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Towards a Functional International Criminal Court: An Argument in Favor of a Strong Privileges and Immunities Agreement

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Lindsay Zelniker

Abstract

Part I of this Note discusses the legal doctrines governing privileges and immunities of U.N. officials and diplomats in international law. Part I also describes the manner in which diplomatic and U.N. privileges and immunities are applied to the ICC. Part II outlines the conflict between the goals of advancing human rights and preserving political sovereignty in international law. Part III argues that the adoption of the Rome Statute compels an international responsibility to achieve the goal of an effective and independent Court. This Note concludes that providing increased privileges and immunities to ICC personnel at the expense of some degree of sovereignty will assist in achieving this goal.

TOWARDS A FUNCTIONAL INTERNATIONAL CRIMINAL COURT: AN ARGUMENT IN FAVOR OF A STRONG PRIVILEGES AND IMMUNITIES AGREEMENT

Lindsay Zelniker*

INTRODUCTION

Ongoing armed conflict in the former Yugoslavia resulted in allegations of gross human rights abuses of Bosnian Muslims by Serbs.¹ A report issued by a United Nations² ("U.N.") Special Rapporteur chronicles the human rights situation in the territory.³ The report contains evidence of substantial contraventions of international humanitarian law, mainly attributed to the Serbian policies of ethnic cleansing.⁴ Such human rights abuses

* J.D. Candidate, May 2002, Fordham University School of Law. This Note is dedicated to my family for their unconditional love and support. I would like to thank Jennifer Schense and the staff of the Coalition for an International Criminal Court for their guidance and friendship. I also would like to thank the editors and staff of the Journal who assisted in the publication of this Note.

1. See Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235, 236 (1994) (addressing legal scope for criminal proceedings). The Socialist Federal Republic of Yugoslavia united six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia), two autonomous regions (Kosovo and Vojvodina), and three major ethnic groups (Bosnian Muslims, Croats, and Serbs) into one state. *Id.*; see Lucas W. Andrews, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471, 475-76 (1997) (providing history of war in territory). Conflict in the country began soon after two of the republics, Croatia and Slovenia, formally declared their independence on June 25, 1991. *Id.*

2. See United Nations, *About The United Nations*, at <http://www.un.org/aboutun/index.html> (providing introduction to structure and work of United Nations ("U.N.")).

3. See generally United Nations Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992*, 49th Sess., Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993) (discussing Rapporteur's three missions to former Yugoslavia to investigate human rights situation) [hereinafter Report on the Situation in former Yugoslavia]. Three other reports by the Special Rapporteur are discussed and summarized in this report: Report of the Special Rapporteur to the Commission on Human Rights of 28 August 1992 (E/CN.4/1992/S-1/9), Report to the Commission on Human Rights of 27 October 1992 (E./CN.4/1992/S-1/10), and Report to the forty-seventh session of the General Assembly (A/47/666-S/24809). *Id.* at 4, para. 3. See also Joyner, *supra* note 1, at 248 (citing series of reports submitted by Special Rapporteur).

4. See Report on the Situation in former Yugoslavia, *supra* note 3, at 7, para. 17 (discussing variety of methods used in ethnic cleansing); see also Joyner, *supra* note 1, at 248-50 (explaining ethnic cleansing as mass numbers of Bosnian Muslims being system-

include: widespread torture of civilians and prisoners of war, shooting of innocent civilians by snipers, destruction of churches and civilian homes, systematic rape of Muslim women, forced transfer of populations, and harassment of humanitarian relief convoys.⁵

On May 25, 1993, the U.N. Security Council approved the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY").⁶ Although the ICTY accumulated evidence and indicted alleged criminals, by 1996 the tribunal encountered numerous setbacks.⁷ One such setback relates to the ease with which Balkan states snubbed the ICTY and denied ICTY officials certain privileges.⁸

In 1999, for example, Louise Arbour, the chief Prosecutor of the ICTY, requested access to Kosovo to conduct on-site investigations.⁹ Such investigations are considered indispensable to the work of an international tribunal.¹⁰ Former Yugoslav President Slobodan Milosevic, however, denied visas to many of Arbour's team members and warned Arbour that she had no right

atically driven from their homes, incarcerated in concentration camps, tortured, raped, and murdered).

5. See Report on the Situation in Yugoslavia, *supra* note 3, at 7 (describing general observations regarding ethnic cleansing); see also Joyner, *supra* note 1, at 249-52 (discussing in further detail reports by U.N. Special Rapporteur).

6. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; see Joyner, *supra* note 1, at 236 (addressing legal scope of criminal proceedings).

7. See Andrews, *supra* note 1, at 484 (noting several reasons for difficulties encountered by ICTY). For example, Security Council member states refused to authorize its forces to arrest suspects. *Id.* In addition, states refused to impose meaningful sanctions upon Serbia or the Bosnian Serb government. *Id.*; see also Richard J. Goldstone & Gary Jonathan Bass, *Lessons from Recent Criminal Tribunals, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 51, 52 (Sarah B. Sewall & Carl Kaysen eds., 2000) (noting that ICTY faced difficulties with funding, with hostility from members of U.N. Security Council, with staffing, and with arrests).

8. See GOLDSTONE, *supra* note 7, at 56 (asserting that renegade regimes must not be allowed to defy international tribunals).

9. See *id.* at 57 (describing Louise Arbour's efforts to gain access to Kosovo).

10. *Id.*

to go to Kosovo.¹¹ On January 18, 2000, when Arbour again attempted to gain access to Kosovo to investigate the massacre of forty-five people, border guards refused her entry.¹²

Commentators note that such outright obstruction as committed by the government of the former Yugoslavia must not be permitted to become a feature of the permanent International Criminal Court ("ICC" or "Court").¹³ U.N. delegates adopted the Rome Statute of the ICC ("Rome Statute") on July 17, 1998.¹⁴ The Court will enter into force with sixty ratifications.¹⁵ As of the date of publication of this Note, 139 states signed and twenty-nine states ratified the Rome Statute.¹⁶

11. *See id.* (noting that Milosevic's denial of tribunal's jurisdiction is part of his ethnic cleansing campaign).

12. *Id.*; see Michel Leclercq, *U.N. Seeks to override Russian reservations in vote on Kosovo*, AGENCE FRANCE-PRESSE, Jan. 19, 1999, at 1 (explaining U.N. Security Council's demand that war crimes investigators be permitted into territory).

13. See GOLDSTONE, *supra* note 7, at 57 (discussing likelihood of renegade regimes causing problems for International Criminal Court ("ICC")); Andrews, *supra* note 1.

14. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute] (adopted by U.N. Diplomatic Conference of Plenipotentiaries on Establishment of an ICC); see United Nations, *Rome Statute of the International Criminal Court*, available at <http://www.un.org/law/icc/>. The Rome Statute created the ICC. Article 1 of the Rome Statute reads:

An International Criminal Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Id.; Roy S. Lee, *Introduction to THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 1*, 26 (Roy S. Lee ed., 1999) (explaining that Rome Statute was adopted by unrecorded vote of 120 in favor, seven against, and 21 abstentions).

15. See Rome Statute, *supra* note 14, art. 126(1) (stating that "[t]his Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations"); see also Christophe de Roquefeuil, *US Unlikely to Ratify Permanent International Criminal Tribunal*, AGENCE FRANCE PRESSE, Jan. 1, 2001 (reporting that U.N. officials expect treaty will be ratified by minimum of 60 countries by middle of 2002).

16. See Steven Lee Myers, *U.S. Signs Treaty For World Court To Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1 (noting recent signatories to treaty); see also The Coalition for an International Criminal Court Home Page on the ICC, at <http://www.iccnw.org> (listing ratifications as of February 12, 2001, by the following countries: Argentina, Austria, Belgium, Belize, Botswana, Canada, Dominica, Fiji, Finland, France, Gabon, Germany, Ghana, Iceland, Italy, Lesotho, Luxembourg, Mali, Marshall Islands, New Zealand, Norway, San Marino, Senegal, Sierra Leone, South Africa, Spain, Tajikistan, Trinidad and Tobago, and Venezuela). President Clinton overrode objections from both

The Rome Statute gives the ICC the authority to investigate and prosecute individuals who commit the most serious crimes of concern to the international community,¹⁷ such as genocide,¹⁸ crimes against humanity,¹⁹ and war crimes.²⁰ Similar to the ICTY, such prosecutions and investigations may necessitate

the Pentagon and Republicans in the Senate and signed the Rome Statute on December 31, 2000. Myers, *supra*. Under the provisions of the Rome Statute, nations had until the end of December 31, 2000, to sign. *Id.* After that date, states could only become a party to the treaty by ratifying. *Id.* According to one commentator, the United States signature represents a "powerful American endorsement of the treaty's goals, and poses a political and diplomatic challenge for the upcoming administration of George W. Bush." *Id.* In a statement released by the White House, President Clinton said "he remained concerned about 'significant flaws' in the treaty that he hoped would be corrected in negotiations before the Court becomes a reality." *Id.*; see *Clinton's Words: "The Right Action"*, N.Y. TIMES, Jan. 1, 2001, at A6 (reprinting President Clinton's speech). United States Senate Foreign Relations Committee Chairman, Jesse Helms, stated: "I will make reversing this decision, and protecting America's fighting men and women from the jurisdiction of this international kangaroo court, one of my highest priorities in the new Congress." Roquefeuil, *supra* note 15. Upon the required minimum 60 ratifications, the ICC will be set up, with or without United States ratification. *Id.* United Nations officials expect the treaty will be ratified by the minimum of 60 countries by the middle of 2002. *Id.*

17. Rome Statute, *supra* note 14, art. 5. Article 5 states:

- (1) The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
- (2) The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Id.

18. *Id.* art. 6. Article 6 states:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id.

19. *Id.* art. 7. Article 7 states:

For the purpose of this Statute, "crime against humanity" means any of the

on-site visits by the Prosecutor.²¹ The various practical arrangements being prepared by the U.N., such as the Agreement on Privileges and Immunities of the ICC, must therefore be strong to avoid rendering ICC personnel ineffective.²²

Part I of this Note discusses the legal doctrines governing privileges and immunities of U.N. officials and diplomats in in-

following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Id.

20. *Id.* art. 8. Article 8, in part, states:

- (1) The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
- (2) For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Willful killing;
 - (ii) Torture or inhumane treatment, including biological experiments;
 - (iii) Willfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

21. *Id.* art. 99(4).

22. See Final Act of the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/ CONF.183/10* (1998), res. F, para. 5 [hereinafter Final Act] (naming practical arrangements to be prepared for establishment of Court).

ternational law. Part I also describes the manner in which diplomatic and U.N. privileges and immunities are applied to the ICC. Part II outlines the conflict between the goals of advancing human rights and preserving political sovereignty in international law. Part III argues that the adoption of the Rome Statute compels an international responsibility to achieve the goal of an effective and independent Court. This Note concludes that providing increased privileges and immunities to ICC personnel at the expense of some degree of sovereignty will assist in achieving this goal.

