

# International Criminal Court

## Agreement on the Privileges and Immunities of the International Criminal Court

Implementation Considerations

FEBRUARY 2003

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## NOTES ON THE CONTRIBUTORS

**The International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR)** was founded in 1991 and is based in Vancouver, Canada. ICCLR conducts research and policy analysis, undertakes the development and delivery of technical assistance programs and provides public information and consultation services relating to the fields of international criminal law, criminal justice policy, and crime prevention. In its role as an affiliated institute of the United Nations, ICCLR participates in the annual meetings of the United Nations Commission on Crime Prevention and Criminal Justice, and the meeting of the institutes comprising the United Nations Crime Prevention and Criminal Justice Programme network. ICCLR has also established numerous co-operative working relationships with other international bodies, institutes and associations.

Since 1992, ICCLR has been actively committed to supporting global efforts in combating international crimes and prioritising the creation of a permanent, effective and just International Criminal Court (ICC). In March of 1993, ICCLR organised and sponsored *The International Meeting of Experts on the Establishment of an International Criminal Court*, which final report was transmitted to the United Nations Legal Office in New York and was used extensively in the design of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia, as noted in the May 1993 Secretary General's Report.

In the ensuing years, ICCLR continued to develop its expansive collection of substantive and comprehensive ICC-related papers while participating in many negotiating conferences, including several United Nations *ad hoc* Committee meetings for the Establishment of the ICC in 1995 and Preparatory Committee meetings from 1996 to 1998. In 1998, ICCLR representatives participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the ICC. This landmark conference ultimately led to an overwhelming vote in favour of the adoption of a convention on the establishment of an international criminal court. ICCLR subsequently participated in the United Nations' periodic meetings of the Preparatory Commission for the ICC and the Assembly of States Parties meetings. Among the numerous ICC-related reports and guides developed by ICCLR are the *Manual for the Ratification and Implementation of the Rome Statute* (developed in cooperation with Rights & Democracy—formerly the International Centre for Human Rights and Democratic Development and available in Arabic, French, Portuguese, Russian, Spanish and Chinese), a *Checklist of Implementation Considerations and Examples under the Rome Statute*, and *Rules of Procedure and Evidence – Implementation Considerations*.

Since August 2000 ICCLR has been involved in organizing workshops to promote the expeditious establishment of a just and permanent ICC, and to assist countries in the development of legislation and administrative procedures to support the ICC. ICCLR has provided regional workshops with support from the Canadian International Development Agency (CIDA), the Department of Justice, and the Department of Foreign Affairs and International Trade and most recently provided country-specific ICC technical assistance to numerous countries with funding from the Department of Foreign Affairs and International Trade.

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# 1. Introduction to the Agreement on the Privileges and Immunities of the International Criminal Court (APIC)

## 1.1. Background to this Supplement

On 1 July 2002, the *Rome Statute of the International Criminal Court* entered into force, triggering the jurisdiction of the first ever permanent international criminal court. The International Criminal Court (ICC) is capable of investigating and prosecuting individuals accused of the most serious crimes of concern to the international community, namely genocide, crimes against humanity, war crimes, and once defined, the crime of aggression (article 5, *Rome Statute*).

Four years earlier, in 1998, during a diplomatic conference, the *Rome Statute* was adopted by 120 States. Also at that time, a Preparatory Commission (Prepcom) was established with the mandate to prepare proposals for the practical arrangements of the establishment and operation of the ICC (see Resolution F, *Final Act of the Rome Conference* – <http://www.un.org/law/icc>). From 1998 to 2002, the Prepcom drafted a series of agreements, all connected to one another, with the ICC at the centre. Some of these documents include:

- Rules of Procedure and Evidence;
- Elements of Crimes;
- Financial Rules and Regulations;
- Relationship Agreement between the Court and the United Nations;
- Basic Principles Governing a Headquarters Agreement;
- Rules of Procedure of the Assembly of States Parties; and
- Agreement on the Privileges and Immunities for the Court.

The entire network of agreements provides the framework within which the Court, as an independent institution, can be most effective. The Assembly of States Parties for the ICC met for the first time from 3-10 September 2002 and formally adopted these legal agreements.

One of the issues that the Precom had to address was the privileges and immunities of the Court and its representatives and when these privileges and immunities may be waived. The Court and its personnel require privileges and immunities to enable the ICC to operate effectively. Article 48, *Rome Statute* provides the basic principles for the privileges and immunities of the Court and of all the people who may be involved in the work of the Court. Paragraphs 3 and 4 of article 48 refer to an additional agreement needed to elaborate the privileges and immunities not detailed in the *Rome Statute*. The Prepcom was mandated to negotiate this agreement in Resolution F, *Final Act of the Rome Conference*. The agreement has now been adopted by the Assembly of States Parties, and is entitled the *Agreement on the Privileges and Immunities of the International Criminal Court (APIC)*. The APIC was opened for signature by all States as from 10 September 2002 at United Nations Headquarters in New York, and will remain open for signature until 30 June 2004. It will enter into force 30 days after the date of deposit of the tenth instrument of ratification (article 35, APIC).

States Parties will need to ratify and implement the APIC as soon as possible. The Court and its personnel will not be able to operate efficiently in the absence of protection from the APIC on

the territory of all States Parties. Furthermore, ensuring strong privileges and immunities for officials, personnel and participants will indicate that States Parties are committed to the *Rome Statute* and support the work being done on the Court's behalf by these individuals. Note that the *APIC* is also open for ratification by non-States Parties. Those States committed to the principles of international justice enshrined in the *Rome Statute*, but who have not yet decided to commit themselves to the *Rome Statute*, may wish to ratify the *APIC* as a way of assisting the ICC in a practical way, in the meantime.

## ***1.2 Purpose of the Guide***

The purpose of this Guide is to provide a general overview of all the provisions in the *APIC*. In addition, this Guide highlights the obligations of the *APIC* and provides some analysis on the implementation considerations for States. The Court is not a United Nations body, but a unique independent international institute and as such requires its own privileges and immunities regime. There are many similarities of the privileges and immunities elaborated in the *APIC* with those found in other treaties such as:

- *The Convention on the Privileges and Immunities of the United Nations*;
- *The Protocol on the Privileges and Immunities of the International Seabed Authority*;
- *The Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea*;
- *The Convention on the Privileges and Immunities of the Specialised Agencies*; and
- *The Headquarter Agreement of the International Tribunal for the Former Yugoslavia* (see Selected Bibliography and Resources).

This Guide will review the extent of the differences in order to assist States in ensuring that the Court and its personnel will be covered by State laws. However, it is important to remember the uniqueness of the ICC. It offers access for victims and their legal representatives in a manner unprecedented. It ensures the right to a fair trial, protecting the rights of the accused with equality of arms between the Prosecutor and defence counsel. Implementation of the *APIC* will be crucial to the effective functioning of the ICC, and may be carried out simply by amending existing legislation or supplementing legislation by decree.

## ***1.3 Background to Privileges and Immunities***

The purpose of the privileges and immunities of the Court, its personnel and officials and those participating in proceedings of the Court is to safeguard the integrity and autonomy of the Court. The *APIC* provides for privileges and immunities that are sufficient to ensure that the Court can function in a fair, independent and effective manner. This agreement affirms and defines the legal status of the Court and its staff. It recognises that privileges and immunities granted to the Court and persons functioning for the Court will greatly influence the way in which the Court will be able to function.

International law on privileges and immunities as well as the United Nations regime dealing with privileges and immunities is well established both in treaties and by custom. Why then is

there a need for a new agreement on privileges and immunities for the International Criminal Court as a court as well as for personal immunities for those involved in the Court? First of all, the Court is not an organ of the United Nations, unlike the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Rather it is an independent treaty-based organisation. This means the Court and its staff will not be covered under the current treaties on privileges and immunities which govern the United Nations, specialised agencies or the tribunals. However, there will be a special *Relationship Agreement between the Court and the United Nations*, which has an article concerning United Nations privileges and immunities and how they will be dealt with by the two institutions (article 19, *Draft Relationship Agreement*). The draft Relationship Agreement was adopted at the first Assembly of States Parties meeting in September 2002 and requires adoption by the United Nations General Assembly.

Secondly, international organisations or institutions, like the Court, are based on agreements concluded by Member States who find that the establishment of the organisation serves a mutually beneficial purpose. It therefore follows that those same States would ensure that the institution they established has the means to carry out the functions envisioned. Another reason is that the personnel serving the Court, especially in the field, will require the protection of a strong privileges and immunities regime.

The Court's headquarters is in The Hague and therefore there will be an arrangement to cover privileges and immunities between the Court and the Netherlands. To this end, the Assembly of States Parties adopted the *Basic Principles Governing a Headquarters Agreement to be Negotiated between the Court and the Host Country* in September 2002. An *Interim Headquarters Agreement* came into force 19 November 2002 and a finalised agreement is expected before the end of 2003. In addition, the *Rome Statute* foresees instances where the Court may sit outside its headquarters. No matter where the Court is sitting, its personnel and officials as well as other individuals participating in an investigation or prosecution will be required to travel and work in different countries. The Court will have to operate across borders, within areas of conflict and possibly against high-level government officials. The potential for exploitation, reprisals and vulnerability of personnel, officials, witnesses and victims has already been demonstrated by the experiences of persons involved in the work of the Yugoslavian and Rwandan international tribunals.

### ***1.4 Relationship between the Rome Statute and the APIC***

It is essential to note that the *Rome Statute* is the primary authority on the jurisdiction and functioning of the Court and all supplementary documents must be in accord with and subject to the Statute. The goal of the Court is to “put an end to impunity for the perpetrators of these crimes” and thereby contribute to the prevention of such crimes (Preamble, *Rome Statute*). Article 48, *Rome Statute* sets out three categories of persons and the types of privileges and immunities to which they are entitled. In general terms, these are:

- Judges, the Prosecutor, the Deputy Prosecutors and the Registrar will enjoy the same immunities as are accorded to heads of diplomatic missions (paragraph 2);
- The Deputy Registrar, staff of the Office of the Prosecutor and staff of the Registry will enjoy privileges, immunities and facilities necessary for the performance of their functions, in accordance with the *APIC* (paragraph 3);

- Counsel, experts, witnesses and any other person required to be present at the seat of the Court will enjoy such treatment as is necessary for the proper functioning of the Court, in accordance with the *APIC* (paragraph 4).

