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Third report on immunity of State officials from foreign criminal jurisdiction

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I. Introduction

1. At its fifty-ninth session (2007), the International Law Commission (hereinafter "the Commission") decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed a Special Rapporteur on the topic.[1] At the same session, the Commission requested the Secretariat to prepare a background study on the topic.[2]

2. At its sixtieth session (2008), the Commission considered the preliminary report on the topic (hereinafter "preliminary report").[3] The Commission also had before it a memorandum by the Secretariat on the topic (hereinafter "memorandum by the Secretariat").[4] In the absence of a further report, the Commission was unable to consider the topic at its sixty-first session (2009).

3. The second report of the Special Rapporteur (hereinafter "second report") was submitted to the Secretariat during the sixty-second session of the Commission (2010), and the Commission was not in a position to consider it.[5]

4. The preliminary report contained a brief history of the consideration by the Commission and the Institute of International Law (hereinafter "the Institute") of the question of immunity of State officials from foreign jurisdiction and outlined the range of issues proposed for consideration by the Commission in the preliminary phase of work on the topic. The latter included the issue of the sources of immunity of State officials from foreign criminal jurisdiction; the issue of the content of the concepts of "immunity" and "jurisdiction", "criminal jurisdiction" and "immunity from criminal jurisdiction" and the relationship between immunity and jurisdiction; the issue of the typology of immunity of State officials (immunity *ratione personae* and immunity *ratione materiae*); and the issue of the rationale for immunity of State officials and the relationship between immunity of officials and immunity of members of special missions.[6]

5. The preliminary report also identified issues that needed to be considered, in the view of the Special Rapporteur, in order to determine the scope of this topic. These included: whether all State officials or only some of them (for example, only Heads of State, Heads of Government and ministers for foreign affairs) should be covered by the future draft guiding principles or draft articles that may be prepared by the Commission resulting from its consideration of the topic; the definition of the

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[1] At its 2940th meeting on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). In paragraph 7 of resolution 62/66 of 6 December 2007, the General Assembly took note of the Commission's decision to include this topic in its programme of work. The topic had been included in the Commission's long-term programme of work at its fifty-eighth session (2006), on the basis of the proposal contained in annex A to the Commission's report (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[2] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386.

[3] A/CN.4/601.

[4] A/CN.4/596 and Corr.1.

[5] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[6] Preliminary report, paras. 27-101.

concept of "State official"; the question of recognition in the context of this topic; and the issue of the immunity of family members of State officials.[7]

6. Other issues which, in the view of the Special Rapporteur, needed to be considered in order to determine the scope of this topic were: the extent of immunity enjoyed by current and former State officials to be covered by future draft guiding principles or articles; and the waiver of immunity (and possibly other procedural aspects of immunity).[8]

7. The conclusions reached by the Special Rapporteur as a result of the analysis carried out in the preliminary report are contained in paragraphs 102 and 130 thereof.[9]

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[7] Ibid., paras. 125-129.

[8] Ibid, para. 4.

[9] "102. … (a) The basic source of the immunity of State officials from foreign criminal jurisdiction is international law, and particularly customary international law;
(b) Jurisdiction and immunity are related but different. In the context of the topic under discussion, the consideration of immunity should be limited and should not consider the substance of the question of jurisdiction as such;
(c) The criminal jurisdiction of a State, like the entire jurisdiction of the State, is exercised in the form of legislative, executive and judicial jurisdiction (or in the form of legislative and executive jurisdiction, if this is understood to include both executive and judicial jurisdiction);
(d) Executive (or executive and judicial) criminal jurisdiction has features in common with civil jurisdiction but differs from it because many criminal procedure measures are adopted in the pre-trial phase of the juridical process. Thus the question of immunity of State officials from foreign criminal jurisdiction is more important in the pre-trial phase;
(e) Immunity of officials from foreign jurisdiction is a rule of international law and the corresponding juridical relations, in which the juridical right of the person enjoying immunity not to be subject to foreign jurisdiction reflects the juridical obligation of the foreign State not to exercise jurisdiction over the person concerned;
(f) Immunity from criminal jurisdiction means immunity only from executive and judicial jurisdiction (or only from executive jurisdiction, if this is understood to include both executive and judicial jurisdiction). It is thus immunity from criminal process or from criminal procedure measures and not from the substantive law of the foreign State;
(g) Immunity of State officials from foreign criminal jurisdiction is procedural and not substantive in nature. It is an obstacle to criminal liability but does not in principle preclude it;
(h) Actions performed by an official in an official capacity are attributed to the State. The official is therefore protected from the criminal jurisdiction of a foreign State by immunity *ratione materiae*. However, this does not preclude attribution of these actions also to the person who performed them;
(i) Ultimately the State, which alone is entitled to waive an official's immunity, stands behind the immunity of an official, whether this is immunity *ratione personae* or immunity *ratione materiae*, and behind those who enjoy immunity;
(j) Immunity of an official from foreign criminal jurisdiction has some complementary and interrelated rationales: functional and representative rationale; principles of international law concerning sovereign equality of States and non-interference in internal affairs; and the need to ensure the stability of international relations and the independent performance of their activities by States."
"130. … (a) This topic covers only immunity of officials of one State from national (and not international) criminal (and not civil) jurisdiction of another State (and not of the State served by the official);
(b) It is suggested that the topic should cover all officials;
(c) An attempt may be made to define the concept "State official" for this topic or to define which officials are covered by this concept for the purposes of this topic;

8. The second report considered: the issue of the scope of immunity of officials from foreign criminal jurisdiction as a general rule, including immunity *ratione materiae* enjoyed as a general rule by all current and former State officials,[10] and the issue of immunity *ratione personae* enjoyed by only certain serving high-ranking officials;[11] the issue of the acts of a State exercising jurisdiction which are precluded by immunity;[12] the issue of the territorial scope of the immunity of a State official;[13] and the issue of whether there are exceptions to the rule on immunity, particularly in a case where an official has committed grave crimes under international law.[14]

9. The general conclusions reached by the Special Rapporteur as a result of the analysis carried out in the second report are contained in paragraph 94 thereof.[15]

(d) The high-ranking officials who enjoy personal immunity by virtue of their post include primarily Heads of State, Heads of Government and ministers for foreign affairs;
(e) An attempt may be made to determine which other high-ranking officials, in addition to the threesome mentioned, enjoy immunity *ratione personae*. It will be possible to single out such officials from among all high-ranking officials, if the criterion or criteria justifying special status for this category of high-ranking officials can be defined;
(e) It is doubtful whether it will be advisable to give further consideration within the framework of this topic to the question of recognition and the question of immunity of members of the family of high-ranking officials."

[10] Second report, paras. 21-34.

[11] Ibid, paras. 35-37.

[12] Ibid, paras. 38-51.

[13] Ibid, paras. 52-53.

[14] Ibid, paras. 54-93.

[15] "94. ... (a) On the whole, the immunity of a State official, like that of the State itself, from foreign jurisdiction is the general rule, and its absence in a particular case is the exception to this rule;
(b) State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself;
(c) There are no objective grounds for drawing a distinction between the attribution of conduct for the purposes of responsibility on the one hand and for the purposes of immunity on the other. There can scarcely be grounds for asserting that one and the same act of an official is, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, is not attributed as such and is considered to be only the act of an official. The issue of determining the nature of the conduct of an official — official or personal — and, correspondingly, of attributing or not attributing this conduct to the State, must logically be considered before the issue of the immunity of the official in connection with this conduct is considered;
(d) Classification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct. The determining factor is that the official is acting in a capacity as such. The concept of an 'act of an official as such', i.e. of an 'official act', must be differentiated from the concept of an 'act falling within official functions'. The first is broader and includes the second;
(e) The scope of the immunity of a State and the scope of the immunity of its official are not identical, despite the fact that in essence the immunity is one and the same. An official performing an act of a commercial nature enjoys immunity from foreign criminal jurisdiction if this act is attributed to the State;
(f) Immunity *ratione materiae* extends to *ultra vires* acts of officials and to their illegal acts;
(g) Immunity *ratione materiae* does not extend to acts which were performed by an official prior to his taking up office; a former official is protected by immunity *ratione materiae* in respect of acts performed by him during his time as an official in his capacity as an official;

10. The preliminary and second reports therefore considered substantive or material aspects of the immunity of State officials from foreign criminal jurisdiction. The present third report will consider procedural aspects of this topic. Furthermore, as consideration of this topic has shown, attention here also deserves to be paid to another issue: the relationship between a State's argument that its official has immunity and the responsibility of that State for a wrongful act committed by that official which gives rise to the issue of immunity. This issue is also considered in the present report.

(h) Immunity *ratione materiae* is scarcely affected by the nature of an official's or former official's stay abroad, including in the territory of the State exercising jurisdiction. Irrespective of whether this person is abroad on an official visit or is staying there in a private capacity, he obviously enjoys immunity from foreign criminal jurisdiction in respect of acts performed in his capacity as an official;

(i) Immunity *ratione personae*, which is enjoyed by a narrow circle of high-ranking State officials, extends to illegal acts performed by an official both in an official and in a private capacity, including prior to taking office. This is what is known as absolute immunity;

(j) Being linked to a defined high office, personal immunity is temporary in character and ceases when a person leaves office. Immunity *ratione personae* is affected neither by the fact that acts in connection with which jurisdiction is being exercised were performed outside the scope of the functions of an official, nor by the nature of his stay abroad, including in the territory of the State exercising jurisdiction;

(k) The scope of immunity from foreign criminal jurisdiction of serving officials differs depending on the level of the office they hold. All serving officials enjoy immunity in respect of acts performed in an official capacity. Only certain serving high-ranking officials additionally enjoy immunity in respect of acts performed by them in a private capacity. The scope of immunity of former officials is identical irrespective of the level of the office which they held: they enjoy immunity in respect of acts performed by them in an official capacity during their term in office;

(l) Where charges (of being an alleged criminal, suspect, etc.) have been brought against a foreign official, only such criminal procedure measures as are restrictive in character and prevent him from discharging his functions by imposing a legal obligation on this person, may not be taken when the person enjoys: (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the measures concerned are in connection with a crime committed by this person in the performance of official acts. Such measures may not be taken in respect of a foreign official appearing in criminal proceedings as a witness when this person enjoys: (a) immunity *ratione personae* or (b) immunity *ratione materiae*, if the case concerns the summoning of such a person to give testimony in respect of official acts performed by the person himself, or in respect of acts of which the official became aware as a result of discharging his official functions;

(m) Immunity is valid both during the period of an official's stay abroad and during the period of an official's stay in the territory of the State which he serves or served. Criminal procedure measures imposing an obligation on a foreign official violate the immunity which he enjoys, irrespective of whether this person is abroad or in the territory of his own State. A violation of the obligation not to take such measures against a foreign official takes effect from the moment such a measure is taken and not merely once the person against whom it has been taken is abroad;

(n) The various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing;

(o) It is difficult to talk of exceptions to immunity as a norm of international law that has developed, in the same way as it cannot definitively be asserted that a trend toward the establishment of such a norm exists;

(p) A situation where criminal jurisdiction is exercised by a State in whose territory an alleged crime has taken place, and this State has not given its consent to the performance in its territory of the activity which led to the crime and to the presence in its territory of the foreign official who committed this alleged crime, stands alone in this regard as a special case. It would appear that in such a situation there are sufficient grounds to talk of an absence of immunity."

II. Procedural aspects of immunity

A. Timing of consideration of immunity[16]

11. In practice, the issue of the immunity of a foreign official from criminal jurisdiction often arises for the authorities of a State only when they intend to take relevant action. At that stage, the State which this person is (or was) serving is usually not aware of the developments. In many cases, the preliminary actions of the criminal process are unrelated to measures precluded by immunity.[17] In that situation, consideration of the issue of immunity by a State exercising criminal jurisdiction is not necessary and cannot be deemed its obligation. However, the issue of the immunity of a State official from foreign criminal jurisdiction should, in principle, be considered at an early stage of the judicial proceedings, or earlier still, at the pretrial stage, when a State exercising jurisdiction takes a decision on adopting criminal procedure measures precluded by immunity against an official. As the International Court of Justice stated in its advisory opinion in the case *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*: "[q]uestions of immunity are ... preliminary issues which must be expeditiously decided *in limine litis*. This is a generally-recognized principle of procedural law."[18] A British District Judge considering an application to issue an arrest warrant against General Shaul Mofaz, the Minister of Defence of Israel, noted: "[i]t has been argued by the Applicant that if the General enjoys any kind of immunity ... then the proper time to raise it would be at the first hearing after the warrant has been issued. I am afraid that I disagree with that proposition and take the view that state immunity is one of the issues that I must consider."[19] In principle, the early consideration of immunity is necessary in order to achieve its fundamental objectives: ensuring normal relations among States and the maintenance of their sovereignty.[20] Immunity also needs to be considered at an early

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[16] See memorandum by the Secretariat, paras. 220-225.

[17] See second report, paras. 38-51, on measures for exercising criminal jurisdiction which are precluded by immunity.

[18] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, advisory opinion* (hereinafter *"Differences Relating to Immunity from Legal Process ..."*), *ICJ Reports 1999*, para. 63. The need for early consideration of the issue of immunity was mentioned in the preliminary report, paras. 67-68.

[19] District Court — Bow Street, Application for Arrest Warrant Against General Shaul Mofaz, 12 February 2004, para. 5, reproduced in 53 ICLQ 772 (2004). See also G. P. Buzzini, "Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on the Djibouti v. France Case", Leiden Journal of International Law, 22 (2009), p. 473. In essence, the same need to consider the issue of immunity at an early stage of the proceedings was mentioned in *The Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I, 31 May 2004, para 30. See also the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case *Belhas et al. v. Moshe Ya'alon*, 15 February 2008, p. 7: ("[I]t is incumbent upon the court to 'engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case' when a party claims it is entitled to foreign sovereign immunity"). Available at: http://caselaw.findlaw.com/us-dc-circuit/1066141.html.

