slave trade.

These three amendments, among others, will be considered by the Commission during its 2025 session.

The amended draft article 7 now proposed reads:

- 'Draft article 7. Crimes under international law in respect of which immunity *ratione materiae* shall not apply.
1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:
 - (a) crime of genocide;
 - (b) crimes against humanity;
 - (c) war crimes;
 - (d) crime of apartheid;
 - (e) torture;
 - (f) enforced disappearance;
 - (g) *crime of aggression*;
 - (h) *slavery*;
 - (i) *slave trade*.
 2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.¹³

Amnesty International reiterates its support for the proposal made by the special rapporteur, including in light of the ILC's acknowledgment that the prohibitions on the international crimes of aggression, slavery and the slave trade have attained the status of peremptory norms of general international law (*jus cogens*).¹⁴

In the organization's view, the ILC should confirm again that immunity *ratione materiae* does not bar prosecution of state officials in foreign criminal jurisdictions with respect to crimes under international law. This would render draft article 7 reflective of customary international law.¹⁵

¹² *Supra* 7, para.53.

¹³ Italics in the original.

¹⁴ ILC, 2022, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), Conclusion 23 - Non-exhaustive list and Annex, https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf

¹⁵ See, among others, Austria ('It is Austrian practice and *opinio iuris* that no functional immunity exists for international crimes, including the crime of aggression, by virtue of customary international law. In Austria's view, this exception also applies to the so-called "troika" after they have left office. This view is expressed in the "Decree of the Austrian Ministry of Justice regarding jurisdiction for war crimes and other international crimes and immunities of highest officials of foreign states in Austrian criminal proceedings" dated 5 July 2022'), https://legal.un.org/ilc/sessions/75/pdfs/english/iso_austria.pdf; Lithuania, ('In principle, Lithuania is of the position that as a matter of customary international law, State officials shall not enjoy functional immunity for crimes under international law, including the crime of aggression'), https://legal.un.org/ilc/sessions/75/pdfs/english/iso_lithuania.pdf; Spain, ('A juicio de España esta práctica es suficiente para concluir la existencia de una costumbre internacional que excluye la aplicación de la inmunidad *ratione materiae* respecto de los crímenes de derecho

At the same time, the organization agrees with those states that have highlighted the importance of keeping the list of crimes under international law included in draft article 7 as non-exhaustive,¹⁶ a position shared by the special rapporteur.¹⁷ For example, Amnesty International has previously argued that the crime under international law of extrajudicial executions should also be included in this provision.¹⁸ Therefore, Amnesty International encourages the ILC to consider, in addition to the amendments proposed by the special rapporteur, the inclusion in Article 7(2) of a ‘catchall’ provision in a newly added subparagraph (j), along the following lines: ‘Any other crime under international law accepted and recognized by the international community of states as a whole’.

Such a provision would achieve a twofold objective: capturing the evolving nature of international law, also considering the ILC’s mandate of “promotion of the progressive development of international law”; and preventing the non-application of the exception to immunity *ratione materiae* to any such crimes not included in draft article 7. Once these draft articles are adopted, in whatever form, they will be seen as authoritative guidance on the matter by national and international actors, while not easily subject to future amendment. It is therefore crucial that these draft articles are formulated in a way that enables their application in light of possible future developments in international law.

II.3. Conclusion

As demonstrated by numerous past and ongoing judicial cases, some of which have been quoted in the Second Report, immunity *ratione materiae* does not apply in the exercise of foreign criminal jurisdictions when state officials are suspected of criminal responsibility for crimes under international law. At the same time, as argued by Amnesty International above,

internacional.’), https://legal.un.org/ilc/sessions/75/pdfs/spanish/iso_spain.pdf; Colombia (‘There are precedents of cases in which national courts have denied the application of the functional immunity of foreign State agents when international crimes of a *jus cogens* nature are involved, such as the Eichmann case in Israel, the Barbie case in France and the Kappler and Priebe cases in Italy. Colombia agrees with that assessment, given that, insofar as such crimes involve *jus cogen* norms, their investigation and prosecution cannot be refused under any circumstances’), https://legal.un.org/ilc/sessions/76/pdfs/english/iso_colombia.pdf