The *APIC*, while related to the *Rome Statute*, is a stand-alone agreement and an autonomous treaty. Some of the provisions in the *APIC* restate certain articles provided for in the *Rome Statute*. For example, article 48(1) “The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purpose” is replicated in article 3 of the *APIC*. This was done in contemplation of the fact that non-States Parties, including those that have signed but not yet ratified the *Rome Statute*, may ratify the *APIC*.

While article 48 of the *Rome Statute* and the *APIC* do contemplate a privileges and immunities regime, the regime is to ensure the effective functioning of the ICC globally by protecting the Court and individuals involved in its proceedings. The regime does not undermine the purpose of the ICC, that is, to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community (preamble, *Rome Statute*). This is ensured by article 27(2) of the *Rome Statute*, wherein it states “immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

### ***1.5 Overview of the APIC***

The *APIC* can be divided broadly into 3 sections.

1. The first section (articles 2-12) deals with the privileges and immunities relating to the legal status of the Court. The issues surrounding the legal identity of the Court include judicial personality, territorial integrity, ownership and control of property, financial, taxation and communication privileges. This protected legal personality of the ICC is crucial for the Court’s functioning both under international law and the domestic legal systems where the Court may be conducting proceedings.
2. The second section of the *APIC* (articles 13-32) deals with the representatives of States Parties, personnel and officers of the Court, experts, witnesses, victims and any other person required to be present at the seat of the Court. These articles cover in detail the extent of their privileges and immunities, conditions of exercise, waiving circumstances, and the settlement of disputes arising from the exercise of privileges. They recognise situations where staff of the Court as well as defence counsel, witnesses and other experts are undertaking work or merely passing through third countries.
3. The last section (article 32-38) contains the final dispositions common to most international agreements.

At the date of writing, the *APIC* is not yet in force. Twenty-five countries had signed the *APIC* (as of 10 February 2003) and two countries had deposited its ratification instrument (Norway and Trinidad & Tobago). For the current status of *APIC* check

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty17.asp>.

The *APIC* will enter into force 30 days after the date of deposit of the tenth instrument of ratification. The importance of broad ratification of *APIC* cannot be understated. With the establishment of the Court on 1 July 2002 the smooth functioning of the Court will be further enhanced by the implementation of the provisions in *APIC* by all States.

## **2. General Issues of Implementation**

### ***2.1 Approaches to Implementation***

The *APIC* is an international treaty, and as such, States need to consider whether ratification will require changes to their national laws or administrative procedures, to enable them to meet their obligations under the treaty. For example, States may need to ensure steps are taken to guarantee the Court will have the capacity that may be necessary to exercise its functions and fulfilment of its purpose in that State, such as the capacity to contract, acquire and dispose of property and participate in national legal proceedings. It is unlikely that most States will be involved either actively or regularly in the work of the ICC. When national authorities are involved however - even indirectly - it is important that they are able to act quickly, with the requisite legal authority already in place, in order to ensure that justice is done.

Each State's constitutional and legislative requirements will dictate the process of implementing international treaty obligations. This varies significantly from State to State. Every State Party to the *APIC*, whether following a monist or dualist system, is free to choose how it will implement its treaty obligations, provided it proceeds in good faith and the result is the fulfilment of the obligations under the Agreement. Some States generally ratify treaties first and then rules included in the treaty automatically become a part of national law upon ratification and publication in an official journal (monist system). Other States, especially those in the Commonwealth, are obliged by their constitutions to prepare implementing legislation before ratifying or acceding to any international treaties (dualist system). In dualist systems, States will be familiar with the legislation, regulations, decrees, executive orders or declarations, as well as the governmental process required to implement international treaties. In monist systems also, it is likely that the implementation of the *APIC* will involve some modifications to existing national laws. The precise form of the implementing law can be decided by each State.

The *APIC* provides minimum standards for the protection of the Court and for all those who need to contribute to its proceedings in order to have an effective legal institution. States may also take this opportunity to provide more extensive privileges and immunities to any of the groups listed below, if they wish. Examples of other treaties which provide more generous privileges and immunities are discussed throughout the remainder of the document.

### ***2.2 Other Privileges and Immunities Regimes***

In order to implement the obligations contained in the *APIC*, it is helpful to appreciate the drafting process of the agreement. In preparing the first draft Agreement discussion paper, a number of international treaties were used as templates, including the *Convention on the Privileges and Immunities of the United Nations*; *Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea*; *the Agreement concerning the Headquarters of the International Criminal Tribunal for the Former Yugoslavia*; and the *Privileges and Immunities of Members of the International Court of Justice*. The *Rome Statute* and the *APIC* expressly refer to the *Vienna Convention on Diplomatic Relations*. Therefore, if

States are Parties to any of these treaties and have implemented their obligations there should be little difficulty to introduce these new provisions as an amendment to existing laws.

Most States will already have in place privileges and immunities legislation or regulations dealing with diplomatic relations, foreign missions, or international organisations. These pieces of legislation could be reviewed for amendment or States may enact a single piece of legislation that covers every aspect of implementation of the *APIC*. States could also use a hybrid approach. Because much of the *APIC* reflects standards found in other international treaties, the amount of implementing legislation required may be minimised. However, it is important to note that the *APIC* does go beyond the scope of existing privileges and immunities regimes as the scope of persons covered by the *APIC* include all those involved in investigations and proceedings before an international criminal court. The changes to the law should be disseminated widely once they come into force and may require training of relevant officials.

Where there are regional inter-State organisations, there also may exist regional treaties covering privileges and immunities that have been incorporated in implementing legislation. Such legislation may assist implementation of the *APIC*. In Africa, the *General Convention on the Privileges and Immunities of the Organisation of African Unity* provides for legal capacity for the Organisation in the territory of each of its Member States as well as immunities for the Organisation's representatives, officials and experts on mission. The Americas have a similar agreement: the *Agreement on Privilege and Immunities of the Organisation of American States*. In Europe, the *General Agreement on Privileges and Immunities of the Council of Europe* covers similar privileges and immunities. The *Protocol on Privileges and Immunities for the Caribbean Court of Justice* also has many similarities to those provisions found in the *APIC*.

### ***2.3 Relationship with the Implementation of the Rome Statute***

It is important to bear in mind when implementing the *APIC* that the ICC is no ordinary international regulatory or institutional body. The Court is unique in its potential to deter and punish “the most serious crimes of concern to the international community as a whole” (article 5, *Rome Statute*). This potential can only be realised through the full cooperation of States Parties. An important aspect of that cooperation is to ensure that privileges and immunities are granted to the Court, its personnel and others who must appear before the Court during proceedings in other countries. Although the *APIC* has been modelled on existing treaties, the unique and potentially sensitive mandate of the Court must not be forgotten.

A number of States Parties have completed or are in the process of implementing the *Rome Statute*. In so doing, States may already have addressed the privileges and immunities of the Court and its personnel, officials and others, particularly those dealing with judges, the Prosecutor, Deputy Prosecutor and Registrar, as they are set out clearly in the *Rome Statute* (article 48). However, because the *Rome Statute* only contemplates – rather than establishes – an agreement on privileges and immunities, the obligations of the *APIC* may not be provided for in countries' ICC implementing legislations. Certain existing implementing legislations have “reserved” the right to issue regulations governing the privileges and immunities for the personnel and others involved in the proceedings of the Court in order to include those

contemplated in the *APIC*. Section 1(2) of Schedule 1 of United Kingdom's *International Criminal Court Act 2001* and section 54 of Canada's *Crimes Against Humanity and War Crimes* are two examples. Those provisions were drafted before the *APIC* was concluded. For those States currently in the process of preparing ICC implementing legislation, it would be more efficient to implement the *APIC* at the same time, since the *APIC* is expressly mentioned in the *Rome Statute*, and seeks to uphold the same principles of international justice established by the *Rome Statute*.

## ***2.4 Introduction of New Procedures***

Many States will also need to introduce new procedures in certain areas of the law, in order to ensure that they meet their obligations under the Agreement, given that the *APIC* includes implications for immigration, economic, labour and tax law. This will involve co-ordination between government departments and various branches of government. It would be advisable for a central authority designated to deal with the ICC to be familiar with the requirements of the *APIC*.

### **3. Specific Issues of Implementation**

#### ***3.1 Privileges and Immunities relating to the Legal Status of the Court***

##### **3.1.1 Legal and juridical personality**

###### ***Description***

The Court has both international legal personality and juridical personality (article 4, *Rome Statute* and article 2, *APIC*). Juridical personality means legal capacity. The Court's legal capacity is limited to that which may be necessary for the exercise of its functions and fulfilment of its purposes. Both of these concepts - legal personality and juridical personality - are reflected in the *APIC* to emphasis the need for a strong, independent Court, able to exercise its functions effectively and without undue influence by States in its operation.

International legal personality ensures that the Court's rights, powers, and duties are separate from those of States. Legal personality allows the Court to enter into international agreements. The legal capacity allows the Court to enter into contracts and to acquire and dispose of immovable and movable property and participate in legal proceedings. The legal personality conferred on the Court by the *Rome Statute* and the *APIC* gives the Court a distinct identity under the law.

The Court's headquarters is in The Hague and the consequences of the Court's legal personality and capacity within the Netherlands will be dealt with in a separate Headquarters Agreement between the Court and the Netherlands (article 3, *Rome Statute*). However, it is anticipated that the Court may be required to conduct proceedings in the territory of other States (articles 3(3) and 62, *Rome Statute*). Accordingly, the Court can decide to hold hearings and trials anywhere in the world, in consultation with relevant national authorities. In addition, the Court may, following the example of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, establish regional and national offices as needed, throughout the world for research, holding archives in secure locations and liaising with national officials. The Court, as an entity with its own legal personality can conclude arrangements with States concerning the provision of facilities for the exercise of its function (article 12, *APIC*).