[20] See A. Gattini's remarks that State immunity is necessary "to maintain a minimum procedural order for the sake of peaceful intercourse between sovereign states as well as to avoid possible inequitable and/or discriminatory solutions", and "in order to be effective, could only be in *limine litis*". A. Gattini, "The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?", *Leiden Journal of International Law*, 24 (2011), p. 192.

stage of the proceedings, *in limine litis*, because the outcome determines the forum State's continued ability to exercise criminal jurisdiction over an official.[21] If the court fails to consider the issue of immunity at the start of the proceedings, this may result in a violation of the forum State's obligations arising from the rule on immunity. Moreover, the failure to consider the issue of immunity *in limine litis* itself may be deemed such a violation. In the aforementioned advisory opinion, the International Court of Justice noted that the Malaysian courts were obliged to consider the question of the immunity of the Special Rapporteur as a preliminary issue. [22]

12. The latter also pertains to the consideration of immunity at the pretrial stage in the exercise of criminal jurisdiction, when the issue of adopting measures precluded by immunity is addressed (for example, arrest on suspicion of having committed a crime). Here a failure by the relevant authorities to consider the issue of the immunity of the official may also result in a violation of the obligations arising from immunity by the State exercising jurisdiction, and this failure may itself be deemed such a violation.

13. However, the above should be considered in the light of the issue of invoking immunity and the burden of invoking immunity, which will be considered further. In particular, if the State of the official enjoying immunity *ratione materiae* does not invoke immunity in the initial stages of the process, then the process may continue and the issue of a violation of the obligations stemming from immunity does not arise.

B. Invocation of immunity[23]

14. In order for a court or other relevant authorities of a State exercising jurisdiction to consider the issue of immunity of a foreign official, someone must raise the issue. The question is, who should do that: the official or the State which the official is (or was) serving? Or should the State exercising jurisdiction ask itself that question?[24]

15. The preliminary report stated that immunity belongs not to the official himself, but to the State which the official serves (or served), i.e., the State of the official.[25]

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[21] See the related comments by J. Verhoeven in para. 220 of the memorandum by the Secretariat. Indeed, as one of the key components determining the ability or inability to exercise foreign jurisdiction, immunity becomes devoid of substance as a legal phenomenon if due attention is not paid to it at the earliest stage of the juridical process. However, recognition of an official's personal and function immunity, as noted in the second report, does not preclude all measures which may be taken in the exercise of criminal jurisdiction, only those which impose an obligation on the official or are coercive (see paras. 38-51, 94 (1), second report).

[22] *Difference Relating to Immunity from Legal Process* ..., op. cit., para. 67 (2) (b).

[23] Memorandum by the Secretariat, paras. 215-229.

[24] Asking an analogous question, G. P. Buzzini wrote, "There may be no clear-cut answer to this question." G. P. Buzzini, op. cit. p. 473.

[25] "The State stands behind both the immunity *ratione personae* of its officials from foreign jurisdiction and their immunity *ratione materiae*. It is the State that is entitled to waive the immunity enjoyed by an official, whether it is *ratione personae* or *ratione materiae* (in the case of a serving high-ranking official) or only *ratione materiae* (in the case of any official who has left government service). In the final analysis, the immunity of State officials from foreign jurisdiction belongs to the State itself, so that it alone is entitled to waive such immunity." Preliminary report, para. 94 (footnotes omitted).

Strictly speaking, the official merely "enjoys" immunity, which belongs legally to the State. Accordingly, the rights inherent in immunity are rights of the State. In upholding the rights inherent in an official's immunity from foreign criminal jurisdiction, the State is upholding its own rights and not those of its official.[26] In this connection, it could be said that only when it is the State of the official which invokes or declares immunity is the invocation or declaration of immunity legally meaningful, i.e., only under those circumstances does it have legal consequences. A declaration by an official himself that he has immunity does not, it would seem, have such legal significance, insofar as the official is merely the beneficiary of immunity. This does not mean that such a declaration by an official has no significance at all in the context of legal procedures carried out in relation to that person. It is unlikely that it could be simply ignored by the State which is criminally prosecuting the official. This State can, on the basis of the declaration, consider the question of immunity. However, uncorroborated by the relevant opinion of the official's State, it would seem that this declaration lacks sufficient legal weight and significance.[27]

16. For the State of an official to be able to declare that that official has immunity, it must know that criminal procedure measures are being taken or planned with regard to that person. Consequently, the State which is implementing or planning such measures must inform the State of the official about this. Naturally, this can be done only when it becomes known or there are grounds to suppose that a foreign official is involved. Therefore, a declaration by the person with regard to whom jurisdiction is being

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[26] This applies to the immunity of former officials. In the case *Arrest warrant of 11 April 2000*, Belgium stated specifically that after Yerodia ceased to be Minister for Foreign Affairs, DRC was not upholding its rights, but rather the rights of that individual, i.e., it was exercising diplomatic protection and should therefore have previously exhausted local remedies (see *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2000 (hereinafter "*Arrest Warrant*"), paras. 37-38). The Democratic Republic of the Congo was of the understanding that this was not an action for diplomatic protection, and that it was defending the rights of the Congolese State on account of the violation of the immunity of its Minister for Foreign Affairs (see ibid., para. 39). The Court essentially agreed with the position of DRC (ibid., para. 40). As the Government of the United States of America noted in the *Samantar* case, "a former official's residual immunity is not a personal right. It is for the benefit of the official's state." U.S. District Court for the Eastern District of Virginia, Alexandria Division, *Bashe Abdi Yousuf, et. al., v. Mohamed Ali Samantar*, Statement of Interest of the United States of America, February 14, 2011, para. 13 available at http://www.cja.org/downloads/Samantar_Stmt_of_Interest.pdf. (Since 2004, this case has served as a precedent in U.S. courts for addressing the issue of a civil case brought by Somali expatriates against the former Minister of Defence and Vice-President of Somalia M. Samantar in connection with the use of torture, extrajudicial executions and other human rights violations. For comments on this case see, for example, S.V. Shatalova, "The United States Supreme Court decision in the case of *Samantar v. Yousuf*, and the immunities of foreign officials" (in Russian only), *Moscow Journal of International Law*, No. 1 (81) (2011), pp. 111-130 and B. Stephens, "The Modern Common Law of Foreign Official Immunity", *Fordham Law Review*, 79 (2011), pp. 2669-2719.

[27] This same logic is applicable when immunity is waived. See paragraph 33, below. See also paragraph 94 of the preliminary report. In connection with a matter under consideration in a United States court on failure to comply with several warrants, Ferdinand Marcos (the former President of the Philippines) stated that he had immunity as the Head of State from the relevant jurisdiction. On this basis, the United States Department of State sent a note to the Embassy of the Philippines with information on possible measures to be taken with regard to Marcos by decision of the court. The Embassy replied in a note that the Government of the Philippines waived any immunity for the former President (*In re Grand Jury Proceedings, Doe No. 700*, 5 May 1987, 817 F.2d 1108, C.A. 4 (Va.), 1987).

exercised, that he is (or was) an official of a foreign State provides the grounds for the State exercising jurisdiction to inform the official's State accordingly. In its judgment in the case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), the International Court of Justice stated, inter alia, "At no stage have the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed this Court, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that *the procureur de la Republique* and the head of National Security were its organs, agencies or instrumentalities in carrying them out.

The State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned."[28]

17. Thus, the Court indicated that the burden of invoking immunity falls to the State which wants to shield its official from foreign criminal jurisdiction. If it fails to do so, then the State exercising jurisdiction is not obligated to consider the issue of immunity *proprio motu*, and, consequently, it may proceed with the criminal prosecution.[29] At the same time, it would seem that the official's State can also declare the individual's immunity at a later stage of the criminal process. However, in this case, measures taken *with regard to the official* by the State exercising jurisdiction prior to the invocation of immunity can hardly be considered as violating immunity (on the understanding, naturally, that the official's State knew of the foreign criminal jurisdiction being exercised with regard to him or her but did not invoke immunity).

18. We note that, judging from its context, the passage from the judgment of the International Court of Justice cited above in paragraph 16 refers to the situation of officials who have functional rather than personal immunity. Such an approach to a situation involving persons with immunity *ratione materiae* would seem logical.[30] This immunity is enjoyed by officials who are not high-ranking and by former officials, and only with regard to actions carried out by them in an official capacity. It does not include serving Heads of State and Government and ministers for foreign affairs. Unlike the situation with the "threesome" referred to below, the State which exercises jurisdiction with regard to such persons is under no obligation from the outset to know or presume either that these are foreign officials or former officials or that in, violating the law, they were acting in an official capacity.[31] Accordingly, if the State of a given official wants to shield him or her from foreign criminal prosecution by invoking immunity, it should notify the State exercising jurisdiction that this is its official, and that he or she enjoys immunity, since he or she committed the incriminating acts in an official capacity.[32]

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[28] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, para. 196, ICJ Reports, 2008.

[29] The consequences of not invoking immunity are examined further on in the present report, see paragraphs 53-55 below.

[30] However, G. P. Buzzini places this position of the International Court of Justice in doubt. See G. P. Buzzini, op. cit., pp. 472-473.

[31] Although in most cases, the case files are likely to indicate this.

[32] Thus, for example, Israel invoked the immunity of A. Dichter, former head of the Israeli Security Service, in the case of *Matar and ors v. Dichter*. ("In February 2006, Dichter moved to dismiss, arguing (1) that he was immune under the Foreign Sovereign Immunities Act (FSIA); (2) that the suit presented a non-justiciable political question; and (3) that the suit implicated the act of State doctrine. At about the same time, Israel's Ambassador to the United States, Daniel Ayalon, wrote the United States State Department declaring that "anything Mr. Dichter did … in

19. If this same logic is applied to a situation where foreign criminal jurisdiction is exercised with regard to the "threesome" of the highest officials in power — a Head of State, Head of Government and minister for foreign affairs, who enjoy personal immunity, it seems that the answer to the question posed earlier would be different. First of all, at least in the absolute majority of cases, serving Heads of State or Government and ministers for foreign affairs are widely known. Therefore, as a rule, the State exercising criminal jurisdiction with regard to such a person knows that a senior foreign official is involved.[33] Second, it is also widely acknowledged that

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connection with the events at issue, ... was in the course of [his] official duties, and in furtherance of official policies of the State of Israel." The district court invited the State Department to "state its views, if any" on the issues raised in the motion to dismiss, or other issues it deemed relevant to the case. The State Department's statement of interest, filed in November 2006, opined that the FSIA afforded immunity for countries, not for individuals, but urged the court to dismiss the suit nevertheless on the ground that Dichter was entitled to immunity under common law as an official of a foreign State." *Matar and ors v. Dichter*, U.S. Court of Appeals for the Second Circuit, Appeal decision, 563 F3d 9 (2d Cir 2009); ILDC 1392 (US 2009) 16 April 2009, para. 6). Available at http://caselaw.findlaw.com/us-2nd-circuit/1002600.html. The Ambassador of Israel to the United States made precisely the same statement with regard to former General of the Israel Defense Forces (serving as head of military intelligence) M. Ya'alon in the case *Belhas v. Ya'alon*. United States Court of Appeals for the District of Columbia Circuit, *Belhas et. al. v. Moshe Ya'alon*, 15 February 2008, available at http://caselaw.findlaw.com/us-dc-circuit/1066141.html. The previously mentioned statement of the United States Department of State in the case of *Samantar* on invocation of immunity said the following: "the Department of State has determined that Defendant enjoys no claim of official immunity from civil suit ... Particularly significant among the circumstances of this case and critical to the present Statement of Interest are (1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity, and (2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents" (Op. cit., see footnote 26, above, paragraph 9).

[33] Indeed, the very fact that, due to established practice in international relations, the people who are members of the threesome for the States of the world are known to the authorities of all (or nearly all) other States makes the requirement to inform the State exercising jurisdiction of the legal situation and inherent immunities of the person in question somewhat inappropriate. A State which presents such a requirement as a condition for acknowledging immunity and to whom the status of a foreign Head of State (Head of Government, minister for foreign affairs) is objectively known can hardly be considered to be carrying out its international obligations conscientiously.

But this question can be considered in a different way. During preparation by the Institute of the resolution "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law" in 2001, the question of the advisability of including in it provisions on submission to a foreign judge of evidence of the status of a Head of State or Government was considered. The members of the Institute concluded that this was not necessary. The principal argument was that in various national legal systems this question is addressed in a range of different ways (see Institute of International Law, Yearbook, Vol. 69, 2000-2001, Vancouver session, 2001, Preparatory work and deliberations of the Institute, pp. 452-485). As a result, article 6 of the resolution reads: "The authorities of the State shall afford to a foreign Head of State, the inviolability, immunity from jurisdiction and immunity from measures of execution to which he or she is entitled, as soon as that status is known to them." In other words, the fact that the position of a Head of State is known to the authorities of the State exercising jurisdiction is sufficient for the latter to be considered bound by obligations inherent in the immunity of the foreign Head of State. We note, however, that in his comments on a draft resolution, Institute member Jacques-Ivan Morin said, "[I]l me semble que la pratique démontre que l'immunité doit être plaidée". Ibid. p. 584.

these serving senior officials enjoy personal immunity from foreign criminal jurisdiction, that is, immunity with regard to actions carried out in both their official and personal capacities. Accordingly, the State exercising criminal jurisdiction does not need to know or establish the capacity in which a given foreign official was acting in order to render a judgment on that person's immunity. Thus, in a situation involving a foreign Head of State, Head of Government or minister for foreign affairs, the State exercising criminal jurisdiction should itself raise the question of that person's immunity and make a determination regarding its further actions within the framework of international law. In this case, it is appropriate perhaps to ask the official's State merely to waive immunity. Accordingly, the latter State does not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.[34]

20. During the oral proceedings of the case Concerning Certain Questions of Mutual Assistance in Criminal Matters, Alain Pellet, the Counsel for France, spoke of the "absolute and possibly irrefutable" presumption of immunity of a serving Head of State or minister for foreign affairs from foreign criminal jurisdiction, unlike other officials, with regard to whom such a presumption is not in effect and for whom the question of immunity should be addressed on a case-by-case basis.[35] Luigi Condorelli, the legal adviser for Djibouti, did not agree with the presumption thesis as applicable to personal immunity, noting, in particular, that,

> "It should first be emphasized that there can be no question of a "presumption" in the true sense of the word applying to incumbent Heads of foreign States, since they are quite simple [sic] covered by complete immunity for all of their acts, including those of a private nature.[36]

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[34] G. P. Buzzini comes to an analogous conclusion, although he cites somewhat different arguments. He writes: "[w]ith respect to state immunity and immunity *ratione personae*, several elements may be identified which would seem to support the view that, when applicable, immunity should be given effect by the authorities of the forum state regardless of any specific invocation … [A]s regards the personal immunities accruing to diplomatic agents and members of special missions, the relevant conventions address only the question of waiver of such immunities (which must always be express) and not the question of their invocation. The same solution appears to be implied, as regards the immunities of heads of state and heads of government, in the wording of the resolution adopted by the Institute of International Law at its Vancouver session in 2001". (G. P. Buzzini, op. cit., pp. 470-471.) However, it should be pointed out that the resolution of the Institute can be interpreted differently in this regard (see footnote 33, above). In yet another argument in support of his position, G. P. Buzzini refers to the fact that in its decision in the *Arrest Warrant* case, the International Court of Justice "held that Belgium had violated the immunity of the minister for foreign affairs of the … Congo without raising the question of whether such immunity had been properly invoked before the Belgian authorities, by the … Congo or by the minister himself." Ibid., p. 471.

