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The Privileges and Immunities of the International Criminal Court: Are They Sufficient for the Proper Functioning of the Court or Is There Still Room for Improvement

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I. INTRODUCTION

At the dawn of the new millennium, it is important to reflect on the events of the 20th century. Despite its best efforts, the international community seems no closer to stopping war and ethnic violence than at the beginning of the century. However, through the establishment of the International Criminal Court (hereinafter “ICC” or the “Court”) there is fresh optimism that the international community has at last found the collective will to end impunity for those who commit the most abhorrent crimes known to international concern. The adoption of the Rome Statute on July 17, 1998, followed five weeks of intense negotiations between national delegations in Rome, which in turn followed years of preparatory work.1 During both the preparatory and negotiation phases of this process,
those involved had the benefit of an increasing body of experience from the functioning of the existing ad hoc international criminal tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY)\(^2\) and the International Criminal Tribunal for Rwanda (ICTR),\(^3\) where criminal investigative and prosecutorial procedures were being tried and tested with varying degrees of success.

The experiences of the ad hoc Tribunals have demonstrated that a fundamental basis for the effective functioning of an international criminal court is that it must be provided with sufficient independence for the conduct of its operations and that States refrain from any acts that would impede the performance of its functions. Although the majority of member States to the United Nations have scrupulously respected the principle of independence, a limited number have impeded the Tribunals’

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operations by restricting the movement of personnel into their territory and placing extensive limitations on their activities.

If it is to fulfil the high expectations of those who participated in its establishment, the ICC must be provided with the necessary privileges and immunities so that it may function in a fair, independent and effective manner. The *ad hoc* Tribunals, in this connection, are fully integrated into the United Nations system, and therefore benefit directly from the various legal instruments covering the privileges and immunities of the organization. This is not the case for the Court, where, in Rome, its independence from the United Nations was hard won. Nonetheless, the privileges and immunities of the United Nations and its personnel have been well established in both treaties and practice and, hence, can serve as reference for the various practical arrangements that are currently being prepared by the ICC Preparatory Commission.

Accordingly, to determine whether the ICC has the privileges and immunities necessary to ensure the proper functioning of the organization, this article will first discuss the historical development of privileges and immunities for international organizations, including the legal foundation of the privileges and immunities of the Court. It will then examine the privileges and immunities of the organization as a legal entity, before turning to the privileges and immunities accorded to the various categories of individuals who have to attend the institution in an official capacity. Lastly, because a number of other categories of individuals play an essential role in the criminal process, the privileges and immunities of counsel, witnesses, victims and the accused will be discussed. Given the similarities in their mandates and the tasks that they are required to perform, the degree to which the *ad hoc* Tribunals have been accorded privileges and immunities, is particularly important. The article will, therefore, examine, where appropriate, the privileges and immunities that have been accorded to these two organizations and their staff.

## II. PRIVILEGES AND IMMUNITIES: LEGAL FRAMEWORK

Under international law, international organizations and the officials of such organizations (as well as, diplomatic representatives of independent States) enjoy certain privileges and immunities. In this connection, the term ‘privilege’ is commonly used to refer to particular and peculiar benefits or advantages enjoyed by an international organization and its officials in the State where the organization is situated (commonly referred to as the “host country”), or where its operations are conducted that are not generally possessed by the nationals of those States. Immunity, on the other hand, grants procedural protection
from a penalty, burden or duty prescribed by the laws and regulations of the State affected.

A. Historical Perspective of Privileges and Immunities of International Criminal Courts

The emergence of international public institutions at the beginning of the 19th century led to the establishment of international and national norms granting the members of these institutions a limited number of privileges and immunities previously accorded to diplomatic agents only. For instance, the privileges of “independence and neutrality” were accorded to the Central Commission for the Navigation of the Rhine (established in accordance with the treaty concluded between France and Germany on August 15, 1804) and European Commission on the Danube (created under the Treaty of the Congress of Paris of 30 March 1856), while the privilege of inviolability was granted to the members of the International Commission on Navigation in the Congo River under the Berlin Congo Act of 1885.

At the end of the century, the Institute of International Law attempted to codify rules and norms pertaining to diplomatic practice and activity. In August 1895, the Institute adopted a resolution containing a Regulation of diplomatic immunities, in which the principles of inviolability and extraterritoriality, as well as a number of taxation immunities, were recognized. According to the Regulation, these privileges were to be enjoyed by public ministers of all classes and the official personnel of diplomatic missions. The privileges were not explicitly extended to the personnel of international public institutions, presumably because few international organizations existed at the time. However, it was understood that such persons were to be accorded a certain level of independence in order to allow them to perform their functions effectively.


5. Tarassenko & Zacklin, supra note 4 at III.1/2-1/3 (observing that the non-official staff of a diplomatic mission, if not citizens of the receiving state, were also deemed to enjoy the privilege of inviolability on the premises of the mission).

6. Id. at III.1/3.
With the increase in international public institutions after the First World War, there grew an awareness of the need to ensure that the personnel of such organizations, in the performance of their functions, were entirely independent of, and protected from, pressure from the authorities of individual States, and were empowered "to deal with the agents of national governments on a footing of equality." As an example, Article 7, paragraph 4 of the Covenant of the League of Nations provided that the representatives of the Members and officials of the League "when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

By the time the United Nations was established in 1945, the recognition of privileges and immunities accorded to international organizations and their personnel had evolved into a rule of customary law. This principle was enshrined in the Charter of the United Nations.
(UN Charter), which provides that the Secretary-General and the officials of the organization shall "enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." To determine the scope of such privileges and immunities, the UN Charter provides that the General Assembly 'may propose conventions' to Member States for this purpose. These provisions were carefully studied by the UN Preparatory Commission which fully endorsed—in light of the inherent conflict between international privileges and immunities and the legitimate interests of host countries, together with practical considerations – the concept of functional necessity of privileges and immunities. Bearing this in mind, the General Assembly adopted the General Convention on the Privileges and Immunities of the United Nations on February 13, 1946, that contains a number of provisions governing important aspects of the organization's operations which apply to these privileges and immunities; including such matters as the institution's property, assets, communications and various tax exemptions.

These instruments are augmented by a wide array of other agreements regulating the activities of the United Nations. Privileges and

10. Id. art. 105, ¶ 3.
11. The limitation of the organization's privileges and immunities to only those which are necessary for the independent exercise of its functions, differs from the privileges and immunities accorded to states, who possess the totality of international rights and duties. As Brouwer observes "compared to states, international organizations . . . have a more limited capacity to engage in the tit-for-tat self-help measures that are vital to the enforcement of legal rights in international relations. At the same time, international organizations necessarily perform tasks that states cannot accomplish by themselves. Thus, international organizations have to do "more," while at the same time overcoming collective-action problems." Charles H. Brouwer II, International Immunities, Some Dissident Views on the Role of Municipal Courts, 41 Va. J. Int’l L. 1, 16-17 (2000).
immunities are included in the agreements with governments concerning the headquarters of the central and regional offices of the United Nations, and in the status agreements governing the conditions under which the various United Nations operated institutions—such as, information centers, research and science institutions—to carry out their functions. To ensure that the participants in conferences and other meetings held under the auspices of the United Nations are accorded those privileges and immunities necessary for the independent exercise of their functions, similar provisions are included in the relevant host agreements with the governments involved.\textsuperscript{13}

In his report on the establishment of the ICTY,\textsuperscript{14} the UN Secretary-General stated that, since it was created as a subsidiary body of the Security Council, “the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 would apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.”\textsuperscript{15} As to the scope of their privileges and immunities, the Secretary General recommended that:

The judges, the Prosecutor and the Registrar would be granted the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. The staff of the Prosecutor and the Registrar would enjoy the privileges and immunities of officials of the United Nations within the meaning of articles V and VII of the Convention.\textsuperscript{16}

He further proposed that other persons, including the accused, required at the seat of the ICTY, be accorded such treatment as necessary for the proper functioning of the organization.\textsuperscript{17} These recommendations were endorsed by the Security Council and were included almost verbatim in Article 30 of the ICTY Statute.\textsuperscript{18}

On May 27, 1994, an agreement was signed between the United Nations and the government of the Kingdom of The Netherlands formalizing the presence of the ICTY in The Hague.\textsuperscript{19} Although the

\textsuperscript{13} Tarassenko & Zacklin, supra note 4, at III.1/6-1/7.
\textsuperscript{15} Id. § 128.
\textsuperscript{16} Id.
\textsuperscript{17} Id. § 129.
headquarters agreement is concerned primarily with normal incidents of diplomatic or international relationships to reflect the specific requirements of the tribunal, a number of provisions are also included relating specifically to the movements of the accused, defense counsel and witnesses in The Netherlands.\textsuperscript{20}

These privileges and immunities were reaffirmed in agreements concluded between the United Nations and the governments of Bosnia, Herzegovina, Croatia, and the Federal Republic of Yugoslavia relating to the presence of ICTY field offices in Sarajevo,\textsuperscript{21} Belgrade\textsuperscript{22} and Zagreb\textsuperscript{23}. These offices were established to provide support to the investigation teams of the Office of the Prosecutor in order to perform liaison functions with local and national governments and organizations in the area, and to provide expert legal advice on repub and federal law in the former Yugoslavia.\textsuperscript{24} As such, the agreements not only contain the standard privileges and immunities applicable to the United Nations and its personnel, but also include provisions relating specifically to the Tribunal’s investigations. Such provisions include the right to access all documentary material relevant for the effective operation of the liaison office; to have direct contact with central and local authorities and government agencies; to question victims and witnesses; to collect evidence and useful information, as well as to conduct on-site investigations; to gain access to all prisons, detention centers and places of interrogation; and to speak in private to any person held therein.

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The privileges and immunities of the judges, the Prosecutor, the Registrar and the officials of the ICTR are defined in Article 29 of the ICTR Statute in exactly the same terms as its ICTY equivalent.25 With respect to the headquarters of the ICTR, the town of Arusha, located in northern Tanzania, was selected as the seat of the Tribunal and an agreement articulating the privileges and immunities that would be accorded to the organization was subsequently concluded.26 In January 1995, the ICTR opened an Investigative and Prosecutorial Unit in Kigali, Rwanda,27 and – following protracted and often difficult negotiations – an agreement covering the privileges and immunities of this office and its personnel was concluded in June 1999.28

B. The Legal Basis for the Privileges and Immunities of the ICC

As a treaty-based international organization, the ICC and its officials will require sufficient diplomatic status to carry out their responsibilities. However, unlike the ad hoc Tribunals, the ICC is not an organ of the United Nations and, consequently, the Court and its officials do not fall under the umbrella of the General Convention. The Rome Statute addresses this situation by guaranteeing to the organization “in the territory of each State Party such privileges and immunities as are necessary for the fulfillment of its purposes.”29 With respect to persons required to attend the institution in an official capacity—who need the protection of privileges and immunities to perform their work independently—Article 48, paragraphs 2 and 3 states:

The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.

The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the

27. Karhilo, supra note 3, at 711.
29. Rome Statute, supra note 1, art. 48, ¶ 1.
In addition to the senior officials of the Court and its staff, Article 48 provides that other persons who will have business with, or appear before the organization, either as counsel, experts, witnesses or in some other capacity, will be accorded the privileges, immunities and facilities necessary for the performance of their functions.

