

WRITTEN COMMENTS OF REDRESS AS AMICUS CURIAE

CASE REFERENCE NUMBER: XII KP 1852/25

Sąd Okręgowy w Warszawie

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A. INTRODUCTION

1. This amicus brief aims to assist the Court in considering whether certain immunities recognized by international law for foreign public officials prevent Polish prosecutors opening an investigation into allegations of international crimes committed in Gaza following criminal complaints submitted by victims in Poland. These proceedings raise complex and important questions of international law as regards the nature and scope of immunities afforded to public officials in foreign courts for the alleged commission of international crimes.
2. Immunities of certain State officials from foreign criminal jurisdiction have a firm basis and long history as principles of international law. However, these principles are inconsistent with another principle of international law accepted as having the status of a jus cogens norm: that there should be no impunity for crimes of concern to the international community as a whole, particularly genocide, crimes against humanity, war crimes, torture and enforced disappearance, which achieved international consensus after 1945. Further, there is an internationally accepted right of victims to an effective remedy and to reparation for international crimes, which includes access to criminal justice. Consequently, there is an increasing trend in international law not to recognise immunity of public officials from criminal prosecution in foreign jurisdictions for international crimes. This can raise complex questions for national prosecutors seeking to navigate the State's different obligations under international law.
3. To assist in clarifying these questions, the amicus first sets out the duties of States under international law to investigate and prosecute international crimes, and the implications of the rights of victims to an effective remedy in that regard. The amicus then goes on to describe the relevant principles of international law relating to the immunities (both functional and personal, as defined in section 4 below) of certain State officials and traces the evolution of an exception for international crimes that has become accepted in both State practice and norm development in recent years. In our conclusion, we draw the implications of this current trend in international law for national jurisdictions considering whether to open investigations into allegations of international crimes.
4. At the outset, REDRESS notes the strong expressions Poland has made on the international stage emphasising the country's commitment to the rule of law, and specifically to accountability for international crimes.¹ Poland has also demonstrated such commitment by its actions. Just days after Russia's full-scale invasion of Ukraine in 2022, the Polish Prosecutor's Office opened an investigation into alleged international crimes committed in Ukraine. Subsequently, Poland joined and has actively participated

¹ A recent example is Poland's Statement to the Sixth Committee, 79th United Nations General Assembly, on 'The Rule of Law at the National and International Levels', available at: https://www.un.org/en/ga/sixth/79/pdfs/statements/rule_of_law/16mtg_poland.pdf?utm

in the Joint Investigation Team established by Eurojust, collecting evidence that could be used to bring perpetrators to justice, whether in international or national courts.

B. SUBMISSIONS

1. International law prohibits international crimes absolutely and imposes duties on States to investigate and prosecute them

5. The prohibition of international crimes including war crimes, genocide, crimes against humanity, torture and enforced disappearance is a peremptory norm of general international law.²
6. Alongside this prohibition, States have a duty to investigate, prosecute and punish violations of international human rights law and international humanitarian law. The Preamble to the Rome Statute of the International Criminal Court (ICC) recalls that “*the most serious crimes of concern to the international community as a whole must not go unpunished*” and that “*it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes*”. Indeed, Poland is party to a number of international treaties that not only impose an obligation to exercise criminal jurisdiction over violations, but also clearly disregard the official capacity of a perpetrator, including the Geneva Conventions, the Genocide Convention, the Torture Convention and the Convention on Enforced Disappearance.³ The duty to investigate and prosecute international crimes is also part of customary International law.⁴
7. REDRESS highlights that States’ duties, as formulated in international instruments, comprise a two-step process. They require States to, in the first instance, investigate alleged crimes “*effectively, promptly, thoroughly and impartially*” and then, on the basis of such investigation, where appropriate, proceed to take relevant action against those found to be responsible in accordance with domestic and international law.⁵ In other words, opening an investigation is a necessary first step and a self-standing obligation that may or may not lead to establishing that specific crimes have been committed, identifying responsible individuals or entities and proceeding to prosecute them.
8. Consequently, Poland’s obligation to exercise its criminal jurisdiction over international crimes carries an obligation to conduct an investigation, regardless of the potential immunity of any possible suspect.

² The International Law Commission set out a non-exhaustive list of peremptory norms of international law (*jus cogens*) in ‘Report of the International Law Commission on the Work of its 73rd Session’ (18 April-3 June and 4 July-5 August 2022), UN Doc A/77/10, Conclusion 23, page 16. On enforced disappearance, see UN Human Rights Council, Working Group on Enforced or Involuntary Disappearances, ‘Universal criminal jurisdiction in cases of enforced disappearance’, A/HRC/60/CRP.2, 20 August 2025, Para 13.