Whether the Court operates in The Hague or in the territory of another State, there are a number of privileges and immunities that attach to the Court as a legal entity. These include legal regulations regarding taxation, custom duties, and requirements for permits and licences. These privileges and immunities will be discussed in more detail in the following pages. However, it is important to remember that the Court's legal personality and legal capacity are exercised in the domestic jurisdictions of those States Parties which gives rise to obligations of implementation. The Court's international legal personality would be worthless if the Court would not have the means to operate within the legal order of the States Parties.

The Court is entitled to display its flag, emblem and markings at its premises, be that in The Hague or any office the Court establishes in another State's territory. Vehicles and other means

of transportation used for official purposes can also have displayed the Court's flag, emblem and markings, at the Court's discretion. While States Parties must ensure that the Court is allowed to do so, such a privilege will probably not require specific implementation legislation.

### ***Obligations***

- When requested by the Court to sit in a territory outside the Netherlands, States Parties may need to negotiate an arrangement allowing the Court to sit and exercise the functions of the Court on their territory (article 3 and 12, *APIC*).
- States Parties must ensure that the Court can contract, acquire and dispose of property and participate in legal proceedings and any other action that may be necessary for the exercise of the Court's functions and the fulfilment of its purpose on their territory (article 2, *APIC*).

### ***Implementation***

In allowing the Court to sit on their territory, some States have enacted legislation that provides for the Head of State to declare any place in the country to be the seat of the Court, pursuant to certain procedures. Section 6 of South Africa's *Implementation of the Rome Statute of the International Criminal Court Act, 2002* is such an example.

Implementation obligations arise from guaranteeing the Court's legal capacity. The Court's legal capacity allows the Court to contract, to acquire and to dispose of movable and immovable property and to participate in legal proceedings. The phrase used in the *APIC* "to participate" in legal proceedings is broader than the standards reflected in other international treaties which provide "to institute" legal proceedings (such as article 1, *Convention on the Privileges and Immunities of the United Nations*). This allows the Court to be a party to legal proceedings as plaintiff and defendant, to sue and be sued. Any implementing legislation should reflect that the list of capacity activities is not meant to be exhaustive and can include other legal actions that will be necessary for the Court to exercise its functions and fulfil its purpose. One way of enacting this obligation is to allow the Head of State, by executive order to confer on the International Criminal Court the legal capacity equivalent to that of a corporation under national law. See section 1(1) of Schedule 1 of United Kingdom's *International Criminal Court Act 2001* for an example of this enactment.

As reflected in the discussions of the ICC Preparatory Commission Working Group, the concept of legal capacity means that States will not subject the Court to national jurisdiction or legislation, and the Court will consult national authorities when it needs to act. Implementing legislation should not restrict the Court in the exercise of its functions or fulfilment of its purpose and should reflect the fact the Court is not subject to national law.

### 3.1.2 Ownership and control of property privileges

#### *Description*

There are a number of privileges and immunities that must be ensured by States Parties that deal with the Court's ownership and control of property. Under the *APIC*, the Court's premises have been accorded the highest form of immunity – “inviolability” (article 4, *APIC*). This means that States Parties must abstain from exercising sovereign rights, including law enforcement rights, in respect of the premises of the Court. While the physical premises of the Court will be in The Hague, the Court may also establish offices outside its headquarters. States Parties should ensure that any premises of the Court located in their territory are immune from interference. The *Vienna Convention on Diplomatic Relations* defines “premises” to mean “the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of...”. In the finalised ICC Headquarters Agreement, the definition of “premises” may be slightly different and therefore guide the definition of “premises” in the *APIC*. Presumably, if the ICC has premises in other countries, an agreement as to what is meant by “premises” may be defined bilaterally.

The Court's other property, funds and assets are subject to a lesser form of immunity than inviolability. As a rule, the Court's property, funds and assets must be immune from every form of legal process except when the Court waives this immunity expressly (article 6, *APIC*). The waiver of immunity can not be extended to acts of execution. Execution includes searches, seizures, requisitions, confiscations, expropriations and any other form of interference, whether by executive, administrative, judicial or legislative action (article 6(2) *APIC*). The property, funds and assets are to be exempt from restrictions, regulations, controls or moratoria of any nature if it is necessary to carry out the functions of the Court. So, for example, this provision would not exempt the Court's property from health and safety law, as long as such laws would not hinder the Court from carrying out its functions. It does not matter where the property, fund or asset is located or who holds possession, as long as it is the property of the Court it should be covered by this immunity.

The Court's ownership and control of property extends to its archives and documents. Article 7 of the *APIC* requires States Parties to ensure that these archives and documents are inviolable. The agreement prescribes a broad range of materials as inviolable: the archives of the Court, all papers and documents in whatever form, and materials being sent to or from the Court, held by the Court or belonging to the Court, wherever located and by whomsoever held. This covers evidence, official or unofficial papers including notes, and documents in electronic or paper form, databases, videotapes and emails. This protection covers all documents needed in proceedings, including those documents provided to the Court but not belonging to the Court.

This provision anticipates the termination or absence of inviolability. For example, when a document has been returned from the Court to the sender, inviolability will cease. When that happens, States Parties must ensure that if there have been protective measures ordered by the Court, pursuant to the *Rome Statute* and the *Rules of Procedure and Evidence*, those orders must be respected.

Inviolability of the Court's archives and documents is an essential guarantee that protects the Court from intrusive inquiries by States that could undermine its independence and integrity. If documents were not defined as inviolable, they could easily be subject to possible interference or confiscation. The ICC is unique and its distinct function and nature of the role is recognised with providing inviolability of documents.

### ***Obligations***

- States Parties must ensure inviolability of the premises of the Court, if such premises are located in their territory (article 4).
- States Parties must ensure that when the Court's property, funds and assets are located in their territory or held by someone residing in their territory or subject to the State's jurisdiction, such property, funds or assets -
  - have immunity from every form of legal process, unless it is expressly waived by the Court. However, measures of execution can not be waived (article 6(1)).
  - have immunity from search, seizure, requisition, confiscation, expropriation and any other form of interference (article 6(2)).
  - be exempt from restrictions, regulations, controls or moratoria of any nature if it is necessary to carry out the functions of the Court (article 6(3)).
- States Parties must ensure that the Court's archives, all papers and documents in whatever form, and materials sent to or from the Court or held by the Court or belonging to it, wherever located and by whomsoever held are inviolable. When inviolability is terminated or absent, States Parties must ensure compliance with any Court ordered protective measures to which the materials may be subject (article 7).

### ***Implementation***

Most States have experience in granting inviolability to the premises of Embassies of other States and international organisations, their property, funds, assets, archives and documents. The ICC could be added to the list of international organisations already covered by national laws that ensure inviolability. Where the Court desires to sit outside its headquarters, the Court and the State, in whose territory the Court will sit can enter into an arrangement according to Article 12 of the *APIC*. Such an arrangement should guarantee the inviolability of the Court's premises.

Implementing the guarantee of inviolability for the Court's archives and documents should take into account the broad protections provided for in the *APIC*. Providing inviolability may assist States in cooperating with the Court when asked to submit papers or materials. Inviolability also prevents impeding the work of the Court, for example travel papers issued by the Court or evidence in the Court's possession could not be seized. Article 7 of the *APIC* dealing with inviolability of archives and documents reflects the uniqueness of a global Court in anticipating the termination of inviolability. As inviolability may cease in certain cases, States Parties may need to incorporate a mechanism by which they can ascertain whether any protective measures have been ordered by the Court and, if so, how such orders are to be respected. This provision is not found in other international treaties on privileges and immunities.

### 3.1.3 Financial and taxation privileges

#### *Description*

There are a number of financial and taxation privileges that States Parties must ensure that the Court could enjoy. The term “Court” includes its assets, income, property, its operations and transactions. Like all other privileges and immunities, these are designed to preserve the integrity and independence of the Court, given that the Court’s funds and assets could be seriously reduced by the unilateral imposition of taxes by a State.

States Parties must ensure that the Court is exempt from any form of direct taxation (article 8, *APIC*). The exemption from taxes will not exempt the Court from charges for public utility services. The Court will also be exempt from custom duties and import and export restrictions (article 8(2)). In general, the Court shall not claim exemption from duties or taxes included in the price of property or services. For major purchases where there is identifiable duties or taxes, States Parties are to have appropriate administrative arrangements for the exemption of such charges or their reimbursement (article 9(1)). The Court is prohibited from selling goods purchased under such exemption or reimbursement, except under conditions agreed to with the State Party (article 8(3)).

States Parties may need to review export and import regulations to ensure that the Court is exempt from all prohibitions and restrictions on imports and exports in respect of articles imported or exported by the Court for official use (article 8(2), *APIC*). This would permit the Court to bring into States where it was sitting, evidence that would otherwise be considered contraband, including weapons, counterfeit currency, stolen property or bodies for the purpose of its proceedings or to return it to the place where it was found or to its rightful owner.

The Court is entitled to carry out freely certain financial activities, such as holding funds in any currency or gold and operate accounts in any currency; transfer its funds from one country to another; convert any currency into any other currency; and receive, hold, negotiate, convert or otherwise deal with bonds and other financial securities (article 10, *APIC*). In its financial transactions, the Court shall enjoy treatment rates of exchange not less favourable than that given by the State Party to any intergovernmental organisation or diplomatic mission (article 10(1)(d)). The concern here is that if the Court were treated less favourably, there could be considerable financial problems. Keeping the costs of the Court as low as possible, supports an effective Court.

#### *Obligations*

- States Parties must exempt the Court, its assets, income and other property and its operations and transactions from all direct taxes, but not taxes that are really charges for public utility services. The taxes from which the Court is exempt include -
  - income tax;
  - capital tax;
  - corporate tax;
  - taxes levied by local and provincial authorities (article 8).