Although the Rome Statute specifies that the ICC and its representatives shall enjoy the requisite privileges and immunities necessary to function, Article 48 simply contains general statements of the Court’s privileges and immunities; the details are not spelled out in the Statute. While there is no specific reference in the Rome Statute for such an agreement, the ICC Preparatory Commission set out, at its sixth session held in New York between November 27 and December 8, 2000, to draft an agreement on privileges and immunities for the Court. Even though it will not be opened for signature until the first meeting of the Assembly of State Parties, at the earliest, the draft Agreement on the Privileges and Immunities of the International Criminal Court confers, in fairly broad terms, sufficient legal protection upon the organization and its representatives for all activities undertaken in their official capacity; particularly focusing on the unique needs of the prosecution to conduct its investigations.

30. Id. ¶ 2 & 3.
31. Article 48, paragraph 5 also provides that the privileges and immunities of a judge or the Prosecutor may be waived by an absolute majority of the judges; those of the Registrar may be waived by the Presidency; those of the Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor; those of the Deputy Registrar and staff of the Registry may be waived by the Registrar.
33. Proceedings of the Preparatory Committee at its seventh session; Draft Agreement on the Privileges and Immunities of the Court, U.N. Doc. PCNICC/2001/L.1/Add. 3 (2001) [hereinafter Draft Agreement], available at http:// www.un.org/law/icc/prepcomm/sep2001/english/pcnicc_2001_1_add3e.doc. As the ICTR Registrar, Adema Dieng observed “this document will prove to be a great asset to the future ICC.” As the experience of the ad hoc Tribunals has demonstrated “[n]egotiating host countries agreements in various countries where the Court will need to operate can be a lengthy process, putting at risk evidence, staff and assets in the interim. This document will provide a pre-negotiated agreement.” Address by the Registrar of the International Criminal Tribunal for Rwanda Adama Dieng to the Preparatory
The multi-faceted structure to the privileges and immunities of the ICC is further illustrated by reference in Article 3 of the Rome Statute to a headquarters agreement, which will address the specific needs of the Court in the host country. This bilateral agreement—which should be goal-oriented, supporting the fulfillment of the independence and efficiency of the institution and should facilitate the smooth and efficient functioning of the Court, as well as support its long-term stability—will be concluded between the President and the government of The Netherlands once the organization has been established. In the meantime, the Preparatory Commission has been given the responsibility of formulating general principles that shall govern the negotiation of such an agreement.

III. STATUS, FUNCTIONING AND PRIVILEGES AND IMMUNITIES OF THE ORGANIZATION

The subject matter of those sections of the draft Agreement that relate to the organization itself can essentially be divided into four groups. While the first two concern the articles on the legal status of the institution and its premises, respectively, the third relates to those provisions governing the privileges and immunities of the organization. The fourth group contains some miscellaneous provisions that, nonetheless, play a crucial role in the relationship that the organization shares with its host country.

A. Legal Personality of the Organizations

An examination of the legal standing of the ICC requires an exploration of its legal personality on both the national and international level. In this connection, the first preliminary matter that needs to be addressed is whether the organization has the capacity to conclude

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34. See Hans Corell, The Relationship between the International Criminal Court and the Host Country, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 181-88 (Herman A.M. von Hebel et al. eds., 1999) (describing the core elements that should be contained in the ICC Headquarters Agreement).


36. Such provisions include articles on settlements of disputes, denunciation, amendment and date of entry into force. See Draft Agreement, supra note 33, arts. 31 & 34-36.
agreements with States and make claims in respect of the rights contained therein. The second issue of fundamental concern is whether it is able to conclude contracts, institute legal proceedings, and acquire and dispose of property under the national law of the States concerned.

Although provisions recognizing their national legal personality have been included explicitly, the headquarters agreements of the ad hoc Tribunals do not refer to the other and more crucial form of legal personality.\(^{37}\) Reference to international juridical personality is also absent from the General Convention.\(^{38}\) Nevertheless, in its Advisory Opinion on the Reparation for Injuries suffered in the Service of the United Nations, the International Court of Justice (hereinafter the "ICJ") ruled that the United Nations possessed "a large measure of international personality."\(^{39}\) Confronted with the question of whether the institution had the capacity to bring an international claim against a state, the ICJ concluded that the possession of juridical personality on the international plane is dictated by the functions and purposes of the organization, as laid down in its constituent instruments, rather than by a strict legal formulation bestowing international legal personality.\(^{40}\) In the words of the ICJ:

[T]he organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of large measure of international personality and the capacity to operate upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.\(^{41}\)

By analogy, the reasoning of the ICJ can be applied to other international organizations.\(^{42}\) Accordingly, as they have been given the

\(^{37}\) ICTY Headquarters Agreement, supra note 19, art. III(1); ICTR Headquarters Agreement, supra note 26, art. III(1).

\(^{38}\) See General Convention, supra note 12, art. I, § 1.


\(^{41}\) Reparations for injuries, supra note 39, at 179.

\(^{42}\) HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW 979 (1995) (asking "if organizations are empowered to conclude treaties to
responsibility of prosecuting the perpetrators of some of the most egregious crimes known to humankind—a function that will require them to issue arrest warrants and other binding orders to member States, as well as conclude treaties regarding the enforcement of their sentences—the ad hoc Tribunals can be said to have both the capacity to act and the capacity to operate in the international community with their own personality, distinct from the member States from which they were established.

The ICC, on the other hand, is not faced with the problem of having to assert its international legal personality by inference. Unlike the ad hoc Tribunals, the Court—in recognition of the fact that it is a recognizable legal entity, distinct from the State Parties—will be explicitly provided legal personality on the international level as well as within the legal order of the host country. Article 2 of the draft Agreement reads:

The Court shall have international legal personality and shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. It shall, in particular, have the capacity to contract, to acquire and dispose of immovable and movable property and to participate in legal proceedings.\(^3\)

This provision will ensure that the Court has sufficient legal standing for the independent exercise of its functions. The author is surprised, nonetheless, that the drafters of this provision decided to limit the right to mere participation in legal proceedings and not institution thereof, a right that is included within the juridical personality of the ad hoc Tribunals (and the United Nations, in general).\(^4\) Although the organization may rely on arbitration procedures for the settlement of contractual disputes,\(^5\) it should be vested with the authority to take recourse to national courts to claim damages and/or compensation arising out of the loss of or damage to its property or assets.

**B. The Premises of the Organizations**

Before embarking on a detailed analysis of the privileges and immunities of the ICC, it is first necessary to examine the position of the exchange diplomats, and to mobilize international forces... how can such powers be exercised without having the status of international legal person?\(^5\)).

\(^3\) Draft Agreement, *supra* note 33, art. 2. *See also* PHILLIPE SANDS & PIERRE KLEIN, *Bowett’s Law of International Institutions* 471 (2001) (concluding that the explicit attribution of international legal personality to the Court reflects the change in international society, which is increasingly open to the co-existence of various categories of subjects of international law).

\(^4\) *See General Convention, supra* note 12, art. 1, § 1 at ¶ (c). This segment of the General Convention provides that the United Nations shall have the capacity “to institute legal proceedings.”

\(^5\) *See Draft Agreement, supra* note 33, art. 30.
actual premises of the Court within the legal order of its host country, especially as they are the most visible aspect of the organization and the location where most of its activities will occur. Since it is customary for provisions on the actual seat of an international organization to be contained within the bilateral instruments of the host arrangements, the ICC Preparatory Commission has proposed that the ICC Headquarters Agreement contain provisions on law and authority on the premises of the Court providing, in particular:

[T]he premises of the Court shall be under the control and authority of the Court; the Court shall have the power to make regulations operative within the premises and may expel or exclude persons from the premises for violation of its regulations; except as otherwise provided in the headquarters agreement, the laws and regulations of the host country shall apply on the premises of the Court.46

However, in light of the brevity of this provision, to fully appreciate the legal status of the Court in the territory of The Netherlands and to identify the laws and regulations that will apply within its seat, reference should be made to the experiences of the ad hoc Tribunals in this regard. Under their respective headquarters agreements, the ICTY and ICTR premises are defined as “buildings, parts of buildings and areas, including installations and facilities made available to, maintained, occupied or used by the Tribunal in the host country in connection within its functions and purposes.”47 The governments of the Netherlands and Tanzania thus recognize that the premises of the ICTY and ICTR, respectively, shall be under the control and authority of the organizations concerned.48 However, the laws and regulations of the host countries still apply within the seat of the organizations unless specified otherwise in the General Convention or the relevant headquarters agreement.49 In this connection, most of the specifications

46. Basic Principles, supra note 35, ¶ 8. See also CORELL, supra note 34, at 185 (observing that such “regulations should, within [the ICC] premises or headquarters district, be operative even though they may be inconsistent with the laws and regulations of the host country. For example, in the area of labor law, the retirement age that might be specified in the [staff regulations of the ICC] may differ from the laws of the host country.”). Id.
47. ICTY Headquarters Agreement, supra note 19, art. I(b); ICTR Headquarters Agreement, supra note 26, art. I(b).
48. See ICTY Headquarters Agreement, supra note 19, art. VI(1); ICTR Headquarters Agreement, supra note 26, art. VI(1).
49. ICTY Headquarters Agreement, supra note 19, art. VI(2); ICTR Headquarters Agreement, supra note 26, art. VI(2).
concerning the non-application of national law—such as exemption from the immigration regime applicable in the host countries—are designed to side-step national mechanisms for the supervision and enforcement of the law; the main rationale being to secure the independent position of the two organizations. They are not, in general, intended to push aside the laws themselves.\textsuperscript{50}

One further exception to the rule relating to the applicability of national law is the ability of the \textit{ad hoc} Tribunals to adopt regulations operative within their premises which are designed to supercede laws and regulations of the host countries that may affect the independence of the their operations.\textsuperscript{51} However, in keeping with the general reluctance of international organizations to adopt regulations overriding national legislation, neither institution has done so.\textsuperscript{52}

The independence of the \textit{ad hoc} Tribunals is not solely dependent on the privileges and immunities that shield the two organizations from the exercise of domestic jurisdiction by judicial and administrative authorities. The continuous supply, on equitable terms, of public services and other amenities is equally important for the effective functioning of the organization. For this reason, the headquarters agreements of the \textit{ad hoc} Tribunals provide:

The competent authorities [of the host country] shall secure, on fair conditions and upon the request of the Registrar or on his behalf, the public services needed by the Tribunal such as, but not limited to, postal, telephone and telegraphic services, electricity, water, gas, sewage, collection of waste, fire protection, local transportation and cleaning of public streets.\textsuperscript{53}

It would be naïve to expect that the public services supplied to the \textit{ad hoc} Tribunals will never be interrupted. In such situations, the host countries are under a due diligence obligation to restore the supply as

\textsuperscript{50} MULLER, \textit{supra} note 40, at 134.\textsuperscript{51} See ICTY Headquarters Agreement, \textit{supra} note 19, art. VI(3); ICTR Headquarters Agreement, \textit{supra} note 26, art. VI(3). It should be noted that "[a]ny dispute between the Tribunal and the host country, as to whether a regulation of the Tribunal is authorized by this Article, or as to whether a law or regulation of the host country is inconsistent with any regulation of the Tribunal authorized by this Article, shall be promptly settled by the procedure set out in Article XXVIII, paragraph 2 of the [ICTY Headquarters Agreement]. Pending such settlement, the regulation of the Tribunal shall apply and the law or regulations of the host country shall be inapplicable on the premises of the Tribunal to the extent that the Tribunal claims it to be inconsistent with its regulations." ICTY Headquarters Agreement, \textit{supra} note 19, art. VI(4).\textsuperscript{52} See MULLER, \textit{supra} note 40, at 136 (observing that at its headquarters in New York, the United Nations has only adopted four such regulations); see also Paul C. Szasz, \textit{Current Development: The United Nations Legislates to Limit its Liability}, 81 \textit{Am. J. Int'l L.} 739 (1987).\textsuperscript{53} ICTY Headquarters Agreement, \textit{supra} note 19, art. XII(1); ICTR Headquarters Agreement, \textit{supra} note 26, art. XII (1).
soon as possible and to minimize the damage to the organizations.\textsuperscript{54} Moreover, the two organizations are to be accorded, with respect to public services, a similar status to the essential agencies and organs of the government in question that are granted priority in times of shortage.\textsuperscript{55}

Having determined the position of the ICC premises within the territory of The Netherlands, a few words need to be said about the presence of the ICC facilities outside the host country. In view of the fact that it is a criminal court with potentially unlimited territorial jurisdiction, the Court may choose to establish regional and national offices throughout the globe in order to facilitate the conduct of its operations, as well as to conduct research, store archives, and other materials in secure locations and communicate with national officials. Moreover, to reduce costs, as well as to strengthen reconciliation, and to increase the awareness of its activities within those regions where crimes were committed, the Court may decide to sit and conduct trials outside The Hague. It is, therefore, unfortunate that the draft Agreement did not reiterate the notion that the relevant privileges and immunities of the organization—such as inviolability of the premises—apply to all offices used or occupied by the institution, even if they are only occupied temporarily and irrespective of ownership.

