

# The Legal Status, Privileges and Immunities of the International Tribunal for the Law of the Sea

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The International Tribunal for the Law of the Sea, hereinafter referred to as the Tribunal, has been established in accordance with article 287 para. 1 lit. (a) of the United Nations Convention on the Law of the Sea of 10 December 1982 and its Annex VI,<sup>1</sup> hereinafter referred to as the Convention, as an international judicial body with competence, under the conditions laid down in the relevant provisions of the Convention, to settle disputes concerning its interpretation or application and, through the Sea-Bed Disputes Chamber of the Tribunal, to give advisory opinions at the request of the Assembly or the Council of the International Sea-Bed Authority on legal questions arising within the scope of their activities.<sup>2</sup>

While Section 4 Subsection G of Part XI of the Convention defines in general terms the legal status, the privileges and immunities of the International Sea-Bed Authority,<sup>3</sup> the Convention only stipulates as to the Tribunal, in article 10 of Annex VI containing the Statute of the Tribunal, that its "members, ... when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities."

It is clear that the text of this article is far from sufficient to define the legal status of a permanent international judicial institution or to satisfy the requirements necessary to the exercise of its functions.

The legal instruments, relating to other international courts or tribunals, to the diplomatic missions or to universal international organizations, which codify the general principles of international law and the customary law concerning privileges and immunities, would not apply expressly to

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<sup>1</sup> Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVII, Doc. A/CONF.62/122 and Corr. 1-11.

<sup>2</sup> Article 191.

<sup>3</sup> Arts 176-183.

the newly created Tribunal. Unlike the ICJ and the *ad hoc* criminal Tribunals established by the Security Council, the Tribunal is not an organ of the United Nations Organization. Furthermore, the General Assembly of the United Nations, when adopting on 13 February 1946 the Convention on the Privileges and Immunities of the United Nations, also considered it necessary to adopt, on the same day, Resolution 22 C (I):

“with a view to ensuring that the International Court of Justice shall enjoy the privileges, immunities and facilities necessary for the exercise of its functions and the fulfillment of its purposes in the country of its seat and elsewhere and invites the members of the Court ... to consider this question and to inform the Secretary-General of their recommendations.”

Among the Assembly's reasons for dealing separately with the case of the ICJ, stated by the President of the Court in his letter dated 26 June 1946 to the Minister for Foreign Affairs of the Netherlands, he cited “that the Court is an organism whose members, with their small staff, perform duties of a special character and whose requirements are consequently different from those of the other organs of the United Nations.”<sup>4</sup>

It is undoubtedly for the same reasons, that the third United Nations Conference on the Law of the Sea, “having decided to take all possible measures to ensure the entry into effective operation without undue delay of the Tribunal and to make the necessary arrangements for the commencement of its functions”, established by Resolution I the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. Paragraph 10 of this Resolution provides that the Commission “shall prepare a report containing recommendations for submission to the meeting of the States Parties ... regarding practical arrangements for the establishment of the International Tribunal for the Law of the Sea.”

Special Commission 4, established by the Preparatory Commission at its first session in 1983, was charged with the preparation of the above-mentioned report.

The Preparatory Commission adopted the provisional report prepared by Special Commission 4 and containing the results of its deliberations in fulfillment of its mandate.<sup>5</sup>

For the purpose of providing the requisite privileges and immunities for the effective functioning of the Tribunal, the Preparatory Commission

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<sup>4</sup> ICJ Acts and Documents No. 5 (1989), 199 et seq.

<sup>5</sup> Doc. LOS/PCN/SCN.4/W.P.16.

considered it desirable that the Meeting of States Parties adopts an international protocol that may be adhered to by all states, and recommended therefore that “the final draft Protocol on the Privileges and Immunities of the International Tribunal for the Law of the Sea,<sup>6</sup> formulated by the Commission and its Special Commission 4, should provide the basis for negotiating and entering into such a protocol.”

The draft Protocol was considered in informal consultations, working groups and the plenary by the States Parties at their second, third, fourth and fifth meetings, held in New York in 1995 and 1996. It was agreed that the instrument would be called an agreement subject to signature and ratification, and should be open to all States. It was also decided to create a working group of the whole to discuss the draft agreement and to submit it to the judges of the Tribunal for their views.<sup>7</sup>

The Tribunal discussed the draft Agreement at its first and second organizational sessions, held respectively in October 1996 and February 1997, in the light of the international instruments and practice relating to the international judicial organs and presented to the Meeting of States Parties its recommendations and conclusions on the draft Agreement.<sup>8</sup>

At the sixth meeting of States Parties, held in New York from 10 to 14 March 1997, the open-ended Working Group adopted, subject to approval by the Meeting, the majority of the draft articles of the Agreement.<sup>9</sup>

At the seventh meeting of States Parties,<sup>10</sup> held in New York, the Draft Agreement on the Privileges and Immunities of the Tribunal, hereinafter referred to as the Agreement, was finalized<sup>11</sup> and adopted by consensus on 23 May 1997.

As depository of the Agreement, the Secretary-General of the United Nations informed all States that the Agreement shall remain open for signature at the United Nations Headquarters for 24 months from 1 July 1997. According to article 30 of the Agreement it will enter into force 30 days after the date of deposit of the tenth instrument of ratification or accession.