³ See Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs to the Republic of Poland on immunities of State officials from foreign criminal jurisdiction, Warsaw, 27 April 2015, pages 15-16.

⁴ International Committee of the Red Cross International Humanitarian Law Databases, Rules of Customary International Law, Rule 158, Prosecution of War Crimes: States must investigate alleged war crimes over which they have jurisdiction.

⁵ UN Basic Principle and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Resolution 60/147, 16 December 2005 (UN Basic Principles), Article 3(b).

2. Victims of international crimes have the right to an effective remedy, including access to justice

2.1 Rights of victims under international law

9. It is well-established in international human rights law and international humanitarian law that victims of human rights violations, including international crimes, have the right to an effective remedy.⁶ This right includes the right to “*equal and effective access to justice*,” and “*adequate, effective and prompt reparation for harms suffered*.”⁷ The right to an effective remedy is fundamental and essential to ensuring the effective protection of all other human rights.⁸
10. The right to an effective remedy encompasses the right to both criminal and civil remedies, as they serve distinct purposes and achieving adequate and effective reparation for the harms suffered typically will require both.⁹

2.2 Access to justice under the ECHR

11. According to the jurisprudence of the European Court of Human Rights (ECtHR) on Article 6(1) of the European Convention on Human Rights (ECHR) (Right to a fair trial), access to justice encompasses the right of access to a court, which must be “*practical and effective*.”¹⁰ This is particularly important given the prominent place held in a democratic society by the right to access to justice.¹¹
12. While the right to access justice is not absolute, any limitations on a victim’s access to justice must not so reduce or restrict the victim’s access such that the very essence of the right is impaired.¹² Moreover, the ECtHR has held that such limitations must pursue a legitimate aim and that the means employed must bear a reasonable relationship of

⁶ Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14; Convention (IV) respecting the Laws and Customs of War on Land, Article 3; International Committee of the Red Cross, Customary International Humanitarian Law, Rule 150.

⁷ UN Basic Principles, Article 11.

⁸ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: a Practitioners’ Guide* (2018) 53.

⁹ *García Lucero et al. v Chile*, Preliminary Objection, Merits and Reparations, Judgment of 28 August 2013, Series C No 267 (IACtHR) paras 196, 222; *Ximenes López v Brazil*, Judgment of 4 July 2006, Series C No 149 (IACtHR) paras 204-205; *Órdenes Guerra et al. v Chile*, Merits, Reparations and Costs, Judgment of 29 November 2018, Series C No 372 (IACtHR) para 89. *See also* Committee on the Elimination of Discrimination Against Women, General Comment No 33, UN Doc CEDAW/C/GC/33, para 19b.

¹⁰ *Bellet v France*, App no 23805/94 (ECtHR, 4 December 1995) para 38. *See also Jones and others v United Kingdom*, Apps no 34356/06 and 40528/06 (ECtHR, 14 January 2014) para 187: “In cases where the application of the principle of State immunity from jurisdiction restricts the exercise of the right of access to a court, the Court is accordingly required to ascertain whether the circumstances of the case justified such restriction.”

¹¹ *Aït-Mouhoub v France*, App no 22924/93 (ECtHR, 28 October 1998) para 52. *See also Ahmed and others v HM Treasury* [2010] UKSC 2, para 146 (saying “[a]ccess to a court to protect one’s rights is the foundation of the rule of law”).

¹² *Philis v Greece*, Apps no 12750/87, 13780/88, 14003/88 (ECtHR, 27 August 1991) para 59; *De Geouffre de la Pradelle v France*, App no 12964/87 (ECtHR, 16 December 1992) para 28; *Stanev v Bulgaria* [GC] App no 36760/06 (ECtHR, 17 January 2012) para 230; *Baka v Hungary* [GC] App no. 20261/12 (ECtHR, 23 June 2016) para 120.

proportionality to the stated aim.¹³ As we will demonstrate below, the evolution of international law on functional immunity of State officials (see the distinction between different types of immunity in section 4 below) means that this type of immunity cannot apply to international crimes. Consequently, in cases of international crimes, functional immunity cannot pursue a legitimate aim, and its application constitutes a disproportionate restriction of access to justice under Article 6(1).