[35] "… [I]n the case of an incumbent Head of State (or Minister for Foreign Affairs) the "presumption of immunity" is absolute and probably irrebuttable. It is covered by the immunities and that is all; on the other hand, where the other officials of the State are concerned, that presumption does not operate and the granting (or refusal to grant) of immunities must be decided on a case-by-case basis, on the basis of all the elements in the case. This supposes that it is for national courts to assess whether we are dealing with acts performed - or not-in the context of official functions." *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Oral Proceedings, CR 2008/5, 25 January 2008, p. 51, para. 77.

[36] Ibid., Oral Proceedings, CR 2008/6b 28 January 2008, p. 46, para. 7.

21. It would seem that the International Court of Justice based its judgments in this case and in the *Arrest Warrant* case on the idea that the personal immunity of a Head of State (in the *Djibouti v. France* case) and of the entire "threesome" (in the *Arrest Warrant* case) simply exists without any presumption whatsoever and the resultant obligations of the State exercising jurisdiction should be met. In the situation involving the two officials of Djibouti who did not enjoy personal immunity, the Court stated that Djibouti should have informed the French authorities about these persons in the appropriate manner.[37] However, in the part of the decision pertaining to the Head of the Republic of Djibouti, there is no mention of the fact that Djibouti should have somehow raised the issue of immunity (although, upon receiving information on the request being prepared by the French authorities, Djibouti reminded France that the Head of State had immunity[38]). The Court simply proceeded in this instance from the position that, as it had already noted in its judgment in the *Arrest Warrant* case, "in international law it is firmly established that … certain holders of high-ranking office in a State, such as the Head of State … enjoy immunities from jurisdiction in other States, both civil and criminal" and that "[a] Head of State enjoys in particular full immunity from criminal jurisdiction."[39] At the same time, the judgment on the *Arrest Warrant* case also fails to mention the fact that the Congolese authorities should have informed the Belgian authorities that their Minister for Foreign Affairs had immunity, so that the issue of immunity could be considered.[40]

22. Indeed, it is not quite clear why only the presumption of immunity should be discussed, and not that of immunity more generally. In any case, whether we are dealing with an "absolute and possibly irrefutable" presumption of personal immunity of persons who are included in the "threesome", or simply with their personal immunity, it can presumably be asserted that a State which exercises criminal jurisdiction with regard to a foreign Head of State or Government or minister for foreign affairs should itself draw a conclusion about the immunity of the person in question and about the measures that it can take with regard to that person, given the constraints inherent in immunity.[41] For that to happen, the State of such an official who enjoys personal immunity does not have to inform the State exercising jurisdiction that the official has immunity.

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[37] See para. 16, above.

[38] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, para. 32., op. cit.

[39] Ibid., para. 170.

[40] In this regard, see the opinion of G. P. Buzzini, footnote 34, above.

[41] This is precisely what usually happens in practice. Judges either independently consider the issue of the immunity of a foreign Head of State, or else they forward a query on the matter to the executive authorities of their own State, who can issue a conclusion or recommendation with a description of the privileges and immunities granted to the specific person. *Cour de Cassation, Affaire Ghaddafi*, Decision no. 1414., 13 mars 2001, Cass Crim.1. See, for example, the decision on the matter of issuing an arrest warrant in the Netherlands for President Yudhoyono of Indonesia (the court established independently that the President of Indonesia enjoyed immunity as a Head of State and declined to issue an arrest warrant. Rechtbanks' Gravenhage, Sector civiel recht, 377038/KG ZA 10-1220, 6 October 2010, available at http://www.rechtspraak.nl). See also the decision of the Court of Cassation of Belgium on the case of A. Sharon, A. Yaron et. al., section having to do with A. Sharon. Court of Cassation of Belgium: *H.S.A. et al v. S.A. et al. (Decision related to the indictment of Ariel Sharon, Amos Yaron and others)*, 12 February 2003, 42 ILM (2003) 596.

23. The preliminary report stated that, in addition to the "threesome", certain other "persons of high rank"[42] enjoy immunity *ratione personae*. No list of such officials exists in international law. In the preliminary report, the Special Rapporteur recommended consideration of the issue of criteria for determining whether a particular high-ranking official not included in the "threesome" enjoyed personal immunity.[43] Specifically, it was noted that along with ensuring the participation of the State in international relations, the importance of the functions performed by a given high-ranking official in ensuring the sovereignty of the State[44] could be a criterion for including an official among those who enjoy immunity *ratione personae*. A State which is starting to exercise criminal jurisdiction with regard to a high-ranking foreign official who is not included in the "threesome" is not required to know or presume that that person meets the criteria mentioned and enjoys personal immunity. It need merely inform the official's State of the measures taken by it. It appears logical to presume that, if the State of such an official believes that the person meets the criteria mentioned and enjoys personal immunity, then the burden of invoking immunity falls to that State. In this procedural sense, the personal immunity of high-ranking officials who are not in the "threesome" is analogous to immunity *ratione materiae*.

24. In the case of the immunity *ratione personae* of a Head of State, Head of Government or minister for foreign affairs which should be addressed by the State exercising jurisdiction, it is logical to presume that the State of the official is under no obligation to provide evidence of immunity or to substantiate its claim. It suffices, where this is not clear,[45] to confirm the official status of the person. This can be done via diplomatic channels, even if the matter is being considered in court.[46] Should a State invoking the functional immunity of officials or the personal immunity of high-ranking officials outside the "threesome" participate in the proceedings in a foreign court against an official so that the issue of immunity is considered and provide evidence of immunity?

25. In the case *Concerning Certain Questions of Mutual Assistance in Criminal Matters*, France maintained that the issue of immunity *ratione materiae* of officials should be dealt with on a case-by-case basis in a foreign court. "The contrary", according to France, "would be devastating and would signify that all an official, regardless of his rank or functions, needs to do is assert that he was acting in the context of his functions to escape any criminal prosecution in a foreign State". As functional immunities are not absolute, it is, in France's view, for the justice system of each country to assess, when criminal proceedings are instituted against an individual, whether, in view of the acts of public authority performed in the context of his duties, that individual should enjoy, as an agent of the State, the immunity

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[42] Preliminary report, paras. 117-121.

[43] Ibid., para. 121.

[44] Ibid.

[45] Leaving aside the importance of recognition for the purposes of immunity (the relevant considerations of the Special Rapporteur are contained in para. 124 of the preliminary report), there appears to be a lack of clarity regarding the status of high-ranking officials, for example during the functioning of a transitional Government (when a new Head of Government has been appointed but the previous one is still in office), or following constitutional reforms which significantly reassign responsibilities among key Government posts.

[46] Methods for invoking immunity are referred to in pp. 27 and 28 of this report.

from criminal jurisdiction that is granted to foreign States …".[47] The International Court of Justice noted in this connection that the French courts had not been informed by the Government of Djibouti that the acts of the Djibouti officials were its own acts, and, more generally, that "the State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned".[48] Thus, the Judgment of the Court refers merely to "informing" or "providing notification" about immunity and does not mention "substantiating" it or why it may be claimed that the acts of officials were carried out by them in an official capacity as organs of the State. In its advisory opinion on the case *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the International Court of Justice also omits to mention to the need for the United Nations to substantiate the functional immunity of its officials.[49] In its judgment in the case *Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), the Court also noted that "it has not been 'concretely verified' before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of their duties as organs of State".[50]

26. In that connection, we should like to point out the following. First, in the passage cited, the International Court of Justice refers only to the fact that the official nature of the acts of the Djibouti officials were not "concretely verified" in that particular court. The French court is not mentioned in that context. Second, strictly speaking, even recalling the lack of concrete verification, the Court, we reiterate, mentions nothing about the obligation of Djibouti to substantiate immunity or the official nature of the acts of its officials on which the immunity is based. Commenting on this passage from the judgment, G. P. Buzzini writes: "[i]t may be argued, especially in the context of an alleged immunity from testimony, that a state wishing to invoke such immunity cannot be deemed to have a duty to substantiate its claim by providing detailed information or evidence which might possibly defeat the whole purpose of that immunity".[51] It appears that this logic applies to the

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[47] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment, para. 189, op. cit.

[48] Ibid., para. 196. In its statement on the *Samantar* case, the United States Department of State noted that: "The typical practice is for a foreign state to request a suggestion of immunity from the Department of State on behalf of its officials. … Because the immunity belongs to the state, and not the individual, and because only actions by former officials taken in an official capacity are entitled to immunity under customary international law, the Executive Branch takes into account whether the foreign state understood its official to have acted in an official capacity in determining a former official's immunity or non-immunity" (op. cit., supra note 26, para. 11). In other words, on the one hand, it is a matter of having an "understanding", not of a State proving that its official was acting in an official capacity; and on the other hand, the United States authorities take this "understanding" into account when addressing the issue of immunity, although this, to all appearances, is not considered to be obligatory.

[49] The advisory opinion states merely that the Secretary-General, as the highest ranking official of the Organization, should inform the Government of the State exercising jurisdiction that the person in the service of the Organization was acting in an official capacity and enjoys immunity. Those grounds establish the legal position which provides for the relevant obligations of the State exercising jurisdiction, and as this position is recognized by the Court as a "presumption" it does not require evidence and can only be set aside for the most compelling reasons.

[50] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), Judgment, para. 191.

[51] G. P. Buzzini, op. cit., p. 467.

invocation of functional immunity in general and not only to immunity from giving evidence as a witness. In order to substantiate the official nature of the acts of its officials in a foreign court or before other organs of a foreign State, an official's State may be requested to provide information that is of an extremely sensitive nature for it and to disclose data related to its internal sovereign affairs. However, immunity from foreign criminal jurisdiction is designed to provide protection in this very area.[52]

27. We also wish to point out that the International Court of Justice, in the case *Concerning Certain Questions of Mutual Assistance in Criminal Matters*, refers to notifying the "authorities" of the State exercising jurisdiction and does not restrict such notification to the courts. The International Court's reference to the fact that notification may be provided to the "authorities" of the State exercising jurisdiction, and not only to the courts, appears to show that the Court did not consider it obligatory for an official's State to notify a foreign court about the official's immunity so that the foreign court might consider the issue of his or her immunity. The official's State may invoke immunity for him or her through the diplomatic channels, thereby notifying the State exercising jurisdiction. This should suffice in order for a court of that State to consider the issue of immunity.[53] The absence of a State's obligation to contact a foreign court directly is derived from the principle of sovereignty and the sovereign equality of States.[54]

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[52] On the basis of these considerations, in the *Belhas et al. v. Ya'alon* case (in the course of an appeals suit lodged as a result of the refusal of the United States district court to accept a civil suit to consider whether the defendant had functional immunity), the United States Court of Appeals for the District of Columbia Circuit noted that the "discovery" of documents confirming that the defendant was duly authorized by the State of Israel to commit the acts imputed to him would defeat the very purpose of immunity (As this Court found in *El-Fadl*, "in light of the evidence that [the defendant] proffered to the district court and the absence of any showing by [the plaintiff] that [the defendant] was not acting in his official capacity, discovery would frustrate the significance and benefit of entitlement to immunity from suit"). *Belhas et al. v. Moshe Ya'alon*, op. cit. (see footnote 32 above).

[53] A similar conclusion is also derived from the advisory opinion in the *Difference Relating to Immunity from Legal Process* ..., op. cit., pp. 60 and 61. Furthermore, it might be possible to talk about the obligations that the authorities of a State receiving the notification have to bring this to the attention of the national courts concerned with considering the immunity of the official in question. At all events, in the aforementioned advisory opinion the International Court noted: "The governmental authorities of a party [to the Convention on the Privileges and Immunities of the United Nations] are therefore under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information". Ibid., para. 61. In this case, the relevant obligation of the authorities of the State exercising jurisdiction arises from obligations inherent in a rule on immunity for United Nations officials in an international treaty. Immunity of State officials from foreign criminal jurisdiction is based on general international law. Accordingly, general international law also forms the basis of the aforementioned obligation of the Government of the State exercising jurisdiction.

[54] The commentary to article 6 of the draft articles on jurisdictional immunities of States and their property notes that: "Appearance before foreign courts to invoke immunity would involve significant financial implications for the contesting State and should therefore not necessarily be made the condition on which the question of State immunity is determined. On the other hand, the present provision is not intended to discourage the court appearance of the contesting State, which would provide the best assurance for obtaining a satisfactory result". Draft articles on jurisdictional immunities of States and their property, with commentaries, 1991. *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 24.