I. PRIVILEGES AND IMMUNITIES GOVERNING OFFICIALS AND DIPLOMATS IN INTERNATIONAL LAW

A privilege is a substantive exemption from the law.²³ Immunity grants a procedural protection from the receiving state, as opposed to applying an exemption from substantive law.²⁴ In international law, privileges and immunities are applied to diplomats, international organizations, and officials of such organizations.²⁵ Currently, privileges and immunities are being applied to the workings of the ICC in a model guided by current diplomatic law and the law of international organizations.²⁶

A. *Privileges And Immunities Applied To Diplomats And United Nations Officials*

Diplomats of independent states and officials of international organizations possess certain privileges and immunities in international law.²⁷ Diplomatic law is controlled by the Vienna Convention on Diplomatic Relations²⁸ ("Vienna Convention").

23. See J. CRAIG BARKER, *THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES* 67 (1996) (citing Satow's Guide as leading manual on diplomatic practice). This definition is found in SATOW'S GUIDE TO DIPLOMATIC PRACTICE 120 (Gore-Booth & Longman eds., 1979). *Id.*

24. *Id.*

25. *Id.*; see *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1137 (Bruno Simma ed., 1994) (providing overview of U.N. system of privileges and immunities).

26. See Rome Statute, *supra* note 14, art. 48 (describing types of privileges and immunities enjoyed by Court and personnel).

27. See *THE CHARTER OF THE UNITED NATIONS*, *supra* note 25, at 1137 (discussing multitude of legal instruments in system of privileges and immunities in international law).

28. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 [hereinafter Vienna Convention] (stating that 177 states are now party to Vienna Convention).

The law governing the privileges and immunities of international organizations, such as the U.N., developed after the U.N.'s establishment.²⁹ It is controlled primarily by the U.N. Charter and is supplemented by additional international instruments.³⁰

1. Diplomatic Immunity Under The Vienna Convention On Diplomatic Relations

Diplomatic law is one of the oldest branches of international law.³¹ The Vienna Convention controls the conduct, limitations, and privileges of diplomats throughout the world.³² It is a universal, comprehensive formulation of the rules of modern diplomatic law,³³ and is often used as a reference in developing related areas of international law.³⁴ Its provisions are regarded as settled law.³⁵

The Vienna Convention succeeded in gaining formal support partially because of the notion of reciprocity.³⁶ In diplomatic relations, reciprocity denotes every state, both sending states and receiving states.³⁷ If a receiving state fails to accord

29. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 315 (1995).

30. *See id.* (providing examples of additional instruments as special agreements with member states or agreements with host states).

31. *See generally* BARKER, *supra* note 23, at 14 (providing history of development of diplomatic relations from origins in antiquity up to present time).

32. *See* Vienna Convention, *supra* note 28; *see also* Joshua D. Groff, *A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of the Absolute Sovereign Right*, 14 *TEMP. INT'L & COMP. L.J.* 209, 210 (2000) (discussing history and background of diplomatic immunity).

33. *See* Vienna Convention, *supra* note 28; EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 2 (1998).

34. *See* DENZA, *supra* note 33, at 2 (noting universality of Vienna Convention).

35. *See id.* (discussing that Vienna Convention significantly developed area of privileges and immunities through numerous provisions). Article 22 establishes the inviolability of mission premises; Article 27, the protection of all forms of diplomatic communication (viewed as the most important aspect of the functioning of the diplomatic mission); Article 31, the exceptions to the immunity of a diplomat from civil jurisdiction; Article 34, the exemption of diplomats from taxes; and Article 37, the limitations of civil immunity of administrative and technical staff with respect to official acts, but allows them full immunity from criminal jurisdiction. *Id.* Articles 22, 27, 31, 34, and 37 are all consistent with the functional approach to diplomatic immunity. *Id.* The Vienna Convention reinforces the functional necessity approach in the varying degrees of immunity granted to members of the diplomatic staff. *Id.* at 5.

36. *See id.* at 1-2 (indicating that reciprocity forms effective sanction for observance of nearly all rules of Convention).

37. *See id.* (noting that main functions of diplomatic mission is to represent sending state and protect its interests and nationals and to negotiate with receiving state).

privileges or grant immunities to diplomatic missions or their representatives, the sending state will likely undertake countermeasures.³⁸

The Vienna Convention has proven resilient to external attacks.³⁹ During the 1980s, however, several diplomats abused their immunity in the United Kingdom and in the United States.⁴⁰ In 1982, a Brazilian ambassador's grandson shot an individual outside a nightclub in Washington, D.C.⁴¹ In 1985, the wife of a Nigerian diplomat slashed her daughter's wrist after learning of her pregnancy.⁴² Recently, in 1997, an intoxicated senior diplomat from the Republic of Georgia struck and killed a sixteen year-old girl in Washington D.C.⁴³

Several possible actions extinguish immunity of an abusive diplomat under the Vienna Convention.⁴⁴ First, an express waiver of immunity by the sending state exposes the diplomat to the jurisdiction of the host state.⁴⁵ Second, the host state may require the sending state to either recall the person concerned or terminate his functions with the mission.⁴⁶

38. *See id.* (noting that failure to accord privileges and immunities to diplomatic missions or their members is apparent immediately).

39. *See id.* at 6 (providing, however, examples of abuse of immunity).

40. *See id.* (noting that number of abuses is small).

41. *See* Groff, *supra* note 32, at 210 (providing details of recent examples of diplomatic abuse).

42. *Id.* at 218.

43. *Id.* No charges were brought against any of these offenders because they were protected by diplomatic immunity. *See id.* (providing further details of examples of diplomatic abuse). *See* DENZA, *supra* note 33, at 6 (noting that because of the overall need for the protection of their diplomats against terrorism and violence, governments chose not to revise Vienna Convention). Instead, governments used the remedies already provided for in the Vienna Convention, and invoked countermeasures on a basis of reciprocity. *Id.*

44. *See* Groff, *supra* note 32, at 214 (providing general discussion on Vienna Convention).

45. *See* Vienna Convention, *supra* note 28, art. 32 (stating, in part, that "immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state"); *see also* Groff, *supra* note 32, at 214-15 (noting that this would expose diplomat to jurisdiction of host country).

46. *See* Vienna Convention, *supra* note 28, art. 9 (stating, in part, that "[t]he receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission of any member of the diplomatic mission is *persona non grata* or that any other member of the staff of the mission is not acceptable"); *see* Groff, *supra* note 32, at 214 (explaining that in such situation if sending state fails within reasonable period to remove individual, that diplomat may lose immunity and be subject to criminal or civil liability).

Countries normally comply with the Vienna Convention.⁴⁷ This compliance, however, generally has not extended to two provisions: Article 26 and Article 27.⁴⁸ Article 26 requires a receiving state to ensure freedom of movement and travel within its territory to members of diplomatic missions.⁴⁹ In violation of Article 26, many Communist states used to bar large parts of their territory to diplomats who had not been given special permission to enter, notwithstanding the ratification of the Vienna Convention.⁵⁰ Second, Article 27 permits and protects mission members free communication for official purposes.⁵¹ States that possess the capacity to intercept embassy communications often disregard this Article.⁵²

2. Privileges and Immunities of United Nations Officials

The constituent instrument of the U.N. determines the privileges and immunities of the organization.⁵³ This instrument may be supplemented by agreements with the member states and the host state.⁵⁴ Both the ICTY and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994⁵⁵ ("ICTR") are subsidiary organs of

47. DENZA, *supra* note 33, at 6.

48. See Vienna Convention, *supra* note 28, arts. 26-27; see also DENZA, *supra* note 33, at 8 (providing details on few instances of non-compliance).

49. See Vienna Convention, *supra* note 28 art. 26 (stating "[s]ubject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure to all members of the mission freedom of movement and travel in its territory").

50. DENZA, *supra* note 33, at 9 (noting, however, this problem in recent years is diminishing due to disappearances of restrictions on movement in states that are no longer Communist).

51. See Vienna Convention, *supra* note 28, art. 27(1) (stating in part "[t]he receiving state shall permit and protect free communication on the part of the mission for all official purposes"); DENZA, *supra* note 33, at 9.

52. See DENZA, *supra* note 33, at 9 (noting that with end of Cold War came reduction of complaints of violations of right to free and secret communication).

53. MORRIS, *supra* note 29, at 315.

54. See *id.* (discussing law of privileges and immunities of international organizations).

55. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian

the U.N. and, therefore, also rely on U.N. instruments to provide privileges and immunities.⁵⁶

a. United Nations Instruments of Privileges and Immunities

The privileges and immunities of the U.N. are based on three primary instruments: the U.N. Charter,⁵⁷ specifically Article 105;⁵⁸ the Convention on Privileges and Immunities of the U.N.;⁵⁹ and the U.N. Headquarters Agreement.⁶⁰ Article 105 of the U.N. Charter establishes the principle of functional necessity of privileges and immunities.⁶¹ Functional necessity means that an international organization is entitled to the immunities it requires to effectively fulfill its tasks.⁶² All major status conventions⁶³ now contain this principle, which is an underlying rule in the system of privileges and immunities.⁶⁴

Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR].

56. See MORRIS, *supra* note 29, at 316 (discussing categories of privileges and immunities of ICTY).

57. CHARTER OF THE UNITED NATIONS, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 [hereinafter U.N. CHARTER].

58. *Id.* art. 105. Article 105 states:

- (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 U.N. and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization;
- (3) The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the U.N. for this purpose.

Id.

59. Convention on the Privileges and Immunities of the U.N., Feb. 13, 1946, 1 U.N.T.S. 15 [hereinafter Convention].

60. See MORRIS, *supra* note 29, at 315-16 (providing background information on law governing privileges and immunities of international organizations).

61. U.N. CHARTER art. 105; see THE CHARTER OF THE UNITED NATIONS, *supra* note 25, at 1139 (discussing implementation of Article 105 of U.N. Charter).

62. See A.S. MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP 151 (1995) (discussing international immunity and functional necessity).

63. See THE CHARTER OF THE U.N., *supra* note 25, at 1138-1139 (providing examples of status agreements on U.N. institutions such as information centers, research centers, and science institutions).

64. See *id.* at 1139 (discussing functional necessity of privileges and immunities).

The U.N. implemented Article 105(3) through multilateral conventions, host nation agreements,⁶⁵ and domestic legislation by states.⁶⁶ The Convention on Privileges and Immunities of the U.N. is one major multilateral convention.⁶⁷ This Convention provides immunity for both the U.N. and its personnel.⁶⁸ Under the Convention on Privileges and Immunities, the U.N. enjoys absolute immunity as a juridical person from any form of legal proceedings before national courts.⁶⁹ U.N. officials enjoy functional immunity in that they enjoy immunity from the jurisdiction of the host country with respect to their official acts and words spoken.⁷⁰

The provisions of the Convention on Privileges and Immunities allow U.N. officials free entry into, and departure from,

65. See THE CHARTER OF THE U.N., *supra* note 25, at 1137 (explaining category of host nation agreements). The category of host nation agreements comprises:

- (1) Seat agreements, i.e. agreements on the status of central and regional offices of the U.N. (principal or subsidiary organs) permanently established in host countries, and respective privileges and immunities;
- (2) Status agreements on U.N. institutions, such as for example information centers, research and science institutions (U.N. University of Tokyo);
- (3) Privileges and immunities and facilities of U.N. field offices (technical assistance projects, environment programs, etc.);
- (4) The status of U.N. peace missions (observers, peace-keeping forces, service staff);
- (5) The privileges and immunities of participants at U.N. conferences and seminars hosted by member or non-member states.

