amnesty international

INTERNATIONAL CRIMINAL COURT

The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice

"Fundamental principles of international law and the place of those principles in the conduct of global affairs are in question.
First, in the absence of a threat to international peace and security, the Council's passing a Chapter VII resolution of the kind currently circulating would be ultra vires.
Second, acting beyond its mandate would undermine the standing and credibility of the Council in the eyes of the membership.
Third, the proposed resolutions currently circulating would set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished, e.g. the nuclear Non-Proliferation Treaty, through a Security Council resolution."

Remarks given by H.E. Mr. Paul Heinbecker, Ambassador and Permanent Representative of Canada to the United Nations before the UN Security Council, 10 July 2002

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INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON wc1x 0dw, UNITED KINGDOM

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Article 16 of the Rome Statute of the International Criminal Court

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Security Council Resolution 1422 (2002) of 12 July 2002

The Security Council,

Taking note of the entry into force on 1 July 2002 of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

Emphasizing the importance to international peace and security of United Nations operations,

Noting that not all States are parties to the Rome Statute,

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes,

Determining that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,

Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council,

Acting under Chapter VII of the Charter of the United Nations,

1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;

3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;

4. *Decides* to remain seized of the matter.

INTERNATIONAL CRIMINAL COURT:

The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice

Amnesty International is deeply concerned that the Security Council adopted Resolution 1422 (2002) on 12 July 2002. That resolution seeks to give perpetual impunity from investigation or prosecution by the recently established International Criminal Court to nationals of states that have not ratified the Rome Statute of the International Criminal Court (Rome Statute) for genocide, crimes against humanity and war crimes when these persons were involved in operations established or authorized by the United Nations (UN). It purports to have been adopted under Chapter VII of the Charter of the United Nations (UN Charter), but, contrary to its consistent practice for 57 years and the express requirements of the UN Charter, the Security Council did not even attempt to determine that there was a threat to or breach of international peace and security. Indeed, it could not have done so since there simply was no such threat. The resolution was adopted at the insistence of the United States of America (USA), which wanted to ensure that members of its armed forces stationed abroad, as well as its military and civilian leaders, could never be subject to the jurisdiction of the International Criminal Court for these crimes.

This unprecedented resolution is contrary to the Rome Statute. It would require states parties to the Rome Statute to violate their obligations under that treaty - if they were to comply with the resolution – by refusing to surrender persons accused of these crimes to the International Criminal Court. The resolution also violates the UN Charter and is contrary to other international law, including *jus cogens* prohibitions, human rights and international humanitarian law. In particular, it is contrary to the fundamental principle of criminal law that all are equal before the law. The adoption of the resolution undermines the legitimacy of the Security Council. Although adopted at the insistence of the USA, it would necessarily apply to the nationals of other states not party to the Rome Statute that have contributed to operations established or authorized by the UN. Amnesty International is calling upon the Security Council not to renew the resolution when it expires on 30 June 2003. If any state were to refuse to surrender an accused to the International Criminal Court based on this resolution – or on any attempt to renew it – the organization would urge the International Criminal Court to determine that the resolution fails to satisfy the requirements of the Rome Statute and other relevant international law.

Section I of this memorandum describes the content of the resolution, identifies some of its most notable features and indicates some of its main flaws. ***Section II*** details the drafting history of the resolution, including the overwhelming criticism by at least 116 states of the

proposals under consideration. The remaining sections of the memorandum expand and develop these legal arguments made by states during the drafting of the resolution. ***Section III*** explains that the International Criminal Court has the power to determine whether the request satisfies the Rome Statute and other relevant international law. ***Section IV*** describes the requirements of Article 16 of the Rome Statute that must be satisfied before the International Criminal Court can grant a request by the Security Council for a deferral of an investigation or prosecution and demonstrates why the resolution is contrary to the Rome Statute. ***Section V*** discusses the legal constraints on Security Council action under Chapter VII of the UN Charter and demonstrates that the resolution is *ultra vires* and contrary to international law, including *jus cogens* prohibitions, human rights and international humanitarian law.

I. THE CONTENT OF THE RESOLUTION AND ITS MAIN FLAWS

This section briefly describes the content of Security Council Resolution 1422, analyses some of its most significant features and identifies its main flaws, which are discussed in more detail below in other sections of the memorandum.

A The content of the resolution

The preamble. In the preamble to the resolution, the Security Council notes the entry into force of the Rome Statute and emphasizes "the importance to international peace and security of United Nations operations". It notes that "not all States are parties to the Rome Statute" and that "States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity". This fundamental principle which underlies the entire framework of contemporary international justice, incorporated in the Rome Statute at the insistence in particular of the United States, recognizes that states have the primary responsibility to bring to justice persons responsible for crimes under international law, but provides that when states are unable or unwilling to fulfil this responsibility, international criminal courts with jurisdiction can decide to investigate and prosecute the crimes.[1] The Security Council then notes "that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes". This paragraph ignores the very reason for establishing the International Criminal Court, which is designed to act only when states are unable or unwilling genuinely to fulfil their responsibilities to investigate or prosecute these crimes.

The Security Council then made two determinations. First, it determined that "operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security". Second, it determined that "it is in the

1 The Preamble to the Rome Statute emphasizes that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". Article 1 repeats this principle, stating that the International Criminal Court "shall be complementary to national criminal jurisdictions" and Article 17 provides that cases are inadmissible when states are able and willing genuinely to investigate and prosecute crimes within the Court's jurisdiction.

interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council". Neither determination amounts to a determination of the existence of a threat to or breach of international peace and security or an act of aggression, although, as shown below in Section V.B.1, such a determination is required by the UN Charter before the Security Council can adopt a binding resolution under Chapter VII.

The operative paragraphs. The operative paragraphs of the resolution read:

"Acting under Chapter VII of the Charter of the United Nations,
1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;
4. Decides to remain seized of the matter."

B. Some of the notable features and flaws of the resolution

There are a number of significant aspects of the resolution that should be noted at the outset. In addition, it would be useful to identify briefly here some of its numerous flaws, which are discussed in greater detail below in Sections IV and V.

Absence of the required determination under Article 39 of the UN Charter. As is evident from the above, although the Security Council asserted that it was "[a]cting under Chapter VII of the Charter of the United Nations", the drafting history (Section II below) makes clear that the Security Council did not make the determination in the resolution required under Article 39 of the UN Charter that there was a threat to or breach of international peace and security or a case of aggression or identify any such threat or breach. As explained below in Section V.B.1, it is beyond dispute that such a determination is necessary under the UN Charter before the Security Council can adopt a binding resolution under Chapter VII. This failure is understandable since there simply was no such breach or threat. Indeed, the *only* such threat reportedly cited during the closed sessions of the Security Council was the threat by the USA to veto the extension of UNMIBH and other UN peace-keeping operations.[2] In the absence of a

2 As it has been noted:
"Resolution 1422 does not only re-interpret the ICC-Statute, in particular its Article 16, but it in fact turns the past logic of peacekeeping measures in the UN system upside down. If the ICC could, so far, be understood – by proponents as well as opponents – as a peacekeeping measure, because, according to the Statute's preamble,

determination pursuant to Article 39, the Security Council could not adopt a resolution under Chapter VII.

Obstruction of justice limited to the International Criminal Court. The scope of obstruction of justice in the resolution is more limited than that originally sought by the USA. The USA has recognized that the International Criminal Tribunal for the former Yugoslavia (ICTY) has jurisdiction over anyone, including US nationals, suspected of crimes under international law committed in the former Yugoslavia. Nevertheless, it originally attempted to obtain a resolution preventing *any* court, including the ICTY and the International Criminal Tribunal for Rwanda (ICTR) and national courts (other than the courts of the state contributing personnel to the operation), from exercising jurisdiction over nationals of contributing states that were not parties to the Rome Statute.

However, the Security Council squarely rejected this attempt. The resolution is limited to seeking to prevent the International Criminal Court from exercising its jurisdiction as a court of last resort. The jurisdiction of the ICTY remains unaffected.[3] Similarly, any state may still exercise territorial, passive personality, protective and universal jurisdiction over persons suspected of crimes in the Rome Statute.[4]

Purported consistency with Article 16 of the Rome Statute. In operative paragraph 1 of the resolution, the Security Council claims that its request is "consistent with the provisions of Article 16 of the Rome Statute". However, as explained below in Section IV, this contention is not correct for a number of reasons, including, in particular, the intent of the drafters that Article 16 be invoked only in the rare event when the Security Council made an individualized

it shall prevent the threat to peace and security of mankind by grave international crimes, it now takes on a whole new nature. In light of the Council's resolution, the Court becomes itself a threat to peace, because only under this condition can the Security Council adopt a resolution under Chapter VII of the UN-Charter. Let us pause to assess this truly grotesque logic: a resolution as it was adopted by the Security Council on July 12th presupposes that the ICC must be labeled as a threat to peace, which can only be averted by granting immunity before the Court!"
Kai Ambos, International Criminal Law has Lost its Innocence, 3 Germ. L. J. (No.10, 1 October 2002) (obtainable from: http://www.germanlawjournal.com), English translation by Dr. Frank Schorkopf of an article which appeared in Süddeutsche Zeitung, 16 July 2002, at 13.

3 Whether the latter distinction will make a difference in practice remains to be seen. In the light of the surrender by members of the Security Council on 12 July 2002 to US pressure, it is an open question whether national prosecutors or investigating judges - or political officials in those states where their approval is required to open an investigation or commence a prosecution - will resist US pressure not to investigate or prosecute one of its nationals. Similarly, the ICTY failed to open an investigation of the alleged war crimes by NATO forces in the air war against the Federal Republic of Yugoslavia in 1999 and it is unlikely that a situation will arise in the future in which members of UNMIBH, SFOR or KFOR could be involved in crimes within the Tribunal's jurisdiction. Amnesty International, NATO/Federal Republic of Yugoslavia: "Collateral damage" or unlawful killings - Violations of the laws of war by NATO during Operation Allied Force, AI Index: IOR 70/018/2000, June 2000. For the explanation by the Office of the Prosecutor of the ICTY of its decision not to open an investigation, see Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000.

4 See Amnesty International, Universal jurisdiction: The duty of states to enact and implement legislation, AI Index: IOR 53/002-018/2001, September 2001. This paper is located on: http://www.amnesty.org and can also be obtained as a CD-ROM from Amnesty International's International Justice Project.

determination in a particular case that a temporary deferral of an investigation or prosecution would help the Council restore international peace and security. Not only can the Security Council not give an authoritative interpretation of the Rome Statute, but the decision whether the request is consistent with Article 16 is *solely* for the International Criminal Court to make.

The requested deferral remains in effect for 12 months, "unless the Security Council decides otherwise", a qualification that is in practical terms meaningless since it would require the concurrence of all five permanent members of the Security Council, including the USA, and the current US administration has made clear that it would not permit such a decision.[5] Nevertheless, it is important to note that the Security Council seeks to invoke the Rome Statute by requesting that the Court defer investigations and prosecutions and rejected the original US proposals that would have sought to bypass the Court and force member states to refuse to surrender persons to the Court. This decision is an implicit recognition by the Security Council that it had no power to order the Court to defer investigations or prosecutions.[6]

Exclusion of all cases involving entire classes of persons in advance. Operative paragraph 1 is triggered automatically and retroactively to 1 July 2002 "if a case arises" – regardless of circumstances. This provision turns Article 16 on its head, since, as explained below, Article 16 was designed to permit the Security Council to request the International Criminal Court to defer temporarily an investigation or a prosecution when it concluded *after an individualized determination in a specific case* that an investigation or a prosecution by the International Criminal Court would undermine efforts to maintain or restore international peace and security. In particular, it was intended to prevent temporarily an investigation or a prosecution of a government leader or leader of an armed group involved in peace negotiations conducted under Security Council auspices. It was not designed to block selectively in advance investigations and prosecutions of entire classes of individuals, such as nationals of non-state parties involved in UN established or authorized operations. Thus, the resolution, by dispensing with the fundamental legal principle of equality before the law, seeks to create a permanent two-tiered system of international justice, one for nationals of non-states parties in UN established or authorized operations and one for everyone else in the world.[7]

5 It is almost certain that the USA will seek a renewal of the resolution since it would have little practical use in insulating US nationals from international justice as it comes to an end on 30 June 2003, a few weeks after the Prosecutor, who was elected by the Assembly of States Parties at the second resumed first session in April 2003, takes office. The Prosecutor will not have sufficient time to identify appropriate cases from those brought to his attention, conduct a preliminary inquiry and decide whether to seek authorization to open an investigation before this date.

6 Antonio Cassese, L'orgoglio americano che frena il tribunale mondiale (The American Pride that Stops the World Court), Le Repubblica, 17 July 2003, 17.

7 A distinguished international criminal law expert has commented:

> "There was a principle, which read: 'All persons are equal before the law.' It is this achievement of the French revolution with its quest for 'egalité,' which is today enshrined in international human rights treaties and national constitutional law, including the American Constitution. This principle no longer seems to apply since the passage of Security Council Resolution 1422 (2002) of July 12th, at least not in international criminal law. It now reads: 'All persons are equal before the law, with the exception of those that are citizens of the United States of America.' That the principle was set aside at the same time for other non-treaty parties of the International Criminal Court (ICC), above

Individuals and activities covered. The resolution seeks to provide immunity to "current or former officials or personnel" and, thus, applies to civilian, as well as military, officials. Any act or omission "relating to" an operation is covered by the resolution, a very broad wording, which could be interpreted to exempt from investigation or prosecution a wide range of activities, including planning, training, funding and providing logistics and intelligence to an operation.

Limited to operations established or authorized by the Security Council. As explained in Section II below, the Security Council rejected US efforts to obtain comprehensive impunity for all officials, military and civilian, involved not only in any peace-keeping operation established by the Security Council, whether under Chapter VII or some other chapter of the UN Charter, but also those involved in any operation expressly or impliedly tolerated by a UN organ or by the UN Charter. Instead, as the preambular paragraphs make clear, the resolution seeks to give impunity only to persons involved in operations established or authorized by the Security Council.[8] Indeed, France is reported to have emphasized during the closed-door drafting of the resolution that only operations established or authorized by the Security Council were included. In addition, the resolution applies only to persons involved in operations established or authorized under Chapter VII, not under any other chapter.[9] Thus, the restrictive language of the resolution precludes the USA from arguing that it gives impunity from international justice to persons involved with *any* US civilian or military operation that the USA considered to be authorized under the UN Charter, such as civilian or military anti-"terrorist" operations, actions taken in individual or collective self-defence under Article 51 of the UN Charter and regional intergovernmental organization peace-keeping operations.[10]

all China, Russia and India, does not improve the matter. They are joyful beneficiaries of the US initiative."

Ambos, *supra,* n. 2.

