

Functional Immunity for Defense Counsel and Defense Staff

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1 Introduction

This chapter focuses on the issue of immunity for defense counsel and their staff from criminal proceedings before domestic courts for activities related to representing an individual in international proceedings before an international criminal court or tribunal (IC). The international law on immunities is well developed and recognizes different degrees of immunity for States and State property, State officials, international organizations, and international organizations' staff and property.¹ It is

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¹ See *inter alia* Convention on the Privileges and Immunities of the United Nations, February 13, 1946, 1 UNTS 15, with corrigendum at 90 UNTS 327; Convention on the Privileges and Immunities of the Specialized Agencies, November 21, 1947, 33 UNTS 261; Vienna Convention on Diplomatic Relations, Vienna, April 18, 1961, in force April 24, 1964, 500 UNTS 95; Vienna Convention on Consular Relations, Vienna, April 24, 1963, in force March 19, 1967, 596 UNTS 261; Convention on Special Missions, New York, December 8, 1969, in force June 21, 1985, 1400 UNTS 231; Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, Vienna, March 14, 1975, UN Doc. A/CONF.67/16; United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, December 2, 2004, UN Doc. A/59/508. See also generally these decisions by the International Court of Justice: ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, May 24, 1980, p. 3; ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, ICJ Reports 1989, December 15, 1989, p. 177; ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, ICJ Reports 1999, April 29, 1999, p. 62; ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, February 14, 2002, p. 3; ICJ, *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, *Provisional Measure Order*, ICJ Reports 2003, June 17, 2003, p. 102; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, February 3,

important to recall the long-standing customary law basis for diplomatic and consular immunities in international law,² and the contemporary general understanding that immunity is not to be claimed for private advantage but for the protection of individuals entrusted with carrying out specific duties from undue interference from host State authorities. Such immunities have long served a functional purpose in international relations,³ by facilitating the activities of diplomatic and other State officials working in a foreign jurisdiction as well as the activities of staff of international organizations. While the law of immunity from criminal prosecution before domestic courts of certain categories of officials is relatively well established in both law and practice, the same cannot be said about the immunity of defense counsel or defense staff.⁴ From a

2012, p. 99; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, July 20, 2012, p. 422. Notably, three cases were removed from the list, namely *Certain Criminal Proceedings in France (Republic of the Congo v. France)*; *Status vis-à-vis the Host State of a Diplomatic Envoy to the United Nations (Commonwealth of Dominica v. Switzerland)*; *Certain Questions Concerning Diplomatic Relations (Honduras v. Brazil)*. For a scholarly discussion see generally Yitih Simbeye, *Immunity and International Criminal Law* (Ashgate, 2004); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 3rd edn. (Oxford University Press, 2008); Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008); Hazel Fox, *The Law of State Immunity*, 2nd edn. (Oxford University Press, 2008); Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, 2012). See also the ongoing work of the International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, UN Doc. A/CN.4/596, March 31, 2008.

² See *inter alia* ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1979, Order (Request for the Indication of Provisional Measures), pp. 19–20, paras. 38–40.

³ See *inter alia* ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, Judgment, pp. 42–3, para. 92.

⁴ See *inter alia* Allison Turner, “Tribunal ambivalence and Rwanda’s rejection of functional immunity for the ICTR defence,” [2010] *Revue québécoise de droit international*, 109–32; Jean Flamme, “The immunity of defence counsel before international criminal jurisdictions,” in Paul de Hert *et al.* (eds.), *Code of International Criminal Law and Procedure Annotated* (Larcier, 2013), pp. 729–34; David Tolbert, “The ICTY and defense counsel: A troubled relationship,” (2003) 37(4) *New England Law Review*, 975–86; Krit Zeegers, “Defence counsel immunity at the ad hoc tribunals,” (2011) 11 *International Criminal Law Review* 869–90; Cecilia Nilsson, “Contextualizing the Agreement on the Privileges and Immunities of the International Criminal Court,” (2004) 17(3) *Leiden Journal of International Law*, 559–78; Katharina Margetts and Katerina I. Kappos, “Current developments at the ad hoc international criminal tribunals” (2011) 9 *Journal of International Criminal Justice*, 481–518, at 493–5; Rosanne Van Alebeek, “Domestic courts as agents of development of international immunity rules,” (2013) 26(3) *Leiden Journal of*

general perspective, the normative aspect of immunities may be understood as striking a balance between the different interests at play, including respect for State sovereignty,⁵ accountability for potential violations of domestic or international law, the smooth functioning of international judicial institutions, and the proper administration of international criminal justice. Debates concerning the applicability of immunities to defense counsel and staff should be informed by the functional nature of such immunities.

Our analysis distinguishes between the legal framework and jurisprudence currently governing the scope of immunity for defense counsel and their teams representing alleged perpetrators of serious international crimes before different ICs (the *is*) and the optimal scope of such immunity (the *ought*). First, we briefly introduce the concept of functional immunity in international law and its applicability to defense counsel and staff. Subsequently, we analyze the relevant legal provisions in the Statutes and the case law of various ICs outlining the scope of this immunity. Finally, we assess whether defense counsel and their teams enjoy the protection against criminal prosecution before domestic courts required to enable them to properly discharge their duties, or whether more clarity and additional substantive and procedural protections are necessary in order to ensure the fair administration of international criminal justice.

2 Functional Immunity under Current International Law

Immunity can either be attached to persons, usually in the form of personal or functional immunity, or attributed to entities such as States or international organizations in the form of sovereign or jurisdictional immunity. Since the latter type of immunity is not relevant to defense counsel, the present discussion will focus mainly on (1) immunity *ratione personae* accruing to an individual by virtue of the office held and (2) immunity *ratione materiae* based on the nature of the acts performed.

International Law, 559–78; Phakiso Mochochoko, “The Agreement on Privileges and Immunities of the International Criminal Court,” (2001) 25(3) *Fordham International Law Journal*, 638–64.

⁵ See *inter alia* Morten Bergsmo and Ling Yan (eds.), *State Sovereignty and International Criminal Law* (TOAEP: Torkel Opsahl Academic EPublisher, 2012).

With regard to immunity *ratione personae*, customary international law requires receiving States to refrain from exercising their criminal jurisdiction *vis-à-vis* a certain category of the highest ranking officials of another State.⁶ Heads of State and Heads of Government, as well as diplomatic agents,⁷ enjoy diplomatic immunity and cannot be prosecuted before a domestic court of another country. While in the past the treatment of Heads of State was based on the principle *par in parem non habet imperium* according to which sovereign States have no power over each other,⁸ now the general consensus is that personal immunities are accorded to Heads of State and Heads of Government, as well as diplomatic agents, in their capacity as representatives of their State and not in their personal interest, “[b]ecause this is necessary for the exercise of his or her functions and the fulfilment of his or her responsibilities in an independent and effective manner.”⁹ Through its judgment in the *Arrest Warrant* case, the International Court of Justice (ICJ) has added another group to this list, namely that of Ministers for Foreign Affairs.¹⁰

⁶ For a classical view on the issue, see L. Oppenheim, *International Law – A Treatise*, 2 vols., 2nd edn. (Longmans, Green & Co, 1906) vol. I, p. 459, para. 387: “As regards the exemption of diplomatic envoys from criminal jurisdiction, theory and practice of International Law agree nowadays, upon the fact that the receiving States have no right, under any circumstances whatever, to prosecute and punish diplomatic envoys.”

⁷ Vienna Convention on Diplomatic Relations, Art. 29: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

⁸ Oppenheim, *International Law*, p. 430, para. 348.

⁹ Institut de Droit International, “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law,” Vancouver, August 26, 2001, pmbl.; ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para. 75; see also the preamble of the Vienna Convention on Diplomatic Relations, stating that “the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.”

¹⁰ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* Judgment, para. 53. Against such a finding of the ICJ see *Dissenting Opinion of Judge Al-Khasawneh*, para. 1 (“By contrast, and this is not without irony, the nature and extent of immunities enjoyed by Foreign Ministers is far from clear, so much so that the ILC Special Rapporteur on Jurisdictional Immunities of States and Their Property expressed the opinion that the immunities of Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law”); *Dissenting Opinion of ad hoc Judge Van den Wyngaert*, para. 10 (“there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of

However, the ICJ has noted that personal immunity may not bar criminal proceedings before international criminal courts, where they have jurisdiction.¹¹ Recognizing the importance of this issue for international law and international relations, the International Law Commission (ILC) has been working on the topic of State officials' immunity from foreign criminal jurisdiction since 2008.