Id. at 1138-1139.

66. See U.N. CHARTER art. 105, para. 3 (stating “[t]he General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the U.N. for this purpose”); see THE CHARTER OF THE U.N., *supra* note 25, at 1137-1138 (classifying system of privileges and immunities that implemented Article 105 as comprehensive).

67. Convention, *supra* note 59; see THE CHARTER OF THE U.N., *supra* note 25, at 1139 (describing Convention as instrument on which U.N. privileges and immunities is based).

68. See THE CHARTER OF THE U.N., *supra* note 25, at 1139 (discussing privileges and immunities provided for U.N. and its personnel).

69. Convention, *supra* note 59, art. II/2; see THE CHARTER OF THE U.N., *supra* note 25, at 1140-1141 (noting absolute immunity of U.N. and noting further that U.N. premises and property are inviolable under Article II/3 of Convention, as are U.N. archives and documents under II/4 of Convention).

70. Convention, *supra* note 59, art. V/18; see THE CHARTER OF THE U.N., *supra* note 25, at 1142 (explaining that U.N. has exclusive competence to decide what constitutes “official act” because U.N. immunity would be jeopardized if decision was left to national courts). In addition, the Secretary-General and the Under-Secretary-Generals, together with their spouses and children, enjoy diplomatic privileges and immunities.

Id.

the host country.⁷¹ U.N. officials only enjoy freedom of movement within host countries during official journeys.⁷² They do not enjoy privileges on private journeys.⁷³ The free movement of officials within the host country, however, continues to be a matter of controversy.⁷⁴

Experts on missions,⁷⁵ who serve under a specific but temporary U.N. mandate, enjoy privileges and immunities strictly related to their official function.⁷⁶ Such immunities are also limited to the duration of their mission.⁷⁷ Representatives of U.N. Members,⁷⁸ permanent missions,⁷⁹ and staff of missions enjoy partial diplomatic privileges if they are non-residents and full diplomatic privileges and immunities if they are permanent staff.⁸⁰ Finally, according to the Convention on the Privileges and Immunities of the U.N., the Secretary-General must waive the immunity of any official when, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the U.N.⁸¹

The case of Dato' Param Cumaraswamy,⁸² the U.N. Special

71. Convention, *supra* note 59, art. V/18(d). See THE CHARTER OF THE U.N., *supra* note 25, at 1143 (discussing freedom of movement under Convention).

72. See THE CHARTER OF THE U.N., *supra* note 25, at 1143-1144.

73. See *id.* (elaborating further on freedom of movement for U.N. officials).

74. See *id.* (emphasizing that seat agreements do not normally permit unrestricted travel by U.N. officials within territory of host country, while host countries are obliged under U.N. Charter to abstain from selective restrictions against diplomats).

75. See Convention, *supra* note 59, art. VI (defining role of experts on missions for U.N.). The term "experts on missions" covers U.N. representatives who do not perform their duties on a permanent contractual basis but are serving under a temporary mandate of the U.N. THE CHARTER OF THE U.N., *supra* note 25, at 1144.

76. See THE CHARTER OF THE U.N., *supra* note 25, at 1144 (describing privileges and immunities of experts on missions).

77. See *id.* (discussing further Article VI of Convention).

78. Convention, *supra* note 59, art. IV(16). According to Article IV(16) of the Convention, "Representatives" of U.N. Members are all delegates, deputy delegates, advisors, technical experts, and secretaries of delegations. THE CHARTER OF THE U.N., *supra* note 25, at 1145.

79. THE CHARTER OF THE U.N., *supra* note 25, at 1145. Members of the mission are defined as "the head of the mission and the members of the staff of the mission." See Vienna Convention, *supra* note 28, art. 1(b).

80. See THE CHARTER OF THE U.N., *supra* note 25, at 1145 (detailing most important privileges of non-resident representatives to be unrestricted entry to and departure from U.N. headquarters).

81. Convention, *supra* note 59, art. V, sec. 20.

82. *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, (Apr. 29, 1999), at <http://www.icj-cij.org>. On August 10, 1998, the U.N. Economic and Social Council requested an advisory opinion from the Interna-

Rapporteur⁸³ on the Independence of Judges and Lawyers, is an example of denial of an immunity by a state.⁸⁴ As a Special Rapporteur, Cumaraswamy is an expert on an ongoing mission and is entitled to immunity from legal process of any kind under the Convention for his official functions.⁸⁵ In 1997, however, various Malaysian plaintiffs brought four defamation suits against Cumaraswamy, claiming damages in excess of US\$100,000,000,⁸⁶ notwithstanding Malaysia's being a party to the Convention on Privileges and Immunities without reservation.⁸⁷

A second example of the denial of privileges and immunities to U.N. personnel is the increase in killings, assaults, and kidnappings of U.N. civilian staff since the early 1990s.⁸⁸ The U.N. has taken concrete steps to improve the situation, such as,

tional Court of Justice on the applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the U.N. in the case of Dato' Param Cumaraswamy. *Id.*

83. *Id.* The Special Rapporteur, as a person appointed by the Commission on Human Rights, is defined as an expert on a mission. *Id.*

84. Peter H.F. Bekker, *Memorandum of Lawyers Committee for Human Rights on Legal Issues Arising from the Case Concerning the Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights before the International Court of Justice*, (1998), at <http://www.lchr.org>.

85. *See id.* (noting that U.N. Secretary-General has authority to determine whether expert on mission spoke words in course of performance of mission for U.N.).

86. *See id.* (detailing legal issues at stake). In 1997, Secretary-General Kofi Annan found that Cumaraswamy was immune. *Id.* In addition, in April 1999 the International Court of Justice ("ICJ") put forth a decision that stated that the Malaysian courts must provide Cumaraswamy with immunity. *Id.* According to the ICJ, Cumaraswamy made the statements in his capacity as a Special Rapporteur and, therefore, was entitled to immunity under the Convention on Privileges and Immunities of the U.N. *Id.* On July 7, 2000, over a year after the ICJ announced its opinion, the Malaysian High Court struck down one of the suits. *Id.* The Court, however, ordered Cumaraswamy to bear the costs of the litigation. *Id.* As of August 2000, the three companion cases were still pending. *Id.*; *see also* Peter H.F. Bekker, *International Decision: Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 93 A.J.I.L. 913 (1999).

87. *See* RICHARD B. LILlich & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS; PROBLEMS OF LAW, POLICY, AND PRACTICE* 250 (3d ed., 1995) (defining reservation as qualifying proviso).

88. *See* U.N. Press Release, 'We Must Not Let Violence Drive Us Out' Says Deputy Secretary-General to Security Council Meeting on Protection of U.N. Personnel, DSG/SM/84, SC/6804 (Feb. 9, 2000) (noting that examples of attacks include shooting down of two U.N. planes in Angola in December 1998 and January 1999, and killings of two staff members of Food and Agricultural Organization in Baghdad). Since January 1992, 184 staff members died in the service of the U.N. *Id.* Ninety-eight of the 184 were murdered. *Id.*; *see also* U.N. Press Release, State Representatives Express Deep Regret at Killing of Two FAO Colleagues in Baghdad, ORG/1308 (June 30, 2000) (providing statement of Deputy Secretary-General Louise Frechette to Security Council that

the Convention on the Safety of U.N. and Associated Personnel ("Safety Convention").⁸⁹ The Safety Convention entered into force on January 15, 1999, and therefore its long-term impact remains to be seen.⁹⁰

b. Privileges and Immunities of the Ad Hoc Tribunals

Pursuant to Chapter VII of the U.N. Charter,⁹¹ the U.N. Security Council established both the ICTY and the ICTR.⁹² The two tribunals are subsidiary organs of the U.N.⁹³ Thus, the privi-

U.N. personnel includes not only military and police staff, but also thousands of civilians who serve in peacekeeping, peacemaking, and humanitarian missions).

89. Convention on the Safety of U.N. and Associated Personnel, GA Res. 49/59 (Dec. 9, 1994), *reprinted in* 34 I.L.M. 482 (1995) [hereinafter *Safety Convention*]. See generally Evan T. Bloom, *Protecting Peacekeepers: The Convention on the Safety of U.N. and Associated Personnel*, 89 A.J.I.L. 621, 621 (1995) (providing background information on *Safety Convention*). The *Safety Convention* covers two types of personnel:

- (1) "U.N. personnel" which includes persons engaged or deployed by the U.N. Secretary-General as members of the military, police or civilian components of a U.N. operation; and
- (2) "Associated personnel" which describes
 - (a) persons assigned by the U.N. Secretary-General or an intergovernmental organization with the agreement of the competent organ of the U.N.,
 - (b) persons engaged by the Secretary-General, a specialized agency, or the International Atomic Energy Agency ("IAEA"), and
 - (c) persons deployed by a humanitarian nongovernmental organization ("NGO") or agency under an agreement with the Secretary-General, a specialized agency or the IAEA.

Id.; see Rome Statute, *supra* note 14, art. 8(2)(b)(iii) (providing special protection for peacekeepers). Under this provision, any intentional attacks against personnel, material, units, or vehicles involved in humanitarian or peacekeeping missions constitute war crimes and under certain circumstances, crimes against humanity. *Id.* See Roy S. Lee, *supra* note 14, at 29 (providing further detail on consequences of attacks on peacekeeping missions).

90. See Major Newton, *United States Convention on the Safety of United Nations and Associated Personnel Enters into Force*, ARMY LAWYER, Feb., 1999 (discussing need for multi-lateral *Safety Convention* and its foreseeable impacts).

91. See generally U.N. CHARTER ch. VII (serving as mechanism authorizing Security Council to adopt measures which permit use of force to bring nations into compliance with U.N. resolutions).

92. ICTY Statute, *supra* note 6; ICTR Statute, *supra* note 55. See MORRIS, *supra* note 29, at 317 (providing background information on tribunals).

93. See U.N. CHARTER art. 29 (stating "[t]he Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions"); MORRIS, *supra* note 29, at 317 n.807 (noting that preamble to Headquarters Agreement between U.N. and Netherlands recognizes status of ICTY as subsidiary organ within meaning of Article 29). However, the Federal Republic of Yugoslavia (Montenegro and Serbia) has expressed the view that the ICTY cannot be deemed a subsidiary organ under Article 29. *Id.*

leges and immunities of the tribunals and their personnel are governed, in part, by the Convention on Privileges and Immunities of the U.N.⁹⁴

i. International Criminal Tribunal for the Former Yugoslavia

The privileges and immunities of the ICTY are based on three primary instruments:⁹⁵ the ICTY Statute,⁹⁶ specifically Article 30;⁹⁷ the Convention on Privileges and Immunities of the U.N.⁹⁸ and the Headquarters Agreement between the U.N. and the Kingdom of the Netherlands.⁹⁹ Article 30 of the ICTY Statute sets forth the status, privileges, and immunities of the ICTY.¹⁰⁰ According to Article 30(2), the Judges, the Prosecutor,¹⁰¹ and the Registrar¹⁰² of the ICTY are entitled to the privi-

94. *Id.* The term "organization" in Article 105(1) of the U.N. Charter encompasses all principle and subsidiary organs of the U.N. THE CHARTER OF THE U.N., *supra* note 25, at 1139; MORRIS, *supra* note 29, at 317 n.808.