A further area of concern relates to the absence of language obliging States Parties to take all the effective and adequate measures necessary to ensure the security, safety and protection of the ICC, its property, premises and the immediate vicinity thereof. A provision to this effect has been included within the draft principles of the ICC Headquarters Agreement.\textsuperscript{56} While this would safeguard the Court’s operations in The Netherlands, the experiences of the \textit{ad hoc} Tribunals have demonstrated the need to establish bases in the field from which the prosecution may carry out its investigative operations. In such cases, it would have been highly advantageous to place the States Parties on notice that they are under a positive obligation to secure, safeguard and protect the premises of the organization in such circumstances.

\textsuperscript{54} Muller, \textit{supra} note 40, at 143.

\textsuperscript{55} ICTY Headquarters Agreement, \textit{supra} note 19, art. XII(3); ICTR Headquarters Agreement, \textit{supra} note 26, art. XII(3).

\textsuperscript{56} Basic Principles, \textit{supra} note 35, ¶ 9.
C. Inviolability of Premises, Assets and Archives

Regarding the privileges and immunities of the ICC, it should be noted that, while the Court has been accorded a special position within the legal order of States Parties, its enjoyment of this status is limited to those matters necessary for the fulfillment of its purposes.\(^5\) Nevertheless, in order to have the independence necessary for the effective performance of its functions, the organization has first been granted protection against control and interference by the governments of the host country. Second, the host country is prohibited from deriving financial advantages by levying fiscal charges on its funds. Lastly, the institution, as a collective of the States Parties, has been granted the same facilities for the conduct of its official business as the host country customarily extends to other States.

The inviolability of the ICC (as in all host country arrangements) is a multi-tiered privilege, which can be divided into several elements.\(^5\) First of all, a distinction can be drawn between the inviolability of the premises, funds and assets of the Court,\(^5\) and the inviolability of its archives (namely, the records, correspondence, documents, manuscripts, photographs, files and sound recordings).\(^6\) Such a difference arises as the need to protect the inviolability of the archives goes beyond the physical realm of the headquarters.\(^6\) For instance, sensitive documentary evidence collected in the field may be carried in a briefcase by an ICC investigator traveling from an investigation site to The Hague. The inviolability accorded to the investigator—as well as any official motor vehicle in which he is travelling—would be thwarted if the documents themselves were not similarly protected. Reference to a locality limitation is therefore omitted in Article 7 of the draft Agreement, which provides that “[t]he archives of the Court, and all papers and documents in whatever form, and materials being sent to or from the Court, held by the Court or belonging to it, wherever located and by whomever held, shall be inviolable.”\(^6\)

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57. Draft Agreement, supra note 33, art. 3; see also ICTY Headquarters Agreement, supra note 19, art. II; ICTR Headquarters Agreement, supra note 26, art. II.
58. See MULLER, supra note 40, at 186.
59. See id.; Draft Agreement, supra note 33, art. 6. For the inviolability of the property, funds and assets of the ad hoc Tribunals. See General Convention, supra note 12, art. II, § 3; ICTY Headquarters Agreement, supra note 19, art. V; ICTR Headquarters Agreement, supra note 26, art. V.
60. See MULLER, supra note 40, at 186; Draft Agreement, supra note 33, art. 7. For the inviolability of the archives and documents of the ad hoc Tribunals, see General Convention, supra note 12, art. II, § 4; ICTY Headquarters Agreement, supra note 19, art. IX; ICTR Headquarters Agreement, supra note 26, art. IX.
61. See MULLER, supra note 40, at 204.
62. Draft Agreement, supra note 33, art. 7.
Within this privilege, a second distinction can be made between the various obligations that are placed on the host country. Officials of the Netherlands will be under a 'passive' obligation not to enter, in the widest possible meaning of the word, the ICC premises or search, confiscate or otherwise interfere with the assets of the organization without the express consent of the competent authorities of the Court.\(^6^3\) Furthermore, judicial actions and the service or execution of legal process, including the seizure of private property, cannot be enforced on the premises of the institution.\(^6^4\) However, in order to prevent the loss of life and limit the damage to property in case of a fire or other crisis requiring prompt protective action, the organization is under a duty to co-operate in good faith with the competent authorities.\(^6^5\) In this context, on account of the urgency associated with such emergency situations, the consent of the Court shall always be presumed.\(^6^6\)

By referring to the headquarters agreement of the ad hoc Tribunals, the author notes that the inviolability of the ICC will impose an active duty on the host country to secure and protect the premises and their vicinity, and to guarantee that "the tranquillity of the Court is not disturbed by the intrusion of persons or groups of persons from outside the premises of the Court or by disturbances in their immediate vicinity."\(^6^7\) The host country must also provide, at the request of the competent authorities of the Court, an adequate number of police "for the preservation of law and order on the premises of the Court or in the immediate vicinity thereof, and for the removal of persons therefrom."\(^6^8\)

In terms of its contents, the inviolability of the premises, assets and archives of the ICC will not differ much from the inviolability of other international organizations, including the ad hoc Tribunals. Nonetheless, three points need to be mentioned. First, the question of legal ownership is not relevant for the determination of whether the premises, assets or archives of the Court are inviolable; the use of

\(^{63}\) Basic Principles, supra note 35, ¶ 7.

\(^{64}\) Id.

\(^{65}\) MULLER, supra note 40, at 191 (arguing that the notion of good faith and cooperation is at the very essence of the relations between a host state and an international organization).

\(^{66}\) Basic Principles, supra note 35, ¶ 7.

\(^{67}\) ICTY Headquarters Agreement, supra note 19, art. VII(1); ICTR Headquarters Agreement, supra note 26, art. VII(1).

\(^{68}\) ICTY Headquarters Agreement, supra note 19, art. VII(2); ICTR Headquarters Agreement, supra note 26, art. VII(2).
premises for official purposes is the essential criterion. Second, it is probable that the Court—like both the ICTY and the ICTR—will at some stage and especially during its start-up phase share buildings with other international organizations or commercial companies. In accordance with the notion of functional necessity, only those parts exclusively used by the organization may be declared inviolable. Finally, since a building used by the organization retains its inviolability, even though it is not permanently occupied, the Court is under a duty to notify the State Party of the exact location of its premises and to keep it informed of its intended use.

The premises of the ICC and its property, funds and assets are not only shielded from physical intrusions by the national authorities but also from less noticeable interference through legal and quasi-legal methods. The draft Agreement emphasizes this by prescribing that "[t]he property, funds and assets of the Court, wherever located and by whosoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action." While this should not cause too many concerns, in order to operate effectively, the Court will need to be able to transfer evidence between the crime scene and the seat of the organization. It is foreseeable that the transfer of such evidence may, on occasion, violate international law, for instance, when the court must transfer of narcotics or prohibited weaponry. To avoid potential difficulties, the definition of assets in the draft Agreement should be expanded to include "evidence and other material gathered during the course of investigations."

As only the premises (or parts thereof), grounds and motor vehicles used exclusively by an international organization are inviolable, the ICC will be under an additional obligation to notify the authorities of the States Parties concerned as to what these premises, grounds and vehicles consist of. To facilitate such identification, the Court is permitted to "display its flag, emblem and markings at its premises" as well as on any vehicle used for official purposes. With respect to the documents and

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69. Gerster, supra note 12, at 1140-41.
70. See MULLER, supra note 40, at 188.
71. For instance, even though the officials of the ICTY Liaison Office in Belgrade were evacuated prior to the start of the NATO bombing in April 1999, the Serbian authorities respected the inviolability of the premises even though it was left vacant.
72. Draft Agreement, supra note 33, art. 6(2). The equivalent privilege accorded to the ad hoc Tribunals is found in ICTY Headquarters Agreement, supra note 19, art. V(1); ICTR Headquarters Agreement, supra note 26, art. V(1). See also General Convention, supra note 12, art. II, § 3.
73. Draft Agreement, supra note 33, art. 5. The equivalent privilege accorded to the ad hoc Tribunals is found in ICTY Headquarters Agreement, supra note 19, art. XIII.
other forms of archives, the organization must also ensure that, whenever possible, they bear some kind of official identification mark so that the competent authorities have some way of knowing to which object(s) the relevant immunity applies.\footnote{See Muller, supra note 40, at 204-05.}

\section*{D. Immunity from Legal Process}

Immunity from legal process, which is designed to secure an independent and tranquil working environment, is one of the most important immunities granted to international organizations. For instance, the jurisdictional immunity of the \textit{ad hoc} Tribunals derives from Article II, Section 2 of the General Convention and is replicated in full in the two headquarters agreements, which states:

The Tribunal, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.\footnote{ICTY Headquarters Agreement, supra note 19, art. VIII(1); ICTR Headquarters Agreement, supra note 26, art. VIII(1).}

Adopting virtually identical language, the draft Agreement safeguards the ICC, as well as its property, funds and assets against the jurisdiction of the courts of the States Parties.\footnote{Draft Agreement, supra note 33, art. 6(1).} Such immunity is necessary, as the work of the Court would be severely hampered if nationals of the States Parties could freely institute legal proceedings against it, allowing national courts to make pronouncements over its policy decisions. Even so, there is an inherent conflict between the institution’s need for independence within the legal order of the States Parties and the latter’s need for adequate means of redress for their inhabitants. Accordingly, like the jurisdictional immunities enjoyed by persons working for the organization, the immunity from suit of the organization is based on the notion of functional necessity.\footnote{See Muller, supra note 40, at 151.}

The decision as to whether or not it is immune from legal process is for the ICC to decide and no one else. As Muller states, “[i]f this were not the case, the organization would risk being exposed to discretionary measures by the host state. However, after having determined that it is
indeed immune, the organization can choose to waive this immunity, thus lifting the shield that protects it from national jurisdiction."\textsuperscript{78} In all cases, the waiver must be explicit, must relate to the particular matter in issue, and must be in writing.

There is a growing consensus among international organizations that, because it is based on the concept of functional necessity, jurisdictional immunity cannot be invoked to deflect civil actions brought by a third party for damages arising from an accident caused by a motor vehicle owned or operated by an international organization.\textsuperscript{79} Any functional necessity argument in support of immunity for the ICC is undermined by the reality that such incidents will generally be covered by motor vehicle insurance. Accordingly, in the author's opinion, the draft Agreement should be amended to exclude auto accident liability from the organization's jurisdictional immunity.