13. The ECtHR takes a range of factors into account in making an Article 6(1) assessment, including the seriousness of the violations seeking to be addressed by the victims¹⁴ and whether alternative means of redress are available.¹⁵ While the ECtHR has held that the availability of an alternative remedy is not dispositive as to whether a grant of immunity from jurisdiction violates Article 6(1), it is a relevant consideration, particularly in cases concerning serious human rights violations.¹⁶
14. REDRESS submits that the right of victims of international crimes to an effective remedy, including criminal remedies, cannot be restricted by applying functional immunities of State officials, even less so in cases where, as is the case for Palestinian victims of international crimes in Gaza, no alternative means are available to the victims to pursue remedies (criminal or civil) in the State where such international crimes took place.¹⁷ Finding otherwise would strip victims of international crimes of the right to an effective remedy, rendering Article 6 illusory, with significant implications for the effective protection of other rights enshrined in the ECHR.
15. Consequently, limiting victims' access to justice in such circumstances would lack a legal basis and therefore constitute a breach of Article 6(1) of the ECHR.

3. International law provides for individual and State responsibility for international crimes, and distinguishes between individual (functional and personal) and State immunity

3.1 Development of international law on individual responsibility for international crimes

16. International crimes, including war crimes, give rise to both individual and State responsibility under international law.¹⁸ In recent years, the international law around

¹³ *Lupeni Greek Catholic Parish and ors v Romania* [GC] App no 76943/11 (ECtHR, 29 November 2016) para 89.

¹⁴ See *Osman v the United Kingdom*, App no 23452/94 (ECtHR, 28 October 1998) paras 150-152.

¹⁵ *Waite and Kennedy v Germany*, App no 26083/94 (ECtHR, 18 February 1999) paras 68-74; *De Jorio v Italy*, App no 73936/01 (ECtHR, 3 June 2004) paras 45, 56; *Ielo v Italy*, App no 23053/02 (ECtHR, 6 December 2005) paras 44, 53.

¹⁶ See *JC and ors v Belgium*, App No 11625/17 (ECtHR, 28 February 2022) para 71; see also (albeit on diplomatic immunities): *Waite and Kennedy v Germany*, App no 26083/94 (ECtHR, 18 February 1999) para 68; *Beer and Regan v Germany*, App no 28934/95 (ECtHR, 18 February 1999) para 58.

¹⁷ See for example UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of Occupied Palestinian Territories: Note by the Secretary General, A/71/352, 23 August 2016, para 64.

¹⁸ See developments since Art 7 of the Charter of the International Military Tribunal at Nuremberg (1945) 82 UNTS 279, e.g. Arts 27(1) of the Rome Statute and Arts 4(1), 5 and 7 of the UN Convention Against Torture firmly establishing individual responsibility for crimes under international law. See also, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (noting that the articles are "without prejudice to the individual responsibility under international law of anyone acting on behalf of a State"); Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, pursuant to Security Council Resolution 1564 of 18 September 2004 (25

individual responsibility for war crimes and other international crimes has been further developed and strengthened,¹⁹ critically affecting the law relating to barriers to the exercise of jurisdiction to establish individual responsibility, including amnesties,²⁰ statutes of limitations²¹ and, as we will demonstrate below, immunities.

3.2 Distinction between immunities *ratione personae* and *ratione materiae*, and between individual and State immunity

17. The immunity of the State and the immunity of individuals, whether personal immunity of high-ranking officials (*ratione personae*) or functional immunity (*ratione materiae*) are distinct legal issues that should be considered separately due to their different purposes and scope.
18. The rationale for State immunity is often cited as sovereign equality and non-intervention in the affairs of other States, international relations, and reciprocity.²² Immunities attaching to individuals are not intended for the benefit of the individuals concerned, but to protect acts of State officials in the performance of their duties. Functional immunity is limited to acts performed in an official capacity and may remain applicable even when the official leaves office. Their main justification is to preclude the immunity of the State itself being circumvented.²³ Personal immunities apply to acts performed by the individual even in a private capacity, but cease as soon as the official no longer holds the position. They typically extend to Heads of State, heads of government, and foreign ministers in office, and their justification is to ensure the individuals concerned are able to perform their functions without hindrance while in office.²⁴
19. As elaborated below, the distinction between State and functional immunity has been further established by the work of the International Law Commission (ILC) in its draft articles on immunity of State officials from foreign criminal jurisdiction.²⁵ This position is reflected in recent State practice.²⁶
20. In the matter currently before the Court, concerning the question whether to open an investigation that may involve individual responsibility of State officials for alleged

January 2005) para 593 (noting that serious violations of international humanitarian law and human rights entail the liability of the perpetrator and the State, including compensation to victims).

