The UN and the ICC: The Immunity of the UN and Its Officials*

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In Memoriam

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1929–2002

Keywords: immunity; International Criminal Court; United Nations.

Abstract. The Relationship Agreement between the United Nations and the International Criminal Court should contain provisions governing situations where requests from the Court might impinge on the privileges and immunities of the UN under its Charter and Privileges and Immunities Convention. In particular, the Court might need access to documents in the UN's archives, might require the testimony of persons serving, or having served, the UN in various capacities and might even consider some such persons as potential defendants; in addition, the inclusion of such provisions might make it advisable to include an effective disputes resolution clause in the Agreement.

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* This study was based on the version of the draft UN/International Criminal Court ('ICC') Relationship Agreement that emerged from the 7th session of the ICC Preparatory Commission (*infra* note 5). Since then the Commission, at its 8th session adopted, on 5 October (*see* UN Doc. PCNICC/2001/L.3/Rev.1, para. 13), a draft of the Relationship Agreement that it will submit to the Assembly of States Parties at its first session (UN Doc. PCNICC/2001/L.4/Add.1, 4 October 2001). That draft is, in respect of the provisions considered herein, essentially unchanged from the draft on which this study is based, except that former Arts. 8, 11, and 19*bis* have become respectively Arts. 19, 20, and 22, all with only very minor editorial changes; furthermore, the two additional paragraphs proposed for former Art. 8 in the Annex to the earlier draft have become paras. 1 and 2 of new Art. 16, the former with substantial changes. The new draft will not be dealt with further by the Preparatory Commission, but will be considered by the Assembly of States Parties, and will of course have to be negotiated with the United Nations; at those stages the proposals made herein might still be taken into account.

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14 Leiden Journal of International Law 867–885 (2001)
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https://doi.org/10.1017/S0922156501000413 Published online by Cambridge University Press

1. INTRODUCTION

One of the important questions to be dealt with in the proposed Relationship Agreement to be concluded between the United Nations and the International Criminal Court (hereinafter 'ICC' or 'the Court') in accordance with Article 2 of the Rome Statute of the Court[1] – a question that did not need to be addressed in any such agreements concluded between the United Nations with other organizations in its system – is how the United Nations should react to requests by the Court that may impinge on the privileges and immunities of the United Nations itself or of persons performing functions on its behalf (herein sometimes referred to as 'officials').

There are basically two contexts in which that question could arise: (i) if the Court seeks information about activities of the United Nations itself or of any of its officials or known to such officials by reason of their work for the United Nations; (ii) if the Court seeks to bring a proceeding against a UN official by reason of any activity performed by him on behalf of the United Nations. The latest draft of the UN/ICC Relationship Agreement under consideration by the ICC Preparatory Commission[2] deals with the second of these situations in Article 8, and with the first in a proposed addendum to that Article set out in the Annex to the draft text. These provisions are worded as follows:

> Article 8
> Rules concerning United Nations privileges and immunities
>
> If the Court seeks to exercise its jurisdiction over a person who is alleged to be criminally responsible for a crime within the jurisdiction of the Court and if, in the circumstances, such person enjoys, according to relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the Organization, the United Nations undertakes to cooperate fully with the Court and to take all necessary measures in order to allow the Court to exercise its jurisdiction, in particular by waiving any such privileges and immunities.
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> Proposals for article 8
>
> Add the following new paragraph 2:
>
> If the Court requests the testimony of an official of the United Nations or one of its programmes, funds or agencies, the Organization undertakes to cooperate with

1. Adopted in Rome on 17 July 1998 and set out *in* UN Doc. A/Conf.183/9* and reprinted *in* 37 ILM 999 (1998). A version that incorporates agreed corrections circulated by the United Nations on 25 September 1998 and 18 May 1999 appears *in* UN Doc. PCNICC/1999/INF/3 (17 August 1999). Subsequent sets of corrections were circulated on 15 October 1999, 24 March 2000, and 15 November 2000, which are set out respectively *in* Depositary Notifications C.N.1075.1999.TREATIES-28, C.N.266.2000.TREATIES-8, and C.N.17.2001.-TREATIES-1. At present, there is no document that sets out a fully corrected text.
2. UN Doc. PCNICC/2001/WGICC-UN/RT.1/Rev.1 (8 March 2001).

https://doi.org/10.1017/S0922156501000413 Published online by Cambridge University Press

> the Court and, if necessary, will waive that person's obligation of confidentiality. The Secretary-General may request the Court to take all necessary measures to ensure the person's protection, guarantee the confidentiality of any information and documents which he or she may transmit to the Court, and safeguard the security of any operation or activity of the United Nations concerning which the person might testify before the Court.
>
> Add the following new paragraph 3:
>
> The Secretary-General may be authorized by the Court to appoint a representative to assist any official of the United Nations who is summoned to appear as a witness in proceedings conducted by the Court.

This study will consider, in turn, both these situations, and also a consequential change that might be desirable in respect of the settlement of disputes between the organizations.

2. The Bases of the Immunities of the UN and Its Officials

The first point to be determined is what immunities of the United Nations is the Court required to recognize, or to put it another way, what immunities may the United Nations assert *vis-à-vis* the Court. The origin of the immunities of the UN and of those associated with it, is Article 105 of its Charter, which in paragraphs 1 and 2 provides that:

> 1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

Though by its terms, and because a treaty can bind only the parties to it,[3] these provisions bind only UN members, the International Court of Justice ('ICJ') determined in the *Reparation for Injuries* case[4] that the United Nations has objective legal personality, opposable also *vis-à-vis* non-member states, and presumably this holding also applies to the necessary immunities of the organization, and that these immunities must be respected not only by member and non-member states but also by other inter-governmental organizations ('IGOs').