In connection with the concept of 'waiver of immunity,' the author notes that for most international organizations, including the \textit{ad hoc} Tribunals, the chief executive of the organization or his duly appointed representative will effectuate the actual waiver. However, given the construction of the constituent organs of the ICC, it may not be appropriate for the Registrar to waive the court's immunity, particularly with respect to a matter involving the Office of the Prosecutor or the Presidency. It is, therefore, suggested that appropriate language should be included, specifying which official will be responsible for taking such a decision.

Having determined the process by which waiver is effected, the next question that needs to be addressed is the scope of the actual waiver; namely, does it extend to both legal process and measures of execution or only the former? Under the General Convention, immunity from execution cannot be the subject of waiver.\textsuperscript{80} Such exclusion is premised on the basis of functional necessity, especially as seizure by national courts of the property of the United Nations may cause irreparable harm to the effective functioning of the organization in a particular situation. During their preliminary discussions on this matter, a number of delegates attending the Preparatory Committee expressed a preference for the inclusion of language specifying that the ICC may waive its immunity with respect to a measure of execution.\textsuperscript{81} The inclusion of this

\textsuperscript{78} Id. at 162-63.
\textsuperscript{79} Id. at 161.
\textsuperscript{80} See General Convention, \textit{supra} note 12, art. II, § 2.
language—which is not as strong as the equivalent provisions of the headquarters agreements of the ad hoc Tribunals—would have had a negative consequence for the operations of the organization. For instance, although it is under an obligation to act in good faith, an unscrupulous State Party may use this provision to exert undue influence on the Court to enable a supplier of goods and services to the organization—especially one that is government owned or otherwise endorsed—to seize the property of the Court to cover an unpaid debt. Fortunately, the views of those advocating a more cautious approach prevailed and the delegates agreed that "no waiver of immunity shall extend to any measure of execution."82

The fact that the ICC is shielded from the domestic jurisdiction of the courts of the States Parties should not mean, however, that vendors have no means of redress to enforce their rights.83 One of the fundamental cornerstones of the future relationship between the Court and the States Parties will be the obligation to co-operate in good faith. The Court, as an international organization that deals with private parties, should not use its jurisdictional immunity to hide from its responsibilities.84 It is under an obligation to create alternative and adequate means of redress, in case disputes with third parties arise.85

Even so, obligating the ICC to establish a dispute resolution mechanism is not the same as actually getting settlement. Nothing in the draft Agreement requires the Court to act in a timely manner. However, the drafters must recognize that any delay, whether purposeful or accidental, may cause irreparable harm, for instance, to a small local firm. It would, therefore, be helpful to place stringent time limits on any settlement process adopted by the organization—thereby ensuring that the organization answers all claims brought against it. The draft

82. Draft Agreement, supra note 33, art. 6(1).
83. See MULLER, supra note 40, at 176.
84. See id. at 177.
85. Draft Agreement, supra note 33, art. 30. This obligation is set out in the draft Agreement which provides that:

The Court shall, without prejudice to the powers and responsibilities of the Assembly under the Statute, make provisions for appropriate modes of settlement of:

(a) Disputes arising out of contracts and other disputes of a private law character to which the Court is a party;

(b) Disputes involving any person referred to in the [Draft] Agreement who by reason of his or her official position or function in connection with the Court, enjoys immunity, if such immunity has not been waived.
Agreement should be amended further to require the Court to implement a procedure for expediting the settlement of small claims.

E. Fiscal, Customs and Financial Exemptions

Before turning to the fiscal, customs and financial immunities of the ICC, a common misconception held by governments, tax authorities and the general public, who often argue in favor of a restrictive application or even an abolition of exemptions, needs to be addressed concerning the rationale behind them. These privileges are not accorded merely to deprive a government of possible sources of revenue and to prevent a state’s sovereign right to tax and levy customs; rather, they are necessary to ensure the inherent independence of the organization. Complicated duties and taxes with the attached supervisory mechanisms may severely infringe upon the organization’s independence. Fiscal privileges are also accorded to preserve the sovereign equality of the member states. That is to say, in this sense, funds that will be given to the Court by a State Party should not be diverted into the treasuries of another by means of national taxes and duties levied on the organization.

In general, international organizations are accorded three types of fiscal exemptions. The ICC is no exception. The Court will first be exempt from “all direct taxes” with the exception of those amounts that are “no more than charges for public utility services.” The organization will also be immune from all customs duties, as well as import and export restrictions “in respect of articles imported or exported by the Court for its official use and in respect of its publications.” The rationale behind this exemption is to ensure that the organization can secure its supplies wherever the most favorable terms can be obtained. Moreover, it enables the institution to transfer goods,

86. MULLER, supra note 40, at 233.
87. Id.
88. Id. at 233-34.
90. Draft Agreement, supra note 33, art. 8(1). “[D]irect taxes... include, inter alia, income tax, capital tax, corporation tax as well as direct taxes levied by local and provincial authorities.” Id. The equivalent privilege accorded to the ad hoc Tribunals is found in General Convention, supra note 12, art. II, § 7(a); ICTY Headquarters Agreement, supra note 19, art. X(1); ICTR Headquarters Agreement, supra note 26, art. X(1).
91. Draft Agreement, supra note 33, art. 8(2). The equivalent privilege accorded to the ad hoc Tribunals is found in General Convention, supra note 12, art. II, § 7(b)-(c); ICTY Headquarters Agreement, supra note 19, art. X(2)(c); ICTR Headquarters Agreement, supra note 26, art. X(3).
equipment and capital from one country to another without becoming liable to customs duties or being impeded by prohibitions and restrictions on imports and exports. 92

The third exemption concerns the ICC’s ability to claim reimbursement of taxes paid in connection to goods or services supplied on a recurring basis or involving considerable expenditure, 93 as well as excise duty included in the price of alcoholic beverages, tobacco products and hydrocarbons necessary for its official activities. 94 The enjoyment of this privilege is not unlimited, however, since the draft Agreement states, “[for] major purchases of property and goods or services on which identifiable duties and/or taxes are charged or are chargeable, States Parties shall make appropriate administrative arrangements for the exemption of such charges or reimbursement of the amount of duty and/or tax paid.” 95 Regardless, this privilege, along with the other fiscal exemptions, will ensure that the Court has a high degree of financial independence from the States Parties and should guarantee that the host country, in particular, is prevented from enriching itself at the expense of the international community.

Given the nature of its work, it is essential to the functioning of the ICC, especially in times of emergency, that it have unrestricted freedom, reliability and speed of communication. The provisions relating to the freedom of communication—which are designed to safeguard information to and from the organization—are set out in Article 11 of the draft Agreement. Like the concept of inviolability, the freedom of communication consists of two parts. First, it includes an active duty on the part of the host country to supply the necessary assistance to ensure that the Court may operate radio and other telecommunications

92. See Gerster, supra note 12, at 1141 (asserting that any bureaucratic impediments in connection with customs clearance are also prohibited under the General Convention, in Article II, Section 3).
93. See Draft Agreement, supra note 33, art. 9. See also Gerster, supra note 12, at 1141 (noting that this phrase has been interpreted quite generously by member States).
94. See Gerster, supra note 12, at 1141-42 (observing that although certain host countries have contested the official character of consumer items, “such as foodstuffs, spirits and tobacco products... [customs exemptions are generally granted] whenever any representative duty or other official purpose of consumption by the United Nations office in question has been demonstrated. In any case of doubt, the ‘official use’ of imported goods has to be ascertained by an evaluation of the facts rather than by juridical interpretation.”). Id.
95. Draft Agreement, supra note 33, art. 9(1).
equipment and to provide the necessary protection thereof.\textsuperscript{96} The second duty for the host country is to abstain from interfering with the organization's communications. Such interference may be in the form of censorship or the imposition of high taxes, duties and seemingly innocuous government licensing requirements.\textsuperscript{97}

With respect to its official communications, the ICC also enjoys "treatment not less favorable than that accorded by the [State Parties] to any intergovernmental organization or diplomatic mission in the matter of priorities, rates and taxes applicable to mail and the various forms of communication and correspondence,"\textsuperscript{98} and—with respect to the host country—"shall be exempt from the licensing restrictions and permit regime and any fees associated thereto."\textsuperscript{99} Furthermore, the organization is entitled to use codes and ciphers\textsuperscript{100} and "to dispatch and receive correspondence and other materials or communications either by courier or in sealed bags, which... have the same privileges and immunities... as diplomatic couriers and bags."\textsuperscript{101}

Another principal aim of the ICC is to establish and maintain international peace and security. To facilitate the achievement of this aim, it seems likely that the Court will create a dedicated program to disseminate and promote its work and objectives within those regions where crimes were perpetrated. In this regard, during the last two years, both the ICTY and the ICTR have established information outreach programs, which have been received with praise and support by the peoples of the former Yugoslavia and Rwanda respectively.\textsuperscript{102} To ensure the success of a similar program for the Court, it is imperative that the States Parties recognize the Court's right to publish and broadcast freely within their territories. Furthermore, all official communications related to this program—whether in the form of publications, still and moving pictures, videos, film, sound recordings or

\textsuperscript{96} See Draft Agreement, \textit{supra} note 33, art. 11(5).
\textsuperscript{97} \textit{Id.} art. 11(2).
\textsuperscript{98} \textit{Id.} art. 11(1).
\textsuperscript{99} Basic Principles, \textit{supra} note 35, \S 14.
\textsuperscript{100} Draft Agreement, \textit{supra} note 33, art. 11(3).
\textsuperscript{101} \textit{Id.} art. 11(4).
\textsuperscript{102} For a discussion of how the establishment of an outreach programme for the ICTY has facilitated the realization of some of the objectives of the ICTY, see Lal C. Vohrah & Jon Cina, \textit{The Outreach Programme, in Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald} 547-57 (Richard May et al. eds., 2000). See also Address ICTR Registrar, \textit{supra} note 33 (observing that information outreach programmes are important, "not merely to sensiti[z]e potential witnesses of the functioning of the [ad hoc] Tribunals, but also to bring the proceedings closer to the people, to inform them of what directly concerns them in an attempt to bridge the huge gap between the remoteness of the Tribunals from the turbulent post-conflict regions over which they ha[ve] jurisdiction."). \textit{Id.}
software—must be considered inviolable.

In view of the fact that its activities and communications will be necessary in a myriad of locations, the right to hold, transfer and dispose of funds will be essential to the proper functioning of the ICC. In this context, Article 10, paragraph 1, of the draft Agreement provides:

Without being restricted by financial controls, regulations or financial moratoria of any kind, while carrying out its activities:

a) The Court may hold funds, currency of any kind or gold and operate accounts in any currency;

b) The Court shall be free to transfer its funds, gold or its currency from one country to another or within any country and to convert any currency held by it into any other currency;

c) The Court may receive, hold, negotiate, transfer, convert or otherwise deal with bonds and other financial securities;

d) The Court shall enjoy the same facilities, if any, in respect of rates of exchange for its financial transactions as are accorded to the most favorably treated mission in that particular State Party.\(^\text{103}\)

These privileges originate from the bygone days where governments maintained strict control over the flow of capital. Despite the liberalization of international trade, the inclusion of this privilege is still important given that, in times of economic reform or restructuring, a State Party may enact strict currency restrictions which may severely hinder the ability of the Court—which by its very nature operates across international borders—to carry out foreign exchange transactions. It should be noted, however, that the free movement of capital from one country to another is not absolute but limited to the funds, gold or currency of the Court. This could have a noticeable impact, for instance, on the ability of the organization to move confiscated assets of suspects and accused which find themselves in the de facto control of the Court.