Functional immunity is, as the term suggests, inextricably linked to acts or conduct committed in the discharge of the official duties of the relevant State or international organization's official. Contrary to personal immunities, function-related immunities may accrue to any State official, provided that the latter has acted in his or her official capacity and not in a private capacity. The position or status of the official is irrelevant here, because his or her conduct is, in itself, attributed directly to the foreign State and not to the individual. Consequently, the duration of functional immunities continues to exist beyond the discharge of the concerned State official's official duties.¹² For Heads of State, Heads of Government, Ministers of Foreign Affairs, and diplomatic agents, both personal and functional immunities may overlap during the period they serve in office, with the functional immunity continuing to exist even after the functions of a person enjoying privileges and immunities have come to an end.¹³

Although similar to the immunity of State officials, the law pertaining to immunity of defense counsel practicing before international criminal courts and tribunals is part of the law of immunities of international organizations. As such, it is not based on customary international law but on treaty law, namely the constitutive instruments of courts or tribunals,

incumbent Foreign Ministers suspected of war crimes and crimes against humanity"). For a more "subtle" critique of the ICJ for failing to provide legal authorities to support such a finding, see *Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal*, para. 81 ("We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State"); see also D. Akande and S. Shah, "Immunities of state officials, international crimes, and foreign domestic courts," (2011) 21 *European Journal of International Law*, 815, at 820 ("In the Arrest Warrant case, the ICJ held – without reference to any supporting state practice – that immunity *ratione personae* also applies to a serving Foreign Minister").

¹¹ ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, para. 61.

¹² A. Cassese, "When may senior State officials be tried for international crimes? Some comments on the *Congo v. Belgium* case," (2002) 13 *European Journal of International Law*, 853, at 863.

¹³ Vienna Convention on Diplomatic Relations, Art. 39(2); Institut de Droit International, "Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law," Vancouver, August 26, 2001, Arts. 13–14.

separate agreements on immunities, and Host State agreements. The ICJ has dealt specifically with the question of functional immunity of international organizations' experts in two cases concerning UN special human rights rapporteurs.¹⁴ Both cases concerned Advisory Opinions requested by the UN Economic and Social Council (ECOSOC) and both related to the applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations (General Convention) on experts on mission¹⁵ to special rapporteurs of UN human rights bodies.¹⁶

2.1 *The Mazilu Case*

Mr. Dumitru Mazilu was a Romanian national nominated by Romania to serve for a three-year term, from 1984 to 1986, as a member of the

¹⁴ See *inter alia* Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Intersentia, 2008), pp. 190–208.

¹⁵ Art. VI, Section 22 (Experts on Missions for the United Nations) of the Convention on the Privileges and Immunities of the United Nations holds:

Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage;
- (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
- (c) Inviolability for all papers and documents;
- (d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;
- (f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

¹⁶ Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, with corrigendum at 90 UNTS 327.

Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission), a subsidiary organ of the (then) Commission on Human Rights.¹⁷ On August 29, 1985, the Sub-Commission appointed him to serve as special rapporteur to prepare a “report on human rights and youth in analysing the efforts and measures for securing the implementation and enjoyment by youths of human rights, particularly, the right to life, education and work.” It asked the UN Secretary-General to provide Mr. Mazilu with all necessary assistance for the completion of his task.¹⁸ As the session of the Sub-Commission at which Mr. Mazilu’s report was to be presented was not convened in 1986, it was decided that the mandates of all members of the Sub-Commission, including that of Mr. Mazilu, be extended for an additional year. However, when the Sub-Commission finally convened in Geneva on August 10, 1987, no report from Mr. Mazilu was received. On August 12, 1987, the Romanian authorities informed the UN that Mr. Mazilu had suffered a heart attack and was still in hospital. Despite the expiration of Mr. Mazilu’s extended mandate as a member of the Sub-Commission, the latter decided to postpone the consideration of his report, thereby retaining his services as special rapporteur during that time. In the meantime, the Centre for Human Rights of the UN Secretariat made various attempts to contact Mr. Mazilu and provide him with assistance in the preparation of the report. However, Mr. Mazilu did not receive any communication from the Centre. In a letter addressed to the Under Secretary General of the UN, Mr. Mazilu informed him that although he was willing to travel to Geneva for consultations, his government had forced him to retire from his various governmental posts, the Romanian authorities were refusing him a travel permit, and strong pressure had been exerted on him and on his family.

The ICJ examined the applicability of Section 22 *ratione personae*, *ratione temporis*, and *ratione loci* to Mr. Mazilu’s situation, considering first what is meant by “experts on missions” for the purposes of Section 22, then the meaning to be attached to the expression “period of [the] missions,” and finally the position of experts in their relations with the

¹⁷ The UN Commission on Human Rights ceased to exist on March 27, 2006. By Resolution A/RES/60/251, the UN General Assembly replaced it with the Human Rights Council.

¹⁸ ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion*, ICJ Reports, December 15, 1989, p. 177. For more details about the case see the summary of the Advisory Opinion at www.icj-cij.org/docket/files/81/6815.pdf.

States of which they are nationals or on the territory of which they reside.¹⁹ With regard to the first issue, the Court noted that, while the General Convention did not provide a definition of the term “expert on mission,” it was clear from the wording of Article VI, Section 22 of the General Convention that its purpose was “to enable the United Nations to entrust missions to persons who d[id] not have the status of an official of the Organization, and to guarantee them ‘such privileges and immunities as are necessary for the independent exercise of their functions.’”²⁰ According to the Court, determination of whether an individual was to be considered as an expert on mission was not dependent on his or her administrative status with the UN, but on “the nature of their mission.”²¹ The Court found that a practice already existed whereby persons not having the status of UN officials were entrusted with various tasks, such as mediation, preparing reports, preparing studies, conducting investigations, or finding and establishing facts.²² In all these cases, the practice of the UN showed that the individuals appointed as special rapporteurs or members of committees were regarded as experts on missions within the meaning of Article VI, Section 22 of the General Convention.²³ Turning to the second issue, on whether the immunities of experts on missions were confined only to the actual journey time or also included situations in which no travel was envisioned, the Court analyzed the term “mission” both in the English and French versions of the Convention and found that, while the word *per se* entailed “journey,” it had long since acquired a broader meaning to embrace in general the tasks entrusted to that person, irrespective of whether such tasks envisioned travel or not.²⁴

Finally, the Court observed that while Section 15 of the General Convention (Representatives of Members) excluded the application of immunities between a representative and the authorities of the State of which he is a national or of which he is or has been the representative, Article V (Officials of the Organization) and Article VI (Experts on Mission) did not provide for such a rule. The reason for this omission was that the privileges and immunities provided in Articles V and VI of the General Convention were conferred on officials and experts on missions in order to ensure their independence in the interest of the Organization. The Court found that such independence must be respected by all States, including the State of nationality and the State of residence of the official or expert on mission, unless a reservation was made to

¹⁹ *Ibid.*, para. 40.

²⁰ *Ibid.*, para. 47.

²¹ *Ibid.*

²² *Ibid.*, para. 48.

²³ *Ibid.*

²⁴ *Ibid.*, para. 49.

this effect.²⁵ Consequently, the Court found that since Mr. Mazilu was entrusted with preparing a report on behalf of the UN, and was neither a representative of Romania nor a UN official, he was to be considered as an expert on mission within the meaning of Article VI, Section 22 of the General Convention, irrespective of whether he was no longer a member of the Sub-Commission.

2.2 *The Cumaraswamy Case*

Dato' Param Cumaraswamy was a Malaysian national who was appointed Special Rapporteur on the Independence of Judges and Lawyers by the UN Commission on Human Rights. His case arose out of an interview Mr. Cumaraswamy gave for an article published in the November 1995 issue of *International Commercial Litigation*, in which he was referred to in his capacity as special rapporteur.²⁶ Mr. Cumaraswamy's remarks in that interview were considered defamatory by two commercial firms, which initiated legal proceedings before Malaysian courts against Mr. Cumaraswamy. The main question before the ICJ was whether the words used by him in the published interview were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.²⁷

The Court pointed out that in the process of determining whether an expert on mission was entitled to immunity pursuant to Article VI, Section 22 of the General Convention, the Secretary General of the UN had a "pivotal role to play."²⁸ The Court noted that, in exercising the protection of United Nations experts, the Secretary General protects the mission with which the expert is entrusted.²⁹ It is for the Secretary General, in his capacity as the chief administrative officer of the Organization, to assess whether the concerned official or expert on mission acted in fulfillment of his official duties, and to consequently exercise the necessary protection by claiming immunity from any legal process before States' domestic courts. In the case at hand, the legal counsel of the Organization, acting on behalf of the Secretary General, had on numerous occasions informed the government of Malaysia of his finding that Mr. Cumaraswamy had given the interview in his capacity as special

²⁵ *Ibid.*, para. 51.