- States Parties must provide the Court exemptions from all custom duties, import turnover taxes and prohibitions and restrictions on imports and exports when the Court is involved in official business, such as exporting publications. If the Court imports goods or purchases goods under exemption, the Court shall not sell or dispose of such property, unless the State Party and the Court have agreed to the terms for its sale or disposition (article 8(2) and (3)).
- In cases where the Court makes major purchases where there are identifiable duties or taxes, States Parties may need to have appropriate administrative arrangements for the exemption of such charges or reimbursement (article 9).
- In States Parties where currency rates fluctuate, States Parties must ensure that the Court is granted the same treatment for currency accorded to the most favoured intergovernmental organisation or diplomatic mission. In States Parties where the currency rate is fixed, the Court is to enjoy that rate rather than any with additional charges (article 10).

### ***Implementation***

Many States that have implemented into domestic law various international treaties on privileges and immunities have provisions in their national laws for granting exemption to United Nations agencies or international organisations exemptions from taxes, custom duties and import or export restrictions. The addition of the ICC should not cause too much difficulty. States Parties may have to review national laws and regulations regarding taxation, international trade (import and export), and currency exchange in order to ensure compliance with the *APIC*.

To comply with the *APIC*, there are a variety of taxes that States may need to review to ensure that the Court is exempt. Such taxes include all direct taxes, for instance, income tax, capital tax, corporate tax, taxes levied by local and provincial authorities, and import turnover tax as well as indirect taxes on movable and immovable goods. Where a tax is in reality a charge for public utility services, then the State does not need to exempt the Court for such “taxes” if these can be specifically identified, described and itemised.

In cases where the Court is purchasing property or services, the Court shall not claim exemption from duties or taxes, which are included in the price. An exception is when the Court makes a major purchase where there are identifiable duties or taxes. This exception obliges States Parties to have appropriate administrative arrangements for the exemption of such charges or payment of a reimbursement. This would not include taxes that may be such a part of the purchase price as to be unidentifiable, such an exemption would place an overwhelming burden on States requiring an altering of their manufacturing taxing system. States Parties may determine the definition of “major purchases” and identify the governmental authority to decide the exception to the rule on indirect taxes.

When the Court imports or purchases goods under an exemption, they cannot be sold or disposed of in the territory of a State Party, except under certain conditions that have been agreed to by the State Party which granted the exemption or reimbursement. States Parties may set out the conditions where this would be allowed.

In some States, currency rates fluctuate while in others these rates are fixed. If there are favourable exchange rates, these rates should be given to the Court. If there are not favourable exchange rates, then the State should ensure that the Court enjoys the normal exchange rate and also means that it should not be charged extra.

### **3.1.4 Communication privileges**

#### ***Description***

All aspects of the Court's official communications and correspondence should be treated by States Parties the same as diplomatic or intergovernmental communications (article 11, *APIC*). Therefore, the Court is entitled to treatment not less favourable than that given to diplomats and intergovernmental organisations in matters of priorities, rates, and taxes. States Parties to the *APIC* may need to ensure that they do not censor any of the Court's communications. States Parties are obliged to ensure that official communication and correspondence of the Court are inviolable. This covers both the means of communication as well as method. Means of communication can include electronic communication, codes or cipher. Methods of communication can include courier or sealed bags. Anything less may be seen to hamper the activities of the Court.

It is foreseen that a Prosecutor or other staff of the Court will have business outside the headquarters of the Court. There will be a need for radio or other telecommunications. Therefore to ensure the effective functioning of the Court, the Court has the right to apply to operate radio and other telecommunications equipment on any frequencies allocated to it by the States Parties (article 11(5)). Allocation would be in accordance with States' national procedures. States Parties are to endeavour to allocate to the Court, to the extent possible, the frequencies for which it has applied. This provision does not mean that States Parties must commit radio waves for the Court on registered frequencies but rather that the Court is allowed to transmit on licensed waves. Each State Party may set the fees.

Some States have noted that since the Court does not have its own frequencies, it may limit the Court. At the first Assembly of States Parties meeting in New York in September 2002, it was discussed whether the Assembly should authorise the Court to seek a special dispensation with the International Telecommunication Union (ITU) so that the Court can establish its own frequencies. Alternatively, the Assembly could consider including a provision in the Relationship Agreement with the United Nations which would allow the Court to operate its radio and telecommunication equipment on frequencies registered with the United Nations.

The Court's communication privileges will be able to enhance information outreach programmes. These programmes can sensitise potential witnesses to the functioning of the Court and make the proceedings more accessible to the general public. Public telecommunication can help to bridge the remoteness of the Court from the turbulent post-conflict regions over which they will have jurisdiction.

## ***Obligations***

- In terms of rates, taxes and priority matters applicable to mail and other various forms of communication and correspondence for official purposes, States must ensure that the Court is treated not less favourably than any intergovernmental organisation or diplomatic mission in the territory of the State (article 11(1) and (4)).
- States must ensure the inviolability of official communications or correspondence of the Court and that they are not censored (article 11(2) and (3)).
- States must endeavour to allocate to the Court, to the extent possible, frequencies for radio or other telecommunications equipment in accordance with States' national procedures (article 11(5)).

## ***Implementation***

International treaties on privileges and immunities have similar provisions dealing with communications, for examples see the *Convention on the Privileges and Immunities of the United Nations* or the *Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea*. These treaties, like *APIC*, make reference to the treatment of intergovernmental organisation or diplomatic mission with respect to communication. The treatment of diplomatic missions is elaborated in the *Vienna Convention on Diplomatic Relations*.

The *Vienna Convention* includes the following provisions:

- protection of free communication of all official purposes, by any and all appropriate means, including diplomatic couriers and messages in code or cipher (article 27(1) and (2));
- consent of the receiving State must be obtained if a wireless transmitter is to be installed and used (article 27(1));
- States Parties must ensure that the diplomatic bag shall not be opened or detained when it bears external marks of their character. The sending State must ensure that the diplomatic bags contain only documents or articles intended for official use (article 27(3) and (4)); and
- States Parties should protect the diplomatic courier in the performance of his or her duties (article 27(5)).

States Parties may need to establish, review or apply national procedures already in place to allocate to the Court, to the extent possible, frequencies for radio or other telecommunications equipment within their territory.

## ***3.2 Privilege and Immunities of Persons involved in the Court***

### ***3.2.1 General***

The *APIC* confers protection upon representatives and participants of the Court for all activities undertaken in their official capacity or for the necessary functioning of the Court. It foresees instances where the Court may sit outside its Headquarters, where Prosecutors and counsel will

travel to the location of alleged crimes to investigate, where witnesses and victims must travel to the Court or where they may be passing through another country to their final destination. Without adequate privileges and immunities to afford protection, those persons representing or participating in the Court's work would be prevented from fulfilling their responsibilities, thereby hindering the work of the Court.

There are a number of actors in the Court system who are covered by the agreement. This section will divide them into four main groups:

1. Representatives of States;
2. Personnel and officers of the Court (Judges, Prosecutor, Deputy Prosecutors, Registrar, Deputy Registrar, staff of the Office of the Prosecutor, staff of the Registry);
3. Counsel and persons assisting defence counsel;
4. Experts, witnesses, victims and others.

Beyond the diplomatic immunity granted to judges, the Prosecutor, Deputy Prosecutor and Registrar, the guiding principle in setting out the privileges and immunities for each actor in the Court system is that of functionality. Each group needs sufficient privileges and immunities to carry out their functions within the ICC process. While diplomatic immunity is derived from the concept of state sovereignty, functional immunity is derived from the need to operate under difficult circumstances, for the ultimate benefit of the entire international community.

It should also be understood that the Court is to cooperate with the authorities of States Parties to facilitate the enforcement of their laws and to prevent abuses. At the same time, it is the duty of all persons enjoying privileges and immunities to respect the laws and regulations of the State Party in whose territory they may be on the business of the Court or passing through.

Privileges and immunities are not for the personal benefit of the persons but to allow them to carry out their assigned tasks. The *APIC* therefore provides for the possibility of waiver. Waivers may be imposed or renounced. The circumstances of when waivers will be imposed will be discussed in more detail in the following sections. However it should be remembered that immunities which attach to the official capacity of a person, whether under national or international law, should not bar the Court from exercising its jurisdiction over such a person. If there are reasonable grounds to believe that the person concerned is responsible for a crime within the Court's jurisdiction, the Court should not shield someone by not waiving immunity and that even without waiver by the ICC, the immunity as such does not bar proceedings against the person before the Court (article 27(2), *Rome Statute*)

For States Parties to be informed of who within their territory should be allowed privileges and immunities, the Registrar has a duty to communicate periodically to all States Parties, the categories and names of persons to which the provisions of the *APIC* shall apply, including the change of status of these persons. The categories and names of persons are limited to judges, the Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar, the staff of the Office of the Prosecutor, staff of the Registry and counsel. The Registrar is not obliged to communicate to States Parties the names of experts, witnesses, victims or other persons required before the Court. During the negotiations regarding the *APIC*, the Preparatory Commission Working Group recognised that for security reasons, some groups should have their identity concealed.

The waiver provisions balance the need to permit the Court to fulfil its mission with due regard for the safety of certain persons.

### 3.2.2 Representatives of States

#### *Description*

Non-States Parties to the *Rome Statute* can have representatives at the Assembly of States Parties and may also be required to appear before the Court, for example if an *ad hoc* co-operation agreement is reached. The privileges and immunities for representatives of States participating in the Assembly and its subsidiary organs and in the proceedings of the Court is not limited to States Parties to the *APIC*. Therefore, States Parties to the *APIC* must ensure that privileges and immunities extend to other States not party to the *APIC*. Representatives of States means all delegates, deputy delegates, advisors, technical experts and secretaries of delegations (article 1(d), *APIC*). Representatives of intergovernmental organisations mean the executive heads (article 1(n)).