Article 105(3) of the Charter foresees that the precise terms of these

3. *See* Arts. 34 of both the 1969 Vienna Convention on the Law of Treaties and of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; *see*, however, Arts. 38 of both these Conventions (possibility of a treaty rule becoming one of customary international law).
4. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 174.

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privileges and immunities would be set out in a convention proposed by the General Assembly to UN members, and the Assembly has done so by adopting the Convention on the Privileges and Immunities of the United Nations ('CPIUN').[5] Though not all members of the United Nations are parties to the Convention, and of course non-members cannot be, the provisions of CPIUN are recognized as constituting an authoritative interpretation of Article 105(1) as to what privileges and immunities the organization requires in order to be able to fulfil its purposes.[6]

The ICC of course is not a state. However, aside from its establishment under the aegis of the United Nations, the parties to its Statute will almost exclusively be UN members (with the exception of Switzerland), bound by Charter Article 103 to give priority to their Charter obligations. To the extent such states (including non-members) are required to recognize the immunities of the United Nations, any creation of these states is presumably also bound to do so – especially as nothing in the Rome Statute suggests otherwise.

It therefore seems appropriate, at least in the first instance, to consider the immunities of the United Nations *vis-à-vis* the Court as those provided for in CPIUN.

The privileges and immunities of the United Nations itself, which are summarily set out in Charter Article 105.1, are detailed in CPIUN Articles II and III.

With respect to persons associated with the United Nations, there are various provisions, some of which require more detailed analysis:

(a) The privileges and immunities of the representatives of member states are summarily set out in Charter Article 105(2), and in detail in CPIUN Article IV.
(b) The privileges and immunities of "officials" of the organization are alsosummarily set out in Charter Article 105(2) and appear to be detailed in CPIUN Article V. However, it is by no means clear that the quoted term is used in precisely the same sense in both these provisions. In this connection it should be noted that:
    (i) The term "officials," has been defined for the purposes of CPIUN by the General Assembly,[7] pursuant to CPIUN Section 17, as generally consisting only of the members of the UN Secretariat (with insubstantial exceptions)[8] and of a few other

5. Adopted by General Assembly Res. 22 A (I), UN Doc. A/43.Ann. I (13 February 1946), 1 UNTS 15 (corrigendum *in* 90 UNTS 327).
6. M. Gerster, *Study of Article 105*, *in* B. Simma (Ed.), The Charter of the United Nations: A Commentary 1138, at para. 2 (1994); P. Cahier, *Study of Article 105*, *in* J.-P. Cot & A. Pellet, La Charte des Nations Unies: Commentaire article par article, Section I, 1398 (1985), citing a statement of the UN Legal Counsel made in the Sixth Committee on 6 December 1967, 1967 UN Juridical Yearbook 311–313, at para. 11.
7. By General Assembly Res. 76 (I) (7 December 1946).
8. Gerster, *supra* note 6, at 1142, para. 23.

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persons serving under particular General Assembly appointments (*e.g.*, Chairman of the Advisory Committee on Administrative and Budgetary Questions ('ACABQ')).

(ii) CPIUN Article VI makes provision for "Experts on Mission for the United Nations," a category not referred to specifically anywhere in the Charter; as pointed out by the ICJ in the *Mazilu* case,[9] this category encompasses a wide variety of persons (including participants in at least some peace-keeping forces) to whom the "United Nations has had occasion to entrust missions" (*i.e.*, assignments), as long as they are neither representatives to nor officials of the organization.

(iii) There is no provision at all in the CPIUN concerning members of UN peace-keeping forces ('Blue Helmets'), nor are they referred to specifically anywhere in the Charter.[10]

There are at least two different conclusions that can be drawn from the above:

(1) That the term "officials" is used in the same sense in both the Charter and in CPIUN; in that event, "experts on mission" are a category not dealt with or protected by the Charter, but only by CPIUN, and members of UN forces are not covered by either instrument.

(2) That the term "officials" in the Charter is broader than that in the CPIUN and encompasses all persons who perform functions for the organization, including members of the Secretariat, certain other appointees of the General Assembly, experts on mission, and probably also members of UN forces.

Considering the evidently broad purpose of Charter Article 105(2), that is to ensure that all persons connected with the United Nations should be able to carry out their functions independently of outside pressures, it would seem that the second alternative presented above offers the better interpretation. To this should be added the consideration that it seems unlikely that the drafters of the Charter would have had in mind the precise

9. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 ICJ Rep. 177.

10. UN Peace-keeping Forces of the type that the organization has been deploying almost since its earliest days are not the types of armed forces foreseen by Charter Art. 43, as no agreements as required by that provision have ever been concluded. Rather they consist of contingents voluntarily provided by member states in response to requests by the Secretary-General and generally pursuant to agreements along the lines of the Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations (UN Doc. A/46/185 (23 May 1991)), serving under a commander who generally is a UN staff member and directly answerable to the Secretary-General. Other members of a force are not UN staff members, but remain officers, non-commissioned officers, and other ranks of their respective national states; for most purposes, the members of such contingents serve under the authority of national officers, though their substantive assignments come from the United Nations.

https://doi.org/10.1017/S0922156501000413 Published online by Cambridge University Press

narrow interpretation of the term "officials" that the General Assembly later used in drafting the CPIUN and in implementing Section 17 thereof. Although it could be argued that the term "officials" (French: '*fonctionnaires*') normally refers to civil servants, should the United Nations establish, as has been proposed, its own military force, its members would presumably be staff members covered by CPIUN Article V.