[8] The term: "a United Nations established or authorized operation" in the first operative paragraph is qualified by the sixth and seventh preambular paragraphs, which make it clear that the resolution applies *only* to "operations established or authorized by the United Nations Security Council".

9 The original US proposal (OPTION ONE: GENERIC TEXT) in the last week of June 2002 provided for immunity for persons participating in operations "to promote the pacific settlement of disputes", a clear reference to operations pursuant to Chapter VI (Pacific Settlement of Disputes) (Articles 33 to 38) of the UN Charter, but this language was eliminated in the resolution as adopted.

[10] Such sweeping interpretations are fully consistent with the numerous statements over the past decade by US officials in the current and previous administrations. They have repeatedly expressed concern about the possibility that members of US armed forces stationed around the world and participating in such operations could be arrested and surrendered to the International Criminal Court. Indeed, as noted above, the US has no reason to believe that any of its nationals involved in acts or omissions related to current peace-keeping operations established by the UN Security Council could ever face arrest or surrender to the International Criminal Court, which suggests that the real concern of the current administration in the USA is about other operations.

Indeed, as a result of the rejection by the Security Council of the attempt to obtain comprehensive impunity for all US armed forces stationed abroad, the USA has been seeking to gain impunity for those persons not covered by the resolution.[11]

Perpetual renewal, perpetual impunity. As noted above, if operative paragraph 2 did not exist, the resolution would have little practical effect since it would be virtually impossible for the Prosecutor, who will take office at the beginning of June 2003, to complete an analysis of all the information received between 1 July 2002 and 30 June 2003 when the resolution expires, to have sought any additional information needed to determine whether to open an investigation and to have obtained authorization from the Pre-Trial Chamber to do so. However, paragraph 2 expresses the intention to renew the request for a deferral "for as long as may be necessary". This phrase is not defined, but, given the rationale for the adoption of the resolution, it is a reasonable assumption that it means "as long as the USA threatens to veto the extension of UN peace-keeping missions if the Security Council does not renew the resolution". Since it is unlikely that the USA will withdraw this threat in the foreseeable future, the Security Council has, in effect, expressed its intention to renew the request indefinitely.

Conflicting obligations. Operative paragraph 3 purports to require states to fulfil two completely contradictory obligations - not to act inconsistently with paragraph 1 and not to act inconsistently with their international obligations. As explained below in Sections IV and V, if states were to comply with paragraph 1, they would be acting in violation of their obligations under the Rome Statute and under other international law. In particular, states parties to the Rome Statute are required under Article 85 to comply with requests to surrender accused persons; all states are obliged not to facilitate impunity.

Perpetually on the agenda. Operative paragraph 4 states that the Security Council "[d]ecides to remain seized of the matter", which means that it can only cease to remain seized of the matter with the concurrence of all five permanent members of the Security Council, including the USA.

II. THE DRAFTING HISTORY OF RESOLUTION 1422

The drafting history, in particular, the overwhelming opposition of states from all regions and all legal systems, most of whom participated in the Rome Diplomatic Conference, is helpful in understanding why Security Council Resolution 1422 does not satisfy the requirements of the Rome Statute and why it is contrary to the UN Charter and other international law. The legal arguments discussed in this section made by states during the drafting of the resolution are further developed and expanded in Sections III to V below.

11 For a legal analysis of these efforts, see Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes,* AI Index: IOR 40/025/2002, August 2002; *International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements,* AI Index: IOR 40/030/2002.

The adoption by the Security Council of Resolution 1422 grew out of the second dramatic reversal of the United States (US) government position on the International Criminal Court in less than four years. On 17 July 1998, at the Rome Diplomatic Conference on the International Criminal Court, the United States of America (USA) was one of seven states, along with Iraq, China and Israel to vote against the adoption of the Rome Statute.[12] However, the USA then played a constructive role in the Preparatory Commission of the International Criminal Court in drafting supplementary instruments, including the Elements of Crimes, which it said reflected customary international law.[13] On 31 December 2000, the USA signed the Rome Statute.

A radical shift with respect to the US position on the International Criminal Court took place after George W. Bush was elected President. The new administration ceased to participate in the work of the Preparatory Commission. It then gave a green light to continued efforts in the US Congress to enact the American Service Members Protection Act (ASPA), which entered into force on 2 August 2002 and bars cooperation with the International Criminal Court if it investigates or prosecutes US citizens.[14] On 6 May 2002, in an unprecedented step for a treaty signatory, the USA repudiated its signature of the Rome Statute.[15] It indicated that the USA would strongly oppose any efforts by the International Criminal Court to exercise its statutory jurisdiction over persons suspected of genocide, crimes against humanity or war crimes if they

[12] In contrast, 120 states voted in favour of the Rome Statute and 21 abstained, many of which later signed the Statute or indicated that they intended to ratify it.

[13] On 30 June 2000, at the close of the fifth session of the Preparatory Commission on the International Criminal Court, the United States delegate, Lt. Col. William Lietzau, said that the adoption of the Elements of Crimes was "an historic accomplishment that cannot be overstated", and he added that the United States was "happy to join consensus in agreeing that this elements of crimes document correctly reflects international law". *See* Christopher Keith Hall, *The First Five Sessions of the UN Preparatory Commission for the International Criminal Court,* 94 Am. J. Int'l L. 788 (2000).

[14] The ASPA prohibits US cooperation with investigations and prosecutions of US citizens by the International Criminal Court and prohibits US military assistance to states parties (except members of the North Atlantic Treaty Organization (NATO) and certain other allies, including Argentina, Australia, Egypt, Israel, Japan, Jordan, New Zealand and the Republic of Korea), but permits the President to waive these prohibitions if they are in the national interest or if the state enters into an agreement prohibiting surrender of a US accused to the Court. American Servicemembers Protection Act, Pub. L. 107-206, *signed* 2 August 2002. The ASPA met with widespread criticism around the world by governments and non-governmental organizations. *See, for example,* letter from the Spanish, Danish and EU Ambassadors to the USA on behalf of the European Union to Senator Tim Johnson, 18 June 2002; European Parliament, Joint Motion for a Resolution on the draft American Servicemembers' Protection Act (ASPA), 3 July 2002; House of Representatives of the States General (The Netherlands), Interpellation regarding the US American Service Members' Protection Act, No. 28, 437, adopted 13 June 2002.

[15] Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary-General, 6 May 2002. *See also* Under Secretary Marc Grossman, *American Foreign Policy and the International Criminal Court*, address at the Center for Strategic and International Studies, 6 May 2002 (both *obtainable from:* http://www.amicc.org).

were US nationals involved in UN peace-keeping operations.[16] The US repudiation of its signature was strongly criticized by governments and non-governmental organizations.[17]

There are few US nationals involved in UN peace-keeping operations.[18] Indeed, one confidential UN study obtained by non-governmental organizations indicated that there were no US peace-keepers in UN peace-keeping operations that could conceivably face arrest and surrender to the International Criminal Court, either because there were no US nationals in the peace-keeping operation or because the host state was not a party to the Rome Statute.

Initially, the USA indicated that it would seek to enter into bilateral agreements with states under which those states would agree not to surrender US nationals to the International Criminal Court. Then, it decided to supplement this effort by going to the Security Council to seek a resolution directing states not to surrender to the International Criminal Court nationals of non-states parties contributing personnel to operations established or authorized by the Security Council.[19]

A. The attempt to obtain impunity for US peace-keepers in East Timor

[16] US Secretary of Defence Donald Rumsfeld stated that "[t]he United States will regard as illegitimate any attempt by the court or states parties to assert the ICC's jurisdiction over American citizens." Secretary Rumsfeld Statement on the ICC Treaty, No. 233-02, 6 May 2002 (*obtainable from:* http://www.amicc.org).

[17] For example, the European Union took note of the repudiation "with disappointment and regret", restated "its belief that the anxieties expressed by the United States with regard to the future activities of the ICC are unfounded and that the Rome Statute provides all necessary safeguards against the misuse of the Court for politically motivated purposes" and expressed its concern "at the potentially negative effect that this particular action by the United States may have on the development and reinforcement of recent trends towards individual accountability for the most serious crimes of concern to the international community". Statement of the European Union on the position of the United States of America towards the International Criminal Court, 14 May 2002, U.N. Doc. PCNICC/2002/INF/7, 20 May 2002. *See also,* American Non-Governmental Organizations Coalition for the International Criminal Court, *AMICC Response to the US Administration International Court Policy,* May 2002 (*obtainable from:* http://www.amicc.org).

[18] As of 30 June 2002, a small number of US personnel served in eight of the 15 UN peace-keeping operations (excluding non-UN operations such as KFOR in Kosovo (run by NATO) and the International Security Assistance Force (ISAF) in Afghanistan, as well as UN peace-building missions, such as MINUGUA in Guatemala and UNAMA in Afghanistan), with over three-quarters of them in Kosovo. As of the same date, 87 states were contributing 45,319 personnel to these UN operations (this figure excludes UN employees), only 680 (1.5 percent) of whom were US personnel. Future of Peace Operations Project, Henry L. Stimson Center, U.S. Personnel Contributions to U.N. Peacekeeping Operations as of 30 June 2002 (Peace Operations Factsheet Series) (*obtainable from:* http://www.stimson.org).

[19] The Security Council has 15 members. Five are permanent members (China, France, the Russian Federation, the UK and the USA). The other ten are non-permanent members which each serve two-year terms. The terms of five (Colombia, Ireland, Mauritius, Norway and Singapore) ended on 31 December 2002; the terms of the other five (Bulgaria, Cameroon, Guinea, Mexico and Syria) end on 31 December 2003. The five states with terms that started on 1 January 2003 are Angola, Germany, Pakistan, Spain and Chile. The Presidency of the Security Council rotates each month. The Syrian Arab Republic held the Presidency in June 2002. The Presidency in the crucial month of July 2002 was held by the UK.

The first attempt to obtain impunity for US peace-keepers from arrest or surrender to the International Criminal Court for genocide, crimes against humanity and war crimes came in mid-May 2002 and involved its peace-keepers in the UN mission in East Timor, which consisted of three unarmed US military monitors and about 80 US police officers.[20] The USA sought to obtain impunity for these US nationals from East Timorese courts as well. However, this effort met with strong resistance from other members of the Security Council and the French Ambassador to the UN, Jean-David Levitte, declared that "[t]he U.S. amendment is a violation of the [ICC] treaty", and he added: "I would be in violation of [my country's] own laws if I supported a text that went against the International Criminal Court".[21] On 17 May 2002, the Security Council declined to provide this immunity when it extended the mandate of the UN peace-keeping mission.[22] The US Ambassador to the UN, John D. Negroponte, warned the Security Council that it might withdraw these 83 US nationals from East Timor and other US officials threatened to withdraw US nationals from all 15 UN peace-keeping missions.[23] US officials also indicated that the USA might seek impunity from the International Criminal Court for US nationals serving in all other UN peace-keeping operations.[24]

B. The first attempt to obtain impunity for US peace-keepers in Bosnia and Herzegovina

The USA renewed its efforts to obtain impunity from international justice for its nationals, in mid-June 2002, shortly before the United Nations Mission in Bosnia and Herzegovina (UNMIBH) was due to expire on 30 June 2002 if it was not routinely renewed. On 19 June 2002, 11 days before that deadline, the USA circulated two alternative proposals for a Security Council resolution.[25] The following history of the drafting of Resolution 1422 is based in part

[20] Colum Lynch, *U.S. Seeks Court Immunity for E. Timor Peacekeepers,* Washington *Post*, 16 May 2002 (the story was written on 15 May 2002).

[21] Colum Lynch, *U.S. Peacekeepers May Leave E. Timor - Immunity Sought from War Crimes Court,* Washington *Post*, 18 May 2002(the story was written on 17 May 2002).

[22] S.C. Res. 1410 of 17 May 2002. Subsequently, East Timor caved into US pressure and signed an agreement that was intended to prevent the arrest or surrender US nationals to the International Criminal Court. Jonathan Steele, *East Timor is independent. So long as it does as it's told, The Guardian, London*, 23 May 2002.

[23] Colum Lynch, *U.S. Peacekeepers May Leave E. Timor - Immunity Sought from War Crimes Court,* Washington *Post*, 18 May 2002 (the story was written on 17 May 2002). The USA subsequently withdrew its three unarmed military observers. Background briefing on the possible effects of the International Criminal Court on U.S. military personnel, DoD News Briefing, Senior Defense Official, 2 July 2002; Agência Lusa Tosdos, *East Timor: Ramos Horta critical of US peacekeeping pull out,* 3 July 2002.

[24] Somini Sengupta, *U.S. Fails in U.N. to Exempt Peacekeepers from New Court,* New York *Times,* 17 May 2002. According to one knowledgeable source, UK diplomats, who were to play a key role in subsequent developments, were initially of the view that the US proposals would undermine the Rome Statute, "but were soon instructed to support the American position". Michael Byers, *America in the Dock*, *Independent on Sunday* (London), 9 March 2003.

[25] The day after the USA made these two proposals, a story appeared in the Washington *Post* in which US officials criticized the existence of a provision in the Military Technical Agreement between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, dated 4 January 2002, claiming that it was evidence of a supposed double standard between states parties to the Rome Statute that had signed the agreement and the USA, which had not. Colum Lynch, *European Countries Cut Deal to*

on a variety of confidential sources and it does not purport to be definitive. Amnesty International would welcome any corrections and copies of all relevant texts.

The generic US proposal applicable to all operations. In the first US proposal (entitled, OPTION ONE: GENERIC TEXT), the operative paragraphs would have attempted to give impunity to nationals of non-states parties to the Rome Statute involved in operations established or authorized by the UN Security Council to promote the pacific settlement of disputes (a reference to Chapter VI of the UN Charter) or to maintain or restore international peace and security (a reference to Chapter VII of the UN Charter) from the jurisdiction of the International Criminal Court, any other international criminal court, including the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and for Rwanda (Rwanda Tribunal)), and any national court other than the courts of the contributing state.[26]

The US proposal applicable only to UNMIBH. The alternative proposal (OPTION TWO: WITHIN AN UNMIBH RESOLUTION), if the first failed to secure approval, was

Protect Afghan Peacekeepers, Washington *Post*, 20 June 2002. The Agreement provides that the consent of ISAF contributing states must be obtained before the Interim Government could surrender their nationals to the International Criminal Court, Eighteen states have contributed personnel to ISAF: Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, New Zealand, Norway, Portugal, Romania, Spain, Sweden, Turkey and the UK. All but Turkey are states parties to the Rome Statute, although Bulgaria ratified it after the date of the agreement. Although the USA is not a party to the agreement, the above provision was reportedly made under US pressure.