28. In practice, States may behave differently.[55] If they so wish, they have an opportunity to assert the immunity of their officials in foreign courts. Others may restrict themselves to invoking immunity through diplomatic channels, based on the premise that the relevant authorities of the State exercising jurisdiction will themselves inform the court that an official's State has referred to the immunity of the official with regard to whom jurisdiction is being exercised.[56] A State may also not take any of these positions and may act depending on the circumstances: in some cases declaring the immunity of its official directly to the court, in other cases acting only through diplomatic channels and, in yet others, making use of all the possibilities. Furthermore, it should be borne in mind that, when exercising criminal jurisdiction, the issue of immunity may arise at the pretrial stage. In that case, the issue of invoking immunity in a court in general may not arise.

29. In order to invoke functional immunity, the official's State should indicate that the acts with which the official is charged were committed by that person in an official capacity (i.e. are acts of the State itself). It is the prerogative precisely of the

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[55] Differences in the practice of asserting immunity are well illustrated in a passage from the judgment of the Supreme Court of the Philippines regarding consideration of a petition from the Holy See to set aside earlier refusals to recognize the sovereign immunity of the Vatican, against which a civil claim had been lodged. While considering whether the International Relations Department of the Philippines could intervene in the case as a third party, the Court describes the practice of invoking State immunity in a foreign court: "[W]hen a state or international agency wishes to plead sovereign or diplomatic immunity in a foreign court, it requests the Foreign Office of the state where it is sued to convey to the court that said defendant is entitled to immunity". Having referred to certain aspects of this practice in the United States and the United Kingdom, the Court then notes: "In the Philippines, the practice is for the foreign government or the international organization to first secure an executive endorsement of its claim of sovereign or diplomatic immunity. But how the Philippine Foreign Office conveys its endorsement to the courts varies. In *International Catholic Migration Commission v. Calleja*, … the Secretary of Foreign Affairs just sent a letter directly to the Secretary of Labor and Employment, informing the latter that the respondent-employer could not be sued because it enjoyed diplomatic immunity. In *World Health Organization v. Aquino* … the Secretary of Foreign Affairs sent the trial court a telegram to that effect. In *Baer v. Tizon* … the U.S. Embassy asked the Secretary of Foreign Affairs to request the Solicitor General to make, on behalf of the Commander of the United States Naval Base at Olongapo City, Zambales, a 'suggestion' to the respondent Judge. The Solicitor General embodied the 'suggestion' in a Manifestation and Memorandum as *amicus curiae* … In some cases, the defense of sovereign immunity was submitted directly to the local courts by the respondents through their private counsels … In cases where the foreign states bypass the Foreign Office, the courts can inquire into the facts and make their own determination as to the nature of the acts and transactions involved". The *Holy See*, Petitioner, *vs. The Hon. Eriberto U. Rosario, Jr., as Presiding Judge of the regional Trial Court of Makati, Branch 61* and *Starbright Sales Enterprises, Inc.*, Respondents. Republic of the Philippines, Supreme Court G.R. No. 101949 December 1, 1994. Available at: www.chanrobles.com/scdecisions/jurisprudence1994/dec1994/gr_101949_1994.php.

[56] In the aforementioned *Belhas v. Ya'alon* case (see footnote 32 above), the immunity from United States civil jurisdiction of Moshe Ya'alon, a former General of the Israeli Defence Forces (serving as the head of military intelligence), was stated in a letter from Israel's Ambassador to the United States, Daniel Ayalon, to United States Deputy Secretary of State Nicholas Burns. This letter was submitted to the court of first instance by Moshe Ya'alon, in a motion filed to dismiss the suit, and was later submitted to the Court of Appeals. In the same way, the actions of Avi Dichter, former head of the Israeli Security Service, were found to be of an official nature. Mr. Dichter also filed a motion to dismiss. *Matar and ors v. Dichter*, op. cit. (see footnote 32 above).

official's State to do so, since this is a matter of its internal organization and its relations with its own officials. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) noted in its judgment on the *Prosecutor v. Blaškic* case, "customary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions ... The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*). ... The general rule at issue has been implemented on many occasions, although primarily with regard to its corollary, namely the right of a State to demand for its organs functional immunity from foreign jurisdiction ... This rule undoubtedly applies to relations between States *inter se*.[57] This prerogative for a State official is derived from State sovereignty.[58]

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[57] ICTY, *Prosecutor v. Blaškic*, IT-95-14-AR108 bis, Appeals Chamber, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997), para. 41 (available at http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html). In its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on a Human Rights* case, the International Court of Justice adopted a similar approach to the issue of the prerogatives of the United Nations Secretary-General with respect to officials of the Organization: "As the Court has observed, the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization; to that end, it is up to him to assess whether its agents acted within the scope of their functions and, where he so concludes, to protect these agents, including experts on mission, by asserting their immunity". Op. cit., para. 60.

[58] *Prosecutor v. Blaškic*, Judgment on the Request of the Government of Croatia …, op. cit., para. 41. As noted by Finn Seyersted, "The organic jurisdiction of a state implies that all its relations with — and all relations between and within — its organs and officials as such are governed by the public law and by the executive and judicial organs of that State and not by the public or private law or the organs of any other State" (in "Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations", 14 *ICLQ* 1965, p. 33). In turn, Malcolm N. Shaw, referring to the status of the Head of State (and a waiver of immunity, in particular), also mentioned the constitutional order of the State in which the official serves ("First, the question of the determination of the status of the head of state before domestic courts is primarily a matter for the domestic order of the individual concerned. In *Republic of the Philippines v. Marcos* (No. 1), for example, the U.S. Court of Appeals for the Second Circuit held that the Marcoses, the deposed leader of the Philippines and his wife, were not entitled to claim sovereign immunity. In a further decision, the Court of Appeals for the Fourth Circuit held in *In re Grand Jury Proceedings Doe No. 770* that head of state immunity was primarily an attribute of state sovereignty, not an individual right, and that accordingly full effect should be given to the revocation by the Philippines government of the immunity of the Marcoses". M. N. Shaw, *International Law*, 6th ed., 2008, Cambridge Univ. Press, p. 736. This is referred to by Mizushima Tomonori: "It has incontestably been stated that, '[i]t is the national legal order, the law of the state, which determines under what conditions an individual acts as an organ of the state'" (here the author is referring to Hans Kelsen, *Principles of International Law* (1952)), p. 117; M. Tomonori, "The Individual as Beneficiary of State Immunity: Problems of

30. However, it would seem worthwhile to heed Rosanne van Alebeek, who writes that "[t]he rule of functional immunity does not … oblige courts to blindly accept *any* claim of a foreign state that an official has acted under its authority. A court may independently inquire into the reasonableness of such claim".[59] Indeed, a foreign court (or any other authority of the State exercising jurisdiction) is not obliged to "blindly accept" such a claim by the State which the official serves. Yet the court cannot disregard such claims, unless the circumstances of the case clearly indicate otherwise, since, as was noted above, it is the prerogative of the official's State, not of the State exercising jurisdiction, to characterize the acts of its officials as its own official acts. It might be appropriate here to wonder whether there may be a presumption that, if a State has appointed someone as an official, then his acts or conduct derive from the authority of the State that he represents. A similar presumption was indicated at least by the International Court of Justice in the case *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. One of the principal elements of the situation under consideration in that case was that the Legal Counsel of the United Nations, acting on behalf of the Secretary-General, informed the Government of Malaysia that the Special Rapporteur of the Commission had been acting in an official capacity in carrying out the actions that were the subject of a lawsuit in Malaysia and therefore had immunity for those actions.[60] The case thus dealt with the

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the Attribution of *Ultra Vires* Conduct", *29 Denver Journal of Int'l Law and Policy*, 2001, p. 276. Jacques-Yvan Morin, responding to questions raised by the Rapporteur in drafting the 2009 Resolution of the Institute, recalled the well-established principle that "each State is itself free to attribute the exercise of its competences to the persons whom its designates as its agents", Travaux préparatoires, The Fundamental Rights of the Person and the Immunity from Jurisdiction in International Law, Annuaire de l'Institut de droit international, Session de Naples, Vol. 73 (2009), p. 19.

[59] Van Alebeek, Rosanne, *The Immunity of States and their Officials in the Light of International Criminal Law and International Human Rights Law*, 2006, p. 166. Van Alebeek goes on to state that "[c]ertain acts are so inherently personal that it cannot be reasonably claimed that they were performed under authority of a state. It is hard to dispute, for instance, that a head of state that murders the proverbial gardener in a fit of rage was committing anything but a purely private crime. Likewise, the veil of state authority could not convincingly cover the trade in narcotic substances for purely private benefit. That such a purely private act is committed during the exercise of an official's functions does not make a difference. In sum, the claim that acts should be attributed to the state rather than to the state official personally cannot be frivolously relied on by foreign states to protect their state officials". Ibid. The criteria for attributing the acts or conduct of a State official to the State itself were discussed in the second report (A/CN.4/631; see para. 26 et seq.) The Commission itself reviewed the issue in detail when considering the draft articles on responsibility of States for internationally wrongful acts (*Yearbook of the International Law Commission*, 2001, vol. II, Part Two. See in particular articles 4 and 7 and the commentaries to them. Ibid., pp. 40-42, 45-47).

[60] "Acting on behalf of the Secretary-General, the Legal Counsel considered the circumstances of the interview and of the controverted passages of the article and determined that Dato' Param Cumaraswamy was interviewed in his official capacity as Special Rapporteur on the Independence of Judges and Lawyers, that the article clearly referred to his United Nations capacity and to the Special Rapporteur's United Nations global mandate to investigate allegations concerning the independence of the judiciary, and that the quoted passages related to such allegations. On 15 January 1997, the Legal Counsel, in a note verbale addressed to the Permanent Representative of Malaysia to the United Nations, therefore 'requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process' with respect to that particular complaint". *Difference Relating to Immunity from Legal Process* …, Request for Advisory Opinion transmitted to the Court

immunity of a United Nations official *ratione materiae*, based on the fact that the official had performed those acts in an official capacity, of which the United Nations informed Malaysia. In that connection, the Court stated that "[w]hen national courts are seised of a case in which the immunity of a United Nations agent is in issue, they should immediately be notified of any finding by the Secretary-General concerning that immunity. That finding, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts".[61] Clearly, what is referred to here is not only a presumption of functional immunity but also a presumption that an official's acts are official in nature which arises when the Organization notifies the State exercising jurisdiction that an official in its service was acting in an official capacity.[62]

31. The considerations set out above regarding the absence of an obligation on the part of the State of an official to participate in court proceedings involving an official who has functional immunity, including by directly notifying a foreign court of the individual's immunity in order to have the court consider the question of immunity, would also appear to apply to cases involving the personal immunity of high-ranking officials who are not among the "threesome". In such cases, the official's State is also not obligated to participate in court proceedings and may inform solely the Government (and not necessarily the court) of the State exercising jurisdiction that its official has immunity in order to have the question of immunity considered by the appropriate organs of the foreign State, including the court. However, considering the circumstances discussed in paragraph 23 of the present report, the State must set out the grounds for a claim that, although its official is not a Head of State or Government or a minister for foreign affairs, his or her status and functions nevertheless meet the criteria for asserting personal immunity. The question of an official's status, functions and importance for the exercise of State sovereignty, and the question of whether the person is acting in an official capacity, fall within the domestic competence of the official's State.[63] For that reason, the State exercising jurisdiction cannot ignore the invocation of an official's personal immunity, even if that official is not one of the "threesome". However, as in the case where the actions of an official are characterized as official acts, the State exercising jurisdiction is not obliged to "blindly accept any" such claim by the State that he or she represents.

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pursuant to Economic and Social Council decision 1998/297 of 5 August 1998 (Note by the Secretary-General "Privileges and Immunities of the Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers", para. 6). Available at: http://www.icj-cij.int.

[61] *Difference Relating to the Immunity from Legal Process* ..., op. cit., para. 61.

[62] The United States District Court and Court of Appeals for the District of Columbia were apparently guided by similar considerations in recognizing General Ya'alon's immunity from a civil suit brought by the victims of military actions by the Israeli armed forces. The Court of Appeals, in its decision of 15 February 2008, stated in part that "[i]n light of the absence of any indication in the complaint that General Ya'alon acted outside his scope of authority and the Israeli ambassador's statement that his actions were within the authority given to him by the State of Israel, General Ya'alon qualifies for the immunity provided by the FSIA".

[63] As Mr. Hmoud, a member of the Commission, observed at its sixtieth session, "[t]he status of an official was a matter to be decided by the State entitled to immunity pursuant to its domestic law and it was not a matter of discretion for the authorities of the State exercising jurisdiction". A/CN.4/SR.2985, 25 July 2008, p. 15.

C. Waiver of immunity[64]

32. As the Commission noted in its commentary to the draft articles on the jurisdictional immunities of States and their property, State immunity does not apply when a State has consented to the exercise of jurisdiction over it by another State.[65] The absence of such consent is an important element of immunity.[66] A State's consent to the exercise of jurisdiction over it by another State is the essence of a waiver of immunity. This would appear to apply fully to immunity of State officials from foreign criminal jurisdiction as well.[67] As the memorandum of the Secretariat states, "[t]he rationale underlying waiver of immunity — like the rationale for immunity itself — is based on the sovereign equality of States and the principle of *par in parem non habet imperium*".[68]

33. Paragraph 15 of the present report recalls the observation made in the preliminary report that immunity does not belong to the individual official but to the official's State. Consequently, only the State can legally invoke the immunity of its officials. The same logic applies to the waiver of immunity. It is generally accepted that the authority to waive a State official's immunity, whether it be *ratione personae* or *ratione materiae*, lies with the State and not with the official.[69] The

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[64] Memorandum by the Secretariat, paras. 246-269.

[65] "State immunity ... does not apply if the State in question has consented to the exercise of jurisdiction by the court of another State. There will be no obligation ... on the part of a State to refrain from exercising jurisdiction, in compliance with its rules of competence, over or against another State which has consented to such exercise. The obligation to refrain from subjecting another State to its jurisdiction is not an absolute obligation. It is distinctly conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought". Commentary to draft article 7, Draft Articles on Jurisdictional Immunities of States and their Property (with commentaries), 1991. *Yearbook of the International Law Commission*, 1991, vol. II, Part Two, p. 26.