This still leaves open the question of precisely what the privileges and immunities of members of UN forces are, as these are not referred to in the CPIUN. One possibility is to consider that these are covered by CPIUN Article VI as experts on mission and little in that instrument would necessarily negate that interpretation; however, in fact, this appears never yet to have been used. Instead, force members are afforded immunity from at least the criminal jurisdiction of the host state(s) of the force by means of Status of Forces Agreements ('SOFAS') concluded with the United Nations;[11] any criminal jurisdiction is to be exercised by the state to whose armed forces they belong and who made their services available to the United Nations, usually pursuant to agreements concluded with the organization;[12] indeed, the Secretary-General's Bulletin about the application of the Humanitarian Rules of Warfare to UN Forces provides specifically that accusations of war crimes are to be tried by the troop supplying state.[13] However, should the situation arise that the immunity of a member of a UN force may have to be asserted in a situation not covered by any of these agreements (for example, *vis-à-vis* a transit state, or the national state of the soldier), then the argument accepted in the previous paragraph would allow the United Nations to rely directly on Charter Article 105(2), which so far has rarely if ever occurred.

The immunities that are granted to UN officials and to experts on mission are basically functional, that is they apply to "words spoken and written and to […] acts performed by them in their official capacity;"[14] this immunity continues to extend even after the person is no longer in UN service.[15] Certain high officials, as well as experts, also enjoy immunities like those of diplomats,[16] but these apply only while the person enjoys the specified status. In any event, neither type of immunity appertains directly to the official concerned but are essentially those of the organization, and only the organization can assert or waive them (*see* Section 3 below).

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11. *See* Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries, UN Doc. A/45/594 (9 October 1990).
12. *See supra* note 10.
13. Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13 (6 August 1999), Sec. 4, reproduced *in* 38 ILM 1656 (1999).
14. CPIUN, Sec. 18(a); *see also* CPIUN, Sec. 22(b).
15. This is explicitly stated in respect of experts in CPIUN, Sec. 22(b), but implicitly applies also to officials since the immunity is related solely to the fact that at the time the words in question were uttered or the acts performed the person was acting in an official capacity, and not to the person's status at the time the immunity is asserted.
16. CPIUN, Secs. 19 and 22(a).

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As members of UN forces are not covered by any general instrument that directly specifies their immunities, except for Charter Article 105(2), there is no explicit statement as to the types of immunities they enjoy and the conditions therefor. However, it is reasonable, and consistent with the Charter provision, to assert that these immunities too are functional, that they endure, and that it is for the United Nations to assert and to waive them.

3. Assertion and Waiver of Immunities

CPIUN Sections 20 and 23 provide, respectively for UN officials and experts on mission, that their privileges and immunities are granted to them for the interests of the United Nations and not for their personal benefit, and that the Secretary-General has the right and duty to waive these immunities "in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."

As the immunities in question are functional, it is first of all necessary to determine whether the words or the acts in question were related to the person's official capacity; if this is not so, then no immunity applies and the organization may not assert any. Though not explicitly stated in CPIUN, this determination is to be made by the Secretary-General, and the ICJ recently affirmed this authority, in respect of experts on mission, in the *Cumaraswamy* case.[17] It should, however, be noted that in effect the Secretary-General's determination can be challenged in two ways: (i) judicially, by the state concerned (*i.e.*, the one that denies the applicability of the immunity) insisting on securing a binding ICJ advisory opinion pursuant to the second sentence of CPIUN Section 30; (ii) politically, by the General Assembly and perhaps by a competent Council, which might direct the Secretary-General to alter his position and in any event could refuse to support his position if a dispute with the state concerned is to be submitted to the ICJ (as only such a political organ can address the necessary query to the Court).

Once it is determined that immunity applies, the next question is whether it should be waived if so requested by the state concerned. That decision is explicitly assigned to the Secretary-General[18] by the provisions quoted in the first paragraph above. According to these provisions, he is to weigh the importance of not impeding the course of justice and the interests of

17. The Court held that any finding by the Secretary-General concerning immunity "creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts," Difference relating to the Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights, Advisory Opinion, 1999 ICJ Rep. 62, at 87, para. 61.
18. Except in respect of the immunity of the Secretary-General himself, which can only be waived by the Security Council (CPIUN, Sec. 20, final sentence).

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the organization. Once more it would seem that such a decision could be challenged in the ways described in the previous paragraph – though no case has so far arisen in which this has been done.

Although, for the reasons explained in the previous section, there are no explicit provisions relating to the UN immunity of members of peacekeeping forces, if it is considered that they are covered by Charter Article 105(2), presumably the same principles would apply: first the Secretary-General would have to determine whether the acts in respect of which the question of immunity arises were ones performed on behalf of the organization; if so, he must determine whether such immunity should be waived in a given case.

Though CPIUN provides that it is the Secretary-General who makes individual decisions regarding the assertion and waiver of immunities, it would seem that the General Assembly, the author of the CPIUN (pursuant to Charter Article 105(3)), could provide for general assertions or waivers of immunity *vis-à-vis* the Court, for example by means of the proposed UN/ICC Relationship Agreement. The extent to which it might consider doing so is explored in the following sections.