¹⁶ Estonia (‘Draft Article 7 includes an exhaustive list of international crimes in case of which immunity *ratione materiae* does not apply. Estonia believes that the list should be open-ended to take into account any further developments, for example, when new international crimes are codified or defined by the international community in the future’),

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_estonia.pdf; France, (‘D’une part, il n’existe pas de liste fixée quant aux crimes pouvant éventuellement fonder une exception à l’immunité de juridiction. A cet égard, la France appelle la Commission à éviter toute énumération qui aurait comme conséquence de cristalliser les éventuelles exceptions et à préciser les raisons à l’origine de son choix’),

https://legal.un.org/ilc/sessions/75/pdfs/french/iso_france.pdf; Netherlands, (‘The Kingdom has previously expressed the view in the UN General Assembly that an exhaustive list of crimes should not be included, because that would exclude important crimes and hinder the development of the concept of crimes under international law to which immunity would not apply’),

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_netherlands.pdf; Norway (on behalf of the Nordic states), (‘At the same time, we do not rule out the possibility of adding other categories of crimes to this list, nor of expanding list of treaty instruments found in the annex’), https://legal.un.org/ilc/sessions/75/pdfs/english/iso_nordic.pdf

¹⁷ *Supra* 7, para.78 (‘The Special Rapporteur also considers it relevant to clarify in the commentary that the list in paragraph 1 of draft article 7 is non-exhaustive’).

¹⁸ *Supra* 11. There may also be other, new crimes under international law developing in the future. For example, Amnesty International is [advocating](#) for the recognition of ‘gender apartheid’ as a crime under international law.

the draft articles should be designed to accommodate new legal developments on the national and international levels that will continue to arise.

III. Notification to the state of the official

III.1. Draft article 10 as adopted on first reading

Draft article 10 was adopted on first reading in 2022, and it reads as follows:

Article 10. Notification to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted for that purpose by the States concerned, which may include those provided for in applicable international cooperation and mutual legal assistance treaties.

It is to be noted that draft article 10, as formulated then, received mixed reactions from states.

For example, Israel¹⁹ and the Russian Federation²⁰ expressed support for the text, while other states stressed the importance of providing “competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively” (Singapore),²¹ and taking into consideration the fact that “coercive measures in certain circumstances may be particularly urgent”, so to require an exception to a notification obligation (Nordic states – Sweden, Norway, Finland, Denmark and Iceland)²².

¹⁹ Israel, Additional comments and observations, 15 November 2024, para.29 (‘The question of the point in time for notification by the authorities of the forum State to the State of the official is a critical one, as almost any step taken in respect of the official could be in itself an abrogation of the immunity of the official. In this regard, Israel believes that notification to the State of the official should be given before any action, other than immediate dismissal, is taken’),

https://legal.un.org/ilc/sessions/76/pdfs/english/iso_israel.pdf

²⁰ Russian Federation, Comments of the Russian Federation on the draft articles on immunity of State officials from foreign criminal jurisdiction, p.21,

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_russia.pdf

²¹ ‘Singapore shares the same concerns under draft article 10(1) as those articulated under draft article 9, and would suggest that draft article 10(1) be similarly amended to provide competent authorities with the necessary flexibility and margin of discretion to fulfil their duties effectively, for example through the addition of a qualifier such as “as far as practicable.”),

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_singapore.pdf

²² Sweden (on behalf of the Nordic states): ‘Article 10 requires the competent authorities of the forum State to notify the State of the official before taking coercive measures that may affect an official of another State. Considered that the nature of coercive measures in certain circumstances may be particularly urgent, for instance where such measures are needed to prevent imminent threats to life, the Nordic countries would like to request the ILC to assess if there is a need to include an exception to the requirement of notification for urgent needs for coercive measures’),

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_nordic.pdf

Several other states openly expressed opposition to the inclusion within draft article 10 of an obligation to notify the state of the official before the forum state may exercise criminal jurisdiction.