[66] Ibid.

[67] On the immunity of Heads of State, Arthur Watts writes that "[w]here an immunity exists, it may be waived and consent given to the exercise of jurisdiction ...". Watts, Arthur, "The legal position in international law of Heads of States, Heads of Governments and Foreign Ministers", *RdC*, 1994-III, p. 67.

[68] Memorandum by the Secretariat, para. 249.

[69] See the memorandum by the Secretariat, para. 265. As the International Court of Justice stated in its decision in the *Arrest Warrant* case, State officials "will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity", *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, para. 61. As the Statement of Interest of the United States of America in the *Samantar* case indicates, "[b]ecause the immunity is ultimately the state's, a foreign state may waive the immunity of a current or former official, even for acts taken in an official capacity". The United States Government refers to the *In re Doe* case (which dealt with a challenge to the issuance of subpoenas by the trial court to Ferdinand Marcos, former president of the Philippines, and his wife. United States Court of Appeals for the Second Circuit, 860 F.2d 40). The decision in that case noted that "[b]ecause it is the state that gives the power to lead and the ensuing trappings of power — including immunity — the state may therefore take back that which it bestowed upon its erstwhile leaders". In the case of *Yousuf v. Samantar*, Statement of Interest of the United States of America, op. cit. (see footnote 26 supra), para. 10. See also art. 7, para. 1, of the 2001 resolution of the Institute of International Law ("The Head of State may no longer benefit from the inviolability, immunity from jurisdiction or immunity from measures of execution conferred by international law, where the benefit thereof is waived by his or her State. Such waiver may be explicit or implicit, provided it is certain. The domestic law of the State concerned determines which organ is competent to effect such a waiver".) On

Commission had already reached this conclusion concerning the staff of diplomatic missions in preparing the draft articles on diplomatic relations,[70] which it then drew upon in preparing the draft articles on consular relations, special missions and State representatives in their relations with international organizations of a universal character.[71] States have indicated their agreement with this conclusion by including the corresponding provisions in the conventions adopted on the basis of these draft articles.[72] There is no reason to suppose that this conclusion does not apply to all State officials.[73]

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the waiver of immunity, the Institute takes the position in its 2009 resolution on the immunity from jurisdiction of the State and of persons who act on behalf of the State in case of international crimes that "States should consider waiving immunity where international crimes are allegedly committed by their agents" (Article II (3). Clearly, however, what is envisaged here is not only the State's right, as the beneficiary of immunity, to waive that immunity, but also a recommendation that it do precisely that when a crime is committed.) See also, for example, Brownlie, Ian, Principles of International Law, 6th ed., Oxford University Press, 2003, p. 335; Buzzini, Gionato Piero, op. cit., p. 474. Dominice, Christian, "Quelques observations sur l'immunité de juridiction pénale de l'ancien chef d'Etat", RGDIP No. 2, 1999, pp. 297-308 ("Les immunités, leurs contours et leurs limites, sont fixées par le droit international. Lorsqu'elles existent, c'est effectivement l'Etat qui peut renoncer a son immunité ou a celle de l'un de ses organes", p. 306). "It is the State which is the real beneficiary of the immunity, and it is the State which may waive it, irrespective of the wishes of the person claiming the immunity", in *An Introduction to International Criminal Law and Practice*, 2nd ed., 2010, Cambridge University Press, Robert Cryer et al., p. 534. Malcolm Shaw, in examining the waiver of immunity by diplomatic representatives, points out that in "*Fayed v. Al-Tajir* [1987 2 All ER 396] the Court of Appeal referred to an apparent waiver of immunity by an ambassador made in pleadings by way of defence. Kerr LJ correctly noted that both under international and English law, immunity was the right of the sending state and that therefore 'only the sovereign can waive the immunity of its diplomatic representatives. They cannot do so themselves.'" Malcolm N. Shaw, op. cit., p. 771.

[70] See the discussion of waiver of immunity during the deliberations on the draft articles on diplomatic intercourse and immunities at the ninth session of the International Law Commission, 27 May 1957, *Yearbook of the International Law Commission*, 1957, vol. I, pp. 111-113. The Commission unanimously adopted art. 21, para. 1, which provides that waiver of immunity is an act of State. In the draft articles adopted by the Commission, this provision was contained in art. 30, para. 1: "The immunity of its diplomatic agents from jurisdiction may be waived by the sending State". *Yearbook of the International Law Commission*, 1958, vol. II, p. 99.

[71] The Commission's commentary to article 45 of the draft articles on consular relations is typical: "The capacity to waive immunity is vested exclusively in the sending State, for that State holds the rights granted under these articles. The consular officer himself has not this capacity". *Yearbook of the International Law Commission*, 1961, vol. II, p. 118.

[72] Vienna Convention on Diplomatic Relations, 1961 (art. 32), Vienna Convention on Consular Relations, 1963 (art. 45), Convention on Special Missions, 1969 (art. 41) and Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, 1975 (art. 31 and art. 61).

[73] In examining the issue of the legality of the State's waiver of immunity for Heads of State in general, the United States Court of Appeals also relies on the analogy with diplomatic immunity: "Related principles of diplomatic immunity support the conclusion that head-of-state immunity can be waived by the sovereign.... Clearly, an individual enjoys diplomatic immunity only at the pleasure of that individual's state. It is true that this provision of the Vienna Convention [on Diplomatic Relations] applies only to diplomats, but we see no reason that its rationale should not also apply to heads of state. It would be anomalous indeed if a state had the power to revoke diplomatic immunity but not head-of-state immunity". *In re Grand Jury Proceedings, John Doe # 700*, United States Court of Appeals, Fourth Circuit, 5 May 1987, 817 F.2d 1108.

34. The question of which State authority is competent to waive the immunity of officials is determined by the State itself within the framework of its internal organization and does not appear to be subject to international regulation.[74] However, special attention should be paid in this context to waivers of immunity for State officials who belong to the "threesome" (meaning, of course, those in office).[75]

35. The Head of State and in many cases the Head of Government are the highest State officials. Together with ministers for foreign affairs, they are deemed to represent the State in international relations without any requirement to present additional credentials. In that connection, the question arises of whether they can themselves waive the immunity from foreign jurisdiction that they enjoy.

36. This question is to some extent hypothetical. As Michael A. Tunks notes, "[i]n practice, it is extremely uncommon for a sitting head of state's immunity to be waived because he is often the person who has the power to control whether or not to issue a waiver".[76] In legal doctrine there are two noteworthy points of view. As Arthur Watts has observed with respect to Heads of State, "[w]aiver of a Head of State's immunity … is complicated by the fact that he is the ultimate authority within his own State".[77] In his opinion, given that the Head of State is the highest

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[74] The second paragraph of art. 7, para. 1, of the Institute's 2001 resolution (see footnote 33 supra) explicitly states that "[t]he domestic law of the State concerned determines which organ is competent to effect such a waiver".

[75] As Joe Verhoeven has observed, "[s]i problème il y a, il concerne surtout la personne qui se trouve au faîte de la hiérarchie et qui n'a pas de supérieur immédiat auquel on puisse se référer, ce qui vise principalement le chef de l'État étranger". Joe Verhoeven (ed.), *Droit international des immunités: contestation ou consolidation?*, 2004, Larcier, p. 114.

[76] Michael A. Tunks, "Diplomats or Defendants? Defining the Future of Head-of-State Immunity", 52, *Duke Law Journal* (2002) 651, p. 673, fn. 123. He goes on to provide a clear illustration of this thesis by referring to the *Lafontant v. Aristide* case: "This catch-22 is illustrated in the *Aristide* case. The de facto Haitian government supported the lawsuit and tried to waive Aristide's immunity, but it was unable to do so because Aristide represented the only Haitian government recognised by the United States; consequently, only Aristide could waive his own immunity". Ibid. Considering the hypothetical ability to waive immunity in *Howland v. Resteiner*, the United States Federal District Court notes that "even if head-of-state immunity does apply to former heads of state, that immunity may be waived at any time either by Dr. Mitchell in his present capacity as the head of state of Grenada or by any subsequent administration that should come into power after Dr. Mitchell's tenure has ended" (the case dealt with the filing of a civil suit against three defendants, including Keith Mitchell, the Prime Minister of Grenada, and his wife, Marietta Mitchell; the court recognized the immunity of these two individuals on the basis of the claim of immunity made by the United States Department of State and the absence of a waiver of immunity, but without prejudice to the possibility of refiling the suit). *Charles C. Howland v. Eric E. Resteiner, et al*. United States District Court, E.D. New York, No. 07-CV-2332, 5 December 2007. Available at: http://www.westlaw.com. There is no doubt that the immunity of a Head of State can be waived. That is set out, for example, in the Institute's 2001 resolution (art. 7, para. 1). In addition, for example, Yoram Dinstein observed during the Institute's deliberations on the draft of the 2009 resolution that "the capacity to waive immunity was vested in the State and not in the individual who benefited from it. This was true even when the immunity was labeled 'personal immunity', since immunity was never personal in the full sense of the word. If the State exercised its option of waiving that 'personal immunity', the person concerned (regardless of his or her wishes) was subject to the exercise of the very jurisdiction that he or she was trying to avoid". Annuaire de l'Institut de droit international. Session de Naples, Vol. 73 (2009), p. 199 (available at: http://www.idi-iil.org).

[77] Watts, Arthur, op. cit., p. 67.

State authority, his waiver of immunity will be valid.[78] Joe Verhoeven, however, believes that the Head of State cannot himself waive his immunities, since they "safeguard functions that he performs in the sole interest of the State of which he is the Head".[79] Verhoeven indicates that the prerogative of waiving the immunity of the Head of State lies with the competent authorities of that State.[80] The question of which authorities have the competence to waive immunity is determined, as for waivers of immunity for other officials, by the domestic law of the State.[81]

37. Watts infers, evidently on the basis of the hierarchy of officials and State bodies, that ministers for foreign affairs cannot waive their own immunity, as this position is not the highest in the State structure and there is always a higher official or body that can waive the immunity of the minister for foreign affairs. Under this approach, the situation with respect to the head of Government is not clear: the head of Government is the highest official in some countries but not in others.

38. It may be useful to consider this question bearing in mind that all three officials are regarded, by virtue of their positions, as representatives of the State in international relations. If this circumstance, and not only considerations of hierarchy, is taken into account, it may be supposed that the State exercising criminal jurisdiction in respect of such an official and having received from him or her a waiver of immunity is entitled to presume that this reflects the wishes of the State represented by that official, at least until such time as that State otherwise indicates.

39. Alongside the question of who has the power to waive an official's immunity, it is necessary to consider what form such a waiver can take.[82] Must a waiver of an official's immunity always be express, or is an implied waiver sufficient? Or is a waiver, whether express or implied, considered sufficient provided it is clear?

40. The Commission considered this issue during the preparation of draft articles concerning diplomatic intercourse, consular relations, special missions, representation of States in their relations with international organizations and jurisdictional immunities of States and their property. The Commission's work on this question in connection with the draft articles on diplomatic intercourse was definitive with regard to the first four sets of draft articles. The Commission's draft article on the waiver of immunity of diplomatic agents provides that "in criminal proceedings, waiver must always be express".[83] In the commentary to this provision the Commission noted that "A distinction is drawn between criminal and civil proceedings. In the former case, the waiver must be express. In civil, as in

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[78] Ibid., p. 68. Arthur Watts examines separately a Head of State's waiver of immunity with respect to acts taken in an official capacity and acts taken in a personal capacity. In both cases he reaches the conclusion that a waiver of immunity can be made by the Head of State himself, although in his view the ability of the Head of State himself to waive immunity is more evident for acts taken in a personal capacity. Ibid.

[79] Institute of International Law, Annuaire, Vol. 69, 2000-2001, Session de Vancouver, 2001, Travaux préparatoires et délibérations de l'Institut, p. 550.

[80] Ibid.

[81] See reference above (footnote 74 supra) to the second paragraph of art. 7, para. 1, of the Institute's 2001 resolution. Also see Verhoeven, Joe, Rapport Provisoire, para. 34, ibid., p. 534.

[82] "An important question with regard to waiver of immunity of State officials is what form such a waiver can take." Memorandum by the Secretariat, para. 250.

[83] *Yearbook ... 1958*, vol. II, p. 99 (art. 30, para. 2).

administrative proceedings, it may be express or implied ...".[84] The States decided otherwise, however, and the requirement that a waiver of immunity must always be express, as provided in article 32, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, pertains to immunity from both criminal and civil jurisdiction.[85] Similarly worded provisions on waiver of immunity can be found in the 1963 Vienna Convention on Consular Relations (art. 45, para. 2), the 1969 Convention on Special Missions (art. 41, para. 2) and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (art. 31, para. 2, and art. 61, para. 2).[86] It should be noted that, except in the Vienna Convention on Consular Relations, the requirement that a waiver of immunity be express pertains to individuals enjoying personal immunity from foreign criminal jurisdiction. In all cases, moreover, these are individuals whose identity and status are well known to the State of residence. Both consular officials and consular employees enjoying only functional immunity belong to this category.

41. A number of rulings by national courts have expressed the view that a waiver of the immunity of a Head of State must be express. Examples of such rulings cited in the memorandum by the Secretariat include decisions by the Swiss Federal Tribunal in *Ferdinand et Imelda Marcos c. Office fédéral de la police*,[87] the United States District Court for the Eastern District of New York in *Lafontant v. Aristide*[88] and the Court of Appeal of Great Britain in *Ahmed v. Government of the Kingdom of Saudi Arabia*.[89]

42. An express waiver of immunity (the express consent of the State having sent an official to the exercise by another State of criminal jurisdiction in respect of that official) may take the form of a unilateral statement or notification by the sending State or the conclusion by that State of an international agreement with the State exercising jurisdiction. This may be done in connection with a specific official or officials named in the criminal proceedings in question, or in a more general manner. Both of these types of express waiver of immunity are specified in article 7,

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[84] Ibid.