In deciding to what extent the United Nations should assert or waive "immunities" in respect to the Court, it should first of all be realized that the provisions of the Charter as well as those of the CPIUN can be applied only by analogy, as these provision apply explicitly only in respect of state members of the organization, and certainly not in respect of another intergovernmental organization. These states have, by the Charter and CPIUN, agreed to grant the United Nations certain immunities from their own courts and other national organs, under specified conditions; the Court is not in a position to assert any jurisdiction over the United Nations, and therefore cannot sensibly grant it any immunities.

To determine what the attitude of the organization should be in respect of the Court if the latter makes requests that are analogous to those that a state might make in connection with criminal proceedings, it may be instructive to take into account how the Secretary-General has dealt with requests that have been made by the two Tribunals established by the Security Council in respect of former Yugoslavia and of Rwanda.[19] After some deliberation by the Office of Legal Affairs, the UN Secretary-General chose to consider requests emanating from these Tribunals (which of course are subsidiary organs of the UN) as if they were issued from national courts of a state bound by the CPIUN. He did so in order to emphasize the complete judicial independence of these Tribunals. Therefore in considering such requests he would take into account on the one hand the desirability of co-operation so as not to impede the course of

19. International Criminal Tribunal for former Yugoslavia ('ICTY'): Security Council Res. 827, UN Doc. S/RES/827 (25 May 1993), reproduced *in* 32 ILM 1203 (1993); International Criminal Tribunal for Rwanda ('ICTR'): Security Council Res. 955, UN Doc. S/RES/955 (8 November 1994), reproduced *in* 33 ILM 1598 (1994).

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justice as administered by these bodies, balanced against the interests of the UN, such as: the question of the safety of potential witnesses, especially if continuing to serve in an area controlled by associates of persons accused in a tribunal (sometimes an important consideration in the Balkans); the security and effectiveness of the UN mission; the confidentiality of the internal affairs of the UN; and practical considerations such as the difficulty in complying with demands for enormous quantities of documentation.[20] Though the details of some of these decisions will be considered in subsequent sections, in general it may be said that after some initial hesitation about providing unquestioning compliance with Tribunal requests (including requests made directly by the Prosecutor or by defense counsel) the Secretary-General has concluded that in practically all cases full compliance is the best course.[21]

In considering how far the United Nations should co-operate with the Court, account should first of all be taken of the fact that the Court was created under the aegis of the United Nations and that the General Assembly and the Secretary-General have repeatedly called on states to sign and ratify the Rome Statute. The organization's concern for the enforcement of compliance with international humanitarian law also appears from its establishment of the International Criminal Tribunals for former Yugoslavia and Rwanda,[22] a Special Court for Sierra Leone[23] and the East Timor Panels with Exclusive Jurisdiction over Serious Criminal Offences,[24] and the establishment of extraordinary chambers in courts of Cambodia.[25] As to its own forces, the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law[26] Section 3 requires that in the SOFASs[27] the organization "undertakes to ensure that the force shall conduct its operations with full respect for the

20. *See* Part VI, "Cooperation with International Tribunals" of the study by P. Szasz of *UN Forces and International Humanitarian Law*, *in* M.N. Schmitt (Ed.), International Law Across the Spectrum: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday, International Law Studies – US Naval War College, Blue Book Series, Vol. 75, Chapter XX, 507–537 (2000).
21. These practices have so far not been published, but they are not considered as confidential. They are known to one of the authors (Szasz) from his own work in the Office of Legal Affairs and from his recent conversations with former colleagues in the Office.
22. *See supra* note 19.
23. Security Council Res. 1315, UN Doc. S/RES/1315 (14 August 2000). In this Resolution the Council reaffirmed

> the importance of compliance with international humanitarian law, and [that] persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.

24. UN Transitional Administration in East Timor ('UNTAET') Reg. No. 2000/15 (6 June 2000).
25. UN Press Release SG/SM/7481 (6 July 2000).
26. *See supra* note 13.
27. *See supra* note 11.

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principles and rules of the general conventions applicable to the conduct of military personnel," that this obligation is to apply even in the absence of a SOFAS, and that the United Nations will ensure that the members of the force are fully acquainted with these principles and rules; the agreements with troop-supplying states also provides that the participants in peace-keeping operations "shall observe and respect the principles and spirit" of these instruments.[28] Consequently, full and ready compliance with demands made by the Court appears to be completely consistent with the general posture of the United Nations.

4. Immunity of Archives and Documents

CPIUN Section 4 provides that:

> The archives of the United Nations, and generally all documents belonging to it or held by it, shall be inviolable wherever located.

Consequently, if the Court requires access to such archives or documents[29] it would have to secure the agreement of the United Nations. The Relationship Agreement would appear to be a suitable place to establish the general consent of the United Nations to granting such access, though it would have to reserve situations in which it, *i.e.*, the Secretary-General, considers that to grant such access would be inimical to the interest of the organization. Such situation could arise, for example, where information had been supplied to the organization in confidence and the breach of such confidence would be considered as seriously contrary to the UN's interests; other situations might involve activities of the UN itself, which it considers (wisely or otherwise) should not be revealed.[30]

In this connection it may also be well to consider Article 73 of the Rome Statute, which provides that state parties to that instrument which are requested to provide documents or information to the Court that was provided to the state in confidence by, *inter alia*, an inter-governmental organization, are to secure the consent of that organization before complying with such request. The UN/ICC Relationship Agreement could provide, subject to the above-suggested reservation, that the United Nations will consent to the release of documents or information if so requested by a state pursuant to Article 73 of the Rome Statute.