The Netherlands, for example, stated:

The Kingdom is not in favour of including a notification obligation in the draft articles, since there is no such obligation for the forum State and no basis for providing a description of the procedure to be followed or details to be provided in the event that criminal proceedings are initiated or coercive measures are taken that may affect an official of another State.²³

The United States expressed a similar view:

Draft Article 10 is without support in State practice and could significantly impede efforts by States to investigate serious crimes. There may be circumstances where notification to a foreign government is appropriate, but there may also be circumstances where imposing a requirement to notify another State “before the competent authorities of the forum State initiate criminal proceedings” could pose a significant risk that the individual being investigated could become aware of the investigation and compromise it, including by permitting the official to destroy evidence, warn partners in crime, or flee from the forum State’s reach.²⁴

The United Kingdom and others also shared that critical view:

The United Kingdom also emphasises that there may be other circumstances where notification prior to the exercise of a coercive measure, such as issuing an arrest warrant, could compromise the investigation or lead to the suspect evading justice. This would be unacceptable in cases such as when the suspect is a State official, but it is clear that their acts were not within scope of immunity *ratione materiae* as set out in draft article 6.²⁵

France:

[La] France s’interroge sur les conséquences que pourrait avoir cette notification sur le bon déroulé de la procédure pénale ainsi que sur la confidentialité d’une enquête en cours.²⁶

Switzerland:

[s] nous posons la question des éventuels effets indésirables que pourrait avoir une telle notification préalable sur l’exercice de la juridiction pénale par l’Etat du for. Une telle notification pourrait notamment engendrer un risque de collusion avec pour effets

²³ Netherlands, Comments and observations,

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_netherlands.pdf

²⁴ United States, Comments from the United States on the International Law Commission’s Draft Articles on Criminal Immunity of State Officials As Adopted by the Commission in 2022 on First Reading,

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_us.pdf

²⁵ United Kingdom, Comments and Observations, para. 39,

https://legal.un.org/ilc/sessions/75/pdfs/english/iso_uk.pdf

²⁶ France, Commentaires et observations de la République Française relatifs aux projets d’articles de la Commission du Droit International sur l’«immunité de juridiction pénale étrangère des représentants de l’état», para.47, https://legal.un.org/ilc/sessions/75/pdfs/french/iso_france.pdf (*‘France questions the consequences this notification could have on the proper conduct of criminal proceedings and on the confidentiality of an ongoing investigation – informal translation by author’*). See also, p.4,

https://www.un.org/en/ga/sixth/78/cah/france_f.pdf

indésirables que des moyens de preuves soient détruits ou des témoins influencés avant tout intervention de la police et/ou du ministère public.²⁷

As discussed in the following sections, it is Amnesty International's view that draft Article 10 lacks support in state practice and could, as expressed by some states, compromise criminal investigations or even lead to the suspect evading justice. In addition, prescribing on the forum state an obligation of notification *before* initiating a criminal proceeding or taking coercive measures would be counter to a "legal and congruent system".²⁸

III.2. The amended draft article 10 in the special rapporteur's Second Report

In his Second Report of 2025, the special rapporteur has proposed to amend the text of draft article 10 as follows:

Draft Article 10. Notification to the State of the official

1. Before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State, the forum State shall notify the State of the official of that circumstance, *unless such notification would jeopardize confidentiality of an ongoing investigation, or the proper conduct of criminal proceedings*. States shall consider establishing appropriate procedures to facilitate such notification.
2. The notification shall include, inter alia, the identity of the official, the grounds for the exercise of criminal jurisdiction and the competent authority to exercise jurisdiction.
3. The notification shall be provided through diplomatic channels or through any other means of communication accepted ~~for that purpose~~ by the States concerned., ~~which may include those provided for in applicable international cooperation and mutual legal assistance treaties.~~²⁹

From Amnesty International's standpoint, even though the proposed amendment in paragraph 1 seems to address much of the concerns over such a provision, there is no need at all for a notification to the state of the official, even less *before* the competent authorities of the forum state initiate criminal proceedings or take any coercive measures.