The Tribunal, established by a convention of universal nature and composed, according to article 2 of its Statute, of a body of 21 independent

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<sup>6</sup> Report of the Preparatory Commission, Doc. LOS/PCN/152 (Vol. I), 115 et seq.

<sup>7</sup> Reports of the Mtgs. of States Parties, Docs. SPLOS/4, SPLOS/5, SPLOS/8 and SPLOS/14.

<sup>8</sup> Doc. SPLOS/CRP.11.

<sup>9</sup> Doc. SPLOS/WP.2/Rev.1.

<sup>10</sup> Report of the 7th Mtg. of States Parties, Doc. SPLOS/24.

<sup>11</sup> Doc. SPLOS/22; text of the Agreement published under – Documents – in this Vol.

members elected by the States Parties to the Convention, is an autonomous international institution and at the same time an international judicial organ with competence to settle disputes in conformity with the relevant provisions of the Convention. The Agreement set out the legal framework necessary to satisfy the requirements of the various aspects of its functions.

The purpose of this article, which reflects solely the views of its author, is to analyze the provisions of the Agreement in relation to the privileges and immunities of the Tribunal as an international institution (I.) and as an international judicial organ (II.).

## **I. Legal Status, Privileges and Immunities of the Tribunal as an International Institution**

The legal status of the Tribunal derives from the Convention, the inter-governmental instrument that has established it, and from the Agreement. Like many other international intergovernmental organizations, the Tribunal is a subject of international law, possessing juridical personality and the legal capacity which entitles it to exercise certain rights and to undertake certain obligations. The Tribunal should also enjoy the privileges and immunities necessary to safeguard its independence.

### **1. Juridical Personality of the Tribunal**

The juridical personality of the Tribunal as an autonomous judicial organ was acknowledged by the community of States even before the adoption of the Agreement.

In this regard, it should be recalled that the States Parties to the Convention, at their fifth Meeting held in New York from 24 July to 2 August 1996, after electing the first 21 members of the Tribunal, recognized that since the proceedings of the General Assembly were of interest to the Tribunal, the Tribunal should be appropriately represented at the meetings of the Assembly and should apply for observer status.

The Meeting also decided to "authorize the Tribunal, as a matter of priority, to undertake negotiations with the United Nations on relationship arrangements and with Germany on a headquarters agreement."<sup>12</sup>

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<sup>12</sup> Report of the 5th Mtg of States Parties, Doc. SPLOS/14.

On 17 December 1996, the United Nations General Assembly invited the Tribunal to participate in the sessions and the work of the General Assembly in the capacity of observer.<sup>13</sup>

In addition, the German Government enacted on 10 October 1996 an internal regulation,<sup>14</sup> with effect from 1 August 1996, on an interim basis, pending the entry into force of a Headquarters Agreement between the Tribunal and Germany, which accords privileges, immunities and facilities to the Tribunal, as an independent institution, and to its Members and Registry. The German Ordinance, based on the Convention on the Privileges and Immunities of the Specialized Agencies adopted on 21 November 1947, recognizes the juridical personality of the Tribunal.<sup>15</sup>

The Agreement on the Privileges and Immunities codifies in an international legal instrument the recognition of the juridical personality of the Tribunal. It provides in article 2 that "the Tribunal shall possess juridical personality; it shall have the capacity:

- (a) to contract
- (b) to acquire and dispose of immovable and movable property
- (c) to institute proceedings."

Furthermore, the Agreement on Cooperation and Relationship between the United Nations and the Tribunal signed in New York on 18 December 1997 by the President of the Tribunal and the Secretary-General of the United Nations stipulates in article 1 para. 1 that "the United Nations recognizes the International Tribunal as an autonomous international judicial body with jurisdiction, as provided for in the relevant provisions of the Convention and the Statute of the International Tribunal annexed thereto."

As stated above, the Tribunal has the capacity to contract, not only with private persons or entities but also with subjects of international law consequently to conclude agreements of an international nature.

Since its inauguration on 1 October 1996, the Tribunal has concluded a Relationship Agreement with the United Nations and is actively negotiating the terms of the Headquarters Agreement to be concluded with the Government of Germany as well as the terms of cooperation arrangements with the International Sea-Bed Authority. The Tribunal is also considering the conclusion of cooperation agreements with other International Organizations whose activities are related to matters of the Law of the Sea.

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<sup>13</sup> A/RES/51/204 of 17 December 1996.

<sup>14</sup> From an exchange of letters dated 23 August 1996, between Dr. Hartmut Hillgenberg, Director General of Legal Affairs of the German Federal Foreign Office and Mr. Hans Corell, Under-Secretary-General for Legal Affairs, Legal Counsel of the United Nations.

<sup>15</sup> BGBl. 1996 II, 2517.

In certain circumstances, the Tribunal may consider it desirable to sit or otherwise exercise its functions elsewhere than at its Headquarters. In this event the Agreement provides that the Tribunal “may conclude with the State concerned an arrangement concerning the provision of the appropriate facilities for the exercise of its functions.”<sup>16</sup>

The Tribunal has the capacity to acquire and dispose of immovable and movable property.<sup>17</sup> It has its own budget, approved by the Meeting of States Parties.