Paragraph 1 of Section 1 (Jurisdiction) of Annex A (Arrangements regarding the Status of the International Security Assistance Force) provides in part:

> "The ISAF and supporting personnel, including associated liaison personnel, will be immune from personal arrest or detention. ISAF and supporting personnel, including associated liaison personnel, mistakenly arrested or detained will be immediately handed over to ISAF authorities. The Interim Administration agree that ISAF and supporting personnel, including associated liaison personnel, may not be surrendered to, or otherwise transferred to the custody of, an international tribunal or any other entity or State without the express consent of the contributing nation."

However, all states parties to the Rome Statute contributing personnel to ISAF are required under Article 85 of the Statute to grant such consent if requested by the International Criminal Court to surrender an accused, so such consent is only a procedural formality for states parties.

[26] The operative paragraphs of OPTION ONE: GENERIC TEXT, a copy of which was obtained by Amnesty International, read as follows:

> "The Security Council,
>
> A. Decides that Member States contributing personnel participating in operations established or authorized by the UN Security Council to promote the pacific settlement of disputes or to maintain or restore international peace and security shall have the responsibility, as appropriate, to investigate crimes with respect to which they have jurisdiction and prosecute offences alleged to have been committed by the nationals in connection with such operations;
>
> B. Decides further that current and former officials and personnel from a contributing State not a party to the Rome Statute acting in connection with such operations shall enjoy, except in the territory of the contributing State, immunity from arrest, detention and prosecution with respect to all acts arising out of such operations and that this immunity shall continue after the termination of their participation in the operation for all such acts;
>
> C. Decides further that the contributing State may waive such immunity in whole or in part and that, in the absence of waiver by the contributing State, the Security Council shall have the exclusive authority to waive this immunity in the interests of justice."

identical, except that it was limited to member states participating in UNMIBH and in the multinational Stabilization Force (SFOR) in Bosnia and Herzegovina, and similar to the failed proposal for East Timor.[27]

Common elements of the two US proposals. Under each proposal, the Security Council would have decided in an operative paragraph that the contributing state has "the responsibility, as appropriate, to investigate crimes with respect to which they have jurisdiction and prosecute offences alleged to have been committed by the nationals in connection with such operations".[28] This description of the scope of state responsibility would leave it to each state to determine – in its own discretion – whether an investigation or prosecution was "appropriate". Each proposal would have prevented, not only any international court, but also the courts of any state – other than those of the contributing state itself – to exercise jurisdiction over genocide, crimes against humanity and war crimes. The fundamental principle of complementarity incorporated in the Rome Statute would have been negated since the International Criminal Court could not exercise jurisdiction even if it were to determine that a national criminal justice system in a particular case was unable or unwilling to investigate or prosecute genuinely these crimes, including states that have not defined all crimes in the Rome Statute as crimes under their national law.[29] The impunity from both international and national justice given in each

[27] The operative paragraphs of OPTION TWO: WITHIN AN UNMIBH RESOLUTION, a copy of which was obtained by Amnesty International, read as follows:
"The Security Council,
A. Decides that Member States contributing personnel participating in UNMIBH and SFOR shall have the responsibility, as appropriate, to investigate crimes with respect to which they have jurisdiction and prosecute offences alleged to have been committed by the nationals in connection with these operations;
B. Decides further that current and former officials and personnel from a contributing State not a party to the Rome Statute acting in connection with these operations shall enjoy, except in the territory of the contributing State, immunity from arrest, detention and prosecution with respect to all acts arising out of these operations and that this immunity shall continue after the termination of their participation in the operation for all such acts;
C. Decides further that the contributing State may waive such immunity in whole or in part and that, in the absence of waiver by the contributing State, the Security Council shall have the exclusive authority to waive this immunity in the interests of justice."

[28] This is the wording of OPTION ONE; the wording of OPTION TWO is identical except that the word "such" is replaced by the word "these".

[29] Every state is obliged to investigate any crime under international law over which it has jurisdiction under international law, even if it has not provided that such crimes were crimes under its national law and that its courts could exercise jurisdiction over them. However, it appears that the USA intended a restrictive reading of the term "appropriate" under which it would be committed to investigate and prosecute crimes under international law only if it had defined them as crimes under US law and had expressly provided its courts with jurisdiction over them. This distinction is significant since the USA has not defined all crimes under international law - or even all crimes under the Rome Statute - as crimes under US law and its courts do not have jurisdiction over all conduct that would be a crime under US law if that conduct occurred abroad. *See* Amnesty International, *Universal jurisdiction: The duty to enact and implement legislation,* AI Index: IOR 53/002-018/2001, September 2001 (particularly the entries on the USA in Chapters Four, Six, Eight, Ten and Eleven); Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the ICC,* 35 New Eng. L. Rev. 421 (2002). Moreover, it is understood that the USA wanted by the term "appropriate" to ensure that even when a contributing state had defined a crime under international law as a crime under its national law it would be able to determine in its sole discretion

proposal to persons from contributing states not parties to the Rome Statute suspected of such crimes would have lasted forever, unless the contributing state waived the "immunity" or the Security Council did. However, if the contributing state was a permanent member or allied to a permanent member, a veto could block such a waiver. Both options met a barrage of criticism by other governments, as well as by non-governmental organizations.[30]

The United Kingdom signal of willingness to compromise. However, on Tuesday, 25 June 2002, the United Kingdom (UK) Ambassador to the UN signalled a weakening of the UK opposition to the US proposal. He reportedly stated at a press briefing that peace-keepers were not the place that one would look first for persons who had violated international humanitarian law and that "[w]e must make sure the Court is not undermined for the main purposes for which it is set up. There may be a possible compromise for the [peace-keeping] problem that has come up." He added that the European Union, the USA and everyone else must consider the practical results of standing pat on a position of pure principle for the Court, but this was an issue for the politicians to resolve.

The revised US proposal for UNMIBH. On Thursday, 27 June 2002, the USA reportedly circulated a revised text of OPTION TWO: WITHIN AN UNMIBH RESOLUTION and threatened to veto an extention of UNMIBH if this text was not adopted.[31] In contrast to the

whether it was appropriate to investigate or prosecute a particular case.

[30] Amnesty International issued a press release, *UN Security Council: International justice must not be undermined,* AI Index: IOR 40/011/2002, 27 June 2002, urging members of the Security Council to reject the proposal and noting that "[i]f the Security Council were, in effect, able to amend the ICC's jurisdiction simply by adopting a resolution, it would set a dangerous precedent paving the way for future amendments of the Rome Statute and possibly other international treaties". Amnesty International sent an open letter to all members of the Security Council on Wednesday, 27 June 2002 outlining these concerns, *UN Security Council: Open letter on international justice,* Ref.77/2002, AI Index: IOR 40/012/2002, 27 June 2002. *See, for example,* U.S. Anti-ICC PKO Resolutions, Coalition for the International Criminal Court Open Letter to Members of the UN Security Council, 25 June 2002; Human Rights Watch, *U.S. in New Fight against War Crimes Court,* 26 June 2002; _____, *U.S. Proposals to Undermine the International Criminal Court Through a Security Council Resolution*, 25 June 2002. In addition, there was significant critical comment in the press. *See, for example,* Editorial, *Peacekeeping Held Hostage,* New York *Times*, 27 June 2002.

[31] The revised text, dated 27 June 2002, 3.20p.m., was entitled "For inclusion into draft resolution on UNMIBH mandate renewal (Ch VII resolution)". It read as follows (with original punctuation):

"-Taking note of the entry into force, on 1 July 2002, of the Statute of the International Criminal Court, done on 17 July 1998,

- Emphasizing the importance to the establishment and maintenance of international peace and security of UN Security Council mandated operations,

- Determining that it is in the interests of peace and security to facilitate Member States' ability to contribute to UN Security Council mandated operations,

- Noting that not all States are parties to the Rome Statute of the International Criminal Court (1998) (the Rome Statute),

- Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

1. Emphasizes that Member States contributing personnel to UNMIBH or SFOR have the primary responsibility to investigate and to prosecute in their national systems as appropriate crimes over which they have jurisdiction alleged to have been committed by their nationals in connection with

previous US version, it specifically would have permitted states to comply with *orders* of the Yugoslavia Tribunal (although it did not mention *requests for assistance* by the Tribunal). However, the revised text continued to prevent the national courts of states other than those of the contributing state from exercising jurisdiction. The draft further weakened the already weak language on the obligations of contributing states to investigate and prosecute "as appropriate" from the operative paragraphs to the preamble. It also eliminated any reference to waiver by the contributing state or by the Security Council.

The French counter-proposal seeking to invoke Article 16 of the Rome Statute. At about the same time, France proposed an alternative, reportedly supported by most of the other members of the Security Council, which would have attempted to use Article 16 of the Rome Statute to obtain a deferral.[32] The proposal expressed the Security Council's readiness, pursuant to Article 16, to request deferrals on a case by case basis, but was silent on renewals. In addition, it urged non-states parties to take prompt action to discharge their responsibilities to bring to investigate and prosecute these crimes and to assist each other in this regard. It also said that the resolution was without prejudice to the rights and obligations of states parties to agreements and conventions providing for jurisdiction over crimes under international law.[33]

UNMIBH or SFOR,

2. Notes that States Parties to the ICC Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

3. Notes that States not Party to the ICC Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes.

- 4. Decides that current and former officials and personnel from a contributing State not a party to the Rome Statute acting in connection with these operations shall have, except in the territory of the contributing State, immunity from arrest, detention and prosecution with respect to all acts arising out of these operations and that this immunity shall continue after termination of their participation in the operation for all such acts;

5. Decides that nothing in this resolution shall affect compliance by Member States with orders of the International Criminal Tribunal for the Former Yugoslavia."

The US Ambassador to the UN declared on the day this proposal was submitted: "A veto is definitely an option if the issue is not resolved in a way that provides the kind of immunity [the USA is seeking]". AP, *U.S. May Veto Bosnia Peace Mission, Guardian,* 28 June 2002.

[32] Mexico reportedly was not willing to support the French alternative for "technical reasons".

[33] The first five paragraphs of the preamble to the French proposal were virtually identical to the preambular paragraphs of the US proposal of 27 June 2002, and the last two reproduced the second and third operative paragraphs of the US proposal:

"PP6 Noting that States Parties to the ICC Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

PP7 Noting that States not Party to the ICC Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes."

However, the operative paragraphs were radically different from the US proposal, except with respect to the reference to the ICTY, and read as follows:

"OPA Emphasizes that Member States contributing personnel to operations established or authorized by the Security Council have the primary responsibility to investigate and to prosecute in their national systems as appropriate crimes over which they have jurisdiction alleged to have been committed by the nationals in connection with these operations, and urges them to take prompt action to discharge this responsibility and to assist each other in that regard.

However, France, along with China, Russia and the UK, made clear that they would not use their veto power to prevent the adoption of the US proposal. These decisions meant that not only could the USA use its veto to block the extensions of all the UN peace-keeping operations coming up for renewal if its proposal were not adopted, but also it simply needed to secure the necessary nine votes for adoption of its resolution without the fear of a veto by one of the other permanent members.

The US veto of the UNMIBH mandate extension. On Friday, 28 June 2002, the USA rejected the French text and renewed its threat to veto the extension of the UNMIBH mandate and, in addition, suggested that it would cease paying its 25% share of the UN peace-keeping operations budget.[34] On Sunday, the UN Secretary-General urged the Security Council to "find a solution acceptable to all concerned that respects the principles of the Charter of the United Nations and treaty obligations of Member States".[35] Despite this appeal, the USA carried out the first part of its threat the same day when it vetoed the extension of the UNMIBH mandate when the other members of the Security Council declined to adopt either US proposal.[36]

C. The renewed US proposal made in cooperation with the UK

After the US veto on Sunday, 30 June 2002, the Security Council agreed to extend the UNMIBH mandate for three days, ostensibly to allow for an orderly transfer of responsibility from the UN

OPB Expresses its readiness, pursuant to Article 16 of the ICC Statute, to consider on a case by case basis requesting the ICC to defer investigations or prosecutions involving personnel participating to [sic] operations established or authorized by the UN Security Council to promote the pacific settlement of disputes or to maintain or restore international peace and security, who have been contributed to these operations by a State not Party to the ICC,

OPC Decides that nothing in this resolution shall affect the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda,

OPD Decides that this resolution shall be without prejudice to the rights and obligations of States Parties to agreements and conventions establishing jurisdictions over international crimes."

[34] AP, *U.S. May Veto Bosnia Peace Mission, Guardian*, 28 June 2002.

[35] UN Secretary-General Kofi Annan Statement to the Security Council: World Cannot Afford Security Council's Deep Divide on Such Important Issue, Press Release, 30 June 2002 (*obtainable from:* http://www.iccnow.org).

[36] The following day, Amnesty International criticized the US initiative in a press release and called for the other 14 members of the Security Council to resist any renewed US attempt to obtain immunity for its personnel. It said that "[t]he US position threatens the integrity of the international system of justice as a whole and challenges the universal applicability of one of its most fundamental principles: no immunity for crimes such as genocide, war crimes and crimes against humanity." *Security Council: No double standards on international justice,* AI Index:: IOR 40/013/2002, 1 July 2002. It also issued an Urgent Action with the same title, EXTRA 49/02, 1 July 2002. Other non-governmental organizations were similarly critical. *See, for example,* Féderation des Droits de l'Homme, *Sursis de trois jours avant une Cour pénale international "à la carte"?, 1 July 2002;* Human Rights Watch, *U.S. Veto Betrays the Bosnian People: But U.S. Attack on War Crimes Court Thwarted - for Now*, 1 July 2002.

to the European Union, which had been scheduled in any case to assume this responsibility at the end of 2002.[37] However, during this period Amnesty International and other members of the Coalition for the International Criminal Court (CICC) learned that the USA, in close cooperation with the UK, had drafted a proposal, but for the first time purporting to act pursuant to Article 16 of the Rome Statute and under Chapter VII. This effort sought to give impunity from international justice to nationals of non-states parties for acts related to UN established or authorized operations during a 12-month period starting on the date of the adoption of the resolution, to be automatically extended for 12-month periods without limit, "unless the Security Council decides otherwise", and for acts during each of these successive one-year periods.[38] The USA could have vetoed any attempt to stop the automatic renewals. When the text of the proposal became known, it immediately met with widespread criticism by governments[39] and non-governmental organizations.[40]

[37] S.C. Res. 716 of 30 June 2002 (co-sponsored by France, Ireland, Norway and the UK).

[38] The chapeau and first operative paragraph of the proposal (as read to Amnesty International from a reliable government source), which the press reported as a US proposal, but sources on the Security Council claimed was drafted or circulated on behalf of the UK, would have applied to all UN established or authorized operations, not just to UNMIBH and to SFOR:

> "Acting under Chapter 7 of the UN Charter:
>
> 1. Requests pursuant to Art. 16 of the Rome Statute, that the ICC defer for a twelve month period investigations or prosecutions involving current and former officials and personnel from a contributing state (not a party to the Rome Statute) for acts arising out of UN established or authorized operations, and decides that, for such acts occurring during such 12 month period, such states shall have and retain jurisdiction to investigate and prosecute."