95. MORRIS, *supra* note 29, at 315-16.

96. ICTY Statute, *supra* note 6.

97. ICTY Statute, *supra* note 6. Article 30 reads:

- (1) The Convention on the Privileges and Immunities of the U.N. of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
- (2) The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law.
- (3) The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the U.N. under Articles V and VII of the Convention referred to in paragraph 1 of this Article.
- (4) 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.

Id.

98. Convention, *supra* note 59.

99. MORRIS, *supra* note 29, at 315-16. The Headquarters Agreement is contained in U.N. Doc. S/1994/848. *Id.* at 317.

100. *Id.* at 316.

101. ICTY Statute, *supra* note 6, art. 16. According to Article 16 of the ICTY Statute:

- (1) The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
- (2) The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
- (3) The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

leges and immunities of diplomatic envoys as provided in the Vienna Convention.¹⁰³ Whether acting within their official duties or not, these individuals are entitled to absolute immunity from arrest and criminal prosecution, their residences and baggage are inviolable, and they are exempt from all forms of taxation.¹⁰⁴

Although senior officials of the ICTY are entitled to diplomatic immunities, staff members of the ICTY are accorded only functional immunities.¹⁰⁵ Staff members are therefore afforded: immunity from arrest and legal process for acts taken in an official capacity,¹⁰⁶ immunity from taxation on salaries,¹⁰⁷ immunity

- (4) The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
- (5) The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Id.

102. *Id.* art. 17. According to Article 17 of the ICTY Statute:

- (1) The Registry shall be responsible for the administration and servicing of the International Tribunal.
- (2) The Registry shall consist of a Registrar and such other staff as may be required.
- (3) The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
- (4) The staff of the Registry shall be appointed by the Secretary General on the recommendation of the Registrar.

Id.

103. *Id.* art. 30(2); see MORRIS, *supra* note 29, at 317 (explaining that diplomatic envoys and their families are accorded absolute immunity from arrest or criminal prosecution, and their private residences are completely inviolable).

104. See MORRIS, *supra* note 29, at 318 (describing that in this way, ICTY is granted broader privileges and immunities than ICJ). Article 19 of the Statute of the ICJ provides: "[t]he members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities." *Id.* at 318 n.811.

105. Convention, *supra* note 59, art. V, sec. 18. MORRIS, *supra* note 29, at 318 (noting that functional immunity means that individuals are entitled to privileges and immunities to extent that they are required to effectively fulfill their tasks). Diplomatic immunities are the privileges and immunities of diplomatic envoys as laid out in the Vienna Convention. Vienna Convention, *supra* note 28.

106. MORRIS, *supra* note 29, at 318.

107. *Id.*

from customs duties on furniture at the time when staff members begin their positions,¹⁰⁸ and immunity from the obligation of national service.¹⁰⁹ Since staff members enjoy immunity from legal proceedings only in the course of official duties,¹¹⁰ they may therefore be tried and convicted in connection with non-official acts.¹¹¹

Article 30(4) of the ICTY Statute sets forth a category of individuals, including witnesses, suspects, the accused, and defense counsel,¹¹² who are accorded the privileges and immunities necessary for the functioning of the tribunal.¹¹³ The ICTY Statute grants less immunity to these individuals because they do not require the same degree of privileges and immunities as the staff and officials of the ICTY.¹¹⁴ Therefore, a state would be required to allow a witness to be transported through its territory in order to testify before the ICTY, even though national authorities may wish to detain the witness.¹¹⁵

ii. International Criminal Tribunal for Rwanda

Just as Article 30 of the ICTY Statute sets forth the status, privileges, and immunities of the ICTY,¹¹⁶ Article 29 of the ICTR Statute establishes the status, privileges, and immunities of the ICTR.¹¹⁷ The wording of the two provisions is identical.¹¹⁸

108. *Id.*

109. *See id.* (discussing Article V of Convention on Privileges and Immunities of U.N.).

110. *See id.* (noting that staff members must claim their immunity in course of judicial proceedings by showing that act in question was official).

111. *See id.* (noting that they may be tried in same manner as private person).

112. *Id.* The Statute does not provide for a separate public defenders office. MORRIS, *supra* note 29, at 318 n.814.

113. ICTY Statute, *supra* note 6. Article 30(4) states: "[o]ther 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." *Id.*

114. *See* MORRIS, *supra* note 29, at 318-19 (noting that it would be abhorrent to confer on indicted war criminals privileges and immunities of United Nations officials or diplomats).

115. *See id.* at 319 (explaining that Tribunal's proceedings should not be delayed because witness or accused is detained for questioning regarding national criminal proceeding in transit state).

116. ICTY Statute, art. 30, *supra* note 6.

117. ICTR Statute art. 29 *supra* note 55. Article 29 states:

(1) The Convention on the Privileges and Immunities of the U.N. of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

Thus, the privileges and immunities afforded to the ICTR and its personnel are the same as those granted to the ICTY.¹¹⁹

B. *Privileges and Immunities Applied to the ICC and Its Personnel*

Article 48 of the Rome Statute provides the basic privileges and immunities of the Court.¹²⁰ Article 48 also announces that it will be supplemented by an agreement on privileges and immunities of the Court.¹²¹ Discussions regarding this agreement are ongoing as of January 2001.¹²²

1. Rome Statute of the International Criminal Court

Having adopted the Rome Statute in 1998, the U.N. Conference of Plenipotentiaries on the Establishment of an ICC decided to establish the Preparatory Commission for an ICC¹²³ ("PrepCom") in order to complete the necessary arrangements for the Court.¹²⁴ The Agreement on Privileges and Immunities of the Court is one such arrangement.¹²⁵ This agreement will supplement articles of the Rome Statute relating to the privileges and immunities of the ICC and its personnel, such as Article 48.¹²⁶

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- (2) The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
 - (3) The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the U.N. under Articles V and VII of the Convention referred to in paragraph 1 of this Article.
 - (4) Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Id.

118. ICTY Statute, *supra* note 6; ICTR Statute, *supra* note 55.

119. ICTY Statute, *supra* note 6; ICTR Statute, *supra* note 55.

120. Rome Statute, *supra* note 14, art. 48.

121. *Id.*

122. See General Assembly resolution 55/155 (requesting Secretary-General to reconvene Preparatory Commission for ICC ("PrepCom") from February 26 to March 9, 2001, and from September 24 to October 5, 2001).

123. See Final Act, *supra* note 22 (establishing PrepCom).

124. See *id.* at res. F, para. 5(a) - (h) (listing practical arrangements to be prepared).

125. *Id.* at res. F, para. 5(f).

126. *Id.*

a. Background to the Preparatory Commission for an ICC

The PrepCom, consisting of the signatories of the Final Act of the Rome Conference as well as the invitees to the Rome Conference,¹²⁷ is charged with the task of preparing the following practical arrangements for the establishment of the Court:¹²⁸ the rules of procedure of evidence; elements of crimes, a relationship agreement between the Court and the U.N., basic principles governing a headquarters agreement to be negotiated between the Court and the host country, financial regulations and rules, an agreement of the privileges and immunities of the court, a budget for the first financial year, and the rules of procedure of the Assembly of States Parties.¹²⁹

The PrepCom met a mandated deadline of June 30, 2000,¹³⁰ to complete work on the Rules of Procedure and Evidence and Elements of Crimes.¹³¹ At the Sixth Session of the PrepCom, which convened from November 27 to December 8, 2000, delegates discussed three arrangements laid out in Resolution F: the financial regulations and rules,¹³² the relationship agreement between the Court and the U.N.,¹³³ and the agreement on privileges and immunities of the Court.¹³⁴

127. *See id.* at res. F, para. 2 (stating “[t]he Commission shall consist of representatives of states which have signed the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court and other states which have been invited to participate in the Conference”).

128. *Id.*

129. *Id.* at res. F, para. 5(a) - (h).

130. *See id.* res. F, para. 6 (stating “[t]he draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes shall be finalized before 30 June 2000”).

131. *See* U.N. Press Release, Preparatory Commission for an International Criminal Court Adopts Rules of Procedure and Evidence and Text on Elements of Crimes, L/2963, (Jun. 30, 2000) (discussing completion of such arrangements by deadline).

132. *See* U.N. Doc. PCNICC/2000/L.4/Rev.1 (2000) (summarizing proceedings of PrepCom at sixth session). For the discussion paper proposed by the coordinator of the financial regulations and rules, see U.N. Doc. PCNICC/2000/L.4/Rev.1/Add.2, available at <http://www.un.org/law/icc/prepcomm/prepfra.htm>.

133. *See* U.N. Doc. PCNICC/2000/L.4/Rev.1 (2000). For the discussion paper proposed by the coordinator of the draft relationship agreement between the Court and the U.N., see U.N. Doc. PCNICC/2000/L.4/Rev.1/Add.1, available at <http://www.un.org/law/icc/prepcomm/prepfra.htm>.

134. U.N. Press Release, L/2963, *supra* note 131. For the discussion paper proposed by the coordinator of the Draft Agreement on the Privileges and Immunities of the Court [hereinafter Draft Agreement], see U.N. Doc. PCNICC/2000/L.4/Rev.1/Add.3, available at <http://www.un.org/law/icc/prepcomm/prepfra.htm>.

b. Relevant Provisions of the Rome Statute

In the Rome Statute, Article 48 is the main provision addressing privileges and immunities.¹³⁵ Additional articles of the Rome Statute, however, relate to privileges and immunities as well.¹³⁶ One example is Article 99(4) setting forth procedures for on-site investigations to be conducted by the Court.¹³⁷

i. Article 48: Privileges and Immunities

Article 48 of the Rome Statute establishes the privileges and immunities of the Court and its personnel, but leaves details to be discussed in the Agreement on Privileges and Immunities.¹³⁸ Different officers and employees of the Court are accorded varying privileges and immunities.¹³⁹ Article 48(2) grants Judges,¹⁴⁰ the Prosecutor,¹⁴¹ the Deputy Prosecutors,¹⁴² and the Registrar¹⁴³ the highest level of protection:¹⁴⁴ the privileges and im-

135. Rome Statute, *supra* note 14.

136. *Id.*

137. *Id.*

138. *Id.* art. 48; see PCNICC/2000/L.4/Rev.1/Add.3, *supra* note 134.

139. Rome Statute, *supra* note 14, art. 48; see also Kenneth S. Gallant, *Symposium, The International Criminal Court: The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21, 30 (2000) (discussing effect of Article 48 of Rome Statute).