The Tribunal has also the capacity to institute legal proceedings. This may happen first when, in disputes arising out of contracts, the Tribunal decides to waive its immunity from legal process and becomes party to litigation before a national jurisdiction or in arbitral proceedings.

Secondly, the Agreement provides<sup>18</sup> that the Tribunal shall make suitable provisions for the settlement of disputes arising out of contracts and other disputes of a private law character to which the Tribunal is a party and disputes involving any person who, by reason of his official position in the Tribunal, enjoys immunity if such immunity has not been waived.

Thirdly, if a dispute arises out of the interpretation or application of the Agreement between the Tribunal and a State Party which is not settled by consultation, negotiation or any other agreed mode of settlement, within three months following a request by one of the parties to the dispute, it shall at the request of the State Party or the Tribunal be referred for final decision to a panel of three arbitrators.<sup>19</sup>

As a sign of its own distinctive juridical personality, the Tribunal is entitled to display its flag and emblem at its premises and on vehicles used for official purposes.<sup>20</sup>

The Agreement provides also<sup>21</sup> that “the States Parties shall recognize and accept the United Nations *laissez-passer* issued to Members and officials of the Tribunal or experts appointed under article 289 of the Convention as a valid travel document.”

It should be noted that the draft Agreement as provisionally adopted by the Working Group of the Meeting of States Parties, contained a provision<sup>22</sup> stating that “the Tribunal may issue *laissez-passer* to the Members and officials of the Tribunal, as well as experts appointed under article 289 of the Convention”, with the following footnote:

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<sup>16</sup> Article 7.

<sup>17</sup> Article 2.

<sup>18</sup> Article 26 para. 1 lit. (a) and (b).

<sup>19</sup> Article 26 para. 2.

<sup>20</sup> Article 4.

<sup>21</sup> Article 21 para. 1.

<sup>22</sup> Doc. SPLOS/W.P.2/Rev. 1, article 19.

“In the event that arrangements are entered into with the United Nations for the issuance of *laissez-passer* of the United Nations, the Tribunal may not need to issue its own *laissez-passer*.”

However in the discussion of the draft Agreement, within the Working Group, at the seventh meeting of States Parties, it was decided to retain the formulation of article 21, concerning the issuance of *laissez-passer*, as stated above, in order to promote cost-effectiveness, in view of the limited number of persons entitled to a *laissez-passer* of the Tribunal. Nevertheless the Chairman of the Working Group reported to the Meeting of States Parties that the Jamaican delegation “wishes to place on record ... that pursuant to the convention and the provisions of the Agreement itself, the Tribunal retains its status as a subject of international law with such personality and capacities as contained in the instruments.”

Confirming the opinion of the Jamaican delegation, the President of the seventh meeting of States Parties, on his report to the General Assembly of the United Nations<sup>23</sup> on developments relating to the Tribunal, stated the following:

“On the issue of *laissez-passer* by the United Nations to Tribunal members, the meeting decided that although the issuance of those documents by the United Nations would facilitate Tribunal development and promote cost-effectiveness, the Tribunal would, nonetheless, retain its juridical personality and capacities, as contained in the provisions of the Convention and Agreement. The Tribunal would therefore retain the right to issue its own *laissez-passer* in the future.”

The right of the Tribunal to “frame rules for carrying out its functions,” provided for in article 16 of its Statute, might be considered as a manifestation of its juridical personality.

The same could equally be said of the power of the Tribunal “to make regulations operative throughout the Headquarters district for the purpose of establishing therein the conditions in all respects, necessary for the full execution of its functions.” Such right will certainly be included in the Headquarters Agreement to be concluded between the Tribunal and the Host Country where the Tribunal has its seat, as is the case in similar agreements concerning international organizations.

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<sup>23</sup> Press Release of the 56th Plen. Mtg. of the 52nd General Assembly, (GA/9364 of 26 November 1997).

## 2. Privileges and Immunities of the Tribunal

The present century has witnessed the creation of a considerable number of intergovernmental international organizations of universal or regional character, whose scope of activities encompasses a great variety of fields. These organizations always enjoy, by virtue of the legal instruments instituting them or by virtue of special multilateral conventions, certain privileges and immunities, of a functional nature, considered to be necessary for the fulfillment of their purposes in adequate conditions of independence and liberty. In this regard the most significant codification of their privileges and immunities was embodied in the Convention on the Privileges and Immunities of the United Nations<sup>24</sup>, adopted by the General Assembly of the United Nations on 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies,<sup>25</sup> adopted by the General Assembly of the United Nations on 21 November 1947.

The Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea stipulates in the second paragraph of its preamble the recognition "that the Tribunal should enjoy ... privileges and immunities as are necessary for the exercise of its functions" and sets out in subsequent articles, the scope of such privileges and immunities.

### a) Inviolability of the Premises of the Tribunal

The Agreement provides<sup>26</sup> that "the premises of the Tribunal shall be inviolable, subject to such conditions as may be agreed with the State Party concerned."