The second operative paragraph of the proposal, reportedly circulated by or on behalf of the USA (as read to Amnesty International from a reliable government source) would have automatically renewed the 12-month deferral indefinitely, "unless the Security Council decided otherwise":

> "2. Decides by this resolution, in accordance with the requirements of Article 16, that on July 1st of each successive year, the request for the deferral and the decision, as contained in paragraph 1, shall be renewed and extended to include acts that occurred during successive 12 month periods thereafter, unless the Security Council decides otherwise and directs the Secretary General to communicate these requests to the ICC."

39 For example, the Swiss Ambassador to the UN stated on 1 July 2003 in the Preparatory Commission that the role of the Security Council was defined by the Rome Statute, in relation to the UN Charter, and that it was not the Council's role to modify a system established by treaty ("*Le role du Conseil de sécurité sera celui qui est défini par le Statut lui-même, en relation avec la Charte des Nations Unies. Il n'appartient pas au Conseil de sécurité de se réapproprier une oeuvre qui est en main des Etats parties. Autrement dit, il n'est pas envisageable qu'une resolution du Conseil de sécurité vienne modifier un régime qui est institute par un traité.*"). Statement of Ambassador Nicolas Michel, 1 July 2002.

[40] For example, the Convenor of the CICC sent an open letter to all members of the Security Council on Tuesday, 2 July 2002 stating that

> "[a]pproving either or both of the above paragraphs would have a far-reaching and devastating effect on international law. The proposals violate Article 16 of the Rome Statute. The UN Charter requires that all UN Member States must implement Chapter VII Security Council resolutions. If the US resolutions were adopted, it could force all countries that have ratified the Rome Statute to breach their treaty obligations. This would set a disastrous precedent under which the Security Council could, in effect, change any treaty it wished through a Security Council resolution. This would severely undermine the treaty-making process, as well as the credibility and effectiveness of the Security Council."

D. The united opposition in the Preparatory Commission on 3 July 2002 to the second US proposal

On Tuesday, 2 July 2002, Germany and several other states participating in the tenth and final session of the Preparatory Commission for the International Criminal Court (Preparatory Commission) (1 to 12 July 2002) requested that a plenary session of the Preparatory Commission be convened to discuss the US initiative. The Chair of the Preparatory Commission, Philippe Kirsch, immediately agreed to convene a plenary session on this subject the following day. This session proved to be the first part of an historic ten-day constitutional debate on the legal limits on the powers of the Security Council, perhaps the most important such debate since the General Assembly adopted the Uniting for Peace Resolution in 1950,[41] half a century earlier. Canada, as the originator of the UN peace-keeping force system, played a leading role in this great debate.[42] These government statements and legal analysis are persuasive evidence of the drafters' intent, but also strong evidence of state practice and *opinio juris* on other international law issues.

At the plenary session of the Preparatory Commission on Wednesday, 3 July 2002, the international community expressed its overwhelming opposition to any Security Council resolution that would undermine the integrity of the Rome Statute in an unprecedented series of statements by or on behalf of at least 116 states. Statements were made by Australia on behalf of the 67 members of the Like-Minded Group, by Burundi on behalf of the African Group, by Denmark on behalf of the members of the European Union (EU) and its associated states and by Syria on behalf of the Arab Group.[43] In addition, Argentina, Australia, Brazil, Côte d'Ivoire,

U.S.A.-U.K. Anti-ICC PKO Resolutions, Open Letter to Members of the UN Security Council from the Coalition for the International Criminal Court's Convenor, William R. Pace, 2 July 2002 (*obtainable from:* http://www.iccnow.org). The Amnesty International Representative to the United Nations, Yvonne Terlingen, sent an open letter to all members of the Security Council on 2 July 2002, UN Ref. UN/Nyt/77/02, expressing the organization's deep concerns about the US proposal.

[41] G.A. Res. 377 (V), 3 November 1950 (Uniting for Peace Resolution).

[42] Prime Minister Lester B. Pearson of Canada proposed on 3 November 1956 during a special session of the General Assembly that it establish its first UN peace-keeping force, called the Blue Helmets, for the Suez. Since that date, Canada has played a leading role in the development and strengthening of UN peace-keeping operations.

[43] The membership of the various groups overlaps, but the total number of states making individual statements or joining in group statements is aapproximately 117. The 67 members of the ***Like-Minded Group*** are: Andorra, Argentina, Australia, Austria, Belgium, Benin, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Congo (Brazzaville), Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Egypt, Estonia, Fiji, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, Netherlands, New Zealand, Norway, Phiippines, Portugal, Poland, Republic of Korea, Romania, Samoa, San Marino, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela, Zambia and Zimbabwe..

The 27 members of the ***European Union and associated states*** are: the 15 members (Austria,

Democratic Republic of the Congo, Fiji, Kuwait, Liechtentstein, Malawi, Mexico, Peru, New Zealand, Samoa, Sierra Leone, Switzerland, Trinidad and Tobago, United Arab Emirates and Venezuela made statements on their own behalf. Indeed, not a single state supported the US proposal (where no citation is given below for the oral statements, they are based on the organization's notes and those of the CICC).

The following points were made by various governments during the debate:[44]

- There were sufficient safeguards in the Rome Statute against frivolous or politically motivated investigations and prosecutions. Canada recognized that "the United States has strong concerns about the International Criminal Court", but stated that "we do not agree with them, given the extensive concessions and safeguards to preclude frivolous prosecutions".[45] Liechtenstein stated that "[t]he concerns regarding frivolous and politically motivated investigations are addressed in a thorough and fully satisfactory manner. There are therefore no substantive reasons, only political and indeed ideological ones to amend any of the provisions of the Statute."[46] Other states emphasized that the Rome Statute had extensive safeguards that addressed US fears, including Australia.[47]

Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK) and the 12 states associated with the European Union: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

The 53 members of the ***African Group*** are: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libyan Arab Jamahirya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia and Zimbabwe..

The 14 members of ***SADC*** are: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

The members of the ***Arab Group*** include: Algeria, Bahrain, Egypt, Iraq, Kuwait, Lebanon, Libyan Arab Jamahirya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

[44] The arguments, country by country, are summarized in the analytical chart published by the CICC later that day, CICC, Government Responses to US - proposed Security Council Resolution on ICC and Peacekeeping, Special Plenary Session, Preparatory Commission for the ICC, 3 July 2002 (*obtainable from:* http://www.iccnow.org).

[45] Remarks given by H.E. Mr. Paul Heinbecker, Ambassador and Permanent Representative of Canada to the United Nations at the tenth session of the Preparatory Commission for the International Criminal Court, Wednesday, 3 July 2002 (*obtainable from:* http://www.iccnow.org).

[46] Statement by Mr. Christian Wenaweser, Deputy Permanent Representative of the Principality of Liechtenstein to the United Nations, 3 July 2002 (*obtainable from:* http://www.iccnow.org).

[47] Australia, oral intervention (there are adequate safeguards in the Rome Statute).

- The US proposal was attempting to amend Article 16. Canada recalled that Article 16 of the Rome Statute was designed for a completely different purpose:

"Article 16 was intended to be available to the Security Council on a case-by-case basis, where a particular situation required a twelve-month deferral in the interests of peace and security. Article 16 was the product of protracted and delicate negotiations. Most states were opposed to any Security Council interference in ICC action, regarding it as inappropriate political interference in a judicial process. The requirement for specific action and reconsideration after twelve months was the sole basis on which this provision was acceptable. The Security Council should not purport to remove that fundamental cornerstone."[48]

Switzerland gave a number of reasons why the US proposal would be inconsistent with Article 16:

> "- Article 1 envisages the possibility to defer the exercise of jurisdiction. But it does not, however, envisage the possibility of immunity from the jurisdiction of the International Criminal Court.
> - Article 16 envisages the renewal of a deferral, but not a mechanism of successive unlimited deferrals."
> - Article 16 refers expressly to Chapter VII, of the Charter. That reference is a clear recollection of the meaning of Article 16. It concerns an authorization to suspend criminal proceedings in order to give chances for peace. The rule is to permit avoiding that, in a particular circumstance, the exercise of jurisdiction would be an obstacle to peace. The interest in the maintenance of peace must be prevailing. But one cannot really see that the fact that the Court is able to exercise its jurisdiction over the members of a peace-keeping operation would be a threat to peace. This is even more so as the Court is only competent within the limits of the principle of complementarity."[49]

Liechtenstein, citing the Swiss intervention, stated that

[48] Canada, *supra,* n. 45.

[49] Switzerland, *Déclaration du Chef de la délégation suisse, l'Ambassadeur Nicolas Michel lors de l'assemblée plénière extraordinaire du 3 juillet 2002* (*obtainable from:* http://www.iccnow.org) (unofficial translation). The original French text reads:

> *"- L'article 16 prévoit la possibilité de différer l'exercice de la juridiction, mais il ne prévoit pas l'immunité face à la juridiction de la Cour.*
> *- L'article 16 permet le renouvellement du report, mais pas un mécanisme de reports successifs illimités.*
> *- L'article 16 se réfère explicitement au Chapitre VII de la Charte. Cette référence est un rappel clair du sens de l'article 16. Il s'agit de permettre une suspension de l'action pénale pour donner des chances à la paix. La règle doit permettre d'éviter, dans une circonstance particulière, que l'exercice de la juridiction soit un obstacle à la paix. Il faut donc que l'intérêt au maintien de la paix soit prépondérant. Mais on ne voit vraiment pas comment le fait que la Cour puisse exercer sa compétence sur des membres d'un corps de maintien de la paix serait une menace pour la paix. Ce d'autant plus que la Cour n'est compétente que dans les limites du principe de complémentarité."*

> "[t]he deliberations in the Security Council and, more specifically, the draft resolution we all have seen at this point, make it clear that the Council is considering an amendment to Art. 16 of the Rome Statute. We would like to recall the sound legal analysis provided by the Swiss delegation in this respect. As a matter of fact, the draft resolution in the Council, while invoking Art. 16 of the Statute, is in stark opposition to that provision, known as the Singapore proposal, which was the product of complex negotiations."

Other states agreed that the US proposal would violate Article 16, including Argentina, Burundi on behalf of the African Group, Mexico, New Zealand.[50]

- The US proposal would undermine the integrity of the Rome Statute. Australia, speaking on behalf of the Like-Minded Group, stated that "[m]embers of the Like-Minded Group are, in particular, committed to the principle of fully safeguarding the integrity of the Rome Statute".[51] Burundi, speaking on behalf of the African Group said, "The African Group believes that the adoption of such a proposal would be a violation of the letter and spirit of the Rome Statute."[52] Canada declared: "The proposal now under discussion would dramatically alter and undermine the Rome Statute."[53] Fiji stated that "[t]he resolution will effectively kill the Court before it is born" and called upon states parties to the Rome Statute on the Security Council "to oppose the draft resolution and, therefore, maintain the integrity of . . . the Rome Statute".[54] Liechtenstein stated that it expected "the Council to act in conformity with its mandate and to fully safeguard the integrity of the Rome Statute, a treaty adopted by a Diplomatic Conference".[55] Malawi, on behalf of SADC, said, "The Southern African Development Community regrets the developments in the UN Security Council, which are clearly aimed at undermining the integrity of the International Criminal Court."[56] The United Arab Emirates declared: "The principle of granting immunity is an exception to the application of the Rome Statute, and this is a violation of the principles agreed upon when we established

[50] Argentina, oral intervention (use of Article 16 for any other purpose than the restoration of international peace and security would violate it); Burundi, on behalf of the African Group (proposal would be contrary to Article 16); Mexico, oral intervention (Article 16 can only be used in special circumstances; cannot suspend investigations and prosecutions in advance); New Zealand oral intervention (agreed with Switzerland that Article 16 was to be invoked only on a case-by-case basis).

[51] Delegate from Australia, on behalf of the Like-Minded Group, 3 July 2002, in Excerpts from the Special Plenary of the 10th Prep Com on the ICC (*obtainable from:* http://www.iccnow.org).

[52] Burundi, oral intervention on behalf of the African Group (*obtainable from:* http://www.iccnow.org).

[53] Canada, *supra,* n. 45.

[54] Brief intervention by H.E. Mr. Amraiya Naidu, Permanent Representative of Fiji to the United Nations, at the 10th International Criminal Court (ICC) Prep Com, 3 July 2002, United Nations, New York (*obtainable from:* http://www.iccnow.org).

[55] Liechtenstein, *supra,* n. 46.

[56] Malawi, oral statement on behalf SADC (*obtainable from:* http://www.iccnow.org).

the Court."[57] Other states expressed similar concerns, including Côte d'Ivoire, Mexico, New Zealand, Peru, Samoa, Sierra Leone and Trinidad and Tobago.[58]

- International justice and peace-keeping are complementary. Canada stated: "What is now at stake is not the ICC versus peacekeeping."[59] It explained that

> "the proposed resolution perversely implies that in upholding the most basic norms of humanity, the ICC is somehow a threat to international peace and security. In fact, the precise opposite is true. We have just emerged from a century that saw the works of Hitler, Stalin, Pol Pot, Idi Amin and Slobodan Milosevic, and the Holocaust and the Rwandan genocide. Surely, we have all learned the lessons of this bloodiest of centuries, which is that impunity from prosecution for grievous crimes must end."

Switzerland pointed out that "In its preamble, [the draft resolution] repeatedly puts in opposition the Rome Statute and peace-keeping operations. That opposition is completely inappropriate. It is not admissible to say and to repeat that the maintenance of peace is put in danger by the International Criminal Court."[60]

- The Security Council would be acting **ultra vires.** A number of states pointed out that if the Security Council were to adopt the US proposal, it would be *ultra vires* (in excess of its powers). According to Canada,

> "the proposed resolution would set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished, e.g. the NPT [nuclear Non-Proliferation Treaty], through a Security Council resolution. This would undermine the treaty-making process."[61]

[57] United Arab Emirates, oral intervention (*obtainable from:* http://www.iccnow.org).

[58] Côte d'Ivoire, oral intervention (affirming the need to protect the total integrity of the Rome Statute); Mexico, oral intervention (states parties should not agree to undermine the Rome Statute; granting immunity to a certain category of individuals was rejected in Rome), New Zealand, oral intervention (concern that US proposal would undermine letter and spirit of the Rome Statute by purporting to give blanket immunity to a group not contemplated by the Rome Statute), Peru, oral intervention (agreement with other speakers that proposal would undermine the Rome Statute); Samoa, oral intervention (draft resolution would do lasting damage to the integrity of the Rome Statute); Sierra Leone, oral intervention (opposing attempt to emasculate the Rome Statute); Trinidad and Tobago, oral intervention (the integrity of the Rome Statute must be maintained).