The *APIC* covers:

- Representatives from States Parties to the *Rome Statute* attending meetings of the Assembly and its subsidiary organs;
- Representatives of other States that may be attending meetings of the Assembly and its subsidiary organs as observers (article 112(1), *Rome Statute*);
- Representative of States invited to meetings of the Assembly and subsidiary organs (see *Rules of Procedure of the Assembly of States Parties*);
- Representatives of intergovernmental organisations invited to meetings of the Assembly and subsidiary organs;
- Representatives of States participating in the proceedings of the Court.

Article 24 of the *APIC* expressly provides that these privileges and immunities are not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with their work. That means that States Parties have a duty to waive the privileges and immunities of their representatives in any case where, in the opinion of those States, they would impede the course of justice.

#### *Obligations*

- States Parties must ensure that representatives of States and intergovernmental organisations will enjoy certain privileges and immunities, while exercising their official functions and during their journey to and from the place of ICC meeting or proceedings of the Court. If the representative is a national of the States Party, then such privileges and immunities do not have to be provided to them (article 13 and 14, *APIC*).
- These privileges and immunities include:
  - immunity from personal arrest or detention (article 13(1)(a));
  - immunity from legal process in respect of words spoken or written and acts performed in their official capacity (article 13(1)(b));

- inviolability of all papers and documents (article 13(1)(c));
- the right to use codes or cipher, to receive papers and documents or correspondence by courier or in sealed bags (the use of codes and ciphers is not specified for all other persons working for the Court) (article 13(1)(d));
- exemption from immigration restrictions, alien registration requirements and national service obligations (article 13(1)(e));
- currency and exchange facilities privileges (article 13(1)(f));
- immunity in respect to their personnel baggage (article 13(1)(g));
- protection and repatriation facilities (article 13(1)(h));
- other privileges and immunities not inconsistent with those that diplomatic agents enjoy, except cannot claim exemption from custom duties on goods imported or from excise duties or sales taxes (article 13(1)(i));
- in determining periods of residency for taxation purposes, the period during attending a meeting will not be considered as periods of residence (article 13(2)).

### ***Implementation***

It should not be difficult for States Parties to implement their obligations, considering that most States will already have in place general privileges and immunities legislation or regulations, and legislative amendments could be made to specifically recognise the representative of States or intergovernmental organisations. The *Vienna Convention* is specifically referred to in a number of the provisions of the *APIC*. What States need to be aware of are the similarities as well as the difference if they are to ensure that they meet their legal obligations once they become States Parties to the *APIC*. Article 13(i) of the *APIC* provides that representatives of States and intergovernmental organisations should enjoy, not only those privileges and immunities listed in (a) to (h) but also enjoy other privileges, immunities and facilities that diplomatic agents enjoy, as long as they are not inconsistent with (a) – (h). However whatever these other privileges and immunities are, the representatives will not have the right to claim exemption from custom duties on goods imported or from excise duties or sales taxes.

A review of both representatives under the *APIC* and diplomatic agents under the *Vienna Convention* is set out below:

- Diplomatic agents under the *Vienna Convention* enjoy inviolability of the person, which includes immunity from personal arrest or detention; representatives under the *APIC* enjoy immunity from personal arrest or detention (article 13(a));
- Diplomatic agents enjoy broad protection from criminal and civil proceedings; the *APIC* is narrower to include only immunity from legal process of every kind in respect of acts performed (including words spoken or written) in their official capacity (article 13(b));
- Diplomatic agents enjoy inviolability of their papers and correspondence. In the *Vienna Convention*, the Receiving State must permit and protect free communications and ensure inviolability of archives and documents of the mission. This is replicated in the *APIC* which ensures representatives inviolability of all papers and documents in whatever form and the right to use codes or ciphers and to receive papers and documents or correspondence by courier or in a sealed bag (article 13(c) (d));
- The personal baggage of a diplomatic agent is to be exempt from inspection, unless there are serious grounds for presuming that it contains items that are not related to the official use

of the mission or for personal use. The *APIC* refers specifically to the *Vienna Convention* with respect to immunities for personal baggage (article 13(g));

- In case of armed conflict, the Receiving State must grant facilities in order to enable persons, other than nationals, and their families, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property. The *APIC* specifically refers to the same protection and repatriation facilities in *Vienna Convention* (article 13(h)).

The provisions in the *APIC* regarding immigration and alien requirements and currency and exchange privileges are similar to those provisions in the *Convention on the Privileges and Immunities of the United Nations*, rather than the *Vienna Convention*. Therefore these provisions may require specific implementation within national laws as well as review of administrative regulations dealing with immigration and currency and exchange.

### **3.2.3 Personnel and officers of the Court**

#### ***Description***

Personnel and officers of the ICC will likely be serving the Court in territories where genocide, crimes against humanity and war crimes have occurred. They will find themselves on duty in difficult situations before the Court and in the field. Appropriate privileges and immunities for its personnel and officers enables the Court to investigate and prosecute these crimes, while ensuring the functioning of the Court, guaranteeing the right to a fair trial and the safety of its personnel and officers.

In the *APIC*, relevant personnel are divided into a number of groups, all of whom are essential to the proper functioning of the Court. While the privileges and immunities granted for each category differs, there are also many similarities. The categories are as follows:

- Judges, the Prosecutor, Deputy Prosecutors and Registrar (article 15);
- Deputy Registrar, staff of the Office of the Prosecutor and staff of the Registry (article 16);
- Personnel recruited locally (article 17).

Officers and personnel of the Court, such as the Deputy Registrar and the staff of the Offices of the Prosecutor and the Registry, shall enjoy such privileges and immunities and facilities as are necessary for the independent performance of their functions. Situations may include occasions where they are in the territory of a State Party on business of the Court, or passing through on such business. However, judges, the Prosecutor, Deputy Prosecutors and Registrar enjoy the same immunities as are accorded to heads of missions, safeguarding them against any political motivated allegations or any reprisals after retirement.

There are a number of different situations in which officers and personnel of the Court may find themselves. The *APIC* anticipates that officers of the Court may be residing at the seat of the Court. Generally this will be in The Netherlands, however the Court could at times sit outside the headquarters. It also recognises that officers may be residing in a neighbouring country but doing work for the Court at its seat. Certain officers of the Court, such as the Prosecutor and his or her staff, could be undertaking work in many countries or merely passing

through third countries to collect and preserve evidence, take testimonies or statements. They will need to move quickly and be able to be operational in conflict or post-conflict areas. The prosecution team likely will have to communicate across borders to potential witnesses, victims, and members of their teams. Personnel recruited locally will include those recruited in The Netherlands but also in other countries where the Court may open regional offices or sit outside headquarters.

A word about persons recruited locally as this group performs functions of a general and supportive nature for the Court, which however small is important for the function of the Court. Persons recruited locally can include translators or people who deal with documentation of the Court and may be paid on an hourly rate or on some other basis. They can be recruited from conflict or post-conflict countries where the Court will be working. They may be one of the most vulnerable groups of personnel of the Court. During their employment, they shall also be accorded such other facilities as may be necessary for their independent exercise of their functions for the Court (article 17, *APIC*).

As previously mentioned, States Parties will receive notification from the Registrar on the categories and names of persons to which States Parties must allow privileges and immunities within their territory (article 28, *APIC*). Such categories include Judges, the Prosecutor, Deputy Prosecutors, Registrar, Deputy Registrar, the staff of the Office of the Prosecutor and staff of the Registry.

Also, as previously mentioned, privileges and immunities are not for the personal benefit of the individual but rather to allow the person to carry out his or her assigned tasks. Article 26 of *APIC* established the scheme relating to waivers:

- for Judges or the Prosecutor, waivers must be agreed by an absolute majority of the judges;
- for the Registrar, waivers are decided by the Presidency;
- for the Deputy Prosecutors and staff of the Office of the Prosecutor, waivers are determined by the Prosecutor;
- for the Deputy Registrar and the staff of the Registry, waivers are decided by the Registrar;
- for locally recruited personnel, waivers are determined by the head of the organ of the Court employing such personnel.

## Obligations

- States Parties must provide the following privileges and immunities to each group:

| Privilege & immunity                                                                              | Judges, Prosecutor, Deputy Prosecutor, Registrar                                                                                                             | Deputy Registrar, staff of Office of Prosecutors and Registry           | Personnel locally recruited                                                        |
|---------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| <b>legal protection</b>                                                                           |                                                                                                                                                              |                                                                         |                                                                                    |
| from personal arrest and detention                                                                | yes, when engaged on or with respect to the business of the Court (then extended to include family, art 37 Vienna Convention) derived from Vienna Convention | yes                                                                     | no                                                                                 |
| from legal process of every kind in respect of words spoken or written and acts performed by them | yes, in their official capacity                                                                                                                              | yes, in their official capacity                                         | yes, in their official capacity                                                    |
| <b>communication privileges</b>                                                                   |                                                                                                                                                              |                                                                         |                                                                                    |
| inviolability of all official papers and documents in whatever form and materials                 | yes, derived from Vienna Convention, (extended to include family, art 37 Vienna Convention)                                                                  | yes                                                                     | no, not expressly, but if necessary for the independent exercise of their function |
| right to receive and send papers and documents in whatever form                                   | not expressly stated but derived from Vienna Convention                                                                                                      | not expressly stated                                                    | no not expressly, but if necessary for the independent exercise of their function  |
| <b>taxation privileges</b>                                                                        |                                                                                                                                                              |                                                                         |                                                                                    |
| exempt from taxation on all salaries, etc                                                         | yes                                                                                                                                                          | yes                                                                     | no                                                                                 |
| period of residency should not be calculated for taxes                                            | yes                                                                                                                                                          | no                                                                      | no                                                                                 |
| right to import free of duties and taxes                                                          | not expressly stated in APIC but included in Art 36(b) Vienna Convention                                                                                     | yes                                                                     | no                                                                                 |
| <b>travel/freedom of movement</b>                                                                 |                                                                                                                                                              |                                                                         |                                                                                    |
| exemption from immigration restrictions, alien registration and national service                  | yes, derived from Vienna Convention (extended to include family)                                                                                             | yes, includes family for immigration and alien exemption                | no                                                                                 |
| currency and exchange facilities                                                                  | yes, as accorded to heads of missions                                                                                                                        | yes, as accorded to officials of comparable rank of diplomatic missions | no                                                                                 |
| personal baggage- exemption from seizure and inspection                                           | yes                                                                                                                                                          | yes                                                                     | no                                                                                 |
| protection and repatriation facilities                                                            | yes, also includes family                                                                                                                                    | yes, also includes family                                               | no                                                                                 |

## Implementation

States Parties can implement these privileges and immunities either incorporating these provisions into existing legislation or drafting new legislation. In order to ensure all the privileges and immunities will be covered, the following will review each type of privilege and immunity and reflect on the differences and similarities between the groups of personnel and officials of the Court.