Generally, headquarters agreements set out the conditions for the application of the principle of inviolability of the premises. The draft Headquarters Agreement between the Tribunal and Germany, presently at the ultimate phase of negotiation, includes, *inter alia*, the following provisions:

- No officer or official of the host country or other person exercising any public authority within the host country shall enter the Headquarters district to discharge any official duty except upon the express consent of or at the request of the President or the Registrar of the Tribunal and in accordance with conditions approved by him.

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<sup>24</sup> UNTS Vol. 1 No. 4.

<sup>25</sup> UNTS Vol. 33 No. 521.

<sup>26</sup> Article 3.



- Judicial actions and the service or executions of legal process ... cannot be enforced in the Headquarters district except with the consent of and in accordance with conditions approved by the President or Registrar of the Tribunal.
- In case of fire or other emergency requiring prompt protective action ..., the consent of the President of the Tribunal to any necessary entry of the Headquarters district shall be presumed if neither the President nor the Registrar can be reached in time.
- ... the Tribunal shall not allow the Headquarters district to become a refuge from justice for persons against whom a penal judgement had been made or who are pursued *flagrante delicto*, or against whom a warrant of arrest or an order of extradition, expulsion or deportation, has been issued by the competent authorities.

### **b) Immunity of the Tribunal, its Property, Assets and Funds**

The Agreement provides<sup>27</sup> that “the Tribunal shall enjoy immunity from legal process, except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.”

The immunity from legal process enjoyed by international organizations is a well established principle in international law. The above formulation of this principle corresponds exactly to the terms contained in the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies; it has been, since the adoption of these Conventions, incorporated in many other bilateral, regional or universal conventions.

In spite of this, however, the German delegation sought to amend the principle of immunity from legal process of the Tribunal, during the negotiation of the Agreement in the Meetings of States Parties. The German proposal<sup>28</sup> aimed at deleting the second sentence of the text cited above because, it was argued, “this is necessary to enable the execution of court decisions in cases where immunity has been expressly waived by the Tribunal.”

When, at the request of the Meetings of States Parties, the Tribunal expressed its views on the draft Agreement, it stated<sup>29</sup> that “the Tribunal unanimously decided that the proposal by the Federal Republic of Ger-

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<sup>27</sup> Article 5 para. 1.

<sup>28</sup> Doc. SPLOS/CRP 8.

<sup>29</sup> Doc. SPLOS/CRP 11.

many to delete this (second) sentence was unacceptable. It strongly recommends that the text of paragraph 1 be retained as drafted.”

Thereafter, the German delegation did not insist on its proposal which was lacking support from other delegations.

– The Agreement provides also<sup>30</sup> that the “property, assets and funds of the Tribunal, wherever located and by whomever held, shall be immune from search, requisition, confiscation, seizure, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action” and “to the extent necessary to carry out its functions, the property, assets and funds of the Tribunal shall be exempt from restrictions, regulations, controls and moratoria of any nature.”

– The Draft Agreement on the Privileges and Immunities of the Tribunal submitted to the Meeting of States Parties<sup>31</sup> contained, in para. 4 of article 4 (article 5 of the Agreement), an important limitation to the immunity of the Tribunal from legal process. This paragraph reads as follows:

“The immunities referred to in this article shall not extend to an action for damages arising from an accident involving a vehicle in respect of which the Tribunal may be liable. Pursuant to the laws and regulations of the State concerned, the Tribunal shall be required to have insurance coverage against third-party risks in respect of vehicles owned or operated by it.”

A similar text was included in the article relating to the officials of the Tribunal. Furthermore the German delegation proposed<sup>32</sup> to add the same text to the article relating to the members and members *ad hoc* of the Tribunal.

The notion of restricting the immunities of an international organism or of an international official for damages arising from an accident involving a vehicle has been previously accepted, with binding legal effect, in certain conventions or agreements relating to international organizations of regional character, particularly in Europe.

For instance, article 3 para. 1 lit. (b) of the Protocol on Privileges and Immunities of the European Patent Organisation excludes the immunity from jurisdiction and execution of the Organisation “in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of the

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<sup>30</sup> Article 5 paras 2 and 3.

<sup>31</sup> Doc. SPLOS/W.P. 2.

<sup>32</sup> Doc. SPLOS/CRP 8.

Organisation, or in respect of a motor traffic offence involving such a vehicle.”

Moreover, the Headquarters Agreement between the Government of Germany and the European Molecular Biology Laboratory, signed in Bonn on 10 December 1974, contains in its article 6 para. 1 lit. (b) a similar provision.

However, no such exclusion from the immunity of jurisdiction was provided for in the Agreement between Germany and the United Nations concerning the Headquarters of the United Nations Volunteers Program<sup>33</sup> signed in New York on 10 November 1995.

It should be noted also that neither the Vienna Convention on Diplomatic Relations nor the Conventions relating to the Privileges and Immunities of the United Nations and the Specialized Agencies have provided for the exception from the immunity of jurisdiction of motor vehicle accidents.

In expressing its views on the Draft Agreement, the Tribunal concluded that the first sentence of para. 4, mentioned above, was not acceptable and should be deleted. It stated further that:

“the Tribunal agrees that persons who suffer damages as a result of accidents involving vehicles owned or operated by the Tribunal or its personnel should be assured of compensation. This can be assured through third-party insurance without in any way affecting the immunity of the Tribunal and the persons concerned from legal process.”