[59] Canada, *supra,* n. 45.

[60] Switzerland, *supra,* n. 49 (*"Dans son préambule, il oppose, de manière répétée, le Statut de Rome aux opérations de maintien de la paix. Cette opposition est tout à fait inappropriée. Il ne convient pas de dire et répéter que le maintien de la paix est mis en danger par la Cour pénale internationale."*).

[61] Canada, *supra,* n. 45.

Fiji stated: "The Security Council must, therefore, refrain from taking an *ultra vires* decision which will result from the adoption of the anti-ICC resolution currently before it."[62] Liechtenstein stated that "[t]he mandate of the Security Council is clearly laid down in the United Nations Charter. It does not include competence in the area of treaty-making. The Security Council would therefore act in clear violation of its mandate, if it were to amend the Rome Statute – or any other treaty for that matter."[63] Switzerland declared that "it was extremely disturbing to see the Security Council setting itself up as a legislator and, even more, involving a treaty in force. If it were adopted, the text which we have seen would be to our knowledge without precedent."[64] It added, "The Security Council does not have the competence to adopt rules of law that overrule a treaty that is fully in conformity with the Charter of the United Nations.[65]

Syria, on behalf of the Arab Group, stated that "the inclusion of Article 16 [in the Rome Statute] did not grant the Security Council the automatic right to grant exemptions. . . . We appeal to the Security Council to assume its responsibility and not accept these exemptions because that might damage the credibility of the Court before it is born. We oppose this resolution."[66] Other states agreed that the Security Council did not have the power to amend the Rome Statute, including Brazil, Côte d'Ivoire, Democratic Republic of the Congo, Mexico, Samoa, Venezuela.[67]

Several statements indicated that member states were not obliged to comply with resolutions of the Security Council that were adopted *ultra vires.* Switzerland declared:

[62] Brief intervention by H.E. Mr. Amraiya Naidu, Permanent Representative of Fiji to the United Nations, at the 10th International Criminal Court (ICC) Prep Com, 3 July 2002, United Nations, New York (*obtainable from:* http://www.iccnow.org).

[63] Liechtenstein, *supra,* n. 46.

[64] Switzerland, *supra,* n. 49 (unofficial translation). The original French text reads: *"Sur le principe, il est extrêmement préoccupant de voir le Conseil de sécurité s'ériger en législateur et, qui plus est, à l'encontre d'un traité en vigueur. S'il était adopté, le texte don't nous avons connaissance serait sans précédent."*).

[65] *Ibid.* (*"Le Conseil de sécurité n'a pas la compétence d'adopter des règles de droit qui vont à l'encontre d'un traité alors que ce traité est pleinement conforme à la Charte des Nations Unies."*).

[66] Syria, Statement on behalf of the Arab Group (*obtainable from* http://www.iccnow.org).

[67] Brazil, oral intervention (if the Security Council does not act consistently with its role under the UN Charter, we will have difficulties and problems); Côte d'Ivoire, oral intervention (Rome Statute can only be amended by states parties); Democratic Republic of the Congo, oral intervention (no body of the UN - the Security Council or any other - can modify the Rome Statute); Mexico, oral intervention (Security Council has no power to amend treaties); New Zealand, oral intervention (it was not open to the Security Council to use Chapter VII to hijack the treaty), Samoa (the proposed use of Article 16 would be *ultra vires*, noting that there was no situation threatening or breaching international peace and security within the meaning of Article 39 of the UN Charter); Venezuela, oral intervention (adoption of proposal would be objectionable for political and legal reasons and would exceed the Security Council's competence).

> "For law to be obligatory, it is not sufficient to have the appearance of law. A law contrary to [a fundamental] law does not impose obligations. We recall that by virtue of Article 21 of the Statute, the Court shall apply in the first place the Statute itself.[68]

Concern about the impact on international law. Fears were expressed for the future of international law and the UN if the US proposal were adopted. Switzerland expressed concern about the possible triumph of political power over law, and stated that "the adoption of the [draft] resolution would be very worrying for the future of international law and would not be without consequences regarding what the UN would become in the future".[69]

Concern about double standards. In particular, there was concern that the US proposal would put certain classes of individuals above the law. Canada stated that "this proposed resolution would send an unacceptable message that peacekeepers are above the law. It would entrench an unconscionable double standard in international law."[70] The United Arab Emirates expressed concern that the proposal would create a double standard and stated: "We recognize the need to prosecute criminals regardless of their origin and without discrimination."[71] Other states, including New Zealand, expressed similar sentiments.[72]

The letter of 3 July 2002 from the Chair of the Preparatory Commission. It was agreed that the Chair of the Preparatory Commission would convey the deep concern of the Preparatory Commission to the Security Council about the US proposal. Unfortunately, the letter, drafted by the Danish Ambassador to the UN and agreed by the Preparatory Commission, was not as strongly worded as the statements made in the debate.[73] The criticisms of governments were echoed by non-governmental organizations.[74]

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[68] Switzerland, *supra,* n. 49 (unofficial translation). The original French text reads: *"Pour que le droit soit obligatoire, il ne suffit pas de l'apparence du droit. Une loi contraire au droit n'oblige pas. Rappelons qu'en vertu de l'article 21 du Statut, la Cour doit appliquer en premier le Statut lui-même."*.

[69] *Ibid.* The original French text reads: *"Les circonstances vont-elles nous obliger à donner raison au fabuliste français Jean de Lafontaine lorsque, dans une fable intitulée « Le loup et l'agneau », il affirme : « La raison du plus fort est toujours la meilleure. » ? Je pressens, à vrai dire, quelque injustice à le citer aujourd'hui en langue française. Il nous faut une bonne traduction pour exprimer tout le sens de cette pensée. Adoption de la résolution serait très préoccupante pour l'avenir du droit international et ne serait pas sans conséquences sur ce que deviendra l'ONU à l'avenir."*.

[70] Canada, *supra,* n. 45.

[71] United Arab Emirates, oral intervention (*obtainable from:* http://www.iccnow.org).

[72] New Zealand, oral intervention (adoption of US proposal would damage the moral authority of peace-keepers by placing them above the law).

[73] The Chair wrote to the President of the Security Council that day, stating:

> "1. The Preparatory Commission for the International Criminal Court, mindful of the Charter of the United Nations, and in particular its provisions relating to the powers and functions of the Security Council, is deeply concerned about the current developments in the Security Council regarding the International Criminal Court and international peacekeeping.
>
> 2. The Preparatory Commission calls on all states to safeguard the independent and effective functioning of the International Criminal Court that is complementary to national jurisdictions.

The letter of 3 July 2002 from the UN Secretary-General to the US Secretary of State. In addition, in an unprecedented letter on 3 July 2002 to the US Secretary of State, Colin Powell, the Secretary-General stated that he was "seriously concerned" about the US proposal.[75] He noted that Article 16 of the Rome Statute was "meant for a completely different situation" from the one outlined in the US proposal, which would be for the Security Council to use it "for a blanket resolution, preventing the Prosecutor from pursuing cases against personnel in peacekeeping missions", and that, "[c]ontrary to the wording of Article 16", the proposal would provide for automatic renewals of the request for a deferral, subject to Security Council approval. After stating that UN peace-keepers and other mission personnel had not been involved in crimes within the jurisdiction of the International Criminal Court, the Secretary-General expressed the fear that "reactions against any attempts at, as [states parties and non-governmental organizations] perceive it, undermining the Rome Statute will be very strong".

The Secretary-General also declared that "the method suggested in the proposal, and in particular its operative paragraph 2, flies in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty". The Secretary-General was concerned that "the only real result that an adoption by the Council of the proposal would produce - since the substantive issue is moot - is that the Council risks being discredited" and noted that it would not be "in our collective interest to see the Council's authority undermined". He suggested that sufficient time be given to finding a satisfactory solution and that to create such time the Security Council could note the primary role of the Yugoslavia Tribunal in the former Yugoslavia.

The 12-day extension of the UNMIBH mandate. After this unanimous opposition to the US proposal was conveyed to the Security Council, it was unable to reach an agreement. On Wednesday evening, 3 July 2002, it agreed to extend the UNMIBH mandate again to Monday, 15 July 2002, three days after the Preparatory Commission session was to end on 12 July 2002.[76]

The 10 July 2002 US proposal. On 10 July 2002, the USA reportedly circulated a modified version of its proposal, with three operative paragraphs. The first operative paragraph contained a request, purportedly consistent with Article 16, that the International Criminal Court

3. The Preparatory Commission appeals to the member states of the Security Council to ensure an outcome of those developments which fully respects the letter and spirit of the Rome Statute of the International Criminal Court."

Letter from Philippe Kirsch, Chair, Preparatory Commission for the International Criminal Court, to the President of the Security Council, 3 July 2002 (*obtainable from:* http://www.iccnow.org).

[74] *See, for example,* Human Rights Watch, *Security Council Needs a "United Front" On the ICC: Transfer Peacekeeping Authority to E.U.,* 10 July 2002 (*obtainable from:* http://www.hrw.org).

[75] Letter from Kofi Annan, Secretary-General, to Colin L. Powell, Secretary of State, 3 July 2002 (*obtainable from:* http://www.iccnow.org).

[76] S.C. Res. 1421, 3 July 2002.

not commence or proceed with any investigations or prosecutions of current or former officials from a non-state party for conduct relating to UN established or authorized operations; the second operative paragraph expressed the intention to renew the request annually for as long as necessary; and the third operative paragraph decided that member states should not take any action consistent with the first two paragraphs.[77]

The 10 July 2002 French counter-proposal. On the same day, France responded with a counter-proposal modifying the first two operative paragraphs of the US proposal and deleting the third operative paragraph of that proposal. Instead of purporting to make a request consistent with Article 16 of the Rome Statute, it would have requested the International Criminal Court to notify the Security Council before commencing investigations or prosecutions so that the Security Council could take a decision, as appropriate.[78]

E. The public debate in the Security Council on 10 July 2002

Canada had been urgently seeking a public debate in the Security Council on the US proposal, which the Council initially rejected twice.[79] It finally agreed to hold such a debate on

77 The full text read as follows:

"Acting under Chapter VII of the Charter,

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC for a twelve-month period shall not commence or proceed with any investigations or prosecutions involving current or former officials or personnel from a contributing State not a Party to the Rome Statute for acts or omissions relating to UN established or authorized operations;
2. Expresses the intention to renew the request in paragraph 1 each July 1 for further 12 month periods for as long as may be necessary and directs the Secretary General to communicate these annual requests of the Security Council to the ICC;
3. Decides that Member States shall take no action inconsistent with paragraphs 1 and 1."

78 The full text of the French counter-proposal read as follows, with deletions in square brackets and additions in bold:

"Acting under Chapter VII of the Charter,

1. Requests [consistent] **in accordance** with the provisions of Article 16 of the Rome Statute, that the ICC for a twelve-month period shall [not commence or proceed] **notify the Security Council before commencing or proceeding** with any investigations or prosecutions involving current or former officials or personnel from a contributing State not a Party to the Rome Statute for acts or omissions relating to UN established or authorized operations, **to allow the Security Council to take a decision, as appropriate**;
2. Expresses the intention to renew the request in paragraph 1 each July 1 for further 12 month periods for as long as may be necessary and directs the Secretary General to communicate these annual requests of the Security Council to the ICC;

[3. Decides that Member States shall take no action inconsistent with paragraphs 1 and 2.]

79 *See, for example,* Letter dated 3 July 2002 from the Permanent Representative of Canada to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/723. Canada emphasized that what was at issue was not simply the extension of the UNMIBH mandate, but, instead,

"the issue is a potentially irreversible decision negatively affecting the integrity of the Rome Statute of the International Criminal Court, the integrity of treaty negotiations more generally, the credibility of the Security Council, the viability of international law with respect to the investigation and prosecution of grievous crimes, and the established responsibilities of States under international law to act on such crimes".

Wednesday, 10 July 2002 after the possibility emerged of a public debate in the General Assembly on the legality of the Security Council adopting a resolution as proposed by the USA. The USA then increased its pressure on other members of the Security Council. This pressure included calls by high-level officials, including the US Secretary of State, Colin Powell, to government leaders in capitals, pressing states to agree to the US proposal. These efforts were supplemented by the pressure from the UK, then holding the Presidency, on other members of the Security Council to reach an accommodation with the USA.

There were statements by or on behalf of approximately 70 states in the public debate in the Security Council on Wednesday, 10 July 2002. Most of the statements were strongly critical of the US proposal, but the extremely weak statements by Norway and by Denmark on behalf of the European Union and associated states, were widely believed to be the result of intense US pressure. Apart from the USA, only one state, India, expressed support for the US proposal.

As the chart compiled by the CICC summarizing interventions in the open debate indicates, many of the same concerns -which to some extent overlap - were reiterated that had been raised in the plenary session of the Preparatory Commission on 3 July 2002:

- There were sufficient safeguards in the Rome Statute against frivolous or politically motivated investigations and prosecutions. Costa Rica, on behalf of the19 members of the Rio Group, stated: "We believe that the Rome Statute already provides the necessary safeguards for preventing a politicized or inappropriate use of the ICC."[80] Ireland stated that the concerns of the USA were not "well founded" as the Rome Statute "already contains adequate safeguards against politically inspired investigations or prosecutions before the Court".[81] Jordan said, "We join others in believing that the existing safeguards in the Rome Statute are sufficient in reducing to an absolute minimum the likelihood the Court will take up a dubious charge."[82] Malaysia stated that it believed that there were "sufficient safeguards, mentioned by previous speakers, to ensure that the ICC does not obstruct the functioning of peacekeeping operations" and that it believed that "the fears and concerns of the United States are unfounded".[83] South Africa noted that the US fears were "unfounded".[84] Other states, including Bosnia and Herzegovina, Brazil, Canada, Liechtenstein, Mexico, Norway, Switzerland, Syria emphasized that the Rome Statute had sufficient safeguards.[85]

[80] U.N. Doc. S/PV.4568, 10 July 2002, 14-15.

[81] U.N. Doc. S/PV.4568, 10 July 2002, 18.

[82] U.N. Doc. S/PV.4568, 10 July 2002, 16.

[83] U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 8.

[84] U.N. Doc. S/PV.4568, 10 July 2002, 7.

[85] Bosnia and Herzegovina, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 3; Brazil, U.N. Doc. S/PV.4568, 10 July 2002, 21; Canada, U.N. Doc. S/PV.4568, 10 July 2002, 3; Liechtenstein, U.N. Doc. S/PV.4568, 20; Mexico, U.N. Doc. S/PV.4568, 10 July 2002, 27; Norway, U.N. Doc. S/PV.4568, 10 July 2002, 29; Switzerland, U.N. Doc. S/PV.4568, 10 July 2002, 23; Syria, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 10.