IV. PRIVILEGES AND IMMUNITIES GRANTED TO PERSONS WHO HAVE TO ATTEND THE ORGANIZATION IN AN OFFICIAL CAPACITY

On account of the unique circumstances within which the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the officials of the ICC will have to work, the discussions within the Preparatory Committee on the privileges and immunities of these persons proved to be more laborious than the determination of the privileges and

\(^{103}\) Draft Agreement, supra note 33, art. 10, ¶ 1.
immunities of the Court as a legal entity. Accordingly, to understand fully the scope and substance of the various provisions of the draft Agreement that relate to those categories of persons who have to attend the organization in an official capacity, comparison should be made to the privileges and immunities of their counterparts within the ad hoc Tribunals.

A. Privileges and Immunities of the Judges, the Prosecutor, the Deputy Prosecutors and the Registrar

Under the Rome Statute, "the Judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions." This formulation differs from the approach taken in the Statutes of the ad hoc Tribunals in two important respects. First, the senior officials of the ad hoc Tribunals are provided the same privileges and immunities as diplomatic envoys, a status that United Nations Assistant Secretary-Generals and above enjoy under the General Convention. Nonetheless, this difference should not place ICC senior officials in a less favorable position since head of mission status is essentially the same as that of a diplomatic agent, with similar privileges and immunities. In accordance with customary international law, ICC senior officials and their families shall therefore enjoy, inter alia, personal inviolability—including immunity from arrest or detention—and immunity from criminal, civil, and administrative
Moreover, their papers and documents are considered inviolable, their personal baggage is generally exempt from inspection and they are exempt from taxation. These privileges and immunities apply whether the ICC senior officials are acting within their official duties or in a purely private capacity.

The second difference relates to the fact that the scope of the privileges and immunities of ICC senior officials is limited by the inclusion of language that merges the diplomatic immunity of a head of mission or diplomatic agent with the concept of functional immunity. By linking their privileges and immunities to the "business of the Court," the drafters of the Rome Statute have followed the approach taken in the ICJ Statute, which provides "[t]he members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." It is important, nonetheless, to realize that the ICJ is not a criminal court and operates exclusively within its host country. Moreover, the government of The Netherlands has essentially granted head of mission status to the members of the ICJ. On the other hand, the ICC is a criminal court with a Prosecutor who must operate not only in The Hague but also in many other jurisdictions. As Tolbert remarks:

It is unclear whether this formulation would strip away some significant immunities of a head of mission, whose immunities do not depend on acting on official business. Indeed, it is difficult to reconcile the grant of head of mission status, which implies a personal immunity in areas such as civil and criminal jurisdiction, with the language linking that status to the "business of the Court". These provisions, if not mutually exclusive, rest very uneasily together. Functional immunity is a distinctly different concept from full diplomatic immunity, and [Article 48] paragraph 2 [of the Rome Statute] appears to confuse the two concepts.

The draft Agreement partly addresses these concerns by specifying that if ICC senior officials are required to reside—for the purpose of holding

\[\text{\textsuperscript{110}} \text{Id.} \text{art. 31.} \]
\[\text{\textsuperscript{111}} \text{Id.} \text{art. 30(2).} \]
\[\text{\textsuperscript{112}} \text{See, e.g., ICTY Headquarters Agreement, supra note 19, art. XIV(1)(f); ICTR Headquarters Agreement, supra note 26, art. XIV(1)(f).} \]
\[\text{\textsuperscript{113}} \text{Vienna Convention, supra note 109, art. 34.} \]
\[\text{\textsuperscript{114}} \text{See MORRIS & SCHARF, supra note 2, at 317.} \]
\[\text{\textsuperscript{115}} \text{Rome Statute, supra note 1, art. 48(2).} \]
\[\text{\textsuperscript{116}} \text{Statute of the International Court of Criminal Justice, art. 19 (on file with author).} \]
\[\text{\textsuperscript{117}} \text{Tolbert, supra note 108, at 669.} \]
\[\text{\textsuperscript{118}} \text{Id.} \]
themselves at the disposal of the Court—in a State Party of which they are not nationals or permanent residents, they shall be accorded diplomatic privileges during the period of their residence.\textsuperscript{119}

In addition to the privileges and immunities they enjoy during their term of office, the ICC judges, the Prosecutor, the Deputy Prosecutors, and the Registrar will also need continued protection for the duties they performed during the course of their appointment. Since they will no longer be officials of the Court, they do not need full immunity. However, the ICC senior officials must be protected from judicial proceedings concerning the decisions they took while they were in office or the information they came across while performing their functions.\textsuperscript{120}

The Rome Statute, therefore, provides that after their departure from the organization these officials shall “continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.”\textsuperscript{121}

As with other international organizations, a fundamental principle of the privileges and immunities of ICC senior officials is that they are not for the personal benefit of the individuals themselves and that immunity of any official should be waived when it would impede the course of justice. The majority of the judges have the right and the duty to waive the immunity of a judge or the Prosecutor in any case where, in their opinion, the immunity can be waived without prejudice to the interests for which it was accorded.\textsuperscript{122} The Presidency may waive the immunity of the Registrar,\textsuperscript{123} and the Prosecutor may waive that of the Deputy Prosecutors.\textsuperscript{124} It has been noted, however, that:

In essence, these arrangements provide for the supervisory powers to waive the immunities of their subordinates, except in the case of a judge, who quite reasonably will be subject to the decision of his or her fellow judges. However, in the case of the Prosecutor, the power to waive is placed with the judges as well. This may be criticized as it could be seen as an encroachment upon the independence of the Prosecutor. It could thus be argued that the Assembly of States Parties would be the appropriate authority to waive the Prosecutor’s immunity.\textsuperscript{125}

\textsuperscript{119} Draft Agreement, supra note 33, art. 15(3).
\textsuperscript{120} See Tolbert, supra note 108, at 670.
\textsuperscript{121} Rome Statute, supra note 1, art. 48(2).
\textsuperscript{122} See id. art. 48(5)(a).
\textsuperscript{123} Id. art. 48(5)(b).
\textsuperscript{124} Id. art. 48(5)(c). Under this provision, the Prosecutor also has the authority to waive the immunity of the staff of the Office of the Prosecutor, while the ensuing paragraph authorizes the Registrar to waive the immunity of the Deputy Registrar and the staff of the Registry.
\textsuperscript{125} Tolbert, supra note 108, at 671.
Such an approach would be roughly analogous to that taken vis-à-vis the Secretary-General under the General Convention.¹²⁶

B. Privileges and Immunities of the Officials of the ICC

The officials of the ICC—namely the Deputy Registrar and the staff of the offices of the Prosecutor and the Registry—shall enjoy the privileges and immunities necessary for the independent performance of their functions, in any country where they may be on business or may pass through. Like those accorded to the Court itself, these privileges and immunities are functional in nature rather than diplomatic. As provided in the Rome Statute, the officials of the organization enjoy, in the territory of the States Parties, such privileges and immunities as are necessary for the independent exercise of their functions in connection with the institution.¹²⁷ They do not have immunities outside the performance of their official duties.

To fully appreciate the privileges and immunities of ICC officials, we need, once again, turn to the privileges and immunities of their counterparts within the ad hoc Tribunals, which are also functional in nature. The privileges and immunities of the officials of the ad hoc Tribunals derive from Article V, Section 18 of the General Convention, and are replicated in full in Article XV of their respective headquarters agreements. In light of its applicability to the present discussion, before commencing this analysis, it is necessary to emphasize three points that underlie the General Convention. First and foremost, privileges and immunities are granted to UN staff members in the interest of the United Nations and not for the personal benefit or advantage of the individuals themselves.¹²⁸ Second, while locally recruited personnel are considered to be staff within the meaning of Article 101, paragraph 1 of the UN Charter, they do not enjoy the same extent of privileges and immunities as do expatriate staff, recruited abroad. Third, in accordance with General Assembly resolution 76(I) of 7 December 1946, the privileges and immunities set out under the General Convention apply to all UN officials except those who are both locally recruited and assigned to hourly rates (even though the terms and conditions of their employment are governed by the relevant United Nations resolutions, decisions,

¹²⁶ See General Convention, supra note 12, art. V, § 20.
¹²⁷ Rome Statute, supra note 1, art. 48(1).
¹²⁸ General Convention, supra note 12, art. V, § 20.
The most important element accorded to the officials of the ad hoc Tribunals is the immunity from legal process in respect to words spoken or written and all acts performed by them in their official capacity. The primary rationale behind this provision is that when acting in their official capacity, the acts of an official are, in effect, the acts of the organization itself. Without such protection, officials of the ad hoc Tribunals would be exposed to civil or criminal liability for acts done in their official capacity; they could be summoned to appear as witnesses in judicial proceedings to give evidence on official matters and could be arrested and questioned by State authorities on issues arising out of their official functions.

The subjection of the officials of the ad hoc Tribunals to legal process would also leave them vulnerable to external pressures and influences, a result which is directly contrary to Article 100 of the UN Charter, which emphasizes the need to maintain the independence of UN officials. It could further lead to the disclosure of confidential information and may circumvent the inviolability of the documents and archives of the two organizations. The notion of legal process is thus given a broad interpretation and is considered to comprise of

the entire judicial proceedings, including the writ, mandate, summons or act by which the court assumes jurisdiction and compels the appearance of the defendant and witnesses and acts of execution, as well as other acts on the part of public authorities, such as arrest and detention in custody, in connection to the proceedings.

One must remember, however, that immunity from legal process for official acts cannot be used as a protection behind which ICTY or ICTR officials may hide while engaging in criminal activities or other conduct directed against the host governments. The Secretary-General must waive the immunity of such officials, where it can be waived without prejudice to the interests of the organization.

Tarassenko and Zacklin observe that, although threats to the physical safety and well being of UN officials are the most manifest intrusions

129. See Gerster, supra note 12, at 1142 (stating that the term ‘official’ refers to any UN staff member who is “engaged on a full-time or substantially full-time basis and has been notified in this capacity to the host country.”). Id.

130. See General Convention, supra note 12, art. V, §18(a); ICTY Headquarters Agreement, supra note 19, art. XV(1)(a); ICTR Headquarters Agreement, supra note 26, art. XV(1)(a).


132. General Convention, supra note 12, art. V, § 20; ICTY Headquarters Agreement, supra note 19, art. XV(5); ICTR Headquarters Agreement, supra note 26, art. XV(4).
upon the independence of the organization, there are others which, although less serious in nature, are nonetheless harmful to the United Nations.133 This observation is also applicable in the case of the ad hoc Tribunals. In order to protect and ensure the independent exercise of their duties, officials of the two organizations are accorded exemption from taxation on the salaries and emoluments paid to them by the organization concerned.134 The rationale for this exemption is two-fold. First, given the desirability to achieve equality of treatment for officials of equal rank, it enables the two organizations to assign comparable salary levels for equivalent posts without the need for continuous adjustment that would be necessary if changes and variations in domestic tax legislation had to be taken into account. Second, and most importantly, the exemption ensures that funds contributed by member states to the budget of the two organizations are not diverted to the treasuries of a particular member state by means of national taxation of the salaries of ICTY and ICTR officials.135 The author notes, however, that—with respect to former officials of the ad hoc Tribunals and their dependants who choose to reside in The Netherlands or Tanzania following their retirement from the organization—the exemption from income tax in the host counties does not apply to any pension and annuity paid by the organization to the individuals concerned.136

Since the efficient conduct of the operations of the ad hoc Tribunals would be jeopardized by their withdrawal from service for the purpose of serving a period of national military service, the officials of the two organizations are furthermore accorded immunity from national service obligations.137 This immunity also reflects an assumption, which member states are required to share, that service in the United Nations is as constructive a role for the individual to play in the preservation of

133. Tarassenko & Zacklin, supra note 5, at III.1/10.
134. ICTY Headquarters Agreement, supra note 19, art. XV(1)(b); ICTR Headquarters Agreement, supra note 26, art. XV(1)(b). See also General Convention, supra note 12, art. V, § 18(b).
135. Tarassenko & Zacklin, supra note 5, at III.1/10-1/11.
136. ICTY Headquarters Agreement, supra note 19, art. XIV(4). An explicit exception to the tax exemption for pensions or annuities is not found in the ICTR Headquarters Agreement, but may be implied by the limitation of the tax exemption to "salaries and emoluments paid them by the Tribunal." ICTR Headquarters Agreement, supra note 26, art. XV(1)(b).
137. ICTY Headquarters Agreement, supra note 19, art. XV(1)(c); ICTR Headquarters Agreement, supra note 26, art. XV(1)(c). See also General Convention, supra note 12, art. V, § 18(c).
international peace and security, as would be service in national armed forces.