Therefore the Tribunal recommended the following provision:

“The Tribunal shall have insurance coverage against third-party risks in respect of vehicles owned or operated by it, pursuant to the laws and regulations of the State in which such vehicles are operated.”

With minor drafting changes, the Meeting of States Parties adopted the Tribunal’s proposal.<sup>34</sup> A similar provision was adopted in relation to Members of the Tribunal.<sup>35</sup> Equally, the officials of the Tribunal shall be required to have this insurance coverage.<sup>36</sup>

However, in view of the concern expressed by certain delegations, the Working Group adopted these provisions with:

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<sup>33</sup> BGBl. 1996 II, 903.

<sup>34</sup> Article 5 para. 4.

<sup>35</sup> Article 13 para. 5.

<sup>36</sup> Article 14 para. 3.

“the *proviso* that the Meeting of States Parties would include in its report a statement specifying that States Parties would not normally expect reliance to be placed on immunity in respect of claims for damages arising from accidents involving such vehicles.”

Subsequently, the President of the seventh meeting of States Parties included this statement in his report to the General Assembly of the United Nations on 26 November 1997.

This statement can be compared to the Resolution II adopted on 14 April 1961, by the United Nations Conference on Diplomatic Intercourse and Immunities,<sup>37</sup> which:

“recommends that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims.”

Though not legally binding, the statement of the Meeting of States Parties carries a moral and political weight which will be taken into consideration in the implementation of the provisions of the Agreement on immunities of jurisdiction in matters regarding motor vehicle accidents.

### c) Freedom of Movement

The Tribunal should be able to exercise its functions without hindrance and undue interference. For this purpose the Agreement provides<sup>38</sup> that no administrative or other restrictions shall be imposed on the free movement of the members and officials of the Tribunal together with members of their families forming part of their households as well as of other persons connected with its activities, to and from the Headquarters of the Tribunal or the place where the Tribunal is sitting or otherwise exercising its functions.

The Agreement also stipulates<sup>39</sup> that if the State Party concerned considers it necessary to take measures for the security or for the maintenance of public order of the State Party in accordance with international law, it should not prejudice the independent and proper working of the Tribunal.

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<sup>37</sup> Doc. A/CONF. 20/4/Add. 1, Official Records, Vol. II, 90.

<sup>38</sup> Article 22.

<sup>39</sup> Article 23.

In addition, the measures necessary for the protection of the Tribunal shall be determined by mutual agreement between the State Party and the Tribunal.

Moreover, applications for visas from all persons travelling on the business of the Tribunal, shall be dealt with as speedily as possible.<sup>40</sup>

#### **d) Inviolability of the Archives and Communications**

The archives of the Tribunal and all documents belonging to it or held by it are inviolable at all times wherever they may be located.<sup>41</sup> Official communications and correspondence and other materials or communications by courier or in sealed bags are also inviolable and, shall have the same privileges, immunities and facilities as diplomatic couriers or bags.<sup>42</sup>

#### **e) Financial Privileges**

Like other international institutions, the Tribunal enjoys financial privileges while carrying out its activities. Among these privileges, the Tribunal may, without being restricted by financial controls, regulations or financial moratoriums of any kind, hold funds, operate accounts in any currency, transfer or convert freely any currency held by it into any other currency.<sup>43</sup>

#### **f) Fiscal Privileges<sup>44</sup>**

The Tribunal enjoys the same exemptions from taxes, customs duties and import or export restrictions that are generally granted to international organisations. These are mainly:

- exemption from all direct taxes except those which are no more than charges for public utility services;
- exemption from all customs duties, prohibitions and restrictions on imports and exports in respect of articles imported or exported by the Tribunal for its official use and in respect of its publications;
- exemption or reimbursement of duties and taxes which are included in the price of movable and immovable property and taxes paid for service rendered when the Tribunal, for its official use, makes major purchases

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<sup>40</sup> Article 21 para. 2.

<sup>41</sup> Article 6.

<sup>42</sup> Article 8 paras 2 and 3.

<sup>43</sup> Article 12.

<sup>44</sup> Arts 9, 10, 11.

- of property and goods or services on which duties and taxes are charged or are chargeable;
- exemption from taxation of the salaries, emoluments and allowances paid to Members and officials of the Tribunal.

## II. Privileges and Immunities of the Tribunal as an International Judicial Organ

The Tribunal constitutes not only an international institution possessing its own juridical personality and enjoying the privileges and immunities above mentioned, but also performs an international judicial function, i.e. the peaceful settlement of disputes, exercised by its Members with the assistance of the Registrar and other members of the staff of the Registry. Moreover, judicial proceedings involve a large number of other persons: agents of the parties, counsel, advocates, witnesses, experts, etc.

The Agreement recalls, in its preamble, that according to article 10 of the Statute, the Members of the Tribunal, defined as including Members chosen *ad hoc* for the purpose of a particular case, shall enjoy diplomatic privileges and immunities, and recognizes that officials of the Tribunal and persons participating in proceedings, “should enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Tribunal.”