- ***The US proposal was attempting to amend Article 16.*** Brazil declared:

> "We strongly discourage proposals or initiatives that ultimately seek to reinterpret or review the Rome Statute, especially with respect to article 16, whose provisions are applicable only on a case-by-case basis and were never intended to give place to ad aeternam deferrals of the Court's jurisdiction."

Canada noted the proposals would drastically amend Article 16:

> "[T]he proposals now circulating would have the Council, Lewis-Carroll-like, stand article 16 of the Rome Statute on its head. The negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation — for example the dynamic of a peace negotiation —warrants a 12-month deferral. The Council should not purport to alter that fundamental provision."

Costa Rica, on behalf of the 19 members of the Rio Group, declared: "In our opinion, the proposal is completely without legal foundation because article 16 of the Rome Statute, invoked by the proposal's advocates, refers to an entirely different situation."[86] New Zealand explained that the proposals were not consistent with the intent of the drafters of Article 16:

> "[I]ts wording as well as its negotiating history — and I can say that I was one of those who was involved in negotiating this among other provisions of the Statute — make clear that it was intended to be used on a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other. Here, no conflict between the two arises. The article might also be used as a protection of last resort against frivolous or political prosecutions. Again, that does not arise here. But it certainly provides no basis for a blanket immunity to be imposed in advance. Again, I would reiterate, as one who participated in the negotiations on article 16, that this was a long and drawn-out compromise. There were concerns expressed by members of the Security Council, which were taken into account. There were concerns by non-members of the Security Council, who wished to ensure that a balance be retained; and this balance was the outcome. It would be most unfortunate, to say the least, if article 16 were to be misused in this particular way."[87]

[86] U.N. Doc. S/PV.4568, 10 July 2002, 14. The 18 member states of the Rio Group are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. CARICOM is also represented at meetings of the Rio Group.

[87] U.N. Doc. S/PV.4568, 10 July 2002, 5, 6.

Samoa said that "we cannot see how [the US proposal] can be viewed as being consistent with article 16 of the Rome Statute, as the draft asserts, when the very purpose of the Statute is to put an end to impunity".[88] Other states raised similar concerns, including Germany, Mauritius, Mexico, Switzerland.[89]

- The US proposal would undermine the integrity of the Rome Statute. Costa Rica, on behalf of the 19 members of the Rio Group, expressed "their concern at the Security Council's consideration of the proposal to grant absolute immunity to the personnel of peacekeeping operations, in violation of the letter and the spirit of the Rome Statute", and added that they "cannot accept any erosion of the Rome Statute" and "consider it essential to maintain the integrity of its provisions".[90] Mongolia emphasized "the vital importance of safeguarding not only the integrity of peacekeeping operations but also of the Rome Statute and thus of international law and treaty-making, the rule of law, and the integrity of the Council itself".[91] Samoa stated that the US proposal would "undermine the purpose and meaning of the Rome Statute".[92] Venezuela stated that adoption of the US proposal "could modify the scope of an international instrument which is not simply conventional law in the strict sense of the term, but also, to a large extent, reflects customary law accepted by all concerning international jurisdiction and international criminal law" and would be contrary to the very spirit and purpose of the Rome Statute".[93] Other states, including Argentina, Germany, Mexico, New Zealand, Sierra Leone, Thailand expressed similar sentiments, and China and Russia urged that any resolution respect the integrity of the Rome Statute.[94]

[88] U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 7.

[89] Germany, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 9; Mauritius, U.N. Doc. S/PV.4568, 10 July 2002, 15 ("The United States has proposed that article 16 of the ICC Statute be used by the Council to provide blanket immunity to peacekeepers. Mauritius maintains that article 16 of the Rome Statute should be invoked only on a case-by-case basis when the Court is seized of a specific case."); Mexico, U.N. Doc. S/PV.4568, 10 July 2002 (US proposal, if adopted, would be "a de facto amendment to the Rome Statute"); Switzerland, U.N. Doc. S/PV.4568, 10 July 2002, 23-24 ("generalized preventive usage of article 16 would be contrary to the Treaty").

[90] U.N. Doc. S/PV.4568, 10 July 2002, 14, 15.

[91] U.N. Doc. S/PV.4568, 10 July 2002, 20.

[92] U.N. Doc. S/PV.4568, 10 July 2002 (Resumption 1), 6.

[93] U.N. Doc. S/PV.4568, 10 July 2002, 30-31.

[94] Argentina, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 13 (the proposals "might lead to a distortion of the spirit and a departure from the letter of a key provision of the Rome Statute, thus undeniably and seriously weakening the powers of the ICC to render justice in an independent and impartial manner"); Germany, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 9; Mexico, U.N. Doc. S/PV.4568, 10 July 2002, 27 ("Any decision that attempts to extract article 16 from the Rome Statute and to interpret it in isolation in a manner contrary to its original purpose undermines the implementation of the entire Statute and erodes the fundamental principle of the independence of the Court. Article 16 must have temporary validity and an exceptional application covering specific situations. We cannot accept the need to grant a general suspension with regard to events that have not yet occurred. Even less can we accept that such a suspension might become unlimited."); New Zealand, U.N. Doc. S/PV.4568, 10 July 2002, 5 ("an attempt to amend the Rome Statute without the approval of the States parties"); Sierra Leone, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 12 (reaffirming "its unfettered commitment to the establishment of the International Criminal

- ***International justice and peace-keeping are complementary.*** Liechtenstein stated:

> "Peacekeeping and international justice are, to our minds, complementary concepts. We find it therefore disturbing that some of the discussions under way treat them, in effect, as mutually exclusive. There can be no choice between one or the other, when the international community so obviously needs both. The progressive development of international law and respect for the rule of law, as well as the maintenance of international peace and security, are core activities of the United Nations, and they both must be treated as such. No choice can be made here, and the Council must therefore not impose such a choice on itself."

Other states, including Argentina, Canada, Malaysia and Venezuela, agreed.[95]

- The Security Council would be acting* ultra vires *and would undermine its credibility. States warned that the Security Council would exceed its powers under the UN Charter and undermine its credibility and legitimacy if it adopted the US proposal. Argentina stated that adoption of the US or other proposals "might also adversely affect the legitimacy of the Security Council, whose activities in this field would appear to exceed the powers conferred on it by the Charter".[96] Brazil explained:

> "The Council cannot alter international agreements that have been duly negotiated and freely entered into by States parties. The Council is not vested with treaty-making and treaty-reviewing powers. It cannot create new obligations for the States parties to the Rome Statute, which is an international treaty that can be amended only through the procedures provided in articles 121 and 122 of the Statute."[97]

Court and to the maintenance of the integrity of the Statute"); Thailand, U.N. Doc. S/PV.4568, 10 July 2002, 29 (shared concern of a large majority of UN members that "recent developments in the Security Council . . . could detrimentally affect the credibility and effectiveness of the Rome Statute").

Although China and Russia did not expressly attack the US proposal, they both urged that any resolution be consistent with the Rome Statute. China, U.N. Doc. S/PV.4568, 10 July 2002, 17 (stating that a "solution must respect the letter and spirit of the ICC Statute"); Russian Federation, U.N. Doc. S/PV.4568, 10 July 2002, 17 (hoping that a solution would be found that "will remain within the confines of the law and will not diminish the Statute of the Court").

[95] Argentina, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 13; Canada, U.N. Doc. S/PV.4568, 10 July 2002, 3; Malaysia, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 8; Venezuela, U.N. Doc. S/PV.4568, 10 July 2002, 31.

[96] U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 13.

[97] U.N. Doc. S/PV.4568, 10 July 2002, 22 (adding that "[a]ny decision by the Council that overreaches its mandate may risk not being accepted by the States parties to the Rome Statute.").

Canada declared that, "in the absence of a threat to international peace and security, the Council's passing a Chapter VII draft resolution on the ICC of the kind currently circulating would in our view be *ultra vires*", "acting beyond its mandate would undermine the standing and credibility of the Council in the eyes of the membership" and "would set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished - for example - the nuclear Non-Proliferation Treaty - through a Security Council resolution".[98] Costa Rica, on behalf of the 19 members of the Rio Group, noted that

> "any proposal for its modification must respect the established norms and procedures of general international law, of the law of treaties and of the Rome Statute itself. We are therefore concerned at any initiative attempting to substantially modify the provisions of the Statute by means of a Council resolution. To adopt this kind of proposal would exceed the competence of the Security Council and would have a serious impact on the Council's credibility and legitimacy."[99]

Fiji declared that "the Security Council's functions and powers, including those set out in Chapter VII, do not include amending treaties. To do that would violate established principles of international treaty law."[100] Germany declared:

> "Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of the peace or an act of aggression — none of which, in our view, is present in this case. The Security Council would thus be running the risk of undermining its own authority and credibility."[101]

Iran stated that Security Council "is not authorized to interpret or amend treaties concluded among States in accordance with the law of treaties — a law that recognizes that only parties to a treaty are competent to interpret or amend it."[102] Jordan stated that should the Security Council adopt such a proposal,

> "it will edge itself toward acting *ultra vires* — that is, beyond its authority under the Charter. After all, how could it adopt a chapter VII resolution on the Court when the

[98] U.N. Doc. S/PV.4568, 10 July 2002, 3, 4 (noting that adoption of the proposals "could place Canada - and indeed other Members of the Organization - the unprecedented position of having to examine the legality of a Security Council resolution")..

[99] U.N. Doc. S/PV.4568, 10 July 2002, 15.

[100] U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 2 (cautioning that "granting the concessions contained in the draft resolutions would set a dangerous precedent, with drastic consequences, and most certainly would compromise the underlying principles and the integrity of both the ICC and the Security Council.").

[101] U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 9.

[102] U.N. Doc. S/PV.4568, 10 July 2002, 15-16.

> latter cannot by any stretch of the imagination be considered a threat to international peace and security?"[103]
>
> Liechtenstein warned that a transgression by the Security Council of its clear mandate
>
> "would have not only disastrous consequences for the ICC, but maybe even more devastating ones for the Council itself. We do not want to see the Council put itself in a position in which the United Nations membership at large is forced to question the legality of one of its decisions. Such a situation would have a devastating impact on the credibility of the Council and thus of the Organization as a whole."[104]

It noted that invoking Article 16 "would constitute an action outside the mandate of the Security Council and fundamentally alter the process of treaty-making as practiced in the United Nations" and that the generic resolution approach "could be based only on the untenable notion that the International Criminal Court constitutes a threat to international peace and security". [105] Mongolia said that "[n]o State should be placed in a situation in which it is forced to breach its international obligations under either the Charter or the Statute."[106] Samoa explained that it was apparent on the face of Article 16 that

> "the true meaning and intent is to enable the Security Council to judge each case on the basis of its particular circumstances. There is clearly no ground for a determination in advance, and then in perpetuity. Our contention, therefore, is that the purported use of article 16 would be plainly ultra vires. I believe there is an abundance of material from the negotiation process that would support such a contention."[107]
>
> Malaysia warned:
>
> "What is at stake is a fundamental principle of international law. It is vitally important for the Council not to take a decision that would have the effect of changing or amending the terms of an international treaty, which the United States draft resolution sets out to do in respect of the Rome Statute. Such changes or amendments could only be effected in accordance with procedures established by the treaty, with the full consent of the States parties, as provided for by the Vienna Convention on the Law of Treaties. We do not believe that the Security Council should be empowered to override the

[103] U.N. Doc. S/PV.4568, 10 July 2002, 16.

[104] U.N. Doc. S/PV.4568, 10 July 2002, 20.

[105] U.N. Doc. S/PV.4568, 10 July 2002, 20.

[106] U.N. Doc. S/PV. 4568, 10 July 2002, 19.

[107] U.N. Doc. S/PV/4568 (Resumption 1), 10 July 2002, 7 (adding that "in the absence of a situation threatening or breaching international peace and security, would we question the vires in the purported use of Chapter VII of the Charter. In our view, it seems very doubtful that the requisite circumstances exist in this case to bring into play Article 39 of the Charter and Chapter VII.").

> intention of the parties to any treaty. That would establish a bad precedent, with serious future ramifications.
> We fear that adoption of the United States proposal would place the Security Council in a difficult position. Its credibility would be questioned, as a number of parties to the Rome Statute have indicated they would be compelled to re-examine the legality of such a decision of the Council."[108]

South Africa stated that "the Security Council's credibility was seriously threatened" and its "mandate leaves no room either to reinterpret or even to amend treaties that have been negotiated and agreed by the rest of the United Nations membership".[109] Switzerland said:

> "The Security Council's adoption of a resolution modifying a treaty that is in conformity with the Charter of the United Nations is inconceivable as a solution. That would be a serious development for the future of international law and of the United Nations, and it would directly affect the authority of the Council itself."[110]

Venezuela made clear that if the Security Council were to adopt the US proposal, "such a decision would exceed the Council's competence and would disrupt the international legal order".[111] Other states expressed similar worries, including Colombia, Cuba, Guinea, New Zealand, the Ukraine and Syria.[112]

[108] U.N. Doc. S/PV.4568 (Resumption 1),10 July 2002, 8.

[109] U.N. Doc. S/PV.4568, 10 July 2002, 6.

[110] U.N. Doc. S/PV.4568, 10 July 2002, 23.

[111] U.N. Doc. S/PV.4568, 10 July 2002, 31.