²⁶ ICJ, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion*, p. 62.

²⁷ *Ibid.*, para. 47. ²⁸ *Ibid.*, para. 50. ²⁹ *Ibid.*, para. 51.

rapporteur of the Commission and was entitled to immunity from “every kind” of legal process.³⁰ The ICJ concluded that the Secretary General of the UN had correctly found that Mr. Cumaraswamy had acted “in the course of his performance as Special Rapporteur of the Commission [on Human Rights].”³¹ Turning to the issue of Malaysia’s legal obligations, the Court found that Malaysia had failed to inform its local courts of the UN Secretary General’s findings concerning Mr. Cumaraswamy’s functional immunity. According to the Court, that finding, “and its documentary expression, create[d] a presumption which c[ould] only be set aside for the most compelling reasons and [was] thus to be given the greatest weight by national courts.”³² Consequently, Malaysia had not acted in conformity with its international obligations when it permitted the proceedings against Mr. Cumaraswamy in its domestic courts.

2.3 *Relevance of the Mazilu and Cumaraswamy Cases to the Functional Immunity of Defense Counsel and Their Staff*

The circumstances surrounding the *Mazilu* and *Cumaraswamy* cases and the rationale behind the ICJ’s findings may be beneficial in highlighting the vulnerable position of defense counsel in the international courts and the importance of acknowledging their immunity from prosecution before domestic courts for activities legitimately related to the performance of their functions as counsel.

Unlike diplomatic agents, who enjoy personal immunity and are not liable for any form of arrest or detention,³³ defense counsel and their teams may only enjoy functional immunity for acts or words spoken in the discharge of their duties as legal counsel. The rationale for according legal protection is simple. Because of their work in defending persons accused of international crimes before international courts and tribunals, defense counsel and their teams may face undue interference by national authorities. As will be shown below, typical examples of such hindrances include prosecution by national authorities for words spoken in relation to a defense case or action taken during on-site investigations. While the

³⁰ *Ibid.*, para. 52. ³¹ *Ibid.*, para. 56. ³² *Ibid.*, para. 61.

³³ In the case that a diplomatic agent commits a crime or any other act which is deemed unacceptable, the host State authorities can – provided that the immunity has not been waived by the sending state – at any time, and without having to provide reasons, declare the person *persona non grata*. This means that, should the sending State not decide to recall the concerned individual, he or she may be refused to be considered as a member of the diplomatic mission and be subject to the jurisdiction of the host State.

latter examples can easily be considered to be covered by functional immunity, it remains unclear whether other activities, such as interviews, speeches at conferences, or articles written about trials can be considered as acts taken in the discharge of their duties as counsel before international courts or tribunals. Indeed, at times it may be difficult to ascertain the difference between a statement issued in a personal capacity and one made as part of fulfilling an official duty. This is especially concerning when domestic criminal proceedings may be used as a disguise to obstruct the work of defense teams.

An important factor is the identity of the authority called upon to determine whether a particular statement or action falls within the official duties of defense counsel or should be considered as committed only in a private capacity. As domestic authorities may have a motive or bias in the matter, especially regarding on-site investigations by the defense, it appears appropriate that the relevant Chamber or the president of an international criminal court or tribunal should determine whether defense counsel should enjoy functional immunity with respect to the acts or words spoken in the discharge of their duties.³⁴

3 Functional Immunity for Defense Counsel and Staff before International Criminal Courts and Tribunals

Various legal frameworks and jurisprudence at the ICs address the existence and extent of immunity for defense counsel and staff from criminal prosecution before domestic courts. The scope of such immunities at the two UN *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), is discussed first. This analysis shall include the decisions in the *Erlinder* and *Gotovina* cases. Subsequently, the focus turns to the legal framework of the ICC and a number of relevant cases, including the detention of defense counsel for Saif Al-Islam Gaddafi and other court staff who were held under arrest in a military compound for several weeks for reportedly giving documents to Mr. Gaddafi, the content of which allegedly constituted a threat to Libyan national security. The analysis in this section serves to put in perspective the different legal frameworks which may apply before the different ICs and the challenges encountered by defense counsel and staff in carrying out their work.

³⁴ This is in line with the ICJ's reasoning in *Cumaraswamy*, paras. 50, 61.

3.1 *Functional Immunity of Defense Counsel and Their Staff at the UN Ad Hoc Tribunals*

Neither the ICTY nor the ICTR Statutes provide for immunity for defense counsel or their staff in their capacity as defense teams practicing before those tribunals.³⁵ Article 30 of the ICTY Statute and Article 29 of the ICTR Statute regulate the status, privileges, and immunities respectively of the ICTY and the ICTR staff. As with all other UN institutions, the legal basis for the *ad hoc* tribunals' immunities stems from the 1946 UN General Convention, which applies *mutatis mutandis* to the tribunals, the judges, the Prosecutor and his staff, and the Registrar and his staff.³⁶ While the judges, the Chief Prosecutor, and the Registrar enjoy personal immunities similar to those accorded to diplomatic envoys,³⁷ the staff of the Prosecutor's and Registrar's offices enjoy privileges and immunities provided by Articles V and VII of the General Convention.³⁸ As for all other categories of persons dealing with the ICTY, including defense counsel and their teams, Article 30(4) of the ICTY Statute provides that "Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal."

The same provision can be found in Article 29(4) of the ICTR Statute. On first sight, the use of the term "treatment" instead of "privileges and immunities" seems to indicate that the drafters may have intended to provide for a lower level of protection compared to the other categories of persons provided in Article 29(2) and (3) of the ICTR Statute and Article 30(2) and (3) of the ICTY Statute. However, in a Note directed to the President of the ICTY, the UN Office of Legal Affairs (UN OLA) stated that "at a minimum such treatment would include immunity from legal process for words spoken or written and acts done in their capacity as Defence counsel."³⁹ According to the UN OLA Note, such an

³⁵ The ICTR formally closed down on the date on which the Appeal Chamber delivered its last appeals judgment in the case of *Nyiramasuhuko et al. (Butare), Appeals Judgment*, Case No. ICTR-98-42-A, December 14, 2015.

³⁶ ICTY Statute, Art. 30(1); ICTR Statute, Art. 29(1).

³⁷ ICTY Statute, Art. 30(2); ICTR Statute, Art. 29(2).

³⁸ ICTY Statute, Art. 30(3); ICTR Statute, Art. 29(3).

³⁹ "Selected legal opinions of the Secretariats of the United Nations and related intergovernmental organizations – Note to the President of the International Criminal Tribunal for Rwanda concerning the immunity of defence counsel," *UN Juridical Yearbook* (2010), p. 505.

approach is also in line with Principle 20 of the UN Basic Principles on the Role of Lawyers,⁴⁰ which states that “lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal administrative authority.” While agreeing with the above conclusion, i.e. that the treatment accorded by Article 29(4) of the ICTR Statute and Article 30(4) of the ICTY Statute should at least include functional immunity for words spoken or written and acts done in counsels’ official capacity before the tribunals, both the ICTY and ICTR Appeal Chambers have clarified that defense counsel admitted to practice before them should be considered as “experts on mission” and accorded the appropriate privileges and immunities, while operating in that capacity, as provided in Article VI, Section 22 of the General Convention.⁴¹

3.1.1 Functional Immunity with Respect to Words Spoken in the Discharge of Official Duties: The *Erlinder* Case

The ICTR was the first to deal with the issue of defense counsel’s functional immunity from prosecution before a domestic court, in relation to Mr. Peter Erlinder, lead counsel for Aloys Ntabakuze.⁴² Rwandan authorities arrested Mr. Erlinder on May 28, 2010 in Kigali, Rwanda, on charges of “genocide denial.”⁴³ At the time of his arrest, Mr. Erlinder was in Rwanda for reasons unrelated to his work as defense counsel at the ICTR.⁴⁴ On June 15, 2010, the Registrar of the ICTR sent a *note verbale* to the Rwandan Ministry of Foreign Affairs and Cooperation, based on

⁴⁰ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27–September 7, 1990, A/CONF.144/28/Rev.1.