**Legal protection privileges** include immunity from personal arrest and detention and from legal processes of every kind. These privileges secure freedom of speech and independence in the discharge of their functions. This also ensures confidentiality of communications between officials and others. States Parties must ensure that all personnel and officers of the Court, except for locally recruited personnel, have immunity from personal arrest and detention. This is expressly so for the Deputy Registrar, the staff of the Office of Prosecutor and the staff of the Registry (article 16(1)(a)). For judges, the Prosecutor, Deputy Prosecutors and the Registrar,

while not expressly stated, the fact that they are accorded privileges and immunities similar to heads of missions, include the inviolability of the person, which includes immunity from personal arrest and detention (article 15(1)). States Parties must also ensure that all personnel and officials, including those locally recruited, have immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity for the Court (article 15(1), article 16(1)(b) and article 17). Immunity is to continue even after termination of employment. For locally recruited personnel, immunity after termination is only in relation to those activities he or she performed on behalf of the Court.

**Communication privileges** include inviolability of papers and documents and the right to receive and send papers and documents. States Parties must ensure all official papers and documents in whatever form and materials should be inviolable for the Deputy Registrar and the staff of the Office of the Prosecutor and the staff of the Registry (article 16(1)(c)). As for judges, the Prosecutor, Deputy Prosecutors and Registrar, such inviolability is indirectly provided through the reference to the *Vienna Convention* as being a privilege granted to heads of mission (article 15(1)). Also mentioned in the *Vienna Convention* is the protection of free communication for all official purposes, using appropriate means of communication, such as diplomatic couriers and messages in code or cipher.

**Privileges relating to travel and freedom of movement** include exemption from immigration restrictions, alien registration and national service, limited immunities relating to personal baggage, fair treatment of currency and exchange facilities and repatriation facilities in times of crisis. For judges, the Prosecutor, Deputy Prosecutors and Registrar, the provision dealing with freedom of movement is very broad. It ensures that they, along with members of their families forming part of their household, shall be allowed every facility for leaving the country where they may happen to be and for entering and leaving the country where the Court is sitting and when on journeys in connection with the exercise of their function (article 15(2)). This is similar to those granted to diplomatic agents. If one of this group resides in any State Party for the purpose of being at the disposal of the Court, then they and their family should have diplomatic privileges and immunities (article 15(3)). This of course refers to a State other than that of which he or she is a national or permanent resident. Such privileges relating to travel and freedom of movement are more limited when it comes to the Deputy Registrar and staff of the Office of the Prosecutor and staff of the Registry. This group is exempt from national service obligations and, along with their family, exempt from immigration restrictions and alien registration (article 16(1)(e) and (f)).

The Deputy Registrar, staff of the Office of the Prosecutor and staff of the Registry are entitled to the same privileges in respect of currency and exchange facilities as are accorded to officials of comparable rank of diplomatic missions established in the State Party (article 16(1)(h)). In terms of repatriation facilities in times of international crisis, staff to the judges should be accorded the same facilities as diplomatic agents under the *Vienna Convention* (article 15(4) and 16(1)(i), *APIC*). This also includes their family members. Also they have the same immunity from seizure of personal baggage and exemption from inspection of personal baggage unless there are serious grounds for believing the baggage contains import or export articles that are prohibited by the State Party (article 15(1) and 16(1)(a) and (g)).

**Taxation privileges** include exemption from taxation on the salaries, emoluments and allowances paid to people by the Court. This exemption is for the personnel of the Court who are receiving salaries from the Court and includes judges, the Prosecutor, Deputy Prosecutors, Registrar, Deputy Registrar and staff of the Office of the Prosecutor and staff of the Registry. States Parties may take these salaries, emoluments and allowances into account for the purpose of assessing the amount of taxes to be applied to income from other sources (article 15(6) and 16(1)(d)). During the negotiations for the *APIC*, it was felt that there should not be a complete exemption from tax unless there would be some internal tax levied by the Court, similar to the United Nations system. Also, States Parties are not obliged to exempt from income tax pensions or annuities paid to this group of personnel of the Court and their dependants (article 15(7) and 16(2)). Again this reflects the feeling that if the Court provides a pension system, exemption from income tax should not be on the pension. In some States, the incidence of taxation depends on residency. In those cases, for judges, the Prosecutor, Deputy Prosecutors and Registrar, the time spent in States for the purpose of discharging their functions, should not be considered as periods of residence for the purpose of taxation (article 15(6)).

Once the Court establishes its own social security scheme, the personnel of the Court shall be exempt from all compulsory contributions to national social security schemes (article 27). This seeks to avoid double contribution so that personnel of the Court will not be forced to pay social security contributions in the State in which they operate as well as in their home country.

States Parties may want to introduce administrative procedures that will ensure that notification from the Registrar is received, recorded and disseminated to the appropriate authorities, including immigration and custom officials. A system for being able to review whether waivers have been made should also be in place.

### **3.2.4 Counsel and persons assisting defence counsel**

#### ***Description***

The *Rome Statute* recognises both the vital role of victims in the ICC proceedings and the need to protect the rights of the accused. Under articles 67 and 68 of the *Rome Statute*, each party is entitled to legal representation, in order to protect their respective interests. Under the *APIC*, “counsel” means defence counsel and the legal representatives of victims in accordance with Rules 22 and 90 of the *Rules of Procedure and Evidence* (article 1(1), *APIC*). Persons assisting counsel can include investigators and others who are connected with the function of representing parties before the Court. Counsel can set up teams which may be required to travel to locations where they can examine evidence presented by the prosecution and gather their own evidence, as provided in articles 56(2)(d) and 57(3)(d) of the *Rome Statute*. Potential witnesses and victims could be refugees or internally displaced persons, thereby requiring counsel to travel in the difficult terrain of refugee camps or other third countries. It may be the case that counsel, themselves, have refugee status. Counsel will likely be communicating across borders to potential witnesses, victims, and members of their teams.

The privileges and immunities protect the independence of counsel and those who are part of the defence team. These privileges and immunities also allow counsel to carry out their duties

efficiently at the seat of the Court and at places where investigation and other activities need to take place. The principle of equality of arms is recognised in the *APIC* in ensuring that the privileges and immunities to be enjoyed by counsel reflect international standards for a fair trial. Counsel must be able to act in a manner that is “necessary for the proper functioning of the Court” (article 18, *APIC*). This includes representation of the client in Court, confidential communications with the client, investigation on site in person or through investigators, to collect evidence and interview witnesses wherever necessary in a timely manner. While the relationship between counsel and client is recognised by most legal systems, international privileges and immunities for an accused’s counsel or victim’s counsel may be a new concept for some national authorities. Therefore dissemination and training will be important.

For counsel, the Registrar is to provide a certificate for the period required for the exercise of his or her functions. This is to ensure that authorities in States Parties are informed that counsel has been retained and therefore are entitled to the privileges and immunities in the *APIC*. The wording is broad to cover from the moment the counsel represents the interest of the defence to the final determination on appeal, as well as post-conviction representation. For counsel and persons assisting defence counsel, the Presidency can waive the privileges and immunities.

### ***Obligations***

- States Parties must provide the following privileges and immunities to this group:

| <b>Privilege &amp; immunity</b>                                                                   | <b>Counsel and persons assisting Defence Counsel</b>                                     |
|---------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------|
| <b>legal protection</b>                                                                           |                                                                                          |
| from personal arrest and detention                                                                | yes                                                                                      |
| from legal process of every kind in respect of words spoken or written and acts performed by them | yes, in their official capacity                                                          |
| <b>communication privileges</b>                                                                   |                                                                                          |
| inviolability of all official papers and documents in whatever form and materials                 | yes, with materials relating to the exercise of his or her function                      |
| right to receive and send papers and documents in whatever form                                   | yes, for communication in purs to function as counsel                                    |
| <b>taxation privileges</b>                                                                        |                                                                                          |
| exempt from taxation on all salaries, etc                                                         | no                                                                                       |
| period of residency should not be calculated for taxes                                            | yes                                                                                      |
| right to import free of duties and taxes                                                          | no                                                                                       |
| <b>travel/freedom of movement</b>                                                                 |                                                                                          |
| exemption from immigration restrictions, alien registration and national service                  | yes for immigration and alien registration but not exempt for national service           |
| currency and exchange facilities                                                                  | yes, as accorded to representatives of foreign governments on temporary official mission |
| personal baggage- exemption from seizure and inspection                                           | yes                                                                                      |
| protection and repatriation facilities                                                            | yes                                                                                      |

### ***Implementation***

As previously mentioned, States Parties can implement these privileges and immunities either incorporating these provisions into existing legislation or drafting new legislation. In order to ensure all the privileges and immunities will be covered for each actor under the ICC, a table at Appendix I summaries and compares the privileges and immunities to be ensured for each actor.

**Legal protection privileges** includes immunity from personnel arrest and detention and from legal processes of every kind. States Parties must ensure that counsel and persons assisting

defence counsel enjoy these privileges, which secures freedom of speech, independence and protection in the discharge of their functions (article 18(1)(a) and (b)).

**Communication privileges** include inviolability of papers and documents and the right to receive and send papers and documents. States Parties must ensure that counsel and persons assisting defence counsel enjoy inviolability for those papers, documents and materials related to the exercise of his or her function (article 18(1)(c)). The *APIC* expressly provides for counsel to be guaranteed the right to receive and send papers and documents in whatever form, for the purposes of communication in pursuance of his or her function as counsel (article 18(1)(d)). This guarantees counsel the ability to communicate with the client in confidence and to maintain confidential files and channels of communication, be they in different States.