The organization considers that notifying the state of the official in advance of initiating criminal proceedings for crimes under international law or taking coercive measures poses a real risk to effective investigations and prosecutions. For example, following notification, states may take measures to forestall or hinder investigations in the forum state. In addition, relevant state officials may: seek to evade or restrict their travel to the forum state; commit further criminal acts; threaten victims or witnesses; tamper with evidence; and other possible negative effects.

III.3. The previous ILC position on the notification to the state of the official

In 2019, three years before the provisional adoption of draft article 10 on first reading, the Commission adopted, as a separate topic, the Draft Articles on Prevention and Punishment of Crimes against Humanity.³⁰ In late 2024, the UN General Assembly decided without a vote to convene in 2028 and 2029 the United Nations Conference of Plenipotentiaries on Prevention

²⁷ Switzerland, Commentaires et observations, https://legal.un.org/ilc/sessions/75/pdfs/french/iso_switzerland.pdf

²⁸ ILC, UN doc. A/77/10, General Commentary, p. 196, para. (7).

²⁹ Italics and strikethrough in the original.

³⁰ UN Doc., A/74/10 (2019).

and Punishment of Crimes against Humanity to elaborate and conclude a legally binding instrument on prevention and punishment of crimes against humanity, on the basis of those Draft Articles.³¹

For present purposes, it is relevant that Article 9 of the 2019 Draft Articles relating to crimes against humanity also included an obligation for the state which adopts coercive measures against a suspected perpetrator of crimes against humanity, including state officials, to notify their state of nationality:

Article 9. Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall, as appropriate, promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

The difference in approaches to the question of notifications adopted by the ILC in the two distinct set of draft articles is stark, if not contradictory.

On the one hand, the 2019 Draft Articles relating to crimes against humanity provide that it is an obligation of the state in the territory under whose jurisdiction a person, including a state official, alleged to have committed a crime against humanity is found to take that person ‘into custody or take other legal measures to ensure his or her presence’ (para.1). That state is also obliged, as per paragraph 3, to ‘immediately notify the States referred to in draft article 7, paragraph 1 [which includes the state of the official], of the fact that such a person is in custody and of the circumstances which warrant his or her detention’.

In this respect, the notification serves as a guarantee for a suspect taken into custody, yet without possibly jeopardizing the initial course of an investigation. As explained in section III.5 below, this approach is grounded in treaty law. While it safeguards the right to a fair trial, consular assistance and other human rights of the suspect, it also enables the state of the official to transmit an extradition request for a potential prosecution there, if preferred by the forum state. However, there is no requirement in draft article 9 relating to crimes against humanity to notify the state of the official *before* criminal proceedings are initiated or “coercive measures”, such as arrest and custody, are taken.

In Amnesty International’s view, in 2019 the ILC rightly decided, in its Draft Articles relating to crimes against humanity, that imposing notification duties before the start of any proceedings could undermine the whole investigation as such, and thereby be damaging to justice, truth and reparation.

In contrast, draft Article 10 of the Draft Articles on immunity of state officials from foreign

³¹ Res.79/122, adopted by the General Assembly on 4 December 2024.

criminal jurisdiction provides an obligation that such a notification ‘shall’ take place ‘before the competent authorities of the forum State initiate criminal proceedings or take coercive measures that may affect an official of another State’ (emphasis added).

Amnesty International firmly believes that such an *ab initio* obligation would run counter to the goals, recognized by the ILC itself in the Commentary to the present Draft Articles, of ‘consolidating the fight against impunity as a goal of the international community’ and ‘avoid[ing] that the immunity of State officials from foreign criminal jurisdiction results in impunity for the most serious crimes under international law’.³²

III.4. The choice facing the Commission: adopting a progressive development or codifying state practice

The notification obligation included in draft article 10 has been described by some states as being related to a progressive development of international law, in the sense of the ILC’s mandate (see above section I). Other states have provided that it is ‘entirely without grounding in State practice’.