⁴¹ ICTR, *Théoneste Bagosora, Aloys Ntabakuze and Anatole Nsengiyumva v. The Prosecutor, Decision on Aloys Ntabakuze’s Motion for Injunctions against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder*, Case No. ICTR-98-41-A, October 6, 2010, para. 22.

⁴² For a short commentary see *inter alia* Kate Gibson, “The arrest of ICTR defense counsel Peter Erlinder in Rwanda” (2010) 14(26) *American Society of International Law: Insights*, at www.asil.org/insights/volume/14/issue/26/arrest-ict-r-defense-counsel-peter-erlinder-rwanda; Gentian Zyberi, “Functional immunity for defence counsel,” *International Law Observer*, October 10, 2010, at www.internationallawobserver.eu/2010/10/10/functional-immunity-of-defence-counsel. For a detailed discussion of other relevant cases see Turner, “Tribunal ambivalence”; Alexis S. Kramer, “Introductory Note to the International Criminal Tribunal for Rwanda: *Bagosora et al. v. Prosecutor*,” (2011) 50 *ILM* 226.

⁴³ ICTR, *Théoneste Bagosora, Aloys Ntabakuze and Anatole Nsengiyumva v. The Prosecutor, Appeal Judgment*, Case No. ICTR-98-41-A, October 6, 2010, para. 2.

⁴⁴ *Ibid.*

advice received from the UN Office of Legal Affairs, asserting that Mr. Erlinder had immunity and requesting his immediate release.⁴⁵ The copy of the charges against Mr. Erlinder that was requested by the Registrar on June 9, 2010 on the instruction of the Appeals Chamber never reached the ICTR. On July 15, 2010, the Registrar submitted that the Rwandan government had told him there were no formal charges against Mr. Erlinder, who was detained as a suspect pending the completion of investigations. He was subsequently released on bail based on health grounds.⁴⁶

Mr. Erlinder's client, Mr. Ntabakuze, had in the meantime requested that the Appeals Chamber "order the Registrar to take immediate action to secure Erlinder's release and to stop all proceedings against him."⁴⁷ He asserted that the charges constituted "intimidation and serious interference with a legal process" directly impacting his right to a fair and expeditious trial.⁴⁸ After first noting that it "will not lightly intervene in the domestic jurisdiction of a state," the Appeals Chamber emphasized its duty to ensure the fairness of the proceedings.⁴⁹ Accordingly, the Appeals Chamber considered only "whether Rwanda's exercise of its domestic jurisdiction in Mr. Erlinder's case threaten[ed] the fairness of the proceedings" in Mr. Ntabakuze's case.⁵⁰

The Appeals Chamber first turned to Article 29 of the Statute, addressing immunities of the Tribunal, and found that defense counsel fall within Article 29's reference to "persons [who are] required at the seat or meeting place of the Tribunal and as such must be accorded such treatment as is necessary for the proper functioning of the Tribunal."⁵¹ It went on to note, pointedly, that:

The proper functioning of the Tribunal requires that Defence Counsel be able to investigate and present arguments in support of their client's case without fear of repercussions against them for these actions. Without such assurance, Defence Counsel cannot be reasonably expected to adequately represent their clients.⁵²

The Appeals Chamber then addressed the application to defense counsel of the immunities provided for in the Memorandum of Understanding between the UN and Rwanda to Regulate Matters of Mutual Concern Relating to the Office in Rwanda of the International Tribunal for Rwanda of 3 June 1999 (Memorandum of Understanding). It found

⁴⁵ *Ibid.*, para. 8. ⁴⁶ *Ibid.*, para. 13. ⁴⁷ *Ibid.*, para. 1. ⁴⁸ *Ibid.*, para. 14.
⁴⁹ *Ibid.*, para. 18. ⁵⁰ *Ibid.* ⁵¹ *Ibid.*, para. 19. ⁵² *Ibid.*, para. 18.

that while defense counsel are not employees of the Tribunal, they are assigned or appointed by the Tribunal to their positions as defense counsel.⁵³ Furthermore, the procedures associated with defense counsel going on mission to Rwanda indicate that the Tribunal considers defense counsel to be acting in an official capacity and on assignment in association with the Tribunal.⁵⁴

The Appeals Chamber found that if the Memorandum of Understanding did not extend to defense counsel, “the right of equality of arms would be meaningless as the Defence would have no guarantee of access to potential witnesses and evidence to allow them to prepare their case.”⁵⁵ In light of the procedural practice of the Tribunal as well as the purpose of the Memorandum of Understanding, the Appeals Chamber found defense counsel fall within the meaning of “other persons assigned to the Office” and therefore are to be accorded the privileges and immunities due to experts performing missions for the United Nations pursuant to Article VI of the General Convention.⁵⁶ Relying also on the ICJ’s interpretation of Article VI, Section 22 of the General Convention, the Appeals Chamber explained:

While Defence Counsel are not officials of the Tribunal, some guarantee is necessary for the independent exercise of their Tribunal assigned functions which are integral to its functioning. Accordingly, the *nature of their mission*, which is to engage in preparations for proceedings before the Tribunal, is the *defining factor in granting them such privileges and immunities* as granted to experts on mission – not their administrative status with the Tribunal.⁵⁷

The Appeals Chamber found that “Defence Counsel benefit from immunity from personal arrest or detention while performing their duties assigned by the Tribunal and also with respect to words spoken or written and acts done by them in the course of the performance of their duties as Defence Counsel before the Tribunal.”⁵⁸ While affording some protection for defense counsel, this reading of Section 22 of Article VI of the General Convention nonetheless significantly circumscribes the scope of that protection.

The Appeals Chamber noted, for example, that for the most part the material submitted by Rwanda as constituting the basis for the investigation of Mr. Erlinder consisted of articles written by Mr. Erlinder in his

⁵³ *Ibid.*, para. 20. ⁵⁴ *Ibid.*, para. 20. ⁵⁵ *Ibid.*, para. 21. ⁵⁶ *Ibid.*, para. 22.

⁵⁷ *Ibid.*, para. 23 (emphasis added). ⁵⁸ *Ibid.*, para. 26.

private or *academic* capacity, with respect to which Mr. Erlinder did not benefit from immunity from legal process.⁵⁹ This finding is problematic, as many lawyers practicing before the ICs write scholarly or other articles for the benefit of the larger public. Lawyers have the right to free speech. They should not face the potential threat of criminal charges when writing about cases in which they are involved or when honestly dealing with controversial factual and legal issues.

One of the documents submitted by Rwanda as evidence against Mr. Erlinder – a *Hirondelle News* article entitled “Military I – Convicting Major Ntabakuze Would Be an ‘Offence to Common Sense’” – reported on the closing arguments that Mr. Erlinder made on behalf of Ntabakuze in the *Bagosora et al.* case.⁶⁰ The Appeals Chamber found that proceeding against Mr. Erlinder based on his closing arguments before the Tribunal violated his functional immunity and interfered with the proper functioning of the Tribunal, which requires that defense counsel be free to advance arguments in his or her client’s case without fear of prosecution.⁶¹ After recalling Rwanda’s intention to respect Mr. Erlinder’s functional immunity and emphasizing the need for such respect,⁶² the Appeals Chamber requested Rwanda to cease proceeding against Mr. Erlinder with regard to words spoken or written in the course of his representation of Ntabakuze before the Tribunal.⁶³ This disposition, of course, still left Mr. Erlinder exposed to criminal prosecution for his personal and academic writing.

3.1.2 Functional Immunity for Members of the Defense Team and for Defense Materials: The *Gotovina* Case

The issue of immunity for defense staff arose before the ICTY due to domestic criminal proceedings brought against an investigator and a member and former member of Ante Gotovina’s defense team, which resulted in the Croatian authorities’ seizure of documents and other materials belonging to the defense.⁶⁴ The Municipal State Prosecutor’s Office in Zagreb charged Ivan Ivanović, an investigator for the Gotovina

⁵⁹ *Ibid.*, para. 28 (emphasis added).