This would be in accord with current UN practice *vis-à-vis* its own

28. *See supra* note 10, Art. X(28).
29. As the Court might pursuant to Arts. 15(2), 54(3), 87(6), or 93(9)(b) of its Statute.
30. Until recently, the United Nations, like almost all official institutions, was particularly wary about releasing unfavourable information. However, Secretary-General Annan appears to have changed that culture by releasing the considerably self-critical reports concerning the Srebrenica and Rwanda massacres (respectively UN Docs. A/54/549 and S/1999/1257), including his own rôle as head of the Department of Peace-Keeping Operations.

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Tribunals. After initially taking a cautious stance in responding to requests for documentation, the Secretariat now normally opens its files to examination by representatives of the Prosecutor or by defense counsel, provided that they first indicate with some precision the materials sought (so as to avoid the need to give access to excessively voluminous files) and provided that any materials to be copied and taken away are cursorily examined to see if there is any objection to their disclosure. In some instances materials made available to the Prosecutor has been provided subject to Rule 70(B) of the ICTY Rules of Procedure and Evidence, which requires her to use such data only for limited purposes and not to disclose them without further approval from the United Nations.

A clause to accomplish the above-stated objectives might read along the following lines and could be added preceding the present draft Article 11:[31]

> The United Nations agrees to make available to the Court, at its request, materials in the United Nations archives, as well as documents and other information available to it, and to consent to the release of documents and information it had provided in confidence to a State Party to the Statute, provided that if the Secretary-General considers that the provision or release to the Court of such materials, documents or information would *be prejudicial to the interests of the United Nations*, these shall not be provided or released, or only be provided or released under terms and conditions agreed between the Secretary-General and the President of the Court.[32]

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31. Art. 11 of the draft Relationship Agreement reads:

> Protection of confidentiality
> If the United Nations is requested by the Court to provide information or documentation in its custody, possession or control which was disclosed to it in confidence by a State or an intergovernmental or international organization, the United Nations shall seek the consent of the originator to disclose that information or documentation. If the originator is a State Party to the Statute and the United Nations fails to obtain its consent to disclosure within a reasonable period of time, the United Nations shall inform the Court accordingly and the issue of disclosure shall be resolved between the State Party concerned and the Court in accordance with the Statute. If the originator is not a State Party to the Statute and refuses to consent to disclosure, the United Nations shall inform the Court that it is unable to provide the requested information or documentation because of a pre-existing obligation of confidentiality to the originator.

> This article provides for situations in which the UN is requested by the Court to provide information that has been supplied to the UN in confidence, and largely corresponds to Art. 73 of the Rome Statute. However, it does not – nor does any other provision of the draft Agreement – deal with the more usual situation of the Court simply requiring information or documentation from the UN archives that is not subject to any external confidentiality requirement.

32. The italicized words are adapted from CPIUN, Secs. 20 and 23.

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5. Immunity of UN Officials as Witnesses

Information of interest to the Court may be known to various categories of persons associated with the United Nations (aside from representatives of states): officials, experts on mission and military personnel constituting part of a UN force, as well as persons having had any such status. To some extent different provisions apply to each of these categories.

Two questions can arise in respect of such information: under what conditions can the United Nations assert its immunity to *prevent* members of any of these categories from revealing information that essentially "belongs" to the organization; and under what conditions can the United Nations *require* a member of these categories to provide such information requested by the Court.

With respect to almost all "officials" (within the meaning of CPIUN Section 17), UN Staff Regulation 1.5 requires that "staff members" (*i.e.*, all members of the Secretariat except for the Secretary-General)

> shall not communicate to any person any information known to them by reason of their official position which has not been made public, except in the course of their duties or by authorization of the Secretary-General […]. These obligations shall not cease upon separation from the Secretariat.

The combination of the immunity provided by CPIUN Section 18(a) (quoted in Section 2 above) and Staff Regulation 1.5 means that UN officials, as well as former officials, can be forbidden by the UN from revealing confidential information, whether of their own volition or on any official demand – including, for the reasons stated above, by the Court. On the other hand, by releasing an official or former official from the duty of confidentiality this would enable (but not compel) him to reveal such information. Finally, the United Nations can require an official, but not a former one, to co-operate with the Court as part of his official duties – *i.e.*, subject to penalties, including dismissal, if the official refuses to do so.[33]

Substantially the same considerations apply in respect of most experts on mission, as well as to former experts. Most experts conclude contractual arrangements with the United Nations which, *inter alia*, contain similar restrictions concerning confidential information as are set out in

33. It should be recognized that in spite of the clear obligation of officials and former officials to maintain confidentiality, there is very little that the United Nations can actually do to prevent them from violating this pledge. In practice, all it can do to a serving official is to dismiss him, and not even that penalty is available in respect of a former official. Only if revealing the information would also violate the laws of some state could the United Nations perhaps facilitate further punishment by waiving any immunity that the (ex-)official might have. *See* P. Szasz, *Disciplining International Officials*, *in* Organisation for the Prohibition of Chemical Weapons (Ed.), Report to the International Symposium: Cooperation and Legal Assistance for Effective Implementation of International Agreements, The Hague, 7–9 February 2001 (to be published).