To further ensure the independent fulfillment of their duties and functions, ICTY and ICTR officials enjoy immunity from immigration restrictions and alien registration.\textsuperscript{138} This privilege does not derogate the visa regime of the host countries concerned. However, entry controls and any travel regulations may not impair freedom of movement in substance.\textsuperscript{139} The officials of the \textit{ad hoc} Tribunals also "have the right to import free of duties and taxes their furniture and effects at the time of first taking up their post in the host country in question."\textsuperscript{140} In this regard, "internationally-recruited staff members [are] also... entitled to export with relief from duties and taxes, on the termination of their function in the host country, their furniture and personal effects, including motor vehicles."\textsuperscript{141}

Pursuant to Article XXIII of the two headquarters agreements, the officials of the \textit{ad hoc} Tribunals have the additional right of unimpeded entry into, exit from, and movement within the host country as appropriate for the purposes of the organization. They are to be granted facilities for speedy travel, and, moreover, any visas, entry permits or licenses they may require are to be provided free of charge and as promptly as possible. In this connection, the Dutch and Tanzanian authorities are under an obligation to recognize and accept UN laissez-passer as a valid travel document,\textsuperscript{142} and once in the host country, the officials of the two institutions are, upon request of the organizations, to be issued an identification card certifying their status.\textsuperscript{143}

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138. ICTY Headquarters Agreement, \textit{supra} note 19, art. XV(1)(d); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(1)(d). \textit{See also} General Convention, \textit{supra} note 12, art. V, § 18(d).
139. Gerster, \textit{supra} note 12, at 1145.
140. ICTY Headquarters Agreement, \textit{supra} note 19, art. XV(1)(g); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(1)(g). \textit{See also} General Convention, \textit{supra} note 12, art. V, § 18(g).
141. ICTY Headquarters Agreement, \textit{supra} note 19, art.XV(3); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(3)(c).
142. ICTY Headquarters Agreement, \textit{supra} note 19, art. XXIV(1); ICTR Headquarters Agreement, \textit{supra} note 26, art. XXIV(1). \textit{See also} General Convention, \textit{supra} note 12, art. VII, § 24.
143. See ICTY Headquarters Agreement, \textit{supra} note 19, art. XXV; ICTR Headquarters Agreement, \textit{supra} note 26, art. XXV. The usefulness of such an identification card is demonstrated by the fact that—since it contains information on the nationality and residence status of the holder—an identity card issued to an ICTY official may be used whenever proof of identity is requested—for example by a notary public, bank, employment office, or immigration officials—and serves as identification in the event of the bearer being stopped by the police or border control authorities. Although holders of these cards are allowed to travel without a visa within the Schengen territories (the Netherlands, Belgium, Luxembourg, Germany, France, Italy, Spain, Austria, Greece and Portugal), the card itself is not a valid travel document. Both
Since access to the region is an indispensable aspect to the prosecution’s work, a similar provision on freedom of movement is contained in the agreements that have been concluded relating to the establishment of the three ICTY liaison offices operating in the former Yugoslavia, as well as the agreement on the Kigali investigative and prosecutorial office.\textsuperscript{144} Although this provision has generally met with compliance, in 1998 the Federal Republic of Yugoslavia denied a request for the issuance of visas to ICTY investigators who wished to enter Kosovo to conduct on-site investigations of the alleged atrocities that were occurring in the area. The disregard shown by the Yugoslav authorities to their international obligations was further demonstrated when border guards refused entry to the Prosecutor herself when she attempted to gain access to Kosovo on January 18, 1999, in order to investigate the massacre of approximately forty-five Kosovo-Albanians in and around the town of Racak.\textsuperscript{145}

A principle associated with the freedom of movement is the obligation of the competent authorities of a host country to take all effective and adequate measures to ensure the appropriate security, safety and protection of the premises of an international organization and its officials. For instance, Article XXVI of the two headquarters agreement provides that “[t]he competent authorities shall take effective and adequate action which may be required to ensure the appropriate security, safety and protection of persons referred to in this Agreement, indispensable for the proper functioning of the Tribunal, free from interference of any kind.”\textsuperscript{146} On account of the precarious situation in which the officials of the ad hoc Tribunals are placed while in the field, it is surprising that a similar requirement was not expressly included within the agreements relating to the establishment of the three ICTY liaison offices, as well as the Kigali investigative and prosecutorial..
office.\textsuperscript{147}

In light of the privileged status they enjoy in their host countries, the officials of the ICTY and ICTR are also granted the same privileges in respect to exchange facilities as are accorded to members of comparable rank of diplomatic missions established in the host country.\textsuperscript{148} Furthermore, they are given, together with their spouses and dependent family members, the same repatriation facilities in time of international crisis as diplomatic agents.\textsuperscript{149}

With respect to fiscal privileges, it should be noted that under the Vienna Convention diplomatic representatives of independent States are accorded exemption from the payment of all dues and taxes (personal or real, national, regional or municipal) with the exception of charges levied for specific services rendered,\textsuperscript{150} indirect taxes incorporated in the price of goods and services, and taxes levied on property or personal activities unrelated to their diplomatic functions.\textsuperscript{151} Because they are considered to hold the same status as diplomatic agents, officials of the grade P-5 and above (in the case of the ICTY) and P-4 and above (in the case of the ICTR) are granted a number of ‘additional’ privileges and immunities by the host country.\textsuperscript{152} However, the enjoyment of these privileges and immunities is not accorded to persons having Netherlands

\textsuperscript{147} See Sarajevo Office Agreement, \textit{supra} note 21; Belgrade Office Agreement, \textit{supra} note 22; Zagreb Office Agreement, \textit{supra} note 23; Kigali Office Agreement, \textit{supra} note 28.

\textsuperscript{148} ICTY Headquarters Agreement, \textit{supra} note 19, art. XV(1)(e); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(1)(e). \textit{See also} General Convention, \textit{supra} note 12, art. V, § 18(e).

\textsuperscript{149} ICTY Headquarters Agreement, \textit{supra} note 19, art. XV(1)(f); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(1)(f). \textit{See also} General Convention, \textit{supra} note 12, art. V, § 18(f).

\textsuperscript{150} Vienna Convention, \textit{supra} note 109, art. 34; \textit{see also} EILEEN DENZA, \textit{DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS} 296 (2d ed., 1998) (noting that such charges include road or bridge tolls, charges or rates levied in respect of such matters as water supply, road improvements and street lighting).

\textsuperscript{151} Vienna Convention, \textit{supra} note 109, art. 34.

\textsuperscript{152} \textit{See} ICTY Headquarters Agreement, \textit{supra} note 19, art. XV(2); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(2). For example, ICTY officials having the rank P-5 and above are currently accorded the following ‘additional’ privileges and immunities:

(a) Motor vehicle tax (motorrijtuigenbelasting);

(b) tax on passenger motor vehicles and motorcycles (bekasting van personenauto’s en motorrijwielen);

(c) value added tax (omzetbelasting) paid on goods and services supplied involving considerable expenditure or supplied on a recurring basis;

(d) excise duty (accijnzen) included in the price of alcoholic beverages, tobacco products and hydrocarbons, such as fuel oils and motor fuels; and municipality taxes.

\textit{Id.}
or Tanzanian nationality, or have established permanent residence in the host country.\textsuperscript{153}

In accordance with Article XXVII of the two headquarters agreements, officials of the \textit{ad hoc} Tribunals—as they are subject to the United Nations Staff Regulations and Rules and, if they have an appointment of six months' duration or more—are exempt from all compulsory contributions to the social security system of the host country, and are therefore not covered against the risks described in the social security regulations.\textsuperscript{154} This exemption is also applicable to the spouse and dependent family members of the officials of the two organizations, so long as they are not employed or self-employed in the host country or receive a Dutch or Tanzanian social security benefit as appropriate.\textsuperscript{155} In this connection, the United Nations and the Dutch Government entered into an agreement in July 2001, allowing the spouse and dependent family members of ICTY officials to seek gainful employment in the Netherlands; a right that was restricted previously to nationals of the European Union and the European Economic Area.\textsuperscript{156}

As noted above, individuals who are locally recruited and assigned hourly rates (such as cleaners and gardeners) do not enjoy the privileges and immunities set out under Section 18 of the General Convention. However, the inviolability of the ICTY and ICTR would be undermined if such persons could be summoned to testify about matters that have been brought to their attention as a result of their association with the organization. Consequently, they are accorded immunity from legal process in respect of words spoken or written and acts performed by them in their official capacity for the organization in question; with such immunity continuing after the termination of their employment.\textsuperscript{157}

Turning back to the ICC, the functional privileges and immunities accorded to officials working for the organization are similar to those enjoyed by their counterparts within the \textit{ad hoc} Tribunals, with a couple

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\textsuperscript{153} ICTY Headquarters Agreement, \textit{supra} note 19, art. XV(2); ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(2).
\textsuperscript{154} ICTY Headquarters Agreement, \textit{supra} note 19, art. XXVII(1); ICTR Headquarters Agreement, \textit{supra} note 26, art. XXVII(1).
\textsuperscript{155} ICTY Headquarters Agreement, \textit{supra} note 19, art. XXVII(2); ICTR Headquarters Agreement, \textit{supra} note 26, art. XXVII(2).
\textsuperscript{156} \textit{See} Exchange of Notes between the Ministry of Foreign Affairs of the Government of The Netherlands and the International Criminal Tribunal for the former Yugoslavia (July 20, 2001) (copy on file with the author).
\textsuperscript{157} ICTY Headquarters Agreement, \textit{supra} note 19, art. XVI; ICTR Headquarters Agreement, \textit{supra} note 26, art. XV(1).
\end{flushright}
of notable additions. In order to reflect current thinking in this area, ICC officials are also accorded "immunity from personal arrest or detention and from seizure of their personal baggage." The inclusion of these immunities should, in particular, facilitate the ability of prosecution staff to conduct on-site investigations independently and in an efficient manner and will thereby overcome a number of problems facing the officials of the *ad hoc* Tribunals.

However, on account of the recent proliferation of international organizations and the resulting demand for highly qualified international civil servants, this author believes that the ICC must be placed in a position to present an attractive and competitive employment package to its staff. To address this need, the Preparatory Committee has proposed that the ICC Headquarters Agreement includes a provision establishing a most favored international organization status upon the Court, thereby ensuring that the privileges and immunities enjoyed by ICC officials, especially tax concessions, are no less favorable than those accorded to persons working at other international organizations located in the host country. Moreover, to ensure prospective staff members do not decline an offer of appointment on account of the lack of employment opportunities for their spouses or family members, the host country has been requested to permit such persons to seek gainful employment in the Netherlands during the period of the appointment of the ICC officials. Although exemption from all compulsory contributions to the social security organizations of the Kingdom of The Netherlands is included within the draft principles, it would be advantageous—especially for the purposes of attracting highly qualified locally recruited staff, particularly in the extremely competitive field of information technology—if payments from the pension scheme operated by the organization were exempted from the payment of income tax.