¹⁹ See EU Genocide Network Secretariat, '20 Years On: Main Developments in the Fight against Impunity for Core International Crimes in the EU' (May 2022) 4.

²⁰ See, e.g. OHCHR, 'Rule-of-law Tools for Post-Conflict States' (2009) 11.

²¹ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1970); Rome Statute of the International Criminal Court. In relation to torture, see *Demir and Baykara v Turkey* [GC] App no 34503/97 (ECtHR, 12 November 2008) para 73.

²² *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment of 3 February 2021) ICGJ 434, paras 53-57; *Al-Adsani v. the United Kingdom*, App no 35763/97 (ECtHR, 21 November 2001) para 54.

²³ See e.g. *Jones and Others v United Kingdom*, Apps no 34356/06 and 40528/06 (ECtHR, 14 January 2014), para 202.

²⁴ See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgement) ICJ Rep 2002, paras 54-55.

²⁵ ILC, 'Report of the International Law Commission on the Work of its 73rd Session' (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10.

²⁶ Case no 3 StR 564/19 (Germany, Federal Court of Justice, 28 January 2021). See also Claus Kress, 'On Functional Immunity of Foreign Officials and Crimes under International Law' (Just Security, 31 March 2021).

international crimes, the types of immunity at stake are personal and functional immunity.

4. The evolution of international law on functional immunity shows that this type of immunity cannot apply to international crimes

21. There is an emerging norm of customary international law, currently in the process of being crystallised by the ILC and confirmed by recent jurisprudence in national courts such as in France and Germany, carving out an exception to functional immunities (immunities *ratione materiae*) for serious crimes under international law including genocide, crimes against humanity and war crimes, on the basis that such acts cannot be considered to fall within the scope of official functions.

4.1 State Practice

22. Decisions of national courts from the post-World War II period and during the last 25 years have set aside functional immunity in order to prosecute foreign State officials for international crimes.
23. Poland has itself made a significant contribution to State practice in this regard, as Poland reminded the ILC in 2024.²⁷ In its submission, Poland recalled that, in the framework of the United Nations War Crimes Commission, the country had submitted formal indictments against prominent German Nazi leaders. Furthermore, the Polish submission noted :

*"... just after the conclusion of the Second World War, Poland significantly contributed to the development of law relating to accountability for the crime of aggression before domestic courts. In particular, the trial of Arthur Greiser, which took place in June and July of 1946 – i.e., before the Nuremberg Tribunal issued its verdicts – involved responsibility for crimes against peace before a Polish court (in this case, the Supreme National Tribunal). Similar trials were held in 1947 for Ludwik Fischer and in 1948 for Albert Forster and Josef Bihler before the Supreme National Tribunal. In all four cases, members of the German Nazi party (NSDAP) – holding senior positions in the administration of the occupied territories – were convicted for crimes against peace."*²⁸

24. The last 25 years have seen an intensive emergence of State practice. In 1990 in *Pinochet*, the House of Lords, then the UK's highest court, determined that former Chilean Head of State General Pinochet – whose extradition had been sought by Spain, Switzerland, France, and Belgium to face charges of torture - could not assert functional immunity with respect to torture.²⁹ Courts in France, Italy, the Netherlands, and Spain have since followed suit, convicting both current and former foreign officials of crimes under international law.³⁰ Other courts in France, Italy, Spain, and Sweden have issued

²⁷ International Law Commission, Seventy-Fifth session, Immunity of State officials from foreign criminal jurisdiction, Comments and observations received from Governments, UN doc A/CN.4/771, 7 May 2024, p.13.

²⁸ *Ibid.*

²⁹ *R v Bow Street Stipendiary Magistrate and others ex p Pinochet Ugarte (No 3)* [1999] 2 WLR 827 (he could not claim personal immunity since he was out of office).