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the Staff Regulations. Consequently, and also taking into account CPIUN Section 22, such experts and former experts can be restrained by the United Nations from revealing confidential information, and can also be released from such restraints. Whether they can be required by the organization to testify depends on their contractual relations.

For the reasons indicated in Section 2 above, the situation in respect of military personnel made available by a state for service with a UN force is not quite as clear, though probably not fundamentally different. Though these persons substantially remain under the command and control of their national states, the United Nations must be able to formally forbid them from revealing confidential information that came to their knowledge by reason of their service in a UN force, but even if the organization should waive any restriction such personnel would still be subject to their national authorities as to whether they can co-operate with the Court; any requirement by the UN that such personnel testify could only be enforced by such national authorities. Of course if the personnel in question are provided by a state party to the Rome Statute, then the provisions of Part IX of that instrument would require that state to co-operate with the Court.

Again, it is instructive to consider the experience of the United Nations in responding to requests that various types of UN personnel provide information in connection with proceedings in its two Tribunals or to testify before them. After initially taking a somewhat cautious stand (*e.g.*, in one instance specifying precisely what subjects a former UN official could address as a witness), the Secretary-General now allows such persons to co-operate freely with the Tribunals.[34] So far, the question of requiring an unwilling official to testify has not actually arisen, but it would be consistent with the Secretariat's general posture if such a requirement were imposed, though taking into account any valid objections that the official might raise.

In light of the above, a provision along the lines of that appearing, in the Annex to the latest draft text of the Relationship Agreement, as a proposed new paragraph 2 of Article 8, would appear substantially satisfactory. However, it might be useful to extend that proposed clause to apply not only to "an official of the United Nations" but also to former officials, to experts on mission and to former experts, as well as to military

34. It should be noted that the High Commissioner for Refugees ('UNHCR'), even though part of the UN, has taken a considerably more restrictive position concerning the making available of witnesses to the Tribunals, on the ground that if it becomes known that observations made by UNHCR staff might be reported in official proceedings, their future access might be restricted; this is similar to the position taken by the International Committee for the Red Cross ('ICRC'). However, the UNHCR would also be bound by any agreement concluded between the UN and the Court.

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personnel serving in UN forces.[35] Furthermore, the UN might undertake to require at least current officials to provide testimony as required.

The above-mentioned Annex also contains a proposed new paragraph 3 that would allow the Secretary-General to appoint a representative to assist any UN official who is summoned by the Court as a witness. This proposal appears to reflect the actual experience of the organization in respect of its Tribunals, where it was found useful, at least as a precaution, to have former officials who had served as commanders of respectively the UN Assistance Mission for Rwanda ('UNAMIR') (General Dallaire of Canada) and of the Bosnian part of the UN Protection Force ('UNPROFOR') in former Yugoslavia (General Morillon of France) to be accompanied by members of the Office of Legal Affairs in their appearances before, respectively, ICTR[36] and ICTY.[37] Though it is not likely that such a provision would be used with any frequency and though the Court could of course allow a UN representative to function even without such a provision in the Relationship Agreement, it still appears that the proposed provision would be of some utility, if only to emphasize the special status of the United Nations.

6. Immunity of UN Officials as Defendants

The situation could of course arise of a UN official, expert, or force member, or a former member of any of these categories, being accused of some of the crimes within the jurisdiction of the Court. This possibility is addressed in Article 8 of the latest draft of the UN/ICC Relationship Agreement, which would have the United Nations waive any privileges and immunities enjoyed by such person.

As pointed out in Section 2 above, the privileges and immunities enjoyed by most persons associated with the United Nations are purely functional, that is they relate to the performance of official duties. Presumably in most instances any accusations of crimes within the jurisdiction of the Court would not relate in any way to official functions, and thus the question of immunities would not arise. The Secretary-General would merely indicate that the acts in question are not covered by any UN-related immunities, and thus there is no obstacle to the Court exercising its jurisdiction. Only if the official happened to be in a category of

35. One convenient way of doing so would be to use the formulation that appears in proposed Art. 8 of the same draft, which refers to persons who enjoy "according to relevant rules of international law, any privileges and immunities as are necessary for the independent exercise of his or her work for the Organization."
36. *See* Prosecutor *v.* Jean-Paul Akayesu, Case No. ICTR-96-4-T, Order granting leave for Amicus Curiae to appear, Decision of 12 February 1998.
37. *See* Le Procureur *c/* Tihomir Blaškić, Affaire No. IT-95-14-T, Décision de la Chambre de première instance I aux fins de mesures de protection en faveur du Général Morillon, temoin de la Chambre, 12 May 1999.

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those enjoying quasi-diplomatic immunity[38] or immunity from arrest[39] would it be necessary for the organization to take some action: either to waive any such immunity or to deprive the person of the status on which such immunity is based.

Nevertheless, it is possible to conceive of some situations in which performance of official functions could lead to an accusation of a serious crime. For example, if as a result of a dispute between a government and officials of a UN organ supplying food (*e.g.*, UN World Food Programme ('WFP'), UNHCR, UN Children's Fund ('UNICEF')) the latter decide that the conditions for providing such assistance do not exist and consequently cut off the food supply, and starvation or serious malnutrition allegedly results, there might be accusations of genocide by deliberately inflicting conditions of life calculated to bring about physical destruction.[40] Or, a member of a UN force fires on buildings from which hostile fire has emanated and as a result kills some civilians.[41] Although, as indicated in the two previous notes, good defenses against such an accusation may exist, these might have to be established at a trial before the Court and for this purpose a waiver of immunity may be necessary.