[85] A number of delegations at the Conference took the view that only an express waiver can constitute sufficient evidence of the real intent of the sending State to waive immunity. As immunity primarily protects the State (whereas the diplomatic agent merely benefits from it), there is no need to differentiate between criminal and civil jurisdiction for the purposes of waiver of immunity. See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. I (A/CONF.20/14), pp. 174 et seq.

[86] It is clear, however, that all these conventions permit implied waivers of immunity from civil jurisdiction. In particular, all the above-mentioned articles contain identical provisions to the effect that the initiation of proceedings by an official enjoying immunity shall preclude him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim. See footnote 109 below.

[87] Memorandum by the Secretariat, para. 251.

[88] Ibid.

[89] Ibid.

paragraph 1, of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.[90]

43. The question of the form to be taken by a waiver of immunity of a former Head of State was touched upon in *Pinochet*. The memorandum by the Secretariat contains a fairly detailed analysis of this aspect of the case and the scholarly commentary thereon.[91] In particular, it is pointed out that "in Pinochet (No. 3), the issue of waiver revolved around Chile's ratification of the Convention against Torture, and waiver was addressed on some level by all seven of the Lords. While one Lord considered this to be a case of express waiver, six Lords did not even consider it to be a case of implied waiver, yet five of the seven Lords concluded that it ultimately operated so as to manifest Chile's consent to have its former head of State subject to jurisdiction".[92] As Lord Saville noted, "[i]t is … said that any waiver by states of immunities must be express, or at least unequivocal. I would not dissent from this as a general proposition, but it seems to me that the express and unequivocal terms of the Torture Convention fulfil any such requirement".[93] Lord Goff disagreed, taking the view that the Convention does not provide for either express or implied waivers of immunity. He noted, inter alia: "[I]t appears to me to be clear that, in accordance both with international law, and with the law of this country which on this point reflects international law, a state's waiver of its immunity by treaty must … always be express. Indeed, if this was not so, there could well be international chaos as the courts of different state parties to a treaty reach different conclusions on the question whether a waiver of immunity was to be

[90] In its commentary to the draft articles on jurisdictional immunities of States and their property, the Commission, inter alia, revealed its approach to the provisions subsequently included in article 7, paragraph 1, of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property ("[T]here appear to be several recognizable methods of expressing or signifying consent. … [T]he consent should not be taken for granted, nor readily implied. Any theory of 'implied consent' as a possible exception to the general principles of State immunities outlined in this part should be viewed not as an exception in itself, but rather as an added explanation or justification for an otherwise valid and generally recognized exception. There is therefore no room for implying the consent of an unwilling State which has not expressed its consent in a clear and recognizable manner, including by the means provided in article 8 … An easy and indisputable proof of consent is furnished by the State's expressing its consent ... in writing on an ad hoc basis for a specific proceeding before the authority when a dispute has already arisen. … [I]f consent is expressed in a provision of a treaty concluded by States, it is certainly binding on the consenting State, and States parties entitled to invoke the provisions of the treaty could avail themselves of the expression of such consent. The law of treaties upholds the validity of the expression of consent to jurisdiction as well as the applicability of other provisions of the treaty". Draft articles on jurisdictional immunities of States and their property and commentaries thereto, *Yearbook ... 1991*, vol. II, Part Two, p. 27. The third means of expression envisaged by the Commission — a written contract — clearly does not pertain to waivers of immunity from criminal jurisdiction.

[91] Memorandum by the Secretariat, paras. 258-264.

[92] Ibid., para. 258.

[93] *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, 24 March 1999 (Pinochet No. 3). Available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino7.htm.

implied".[94] It thus appears that both Lords were saying, in essence, that a waiver of immunity, at least in the form of an international agreement, must be express.[95]

44. One viewpoint expressed in the literature is that a number of international agreements that do not include any provisions on waiver of immunity are nonetheless incompatible with immunity. Such agreements include human rights treaties that criminalize certain conduct and provide for universal criminal jurisdiction in respect of such conduct.[96] Accordingly, a State that has consented to be bound by such an agreement has ipso facto implicitly waived its officials' immunity if they violate the human rights protected by that agreement or commit acts criminalized therein.[97] The differences between jurisdiction, on the one hand, and immunity, on the other, and also between substantive and, in some cases, peremptory human rights norms and rules prohibiting and criminalizing various acts, on the one hand, and the procedural nature of immunity, on the other, were dealt with in the preliminary and second reports.[98] The second report concludes that neither universal jurisdiction nor rules of this kind preclude immunity.[99] These observations also apply to the present case. For similar reasons, a State's consent to

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[94] Ibid.; available at http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino3.htm.

[95] In considering the question of an implied waiver of a State's immunity under the Foreign Sovereign Immunities Act (FSIA), the United States District Court observed, in *Doe and ors v. Israel and ors*, Motion disposition, 400 F Supp 2d 86, 95-96 (DDC 2005); ILDC 318 (US 2005), that "*An implicit waiver under this provision requires that the foreign sovereign 'hav[e] at some point indicated its amenability to suit*', and that it have subjectively intended to do so".

[96] According to R. O'Keefe, the doctrine of implied waiver of immunity "posits that when states enter into an international agreement creating or recognizing an international crime and imposing the obligation to punish it, this is logically incompatible with the upholding of immunity where the accused is a foreign state official. As such, the necessary implication is that these states have opted to waive in advance any state immunity presumptively attaching to the impugned conduct, insofar as it is inconsistent with the agreement. In short, the act of establishing universal and mandatory criminal jurisdiction in respect of potentially official conduct constitutes consent in advance to the exercise of that jurisdiction by foreign municipal courts, regardless of the doctrine of state immunity". R. O'Keefe, "The European Convention on State Immunity and International Crimes", *The Cambridge Yearbook of European Legal Studies,* vol. 2, 1999, p. 513. The author substantiates that theory on the basis of his understanding of article 2 (a) of the 1972 European Convention on State Immunity, noting, inter alia, that it "has at least the potential to sustain an argument based on implied waiver by inconsistent international agreement" (ibid., p. 517). He also considers, however, that the existence of an implied waiver cannot be inferred from an agreement unless the parties' intent to consent to the exercise by foreign courts of criminal jurisdiction in respect of the conduct criminalized therein is unequivocally apparent. In his view, the existence of an obligation to exercise jurisdiction (including under the principle *aut dedere aut judicare*) constitutes evidence of such intent (ibid.). V. Koivu, for his part, notes that in order to establish the existence of an implied waiver the international agreement must "expressly conflict with the applicable provisions of immunity". V. Koivu, "Head-of-State Immunity v. Individual Criminal Responsibility under International Law", *Finnish Yearbook of International Law*, vol. XII (2001), p. 318.

[97] Although consent to be bound by such an agreement is usually considered not a waiver of immunity but simply an exception from or absence of immunity alongside the possibility of waiver of immunity. See, for example, Curtis A. Bradley and Jack Landman Goldsmith, "Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation", Green Bag 2D, vol. 13, p. 9, 2009; Harvard Public Law Working Paper No. 10-05, p. 22. Available at http://ssrn.com/abstract=1485667. This question was considered in detail in the second report (para. 63 et seq).

[98] Preliminary report, paras. 64-70; second report, paras. 64-77.

[99] Second report, paras. 64 and 77.

be bound by an international agreement of this kind does not imply consent to the exercise of foreign criminal jurisdiction in respect of its officials, i.e. waiver of their immunity. Moreover, an international agreement cannot be construed as implicitly waiving the immunity of a State party's officials unless there is evidence that that State so intended or desired. Meanwhile, as noted by J. Verhoeven in relation to agreements concerning crimes under international law, "[n]ul ne paraît toutefois y découvrir une volonté — implicite, mais certaine — de leurs signataires de déroger à l'immunité".[100]

45. In its judgment in the *Arrest Warrant* case, the International Court of Justice stated its opinion most definitely on the issue of whether the conclusion by States of an international treaty criminalizing certain actions and requiring States to extend criminal jurisdiction to them meant that these States were waiving immunity for their officials. The Court said, in part: "[J]urisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of ministers for foreign affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions".[101] It would seem that this statement also fully applies to the relationship between human rights treaties and waivers of immunity.

46. Overall, the memorandum by the Secretariat notes "general reluctance to accept an implied waiver based on the acceptance of an agreement".[102]

47. In the resolution of the Institute, instead of a choice between an explicit or implied waiver of immunity, the emphasis is on the clarity and lack of ambiguity of the waiver of immunity. With regard to waiving immunity for Heads of State, its article 7 says: "Such waiver may be explicit or implied, so long as it is certain".[103] As Joe Verhoeven noted in this connection in his report, "[l]'important est d'ailleurs

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[100] *Droit international des immunités: contestation ou consolidation?*, Joe Verhoeven (dir.) 2004, Larcier, p. 123. The author also notes that "[C]es conventions (génocide, torture, etc.) ne comportent aucune disposition écartant explicitement celle-ci et ... rien ne laisse croire, ni dans leurs travaux préparatoires ni ailleurs, que telle ait été la volonté implicite des États qui les ont négociées ou qui y sont devenus parties" (ibid., p. 125).

[101] *Arrest warrant*, Judgment, para. 59. With regard to the Convention against Torture, Xiaodong Yang notes, "… the Torture Convention is silent on the question of State immunity. The reason for this silence may be a matter of conjecture but one thing is clear, that is, in the absence of a specific provision dealing with State immunity, the interpretation and application of the Torture Convention should be subject to existing rules of international law pertaining to this matter. The existence of universal jurisdiction does not necessarily entail a loss of immunity, as has been affirmed in unequivocal terms by the ICJ", "*Jus Cogens* and State Immunity", *New Zealand Yearbook of International Law*, Vol. 3, 2006, pp. 144-145. The Court of Cassation of Belgium, considering the issue of the immunity of Ariel Sharon in connection with charges of war crimes, states, "[T]he Geneva Conventions of August 12, 1949 as well as the Additional Protocols I and II to these Conventions contain no provision that would prevent the defendant from invoking jurisdictional immunity before Belgian courts". *H.S.A. et al., v. S.A. et al., (Decision related to the Indictment of Ariel Sharon, Amos Yaron and others)*, Court of Cassation of Belgium, see footnote 41 above.

[102] Memorandum by the Secretariat, para. 259.

[103] Institut de droit international, Annuaire, Vol. 69, 2000-2001, Session de Vancouver, 2001, Travaux préparatoires et déliberations de l'Institut, p. 689.

là: c'est que la volonté [de l'État] soit certaine".[104] As an example of such an unambiguous expression of a State's will, which, if not expressed clearly, can be considered an implied waiver of immunity, the author cites a situation in which a Government brings a former Head of State to trial.[105]

48. However, is this so obvious? For example, a former Head of State (or other official) can be brought to trial by his State, and that State can even demand that he be extradited from another country.[106] Such a request would obviously mean a waiver of that person's immunity with regard to the procedural actions by the foreign State to extradite him. At the same time, however, the State can continue to insist on the immunity of its former Head with regard to actions by a foreign State that can be undertaken by the latter for the purpose of its own criminal prosecution of the person in question or in order to extradite him to a third country.[107] On the whole, it would seem that the desire of a State to prosecute its own former official in no way means that this State has ceased to consider the actions in question as having been committed in an official capacity, and is not equivalent to consent to the exercise of foreign criminal jurisdiction against this official, i.e., a waiver of immunity. It is more likely the contrary: the State does not want its former official to be prosecuted abroad, but wants to bring him to justice itself.[108]

49. Probably, one could imagine a situation in which a State requests a foreign State to carry out some sort of criminal procedure measures against one of its sitting high-ranking officials — a Head of State or Government or a minister for foreign affairs. This of course presumes a waiver of immunity for that person with regard to

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[104] Ibid., p. 534.

[105] Ibid., p. 534.

[106] Thus, for several years, Peru worked to obtain the extradition of former dictator Alberto Fujimori, first from Japan (which was unsuccessful due to the fact that he held Japanese citizenship), and then from Chile. Fujimori was arrested in Chile at the request of the Peruvian leadership immediately upon his arrival, and some time later, in 2007, was extradited to Peru for criminal prosecution. As far as can be determined from accounts of the case, in the decision regarding his arrest and during consideration of the extradition request, the issue of whether or not Fujimori had immunity did not come up. See, for example, M. Haas, "[F]ujimori Extraditable!: Chilean Supreme Court Sets International Precedent for Human Rights violations", 39 *University of Miami Inter-American Law Review*, Winter 2008, pp. 373-407.

[107] In the case *Lafontant v. Aristide*, a U.S. circuit court dismissed the argument that a warrant for the arrest of Jean-Bertrand Aristide issued in Haiti could be considered a waiver of immunity for the Head of State. Moreover, the absence of a waiver of immunity was noted in a letter from the Ambassador of Haiti to the United States. However, a statement that Aristide had immunity, which was submitted by the U.S. Department of State, was decisive for the court in this case. It follows that the U.S. did not recognize the Government of Haiti, since Aristide, then in exile, was still recognized by the United States as the sole legitimate Head of State. *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (EDNY 1994), 103 ILR 581.

[108] A criminal case brought by a State against a former Head of that State may be accompanied by that State's consent to exercise of jurisdiction with regard to that person by a foreign State (see, for example, the case of the former President of Bolivia *Gonzalo Sanchez de Lozada*) (the criminal charges brought against him in Bolivia were accompanied by a waiver of any remaining immunity by the Government of Bolivia with regard to the civil case brought against him in the U.S., which was then considered. *Mamani, et al. vs. Jose Carlos Sanchez Berzain and Gonzalo Daniel Sanchez de Lozada Sanchez Bustamante* U.S. District Court, Southern District of Florida, Miami Division, 9 November 2009, available at: http://www.law.harvard.edu/programs/hrp/documents/Mamani_Sanchez_Berzain_Sanchez_de_Lozada.pdf). This only confirms that to equate attempts at criminal prosecution with an implied waiver of immunity is not likely to be legal.

the measures in question. But such a situation is, it would seem, hypothetical in nature.