³⁰ France: Ordonnance de mise en accusation de Khaled Ben Saïd devant la Cour d'assises du Bas Rhin, No. J.20009/01, No. 5/02/12, 15 December 2008; Italy: see Amnesty International, 'Annual Report 2001' (AI Index: POL 10/0001/2001) 139 (conviction by Rome Court of Assizes of seven former Argentine officials for murder and abduction of seven Italian citizens); Netherlands: *H v Public Prosecutor*, Case BG1476, 07/10063 (Supreme Court, 2008) (upholding conviction of former senior

arrest warrants for current and former officials for such crimes without functional immunity presenting an obstacle to their issuance.³¹

25. In the past decade, courts in EU member States have repeatedly authorised investigations, issued arrest warrants, and convicted former foreign officials of crimes under international law. To name a few examples, in 2017, a Dutch court found Eshetu Alemu, a former member of the Provisional Military Administrative Council in Ethiopia, guilty of war crimes.³² More recently, Dutch courts convicted former State officials in relation to war crimes in Afghanistan and Syria, among others.³³ In 2021 and 2022, German courts convicted former Syrian intelligence officials for crimes against humanity.³⁴ A Lithuanian court convicted former foreign Soviet officials of war crimes and crimes against humanity in 2022.³⁵ Also in 2022, a Swedish court found Hamid Noury, a former Iranian official, guilty of war crimes.³⁶ In 2023, the French Cour de Cassation confirmed the referral of a former Rwandan official to criminal courts for genocide and crimes against humanity,³⁷ and the Office of the Attorney General in Switzerland indicted former Algerian Minister of Defence, Khaled Nezzar.³⁸ The same year, a Belgian court found former Guatemalan ministers and military leaders guilty of crimes against humanity.³⁹ In 2024, a Swiss court convicted former Gambian Interior Minister Ousman Sonko of crimes against humanity.⁴⁰
26. In 2021, the German Federal Court of Justice held that “*State officials, at least to the extent that they hold subordinate positions, do not enjoy functional immunity under*

intelligence official for torture); Spain: Sentencia no 798/2007 (Tribunal Supremo, Sala de lo Penal, 2007) (conviction of former Argentine naval officer, Adolfo Scilingo, for kidnapping and murder).

³¹ France: Deliverance de mandats d’arrêt internationaux, Ordonnance de soit-communiqué (Tribunal de grande instance, Paris, 17 November 2006) (arrest warrant issued in November 2006 for eight current Rwandan officials [but not the President on the ground of personal immunity] and one former official for killings and various terrorist acts in case with eight *parties civiles* seeking civil reparation); Italy: Bill Van Auken, ‘Italian judge seeks trial of 140 over Operation Condor repression’ (World Socialist Web Site, 15 January 2008) (arrest warrants issued for current and former officials in Argentina, Bolivia, Brazil, Chile, Peru and Uruguay suspected of committing torture and enforced disappearances); Spain: see ILC, ‘Second report on immunity of State officials from foreign criminal jurisdiction’ UN Doc A/CN.4/631* (10 June 2010) n 190 (“Spanish courts have issued arrest warrants for current and former officials from Argentina, Chile, Guatemala”) and Project MUSE, *Genocide: New Perspectives on Its Causes, Courses and Consequences* (Amsterdam University Press, 2016) n 65 (Spanish Investigative Judge Andreu Merelles indicted 40 high-ranking Rwandan officials); Sweden: see Amnesty International, ‘Sweden: End Impunity Through Universal Jurisdiction’ (2009) 87 (international arrest warrant and extradition request issued in November 2001 for an Argentine naval officer for the enforced disappearance of a Swedish citizen).

³² See TRIAL International, ‘Universal Jurisdiction Annual Review 2024’ 89.

³³ See for instance Case No ECLI:NL:RBDHA:2024:575 (Hague District Court, 22 January 2024); Case No ECLI:NL:RBDHA:2022:4976 (Hague District Court, 14 April 2022).

³⁴ Case no 1 StE 3/21 (Germany, Koblenz Higher Regional Court, 24 February 2021); Case no 1 StE 9/19 (Germany, Koblenz Higher Regional Court, 13 January 2022).

³⁵ Case no 2K-7-39-1073/2022 (Lithuania, Supreme Court, 30 June 2022).

³⁶ See TRIAL International, ‘Universal Jurisdiction Annual Review 2024’ 96.

³⁷ Ibid 45. Note also the 2024 French arrest warrant against Bashar al-Assad, ‘French court upholds arrest warrant for Syria’s Bashar al-Assad’ (Aljazeera, 26 June 2024).

³⁸ Ibid 100 (note that Khaled Nezzar passed away in December 2023, extinguishing the criminal proceedings).

³⁹ See Impunity Watch, ‘Belgium: Guatemalan officials found guilty of crimes against humanity in historic trial’ (18 December 2023).

⁴⁰ See Human Rights Watch, ‘Gambia: Landmark Swiss Conviction of Ex-Official’ (15 May 2024).