[112] Colombia, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002 ("A Security Council resolution issued under Chapter VII cannot ignore the content of the provisions of the Rome Statute. Moreover, a resolution of this kind cannot interpret the mandates of the Statute above and beyond their content, or contradict the purpose of their provisions."); Cuba, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 13-15 (stating that the Security Council had no power to amend treaties); Guinea (Resumption 1), U.N. Doc. S/PV.4568, 10 July 2002 ("no Security Council resolution could therefore modify a provision of an international treaty"); New Zealand, U.N. Doc. S/PV.4568. 10 July 2002, 6 ("It would represent an attempt by the Council to change the negotiated terms of a treaty in a way unrecognized in international law or in international treaty-making processes. Member States would have to question the legitimacy and legality of this exercise of the role and responsibility entrusted to the Council were that to occur."); Ukraine, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 4 (expressing concern that the Security Council was "divided over a problem that could undermine its credibility" and "call into question the legitimacy of its decisions" and warning that the solution "should not create a precedent of interference by the Security Council with the sovereign rights of the Member States in the treaty-making process" or "create a conflict between the powers of the Security Council under Chapter VII of the Charter and the legal obligations entered into by Member States in compliance with the provision of the United Nations Charter"); Syria, U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002 ("[T]he Security Council does not have the right to take decisions under Chapter VII to amend an international treaty that has entered into force, because this would constitute a precedent that would destabilize and undermine the international legal regime. Such an action is also outside the purview of the Security Council, whose principal task, as set out in the Charter, is the maintenance of

- The US proposal would undermine international law and the principle of equality before the law. Canada declared:

> "At stake today are entirely different issues that raise questions about whether all people are equal and accountable before the law; whether everyone in the territory of a sovereign State is subject to that State's laws, including international laws binding on that State; and whether States may collectively exercise their sovereignty to prosecute perpetrators of grievous crimes. Those principles were affirmed at Nuremberg and have been affirmed since."[113]

Malaysia stated that it believed that "giving immunity to the peacekeepers would send a wrong and unacceptable message that they are above the law" and that the "viability and effectiveness" of UN peace-keeping missions "would be seriously affected if it were to allow different sets of rules to govern different groups of peacekeepers".[114] Thailand stated that it feared recent developments in the Security Council "may erode the sanctity of international law and multilateralism, and we therefore ask all States to safeguard the independence and the effective functioning of the ICC".[115] Other states, including Brazil, Mexico, Mongolia and South Africa, expressed similar concerns.[116]

F. The adoption of the US proposal, as reportedly modified by the UK, on 12 July 2002

After the public debate in the Security Council, Permanent Representatives of Canada, Brazil, New Zealand and South Africa sent a letter to the President of the Security Council on Friday, 12 July 2002, concerning draft resolution S/2002/747, stating that the Council's consideration of

international peace and security.").

[113] U.N. Doc. S/PV.4568, 10 July 2002, 3.

[114] U.N. Doc. S/PV.4568 (Resumption 1), 10 July 2002, 8.

[115] U.N. Doc. S/PV.4568, 10 July 2002, 30.

[116] Brazil U.N. Doc. S/PV.4568, 10 July 2002 ("Security Council members have a special responsibility to maintain and promote a stable world order, and it is the Council's duty to make every effort to sustain international law and to help make it universal; this is the only real source of legitimacy in a world based on justice for all. The creation of unnecessary and unjustifiable exceptions to the rule of law with regard to international behaviour would be a denial of that principle and a dangerous setback for the Organization."); Mexico, U.N. Doc. S/PV.4568, 10 July 2002 ("legal institutions such as the law of treaties, one of whose essential objectives is to promote peaceful cooperation among States, would be damaged if we allowed the Council to set the negative precedent of using its resolutions to amend treaties"); Mongolia, U.N. Doc. S/PV4568, 10 July 2002, 20 (underlining "the vital importance of safeguarding . . . the Rome Statute and thus of international law and treaty-making, the rule of law . . ."); South Africa, U.N. Doc. S/PV.4568, 10 July 2002, 7 ("The creation of the International Criminal Court is evidence of an emerging norm in international law in favour of ensuring that those accused of the most serious crimes are either prosecuted by competent national authorities or handed over for prosecution by a duly instituted international court.").

the matter, "in spite of the clear opposition of the international community, as most recently expressed in the public debate on 10 July 2002, "is damaging international efforts to combat impunity, the system of international justice, and the collective ability to use these systems in the pursuit of international peace and security".[117] The letter left aside "the legitimacy of the Security Council's arrogating to itself the right to interpret and to change the meaning of treaties", which the signers challenged, and focussed on "one of the unacceptable consequences of the passage of the draft resolution". It noted that

> "[t]he International Criminal Court was always intended as a court of last resort filling a void where States fail to undertake their international responsibilities to prosecute perpetrators of grievous crimes. The net effect of operative paragraphs 1 and 2 of the Council's resolution will be to remove that possibility in the specific cases of peacekeepers who may have committed crimes under the Court's jurisdiction, if that peacekeeper comes from a State not party to the Rome Statute. Further, the request to the Court in the draft resolution would be renewable on an annual basis, which, for all intents and purposes, would amount to creating a perpetual obstacle to Court action."

The letter also noted that the draft resolution, by directing states not to cooperate with the International Criminal Court in relation to peace-keepers from non-state parties, would lead to impunity in those countries where suspects were found that did not have legislation providing for universal jurisdiction. It requested members of the Council "not to pass a resolution that would have such negative consequences".

On 11 July 2002, the day before the joint letter, the USA circulated a draft resolution. The preambular paragraphs and the first three operative paragraphs were substantially the same as those in the resolution that was adopted.[118] An alternative text, reportedly drafted by France, and reportedly acceptable to 13 other members, was abandoned after the USA opposed it. A draft amendment to the 11 July 2002 US proposal replacing its first two operative paragraphs was then presented on 12 July 2002 by Mauritius, a former British colony, but it was reportedly drafted by the UK. The Mauritius proposed amendment introduced the phrase "if a case arises" in the first operative paragraph and the concept of case-by-case review of each successive renewal:

[117] Letter from the Ambassadors to the UN of Canada, Brazil, New Zealand and South Africa to the President of the UN Security Council in relation to the draft resolution S/2002/747 currently under consideration by the Security Council under the agenda item of Bosnia-Herzegovina, 12 July 2002, U.N. Doc. S/2002/754.

118 U.N. Doc. S/2002/747 of 11 July 2002. The three operative paragraphs read:

> "1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC for a twelve-month period starting 1 July 2002, shall not commence or proceed with any investigations or prosecutions involving current or former officials or personnel from a contributing State not a Party to the Rome Statute for acts or omissions relating to United Nations established or authorized operations;
>
> 2. *Expresses* the intention to renew the request in paragraph 1 each 1 July for further 12-month periods for as long as may be necessary;
>
> 3. *Decides* that Member States shall take no action inconsistent with paragraph 1."

> "1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing state not a party to the Rome Statute over acts or omissions relating to a UN established or authorized operation, shall for a twelve month period starting from 1 July 2002 not commence or proceed with investigation or prosecution of any such case;
> 2. Expresses its intention to renew such request on a case-by-case basis for further twelve month periods for as long as may be necessary;"

However, the phrase "if a case arises" does not mean that the Security Council would make individualized *determinations*, but *automatic* requests in each case without any determination of the necessity for such requests. The Security Council adopted Resolution 1422 on Friday evening, 12 July 2002, with two minor changes from the Mauritius amendment. It added "unless the Security Council decides otherwise" (a decision subject to a US veto) and a fourth operative paragraph deciding to remain seized of the matter. The adoption of the resolution has been called "a black day for international criminal law". [119]

Reasons for the adoption of the resolution. As a preliminary matter, it is important to note that the decision by the Security Council, a political body, was a political, not a legal, decision. None of the 15 members, including the USA, made a cogent legal argument during the debate on 10 July 2002 or at the time of adoption on 12 July 2002 why either the US proposal or Resolution 1422 was consistent with Article 16.[120] Instead, these states spoke solely of compromise and pragmatic considerations.[121] Why did the Security Council unanimously cave in to US pressure, despite the overwhelming opposition by the international community, as reflected in the government statements on 3 and 10 July 2002 and in the legal criticism by non-governmental organizations? There appear to have been several reasons, including the

119 Ambos, *supra,* n. 2.

[120] Reportedly, the UN Legal Counsel gave a guarded legal opinion in closed session concerning the draft resolution. According to various accounts, the opinion emphasized that the Rome Statute would have to be construed by the International Criminal Court, not just the Security Council. It noted that this was the first time that the Security Council sought to invoke Article 16, which was more complex than many realized. The opinion stated that any request under this article had to be under Chapter VII, but it did not express any view whether that chapter had been properly invoked. It suggested that the situation envisaged in the draft resolution would almost certainly not happen and concluded that "in the present circumstances" a resolution of the sort envisaged would be consistent with Article 16. The opinion also indicated that the draft resolution would give the Security Council ample time to be able to reconsider the question in less stressful circumstances when it expired in a year's time. Nothing in the reports about the content of the opinion suggests that the Legal Counsel would necessarily conclude that a renewal of the request in the resolution as adopted would be consistent with Article 16.

[121] *See, for example,* China, U.N. Doc. S/PV.4568, 10 July 2002 ("We also believe that the most urgent current task is to find a practical solution."); Ireland, U.N. Doc. S/PV.4568, 10 July 2002 ("At every stage during the past few difficult weeks, Ireland has confirmed that it will work with other members of the Council to achieve a pragmatic and reasonable outcome . . . "); Singapore, U.N. Doc. S/PV.4568, 10 July 2002 ("Instead of insisting on stock ideological positions that make compromise impossible, there has been an effort to temper principle with prudence and to seek pragmatic solutions.").

following, which will need to be taken into account by states and non-governmental organizations in the fight to prevent renewal of the resolution in June 2003.

First, crucial swing states on the Security Council like Norway failed to stand up to very high-level US pressure at an early stage when it could have made a difference. Norway did not make a statement in the Preparatory Commission on 3 July 2002. Its statement in the Security Council on 10 July 2002 is in marked contrast to those of China and Russia on the same day, both of which urged that any resolution be consistent with the Rome Statute. The Norwegian statement implicitly placed the supposed threat to UN peace-keeping from the threatened US vetoes of extensions of mandates above the requirements of international justice. Norway's decision to join the consensus was a major disappointment in the light of the leading role it played over the years as a key member of the Like-Minded Group working to establish the Court and to protect the Rome Statute from efforts by the USA and other states to weaken it.

Second, the European Union was hampered by its decision to take a common public position on the US proposal and not to permit individual statements unless the member was a member of the Security Council. This decision meant that the other members were subject to a position reflecting the lowest common denominator insisted upon by the UK. However, Germany decided to take a principled stand to protect the integrity of the Rome Statute by addressing the Security Council in the public session.

Third, despite their obligations as states parties to the Rome Statute and their obligations to implement the European Union Council's Common Position adopted on 11 June 2001 and amended in June 2002, the UK and France did not use their power to as permanent members of the Security Council to veto the US proposal or even to abstain in an effort to prevent it from receiving the necessary nine votes. Indeed, persons involved in the informal discussions among members of the Security Council reported their perception that the UK, which had played a major role in the drafting of the Rome Statute, shifted from initial opposition to the US proposals to working closely with the USA. The UK was also perceived as largely responsible for drafting the final "compromise" text presented by Mauritius.

Fourth, members of the Security Council prefer to operate by consensus and when it appears that a proposed resolution is likely to receive the necessary nine votes, the other states often are willing to have the resolution adopted unanimously.

III. THE POWER OF THE INTERNATIONAL CRIMINAL COURT TO DETERMINE THAT A SECURITY COUNCIL REQUEST IS NOT CONSISTENT WITH THE ROME STATUTE

When the International Criminal Court receives a request to defer an investigation or prosecution, it must itself decide what legal effect *under the Rome Statute* to give to the request. It must also be convinced that a decision has been taken that would impose a requirement *under Article 16 of the Rome Statute - not a requirement under the UN Charter* - to defer the investigation or prosecution. The International Criminal Court - not the Security Council - has the sole responsibility for interpreting this exceptional statutory provision authorizing the

Security Council to request a temporary deferral of an investigation or a prosecution of the worst crimes in the world. [122] The choice of the word "request" in Article 16, rather than "decide" or "determine", was deliberate.[123] The use of the word "request" was understandable, since the Security Council has no power to order the International Criminal Court, an independent body, or any other intergovernmental organization to take or cease action.[124]

Obligation of the International Criminal Court to determine whether request is consistent with Rome Statute. As explained below in Section IV.B, the International Criminal Court must be convinced that the request is one within the meaning of Article 16 of the Rome Statute – that is, an exceptional request in a particular case for a temporary delay, for example, where the Security Council has made a determination that an investigation or a prosecution of a government leader or leader of an armed group would prevent the leader from participating in peace negotiations under its auspices. The International Criminal Court must also determine whether the request is consistent with the Rome Statute as a whole. [125]

122 The head of the UK's delegation at the Rome Diplomatic Conference of one of the permanent members of the Security Council has recognized that a request by the Security Council does not automatically stay an investigation or prosecution, but, instead, the International Criminal Court itself must decide whether to give effect to the request. The former Legal Adviser of the UK's Foreign and Commonwealth Office, who played a key role in drafting Article 16, recently stated with respect to Security Council Resolution 1422:

> "I don't envy my former colleagues their task of drafting this resolution. They were acting of course within the autonomous powers of the Security Council under the Charter, but nevertheless under the need to do so in such a way as to create a reliable assumption that the ICC would give effect to it (if the case arose)."

Sir Franklin Berman, KCMG, QC, *The International Criminal Court: is it a threat?,* Chatham House address, 5 November 2002 (*obtainable from:* http://www.riia.org).

123 The drafters of Article 16 approved an amendment proposed by the UK which replaced the phrase, "where the Security Council has . . . given direction to that effect" with the current text, "where the Security Council has . . . requested the Court to that effect".

124 Lawful decisions (not requests) of the Security Council bind members, not intergovernmental organizations, as Article 48 (2) of the UN Charter makes clear. It states that decisions of the Security Council for the maintenance of international peace and security "shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members". Leading commentators have stated that, "[u]nlike the first draft [of the Dumbarton Oaks proposals that would have imposed obligations on intergovernmental organizations, rather than their members], Art. 48 (2) correctly creates a legal duty for the UN members in other organizations, since only these members – not the other organizations themselves – can be bound by the Charter". Bryde & Reinisch, *Article 48, in* Bruno Simma, ed., 1 *The Charter of the United Nations: A Commentary* 778-779 (Oxford: Oxford University Press 2nd ed. 2002) (Simma 2nd ed.). Indeed, when the UN seeks to bind other international organizations or agencies directly, it does so through agreements. *Ibid.*, 779. As Article 3 of the draft Relationship Agreement between the Court and the United Nations makes clear, the mutual obligations of the UN and the International Criminal Court are limited to cooperation and coordination. U.N. Doc. ICC-ASP/1/3 (2002), Art. 3. Thus, the suggestion of one author, Bryan MacPherson, *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings,* ASIL Insights, July 2002 (*obtainable from:* http://www.asil.org/insights.htm), that Resolution 1422 binds the International Criminal Court is not correct.