However, the status, as to the privileges and immunities of the different categories of persons mentioned, is not a uniform one and is subject to various limitations.

### 1. Scope of the Privileges and Immunities of the Persons Participating in the Judicial Function of the Tribunal

#### a) Members of the Tribunal

As a general principle, the Agreement provides<sup>45</sup> that the Members of the Tribunal shall, when engaged on the business of the Tribunal, enjoy the privileges, immunities, facilities and prerogatives accorded to heads of diplomatic missions in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961, hereinafter referred to as the Vienna Convention. In particular, the person of a Member and his private residence shall be inviolable. His papers, correspondence and property shall

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<sup>45</sup> Article 13 para. 1.

likewise enjoy inviolability. He shall also enjoy immunities from jurisdiction, exemption from inspection of his personal baggage and, together with members of his family forming part of his household, repatriation facilities in time of international crisis, and exemption from taxes and customs duties. However, States Parties have no obligation to exempt from income taxes pensions or annuities paid to former Members (and also to former officials of the Tribunal). It is evident that the provisions of article 4 of the Vienna Convention relating to the *agrément* to be given by the receiving State for the accreditation of a head of a diplomatic mission and of article 9 relating to declaring him *persona non grata*, do not apply to the Members of the Tribunal.

In addition to their diplomatic status in the country where the Tribunal is sitting or exercising its functions, the Agreement provides for special privileges accorded elsewhere to the Members of the Tribunal and aimed at securing for them complete freedom of speech and independence in the discharge of their functions.

- Members of the Tribunal together with members of their families forming part of their households shall be accorded every facility for leaving the country where they may happen to be and for entering and leaving the country where the Tribunal is sitting. On journeys in connection with the exercise of their functions, they shall, in all countries through which they may have to pass enjoy all the privileges, immunities and facilities granted to diplomatic agents in similar circumstances.
- When they reside, for the purpose of holding themselves at the disposal of the Tribunal, in any country other than that of which they are nationals or permanent residents, they shall be accorded, together with the members of their families, diplomatic privileges, immunities and facilities during the period of their residence there.
- The immunity from legal process in respect of words spoken or written and all acts done by them in discharging their functions shall continue to be accorded even after they are no longer Members of the Tribunal or performing those functions.

In the final analysis, the Agreement defines for the Members of the Tribunal a legal status similar to the one approved by Resolution 90 (I) of the General Assembly of the United Nations of 11 December 1946 for the Judges of the ICJ.<sup>46</sup>

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<sup>46</sup> ICJ Acts and Documents No. 5 (1989), 207 et seq.

## b) Officials of the Tribunal

Officials of the Tribunal are the Registrar and other members of the staff of the Registry.

### *aa) The Registrar*

The Registrar shall, when engaged in the business of the Tribunal, be accorded diplomatic privileges, immunities and facilities.<sup>47</sup> For the purpose of the Agreement “Registrar” means the Registrar of the Tribunal and includes any official of the Tribunal acting as Registrar.

It should be noted that the Registrar of the ICJ and the Deputy Registrar when acting for the Registrar are accorded, within the territory of the Netherlands, the same privileges, immunities and facilities as those accorded to the Members of the Court. It is expected that the Headquarters Agreement, to be concluded between the Tribunal and Germany, extends the same treatment to the Registrar and the Deputy Registrar of the Tribunal.

### *bb) Other Officials of the Tribunal*

Apart from the Registrar, who enjoys diplomatic status, other officials of the Tribunal, as well as experts, agents, counsel, advocates and witnesses, shall enjoy in any country where they may be on the business of the Tribunal, or in any country through which they may pass on such business, such privileges, immunities and facilities as are necessary for the independent exercise of their functions.

In order to avoid repetition, the privileges and facilities accorded to all the persons referred to above are enumerated first, and those specific to each category of these persons will be mentioned below.

aaa.) The officials of the Tribunal and persons participating in its proceedings shall be accorded:

- immunity from personal arrest or detention and from seizure of their personal baggage;
- exemption from inspection of personal baggage, unless there are serious doubts about its contents;
- immunity from legal process in respect of words spoken or written and all acts done by them in discharging their functions, which immunity shall continue even after they have ceased to exercise their functions;

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<sup>47</sup> Article 14.



- exemption from immigration restrictions or alien registration.

bbb.) In addition to the previous immunities, officials of the Tribunal shall be accorded:<sup>48</sup>

- the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question and to re-export the same, free of duty, to their country of permanent residence;
- immunity from national service obligations;
- exemption from immigration restrictions or alien registration for members of their families forming part of their households;
- the same privileges in respect of currency and exchange facilities as are accorded to the officials of comparable rank forming part of diplomatic missions to the Government concerned;
- together with members of their families, the same repatriation facilities in times of international crises as are accorded to diplomatic agents.

#### c) Experts Appointed Under Article 289 of the Convention<sup>49</sup>

In addition to the privileges and immunities listed above, experts appointed under article 289 of the Convention, shall be accorded, during the period of their missions, including the time spent on journeys in connection with their missions:

- inviolability of documents and papers;
- the same facilities in respect of currency and exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions;
- the same repatriation facilities in times of international crises as are accorded to diplomatic agents.<sup>50</sup>

#### d) Agents, Counsel and Advocates

They shall be accorded also, during the period of their missions:

- inviolability of documents and papers;

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<sup>48</sup> Article 14 para. 2 lit. (b), (e), (f), (g), (h).