*customary international law in foreign criminal proceedings for war crimes [...].*⁴¹ In a 2024 order, the Federal Court of Justice extended this holding to apply to all foreign State officials “*regardless of status and rank*” and to all international crimes.⁴²

27. Most recently, in July 2025, the Plenary Assembly of the French Cour de Cassation (Supreme Court) issued two landmark decisions in which it examined whether, under international law, there are exceptions to functional immunity from criminal jurisdiction where the acts being prosecuted constitute international crimes.⁴³ The cases related to former Syrian President Bashar al-Assad and the former director of the Syrian central bank, against whom French prosecutors wanted to bring charges relating to chemical weapons attacks on civilians in Syria. After reviewing State practice and the work of the ILC, the Court concluded “*It can be deduced from these elements that there is significant State practice consisting in setting aside, as a matter of law, functional immunity in the case of international crimes.*”⁴⁴ This development in international custom, the Court went on to say, “*to which the Cour de cassation intends to contribute, defines a new balance between immunities and the fight against impunity*”, and consequently, “*the principle of functional immunity from jurisdiction in criminal matters cannot be invoked in the case of prosecutions for genocide, crimes against humanity and war crimes*”.⁴⁵
28. From the above it is evident that if it were to decline to investigate in the current case on the grounds of functional immunity, Poland would find itself out of step not only with its own previous practice in the post WWII period, but also with jurisprudence from numerous other national jurisdictions over the past 25 years. These jurisdictions have all reached the same conclusion that a new norm of international law has been formed,⁴⁶ which, as such, would be binding on all States. This would be a relevant factor in considering whether Poland had breached the victims’ right to access to justice under Article 6(1) of the ECHR (see section 2.2. above).

4.2 ILC Draft Articles on the immunity of State officials from foreign criminal jurisdiction

29. In 2007, the ILC decided to include the topic of the Immunity of State Officials from Foreign Criminal Jurisdiction in its programme of work. In 2016, the ILC Special Rapporteur on the issue expressed the view that “*the commission of international crimes may indeed be considered a limitation or exception to State immunity from foreign criminal jurisdiction based on a norm of international customary law.*”⁴⁷ She

⁴¹ Case no 3 StR 564/19 (Germany, Federal Court of Justice, 28 January 2021). See also Claus Kress, ‘On Functional Immunity of Foreign Officials and Crimes under International Law’ (Just Security, 31 March 2021).

⁴² Isabel Walther, ‘Functional Immunity Exceptions for Crimes Under International Law – New Developments in German Legislation and Case Law Raising Questions Concerning the Identification of Customary International Law’ (EJIL: Talk!, 5 August 2024); see also Claus Kress, Peter Frank and Christoph Barthe, ‘Functional immunity of foreign State officials before national courts: a legal opinion by Germany’s Federal Public Prosecutor General’ (2021) 19 JICJ697, 700-716.

⁴³ Cour de cassation Plenary Assembly, Appeal No.24-84.071, Ruling no.684 B+R, 25 July 2025, para 15 (English translation from the original French).

⁴⁴ Ibid, para 31.

⁴⁵ Ibid, paras 32-33.

⁴⁶ Article 38 of the Statute of the International Court of Justice sets out the ways in which norms of international law can be established.

⁴⁷ ILC, ‘Fifth report on immunity of State officials from foreign criminal jurisdiction’ (14 June 2016) UN Doc A/CN.4/701, para 189.

reached this conclusion after carrying out an in-depth review of relevant State practice and *opinio juris*.⁴⁸

30. At the time, in 2015, Poland had submitted an Opinion by a Legal Advisory Committee to the Minister of Foreign Affairs, cited above, which affirmed its view that *“There is no doubt that a tendency to exclude the immunity ratione materiae in case of international crimes, such as genocide, crimes against humanity, war crimes, torture, enjoys increasing support”*, and that the Committee was in favour of this trend.⁴⁹
31. In 2022, the ILC published draft articles on the immunity of State officials from foreign criminal jurisdiction. Draft Article 7 provides that *“immunity ratione materiae from the exercise of foreign criminal jurisdiction shall not apply in respect of”* war crimes, crimes against humanity, and genocide, among others.⁵⁰ In its commentary to this Article, the ILC explained that *“there has been a discernible trend towards limiting the applicability of immunity from jurisdiction ratione materiae in respect of certain types of behaviour that constitute crimes under international law,”* reflected in the legislation and judicial decisions of many States.⁵¹ While the ILC continues its consideration of the draft articles, the broad support for Article 7, including by Poland which reiterated its 2015 position,⁵² makes it likely the provision will be adopted.⁵³
32. In its decision of 8 May 2025, the Polish Regional Prosecutor’s Office cites the International Court of Justice’s (ICJ) Arrest Warrant case⁵⁴ as authority for deciding to refuse to initiate proceedings in the present case. The ILC has considered the implications of the Arrest Warrant decision in the context of their work on the draft articles on Immunity of State Officials from Foreign Criminal Jurisdiction. In two reports, ILC Special Rapporteur Concepción Escobar Hernández discusses the case and cites with approval the separate, dissenting opinions of several judges, in which they questioned whether serious international crimes can be regarded as official acts and asserted that functional immunity could not apply to war crimes, crimes against humanity and genocide.⁵⁵ Further, the Arrest Warrants case was specifically considered in a number of the cases cited above but found not to present a bar to prosecution of foreign officials for international crimes in cases involving functional immunity.⁵⁶ These developments in norms and State practice make it crystal clear that the ICJ Arrest Warrant case cannot now be considered an authority for asserting that functional immunity presents a bar to prosecution of foreign State officials in national courts.