⁶⁰ *Ibid.*, para. 29.

⁶¹ *Ibid.*, para. 29 (emphasis added).

⁶² *Ibid.*, para. 30.

⁶³ *Ibid.*, para. 31.

⁶⁴ For a short commentary see *inter alia* Gentian Zyberi, “Functional immunity at the ICTY,” *International Law Observer*, March 1, 2011, at www.internationalallawobserver.eu/2011/03/01/functional-immunity-at-the-icty. See also Bruce Zagaris, “Introductory Note to the International Criminal Tribunal for the former Yugoslavia: *Prosecutor v. Gotovina*, Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders” (2011) 50 ILM 873.

defense team, with concealment of archival material.⁶⁵ In July 2009, the ICTY Trial Chamber denied Gotovina's motion seeking a restraining order, finding that Mr. Ivanović had not invoked functional immunity before the Croatian court or had established that invoking functional immunity before the Croatian court "would necessarily result in [its] rejection."⁶⁶ In September 2009, Gotovina again requested that the Trial Chamber issue a restraining order against Croatia to direct it to terminate criminal proceedings against Mr. Ivanović, since the Municipal Criminal Court in Zagreb had denied Mr. Ivanović's motion to dismiss the proceedings based on its determination that he did not have functional immunity as a defense investigator for Gotovina at the Tribunal.⁶⁷ While this motion was pending, on December 9, 2009, the Croatian authorities arrested Mr. Ivanović and detained another member and former member of the Gotovina defense team. The authorities also searched several locations and seized material and computers belonging to the Gotovina defense. Two days later, the ICTY Trial Chamber granted Gotovina's motion to issue an oral interim order directing Croatia to stop all inspection of the items in its custody belonging to present or former members of the Gotovina defense team or their relatives, and to keep these materials under seal while in its possession.⁶⁸

In its decision of March 12, 2010,⁶⁹ the Trial Chamber, after conceding that defense counsel and investigators should benefit from protection under Article 30(4) of the Statute, noted that unlike Articles 30(2) and 30(3), Article 30(4) of the ICTY Statute did not refer to the VCDR or the General Convention.⁷⁰ The Trial Chamber further considered that Article 30(4) of the Statute did not explicitly provide for personal or

⁶⁵ ICTY, *Prosecutor v. Ante Gotovina et al., Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia Pursuant to Rule 54*, Case No. IT-06-90-T, April 1, 2009, Annex A.

⁶⁶ ICTY, *Prosecutor v. Ante Gotovina et al., Decision on Defendant Ante Gotovina's Motion for a Restraining Order against the Republic of Croatia*, Case No. IT-06-90-T, July 23, 2009, paras. 20–22.

⁶⁷ ICTY, *Prosecutor v. Ante Gotovina et al., Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia*, Case No. IT-06-90-AR73.5, February 14, 2011, para. 7.

⁶⁸ ICTY, *Prosecutor v. Ante Gotovina et al., Decision on Requests for Temporary Restraining Orders Directed to the Republic of Croatia and Reasons for the Chamber's Order of 11 December 2009*, Case No. IT-06-90-T, December 18, 2009.

⁶⁹ ICTY, *Prosecutor v. Ante Gotovina et al., Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia*, Case No. IT-06-90-T, March 12, 2010.

⁷⁰ *Ibid.*, para. 53.

functional immunity for defense teams.⁷¹ Additionally, the Trial Chamber noted that the treatment to be accorded to members of the defense team had not been defined by a Security Council resolution, a multilateral treaty, or a bilateral agreement with Croatia.⁷² The Trial Chamber also considered an opinion by UN OLA which was provided to the Registrar of the ICTR and suggested that defense investigators at the ICTR would be entitled to functional immunity in the execution of their duties.⁷³ The Trial Chamber found that UN OLA's opinion was of no assistance to it since it did not conclude that members of the defense team enjoy functional immunity under Article 29(4) of the Statute of the ICTR, which is the counterpart to Article 30(4) of the ICTY Statute.⁷⁴

The Trial Chamber concluded that members of the defense team did not enjoy personal or functional immunity from legal process under Article 30(4) of the ICTY Statute. However, it found that, under Article 30(4) of the Statute, a State may not improperly subject members of the defense team to legal process "with regard to acts that fall within the Defence's fulfilment of its official function before the Tribunal, with the intended or foreseeable result of substantially impeding or hindering the performance by Defence members of their functions."⁷⁵

The Appeals Chamber subsequently reversed that decision.⁷⁶ The Appeals Chamber found that the absence of an explicit reference to the VCDR and the General Convention in the text of Article 30(4) of the Statute did not mean that defense team members were denied functional immunity.⁷⁷ The Appeals Chamber found that, instead, the Trial Chamber should have focused on what protection was "necessary for the proper functioning of the . . . Tribunal" pursuant to Article 30(4) of the Statute.⁷⁸ It held that the relevant question was whether functional immunity for defense members was "necessary for the proper functioning of the . . . Tribunal," not whether another treaty or Security Council resolution explicitly provides for such immunity.⁷⁹

The Appeals Chamber considered that members of the defense team working in an international criminal court operate in a different legal

⁷¹ *Ibid.*, para. 53. ⁷² *Ibid.*, para. 53. ⁷³ *Ibid.*, para. 55. ⁷⁴ *Ibid.*, para. 55–56.

⁷⁵ *Ibid.*, para. 61.

⁷⁶ ICTY, *Prosecutor v. Ante Gotovina et al.*, *Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia*, Case No. IT-06-90-AR73.5, February 14, 2011.

⁷⁷ *Ibid.*, para. 28. ⁷⁸ *Ibid.* ⁷⁹ *Ibid.*

environment than those working in domestic criminal courts.⁸⁰ Finding and interviewing witnesses, conducting on-site investigations, and gathering evidence in a State's territorial jurisdiction may be more difficult without the grant of functional immunity, as there is always a risk that a State might interfere by exercising its jurisdiction in such a way as to impede or hinder the activities of the defense.⁸¹ Permitting freedom of action in these situations by virtue of a grant of functional immunity protects individuals before the Tribunal in a manner unnecessary in domestic courts, where individuals can rely upon the State's judicial apparatus and other entities to protect their ability to perform their functions in a criminal trial.⁸²

The Appeals Chamber also held that although a State may not intend or foresee that its actions will interfere with a defense investigation, such actions may nonetheless have this effect if the State arrests a member of the defense team who is acting in his or her official capacity.⁸³ Therefore, prioritizing the State's exercise of its domestic jurisdiction over a defense investigation did not accord with providing defense team members the protection "necessary for the proper functioning of the . . . Tribunal."⁸⁴ Turning to the prosecution's contention that granting functional immunity to members of the defense team would allow them to act with impunity, the Appeals Chamber stated that functional immunity for members of the defense team, as with prosecution staff, was limited to their official functions before the Tribunal and in the interests of the United Nations.⁸⁵ This immunity did not allow them to violate domestic criminal laws with impunity.⁸⁶ Hence the Appeals Chamber found that Croatia was barred from continuing criminal proceedings and taking any further investigative steps against Gotovina defense team members for acts performed by them in their official capacity.⁸⁷

The approach followed by the ICTY Appeals Chamber is commendable. Its holding has been accepted and "codified" in the Statute of the Mechanism for International Criminal Tribunals (MICT),⁸⁸ which has now taken over the residual competences of the ICTY and ICTR, given the completion of their mandates. Article 29(4) of the MICT Statute provides:

⁸⁰ *Ibid.*, para. 31. ⁸¹ *Ibid.* ⁸² *Ibid.* ⁸³ *Ibid.*, para. 32. ⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 34. ⁸⁶ *Ibid.* ⁸⁷ *Ibid.*, para. 36.

⁸⁸ UN Security Council, Security Council Resolution 1966 (2010) [on the establishment of the International Residual Mechanism for Criminal Tribunals with two branches], December 22, 2010, S/Res/1966.

Defence counsel, when holding a certificate that he or she has been admitted as counsel by the Mechanism and when performing their official functions, and after prior notification by the Mechanism to the receiving State of their mission, arrival and final departure, shall enjoy the same privileges and immunities as are accorded to experts on mission for the United Nations under Article VI, Section 22, paragraphs (a) to (c), and Section 23, of the Convention referred to in paragraph 1 of this Article. Without prejudice to their privileges and immunities, it is the duty of Defence counsel enjoying such privileges and immunities to respect the laws and regulations of the receiving State.