<sup>49</sup> Article 289 of the Convention allows the Tribunal, in any dispute involving scientific or technical matters, at the request of a party or, *proprio motu*, to select in consultation with the parties no fewer than two scientific or technical experts, to sit with the Tribunal but without the right to vote.

<sup>50</sup> Article 15 lit. (d), (f), (g).

- the right to receive papers or correspondence by courier or in sealed bags;
- the same facilities in respect of their personal baggage and in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions;
- the same repatriation facilities in times of international crises as are accorded to diplomatic agents.<sup>51</sup>

### e) Witnesses, Experts and Persons Performing Missions

Witnesses, experts and persons performing missions by order of the Tribunal shall be accorded also, during the period of their missions:

- inviolability of documents and papers;
- the same facilities in respect of currency and exchange restrictions as are accorded to representatives of foreign Governments in temporary official missions;
- repatriation facilities in times of international crises.<sup>52</sup>

The different legal regimes relating to the privileges and immunities provided for in the Agreement, correspond to the various functions of unequal importance performed by the persons participating in the judicial proceedings of the Tribunal. Their aim is to ensure the minimum requirements for the independence and the protection of these persons.

However, special agreement between the Tribunal and a State Party, in particular the future Headquarters Agreement, relating to the same subject matter as the Agreement, may provide for distinct status in particular circumstances and possibly for additional privileges and facilities. The Agreement provides, in its article 25, that the provisions of the Agreement and of the special agreement shall be treated, whenever possible, as complementary, so that both provisions shall be applicable and neither provision shall narrow the effect of the other; but in case of conflict the provision of the special agreement shall prevail.

## 2. Limitations to the Privileges and Immunities

The Agreement asserts, in conformity with the general principle in international law governing the question of privileges and immunities, that the

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<sup>51</sup> Article 16 lit. (d), (e), (g), (h).

<sup>52</sup> Article 17.

purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient and independent performance of the functions of the persons to whom they are accorded. Consequently, pursuant to the Agreement, the privileges and immunities, in particular those relating to its officials and to the persons participating in its proceedings, are subject to certain limitations.

### **a) Purpose of the Privileges and Immunities**

The Agreement stresses,<sup>53</sup> as a general principle, that the privileges, immunities, facilities or prerogatives enjoyed by all persons concerned, are granted not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions. These persons have an obligation, without prejudice to their privileges and immunities, to respect the laws and regulations of the State Party in whose territory they may be or through whose territory they may pass on the business of the Tribunal. They have a duty not to interfere in the internal affairs of that State. On the whole, privileges and immunities are no licence for the violation with impunity of the laws and regulations of the States which agree to their granting.

### **b) Nationals and Permanent Residents**

Many general conventions or headquarters agreements relating to privileges and immunities provide for a limitation of the privileges and immunities of the persons who are nationals of or permanent residents of the State where those persons are exercising functions of an international nature. In this regard, the Agreement is no exception. It provides<sup>54</sup> that a person enjoying immunities and privileges pursuant to its provisions, shall enjoy immunity from legal process and inviolability only in respect of words spoken or written and all acts done by that person in the discharge of his or her duties, even after the person has ceased to exercise functions in connection with the Tribunal.

In addition, for Members and officials of the Tribunal, their salaries and emoluments shall be exempt from taxation.

The Draft Protocol on the Privileges and Immunities of the Tribunal, submitted by the Preparatory Commission to the Meeting of States Parties did not contain a similar provision. However, the delegations of Canada

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<sup>53</sup> Article 19.

<sup>54</sup> Article 18.

and Argentina, proposed<sup>55</sup> that a new paragraph be added to article 12 (relating to the Members of the Tribunal) which reads as follows:

“A person mentioned in articles 12 to 16 shall not enjoy the privileges and immunities provided therein in the territory of the State or States of which the person is a national, a landed immigrant or a permanent resident, with the exception of the immunity from legal process in respect of words spoken or written and all acts done by the person in discharging his or her duties, which immunity shall continue even after the person has ceased to exercise his or her functions.”

The Tribunal was not in favour of this proposal and considered it too restrictive and not in conformity with the legal regime established by the Vienna Convention deemed to be applicable, according to the Agreement, to the Members of the Tribunal and to its officials enjoying diplomatic status. Indeed, article 38 para. 1 of this Convention accords only to the diplomatic agent, national of or permanent resident of the receiving State, immunity of jurisdiction and inviolability in respect of official acts performed in the exercise of his functions, but also recognizes the right of the receiving State to grant this agent additional privileges and immunities.

Upon the recommendation of the Tribunal, the Meeting of States Parties approved, with regard to the privileges and immunities of nationals and permanent residents of a State Party, a legal status consistent with the relevant provisions of the Vienna Convention.

### **c) Immunity from Legal Process in Respect of Official Acts**

While the diplomatic immunity from legal process is complete and means the exemption of diplomatic agents from the criminal jurisdiction of the receiving State and from its civil and administrative jurisdiction, except for a few cases, and consequently covers official acts as well as private acts of the agents, the officials of the international organizations, enjoy, in general, this immunity only in respect of official acts performed in the exercise of their functions.