⁴⁸ See *ibid* paras 181-189.

⁴⁹ Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction, Warsaw, 27 April 2015, pages 13-14.

⁵⁰ ILC, ‘Report of the International Law Commission on the Work of its 73rd Session’ (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10, 229, Article 7.

⁵¹ *Ibid* 230-232, fn 1012.

⁵² ILC, Immunity of States from foreign criminal jurisdiction, Comments and observations received from Governments, A/CN.4/771, 7 May 2024, p.13.

⁵³ ILC, Report of the work of the seventy-sixth session (2025), A/80/10, Chapter V, p.33.

⁵⁴ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgement) ICJ Rep 2002.

⁵⁵ Fourth and Fifth Reports on the Immunity of State Officials from Foreign Criminal Jurisdiction, A/CN.4/SER.A/2015/Add.1 (Part 1) at pg. 10, p. 37-38, and A/CN.4/701/2016 at pg. 121, p. 69.

⁵⁶ For instance, in a decision of 2024, the German Federal Court of Justice explicitly distinguished functional immunity from the unrestricted personal immunity that certain officials are entitled to as mentioned in the Arrest Warrants case: Order on first detention review of Ahmad H, AK 4/24, 21 February 2024, para 53.

5. Personal immunities for international crimes are not intended to lead to impunity

33. In this amicus, REDRESS has described the general shift in international law that has seen a strengthening of the prohibitions on international crimes and of State obligations to exercise their jurisdiction in order to investigate, prosecute and punish perpetrators, and how it has involved a narrowing of the applicability of bars to prosecution such as immunities. While an extension of the exception for international crimes to personal immunities, which attach to Heads of State, heads of government and foreign ministers while in office, has not yet achieved consensus, personal immunities should not equate to impunity for international crimes.
34. However, in recent years it has come to light that there is some highly relevant State practice from the post WWII period, and that Poland itself contributed to it. As Poland reminded the ILC in 2024, in the framework of the United Nations War Crimes Commission, the country submitted formal indictments against Adolf Hitler alongside other Nazi leaders.⁵⁷ The Commission provided a legal opinion in which it discarded as “irrelevant” the doctrines of Head of State immunity in the present case.⁵⁸ On this basis, while still a sitting Head of State, Adolf Hitler was indicted for war crimes by Poland, Belgium and Czechoslovakia in the winter of 1944-45, supported by the other 13 members of the War Crimes Commission. It may be highly significant that the legal documents, which included legal submissions by member States, were sealed for decades, until the 2010s, so were not available to the ICJ when it considered the Arrest Warrants case in 2002.⁵⁹
35. Furthermore, while the French Cour de Cassation, in its recent ruling on immunities mentioned above, did not yet find sufficient basis in international law to establish an exception to personal immunity from criminal jurisdiction before foreign courts in cases of international crimes, it emphasised that such immunities do not equate to impunity. Specifically, the Court said, such immunities should not preclude domestic courts of the protected officials, and international courts such as the ICC from exercising their jurisdiction.⁶⁰ The ICC has in fact issued arrest warrants, not only for Mr Netanyahu but also for Vladimir Putin and, while he was sitting Head of State of Sudan, Omar Al Bashir. This poses an obligation on all ICC Member States to cooperate in the arrest and surrender of these individuals should they travel through territories under their jurisdiction.
36. The French court also emphasised that personal immunities are limited in time, to the time period during which the person is in function. After they leave office, personal immunities are no longer applicable and the immunity becomes functional, and thus subject to the exception in cases of international crimes. Consequently, the Court ordered that a new arrest warrant could now be issued by French authorities against Bashar al-Assad, now a former Head of State, concerning international crimes he allegedly committed while in office. Other examples of where personal immunities became functional once a Head of State left office and a foreign court proceeded to

⁵⁷ ILC, Immunity of States from foreign criminal jurisdiction, Comments and observations received from Governments, A/CN.4/771, 7 May 2024, p.13.