It has been suggested that Article 27 of the Rome Statute in effect eliminates the need for any waiver by the United Nations, because in paragraph 1 it provides that that Statute applies equally to all persons without any distinction based on official capacity, and in paragraph 2 that immunities which may attach to the official capacity of a person shall not bar the Court from exercising its jurisdiction over such a person. The first question to be raised in connection with Article 27 is whether it was meant to apply to officials of inter-governmental organizations. The long list of officials recited in paragraph 1 includes only those of national governments, and nothing in that article suggests its application to international ones.[42] It should also be noted that the United Nations is of course not a party to the ICC Statute and thus in the normal course is not bound by it, though it could be asserted that the rule embodied by Article 27 reflects customary international law.[43] In any event, Charter Article 103 would seem to prevent the application, in respect of the United Nations, of any

38. Certain high officials, pursuant to CPIUN, Sec. 19.
39. Experts on mission, pursuant to CPIUN, Sec. 22(a).
40. ICC Statute, Art. 6(c). It should be noted that in the circumstances described it would appear not to be possible to establish some of the important elements of that crime, as set out in the Finalized draft text of the Elements of Crimes (UN Doc. PCNICC/2000/1/Add.2, 7), such as the intention of the accused to destroy a group (element 3).
41. The war crime of attacking civilians, ICC Statute, Art. 8(2)(b)(i). However, according to the applicable elements of that crime (*see supra* note 40) an accused can only be found guilty if it can be shown that he intended civilians to be the object of the attack (element 3).
42. It should be noted that the Statute in a number of provisions (*e.g.*, Arts. 15(2), 54(3)(c), 73, 87(6), and 93(9)(b)) refers explicitly to international organizations along with states; Art. 27 does not.
43. *See supra* note 3.

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provision of a treaty, and probably also of customary international law,[44] that would derogate from the important principle that it and its officials have such immunities as are necessary for the fulfilment of its purposes and the independent exercise of their functions.

Consequently, there may be situations in which the United Nations would be called upon to waive the immunity of some person in or formerly in its service when accused of a crime within the purview of the Court, and for the reasons indicated in Section 3 above there would be no obstacle to the General Assembly agreeing to such waivers. Presumably, the actual waiver would still be issued by the Secretary-General,[45] unless the Relationship Agreement were to be so formulated (as is not true of the current draft of Article 8) that it itself constitutes a waiver.

Taking into account the above considerations, the proposed text of Article 8 in the current draft of the Relationship Agreement would appear satisfactory.

7. SETLEMENT OF DISPUTES

If the UN/ICC Relationship Agreement is to set out any substantive obligations of the UN to assist in making available to the Court UN officials, experts, or members of its forces, either as witnesses or as defendants, then it will be desirable to include in the Agreement a more robust dispute resolution clause than is currently foreseen in Article 19*bis* of the latest draft.

Relationship agreements between international organizations generally contain no dispute settlement provision at all.[46] That is because these agreements rarely set out any substantive obligations that might become the subjects of legal, as distinguished from essentially political disputes. Only when IGOs do enter into substantive transactions (for example, the provision of substantial resources by one organization to another), then the agreement concerning that transaction might contain a more elaborate dispute resolution clause.

If the UN should undertake, as suggested above, generally to waive at the request of the Court the immunity of officials or others to whom such protection might be accorded or of its archives, then it is clear that the

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44. At the San Francisco Conference a proposed reference to customary international law was not included in Charter Art. 103 (*see* R. Bernhardt, *Study of Article 103*, *in* Simma, *supra* note 6, at 1118, para. 2). This question has remained largely unexplored, including the relationship of obligations under the Charter and any *jus cogens* principles.
45. Unless the Secretary-General is the one accused, in which case the waiver would have to be issued by the Security Council (*see supra* note 18).
46. *See* the first such agreement, was concluded between the UN and the International Labour Organization ('ILO') in 1946 (1 UNTS 186), and the latest, was concluded in 2000 between the UN and the Preparatory Commission for the Comprehensive Test Ban Treaty Organization ('CTBTO') (UN Doc. A/RES/54/280, Annex).

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implementation of such an undertaking may well lead to disputes between the two organizations. That this is no mere idle speculation appears from the difficulties that the Secretary-General sometimes had in responding to requests from the two existing *ad hoc* Tribunals, which in the event could and were always resolved internally within the United Nation itself; evidently, no external dispute resolution mechanism would have been appropriate in respect of such internal differences – though it would not be inconceivable that in an extreme situation an advisory opinion might be sought from the International Court of Justice. However, such internal resolution is of course not possible if a difference should arise between two autonomous IGOs, such as the UN and the ICC.

Although proposed Article 19*bis*[47] in form would cover any type of dispute between the organizations, such an anodyne clause really constitutes no more than an opening for the two parties to start negotiating about an appropriate method of resolving any dispute that may arise. Such clauses are typically used in inter-state treaties when at least some of the state parties are reluctant to commit themselves, in advance, to any binding method of disputes settlement. There should, however, be no such inhibition where all the parties are international organizations, which are entirely creatures of international law and completely bound to abide by its provisions. It would therefore be preferable if the disputes clause in the agreement be one that is guaranteed to lead, whether through arbitration or a judicial or quasi-judicial proceeding, to a definitive resolution – on the understanding that if an actual dispute arises that both parties agree could more easily be resolved by some other means, they are free to substitute such an alternative.