140. Rome Statute, *supra* note 14. Articles 35 through 41 detail the service of judges, qualifications, nominations and elections of judges, judicial vacancies, presidency, chambers, independence of judges, and excusing and disqualification of judges. *Id.* All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office. *Id.* art. 35(1).

141. *Id.* Article 42(1) states:

The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

Id. See generally *id.* art. 42 (enumerating role of office of Prosecutor); *Id.* art. 15 (discussing ability of Prosecutor to initiate investigations).

142. *Id.* Article 42 of the Rome Statute, in part, states: "[t]he Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute."

143. *Id.* Article 43(1) of the Rome Statute states: "[t]he Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with Article 42." *Id.* Article 43(2) states: "[t]he Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court." *Id.*

munities accorded to the heads of diplomatic missions when on business of the Court.¹⁴⁵ Article 48(2) also provides such personnel immunity from legal process of every kind, even after their terms of office have expired.¹⁴⁶

The privileges and immunities for the Deputy Registrar, the staff of the Office of the Prosecutor, and the staff of the Registry, as well as counsel, experts, witnesses, or any other person required to participate in Court proceedings, are not fully defined in Article 48 of the Rome Statute.¹⁴⁷ Article 48(3) states that the Deputy Registrar, the staff of the Office of the Prosecutor, and the staff of the Registry shall enjoy the privileges and immunities necessary to carry out their functions, in accordance with the Draft Agreement on the privileges and immunities of the Court ("Draft Agreement").¹⁴⁸ This grant of functional immunity is consistent with the privileges and immunities granted to ICTY officials; senior officials of the ICTY are entitled to diplomatic immunities, and staff members of the ICTY are accorded functional immunities.¹⁴⁹

Article 48(4) also leaves privileges and immunities open.¹⁵⁰ According to Article 48(4), protections for the counsel, experts,

144. *Id.* art. 48(2).

145. *Id.*

146. *Id.* This is in respect of words spoken or written and acts performed by them in their official capacity. *Id.* Article 48(2) provides that the Judges, the Prosecutor, the Deputy Prosecutors, and the Registrar shall:

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

Id.

147. *Id.* arts. 48(3) and (4); *see also* Gallant, *supra* note 139, at 30-31 (noting that defense counsel is given far fewer powers than prosecutorial counterparts and that if agreement on privileges and immunities of court is drafted with sensitivity towards defense function, there may be substantial protections for defense counsel).

148. Rome Statute, *supra* note 14, art. 48(3). Article 48(3) provides that such personnel shall "enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court." *Id.*; *see also* Draft Agreement, *supra* note 134.

149. *Id.*; ICTY Statute, *supra* note 6.

150. Rome Statute, *supra* note 14, art. 48(4). Article 48(4) states: "Counsel, experts, witnesses or any other persons 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." *Id.*

witnesses, and others will not have diplomatic-type privileges and immunities.¹⁵¹ Finally, the privileges and immunities of ICC personnel may be waived according to procedures set out in Article 48(5).¹⁵²

ii. Article 99: Execution of Requests under Articles 93 and 96

On-site investigations are an extremely sensitive issue because investigations that are conducted by persons other than national law enforcement officers, intrude upon the sovereignty of the state on whose territory the investigations take place.¹⁵³ The normal procedure for conducting investigations in the territory of a state party is governed by the rules in Part 9 of the Rome Statute dealing with international cooperation and judicial assistance.¹⁵⁴ In certain situations, however, the rules in Part 9 do not have to be followed and the Pre-Trial Chamber¹⁵⁵ may authorize the Prosecutor to take the necessary steps within the territory of a state party.¹⁵⁶

151. Gallant, *supra* note 139, at 31.

152. Rome Statute, *supra* note 14, art. 48(5).

153. See Bert Swart & Goran Sluiter, *The International Criminal Court and International Criminal Co-operation*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 91, 113-14 (Herman A.M. von Hebel et al. eds., 1999) (discussing procedure for conducting on-site investigations). Sovereignty concerns also arose during the negotiations of the Rome Statute. John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS 41, 41 (Roy S. Lee ed., 1999). Certain states, while supporting the ICC's creation, were hesitant to create a body that could intrude on national sovereignty. *Id.* These concerns are now embodied in the Rome Statute as the principle of complementarity, whereby the ICC complements national courts. *Id.*

154. Rome Statute, *supra* note 14; see Fabricio Guariglia, *International Criminal Law Procedures; Investigation and Prosecution*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS 227, 232 (Roy S. Lee ed., 1999) (describing debate over this issue during treaty negotiations). For a further discussion on the initiation of investigations and prosecutions and the evaluation by the Prosecutor, see Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 61, 73-76 (Sarah B. Sewall & Carl Kaysen, eds., 2000).

155. Rome Statute, *supra* note 14, art. 39. Article 39, in part, states:

(1) As soon as possible after the election of the Judges, the Court shall organize itself into the divisions specified in Article 34, paragraph (b). The Appeals Division shall be composed of the President and four other Judges, the Trial Division of not less than six Judges and the Pre-Trial Division of not less than six Judges.

Id.

156. See Guariglia, *supra* note 154, at 232 (detailing process of conducting on-site

Article 99(4) of the Rome Statute grants the ICC Prosecutor the power to conduct on-site investigations, albeit only under strict conditions.¹⁵⁷ An on-site investigation may be performed without the express consent of a state only if that state is a state party.¹⁵⁸ Article 99(4) also mentions some forms of on-site investigations, such as the interview of witnesses without the presence of national authorities and the examination of a public site or other public place.¹⁵⁹ The examination of a public site may give rise to difficulties, especially where the exhumation of graves is concerned.¹⁶⁰

investigations). This exception only applies if the Pre-Trial Chamber determines that a state clearly is unable to execute a request for cooperation due to the inability of any competent judicial system. *Id.* at 233; Rome Statute, *supra* note 14. Article 57(3)(d), reads that the Pre-Trial Chamber may:

[a]uthorize the Prosecutor to take specific investigative steps within the territory of a state party without having secured the cooperation of that state under Part 9 if, whenever possible having regard to the views of the state concerned, the Pre-Trial Chamber has determined in that case that the state is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

Id.

157. *Id.* Article 99(4) reads:

Without prejudice to other Articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested state party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such a request directly on the territory of a state as follows:

- (a) When the state party requested is a state on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to articles 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested state party;
- (b) In other cases, the Prosecutor may execute such request following consultations with the requested state party and subject to any reasonable conditions or concerns raised by that state party. Where the requested state party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve this matter.

Id. Guariglia, *supra* note 154, at 232-33; Swart, *supra* note 153, at 114-15.

158. Guariglia, *supra* note 154, at 232.

159. See Swart, *supra* note 153, at 115 (noting that forms mentioned were particularly useful to drafters of Rome Statute).

160. See *id.* (noting usefulness of this form of investigation).

Commentators note several criticisms of Article 99(4).¹⁶¹ First, Article 99(4) limits the ability to conduct on-site investigations to the Prosecutor.¹⁶² Second, the Prosecutor appears to be granted no more privileges than a tourist in a foreign state.¹⁶³

Given the reluctance of states to allow on-site investigations, Article 99(4) is an achievement reached by consensus on an extremely sensitive issue.¹⁶⁴ The recent refusal by the Federal Republic of Yugoslavia to allow ICTY Prosecutor Arbour to enter Kosovo in order to carry out on-site investigations provides an example of the sensitivity of the issue.¹⁶⁵ After the Court enters into force, the question of whether or not Article 99(4) provides an adequate legal framework enabling the Court to effectively fulfill its mandate, will be answered.¹⁶⁶

2. The Draft Agreement on the Privileges and Immunities of the ICC

While Article 48 of the Rome Statute provides that the ICC shall enjoy such privileges and immunities as are necessary to fulfill its purposes, Articles 1 through 28 of the Draft Agreement¹⁶⁷ expand upon this notion and set forth specific provisions governing the Court and its personnel.¹⁶⁸ The Draft Agreement grants privileges and immunities first to the Court itself and then to the different levels of personnel of the Court.¹⁶⁹ The Draft Agreement also contains provisions intended to deal with abuse by all persons enjoying such privileges and immunities pursuant to the Draft Agreement.¹⁷⁰

161. *Id.*; Guariglia, *supra* note 154, at 233.

162. Swart, *supra* note 153, at 115; Guariglia, *supra* note 154, at 233.

163. Swart, *supra* note 153, at 115; Guariglia, *supra* note 154, at 233.

164. *See* Swart, *supra* note 153, at 114-15.

165. *See id.* at 114 (noting that sensitivity relates to state conduct).

166. Medard R. Rwelamira, *Composition and Administration of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS 153, 167-68 (Roy S. Lee, ed., 2000). *See* Swart, *supra* note 153, at 115.

167. Draft Agreement, *supra* note 134. The Draft is based on three main agreements: the Convention of the Privileges and Immunities of the U.N., the Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, and the Headquarters Agreement between the U.N. and the Kingdom of the Netherlands concerning the ICTY. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* The Draft Agreement also contains three notification and travel provisions. *Id.* Article 20 confirms that the Registrar shall periodically communicate to all state parties the names of persons to which the provisions of the agreement apply. *Id.*

a. Provisions Governing Privileges and Immunities of
ICC Personnel

Articles 1 through 11 of the Draft Agreement set forth standard privileges and immunities for the Court.¹⁷¹ Articles 14 through 17 provide the privileges and immunities of the personnel of the Court.¹⁷² Article 14 grants the same privileges and immunities to the Judges, the Prosecutor, the Deputy Prosecutors, and the Registrar as heads of diplomatic missions receive under the Vienna Convention.¹⁷³ Such immunity applies during official journeys,¹⁷⁴ in times of international crises,¹⁷⁵ and even

Article 21 provides for the freedom of movement of Court officials by allowing ICC personnel to travel with the U.N. laissez-passers. *Id.* Finally, Article 22 provides that applications for visas shall be processed quickly. *Id.* The Draft Agreement concludes with provisions for settlements of disputes, signature and ratification, entry into force, denunciation, depositary, and authenticity of texts. *Id.*

171. *See* Draft Agreement, *supra* note 134, arts. 1-11 (providing legal status and juridical personality, inviolability of premises, archives and all documents, immunity of property, funds and assets; exemptions from taxes, customs duties, and import or export restrictions; reimbursement from duties and/or taxes; and finally, facilities in respect of communications). Article 11 provides the facilities in respect of communications. Article 11 states:

- (1) The Court shall enjoy in the territory of each state party for the purposes of its official communications and correspondence treatment not less favorable than that accorded by the state party concerned to any intergovernmental organization or diplomatic mission in the matter of priorities, rates and taxes applicable to mail and the various forms of communication and correspondence.
- (2) No censorship shall be applied to the official communications or correspondence of the Court.
- (3) The Court may use all appropriate means of communication, including electronic means of communication, and shall have the right to use codes or cipher for its official communications and correspondence. The official communications and correspondence of the Court shall be inviolable.
- (4) The Court shall have the right to dispatch and receive correspondence and other materials or communications by courier or in sealed bags, which shall have the same privileges, immunities and facilities as diplomatic couriers and bags.
- (5) The Court shall have the right to operate radio and other telecommunication equipment on its registered frequencies and those allocated to it by the states parties concerned.