France, for example, stated:

À titre liminaire, la France note que l’obligation de notification par l’État du for prévue dans le cadre du projet d’article 10 relève davantage du développement progressif du droit international que de la codification.³³

Germany commented:

[To] Germany the draft articles on procedural provisions and safeguards (part four) seem to constitute, for the most part, propositions of what the law ought to be rather than provisions firmly grounded in the practice of States.³⁴

And the United States of America declared:

The concerns with Draft Article 10 are exacerbated by the fact that Draft Article 14.2(a) purports to make Draft Article 10 notification a factor that States may consider in making immunity determinations, which is entirely without grounding in State practice.³⁵

In his Second Report, the special rapporteur acknowledges the progressive development

³² ILC, UN doc. A/77/10, General Commentary, p. 196, para. (7) (‘immunity of State officials applies bearing in mind that international law is a legal and congruent system. Therefore, in the elaboration of these draft articles, consideration must be given to existing rules in different areas of contemporary international law. In particular, account must be taken of the strides made in international criminal law in terms of defining and punishing the most serious crimes under international law, defining the principle of accountability as one of its constituent elements, and consolidating the fight against impunity as a goal of the international community. While the terms “immunity” and “impunity” are neither equivalent nor interchangeable, it is important to avoid that the immunity of State officials from foreign criminal jurisdiction results in impunity for the most serious crimes under international law.’).

³³ France, Commentaires et observations, para.45. (‘At the outset, France notes that the obligation of notification by the forum State provided for in draft Article 10 is more a matter of the progressive development of international law than of codification.’ – unofficial translation by Amnesty International.

³⁴ Germany, Comments and observations by the Federal Republic of Germany on the draft articles on Immunity of State officials from foreign criminal jurisdiction, November 2023, para.11, https://legal.un.org/ilc/sessions/75/pdfs/english/iso_germany.pdf

³⁵ *Supra* 24.

nature of, among others, the notification obligation included in draft article 10.³⁶

Again, it is worth noting the different view adopted by the Commission in its Commentary to article 9 of the 2019 Draft Articles relating to crimes against humanity. In that context, the Commission stated:

Draft article 9 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present. Paragraph 1 calls upon the State, upon being satisfied that the circumstances so warrant, to take the person into custody or take other legal measures to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. Such measures are a common step in national criminal proceedings, in particular to avoid further criminal acts and a risk of flight by the alleged offender, and to prevent tampering of evidence by the alleged offender.³⁷

Amnesty International believes that the ILC has an important role to play in the progressive development of international law. However, on this occasion, the proposed progressive development – the notification to the state of the official *before* the competent authorities initiate criminal proceedings or take coercive measures – is not warranted. Nor does such a proposal codify developing international law emerging from state practice or from ongoing international legal debates, including in the related context of discussions on 'preliminary measures' in the Draft Articles relating to crimes against humanity, where the issue of 'notification' has been well considered by states and other stakeholders. Indeed, the proposed notification obligation, as currently set out in draft article 10 of the articles on immunity of State officials, would – respectfully – mark a *regressive* development.

Therefore, rather than considering recourse to a progressive development, Amnesty International believes that the Commission should instead draw from state practice by enshrining what it itself described, in its Commentary to article 9 of the 2019 Draft Articles relating to crimes against humanity, as a 'common step in national criminal proceedings',³⁸ which is also part of established treaty law.³⁹

In this case, departing from state practice would hamper the prospect of effective individual accountability and the administration of international criminal justice, significantly increasing the possibility of impunity by providing for a legally unnecessary and unjustifiable role for states at the outset of a criminal process. In turn, this would significantly increase the prospect of suspects being able to evade arrest, destroy evidence, or take other measures to the detriment of any criminal justice process.

Finally, the organization is not aware of any national legislation, domestic jurisprudence or treaty law requiring the competent authorities of the forum state to provide prior notification to the state of the official when they intend to initiate criminal proceedings or take coercive measures against a suspect. The special rapporteur's Second Report does not include any such references.

III.5. The notification to the state of the official in treaty law

³⁶ *Supra* 7, para.91 ('The Special Rapporteur concurs with the observations by States that some of the proposals constitute progressive development of international law'). See also Jalloh CC, *supra* 4, observing that 'Part Four, procedural provisions and safeguards, is the longest and the most creative section of the draft articles'.