50. In conventions on diplomatic relations, consular relations, special missions, representation of States in their relations with international organizations of a universal character and on the jurisdictional immunities of States and their property, there are similar provisions, whereby the initiation of proceedings by a subject enjoying immunity precludes him from invoking immunity from jurisdiction in respect of any counterclaim directly connected with the principal claim.[109] It is clear that civil jurisdiction is at issue here. However, various forms of initiative participation by victims in criminal litigation exist in the criminal procedure legislation of many countries. Can it be considered a waiver of immunity from criminal procedure measures carried out with regard to an official, if he is the aggrieved party in a criminal case, including from measures carried out in connection with countermeasures by the person against whom the case is brought?

51. It would seem that, in general, an analogy with a situation involving immunity from civil jurisdiction in an instance where the aggrieved party initiates or joins a criminal case is not exactly fitting. In cases where a criminal trial is conducted through a judicial investigation or a State prosecution, procedural measures are carried out, regardless of participation by the aggrieved party or the authorities of the relevant State. In this context, it is important that the official is only a beneficiary of the immunity which belongs to the State of that official. And that State, whose interests the immunity protects, cannot be considered to have waived immunity as a result of its official's actions.[110]

52. At the same time, there are cases when an official acts as the sole prosecutor in a criminal case at the trial stage, without any involvement by a State prosecutor, while enjoying all the procedural rights of the prosecution. In this connection, the question arises of whether this leads to a waiver of immunity with regard to counter-accusations related to the presumed crime. Such a situation can arise in cases of so-called private prosecution, which is provided for in the legislation of a number of States for a limited number of crimes (generally, crimes without serious consequences, such as infliction of minor injuries, etc).[111] In private prosecutions,

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[109] See art. 32, para. 3 of the Vienna Convention on Diplomatic Relations 1961, art. 45, para. 3 of the Vienna Convention on Consular Relations 1963, art. 41, para. 3 of the Convention on Special Missions, 1969, art. 31, para. 3 of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character 1975 and art. 8 of the Convention on Jurisdictional Immunities of States and their Property, 2004 (available at http://untreaty.un.org).

[110] Although, again, a somewhat unclear situation results in this hypothetical case, when a criminal case is initiated by a Head of State or Government or a minister for foreign affairs.

[111] See, for example, arts. 43, 318 of the Criminal Procedure Code of the Russian Federation, available at http:///www.consultant.ru/popular/upkrf/; arts. 374-394 of the German Code of Criminal Procedure, available at: http://www.gesetze-im-internet.de/englisch_stpo/englisch-stpo.html; art. 27 of the Criminal Procedure Code of Ukraine, available at: http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=1001-05; art. 71 of the Criminal Procedure Code of Austria, available at: http://www.jusline.at/Strafprozessordnung_(StPO).html. There are rules under which criminal cases involving certain forms of crime can be brought only as private prosecutions — the government prosecutor does not have that right, i.e., the Government does not have jurisdiction, or, essentially, a legal interest in a criminal prosecution — see art. 20, part 2 of the Criminal Procedure Code of the Russian Federation (these include inflicting minor injuries, beating which does not result in serious consequences, slander or libel and insult).

there is no State prosecutor, and the aggrieved party[112] exercises all rights usually enjoyed by the State prosecutor, so that the aggrieved party actually engages in a dispute with the defendant, with the court acting as arbitrator in that dispute. For this reason, a counter-accusation is permissible in such a trial.[113] In other words, it can be very close, in its procedural aspects, to a civil legal case. Of course, how close it comes,[114] based on nuances of the criminal procedure legislation of the State of jurisdiction, should in fact be decisive in situations involving a waiver of immunity in "private prosecution" cases.

53. In the case concerning *Certain Questions of Mutual Assistance in Criminal Matters*, the International Court of Justice, in considering the issue of France's actions with regard to the Prosecutor of the Republic and the head of the national security service of Djibouti, concluded that France had not violated the functional immunity that those officials may have enjoyed, since Djibouti did not invoke it. At the same time, the Court did not state that in not invoking immunity, Djibouti had waived it. Nonetheless, it seems reasonable to ask whether a State's non-invocation of the immunity of an official can be considered an implied waiver of immunity.[115]

54. There was mention above of the fact that when the "threesome" is involved, the burden of invoking immunity falls to the State exercising criminal jurisdiction, and that it falls to the State of the official, when the matter involves an official who enjoys functional immunity or an official who is not one of the "threesome", but enjoys personal immunity.[116] If that is the understanding, then if the State of the official does not invoke immunity in a situation where foreign criminal jurisdiction is being exercised against the Head of that State or its Government or its minister for foreign affairs, that does not mean that the State consents to the exercise of foreign criminal jurisdiction with regard to that person, and, accordingly, to a waiver of immunity. Proceeding from that same logic in a case where foreign criminal jurisdiction is being exercised against an official who enjoys functional immunity or personal immunity but who is not one of the "threesome", it can be presumed that non-invocation of immunity by the State of the official can be considered consent by that State to the exercise of jurisdiction and, accordingly, a waiver of immunity.[117]

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[112] See, for example, art. 71, part 5, of the Criminal Procedure Code of Austria and art. 43, part 2 of the Criminal Procedure Code of the Russian Federation, ibid.

[113] See art. 388 of the German Criminal Procedure Code, ibid.

[114] Private prosecutions can take a variety of forms in certain States and consist sometimes of a blend. For example, in Germany there are "private collaborative prosecutions" (arts. 395-402 of the German Criminal Procedure Code, op. cit.), in which the essential role in the trial is played by the State prosecution, while the private prosecution plays an auxiliary role.

[115] See also G. P. Buzzini, op. cit., p. 474.

[116] See. paras. 18-24, above.

[117] However, the Special Rapporteur is not familiar with any court judgments, practices, State opinions or doctrines which either clearly confirm or are at variance with such an approach to the issue. The provisions of the previously mentioned statement of the U.S. Department of State in the case of *Samantar* (see footnote 32 above) indicate a link between failure to invoke immunity and exercise of criminal jurisdiction by a foreign State with regard to a person who could in principle enjoy immunity. There are quite a few examples of court judgments in which immunity was either rejected or not considered at all, in which the State of the (former) official did not invoke immunity. These include the judgment in the case of *Xuncax v. Gramajo*, U.S. District Court of Massachusetts, 1995 and in a similar case in Spain, the *Guatemala Genocide Case*, Spanish Supreme Court, 23 February 2003, 42 ILM 686 (2003), as well as the judgment of the Court of Cassation of Belgium in the case *H.S.A. v. S.A. et al.,: (Decision related to the indictment of Ariel Sharon, Amos Yaron and others)*, 12 February 2003, 42 ILM 596 (2003). The

At the same time, nothing prevents a State exercising jurisdiction from itself refraining from its exercise with regard to a serving or former official of a foreign State and acknowledging that he has immunity.

55. Therefore, a general conclusion on the issue of the form of the waiver of immunity of State officials from foreign criminal jurisdiction could be phrased approximately as follows: when applied to a serving Head of State, Head of Government or minister for foreign affairs, a waiver of immunity should be explicitly stated. A possible exception would be a hypothetical situation in which the State of such an official requests the foreign State to carry out certain criminal procedure measures with regard to the official. Such a request would unambiguously presume a waiver of immunity with regard to those measures, and in such a case, it would be implied. Applied to serving officials who are not included in the "threesome" but who enjoy personal immunity, to other serving officials who enjoy functional immunity and to all former officials who also enjoy functional immunity, a waiver of immunity can be either express or implied. An implied waiver in this case can be expressed specifically in the non-invocation of immunity by the State of the official.

D. Can the official's State invoke immunity after waiving it?[118]

56. It would seem that in a case when immunity is expressly waived, i.e., after a State has consented to the exercise of criminal jurisdiction over its official by another State, it is legally impossible to invoke immunity. In particular, this would not be in keeping with the principle of good faith.[119] At the same time, an express waiver of immunity may, in some cases, affect immunity only with regard to certain measures. For example, a State may waive the immunity of its minister for foreign

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U.S. Government did not invoke immunity before the Italian court relative to the criminal case in which U.S. Secret Service personnel were accused of abducting in Italy Nasr Osama Mustafa Hassan, suspected of involvement in terrorist activity and known as Abu Omar. (See the Judgment of the Fourth Criminal Section of the Tribunal of Milan of 4 November 2009, in which 23 former CIA employees, including several members of the staff of the U.S. Consulate, were sentenced *in absentia*. *Public Prosecutor v. Adler and ors*. First instance judgment, No. 12428/09, Italy, Tribunal of Milan, Fourth Criminal Section, reported in Oxford Reports on International Law in Domestic Courts, ILDC 1492 (IT2010)). An employee of the U.S. Consulate even sued the U.S. Government on grounds of failure to invoke consular immunity in this instance, demanding that such immunity be invoked (see *Sabrina De Sousa v. Department of State, et al*., Case No. 09-cv-896 (RMU), Complaint and Defendants' Motion to Dismiss, available at: http://jurist.law.pitt.edu/papershase/2009/09/doj-seeks-dismissal-of-diplomatic.php). However, it cannot be said with certainty that failure by the State of the official to invoke immunity in these cases was the reason that immunity was denied.

[118] This is a continuation of the consideration begun above (paras. 11-13 of the present report) of the issue of the timing of invocation of immunity.

[119] The Commission's commentaries on article 30 of the draft articles on diplomatic intercourse and immunities say, in part, "It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance". Draft Articles on Diplomatic Intercourse and Immunities, with commentaries, *Yearbook of the International Law Commission, 1958*, vol. II, p. 99. See also, for example, commentaries on article 45 of the draft articles on consular relations: "[O]nce the immunity has been waived, it cannot be pleaded at a later stage of the proceedings (for example on appeal)." Draft Articles on Consular Relations, with commentaries, *Yearbook of the International Law Commission, 1961*, vol. II, p. 118.

affairs with regard to his testifying at a deposition. It would seem that such a waiver of immunity cannot be considered a waiver of that person's immunity if the State who subpoenas that person as a witness then intends to criminally prosecute him.[120]

57. As noted earlier, an implied waiver of immunity can occur when there is non-invocation of immunity of someone who is not one of the "threesome" (with the understanding, of course, that the official's State was aware of the exercise of foreign criminal jurisdiction with regard to this person but did not to invoke immunity).[121] The Special Rapporteur is not certain that, when there is such an implied waiver of immunity, it cannot be invoked at a later stage of a criminal trial.[122] On the one hand, as noted earlier,[123] the issue of immunity should be considered at an early stage of the process. On the other hand, in a situation, for example, in which the official's State did not invoke that person's immunity at the pretrial stage, and can thereby be considered as having already waived immunity with regard to the measures taken at that stage, would it be unlawful for it to then decide to invoke immunity when the case comes to trial? It would seem that in such a situation it is still possible to invoke immunity. However, procedural actions already carried out with regard to the official in question by the State exercising jurisdiction, up to the point when immunity is invoked, cannot be considered illegal, since, as noted earlier, in this case the State exercising criminal jurisdiction is not required to consider the issue of immunity *proprio motu*, and the burden of invoking the official's immunity falls to his State.[124] At the same time, there are doubts as to the applicability of such an approach to a situation in which immunity was not invoked in the court of first instance, but the official's State decides to invoke it at the appeal stage.[125]

III. An official's immunity and the responsibility of the official's State

58. If the official's State waives his immunity, that opens the way for the full exercise of foreign criminal jurisdiction in regard to this official. This also relates to jurisdiction with regard to actions performed by the official in an official capacity (even a waiver of immunity *ratione materiae* does not have to be accompanied by a statement that the presumed illegal actions were performed in a personal capacity). As noted in the preliminary report, attributing to the State actions performed by an official in an official capacity does not mean that they cease to be attributed to that

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[120] The memorandum by the Secretariat (A/CN.4/596) notes, in part, "Concerning the legal effects of the waiver of immunity — including any residual immunity not covered by the waiver — in the case of express waiver this question should be clarified by the express terms of the waiver itself". Memorandum by the Secretariat, para. 269, p. 175.

[121] Para. 54 of the present report.

[122] What is at issue here, of course, is a situation in which the State of the official knows that a foreign State is exercising (intends to exercise) criminal jurisdiction with regard to its official and does not invoke immunity for some period of time. As G. P. Buzzini has noted, "… it is not entirely clear until which point in time in the proceedings an immunity [issue] can still be raised". Buzzini, G. P. op. cit., p. 474.

[123] Paras. 11-13 of the present report.

[124] See para. 17, above.

[125] See the opinion of the Commission set forth in the commentaries on the Draft Articles on Diplomatic Intercourse and Immunities cited in footnote 119, above.

official.[126] The only hindrance to the criminal prosecution of this person by a foreign State is the fact that he enjoys immunity. Waiving immunity removes this hindrance. At the same time, waiving immunity of an official with regard to actions performed by this person in an official capacity does not mean that this conduct loses its official character. Accordingly, it is still attributed not only to the official but also to the State which he is or was serving. This is dual attribution. Accordingly, waiving immunity not only creates the conditions for establishing the official's criminal responsibility, but also is not an obstacle to holding the official's State responsible under international law, if the actions are in violation of the State's obligations under international law.[127] Thus, despite the waiver of immunity with

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[126] Preliminary report, para. 89. However, directly opposite views are expressed in the doctrine. See, for example, how Dapo Akande and Sangeeta Shah describe such a position: "[T]his type of immunity constitutes (or, perhaps, more appropriately, gives effect to) a substantive defence, in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the state. Such acts are imputable only to the state and immunity *ratione materiae* is a mechanism for diverting responsibility to the state. This rationale was cogently expressed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Blaškić*:

> [State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called "functional immunity". This is a well established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.