Id.

172. Draft Agreement, *supra* note 134, arts. 14-17.

173. Draft Agreement, *supra* note 134, art. 14(1). According to Article 1(n) of the Draft Agreement "Vienna Convention" means the Vienna Convention on Diplomatic Relations of 18 April 1961. *Id.* art. 1(n).

174. *Id.* art. 14(2).

175. *Id.* art. 14(4).

after the expiry of their office.¹⁷⁶ Article 14 also permits such personnel and their families the right to enter and leave the country where the Court is sitting.¹⁷⁷ Paragraph 6 of Article 14 provides the Judges, the Prosecutor, the Deputy Prosecutors, and the Registrar complete freedom of speech and independence, granting immunity from legal process both during and after their term of office.¹⁷⁸

Article 15 sets forth the privileges and immunities for the officials of the Court. Article 1(1) of the Draft Agreement defines officials as: the Deputy Registrar and the staff of the offices of the Prosecutor and the Registry.¹⁷⁹ As explained in Article 48(3) of the Rome Statute, officials are accorded the privileges and immunities necessary for the independent performance of their functions, in any country where they may be on business or may pass through.¹⁸⁰ Article 15 then sets forth a list detailing immunities for the officials.¹⁸¹

The Draft Agreement also grants privileges and immunities to Counsel, witnesses, experts, and other persons required to be at the seat of the Court.¹⁸² Article 16(1) provides that Counsel before the Court shall be accorded the treatment necessary for the proper functioning of the Court.¹⁸³ It also provides for privileges and immunities for the independent performance of their duties during the period of their missions.¹⁸⁴ According to Arti-

176. *Id.* art. 14(5).

177. *Id.* art. 14(2).

178. *Id.* art. 14(6). Article 14 also exempts the salaries, emoluments, and the allowances paid to such personnel from taxation. *Id.* art. 14(7).

179. *Id.* art. 1(1).

180. Rome Statute, *supra* note 14, art. 48(3); Draft Agreement, *supra* note 134, art. 15.

181. Draft Agreement, *supra* note 134, art. 15 (providing immunity from personal arrest, seizure of personal baggage, legal process in respect of words spoken or written and all acts performed in official capacity, and national service obligations). Article 15 also provides for inviolability of official papers and exemption from taxation and from immigration restrictions. *Id.* arts. 15(c), (d), (f), and (j). Article 15 also provides an exemption from inspection of personal baggage, but creates an exception if there are grounds for believing the baggage contains Articles not for personal use. *Id.* art. 15(g).

182. *Id.* arts. 16-17.

183. *Id.* art. 16(1).

184. *Id.* This paragraph then accords immunity from personal arrest, immunity from seizure of their baggage and from legal process of very kind in their official capacity, inviolability of documents, the right to receive sealed correspondence, exemption from immigration restrictions and inspection of personal baggage, and the repatriation facilities in time of international crises as are accorded to diplomatic agents under the Vienna Convention. *Id.*

cle 17, experts, witnesses, and other persons required to participate in Court proceedings are entitled to the treatment necessary for the proper functioning of the Court.¹⁸⁵ During the period of their missions, such individuals are provided with the same privileges and immunities provided for Counsel in Article 16, subparagraphs (a) to (f).¹⁸⁶

b. Provisions Governing Abuses by ICC Personnel

The Draft Agreement also contains provisions regarding the abuse of privileges and immunities.¹⁸⁷ First, Article 18 provides that the Court shall cooperate with state authorities to prevent the occurrence of any abuse in connection with privileges and immunities.¹⁸⁸ Additionally, Article 18 requires that all persons enjoying privileges and immunities respect the laws of the state party in whose territory they may be on.¹⁸⁹ Second, Article 19 permits the possibility of a waiver of privileges and immunities.¹⁹⁰

II. *BALANCING SOVEREIGNTY WITH HUMAN RIGHTS PROTECTION*

The notion of sovereignty¹⁹¹ recognizes that each state is the master of its own territory, except as limited by international treaties or law.¹⁹² Sovereignty has numerous functions.¹⁹³ First, it prohibits the exercise of jurisdiction by one state over matters

185. *Id.* art. 17.

186. *Id.* arts. 16(1)(a)-(f) (defining privileges and immunities of Counsel).

187. *Id.* arts. 18-19.

188. *Id.* art. 18.

189. *Id.* The final sentence of Article 18(2) states: "They also have a duty not to interfere in the internal affairs of that state." *Id.*

190. *Id.* art. 19. This is stated in Article 48(5) of the Rome Statute. Rome Statute, *supra* note 14 art. 48(5).

191. See William C. Plouffe, Jr., *Sovereignty in the "New World Order": The Once and Future Position of the United States, A Merlinesque Task of Quasi-Legal Definition*, 4 *TULSA J. COMP. & INT'L L.* 49, 52 (1996) (noting that practitioners of international law are aware that international law is vague concept).

192. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 *AM. U.J. INT'L L. & POL'Y* 1, 1 (1993) (noting that international law is organized around concept of sovereignty).

193. See Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 *ST. JOHN'S J.L. COMM.* 535, 539-40 (1997) (discussing different meanings of sovereignty).

within the territory of another state.¹⁹⁴ Thus, it serves as a political weapon defending the independence of a state.¹⁹⁵ Second, it provides, in part, a state's sense of dignity.¹⁹⁶ Finally, a sovereign state has the power to provide protection to its citizens.¹⁹⁷

Sovereignty is the underlying concept around which international law is currently organized.¹⁹⁸ Some commentators note that although sovereignty is no longer absolute, this principle still takes precedence over human rights.¹⁹⁹ Other commentators argue, however, that the interdependence of the international community and the increased concern for human rights are leading to a diminution of the classical notions of sovereignty.²⁰⁰ This debate echoes the classic conflict between the Realist and Cosmopolitan traditions.

A. *The Realist Theory*

Realist thinkers argue in favor of the legal principle of non-intervention, the duty of states to refrain from interfering in the affairs of other states.²⁰¹ This notion conflicts directly with the

194. *See id.* at 536 (noting that sovereignty has long been considered most fundamental right nations can possess).

195. *See id.* at 540 (noting that this is less abstract function of sovereignty).

196. *See id.* (providing that this is abstract function of sovereignty as well).

197. *See id.* (stating that sovereign state's power to provide security to its citizens is most important).

198. *See* Grossman, *supra* note 192, at 1 (explaining that this principle means that each state is master of its own territory, unless limited by international treaty).

199. *See* McKeon, *supra* note 193, at 538 (discussing sovereignty and its relation to creation of ICC); *see also* Plouffe, *supra* note 191, at 54 (noting some theorists view that it is duty of states not to violate territorial sovereignty of another state).

200. *See* McKeon, *supra* note 193, at 541 (claiming that combination of factors have emerged to compromise sovereignty). The most contentious issue discussed during the 1999 general debate at the U.N. was whether human rights or sovereignty are more important. *See* Dieter Kastrop, *From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity*, 23 *FORDHAM INT'L L.J.* 404, 411 (1999) (discussing conflicting notions of sovereignty and humanitarian intervention). During this U.N. debate, the United States, most European nations, and a large number of African and Latin American nations supported the idea that human rights should take precedence over sovereignty. *Id.* Other countries, such as China, Iraq, Libya, North Korea, and Sudan, argued that sovereignty takes priority over human rights and expressed strong opposition to humanitarian intervention. *Id.* Numerous other countries found themselves somewhere in the middle. *Id.*

201. *See* Ravi Mahalingam, *The Compatibility of the Principle of Nonintervention with the Right of Humanitarian Intervention*, 1 *UCLA J. INT'L L. & FOR. AFF.* 221, 229 (1996) (elaborating on Realist perspective).

protection of human rights generally.²⁰² In current international law, however, state sovereignty continues to be essential,²⁰³ and thus it can be argued that the Realist tradition holds true today.

1. An Explanation

Realist thinkers²⁰⁴ maintain that in international relations, states, not individuals, are the principle actors.²⁰⁵ Modern realists contend that sovereignty is a right based on a presumed legitimacy from the people within a state's territory.²⁰⁶ From this perspective, because sovereignty is a right, any intervention infringing on that right must be *prima facie* illegitimate.²⁰⁷

Realists present several arguments in favor of the legal principle of nonintervention.²⁰⁸ First, they argue that all states are equal.²⁰⁹ This conclusion is based on a state's sovereign right to regulate conduct within its borders and to regulate its foreign affairs.²¹⁰ Second, modern realists argue that non-intervention is important for international order.²¹¹ From the realist's perspective, humanitarian intervention is likely to lead to major wars fought with passion rather than self-interest.²¹² According to this perspective, a non-interventionist view will be less likely to lead to a breakdown in international order.²¹³ Thus, such schol-

202. *See id.* at 229-30 (discussing Realist view on legal principle of humanitarian intervention).

203. *See* John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 453 (1997) (discussing role of sovereignty in international law).

204. *See* Mahalingam, *supra* note 201, at 228 (explaining that Realists consider international community to be anarchical in nature because there is no higher authority and thus such thinkers doubt enforceability of international law).

205. *See id.* (discussing philosophical underpinnings of principle of nonintervention and right of humanitarian intervention).

206. *See id.* at 229-30 (discussing further realist view on legal principle of humanitarian intervention).

207. *See id.* at 230 (noting importance of this concept for international order).

208. *See id.* at 229 (elaborating on Realist perspective); *see also* Plouffe, *supra* note 191, at 53-54 (providing views of alternative theorists).

209. *See* Mahalingam, *supra* note 201, at 229 (explaining that this is so because states are sovereign entities).

210. *See id.* (claiming that all states are equal because they are sovereign entities).

211. *See id.* at 230 (providing that Realists assert that world government cannot be achieved and is not necessarily desirable).

212. *See id.* at 231 (noting Realist view that international society should strive to prevent major breakdowns of order without guidance of sovereign).

213. *Id.*

ars argue that the international community should strive to maintain the basis of international order by mediating and containing conflict by acting rationally.²¹⁴

2. In Practice

Attempts to regulate warfare that emerged at the end of the 19th century and at the beginning of the 20th century were linked closely to notions of state sovereignty.²¹⁵ The U.N. and international law historically supported the doctrine of non-intervention.²¹⁶ The tenets of sovereignty lie at the foundation of the principle of non-intervention.²¹⁷

The concept of territorial sovereignty is embodied in Article 2(7) of the U.N. Charter.²¹⁸ Article 2(7) provides that the U.N. Charter does not authorize the U.N. to intervene in matters that are essentially within the domestic jurisdiction of any state.²¹⁹ This Article preserves a protected sphere of domestic affairs.²²⁰ Scholars read Article 2(7) broadly to impose the prohibition of interference by one state in the internal affairs of another.²²¹

The U.N. Charter does not recognize the right of intervention on behalf of human rights.²²² It, however, does qualify the support for the doctrine of non-intervention with one excep-

214. *See id.* at 230-31 (claiming that if states behave rationally their behavior will be more predictable and diplomacy could substitute for major wars).