³⁷ *Supra* 29, p. 90.

³⁸ *Supra* 29, p. 90.

³⁹ See section III.5 below.

Even though Amnesty International considers that there is no need at all for a notification to the state of the official (and draft article 10 should be deleted), the organization recognizes that the approach taken by the Commission in the 2019 Draft Articles relating to crimes against humanity, which envisages a notification only *after* criminal proceedings have been initiated or a coercive measure has been taken against the suspect, is significantly preferable to draft article 10.

A paramount example of international treaty law is the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to which 175 states are parties. The CAT is particularly relevant as its definition of torture specifically mentions as perpetrators or instigators of acts of torture state officials or persons acting on the state's behalf.⁴⁰

With respect to notification obligations when a forum state exercises criminal jurisdiction, Article 6 of the CAT provides:

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

In the Commentary to article 9 of the 2019 Draft Articles relating to crimes against humanity, the Commission stated:

Treaties addressing crimes typically provide for such preliminary measures, such as article 6 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading

⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, New York, 10 December 1984. Entry into force: 26 June 1987. Article 1 ('1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application' [emphasis added]).

Treatment or Punishment.⁴¹

Amnesty International fully agrees with the Commission's view that article 6 of the CAT is *typical* of international treaties addressing crimes. As shown below, this is evidenced by several treaties, which provide for the obligation to notify the state of nationality of the suspect, without differentiating between state officials and non-state actors, only *after* the person has been taken into custody or criminal proceedings have been initiated.

Article 10 of the UN Convention for the Protection of All Persons from Enforced Disappearance (CPED),⁴² for instance, provides:

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.
2. A State Party which has taken the measures referred to in paragraph 1 of this article shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.
3. Any person in custody pursuant to paragraph 1 of this article may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

It is particularly worth mentioning that, strictly speaking, enforced disappearance, in the sense of Article 2 of the CPED, may only be committed by state officials or by 'persons or groups of persons acting with the authorization, support or acquiescence of the State', so the reference to the notification *a posteriori* in article 10(2) of the CPED includes state officials ('the person').

In addition, the crimes or offenses set out in the following treaties, which may be committed by either state officials or non-state agents, provide in all cases for the notification *after* custody or other coercive measures have taken place and thus constitutes state practice.

- 1970 Convention for the suppression of unlawful seizure of aircraft⁴³ (185 states parties);
- 1971 Convention for the suppression of unlawful acts against the safety of civil

⁴¹ ILC... Article 9. Preliminary measures when an alleged offender is present, Commentary, (5).

⁴² International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, New York, 20 December 2006.

⁴³ Convention for the suppression of unlawful seizure of aircraft, 860 UNTS 105, The Hague, 16 December 1970, article 6 ('4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State mentioned in Article 4, paragraph 1(c), the State of nationality of the detained person and, if it considers it advisable, any other interested States of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction').

aviation⁴⁴ (188);

- 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;⁴⁵
- 1979 International Convention against the Taking of Hostages⁴⁶ (176);
- 1979 Convention on the physical protection of nuclear material⁴⁷ (164);
- 1998 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation⁴⁸ (166);
- 1997 International Convention for the Suppression of Terrorist Bombing⁴⁹ (170);

⁴⁴ Convention for the suppression of unlawful acts against the safety of civil aviation, 974 UNTS 178, Montreal, 23 September 1971, article 6 ('4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in Article 5, paragraph 1, the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention').

⁴⁵ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 167, New York, 14 December 1973, article 6 ('1. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. Such measures shall be notified without delay directly or through the Secretary-General of the United Nations to: (a) The State where the crime was committed; (b) The State or States of which the alleged offender is a national or, if he is a stateless person, in whose territory he permanently resides; (c) The State or States of which the internationally protected person concerned is a national or on whose behalf he was exercising his functions; (d) All other States concerned; and (e) The international organization of which the internationally protected person concerned is an official or an agent').

⁴⁶ International Convention against the Taking of Hostages, 1316 UNTS 205, New York, 17 December 1979, Article 6 (1) and (2).