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158. Draft Agreement, *supra* note 33, art. 16(1)(a).
159. Zelniker, *supra* note 32, at 1011 (commenting that the provisions of the Rome Statute dealing with on-site investigations appear to grant the Prosecutor and his/her staff no more privileges than a tourist).
162. *Id.* ¶ 21.
C. Privileges and Immunities of Other Persons Attending the Court in an Official Function

Two other categories of individuals who will attend the ICC in an official function need to be mentioned, namely ‘experts on mission,’ and representatives of States Parties participating in meetings of the Assembly. With regard to the first category, it should be noted that following their establishment, it soon become clear that the ad hoc Tribunals would require the services of a number of highly-qualified experts on a short term basis to carry out specific missions for the two organizations, or on their behalf, and at their expense (particularly, in respect to the exhumation projects which were being operated by the Prosecutor). In accordance with Article VI of the General Convention, ‘experts on mission’ were granted, during the period of their missions including the time spent in journeys, a number of privileges and immunities necessary for them to carry out their functions in an expedient and independent manner. However, unlike the officials of the two institutions, ‘experts on mission’, among their privileges and immunities, enjoy an express immunity from personal arrest or detention and from seizure of personal baggage.

The inclusion of an article relating to the privileges and immunities of ‘experts on mission’ was surprisingly absent from the original version of the draft Agreement, even though it was obvious—at least to this author

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164. See General Convention, supra note 12, art. VI, § 22; ICTY Headquarters Agreement, supra note 19, art. XVII; ICTR Headquarters Agreement, supra note 26, art. XVII. Under its advisory opinion of December 15, 1989, the ICJ stated that “the purpose of [Article V,] Section 22 [of the General Convention] is... to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization and to guarantee them ‘such privileges and immunities as are necessary for the independent exercise of their functions’... The essence of the matter lies not in their administrative position but in the nature of their mission.” Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, (Advisory Opinion), 1989 ICI 194. This opinion, issued at the request of the Economic and Social Council, concerned Mr. Dumitru Mazilu, a Romanian national, who was nominated to serve as a member of the Sub-Commission on Prevention of Discrimination and the Protection of Minorities (a subsidiary organ of the Human Rights Commission, which was in turn a subsidiary organ of the Economic and Social Council). For political reasons, the Rumanian Government prevented Mr. Mazilu from leaving Romania in order to reach the United Nations headquarters, receiving documents from the organization, and preparing a report assigned to him by the Secretary-General.

165. Experts on mission are not exempt from national taxation, since they do not receive regular UN salaries but special allowances and honoraria, or are even on the payroll of their native countries. Gerster, supra note 12, at 1144-45.
—that a number of persons, other than ICC officials, would be required to carry out specific and highly specialized functions for the Court, especially during its start-up operations. The absence of such an article was fortunately noted by a number of delegates attending the ICC Preparatory Committee, leading to a discussion paper being submitted at its eighth session, proposing that this category of persons be explicitly included in the draft Agreement. The delegates agreed and a provision according ‘experts on mission’ the privileges and immunities necessary for the independent exercise of their functions was inserted into the draft Agreement. The author notes, however, that despite the fact that it has become a codified norm of international law that the privileges and immunities accorded to ‘experts on mission’ are quasi-diplomatic in nature, this provision accords them no higher status than that enjoyed by ICC officials.

Under the Rome Statute, an Assembly of States Parties—which is open to States Parties as members and to other States as observers—is to be established to provide, among other matters, managerial and budgetary oversight of the operations of the Court. To ensure that they may carry out their duties independently without interference by either the host country or third parties, the draft Agreement provides that the representatives of States participating in the meetings of the Assembly and its subsidiary organs—as well as representatives of observer States and intergovernmental organizations invited to attend such meetings—enjoy partial diplomatic privileges and immunities. Like the other categories of persons falling within the draft Agreement, representatives of States Parties and other persons falling within this category are accorded immunity from jurisdiction (legal


168. Draft Agreement, supra note 33, art. 21.

169. See, e.g., General Convention, supra note 12, art. VI, § 22.


171. Representatives of States participating in the proceedings of the Court shall also enjoy—while exercising their official functions, and during their journey to and from the place of the proceedings—the same privileges and immunities as are accorded to representatives of States participating in the Assembly and its subsidiary organs. See Draft Agreement supra note 33, art. 14.
process), with respect to their official acts and words spoken or written in an official capacity.\textsuperscript{172} These persons are also granted immunity from personal arrest or detention\textsuperscript{173} and from seizure of personal baggage.\textsuperscript{174} Moreover, all papers and documents belonging to them are inviolable.\textsuperscript{175} For non-resident representatives of States Parties, the most important privilege is the unrestricted entry to and departure from the locality of the meetings of the Assembly and its subsidiary organs and the right to protection by the host countries concerned.\textsuperscript{176} In this way, it should be noted that the nationality of the representatives of States Parties is at the discretion of sending states, thus, a host country is only entitled to restrict privileges and immunities for reasons of nationality, if a representative is a national or permanent resident of the host country concerned.\textsuperscript{177}

V. PRIVILEGES AND IMMUNITIES OF OTHER PERSONS REQUIRED AT THE SEAT OF THE COURT

In addition to the senior officials of the ICC and its staff, various other persons are required at the seat of the Court, either as defense counsel, expert witnesses, witnesses of fact or in some other capacity. As these categories of persons do not fall within the classical categories of persons enjoying privileges and immunities, in order to ensure the effective operations of the Court, the drafters of the draft Agreement specifically included various provisions according a limited array of privileges and immunities to defense counsel, victims and witnesses.\textsuperscript{178} Similar provisions were included in the headquarters agreements of the \textit{ad hoc} Tribunals.\textsuperscript{179}

A. Privileges and Immunities of Defense Counsel

One of the main principles underlying the right to a fair trial, as set out in Statutes of the \textit{ad hoc} Tribunals, is the right of suspects and accused to an adequate and effective defense. In recognition of this principle,
Article XIX of the two headquarters agreements provides that defense counsel "shall not be subjected by the host country to any measure [that] may affect the free and independent exercise of [their] functions under the Statute."\textsuperscript{180} Because their privileged status is functional, counsel are only accorded exemption from immigration restrictions, inviolability of documentation and immunity from legal process.\textsuperscript{181} Such immunities, however, are without prejudice to the regime that the court has established governing their conduct.\textsuperscript{182} Furthermore, as they are not intended for the personal benefit of the recipient but in the interests for the good administration of justice, the UN Secretary-General may waive the privileges and immunities of defense counsel.\textsuperscript{183}

In order to provide their clients an adequate defense, defense counsel is required to undertake extensive travel to the region where the crimes were allegedly committed, as well as to numerous other destinations, particularly in view of the fact that potential witnesses are dispersed across the globe. While their prosecutorial counterparts can rely on the protection afforded by the General Convention, as well as the agreements concluded with respect to the ICTY and ICTR liaison offices when travelling in the field, the privileges and immunities accorded to counsel are only applicable in the Netherlands and Tanzania. To address the lack of equality in treatment, the Registrar of ICTR has nonetheless agreed to issue a "Letter of Mission" to defense counsel that provides mild assistance to them during their travels in relation to their case.\textsuperscript{184}

The provisions of the draft Agreement according privileges and immunities to defense counsel appearing before the ICC are considerably stronger than those found in the headquarters agreements of the \textit{ad hoc} Tribunals. To ensure that those appearing before the Court are not given the slightest excuse to protest that they are denied a fair trial, the drafters of the Rome Statute went to great lengths to ensure that

\textsuperscript{180} ICTY Headquarters Agreement, \textit{supra} note 19, art. XIX (1); ICTR Headquarters Agreement, \textit{supra} note 26, art. XIX (1).

\textsuperscript{181} ICTY Headquarters Agreement, \textit{supra} note 19, Article XIX(2); ICTR Headquarters Agreement, \textit{supra} note 26, art. XIX(2). See also \textsc{Morris & Scharf}, \textit{supra} note 2, at 316 (noting that "[t]he Nuremberg Charter did not provide for the privileges and immunities of the Nuremberg Tribunal since it operated in territory occupied by the Allied States. However, the United States authorities granted immunity to German defense lawyers from national prosecution for membership in the Nazi Party or the S.S.," thereby enabling them to participate in the subsequent Nuremberg proceedings).

\textsuperscript{182} ICTY Headquarters Agreement, \textit{supra} note 19, art. XIX(3); ICTR Headquarters Agreement, \textit{supra} note 26, art. XIX(3).

\textsuperscript{183} ICTY Headquarters Agreement, \textit{supra} note 19, art. XIX(4); ICTR Headquarters Agreement, \textit{supra} note 26, art. XIX(4).

the rights of persons suspected, accused and convicted of the most serious crimes of concern to the international community would be respected. Of particular importance to the present discussion was the incorporation into the Statute of the right of equality of arms and the right to legal assistance. With respect to the latter, the corpus of international human rights institutions is clear that courts have a special responsibility to ensure that the legal representation provided to suspects and accused, and in particular to those that are indigent, is adequate and effective. However, the integrity and success of the Court—an institution whose primary purpose is to ensure that justice is done—will be judged, not on the existence of these provisions, but in their application.

Apart from being accorded the resources essential to conduct an adequate and effective defense, defense counsel—as well as persons assisting counsel, particularly investigators and researchers—are to be accorded privileges and immunities “necessary for the proper functioning of the Court.” As such, they need to be provided with privileges and immunities that enable them to effectively and adequately represent their clients in court, to communicate with their clients in confidence and maintain the confidentiality of their files and channels of communication, and to interview witnesses and conduct on-site investigations wherever necessary and in a timely manner.

Article 18 of the draft Agreement addresses these needs. In order to protect their role in courtroom proceedings, defense counsel shall enjoy immunity from legal proceedings, as well as exemption from

185. Rome Statute, supra note 1, art. 67.
186. Id. art. 67(1)(d); see also Address ICTR Registrar, supra note 33 (stressing that “[t]he equality of arms between the parties is sacrosanct.”).
190. Draft Agreement, supra note 33, art. 18(1)(b).
immigration restrictions or alien registration. Documents, papers and materials relating to the exercise of their functions are also inviolable. To take account of rapid developments in information technology, especially the storage of information in electronic format, it is submitted that the latter privilege should be expanded to include data information.

The draft Agreement protects the confidentiality of communications between defense counsel and their clients (or the court itself) by ensuring that the former are entitled to receive and send papers or correspondence, by courier or in sealed bags, and to receive and send electronic communications. When combined with the privilege of document inviolability, these rights will also facilitate counsel-client communications, especially when the two are located in different countries, which may occur frequently during the investigative stage of the proceedings.

It is in the area of on-site investigations that the privileges and immunities accorded to defense counsel will be most beneficial. Counsel “may need to travel not only in countries where they might not be welcome, by association with their client, but [also] in the difficult terrain of refugee camps [where many potential defense witnesses may be located].” It may also be the case that a limited number of lawyers have refugee status themselves. While this should not diminish their professionalism as a lawyer, when “combined with the stigma of association with [a person] accused of the most heinous crimes imaginable, the maintenance of equality with the prosecution [will be] an undeniable challenge.” They are therefore provided with immunity from arrest or detention and from seizure of their personal baggage, which shall also be exempt from inspection, unless there are serious grounds for believing that the baggage contains articles not for personal use, prohibited by law, or controlled by quarantine regulations. Moreover, they shall be accorded fair treatment in respect of currency and exchange, as well as repatriation facilities in times of crisis.