**Privileges relating to travel and freedom of movement** include exemption from immigration restrictions, alien registration, limited immunities relating to personnel baggage, fair treatment of currency and exchange facilities and repatriation facilities in times of crisis. States Parties must ensure that counsel are exempt from immigration restrictions and alien registration (article 18(1)(e)). This is more limited than similar exemptions to the Deputy Registrar and staff as such exemption also includes their family members as well as an exemption from national service obligations. States Parties must ensure that the same immunities from seizure of personal baggage and exemption from inspection of personal baggage for judges, etc are granted to counsel (article 18(1)(a) and (f)). Counsel are entitled to the same privileges in respect of currency and exchange facilities as are accorded to representatives of foreign governments on temporary official missions (article 18(1)(g)). In terms of repatriation facilities in times of international crisis, counsel must be accorded the same as diplomatic agents under the *Vienna Convention*, but does not include their family members (article 18(1)(h)).

**Taxation privileges.** Counsel and those assisting defence counsel are not paid personnel of the Court and therefore are not provided exemption from taxation on salaries. However, in some States where the incidence of taxation depends on residency, in those cases where counsel and persons assisting defence counsel are involved, the time spent in States for the purpose of discharging their function should not be considered as periods of residence for the purpose of taxation (article 18(3)).

### 3.2.5 Experts, witnesses, victims and others

#### *Description*

The *APIC* sets out functional immunities for experts, witnesses, victims and other persons required to be present at the seat of the Court. These groups have been separated based on their function and role within the proceedings of the Court and should be provided with such privileges and immunities as are necessary for the proper functioning of the Court, which includes the time spent on journeys in connection with their functions. While the privileges and immunities are similar, they are not the same.

The ICC allows access for victims in a manner unprecedented, providing for participation and legal representation in the proceedings before the Court. The *APIC* distinguishes between

victims and witnesses, as witnesses can include both prosecution and defence witnesses. However, victims who also appear as witnesses are covered by those privileges. In recognising that victims and witnesses may need additional support, persons who accompany them are also to be ensured privileges and immunities. The privileges and immunities for each of these groups reflect the need for protection and safety as well as access to the Court.

The *APIC* recognises that these persons can be present at the seat of the Court or away from it. The Court may sit elsewhere than at the seat of the Court in the Netherlands as well as operate regional offices in various States. This covers different scenarios, for instance experts on mission for the Court whose services are required in the field and not necessarily at the seat of the Court, such as forensic experts, investigators, or information technologists. It can also include victims and witnesses who provide oral statements to investigators or testify before the Court through video-link within their country or some third country, or give depositions before national courts for use by the ICC. Victims and witnesses could be refugees living in camps in the diaspora or in countries around the world. The *APIC* can cover persons who otherwise cooperate with the Court, such as people who assist investigators to locate the whereabouts of a witness or suspect. Other persons required to be present at the seat of the Court covers representatives of NGOs which provide services and assistance to the Court and victims and witnesses, as well as people accompanying minors or vulnerable victims and witnesses who may have difficulty travelling on their own and need support in providing testimony.

Experience from international criminal tribunals has shown that experts, witnesses and victims, due to the nature of their work or role, can be extremely vulnerable. Privileges and immunities provide a measure of protection in addition to the protection measures described in the *Rome Statute* (article 93(1)(j) and (2), *Rome Statute*). Experts in the field, due to the conditions under which their work is often carried out, have come under attack in the past. Witnesses and victims include those who have already suffered greatly as a result of armed conflicts, often having lost family members, property, and employment. They could be at great risk in view of their testimony.

Experts, witnesses, victims and others will be provided by the Court with a document certifying that their appearance or participation is required by the Court and specifying a time period during which such appearance or participation is necessary. The Court is the one that requests the attendance of the witness and certifies that the presence is required with this document. States Parties may need to establish mechanisms or procedures wherein the documents will be identifiable by the appropriate authorities, such as immigration officers, custom officers, etc. Waiver for witnesses, victims and others will be done by the Presidency. For experts, waiver is at the discretion of the head of the organ of the Court appointing the experts.

## Obligations

- States Parties must provide the following privileges and immunities to each group:

| Privilege & immunity                                                                              | Witnesses                                                                      | Victims                                                                        | Experts                                                                        | Other persons required to be present at the seat of the Court                  |
|---------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| <b>legal protection</b>                                                                           |                                                                                |                                                                                |                                                                                |                                                                                |
| from personal arrest and detention                                                                | yes                                                                            | yes                                                                            | yes                                                                            | yes                                                                            |
| from legal process of every kind in respect of words spoken or written and acts performed by them | yes, in the course of their testimony                                          | yes, in the course of their appearance before the court                        | yes, in the course of the performance of their functions for the court         | yes, in the course of their appearance before the court                        |
| <b>communication privileges</b>                                                                   |                                                                                |                                                                                |                                                                                |                                                                                |
| inviolability of all official papers and documents in whatever form and materials                 | yes, relating to their testimony                                               | no                                                                             | yes, relating to their functions for the court                                 | no                                                                             |
| right to receive and send papers and documents in whatever form                                   | yes, for communications with the court and counsel                             | no                                                                             | yes, for communications with the court (by courier or sealed bag)              | no                                                                             |
| <b>taxation privileges</b>                                                                        |                                                                                |                                                                                |                                                                                |                                                                                |
| exempt from taxation on all salaries, etc                                                         | no                                                                             | no                                                                             | no                                                                             | no                                                                             |
| period of residency should not be calculated for taxes                                            | no                                                                             | no                                                                             | no                                                                             | no                                                                             |
| right to import free of duties and taxes                                                          | no                                                                             | no                                                                             | no                                                                             | no                                                                             |
| <b>travel/freedom of movement</b>                                                                 |                                                                                |                                                                                |                                                                                |                                                                                |
| exemption from immigration restrictions, alien registration and national service                  | yes for immigration and alien registration but not exempt for national service | yes for immigration and alien registration but not exempt for national service | yes for immigration and alien registration but not exempt for national service | yes for immigration and alien registration but not exempt for national service |
| currency and exchange facilities                                                                  | no                                                                             | no                                                                             | yes                                                                            | no                                                                             |
| personal baggage-exemption from seizure and inspection                                            | only exempt from seizure not inspection                                        | only exempt from seizure not inspection                                        | yes                                                                            | only exempt from seizure not inspection                                        |
| protection and repatriation facilities                                                            | no                                                                             | no                                                                             | yes                                                                            | no                                                                             |

## Implementation

States Parties can implement these privileges and immunities either incorporating these provisions into existing legislation or drafting new legislation. In order to ensure all the privileges and immunities will be covered, the following will review each type of privilege and immunity and reflect on the differences and similarities between each group.

**Legal protection privileges** includes immunity from personal arrest and detention and from legal processes of every kind. These privileges are similar for experts, witnesses, victims and others, reflecting the similar purpose of being before the Court (articles 19 to 22). Additional legal protection is provided for in article 93 of the *Rome Statute* wherein the Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by

the Court in respect of any act or omission that preceded the departure of that person from the requested State.

**Communication privileges** include inviolability of papers and documents and the right to receive and send papers and documents. Under the *APIC*, victims and others are not entitled to inviolability of their papers and documents nor do they have a right to receive and send paper and documents, whereas witnesses and experts do (articles 19 to 22). However, given the especially vulnerable position of victims and those who care for them, States may wish to provide full communication privileges to victims and others. Note that the Court itself is to have inviolability of its archives, documents and materials, which will provide a measure of protection for the victim and others.

**Privileges relating to travel and freedom of movement** include exemption from immigration restrictions, alien registration, limited immunities relating to personnel baggage, fair treatment of currency and exchange facilities and repatriation facilities in times of crisis. Experts are immune from seizure of baggage and exemption from inspection of baggage unless there are serious grounds for believing it contains items that are illegal for import or export (article 21(1)(a) and (e)). Witnesses, victims and others are not immune to inspection; however, personal baggage shall be exempt from seizure unless there are serious grounds (articles 19(1)(b), 20(1)(b), 22(1)). Each group enjoys the exemption from immigration restrictions or alien registration when they travel for the purpose of their function within the Court's process (articles 19 to 22). Only experts have privileges in respect to currency and exchange facilities (article 21(1)(f)). Victims and others do not have repatriation facilities in times of crisis available to them, where experts and witnesses do (article 19 to 22). However, States may wish to consider extending such facilities to victims within their *APIC* implementing legislation.

### ***3.3 The Reservation***

#### ***Description***

The *APIC* allows States Parties to make a reservation at the time of signature, ratification, acceptance, approval or accession of this agreement (article 23). The reservation limits the privileges and immunities of personnel and officers of the Court, as well as witnesses, victims, experts and others, when they are nationals or permanent residents in the territory of a State Party of their nationality or permanent residence.

The privileges and immunities that various actors within the Court's jurisdiction enjoy ensure the protection for the person as well as ensuring the effective and unhindered functioning of this Court. It is important to note that limiting privileges and immunities in this case is an option open for States rather than being incorporated into the main agreement. This is because most States did not agree with the provision in question. This provision has the potential to interfere with the work of the ICC, by restricting the privileges and immunities of key actors in ICC proceedings. States Parties that are committed to the efficient functioning of the Court should review carefully whether such a reservation limits the effective operations of the Court, or violates the rights of their nationals.

One of the reasons for this reservation is that in general, nationals and permanent residents may not enjoy in the State of their nationality or permanent residence the same privileges and immunities granted to persons under international law. However, in recognising that the ICC has a unique and special nature, and that the privileges and immunities are not based on nationality or sovereignty or on diplomatic relations, but on legal necessities to guarantee independence and a fair process, evolutions of existing practice of national and international law are necessary.