⁴⁷ 1979 Convention on the physical protection of nuclear material, UNTS, Vienna, 26 October 1979, Article 9 ('Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take appropriate measures, including detention, under its national law to ensure his presence for the purpose of prosecution or extradition. Measures taken according to this article shall be notified without delay to the States required to establish jurisdiction pursuant to article 8 and, where appropriate, all other States concerned').

⁴⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 222, Rome, 10 March 1988, article 7 ('5. When a State Party, pursuant to this Article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with Article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in Paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction').

⁴⁹ International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, New York, 15 December 1997, article 7 ('6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 6, paragraphs 1 and 2, and, if it considers it advisable, any other interested States Parties, of the fact that that person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 of the present article shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction').

- 1999 International Convention for the Suppression of the Financing of Terrorism⁵⁰ (190);
- 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries⁵¹ (38).

More recently, the Ljubljana-The Hague Convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes (Ljubljana-The Hague Convention),⁵² without differentiating between state officials and non-state agents, similarly provides – in terms of notification – for an obligation to inform the state of nationality of the suspect only *after* the investigated person is detained:

Article 13. Preliminary measures

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed a crime to which it applies this Convention in accordance with article 2 is present shall take the person into custody or take other legal measures to ensure the person's presence, in accordance with its domestic law. The custody and other legal measures may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

(...)

4. When a State Party, pursuant to the provisions of this article, has taken a person into custody, it shall immediately notify the States Parties referred to in article 8, paragraphs 1 and 2, of the fact that such a person is in custody and of the circumstances which warrant the person's detention. The State Party which makes the preliminary inquiry contemplated in paragraph 2 shall, as appropriate, promptly report its findings to said States Parties and shall indicate whether it intends to exercise jurisdiction.

III.6. Conclusion

Amnesty International considers that imposing on the forum state an obligation to notify the state of the official *before* criminal proceedings are initiated or coercive measures are adopted against a suspect has no basis in international or national law and that, consequently, draft article 10 should be deleted. If the Commission did not agree with such a recommendation,

⁵⁰ International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197, Article 9 ('6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction').

⁵¹ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 2173 UNTS 65, New York, 4 December 1989, article 10 (2. When a State Party, pursuant to this article, has taken a person into custody or has taken such other measures referred to in paragraph 1 of this article, it shall notify without delay either directly or through the Secretary-General of the United Nations: a) The State Party where the offence was committed; b) The State Party against which the offence has been directed or attempted; c) The State Party of which the natural or juridical person against whom the offence has been directed or attempted is a national; d) The State Party of which the alleged offender is a national or, if he is a stateless person, in whose territory he has his habitual residence; e) Any other interested State Party which it considers it appropriate to notify').

⁵² Adopted in Ljubljana on 26 May 2023 (not yet entered into force), 40 states are so far signatories, <https://diplomatie.belgium.be/en/treaties/treaties-which-belgium-serves-depositary>

Article 10 should be modified to impose an obligation of notification *after* custodial measures have been adopted against the suspect by the forum state. This constitutes established state practice regarding crimes under international law and other crimes, as demonstrated by the treaty law cited above. The Commission itself has also described this practice as ‘a common step in national criminal proceedings’ in its 2019 Draft Articles on prevention and punishment of crimes against humanity.

Amnesty International submits that such early and especially *ab initio* ‘warning’ included in draft article 10 could have the effect of rendering criminal investigations against foreign state officials de facto impossible.

IV. Recommendations

Amnesty International recommends that the ILC, in the context of adopting the Draft articles on immunity of state officials from foreign criminal jurisdiction on second reading:

1. adopts amended draft article 7 as proposed by the special rapporteur in his Second Report, yet with the addition of a new provision permitting the application of the exception to immunity *ratione materiae* to any new crimes under international law which could emerge in the future;
2. delete draft article 10 or replace it with a new article drafted in conformity with established treaty law on the matter, according to which an obligation to notify the state of the official arises only after – not before – the forum state has taken coercive measures against a suspect.