Although defense counsel may obtain an order of a pre-trial chamber to facilitate the collection of evidence and the conduct of its on-site investigations, and the right to travel, especially in the field, is not

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191. Id. art. 18(1)(e).
192. Id. art. 18(1)(c).
193. Id. art. 18(1)(d).
194. Address ICTR Registrar, supra note 33.
195. Id.
196. Draft Agreement, supra note 33, art. 18(1)(a).
197. Id. art. 18(1)(f).
198. Id. art. 18(1)(g).
199. Id. art. 18(1)(h).
200. See Rome Statute, supra note 1, art. 57(3)(b); Finalized Draft Text of the Rules
unrestricted; the draft Agreement provides that applications for visas and entry/exit permits shall be dealt with as speedily as possible and granted free of charge.\textsuperscript{201} Furthermore, despite the fact that they are not to be issued a UN laissez-passer, they are to be provided with a certificate under the signature of the Registrar for the period required for the exercise of their functions.\textsuperscript{202} It should be noted that certificates are issued to consultants on mission for the United Nations, as it is the long-standing policy of the organization not to issue laissez-passer to persons who do not represent the institution and are not official staff members thereof.\textsuperscript{203} The certificates in question resemble a laissez-passer—in that they are in the form of a renewable passport—and are widely recognized by custom officials. In the author's opinion, therefore, if the certificates display, in their inside cover (as do laissez-passer), the extent of the privileges and immunities granted, counsel should receive the necessary functional access and should thereby be placed on an equal footing to prosecution staff in this regard.

B. Privileges and Immunities of Victims and Witnesses

Under the headquarters agreements of the \textit{ad hoc} Tribunals, witnesses are accorded a limited array of privileges and immunities, relating primarily to their freedom of movement. No special status is accorded to victims unless they are required at the seat of the Tribunals for the purpose of testifying. In addition to having the right of unimpeded entry into, exit from and movement within the territory of the Netherlands and Tanzania, witnesses are to be issued visas, entry permits or licenses, where required, free of charge and as promptly as possible.\textsuperscript{204} These facilities are also to be accorded to persons accompanying witnesses to The Hague and Arusha (such as dependants or support persons).\textsuperscript{205} Moreover, witnesses are not to be "prosecuted or detained or subjected to any other restriction of their liberty by the authorities of the host country in respect of acts or convictions prior to their entry into the

\textsuperscript{201} Draft Agreement, \textit{supra} note 33, art. 29.
\textsuperscript{202} \textit{Id.}, art. 18(2).
\textsuperscript{203} General Convention, \textit{supra} note 12, art. VII, \textsection 26.
\textsuperscript{204} See ICTY Headquarters Agreement, \textit{supra} note 19, art. XXIII; ICTR Headquarters Agreement, \textit{supra} note 26, art. XXIII.
\textsuperscript{205} ICTY Headquarters Agreement, \textit{supra} note 19, art. XXIII; ICTR Headquarters Agreement, \textit{supra} note 26, art. XXIII.
territory of the host country." Such immunity shall cease fifteen days after the date upon which the ICTY or ICTR, as the case may be, no longer requires the presence of the witness.

In the case of the ICTY, it soon became apparent that in order to corroborate their testimony, witnesses (particularly, those providing expert evidence) appearing from outside the host country may be required to bring a number of papers and documents to The Hague. As it was imperative that such papers and documentation were not intercepted or tampered with prior to being admitted as evidence, the ICTY reached agreement with the Dutch authorities that while they are in the territory of the host country, witnesses appearing before the court would enjoy inviolability for all papers and documents in their possession.

The freedom of movement of witnesses appearing before the ad hoc Tribunals is not limited solely to the territories of the host countries. On account of the general wording contained in Articles 29(4) and 30(4) of the ICTR and ICTY Statutes, respectively—namely, that persons required at the seat of the courts shall be accorded such treatment as is necessary for the proper functioning of the organizations—witnesses have the protection of these rights while traveling to and from, and in some cases through, other member States. Nonetheless, it is arguable whether they are immune from legal proceeding regarding their testimony before the courts, or whether they benefit from other privileges and immunities generally accorded to the officials of the ad hoc Tribunals.

The draft Agreement is not as restrictive as the headquarters agreements of the ad hoc Tribunals, either in scope or in substance. It specifies that both witnesses and victims, participating in the proceedings (as well as other persons required to be present at the seat of the ICC), shall be accorded such treatment as is necessary for their appearance before the Court, including the time spent on journeys in connection with their appearance. As they will have to travel to and from, and in some cases through, other States, these categories of persons will require not only the co-operation of officials in those States but also safe conduct and, in principle, jurisdictional immunity during

206. ICTY Headquarters Agreement, supra note 19, art. XVIII(1); see also ICTR Headquarters Agreement, supra, note 26, art. XVIII(1).
207. ICTY Headquarters Agreement, supra note 19, art. XVIII(2); ICTR Headquarters Agreement, supra note 26, art. XVIII(2).
209. MORRIS & SCHARF, supra note 2, at 319; Zelniker, supra note 32, at 1004.
the course of their testimony before the Court.211 Accordingly, the delegates of the Preparatory Commission have agreed that they should be accorded the same privileges and immunities as those provided to counsel with the exception of repatriation and currency exchange facilities.212

The draft Agreement appears, on its face, to have the necessary elements and sufficient provisions for a successful witness operation. In particular, by providing certain privileges and immunities to the witnesses during their stay at, and travel to and from, the seat of the ICC, it addresses some of the problems the ad hoc Tribunals have faced in their witness operations.213 Unfortunately, there seems to be an inaccurate assumption as to the ability of victims and witnesses to arrange for their travel documentation and visas relying solely on a certificate issued by the organization. To avoid any abuse of these certificates and, more importantly, in order to cater for the needs of victims and witnesses—some of whom may be extremely reluctant to approach the relevant national authorities in order to obtain a valid passport to travel to The Hague—the Court should follow the practice of the ad hoc Tribunals and arrange through the appropriate diplomatic channels for the issuance of visas and travel documentation. In this regard, it is inappropriate (and unnecessary) to require the organization to advise all States Parties of the names of persons falling within this category; a requirement which is currently set out in Article 20 of the draft Agreement.

The granting of privileges and immunities to "other persons required to be present at the seat of the Court" should ensure that persons providing emotional and other forms of support to witnesses, particularly the victims of violent crime—for instance, counselors who are not officials of the institution—will have the necessary freedom to carry out their functions. Although there is no specific function which they perform for the Court, whether directly or indirectly, it would have been useful if family members and other dependants of witnesses were also included in this article so as to guard against attempts to harass witnesses

211. Tolbert, supra note 108, at 671.
212. Compare Draft Agreement, supra note 33, art. 19(1) with Draft Agreement, supra note 33, art. 18(1).
213. See Address ICTR Registrar, supra note 33 (relating that "[t]he overwhelming majority of witness called upon [by the ICTR] have never traveled abroad before, do not have valid travel documents or are refugees."). Id.
by ‘getting at’ their family members. For example, a rouge State may attempt to dissuade witnesses from testifying by persecuting their loved ones on trumped up charges, such as ‘conspiring’ with the witness, to pervert the course of justice.

C. Privileges and Immunities of the Accused

Commentators and academics alike have strongly argued that “it would be repugnant to confer on indicted war criminals the privileges and immunities of United Nations officials or diplomats by making the [General Convention] applicable to this group.” Nonetheless, in light of the fact that the operations of the ad hoc Tribunals would be undermined if the host country could exercise its jurisdiction over suspects or accused who have been acquitted or otherwise released by the court, Article XX of the two headquarters agreements states that

[the host country shall not exercise its criminal jurisdiction over persons present in its territory, who are to be or have been transferred as a suspect or an accused to the premises of the Tribunal pursuant to a request or an order of the Tribunal, in respect of acts, omissions or convictions prior to their entry into the territory of the host country.]

Such immunity is limited to crimes committed prior to the arrival of the suspects and accused in The Netherlands and Tanzania, as appropriate, and is only applicable for a period of fifteen days following their release.

Suspects and accused are not accorded privileges and immunities under either the Rome Statute or the draft Agreement. The author does not have an elaborate insight into the political machinations that were behind the exclusion of this category of persons from the draft Agreement. Nonetheless, in light of the fact that in the ICC context, provisional release will be the norm as opposed to the exception (as in the case of the ad hoc Tribunals), the question of whether suspects and accused require a limited array of privileges and immunities (particularly, exemption from immigration restrictions) should have been addressed. Granted, this is a very controversial issue and—if it turned out that they were prevented from travelling to the seat of the Court—such problems could be resolved pragmatically by simply bringing

214. See Morris & Scharf, supra note 2, at 319.
215. ICTY Headquarters Agreement, supra note 19, art. XX(1); ICTR Headquarters Agreement, supra note 26, art. XX(1).
216. ICTY Headquarters Agreement, supra note 19, art. XX(2); ICTR Headquarters Agreement, supra note 26, art. XX(2).
suspects or accused within the scope of “other persons required to be present at the seat of the Court.” Nonetheless, given the consequential effects of adopting this approach, the current omission of a separate provision on suspects and accused is highly unfortunate.  

VI. CONCLUDING REMARKS

After overcoming many practical, financial and structural problems, the existing international criminal tribunals have demonstrated that they are no-longer “paper tigers”: established as a token gesture to appease those who criticized the major powers for refusing to intervene militarily in the humanitarian crises that unfolded in many regions throughout the world during the last decade. The growing commitment of the international community to create a fair and independent global system of justice, empowered with the ability to bring to trial the perpetrators of mass crimes in the hope of deterrence of further violence and in the hope of peace, was further demonstrated by the establishment of the ICC.

Given the strenuous efforts of all those who participated in the historic events in Rome, it would be inexcusable if the States Parties did not provide the ICC with the necessary tools to carry out its functions independently and in a fair and effective manner. To this end, the delegates at the Preparatory Commission have prepared a document on the legal status of the organization that is sufficient for the needs of an international criminal court. Moreover, they have paid close attention to the experiences of the ad hoc Tribunals and have ensured that the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the officials of the Court will be accorded the privileges and immunities necessary for the independent exercise of their functions. They have also included within the draft Agreement, provisions that expand substantially upon the protection offered to defense counsel as well as witnesses and victims participating in the proceedings.

218. The drafters of the Basic Principles have attempted to address this concern by recommending that a provision be included in the ICC Headquarters Agreement specifying that the host country shall not exercise its criminal jurisdiction over accused persons in respect of acts, omissions or convictions prior to their entry into the territory of the host country. See Basic Principles, supra note 35, ¶ 25.

219. For instance, since their creation, the ad hoc Tribunals have issued collectively 68 public indictments against 167 individuals, of whom 112 have been taken into custody. Sixteen trials have been completed, resulting in 24 convictions, and a further 8 individuals have pleaded guilty to the charges against them.
The independence, safety, well-being and protection of the officials of the Court, as well as other persons involved in the proceedings will only be achieved, however, if there is a strong and clear commitment by the States Parties to scrupulously and unequivocally observe their legal obligations. Although it is likely that the great majority of States Parties will respect the principle of independence, as well as other privileges and immunities, it is plausible that a limited number may restrict or even disregard altogether the international status of these persons, particularly in areas where on-site investigations are taking place and where the Court employs large numbers of locally-recruited officials. The Assembly of States Parties should therefore be sensitive to the claims of encroachment on the safety and well being of ICC officials as well as any actions that may undermine the independence of the ICC. State Parties must be prepared to explore all available mechanisms to ensure that the operations of the organization are not jeopardized.\textsuperscript{220}

\textsuperscript{220} See Rome Statute, \textit{supra} note 1, arts. 87(7) & 112(2)(f) (concerning the role of the Assembly of States Parties in cases where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of the Rome Statute).