With respect to the Tribunal, only its Members, its Registrar and, depending on what will be agreed upon in the Headquarters agreement, a limited number of its high ranking officials, enjoy diplomatic privileges and immunities.

Pursuant to the Agreement, the immunity from legal process accorded to all other officials of the Tribunal and to the persons participating in its

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<sup>55</sup> Doc. SPLOS/W.P.2/Add. 1.

proceedings (agents, counsel, advocates, experts and witnesses) is restricted to official acts done by them in discharging their functions or missions, in accordance with the well established principle of the functional immunities of the officials of the international organizations.

#### d) Prevention of any Abuse of Immunities

Privileges and immunities do not exempt their beneficiaries from respecting the laws and regulations of the States concerned. It is admitted in international law that these immunities constitute only an immunity from local jurisdiction, not from local law. In this perspective, the Agreement provides<sup>56</sup> that the Tribunal shall cooperate with the appropriate authorities of States Parties to facilitate the execution of their laws and to prevent any abuse in connection with the privileges and immunities.

#### e) Waiver of Immunity

To counterbalance the immunities from legal process granted to the officials of the Tribunal and to persons participating in its proceedings, in the absence of the counterbalance available in the case of diplomatic immunities — recall, *persona non grata*, civil and criminal jurisdiction of the sending State — and in order to avoid denial of justice, the Agreement provides<sup>57</sup> for the waiver of immunities.

The Agreement distinguishes between three categories of persons enjoying immunities. The first category includes agents, counsel and advocates representing or designated by a State which is a party to proceedings before the Tribunal. The second category includes other agents, counsel, advocates representing or designated by entities other than States or by juridical or physical persons, the Registrar, experts appointed under article 289 of the Convention, witnesses, experts and persons performing missions by order of the Tribunal. The third category includes officials of the Tribunal other than the Registrar. The competent authority to waive the immunity will be the State concerned, in the case of persons belonging to the first category, the Tribunal, in the case of persons belonging to the second category and the Registrar, acting with the approval of the President of the Tribunal, in the case of other officials of the Tribunal.

While article 32 of the Vienna Convention specifies that the immunity from jurisdiction of diplomatic agents *may be waived* by the sending State, the Agreement states, following the formulation adopted in the general

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<sup>56</sup> Article 24.

<sup>57</sup> Article 20.

conventions relating to privileges and immunities of international organizations, that the competent authority has the right and *duty* to waive the immunity. But this obligation is subject to two conditions: the competent authority should be convinced, in a particular case, that the immunity would impede the course of justice and can be waived without prejudice to the administration of justice.

The question might be posed as to whether or not the immunity of the members of the Tribunal can be waived. The Agreement does not provide for an affirmative answer.

“International Judges stand in a category by themselves. They are neither representatives of members, nor ‘officials’ of an international organization.”<sup>58</sup> Therefore the Members of the Tribunal are neither “representing or designated” by a State nor officials of the Tribunal, as referred to above in the determination of the competent authority to waive immunity.

An attempt was made to include expressly in the article relating to the waiver of immunity in the Agreement, the article concerning the Members of the Tribunal.<sup>59</sup> But the Meeting of States Parties did not adopt this proposal.

It should be noted that article 9 of the Statute of the Tribunal, corresponding to article 18 of the Statute of the ICJ provides that “if, in the unanimous opinion of the other members of the Tribunal, a member has ceased to fulfill the required conditions, the President of the Tribunal shall declare the seat vacant.”

The “required conditions” to be fulfilled by the member of the Tribunal, according to article 2 of the Statute, include the “highest reputation for fairness and integrity.”

It is significant, in this regard, that in more than 50 years of the establishment of the ICJ, article 18 of its Statute has never been applied.<sup>60</sup>

The Agreement is a comprehensive legal instrument, essential for the independent fulfillment by the Tribunal of its important functions. Its provisions, defining the international juridical personality of the Tribunal and the scope of its privileges and immunities, are consistent with the rules of international law governing the legal status, privileges and immunities of the International Organizations and of the ICJ.

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<sup>58</sup> J.L. Kunz, “Privileges and Immunities of International Organizations”, *AJIL* 41 (1947), 828 et seq., (852).

<sup>59</sup> Doc. SPLOS/W.P.2/Rev. 1.

<sup>60</sup> G. Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice*, 1983.

For the first time in the history of codification of international law, a multilateral treaty deals exclusively with the legal status, in its various aspects, of an autonomous international judicial body.

In view of the importance of the Agreement for a State which intends to ratify or accede to it, or for a State, not yet a Party, appearing before the Tribunal in a particular dispute, the Agreement provides for its provisional application<sup>61</sup> or for its *ad hoc* application for the purposes and duration of the case relating to the dispute.<sup>62</sup>

It is hoped that this Agreement which has been carefully prepared and discussed will be ratified or acceded to by a large number of States, particularly among the States Parties to the United Nations Convention on the Law of the Sea.

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<sup>61</sup> Article 31.

<sup>62</sup> Article 32.