215. *See* Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 31, 33 (Sarah B. Sewall et al. eds., 2000) (noting that states at that time were subject to only their own laws).

216. *See* David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 *CORNELL INT'L L.J.* 203, 209 (providing background on doctrine of non-intervention).

217. *See id.* (noting that states act partially out of self-interest and adopt principal of non-intervention).

218. *See id.* (stating that founders of U.N. incorporated doctrine of non-intervention into U.N. Charter).

219. U.N. CHARTER art. 2, para. 7 (stating that "[n]othing contained in the present Charter shall authorize the U.N. to intervene in matters which are essentially within the domestic jurisdiction of any state").

220. *See* Abram Chaynes & Anne-Marie Slaughter, *The ICC and the Future of the Global Legal System*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 240 (Sarah B. Sewall et al. eds., 2000) (explaining that founders of U.N. preserved insulated sphere of domestic affairs).

221. *See id.* (noting that although provision reads only against United Nations, it has been read broadly).

222. *See* Kresock, *supra* note 216, at 209 (explaining how founders of U.N. incorporated doctrine of non-intervention into U.N. Charter).

tion.²²³ It provides that the absence of support for intervention should not prejudice the abilities of the U.N. Security Council²²⁴ under Chapter VII.²²⁵

For the U.N. to take action pursuant to Chapter VII, the Security Council must find that the controversy satisfies two requirements.²²⁶ First, the controversy cannot lie essentially within the domestic jurisdiction of the state.²²⁷ Second, the controversy must constitute a threat to international peace and security.²²⁸ Thus, it is argued that all Member States are obliged to refrain from acting to correct humanitarian and human rights concerns that do not escape the territory of a state, unless there is a serious threat to international security.²²⁹

In current international law, state sovereignty continues to be an essential principle.²³⁰ States are often faced with the choice between strengthening the enforcement capacity of international law and shielding their nationals from the reach of international justice.²³¹ When presented with this dilemma, most states choose to protect their nationals.²³²

223. *Id.*

224. *Id.* The Security Council is the executive body of the U.N. that may use diplomatic, economic, or military means to resolve international disputes. *See generally* U.N. CHARTER arts. 23-32 (discussing composition, functions, and powers of Security Council). The Security Council is an 11-member body with five permanent members (China, France, Great Britain, the Soviet Union, and the United States) and six additional members that are elected at two-year intervals. *Id.* art. 23.

225. U.N. CHARTER art. 2, para. 7 states: "[T]his principle shall not prejudice the application of enforcement measures under Chapter VII."

226. *See* Kresock, *supra* note 216, at 209 (discussing process whereby Security Council may act).

227. U.N. CHARTER art. 2, para. 7.

228. U.N. CHARTER art. 39 (stating that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security").

229. *See* Kresock, *supra* note 216, at 209-10 (discussing process whereby Security Council may act).

230. *See* Perkins, *supra* note 203, at 453 (discussing role of sovereignty in international law).

231. *See* Jelena Pejic, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 860 (1997) (discussing differences between Ad Hoc Tribunals and ICC).

232. *Id.*

B. *The Cosmopolitan Tradition*

While Realist thinkers favor the principle of non-intervention, Cosmopolitan theorists advocate a legal right of humanitarian intervention.²³³ In their view, human rights must take precedence over the rights of states.²³⁴ In practice, it can be argued that contemporary international law establishes that a state's treatment of human beings in respect of their human rights is not solely the state's business, but is a matter of international concern.²³⁵

1. An Explanation

The Cosmopolitan tradition traces back to Immanuel Kant.²³⁶ Kant believed that people, not states, were the subjects of the international community.²³⁷ The notion that the individual is the bearer of rights became a familiar concept during the time of Hugo Grotius.²³⁸ Grotius rejected the notion that international law should be confined to regulating relations between states.²³⁹

Modern theorists of this tradition encourage an international legal right of humanitarian intervention.²⁴⁰ In their view, either the international community or an individual state may

233. See Mahalingam, *supra* note 201, at 236 (citing examples of such theorists as David Luban and Fernando Teson).

234. See *id.* (noting that such theorists might at same time accept some form of limited sovereignty).

235. See Perkins, *supra* note 203, at 443 (claiming that there exists limits on state's sovereignty even in dealing with its own citizens).

236. See Mahalingam, *supra* note 201, at 235 (providing further information on Kant's views). Immanuel Kant's contribution to the debate between non-intervention and intervention is that he supported the doctrine of intervention in order to establish a republican state. *Id.* Kant argues that intervention by one state in the affairs of a second state can be legitimate, albeit only when the intervention occurs in order to assist in the formation of a republic. *Id.*

237. See *id.* (stating that Kant envisioned peaceful international society could exist only if all states had republican forms of government). Modern members of the Cosmopolitan perspective, such as David Luban and Fernando Teson, focus on the theme that individuals are the principal subjects of international law. *Id.*

238. See Adriaan Bos, *The International Criminal Court: A Perspective*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS* 463, 468 (Roy S. Lee, ed., 1999) (comparing view held by Grotius with qualities of Rome Statute).

239. See *id.* (noting that Grotius rejected view that is upheld by 19th century Positivism).

240. See Mahalingam, *supra* note 201, at 236 (citing examples of such theorists as David Luban and Fernando Teson).

invoke the right of intervention against any state that violates human rights.²⁴¹ While accepting a form of limited sovereignty, the modern cosmopolitan perspective emphasizes that human rights must take precedence over the rights of states.²⁴²

These theorists also contend that when a state commits substantial human rights violations, that state's international legitimacy is damaged and thus, its sovereign rights should not shield its actions.²⁴³ The right to intervene on behalf of humanitarian concerns should exist because such intervention is just and serves to establish true legitimacy.²⁴⁴ From the modern cosmopolitan perspective, states exist to preserve the rights of human beings, and the right of intervention will allow international law to better achieve that end.²⁴⁵

2. In Practice

The interdependence of the international community and the increased concern for human rights are leading to an erosion of the classical notions of sovereignty.²⁴⁶ Even the strong proponents of the positivist perspective of international law²⁴⁷ concede that the current state of international law rejects the notion of absolute sovereignty.²⁴⁸ The U.N. Secretary-General noted recently that globalization is redefining state sovereignty.²⁴⁹

Contemporary international law establishes that a state's treatment of human beings with respect to their human rights is

241. *See id.* (stating that in modern theorists' view, ultimate justification for state's legitimacy is enforcement of natural rights of citizens).

242. *See id.* (claiming that if states exists for reason, according to cosmopolitans, it is to protect human rights).

243. *See id.* at 236-37 (noting that foreign governments can intervene on behalf of human beings).

244. *See id.* (suggesting that many states do not respect right to intervene).

245. *See id.* at 237 (summarizing Cosmopolitan views as in favor of humanitarian intervention).

246. *See* McKeon, *supra* note 193, at 541 (noting that combination of factors have emerged to compromise sovereignty).

247. Winston P. Nagan, *Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia*, 6 DUKE COMP. & INT'L L.J. 127, 142 (1995). Theorists of the positivist perspective view the community as conditioned by sovereign states. *Id.*

248. *See id.* (explaining authors indicate clear repudiation of any absolutist notion of sovereignty).

249. *See* Kastrup, *supra* note 200, at 411-12 (providing information regarding 1999 U.N. general debate).

not solely the state's business, but is a matter of international concern.²⁵⁰ The acceptance of this notion dramatically increased over the past fifty years with the development of multilateral frameworks for the protection of human rights against the state²⁵¹ and the increasing willingness of nations to surrender a degree of sovereignty necessary for the prosecution of international crimes.²⁵²

The international community first attempted to work towards international cooperation through multilateral commitments at the Hague Conferences of 1899 and 1907.²⁵³ At the Second Hague Peace Conference of 1907, thirty-nine states agreed to form an international criminal court.²⁵⁴ The Court, however, did not immediately come to fruition.²⁵⁵ The international community did not display the determination to prosecute alleged perpetrators of international crimes until the establishment of the Nuremberg and Tokyo trials.²⁵⁶

Regional human rights tribunals in effect today, such as the European and Inter-American Courts of Human Rights, further demonstrate the movement towards an acceptance of international justice.²⁵⁷ In the 1990s, the political determination to prosecute atrocities grew even stronger with the efforts before

250. See Perkins, *supra* note 203, at 443 (discussing limits on state sovereignty).

251. See Ronald A. Brand, *The Role of International Law in the Twenty-First Century: External Sovereignty and International Law*, 18 *FORDHAM INT'L L.J.* 1685, 1694 (1995) (discussing development of binding international protections for individuals).

252. See Daniel B. Pickard, *Security Council Resolution 808: A Step Toward A Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 *GOLDEN GATE U.L. REV.* 435, 454 (1995) (noting that although willingness of nations to surrender some fraction of their sovereignty took generations to develop, nations are now determined to prosecute international crimes).

253. See Roy S. Lee, *supra* note 14, at 36 (noting that Hague Peace Conferences were beginnings of substantive international criminal law); see also Pickard, *supra* note 252, at 454 (revealing that although conferences did not succeed in establishing international criminal court, they resulted in major developments in international law).

254. See Pickard, *supra* note 252, at 454 (noting that acceptance of international court in theory was major advancement in field of international law).

255. See *id.* (noting that this was due to nations' failure to ratify convention).

256. See *id.* at 454-55 (describing Nuremberg and Tokyo Trials as successful examples of temporary international criminal courts).

257. *Id.* at 456. The European Court of Human Rights is a creation of the European Convention on Human Rights, signed on November 4, 1950. *Id.* This convention held governments accountable to their own citizens for violations of international law. *Id.* The European Court of Human Rights served as a model for the Inter-American Court of Human Rights 25 years later. *Id.* See Brand, *supra* note 251, at 1694 (citing these courts as international legal mechanisms which are steps towards limits on states).

the ICTY and ICTR.²⁵⁸ Since the Hague Conferences, intervening treaties have had limited success due to a lack of meaningful enforcement.²⁵⁹ Finally, in 1998, the Rome Statute achieved a permanent international institution with the ability to prosecute and punish perpetrators of the most heinous crimes.²⁶⁰

III. *THE AGREEMENT ON PRIVILEGES AND IMMUNITIES SHOULD BE NEGOTIATED WITH A VIEW TOWARDS STRENGTHENED PRIVILEGES AND IMMUNITIES*

In the post-Cold War era, human rights laws and the humanitarian laws of war are growing stronger.²⁶¹ This development of human rights norms evidences a growing trend that individuals have rights and obligations flowing from the international legal system.²⁶² Beginning with the successful indictment of crimes against humanity at Nuremberg, international jurisdiction to try the most egregious crimes emerged.²⁶³ A state is no longer immune from international scrutiny as mechanisms are being created through which a state is held accountable for its conduct.²⁶⁴ Thus, while sovereignty remains a recognizable norm as acknowledged in the U.N. Charter, changing events over time have caused states to accept a certain amount of restrictions on their sovereignty.²⁶⁵

258. See MORRIS, *supra* note 29, at 317 (providing background information on tribunals).

259. See Roy S. Lee, *supra* note 14, at 36 (discussing that success has been limited over intervening years because meaningful enforcement seemed unattainable).