It thus appears that defense counsel before UN *ad hoc* tribunals have, after twenty years of operation, finally acquired a similar level of legal protection to that accorded to prosecution staff and other employees of the *ad hoc* tribunals. However, while the scope of functional immunity for defense counsel and their staff members has been clarified, it remains to be seen whether this will lead to compliance by the receiving States.

3.2 *Defense Counsel and Staff at the ICC*

This section analyses the scope of functional immunity for defense counsel and staff practicing before the ICC. After providing a general overview of the ICC legal framework, we analyze the relationship between the ICC Statute and the Agreement on the Privileges and Immunities of the Court (APIC), and discuss two prominent cases in which the scope of these immunities was tested in practice.

3.2.1 The ICC Legal Framework

The ICC is the first international criminal court to specifically introduce into its Statute a provision regarding the functional immunities of defense counsel.⁸⁹ Article 48(4) of the ICC Statute provides:

Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.

Despite this apparent progress in comparison with the Statutes of the *ad hoc* tribunals, it is striking that the wording of Article 48(4) of the Rome Statute remains similar to that used in Articles 29(4) of the

⁸⁹ See generally William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), pp. 619–26.

ICTR Statute and 30(4) of the ICTY Statute. The adoption of the term “treatment” instead of “privileges and immunities” indicates that the drafters of the Rome Statute might have intended not to provide defense counsel, experts, or witnesses the same privileges and immunities as those accorded to staff members of the ICC, including prosecution counsel and their staff. Whether such treatment would be interpreted broadly to provide to counsel privileges and immunities similar to those accorded to the Prosecutor or Deputy Prosecutor was left to be determined in a different treaty,⁹⁰ namely the Agreement on the Privileges and Immunities of the Court.⁹¹ Questions remain as to whether, according to the principle of equality of arms, defense counsel will be given the same level of protection that the prosecution enjoys.⁹² Discussions held by the Working Group of the APIC concentrated on whether counsel should be issued a *laissez-passer*; whether “persons assisting counsel” encompassed the whole defense team, including support staff such as case managers or interns; and whether counsel should be exempted from immigration restrictions or alien registration.⁹³ While the latter issue was resolved in counsel’s favor, other issues were left open. It was decided, however, that instead of a *laissez-passer*, counsel would be issued a “certificate under the signature of the Registrar for the period required for the exercise of his or her functions.”⁹⁴

Rule 22(1) of the Rules of Procedure and Evidence of the ICC (Rules) provides that “Counsel for the Defence may be assisted by other persons, including professors of law, with relevant expertise.”⁹⁵ While defense

⁹⁰ Mochochoko, “Agreement on Privileges and Immunities of the ICC,” 654–5.

⁹¹ Agreement on the Privileges and Immunities of the Court, New York, September 3–10, 2002, ICC-ASP/1/3, 2271 UNTS 3.

⁹² Mochochoko, “Agreement on Privileges and Immunities of the ICC,” 655.

⁹³ *Ibid.*; see also a discussion paper proposed by the Coordinator on Arts. 17 and 19 in Eighth Session of the Preparatory Commission for the International Criminal Court, “Draft Agreement on the Privileges and Immunities of the International Criminal Court,” January 8, 2002, Doc. No. PCNICC/2001/L.1/Rev.1/Add.3, at note 13.

⁹⁴ Art. 18(2) of APIC reads:

2. Upon appointment of counsel in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court, counsel shall be provided with a certificate under the signature of the Registrar for the period required for the exercise of his or her functions. Such certificate shall be withdrawn if the power or mandate is terminated before the expiry of the certificate.

⁹⁵ ICC, “Rules of Procedure and Evidence,” September 9, 2002, ICC-ASP/1/3 (Part.II-A), Rule 22(1).

investigators are considered as persons “with relevant expertise,” a textual reading of Article 18(4) of the APIC, in conjunction with Rule 22(1) of the Rules, seems to exclude support staff such as counsel’s interns from the privileges and immunities provided to defense counsel. Clearly, a better view would be to opt for a wider interpretation and extend functional immunities to defense teams in their entirety so long as they are acting in their capacity as defense team members. In any case, it should be noted that interns enjoy limited functional immunities within the territory of the host State with regard to acts or words spoken or written in the discharge of their official duties and inviolability of papers, documents in whatever form, and materials relating to the performance of their functions for the Court.⁹⁶

3.2.2 Relationship between the ICC Statute and the APIC

The practice of having a separate treaty regulating the privileges and immunities of an international organization and its staff is well established.⁹⁷ From an international law perspective, the APIC is a normal treaty, to be interpreted in accordance with relevant customary international law rules and the 1969 Vienna Convention on the Law of Treaties (VCLT).⁹⁸ In principle, the ICC Statute and the APIC operate as separate international law agreements. This is because the APIC is open not only to States Parties to the ICC Statute, but also to any other

⁹⁶ Art. 24(5), Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, June 7, 2007. The same provisions can be found with regard to interns working at other international criminal courts or tribunals, such as the Special Tribunal for Lebanon (Art. 21(5), Agreement between the Kingdom of the Netherlands and the United Nations Concerning the Headquarters of the Special Tribunal for Lebanon, April 1, 2009); the MICT (Art. 21(5), Agreement between the Kingdom of the Netherlands and the United Nations Concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals, February 23, 2015); and the newly Kosovo Relocated Specialist Judicial Institution (Art. 22(3), Agreement between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands, February 15, 2016).

⁹⁷ See for example, the Charter of the United Nations, October 24, 1945, 1 UNTS XVI, and the Convention on the Immunities and Privileges of the United Nations. For a detailed discussion of the relationship of the APIC with other relevant international instruments see Nilsson, “Contextualizing the Agreement on the Privileges and Immunities of the International Criminal Court.”

⁹⁸ Vienna Convention on the Law of Treaties, Vienna, May 23, 1969, in force January 27, 1980, 1155 UNTS 331.

State wishing to be part of it.⁹⁹ Therefore, a State Party to the APIC could be bound only by this treaty and not by the ICC Statute.¹⁰⁰ The situation concerning States that are party to the ICC Statute but have not yet agreed to the APIC may be undesirable, but it is theoretically unlikely that this would endanger the functional immunities of defense counsel and their staff working at the ICC.

The general obligation to assure privileges and immunities to defense counsel stems from Article 48(4) of the ICC Statute. The reference to the APIC in Article 48(4) of the ICC Statute specifies the treatment accorded to defense counsel that is necessary for the proper functioning of the Court.¹⁰¹ This approach would not run counter to the general rule in international law holding that as to third parties, a treaty is *res inter alios acta*.¹⁰² In such a case, Article 18(4) of the APIC would act only as a reference to an obligation already stemming from Article 48(4) of the ICC Statute.

This does not mean that the APIC is binding in its entirety on all States Parties to the ICC Statute. Only the provisions in the APIC that specify the obligations created by Article 48 of the ICC Statute may be interpreted as binding to States that are party to the ICC Statute but not to the APIC. A broader interpretation, holding that the APIC is binding to all States Parties to the ICC Statute irrespective of whether they have ratified it or not, would run counter to the *res inter alios acta* principle and make redundant the accession process to the APIC. Likewise, a narrower interpretation, holding that there is no interaction between the APIC and the ICC Statute if a State is party to only one of these treaties, would make certain provisions of Article 48 of the ICC Statute inapplicable. The above reasoning would be valid even in the case that the UN Security Council, acting under Chapter VII of the UN Charter,¹⁰³ decided to refer a situation to the Prosecutor of the ICC.¹⁰⁴ In such a case, the ICC would

⁹⁹ Art. 1(c) of the APIC defines “States Parties” as . . . States Parties to the present Agreement.”

¹⁰⁰ Mochochoko, “Agreement on Privileges and Immunities of the ICC,” 641.

¹⁰¹ Dapo Akande, “The immunity of ICC lawyers and staff detained in Libya,” *EJIL:Talk!*, June 18, 2012, at www.ejiltalk.org/the-immunity-of-the-icc-lawyers-and-staff-detained-in-libya.

¹⁰² VCLT, Article 34. For a detailed analysis on the effect of treaties to third parties, see Malgosia Fitzmaurice, “Third Parties and the Law of Treaties,” [2002] 6 *Max Planck Yearbook of United Nations Law*, 37–137.