Though one can conceive of various ways of settling any disputes that might arise between the UN and the ICC concerning the implementation of the Relationship Agreement, and in particular Articles 8 and 11 thereof, the most obvious one would be by means of an advisory opinion of the International Court of Justice that is to be accepted as binding by the parties. Such a device has been included in numerous international agreements concerning the resolution of disputes between parties not all of which are states eligible to participate in contentious proceedings before the ICJ. In particular, CPIUN Section 30 provides, for this method of resolving disputes that might arise between the United Nations and a state

47. Proposed Art. 19*bis* reads:

> Settlement of disputes
> The United Nations and the Court agree to settle any dispute related to the interpretation or application of this Agreement by appropriate means.

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party to the Convention.[48] There is therefore no reason why this method should not also be utilized in an agreement between two IGOs, particularly if one of them is the United Nations. This is especially so because the disputes that might arise concerning the implementation of Article 8 would resemble those that might arise (and indeed have arisen) under CPIUN.

To implement such a clause providing for the settlement of disputes by an ICJ advisory opinion accepted in advance as binding by the parties, it is necessary that one or both parties be authorized to request such an advisory opinion. The United Nations of course has a number of organs that are so authorized, in particular both the General Assembly and the Security Council under UN Charter Article 96(1). On the other hand, no organ of the ICC would be authorized to make such a request, presumably because the ICC would not be a specialized agency within the meaning of Charter Article 96(2) that could receive such an authorization from the General Assembly.[49,50] Although this asymmetrical situation suggests that the UN might gain some advantage from its monopoly in approaching the ICJ, it should be recognized that even UN member states were prepared to assume that risk in accepting the formulation of Section 30 of CPIUN; in the only instance in which that provision has so far been implemented,[51] the UN actually reached agreement with the state concerned (Malaysia) about the formulation of the question that would be put to the ICJ, and ECOSOC might not have approved the query had such an agreement not been reached. Moreover, the ICJ itself, conscious always of its judicial character, might well refuse to respond to a question that is designed to lead to a binding resolution of a dispute, if it considered that the UN had formulated it unfairly to the other party.

Consequently, if Articles 8 and 11 of the Relationship Agreement are to be formulated along the lines here proposed, then Article 19*bis* should read along the following lines:

48. Up to now, this provision has been utilized only once, in the Cumaraswamy case (*see supra* note 17), which resolved a dispute between Malaysia and the United Nations. It should be noted that the superficially rather similar proceeding in the Mazilu case (*see supra* note 9) was not based on Sec. 30 of the Convention, as the state party to that dispute, Romania, had made a reservation to that provision; consequently, the advisory opinion rendered at the request of the UN Economic and Social Council ('ECOSOC') had (unlike that in the Cumaraswamy case) no binding force.
49. It is true that the International Atomic Energy Agency ('IAEA'), which is also not a specialized agency, has received such an authorization (*see* Art. X(1) of the 1957 UN/IAEA Relationship Agreement and UN General Assembly Res. 1146 (XII) (14 November 1957)), but that provision has never been tested by the ICJ and some doubts have been expressed about its efficacy (*see* P. Szasz, The Law and Practices of the International Atomic Energy Agency, IAEA Legal Series No. 7 (1970), Secs. 12.1.4.1 and 27.1.2).
50. The conclusion that no ICC organ could be authorized to request an ICJ advisory opinion is reflected in Art. 13 of the draft UN/ICC Relationship Agreement, which provides that even when the ICC requires such an opinion in implementation of Art. 119(2) of its Statute, it would have to make a submission to the UN General Assembly to address a request to the ICJ.
51. *See supra* note 48.

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> Unless the United Nations and the Court otherwise agree, any dispute between them relating to the interpretation or application of this Agreement shall be resolved by an advisory opinion of the International Court of Justice [, to be requested by the General Assembly after consultations between the Secretary-General and the President of the Court,] that shall be accepted as decisive by the parties.

8. CONCLUSION

Unlike the agreements concluded by the United Nations with the other organizations within the UN system, the proposed Relationship Agreement with the ICC will have to deal with possible requests from the Court that might infringe on the privileges and immunities of the UN. Although the ICC Statute requires the co-operation of the state parties to it, and in some clauses also foresees interaction with international organizations, these provisions are not by themselves binding on the UN. Consequently, it would be useful if the proposed Agreement would provide for the waiver, under specified circumstances, of certain privileges and immunities of the UN relating to its archives and to persons in its service. On the basis of the considerations advanced in the previous sections, it is therefore proposed that:

1. In respect of persons associated with the UN being accused of crimes within the jurisdiction of the Court, Article 8 of the proposed draft Relationship Agreement should be maintained (as Article 8(1)).
2. To govern the likelihood of the Court requesting that persons associated with the UN appear as witnesses, the texts being proposed[52] as paragraphs 2 and 3 of Article 8, revised as suggested at the end of Section 6 above, be combined as Article 8(2).
3. To govern situations when the Court requests access to documents in the UN's archives, a new Article 11(1) should be formulated along the lines of the text appearing at the end of Section 4 above (current draft Article 11 becoming Article 11(2), with an appropriately revised heading);
4. Because differences between the UN and the Court might arise in connection with the implementation of the above proposed provisions, an effective disputes settlement clause along the lines appearing at the end of Section 7 be included.

52. In the Annex to UN Doc. PCNICC/2001/WGICC-UN/RT.1/Rev.1.

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