260. *Id.* Although individual responsibility is not a new concept, the way in which it is elaborated in the Rome Statute is novel. Bos, *supra* note 238, at 468. For the first time, general principles of criminal law and procedural regulations are part of the definitions of crimes. *Id.*

261. See *supra* notes 250-52 and accompanying text (discussing contemporary notion that treatment of human beings is matter of international concern).

262. *Id.*

263. See *supra* notes 253-56 and accompanying text (describing historical attempts by international community to prosecute perpetrators of international crimes).

264. See *supra* notes 257-60 and accompanying text (providing examples of international and regional tribunals already in place).

265. See *supra* notes 218-21 and accompanying text (explaining effect of Article 2(7) of U.N. Charter); see also *supra* notes 246-49 and accompanying text (noting erosion of notion of absolute sovereignty).

A. *The Need For a Strong Privileges and Immunities Agreement as Evidenced by Current Trends in International Law*

The adoption of the Rome Statute, the continuous support of the Rome Statute by over 130 nations, and the ongoing PrepCom negotiations evidence the growing concern for the promotion of human rights.²⁶⁶ Once the ICC enters into force, it must be functional to be consistent with the international community's commitment to human rights.²⁶⁷ The various practical arrangements being prepared by the PrepCom will significantly impact the functioning of the Court.²⁶⁸ In particular, the Privileges and Immunities Agreement of the ICC will potentially provide the ICC Prosecutor with the ability to conduct on-site investigations in an efficient manner.²⁶⁹

The power to conduct on-site investigations, an essential element of the ICC, already belongs to the Prosecutor.²⁷⁰ The entire framework of the ICC will be less efficient without the authority to conduct such investigations independently. Thus, the task ahead is to provide the Prosecutor and other personnel with necessary tools for the effective fulfillment of their mandates.²⁷¹ The Draft Agreement must provide sufficient privileges and immunities to personnel to be consistent with the growing political will to enforce the protection of human rights.²⁷²

Addressing sovereignty concerns, the Court will be based on national procedures supplemented by the Court according to the complementarity regime.²⁷³ Thus, states retain the primary obligation to prosecute crimes of international concern, and it is only when a national system is unwilling or unable to prosecute

266. *See supra* notes 14-16 and accompanying text (discussing adoption of Rome Statute and high number of countries supporting Court); *see also supra* notes 131-34 and accompanying text (noting progress made by PrepCom).

267. *See supra* note 15 and accompanying text (noting ICC will enter into force upon 60th ratification).

268. *See supra* notes 127-29 and accompanying text (providing list of practical arrangements to be negotiated by PrepCom).

269. *See supra* notes 153-60 and accompanying text (describing procedure whereby ICC Prosecutor may conduct on-site investigations).

270. *Id.*

271. *See supra* note 166 and accompanying text (explaining that effective ICC requires Prosecutor who is independent and has ability to access information).

272. *See supra* notes 246-60 and accompanying text (discussing increased protection of human rights).

273. *See supra* note 153 and accompanying text (describing Court's complementarity regime).

that the ICC will have jurisdiction.²⁷⁴ Other sovereignty concerns that states may possess regarding the Court relate to the privileges and immunities agreement.²⁷⁵ Although commentators observe that there is generally high compliance with the law of diplomatic immunity, in diplomatic relations the reciprocal benefits of compliance are visible.²⁷⁶ This notion of reciprocity, however, is not present in the same manner with regards to international criminal tribunals. Thus, the realist notion of international law, taken together with the possibility of abuse of privileges, presents an argument for a lower level of privileges and immunities.²⁷⁷

There are several arguments, however, against such a view. First, the level of abuse by diplomats in recent decades is minimal, as evidenced by the generally high compliance level.²⁷⁸ Second, the examples of abuse did not occur in the course of, or related to, any official duties.²⁷⁹ Finally, the Draft Agreement on the Privileges and Immunities of the ICC provides provisions for dealing with instances of abuse.²⁸⁰ Most notable is the ability to waive any privileges and immunities in cases where they can be waived without prejudice to the purpose for which they are accorded.²⁸¹ The incidents of genocide, crimes against humanity, and war crimes are far more numerous than the occurrence of abuse by diplomats. Thus, states should be more concerned with providing increased privileges and immunities to ICC personnel in order for such persons to effectively carry out investigations.

B. *Specific Issues and Provisions to Address in the Draft Agreement*

Noncompliance undermined the credibility and the effec-

274. *Id.*

275. *See supra* notes 167-86 and accompanying text (discussing Draft Agreement in detail).

276. *See supra* note 36 and accompanying text (noting success of Vienna Convention is due partially to notion of reciprocity).

277. *See supra* notes 205-14 and accompanying text (providing explanation of Realist tradition).

278. *See supra* notes 39-40 and accompanying text (acknowledging small number of diplomatic abuses).

279. *See supra* notes 41-43 and accompanying text (describing instances of abuse).

280. *See supra* notes 187-90 and accompanying text (discussing Articles of Draft Agreement that provide protection from abuse of immunities).

281. *See supra* note 190 and accompanying text (describing Article 48(5) of Rome Statute).

tiveness of the ICTY,²⁸² and one cannot assume that the situation will be any different with respect to the ICC. Thus, certain areas should be flagged as having a high potential for non-cooperation in order to provide U.N. delegates with the opportunity to strengthen such provisions during negotiations.

First, the case of Dato' Param Cumaraswamy demonstrates the importance of the notion of immunity from legal process.²⁸³ An increasing number of U.N. experts are required to conduct investigations in countries that are responsible for human rights violations.²⁸⁴ ICC Prosecutors will conduct investigations in a similar manner.²⁸⁵ If states take action against U.N. experts, the only source of legal protection is civil and criminal immunity provided for in the Convention on the Privileges and Immunities of the U.N.²⁸⁶ Unfortunately, the fact that a state is party to the Convention has not always resulted in compliance.²⁸⁷ Similarly, ICC personnel will rely solely on the provisions in the Rome Statute and in the Draft Agreement for their grant of privileges and immunities.²⁸⁸ Thus, extra attention should be paid to such provisions for each type of personnel.

A second area of privileges and immunities that countries oftentimes disregard is freedom of communication.²⁸⁹ States do not always comply with Article 27 of the Vienna Convention, which permits and protects free communication on the part of the mission for official purposes.²⁹⁰ Article 11(3) of the Draft Agreement provides that all official communications and corre-

282. See *supra* notes 7-12 and accompanying text (describing setbacks encountered by ICTY).

283. See *supra* notes 82-87 and accompanying text (discussing refusal of Malaysian government to grant immunity to Cumaraswamy).

284. See *supra* notes 153-66 and accompanying text (describing procedure whereby ICC Prosecutor may conduct on-site investigations).

285. *Id.*

286. See *supra* note 86 and accompanying text (explaining ICJ's decision that Cumaraswamy was entitled to immunity under U.N. Convention on Privileges and Immunities).

287. See *supra* notes 82-87 and accompanying text (describing Malaysia's noncompliance).

288. See *supra* notes 120-21 and accompanying text (discussing privileges and immunities for ICC personnel).

289. See *supra* notes 51-52 and accompanying text (discussing noncompliance with Article 27 of Vienna Convention).

290. See *id.* (noting that such noncompliance occurs by states possessing capacity to intercept embassy communications).

spondence of the Court shall be inviolable.²⁹¹ There unfortunately may be little else the Draft Agreement can provide and the level compliance with the provision will remain to be seen according to the states involved.

Freedom of Movement is a third area of the Draft Agreement that continues to be a matter of serious controversy in the international community.²⁹² The defiance by renegade states experienced by the ICTY regarding entry into state's territory is a broad lesson for the ICC.²⁹³ States should not be permitted to defy a legitimate international tribunal, especially when the Prosecutor requests entry into the territory.²⁹⁴

Also related to freedom of movement within a state are safety concerns for ICC personnel operating in the field. The importance of protecting officers in the field is evidenced by the increase in the number of killings of U.N. civilian staff since the early 1990s.²⁹⁵ Those who have come under attack are not only military personnel, but are civilians serving in peacekeeping, peacemaking, and humanitarian missions as well.²⁹⁶ With the ability to conduct on-site investigations, ICC Prosecutors will be in similarly precarious situations.²⁹⁷ This situation is exacerbated because the Prosecutor can conduct on-site investigations in the territory of a state without express consent, provided that such state is a party to the treaty.²⁹⁸

The U.N. is taking strides to counter such problems with the Safety Convention;²⁹⁹ however, the ICC will be an independent treaty-based organization outside the U.N., and therefore, ICC

291. See *supra* note 171 (setting forth text of Article 11 of Draft Agreement).

292. See *supra* notes 48-52 and accompanying text (describing defiance by states of Vienna Convention); see also *supra* notes 7-12 and accompanying text (discussing refusal of government of Former Yugoslavia to allow ICTY Prosecutor Arbour to enter Kosovo).

293. See *supra* note 13 and accompanying text (noting commentators' opinion that obstruction by governments should not be permitted).

294. *Id.*

295. See *supra* note 88 and accompanying text (explaining increase in killings of U.N. staff in recent years).

296. See *id.* (describing individuals coming under attack).

297. See *supra* notes 153-66 and accompanying text (describing procedure whereby ICC Prosecutor may conduct on-site investigations).

298. *Id.*

299. See *supra* notes 89-90 and accompanying text (discussing adoption of Safety Convention).

personnel cannot rely on this convention.³⁰⁰ One possible solution is to expand the definition of Associated Personnel in the Safety Convention to include ICC investigators.

CONCLUSION

World War II offered a powerful lesson in the danger inherent in an international legal order based upon the notions of absolute sovereignty. This lesson provided the impetus for the creation of organizations such as the U.N. and led to a diminution of the concept of sovereignty to protect human rights. There is a growing consensus that the international community is no longer prepared to stand aside and tolerate a government committing violations of fundamental human rights.

The adoption of the Rome Statute is evidence of the world commitment to the advancement of human rights. The world, however, does not have to make a choice between national sovereignty and human rights. Concerns over violations of sovereignty by diplomats are minimal as compared to the incidents of genocide, crimes against humanity, and war crimes. Because there is little evidence of diplomatic abuses, and because one would expect diplomatic abuses to occur more frequently than those committed by personnel of an international organization seeking to promote human rights, the granting of immunities to the ICC Prosecutor will not be a severe diminution to the notion sovereignty.

Now that the commitment to advance human rights is evident, it would be unthinkable to undermine the potential of the Court's personnel with ineffective tools. One of the final steps towards an effective ICC is the adoption of the Draft Agreement. The U.N. delegates at the PrepCom should note the trend toward the protection of human rights in the international community and negotiate the agreement with a view towards increasing the privileges, immunities, facilities, and exemptions of the Court and its personnel.

300. See *supra* note 89 (describing types of personnel covered by Safety Convention).