⁵⁸ Dan Plesch, ‘An Important Past: Since Hitler, Heads of State have no immunity’, Justice in Conflict, 26 September, 2024, available online at: <https://justiceinconflict.org/2024/09/26/an-important-past-since-hitler-heads-of-state-have-no-immunity/>

⁵⁹ Ibid.

⁶⁰ Cour de cassation Plenary Assembly, Appeal No.24-84.393, Ruling no.685 B+R, 25 July 2025, especially paras 35-36.

exercise their jurisdiction over them for international crimes include former Chilean President Augusto Pinochet mentioned above, charged in four European jurisdictions for torture; and former President of Chad Hissène Habré, prosecuted in the Extraordinary African Chambers.⁶¹ There are also examples of former Heads of State prosecuted for international crimes in their own countries after leaving office.⁶²

C. CONCLUSION

37. REDRESS submits that there is no reason under international law that the possible existence of a procedural obstacle (personal immunity of a Head of State in office) to prosecuting one of the individual suspects named by the applicants should prevent the opening of an investigation by Polish prosecutors into the crimes alleged in the Notice of commission of crimes.
38. First, REDRESS observes that at the moment of opening an investigation, it cannot be known whether or not the issue of any immunities will arise. As noted above, the purposes of a criminal investigation are, in Poland as elsewhere, firstly to determine whether one or more criminal acts have been committed, and then to identify who is responsible for such crime(s) and whether they can be prosecuted. In the present proceedings, the applicants have identified three individuals who they believe to be responsible for the crimes they allege, but an investigation by the Public Prosecutor may reveal others. The relevance of any immunities any individuals identified as responsible may arise for determination at that stage. As stated in Poland's 2015 submission to the ILC, a Polish court would have to decide the applicability of immunities after determining whether it has jurisdiction in the case.⁶³ Further, as the French case relating to Bashar al-Asad demonstrates, the official status of individual suspects can change during the course of an investigation.
39. Second, it is evident that two of the individuals named in the Notice of commission of crimes, whose positions would not entitle them to personal immunity, would not benefit from any immunity. Mr Gallant and Mr Kisch are not entitled to claim functional immunities to criminal prosecution in Poland for alleged international crimes in Gaza. According to principles of international law explicitly supported by Poland in its practice following World War II and its recent submissions to the ILC, functional immunity no longer protects public officials from prosecution for international crimes in foreign courts, as functional immunities do not cover such acts. In the unlikely event that a Polish court were to determine otherwise, in any event, Mr Gallant was not a minister at the time all the alleged crimes were committed, and Mr Kisch was not yet a minister at the time of the alleged crimes that the claimants seek to have investigated.
40. Third, REDRESS submits that Poland should follow the precedent of its investigation into alleged international crimes in Ukraine, where individuals identified as responsible are

⁶¹ Extraordinary African Chambers, Judgment of 30 May 2016, available at: <https://legal-tools.org/doc/98c00a/pdf>

⁶² For example, former Peruvian President Fujimori was convicted of enforced disappearances and killings in a Peruvian court on 7 April 2009: <https://www.amnesty.org/en/latest/press-release/2009/04/peru-conviction-fujimori-e28093-milestone-fight-justice-20090407/>. Former Guatemalan President Rios Montt was convicted of genocide and crimes against humanity in a Guatemalan court on 10 May 2013: <https://www.hrw.org/news/2013/05/10/guatemala-rios-montt-convicted-genocide>.

⁶³ Opinion by Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on immunities of State officials from foreign criminal jurisdiction, Warsaw, 27 April 2015, page 16.

also likely to be State officials. As is the case with the Ukraine investigation, any evidence collected during an investigation into the international crimes alleged in Gaza could be used either to initiate prosecutions in Poland on any jurisdictional basis – in this case passive personality – or provided to an international court or other country exercising their jurisdiction. REDRESS also recalls that since the ICC has issued a warrant of arrest for Mr. Netanyahu, as a State Party to the Rome Statute, Poland would be under a statutory obligation to cooperate with the Court, including to arrest and surrender him to the ICC.



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London, 27 October 2025