¹⁰³ Art. 25, combined with Art. 113 of the UN Charter, holds that obligations stemming from decisions of the UN Security Council are binding to UN member states and prevail over any other treaty obligations.

¹⁰⁴ ICC Statute, Art. 13(b).

have jurisdiction in the territory of a State where crimes under the jurisdiction of the ICC appear to have been committed even if that State is not party to the ICC Statute.

The Security Council has, in fact, done this on two occasions, with regard to the situations in Sudan¹⁰⁵ and in the Libyan Arab Jamahiriyah,¹⁰⁶ deciding that the authorities of those States shall “cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.” Despite a certain ambiguity in the text of the Resolutions, arguably there is cause to suggest that the obligation to cooperate with the ICC and the Prosecutor means, in practice, to “give operative effect to the [ICC] Statute with regard to that situation.”¹⁰⁷ This would in turn, at least theoretically, make the relevant provisions of the APIC binding on the relevant State. This position seems to have been confirmed by the ICC in the *Gaddafi and Al-Senussi* case,¹⁰⁸ which is discussed below.

3.2.3 The Scope of Privileges and Immunities for Defense Counsel and Staff in the Libyan Situation

In June 2012, four ICC staff members, including the defense counsel just appointed by the ICC to represent Saif Al-Islam Gaddafi, were imprisoned by militia for four weeks in Zintan, Libya.¹⁰⁹ They had been ordered by an ICC Pre-Trial Chamber to go to Zintan to meet with Mr. Gaddafi, to determine if he wished to be tried in The Hague as opposed to Libya, and, if so, to assist him in the selection of counsel of his own choosing. No formal arrangements were made with the Libyan government for this visit, such as a *note verbale* or Memorandum of Understanding.

During the course of what should have been a privileged attorney-client visit with Mr. Gaddafi, members of the Zintan Brigade repeatedly interrupted the visit between Mr. Gaddafi, counsel, and the ICC interpreter who was also sent by the ICC on this mission. Documents were

¹⁰⁵ UN Security Council, Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on March 31, 2005. UN Doc S/RES/1593.

¹⁰⁶ UN Security Council, Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on February 26, 2011, UN Doc S/RES/1970.

¹⁰⁷ Dapo Akande, “The effect of Security Council Resolutions and domestic proceedings on State obligations to cooperate with the ICC” (2012) 10 *Journal of International Criminal Law*, 310.

¹⁰⁸ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *Decision on the “Urgent Defence Request,”* Case No. ICC-01/11-01/11, March 1, 2013.

¹⁰⁹ Namely from June 7, 2012 until July 2, 2012. For more information see ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *Decision on the “Urgent Defence Request,”* para. 3.

seized and ultimately counsel and her interpreter were arrested. Thereafter, the other two members of the ICC Registry who were present were also arrested. The four were imprisoned in a military compound in Zintan for twenty-seven days and released only after intense negotiations with the ICC and a personal visit to Zintan by the then ICC President.

Libya is not a signatory to the ICC Statute and never signed the APIC. In any event, the four were held by the Zintan Brigade in the town of Zintan, located about 150 kilometers from Tripoli, in an area which was not under government control. Clearly, the privileges and immunities of these staff members were not honored. They were arrested, imprisoned, and interrogated, and, to the authors' knowledge, criminal charges are still pending against them in Zintan.

After her release, defense counsel for Mr. Gaddafi requested that the Pre-Trial Chamber order the privileged material seized from her in Libya to be immediately returned to the defense, and that all copies in Libya be destroyed.¹¹⁰ After noting that Article 48(4) of the Statute provides that counsel "shall be accorded such treatment as is necessary for the proper functioning of the Court," the Pre-Trial Chamber found that the inviolability of documents and materials related to the exercise of the functions of the defense constitutes an integral part of the treatment that shall be accorded to the defense pursuant to Article 48(4) of the Statute and in light of Article 67(1) of the Statute.¹¹¹ Taking into account the context of this case, namely a privileged attorney-client visit specifically ordered by the Pre-Trial Chamber, the Pre-Trial Chamber decided that, in the absence of a waiver of privileges and immunities by the appropriate organ of the Court, the principle of inviolability of the defense documents stood fully. Accordingly, Libya was required to return to counsel the originals of the materials seized in Zintan and destroy any copies thereof.¹¹²

This is something of a pyrrhic victory, of course, as there is no way to verify what Libya has done with the documents. What is clear is that the Zintan Brigade had no intention of abiding by any external analysis, legal or otherwise, as to the application of privileges and immunities to the four ICC court employees, including Mr. Gaddafi's counsel, sent by court order to offer him legal advice and assistance.

¹¹⁰ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the "Urgent Defence Request,"* para. 18.

¹¹¹ *Ibid.*, para. 25. ¹¹² *Ibid.*, para. 27.

In another relevant decision, the defense requested that Libya be referred to the Security Council for failing to cooperate with the ICC since, seven months after the Pre-Trial Chamber's decision for the Libyan authorities to arrange for a visit between Mr. Al-Senussi and his defense counsel, the visit had not been arranged.¹¹³ The Pre-Trial Chamber held that such a visit could be scheduled on the basis of an *ad hoc* arrangement which should include all practical arrangements necessary to ensure the unhindered entrance of the defense team and their belongings to Libya, as well as their appropriate treatment and protection during their stay on Libyan territory.¹¹⁴ The Pre-Trial Chamber pointedly noted that the provisions of the *ad hoc* arrangement should be appropriate to ensure the right of Mr. Al-Senussi to communicate freely with his counsel in confidence, in accordance with Article 67(l)(b) of the Statute.¹¹⁵ According to the Pre-Trial Chamber, this treatment should explicitly include, at a minimum, immunity from arrest and detention and from search of personal baggage for the individuals participating in the visit, inviolability of the defense documents, and non-interference with and guarantee of the privileged nature of communication between Mr. Al-Senussi and his defense during the meeting.¹¹⁶ Noting that such privileges and immunities are without prejudice to the obligation of those participating in the visit to respect the national laws of Libya, the Pre-Trial Chamber added that if Libya had reasonable grounds to believe that the defense of Mr. Al-Senussi violated Libyan law, Libya should not take any action that may impact on the necessary treatment that must be accorded to the defense under the Statute unless and until the Presidency of the Court had, upon prompt official request by Libya, waived the relevant immunity.¹¹⁷ These clarifications are important for attempts to ensure that national authorities do not unduly interfere with the work of the defense. Since the entry of this order, however, the ICC has found that Mr. Al-Senussi's case is not admissible before it.¹¹⁸ It is impossible to

¹¹³ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision Concerning a Privileged Visit to Abdullah Al-Senussi by His Defence*, Case No. ICC-01/11-01/11, September 26, 2013, paras. 11–12.

¹¹⁴ *Ibid.*, para. 16. ¹¹⁵ *Ibid.*, para. 15. ¹¹⁶ *Ibid.*, para. 16. ¹¹⁷ *Ibid.*

¹¹⁸ ICC, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Decision on the Admissibility of the Case against Abdullah Al-Senussi*, Case No. ICC-01/11-01/11-466-Red, October 11, 2013. The decision of the Pre-Trial Chamber I to declare the case against Mr. Al-Senussi inadmissible was later confirmed by the Appeals Chamber in *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the Appeal of Mr Abdullah Al-Senussi against the Decision of Pre-Trial Chamber I of 11 October 2013*

know, then, whether Mr. Al-Senussi's counsel would have been more successful in obtaining appropriate cooperation with the Libyan authorities in gaining access to his client and maintaining the applicable attorney–client privileges, and applicable privileges and immunities, than the disastrous failure which occurred in the Gaddafi situation.

3.2.4 Proceedings Relating to Offenses against the Administration of Justice: Does Functional Immunity Cover Investigations Prior to the Issuance of a Warrant of Arrest?