Under article 23 of the *APIC*, which allows for the reservation, in situations where the officials and personnel of the Court are nationals or permanent residents in a State Party, they would enjoy only the legal protection and communication privileges to the extent necessary for the independent performance of his or her functions. This covers immunity from personal arrest and detention; immunity from legal process of every kind in respect of words spoken or written and all acts performed in the performance of their functions for the Court; inviolability of documents; and the right to receive and send papers in whatever form. Counsel, persons assisting defence counsel, witnesses and experts who are nationals or permanent residents will also be limited to legal protection and communication privileges as described above. For the judges, Prosecutor, Deputy Prosecutor, Registrar, Deputy Registrar and the staff of both offices, no matter what their nationality will still remain entitled to tax exemption on their salaries, emoluments and allowances. Victims and other persons required to be present at the seat of the Court who are nationals or permanent residents would enjoy only legal protection privileges when they are in the territory of the State Party of their nationality or permanent residency.

### ***3.4 Travel Documentation***

#### ***Description***

The *APIC* envisages that judges, the Prosecutor, Deputy Prosecutors, Registrar, Deputy Registrar, the staff of the Offices of the Prosecutor and staff of the Registry will be entitled to use the United Nations laissez-passer or travel documents issued by the Court (article 29). These travel documents, either United Nations or Court issued, are to take the place of ordinary travel documents and should be recognised and accepted by States Parties. It is important for the Court to be able to issue its own travel documents and for its officials to be seen as different to the United Nations personnel, such as peacekeepers, to ensure the independence of the Court.

Counsel, persons assisting defence counsel, experts, witnesses, victims and other persons required to be present at the seat of the Court are to be provided with a certificate or document by the Court which certifies that their appearance is required by the Court and specifies a time period during which such presence is necessary (article 18 to 22). By presenting this Court documentation to officials, the person should be able to obtain their own travel documents.

Many victims and witnesses may not have the necessary travel documents for their travel and this could be difficult for them to obtain. In collapsed States or States suffering from conflict, there may be no functioning passport offices. It can also be difficult, dangerous or even

impossible for them to take a certificate issued by the Court to their own government, members of which may be implicated in the crimes being investigated or prosecuted, to obtain a passport, then go to the consulate or embassy of the Netherlands to obtain a visa, then to make the necessary travel arrangements and finally make the trip to The Hague. Many such persons are asylum seekers fearful of endangering their application for asylum to a second country without proper travel papers. Many are traumatised by the crimes committed against them and unable to make decisions on their own; others have never travelled outside their own villages or abroad; some are still in danger from those who fear their testimony. The Court should assist victims and witnesses in obtaining the necessary entry and exit permits and visas, where it may be difficult for them to be seen or known to be approaching the Dutch Embassy to obtain visas for their travel to The Hague or other States. Any States in a position to assist victims and witnesses with travel documentation should do so.

For those who are holding United Nations laissez-passer or travel documents issued by the Court or those who have a certificate of the Court which confirms that they are travelling on business of the Court, they may need to apply for visas or entry/exit permits. Where this is required, States Parties should ensure that they are dealt with as speedily as possible and granted free of charge (article 30).

### ***Obligations***

- States Parties must recognise and accept the United Nations laissez-passer and travel documents issued by the Court as valid travel documents (article 29).
- States Parties must ensure that applications for visas or entry/exit permits, where required, are dealt with as speedily as possible and granted free of charge (article 30).

### ***Implementation***

States Parties will most likely have to implement appropriate procedures to ensure that their officials can recognise and accept travel documents issued by the Court. Many States will likely have existing procedures in place for the recognition and acceptance of United Nations laissez-passer. States Parties may need to review the relevant laws, such as immigration laws, to ensure that applications for visas and exit/entry permits can be dealt with in a speedy manner and free of charge.

## **4. Other Issues**

### ***4.1 Settlement of disputes***

The *APIC* foresees two kinds of disputes that may require settlement (article 31 and 32):

- 1. disputes with third parties and
- 2. disputes on the inter-operation or application of the *APIC*.

The second type of dispute can involve a person referred to in the *APIC* 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.

The *APIC* sets out the procedure to solve a dispute of interpretation (article 32). First, all differences between two or more States Parties or between the Court and a State Party shall be settled by consultation, negotiation or agreed mode of settlement. If the difference is not settled within three months, it shall, at the request of either party, be referred to an arbitral tribunal. Such procedure is set out in article 32(3)-(6), which is final and binding on the Parties.

The Court shall, without prejudice to the powers and responsibilities of the Assembly of States Parties, make provisions for appropriate modes of settlement. While the Court has legal personality, the Court should not act when it did not enjoy the approval of the Assembly. The support is needed because financial and budgetary implications fall under the purview of the Assembly. Article 32 leaves the dispute resolution mechanism to be drafted by the Court and approved by the Assembly.

#### ***4.2 Amendments to APIC***

Any State Party can propose an amendment to the *APIC* (article 36). The procedure involves sending a written communication of such a proposal to the Secretariat of the Assembly of States Parties, who will then circulate it to all States Parties and the Bureau of the Assembly with a request that they notify him or her whether they favour a Review Conference to discuss the proposal. If, within three months, a majority of States Parties favour a Review Conference, the Secretariat informs the Bureau of the Assembly who will convene such a conference with the next regular session or special session of the Assembly.

**APPENDIX I Table Summary of Privileges and Immunities**

| <b>Privilege &amp; immunity</b>                                                                   | <b>Judges, Prosecutor, Deputy Prosecutor, Registrar</b> | <b>Deputy Registrar, staff of Office of Prosecutors and Registry</b>    | <b>Personnel locally recruited</b> | <b>Counsel and persons assisting Defence Counsel</b>                                     | <b>Witnesses</b>                                                               | <b>Victims</b>                                                                 | <b>Expert</b>                                                                   | <b>Other persons required to be present at the seat of the Court</b>           |
|---------------------------------------------------------------------------------------------------|---------------------------------------------------------|-------------------------------------------------------------------------|------------------------------------|------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------|---------------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| <b>legal protection</b>                                                                           |                                                         |                                                                         |                                    |                                                                                          |                                                                                |                                                                                |                                                                                 |                                                                                |
| from personal arrest and detention                                                                | yes, derived from Vienna Convention                     | yes                                                                     | no                                 | yes                                                                                      | yes                                                                            | yes                                                                            | yes                                                                             | yes                                                                            |
| from legal process of every kind in respect of words spoken or written and acts performed by them | yes, in their official capacity                         | yes, in their official capacity                                         | yes, in their official capacity    | yes, in their official capacity                                                          | yes, in the course of their testimony                                          | yes, in the course of their appearance before the court                        | yes, in the course of their performance of their functions for the court        | yes, in the course of their appearance before the court                        |
| <b>communication privileges</b>                                                                   |                                                         |                                                                         |                                    |                                                                                          |                                                                                |                                                                                |                                                                                 |                                                                                |
| inviolability of all official papers and documents in whatever form and materials                 | yes, derived from Vienna Convention                     | yes                                                                     | no                                 | yes, with materials relating to the exercise of his or her function                      | yes, relating to their testimony                                               | no                                                                             | yes, relating to their functions for the court                                  | no                                                                             |
| right to receive and send papers and documents in whatever form                                   | not expressly stated but derived from Vienna Convention | not expressly stated                                                    | no                                 | yes, for communication in purs to function as counsel                                    | yes, for communications with the court and counsel                             | no                                                                             | yes, for communication with the court                                           | no                                                                             |
| <b>taxation privileges</b>                                                                        |                                                         |                                                                         |                                    |                                                                                          |                                                                                |                                                                                |                                                                                 |                                                                                |
| exempt from taxation on all salaries, etc                                                         | yes                                                     | yes                                                                     | no                                 | no                                                                                       | no                                                                             | no                                                                             | no                                                                              | no                                                                             |
| period of residency should not be calculated for taxes                                            | yes                                                     | no                                                                      | no                                 | yes                                                                                      | no                                                                             | no                                                                             | no                                                                              | no                                                                             |
| right to import free of duties and taxes                                                          | not expressly stated                                    | yes                                                                     | no                                 | no                                                                                       | no                                                                             | no                                                                             | no                                                                              | no                                                                             |
| <b>travel/freedom of movement</b>                                                                 |                                                         |                                                                         |                                    |                                                                                          |                                                                                |                                                                                | no                                                                              |                                                                                |
| exemption from immigration restrictions, alien registration and national service                  | yes, derived from Vienna Convention                     | yes, includes family for immigration and alien exemption                | no                                 | yes for immigration and alien registration but not exempt for national service           | yes for immigration and alien registration but not exempt for national service | yes for immigration and alien registration but not exempt for national service | yes, for immigration and alien registration but not exempt for national service | yes for immigration and alien registration but not exempt for national service |
| currency and exchange facilities                                                                  | yes, as accorded to heads of missions                   | yes, as accorded to officials of comparable rank of diplomatic missions | no                                 | yes, as accorded to representatives of foreign governments on temporary official mission | no                                                                             | no                                                                             | yes                                                                             | no                                                                             |
| personal baggage- exemption from seizure and inspection                                           | yes                                                     | yes                                                                     | no                                 | yes                                                                                      | only exempt from seizure not inspection                                        | only exempt from seizure not inspection                                        | yes                                                                             | only exempt from seizure not inspection                                        |
| protection and repatriation facilities                                                            | yes, also includes family                               | yes, also includes family                                               | no                                 | yes                                                                                      | no                                                                             | yes                                                                            | no                                                                              |                                                                                |

## **Appendix II Selected Bibliography and Resources**

### ***International Documents and Treaties***

*Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea*

*Agreement Between the United Nations and the Kingdom of the Netherlands concerning the Headquarters of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, found at [www.un.org/icty/basic/statut/S1994\\_848-849.htm](http://www.un.org/icty/basic/statut/S1994_848-849.htm)

*Convention on the Privileges and Immunities of the United Nations*, adopted by the General Assembly on 13 February 1946. found at [http://www.unog.org/archives/un\\_priv.htm](http://www.unog.org/archives/un_priv.htm)

*Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/10, 17 July 1998

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## **Appendix III The Agreement on Privileges and Immunities**

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