(Dapo Akande and Sangeeta Shah, "*Immunities of State Officials, International Crimes, and Foreign Domestic Courts"*, EJIL (2010), Vol. 21, No. 4, 815, pp. 826-7). On the other hand, they make reference to another practice: "However, in the *Rainbow Warrior Case*, 74 ILR (1986) 241, the French government's assertion that military officers should not be tried in New Zealand once France had accepted international responsibility was rejected by New Zealand." Ibid., footnote 51. In this regard, see also Roseanne Van Alebeek (op. cit., footnote 59 above). The possibility of attributing official behaviour of an official solely to the State was one of the arguments made by Djibouti during the consideration by the International Court of Justice of the Case Concerning Certain Questions of Mutual Assistance in Criminal Matters. ("What Djibouti requests of the Court is to acknowledge that a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as that organ." *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Oral proceedings, 22 January 2008, CR 2008/3, para. 23.)

In the Institute's 2009 resolution there is a "without prejudice" clause on the issue of the relationship between absence of immunity for an official and possible attribution of actions to the State, even though there were some commentaries by Institute members on this issue as well. ("The above provisions are without prejudice to: (a) the responsibility under international law of a person referred to in the preceding paragraphs; (b) the attribution to a State of the act of any such person constituting an international crime." Resolution of the Institute 2009, Art. III (3)).

[127] International Court of Justice Judge Kenneth Keith describes the relationship between State responsibility and the responsibility of an official in the following terms: "[E]ven if States cannot commit international crimes, they might ... be held to be subject to the same obligations as individuals, without the obligations being characterized as criminal; that is to say, the obligation may be dual, binding both States and individuals". "*The International Court of Justice and Criminal Justice*", ICLQ ... p. 896. Further on, he writes: "[M]uch law and practice shows that the liability (criminal or civil) of the principal (e.g. the employer, the State) and of the agent (e.g. the employee, the official) will often be dual", ibid., p. 900. The International Court of Justice also refers to the dual liability of the individual and the State: "[T]he duality of

regard to its official, the official's State is not released from responsibility under international law for the actions performed by that person in an official capacity.[128]

59. While waiving an official's immunity with regard to actions carried out in an official capacity does not release the official's State from responsibility under international law, invocation of an official's immunity with reference to the fact that the internationally wrongful action with which the official is charged was performed in an official capacity establishes grounds for such responsibility. In considering the

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responsibility continues to be a constant feature of international law", *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, para. 173. Andre Nollkaemper observes: "State responsibility neither depends on nor implies the legal responsibility of individuals" ("Concurrence between Individual Responsibility and State Responsibility in International Law", 52 *ICLQ* (2003), p. 616). Further on, he writes: "State practice provides no support for the proposition that, in cases where responsibility has been allocated to an individual, there can be no room for attribution to the state". (Ibid., p. 619). "The prosecution and conviction of the individual responsible for the Lockerbie bombing, considered to be an agent of Libya, did not preclude subsequent claims against Libya for compensation by the United Kingdom and the United States. … The effectuation of responsibility of individual agents of Yugoslavia for acts during the armed conflict between 1991 and 1995 in the ICTY and national courts did not preclude claims by Bosnia-Herzegovina and Croatia in the ICJ. It does not appear that in any of these cases the states against which claims were made invoked the argument that these acts could not be attributed to the state since they already had been contributed to individual agents. … Individual responsibility does not necessarily mean that the state is atomized and that the state could negate its own responsibility by having responsibility shifted towards individual state organs — state responsibility can exist next to individual responsibility" (Ibid., pp. 619-621, footnotes omitted). It is worth keeping in mind, however, that an official's lack of immunity does not predetermine either the responsibility of such a person himself, or that of the State (with regard to the latter, the fact that the official is protected by immunity has no significance either. See para. 60, below. ("[W]e ought to bear in mind that the denial of jurisdictional immunity does not necessarily amount to the existence of responsibility as a matter of substantive law" in M. Tomonori, op. cit., p. 266).

[128] The draft articles on the responsibility of states for internationally wrongful acts contain no indication that the responsibility of States depends in some way on such circumstances as prosecution of persons who are directly guilty of performing various actions. In addition to everything else, national procedures carried out with regard to an individual can significantly aid the prosecution of the State. As H. van der Wilt says, "One may assume that evidence obtained in criminal proceedings against individual perpetrators may serve as ammunition for the assessment of state responsibility as well, as the recent judgment of the ICJ has illustrated". (The author refers to the fact that ICJ accepted, without additional substantiation, the circumstances of the perpetration of genocide previously established by the International Criminal Tribunal for the former Yugoslavia in the case of *Krstic* in the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia*). See para. 296 of the ICJ Judgment in this case, I.C.J. Reports, 2007). "The Issue of Functional Immunity of Former Heads of State" in *Criminal Jurisdiction 100 Years After the Hague Peace Conference. 2007 Hague Joint Conference on Contemporary Issues of International Law*, Willem J. M. van Genugten, M. P. Scharf, S. E. Radin eds., … p. 105. On the other hand, A. Nollkaemper writes: "Eventually, the findings of individual responsibility in connection to the Lockerbie bombing supported subsequent claims of state responsibility. On the other hand, if the Scottish Court sitting in the Netherlands would have found that the individuals who were indicted were not remotely related to the bombing, the factual basis for the claim of the responsibility of the state of Libya would have fallen away. It is difficult to envisage that a court charged with determining state responsibility would in a subsequent proceeding find evidence of individual involvement that a court charged with determining individual responsibility would have missed" (op. cit., p. 622). At the same time, he goes on to say: "If a court or tribunal were to find that no factual basis exists for individual responsibility, this need not preclude a finding of state responsibility" (ibid., p. 630).

issue of the functional immunity (or lack thereof) of officials of Djibouti in the case *Concerning certain questions of mutual assistance in criminal matters*, the International Court of Justice stated that "the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs".[129] In the context of this case, that meant that if the Republic of Djibouti had informed the French court (or other appropriate French authority) that the acts of its officials were its own (official) acts and that these people were acting in an official capacity (as organs or something similar of the Republic of Djibouti) and on that basis had invoked those officials' immunity, it would have assumed responsibility for those internationally wrongful acts.

60. It would perhaps be more accurate to say that the State which invokes its official's immunity on the grounds that the act with which that person is charged was of an official nature is acknowledging that this act is an act of the State itself, but is still not acknowledging its responsibility for that act. Attributing behaviour to a State is definitely an important element, the basis of responsibility under international law, but it still falls short of acknowledging it. Another element necessary to State responsibility, as is well known, is that the act attributed to the State should be in violation of its obligations under international law.[130] It should be kept in mind here that a State usually invokes its official's immunity at a point in criminal proceedings when the wrongfulness of the official's act has yet to be proven in court, and in and of itself, the invocation of immunity does not mean that the State agrees that the act in regard to which immunity is invoked is an internationally wrongful act. At the same time, acknowledgement that the conduct with which the official is charged is the conduct of the State itself, i.e., attribution by the State to itself of that conduct, is, of course, an important step towards the possible assumption by it of responsibility. In any case, it provides grounds for the institution of international legal proceedings against this State by actors who are entitled to do so.[131] It is worth noting that, in many cases, if the official's State wishes to invoke that official's immunity, the necessity of acknowledging an official's conduct as official, as being its own, presents the State with a difficult choice. In stating that its official's actions were official in nature and that he enjoys immunity, the State is acting in the official's defence but is establishing significant premises for its own potential responsibility for what this person did. Yet, if it does not invoke the official's immunity, the State opens the way for this person to be

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[129] *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment, op. cit., para. 196.

[130] See draft articles on responsibility of states for internationally wrongful acts, article 2, *Elements of an internationally wrongful act*: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: *(a)* is attributable to the State under international law; and *(b)* constitutes a breach of an international obligation of the State". General Assembly resolution 56/83 of 12 December 2001.

[131] During the sixtieth session of the Commission, M. Yakobson raised a question in his statement about the possible responsibility of a State which invokes its official's immunity from foreign criminal jurisdiction in a case when it subsequently fails to criminally prosecute that official (A/CN.4/SR.2985, p. 6). It would seem that such responsibility can arise only when the State has something resembling the following obligation under international law: either to waive its official's immunity from foreign criminal jurisdiction, or else, if immunity has been invoked, to carry out its own criminal prosecution of its official. The Special Rapporteur is aware of no evidence that such an obligation exists in general international law. If it so chooses, the Commission can of course consider developing international law in this direction.

criminally prosecuted in a foreign State and thereby creates the possibility of occasionally serious intrusion by a foreign State into its internal affairs.

IV. Summary

61. The contents of this report can be summarized in the following statements:

(a) The question of the immunity of a State's official from foreign criminal jurisdiction must in principle be considered either at the early stage of court proceedings or even earlier at the pretrial stage, when the State that is exercising jurisdiction decides the question of taking, in respect of the official, criminal procedure measures which are precluded by immunity.

(b) Failure to consider the issue of immunity *in limine litis* may be viewed as a violation of the obligations of the forum State under the norms governing immunity. This also relates to the consideration of the question of immunity at the pretrial stage of the exercise of criminal jurisdiction at the time when the question of the adoption of measures precluded by immunity is decided. This, however, does not pertain to a situation in which the State of the official who enjoys immunity *ratione materiae* does not invoke his immunity or invokes it at a later stage in the proceedings.

(c) Only the invoking of immunity or a declaration of immunity by the official's State, and not by the official himself, constitutes a legally relevant invocation of immunity or declaration of immunity, i.e. they have legal consequences.

(d) In order to be able to invoke the immunity of that official, the official's State must know that corresponding criminal procedure measures are being taken or planned in respect of that person. Accordingly, the State that is implementing or planning such measures must inform the official's State in this regard.

(e) When a foreign Head of State, Head of Government or minister for foreign affairs is concerned, the State exercising criminal jurisdiction itself must consider the question of the immunity of the person concerned and determine its position regarding its further action within the framework of international law. In this case, it is appropriate perhaps to ask the official's State only about a waiver of immunity. Accordingly, the official's State in this case does not bear the burden of raising the issue of immunity with the authorities of the State exercising criminal jurisdiction.

(f) When an official who enjoys functional immunity is concerned, the burden of invoking immunity lies with the official's State. If the State of such an official wishes to protect him from foreign criminal prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person in question is its official and enjoys immunity since he performed the acts with which he is charged in an official capacity. If it does not do so, the State exercising jurisdiction is not obliged to consider the question of immunity *proprio motu* and, therefore, may continue criminal prosecution.

(g) When an official who enjoys personal immunity but is not one of the "threesome" is concerned, the burden of invoking immunity lies with the official's State. If the State of such an official wishes to protect him from foreign criminal

prosecution by invoking immunity, it must inform the State exercising jurisdiction that the person in question is its official and enjoys personal immunity since he occupies a high-level post which, in addition to participation in international relations, requires the performance of functions that are important for ensuring that State's sovereignty.

(h) The State of the official, regardless of his level, is not obliged to inform a foreign court of his immunity in order for that court to consider the question of immunity. The official's State may invoke the immunity of the official through the diplomatic channels and thereby inform the State exercising jurisdiction. This suffices in order for a court of that State to be obliged to consider the issue of immunity. The absence of an obligation on the part of a State to deal directly with a foreign court is based on the principle of sovereignty, the sovereign equality of States.

(i) The State invoking the immunity of its official is not obliged to provide grounds for immunity apart from those referred to in paragraphs (f) and (g) above. The State (including its court) that is exercising jurisdiction, it would seem, is not obliged to "blindly accept any" claim by the official's State concerning immunity. However, a foreign State may not disregard such a claim if the circumstances of the case clearly do not indicate otherwise. It is the prerogative of the official's State, not the State exercising jurisdiction, to characterize the conduct of an official as being official in nature or to determine the importance of functions carried out by a high-ranking official for the purpose of ensuring State sovereignty.

(j) The right to waive the immunity of an official is vested in the State, not in the official himself.

(k) When a Head of State or Government or a minister for foreign affairs waives immunity with respect to himself, the State exercising criminal jurisdiction against such an official has the right to assume that that is the wish of the official's State, at least until it is otherwise notified by that State.

(l) The waiver of immunity of a serving Head of State, Head of Government or minister for foreign affairs must be express. The hypothetical situation in which the State of such an official requests a foreign State to carry out some type of criminal procedure measures in respect of the official possibly constitutes an exception. Such a request unequivocally involves a waiver of immunity with respect to these measures and in such a case the waiver is implied.

(m) A waiver of immunity of officials other than the "threesome" but who have personal immunity, of officials who have functional immunity as well as of former officials who also have functional immunity may be either express or implied. Implied immunity in this case may be expressed, inter alia, in the non-invocation of immunity by the official's State.

(n) It would seem that, following an express waiver of immunity, it is legally impossible to invoke immunity. At the same time, an express waiver of immunity may in some cases pertain only to immunity with regard to specific measures.

(o) In the case of an initial implied waiver of immunity expressed in the non-invocation of the functional immunity of an official or the personal immunity of an official other than the "threesome", immunity may, it would seem, be invoked at a later stage in the criminal process (inter alia, when the case is referred to a court).

At the same time, there is doubt as to whether a State which has not invoked such immunity in the court of first instance may invoke it at the stage of appeal proceedings. In any case, the procedural steps which have already been taken in such a situation by the State exercising jurisdiction in respect of the official at the time of the invocation of immunity may not be considered unlawful.

(p) A waiver by the State of the official of the latter's immunity makes it possible to exercise to the full extent foreign criminal jurisdiction in respect of that official. This pertains, inter alia, to jurisdiction in respect of acts performed by the official in an official capacity.

(q) Irrespective of the waiver of immunity with regard to its official, the official's State is not exempt from international legal responsibility for acts performed by that person in an official capacity.

(r) A State which invokes the immunity of its official on the basis that the act with which the official has been charged was of an official nature recognizes that the act constitutes an act by that State itself. This establishes the prerequisites for the international legal responsibility of that State and for the institution of international legal proceedings against it by actors that are entitled to do so.[132]

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[132] The Special Rapporteur would like to express his gratitude to Ms. S. S. Sarenkova and Mr. M. V. Musikhin for their assistance in the preparation of this report.