In the *Bemba et al.* case at the ICC,¹¹⁹ the defendants, Mr. Jean-Pierre Bemba Gombo and former members of his defense team, were charged with offenses against the administration of justice (Article 70 ICC Statute) in relation to alleged payments made to witnesses in order to influence them to provide false testimony in Mr. Bemba's trial before the ICC. Mr. Bemba's defense team contended that the prosecution's investigation pursuant to Article 70 of the ICC Statute had violated Mr. Bemba's right to a fair trial in his main case. In its request before the Trial Chamber, the defense asserted that the prosecution had, *inter alia*: (1) requested States to perform actions which violated defense privileges and immunities and (2) received privileged information concerning defense strategy and instructions from Mr. Bemba, internal work product, and *ex parte* information.¹²⁰

With regard to the question of immunities, Mr. Bemba's defense argued that the investigation had taken place while the defense immunities were fully in force. According to the defense, it did not matter that the immunities could have been waived. What mattered "was that [the immunities] were not waived at the time the Rule 70 investigative action occurred."¹²¹ The defense argued that these breaches, considered in their entirety, justified a stay of proceedings.¹²²

Entitled "Decision on the Admissibility of the Case against Abdullah Al-Senussi," Case No. ICC-01/11-01/11-565, July 24, 2014.

¹¹⁹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Case No. ICC-01/05-01/13.

¹²⁰ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Decision on "Defence Request for Relief for Abuse of Process,"* Case No. ICC-01/05-01/08, June 17, 2015, para. 12.

¹²¹ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Defence Request for Relief for Abuse of Process*, Doc. No. ICC-01/05-01/08-3217-Red2, January 30, 2015, para. 24.

¹²² ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Decision on "Defence Request for Relief for Abuse of Process,"* paras. 12–14.

The Chamber disagreed with the defense. It found that, while providing general submissions as to the relationship between (1) privileges and immunities and (2) the ability of the defense to carry out its work confidentially and securely, the defense had fallen short of demonstrating the existence or risk of prejudice to the fairness of Mr. Bemba's main case or justifying a request for the "exceptional" and "drastic" remedy of a stay of proceedings.¹²³ It is unfortunate that the Chamber's analysis concentrated specifically on the issue of whether the defense had met its – relatively heavy – burden of proof in order for the Chamber to pronounce a stay of proceedings as a remedy for abuse of process. Instead of providing a clear answer to the defense submissions, the Chamber suggested that the defense should have focused on proving the causal link between the alleged violations of immunity resulting from requests to States made by the prosecution on the one hand, and irreparable deficiencies in the presentation of the defense's evidence or loss of defense witnesses' confidence that their statements would remain confidential on the other.¹²⁴ While the Chamber had held in the past that the interception of telephone conversations between members of Mr. Bemba's defense team was not unlawful,¹²⁵ it never explained whether the functional immunity of defense counsel permitted such an investigation by State authorities in the first place without such immunities being previously waived by the presidency. This question is crucial as to *when* defense counsel immunities might be waived during Article 70 proceedings. It remains unanswered at the ICC.

In fact, it seems that the Single Judge did not even consider functional immunity to be an issue when he authorized the prosecutor to contact the relevant authorities of Belgium and the Netherlands with a view to collecting logs and recording telephone calls placed by and between members of Mr. Bemba's defense team.¹²⁶ The question of immunity of defense counsel arose only in connection with the issuance of warrants of arrest when the Single Judge decided to request that the presidency make a finding on whether to waive the immunities of counsel or follow

¹²³ *Ibid.*, para. 33. ¹²⁴ *Ibid.*

¹²⁵ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, Case No. ICC-01/05-01/13-749, November 11, 2014, para. 14.

¹²⁶ ICC, *Situation in the Central African Republic, Decision on the Prosecutor's "Request for Judicial Order to Obtain Evidence for Investigation under Article 70,"* Doc. No. ICC-01/05-52Red.2, February 3, 2014 (Original July 29, 2013).

the prosecution's interpretation claiming that since privileges and immunities apply only with respect to prosecution before national courts, no waiver was required for prosecutions under Article 70 of the ICC Statute.¹²⁷ The presidency accepted that, while no waiver was needed for arrest and potential detention for Article 70 offences, it was still under an obligation to waive the immunities of the lead defense counsel, and that the case manager enjoyed functional immunities pursuant to Article 30 of the Headquarters Agreement and Article 26 of the APIC.

But was the presidency required to waive immunities regarding not only detention on remand, but also phone interceptions and the seizure of defense work product and files? While Article 25(1)(a) of the Host State Agreement and Article 18(1)(a) of the APIC clearly afford defense counsel and persons assisting counsel with immunity from personal arrest or detention, Articles 25(1)(d) and (e) of the Host State Agreement and 18(1)(c) and (d) of the APIC also provide for the "inviolability of all papers, documents in whatever form and materials relating to the performance of their functions," and "for the purposes of communications in pursuance of their functions as counsel, the right to receive and send papers and documents in whatever form."

In *Bemba*, a teleological interpretation of the relevant provisions would appear to preclude national authorities from intercepting privileged phone and e-mail conversations of counsel without a previous waiver of the relevant immunities from the ICC presidency. At a minimum, the Single Judge should have requested such a waiver, based on solid grounds, before authorizing the prosecution to request judicial assistance from State authorities, as it did.

It is also arguable that the evidence collected during the time the immunities of counsel were in force should be deemed inadmissible now for the purpose of Article 70 proceedings. Rules of functional immunity, unlike the rules regarding attorney–client privilege, operate as a bar to adjudicatory jurisdiction and aim at avoiding State interference such as the wire-tapping and seizure of computers and documents that occurred in *Bemba*.

Unfortunately, Trial Chamber III at the ICC foreclosed the possibility of review of these critical issues by the Appeals Chamber prior to the Rule 70 trial when, on July 24, 2015, it rejected the defense's request for

¹²⁷ Internal Memorandum from Cuno Tarfusser to President Song and Vice President Monageng, "Request to waive immunities of counsel and to be excused from the Presidency in such decision," Doc. No. ICC-01/05-01/08-3001-AnxI, November 19, 2013.

leave to appeal against the *Decision on the Abuse of Process* of June 17, 2015.¹²⁸ On October 19, 2016, Trial Chamber VII found that Messrs Bemba, Kilolo, and Mangenda were guilty, as co-perpetrators, for having jointly committed the offences of intentionally corruptly influencing fourteen defense witnesses, and presenting their false evidence to the court.¹²⁹

4 Conclusion

As the cases before the *ad hoc* tribunals and the ICC show, it is very important for there to be clarity over the scope of immunity for defense counsel and staff from criminal prosecution before domestic courts for acts carried out in the course of representing a person before an international court or tribunal. Following the events of June–July 2012 in Libya, the Assembly of States Parties to the ICC noted the need to raise awareness of the applicable obligations of States Parties and other States with regard to privileges and immunities for the ICC’s staff members.¹³⁰ As the cases brought before the various ICs show, there are several aspects of the work of the defense that can be directly and negatively affected by the actions of States, organs of the ICs, or non-State actors. Some of the most important aspects are the personal security and immunity of defense counsel and staff from criminal prosecution, respect for the privileged nature of defense documents and materials and the confidentiality of counsel communications with the client, and concerns over the physical safety of defense staff in conflict areas.

A principled approach to immunity that provides functional as well as personal immunity for defense counsel and staff while on proper case-related missions, combined with a principled and consistent approach to waiver thereof if necessary, is essential to enable international criminal courts and tribunals to deliver justice in a manner that not only takes due account of state interests but is also fair and fully respects the rights

¹²⁸ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo, Decision on “Defence Request for Leave to Appeal the ‘Decision on Defence Request for Relief for Abuse of Process,’”* Case No. ICC-01/05–01/08–3273, July 24, 2015.

¹²⁹ See ICC Press Release, “Bemba et al. case: ICC Trial Chamber VII finds five accused guilty of offences against the administration of justice,” ICC-CPI-20161019-PR1245, October 19, 2016.

¹³⁰ See Assembly of State Parties, “Report of the Bureau on cooperation,” ICC-ASP/11/28, October 23, 2012, paras. 13–16 and Annex III.

of the accused.¹³¹ The ICTR finding in the *Erlinder* case, excluding immunity of defense counsel for materials written in a *private* or *academic* capacity, is quite problematic, since many persons practicing before the ICs are also academics or write scholarly or other articles for the benefit of the public. The potential threat of criminal charges could serve to prevent defense counsel from writing about cases in which they were or are involved or from airing and debating controversial factual and legal issues. No proper system of criminal justice can survive if it stands for or enforces policies and rules which undermine freedom of speech as well as the principles of equality of arms, fairness, and transparency of the court and its proceedings.

¹³¹ Krit Zeegers, "Defence counsel immunity at the ad hoc tribunals," (2011) 11 *International Criminal Law Review*, 890.