125 Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council, in* Antonio Cassese, Paola Gaeta, John R.W. D. Jones, eds, 1 *The Rome Statute of the International Criminal Court: A Commentary* 647 (Oxford: Oxford University Press 2002) ("The deferral by the Security Council should thus respect the conditions set up by the UN Charter, but also those deriving from the system of the

The law governing the International Criminal Court's determination. In so interpreting its statutory obligations, the International Criminal Court is required under paragraph 1 of Article 21 (Applicable law) to examine, if necessary, three bodies of law. That paragraph provides:

> "1. The Court shall apply:
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

In addition, when applying and interpreting law under Article 21, the International Criminal Court is required to do so consistently with international human rights and without any adverse distinction. Paragraph 3 of that article provides:

> "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

Therefore, in determining whether a request by the Security Council should be granted, the International Criminal Court is required to undertake a four-step analysis. ***First***, it must examine the request in the light of the Statute, Elements of Crimes and Rules of Procedure and Evidence. ***Second***, it must examine, "where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". In doing so, the International Criminal Court will need to be guided by the fundamental principle of both international human rights and international humanitarian law that those responsible for grave violations of that law, such as genocide, crimes against humanity and war crimes – conduct that is contrary to *jus cogens* prohibitions – must be brought to justice in all cases. ***Third***, to the extent that the first and second bodies of law do not answer the problem of application and interpretation, the International Criminal Court must examine general principles of law. A general principle of law common to all contemporary legal systems is that that all persons are equal before the law.[126] Thus, an attempt to obtain impunity for an entire

ICC Statute.").

126 Article 14 (1) of the International Covenant on Civil and Political Rights provides that "[a]ll persons

class of individuals would be contrary to this fundamental principle. ***Finally***, all of these three bodies of law must be applied and interpreted in a manner that is consistent with international human rights and without any adverse distinction.[127] In particular, the International Criminal Court should consider whether the request would deny the human right of victims to reparations, the right of an accused to a speedy trial and the right of a detained person not to be detained indefinitely without trial.[128]

The ability of the International Criminal Court to determine whether the request was consistent with the UN Charter and other international law. As shown below in Section IV, it is possible for the International Criminal Court to assess the compatibility with the Rome Statute of a request by the Security Council in the light of the above criteria based solely on the nature of the request without having to decide the more sensitive question whether the Security Council exceeded its powers under the UN Charter and other international law. However, the International Criminal Court has the power under the Statute to make such a determination as an incidental part of its jurisdiction, for example, in determining whether the Security Council resolution was adopted under Chapter VII.[129] In addressing this alternative

shall be equal before the courts and tribunals."

127 It has been noted that Article 21 (3) of the Rome Statute "elevates human rights to the highest rank of sources" of international law and that "the Statute and Rules of Procedure and Evidence are subject to human rights". Bruno Simma & Andreas Paulus, *Le rôle relatif des différentes sources du droit international pénal (dont les principes généraux de droit), en,* Hervé Ascensio, Emmanuel Decaux & Alain Pellet, *Droit International Pénal* 57 (Paris: Pedone 2000) (*"le Statut élève les droits de l'homme au plus haut rang des sources"; "le Statut et le Règlement sont assujettis aux droits de l'homme"*).

128 The extent to which these rights are respected will be an important factor in determining the legality under the Rome Statute and international law of any Security Council request for a deferral:

> "It follows from the provision entitling the Security Council to request a deferral under Chapter VII that the Statute considers the interests of the maintenance or restoration of international peace and security to be paramount; however, this does not mean in any way that those interests may set aside the guarantees of a fair trial. In their ruling on the suspension on the proceedings, the jurisdictional organs of the Court should verify the legality of the Security Council's resolution also under this aspect, taking into due consideration the rights of the suspect or the accused."

Condorelli & Villalpando, *supra,* n. 125, 653 (footnote omitted). In this situation, "[t]he Court should then verify whether or not the purpose of the resolution is to unduly keep a person in custody without a trial. If so, the action by the Security Council would be contrary to the Charter, since it would deviate from the purposes laid down in Chapter VII." *Ibid.* 653, n. 103. In addition, "in accordance with the obligation to periodically review the ruling providing for the detention of a person, the competent Chamber, at the moment of deferral, and during the period of suspension, should re-examine the subsistence of the conditions that justified the detention as provided for under Article 53 of the Statute." *Ibid.,* 653 (footnote omitted).

129 Thus, if the International Criminal Court were to address this second question by examining the legality of the Security Council's action, it would be doing no more than the Appeals Chamber of the ICTY did in the *Tadić* case in 1995. There, the Appeals Chamber reviewed the question whether the Security Council had the power to establish a subsidiary judicial organ. In deciding this question, the Appeals Chamber explained that it was not sitting as a constitutional tribunal reviewing acts of the Security Council, but was addressing the question "whether the International Tribunal, in exercising this 'incidental' jurisdiction, can examine the legality of its establishment by the Security Council, solely for the purpose of ascertaining its own 'primary' jurisdiction over the case before it". *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para. 20. It added:

> "Obviously, the wider the discretion of the Security Council under the Charter of the United

ground, the International Criminal Court must first be convinced that the Security Council, in fact, has determined pursuant to the UN Charter that there is a threat to or breach of international peace and security or a case of aggression and, second, that such a threat, breach or case exists (Section V.B.1).[130] Assuming that the International Criminal Court determines that the Security Council has properly made such a determination under Article 39 of the UN Charter, then the Court may then examine whether the Security Council exceeded its powers under the UN Charter and other international law (Section V.B.2 to 4). One essential limitation in Article 16 of the Rome Statute is that the request of the Security Council must be "adopted under Chapter VII of the United Nations", but the request must necessarily also be otherwise consistent with the UN Charter and other international law.[131] Of course, it goes without saying that it is not enough for the Security Council simply to say that a request was adopted under Chapter VII; such a labelling exercise cannot be decisive.

In reviewing the Security Council's request for a deferral, the International Criminal Court must take into account a number of factors:

> "In their decision to suspend the proceedings, the jurisdictional organs of the Court should have a power of review of the Security Council's request of deferral. They shall ensure that the request is being made in accordance with the conditions provided for under the UN Charter and the ICC Statute, notably that it is indeed a resolution taken under Chapter VII of the Charter, that it follows a determination of the existence of a situation described under Article 39, that, in so doing, the Security Council has respected the Purposes and Principles of the UN and has not acted ultra vires, that there is effectively a duly motivated request of deferral, etc. As in the event of referral under Article 13 (b), the power of review of the ICC's jurisdictional organs shall be limited to verifying the legality of the action by the Security Council and should not extend to the political grounds of its decisions. In addition, through an interpretation of the

Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter."

Ibid., para. 21.

[130] Condorelli & Villalpando, *supra,* n. 125, 648 ("In exercising its power of judicial review of the resolution requesting the deferral, the Court will establish the legality or otherwise of the Security Council's action. In so doing, the Court will also be entitled to ascertain that the Security Council has not exceeded its competence according to the Charter.") (footnote omitted). *See also* William A. Schabas, *Introduction to the International Criminal Court* 66 (Cambridge: Cambridge University Press 2001) (noting that the Rome Statute "imposes the requirement that in seeking a deferral or stay of proceedings, the Council act pursuant to Chapter VII of the Charter", which "means that the Council must determine the existence of a 'threat to the peace', a 'breach of the peace' or an 'act of aggression', in the words of Article 39 of the Charter" and that, "[c]onceivably, the Court could assess whether or not the Council was validly acting pursuant to Chapter VII.").

[131] Condorelli & Villalpando, *supra,* n. 125, 647 ("The deferral by the Security Council should thus respect the conditions set up by the UN Charter . . . . ").

> resolution, they should determine whether the specific case is part of the situation considered by the Security Council under Chapter VII."[132]

When the International Criminal Court, acting under the Rome Statute, is "verifying the legality of the action by the Security Council", the Security Council has the burden of justifying its request for deferral. At a minimum, it has been argued,

> "the Security Council shall indeed justify its decision of deferral as a means to maintain or restore international peace and security; it should give reasons for its decision by demonstrating that the suspension of the investigations or the prosecutions will contribute to the objective provided for in Chapter VII of the Charter."[133]

However, although this view correctly places the burden on the Security Council to justify a request, it would appear to set too low a threshold; there will always be those willing to contend that a suspension of investigations or prosecutions might somehow contribute to the maintenance or restoration of international peace and security. A narrower, but still unsatisfactory, view, since there can be no lasting peace without justice, is that the Security Council must demonstrate that investigations or prosecutions are a threat to international peace and security.[134] As is evident from the text of the resolution and its drafting history, the Security Council did neither.

Therefore, in examining the legality of the Security Council's request, the International Criminal Court is performing a function that it is required to perform *under the Rome Statute.* In doing so, it determines whether the Statute compels it to give a specific legal effect to a Security Council resolution that the resolution would not otherwise have had if Article 16 had not been included in the Statute since the UN Charter does not give the Security Council itself the power to order international courts to stop criminal investigations or prosecutions.[135] In conducting

[132] *Ibid.*, 650 (footnote omitted). The authors asserted that if all the conditions listed were present, the International Criminal Court would be "bound to uphold the deferral of the case", *ibid.* This conclusion is correct to the extent that "a duly motivated request of deferral" is one that was intended by the drafters (see Section IV.B below).

[133] *Ibid.*, 647 (footnote omitted).

[134] Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections,* 10 Eur. J. Int'l L. 144, 163 (1999) ("[A] sound interpretation of this provision [Article 16] leads to the conclusion that the powers of the Security Council are not unfettered. The request may only be made by a resolution adopted under Chapter VII of the United Nations Charter. Hence, the Security Council may request the Prosecutor to defer his activity only if it explicitly decides that continuation of his investigation or prosecution may amount to a threat to the peace.").

[135] Indeed, the UN Charter does not authorize the Security Council, the General Assembly or any other UN organ to compel the International Court of Justice or any other international or national court to defer judicial proceedings. Any such power must be found in an express provision of the constitutive instrument of the court. As one commentator has noted, "[a]s the organ charged with the primary responsibility for the maintenance of peace, the SC does not enjoy priority of any kind over the ICJ." Jost Delbrück, *Article 24, in* 1 Simma (2nd ed.), *supra,* n. 124, 447. The commentator explains:

"[T]he very fact that the primary responsibility for the maintenance of peace is placed in the SC

this statutory examination, the International Criminal Court is not impinging on the powers of the Security Council under the UN Charter.

IV. THE LIMITED SCOPE OF ARTICLE 16 OF THE ROME STATUTE

Article 16 of the Rome Statute is an unfortunate provision - the inclusion of which Amnesty International and many other non-governmental organizations strongly opposed as an obstruction of justice.[136] This article permits a political body, the Security Council, to undermine the independence of the International Criminal Court in exceptional cases by temporarily preventing the Prosecutor from opening an investigation or commencing a prosecution of the worst possible crimes in the world: genocide, crimes against humanity and war crimes, but only in extraordinary circumstances, as explained below in this section. It provides:

> "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

As explained below in Section IV.A, the object and purpose of the Rome Statute and the exceptional nature of this article require that it be given the narrowest possible reading. Moreover, as discussed below in Section IV.B, the drafting history of Article 16 demonstrates

> could be interpreted in such a way as to preclude the ICJ from dealing with a case of which the SC is already seized. Such priority and exclusiveness regarding the competence of the SC *vis-à-vis* the ICJ, however, can neither be deduced from the notion of the primary responsibility of the SC for the maintenance of peace, nor find support in any other Charter provisions or any general principles of law."

Ibid.

The same principle applies with equal force to other courts that are not UN organs. Athough the Security Council has the power to terminate the existence of the two international criminal tribunals that it established for the former Yugoslavia and for Rwanda, it cannot - either under the UN Charter or the statutes of those tribunals - interfere with their independence by preventing them from investigating or prosecuting a crime. *See Effect of Awards of Compensation Made by the United Nations Administrative Tribunal,* 1954 ICJ Rep. at 56 (confirming independence of court from the organ that established it, the General Assembly). The primacy of the two international criminal tribunals established by the Security Council over national courts and the ability to remove cases from national courts is a judicial power that can only be exercised by the two tribunals pursuant to their statutes, not by the Security Council directly. Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 9 (2); Statute of the International Criminal Tribunal for Rwanda, Art. 8 (2).

[136] *See, for example,* Amnesty International, *The international criminal court: Making the right choices - Part V: Recommendations to the diplomatic conference,* AI Index IOR 40/10/98, May 1998 (Principle 10 of the *16 Fundamental Principles for a Just, Fair and Effective Court* and comment on Article 10 of the consolidated text submitted to the Rome Diplomatic Conference).

that it was intended to be used only in a rare case, such as when the Security Council considered that peace negotiations taking place under its auspices with a government leader or leader of an armed group would be impeded by investigations or prosecutions and that a temporary delay in investigations or prosecutions would facilitate the presence of the government leader at the negotiations.[137]

A. The need to interpret the scope of the Article 16 exception narrowly and in accord with the object and purpose of the Statute

Under customary international law, as reflected in Article 31 (1) of the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[138] Giving legal effect under the Rome Statute to the attempt by the Security Council to misuse Article 16 to obtain impunity from international justice for a particular class of individuals from non-states parties, simply because a permanent member threatened to veto extensions of mandates of UN peace-keeping operations - an absurd and unreasonable result, could not be considered a good faith interpretation by the International Criminal Court.[139] Such an interpretation would be completely at odds with what the states at Rome intended and, thus, contrary to the overriding principle of treaty interpretation under international law that the intent of the parties must be ascertained.[140]

137 The assumption that a temporary or permanent guarantee of impunity to a government leader or a negotiator is essential is belied by numerous examples of negotiations on peace settlements, food deliveries to starving civilians or surrender of armed forces where the protagonists faced prosecution for war crimes, crimes against humanity or genocide. In some cases, the negotiations can take place directly during hostilities with government leaders facing the possibility of an arrest, as in the 1995 peace negotiations involving three heads of state concerning the armed conflict in Bosnia and Herzegovina in Dayton, Ohio. During the Second World War, the Allies negotiated food drops over the Netherlands with S.S. General Sepp Dietrich and conducted surrender negotiations with Field Marshal Albert Kesselring and Japanese officials who subsequently were prosecuted for war crimes. Alternatively, negotiations can take place with other government officials who are not suspected of crimes.

[138] Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969), Art. 31 (1).

[139] As one commentator has explained:

> "The first principle - interpretation *in good faith* - flows directly from the principle of *pacta sunt servanda* enshrined in Article 26 [of the Vienna Convention]. Interpretation is part of the performance of the treaty, and therefore the process of examining the relevant materials and assessing them must be done in good faith. Even if the words of the treaty are clear, if applying them would lead to a result which would be manifestly absurd or unreasonable (to adopt the phrase in Article 32 (b) [of the Vienna Convention]), the parties must seek another interpretation."

Anthony Aust, *Modern Treaty Law and Practice* 187 (Cambridge: Cambridge University Press 2000).

[140] As McNair has explained, each of the various rules of interpretation "is merely a *prima facie* guide and cannot be allowed to obstruct the essential quest in the application of treaties, namely, to search for the real intention of the contracting parties in using the language employed by them". Arnold Duncan McNair, *The Law of Treaties: British Practice and Opinions* 175 (Oxford: Clarendon Press 1938). He reiterated:

> "The primary rule is that the tribunal should seek to ascertain from all the available evidence the intention of the parties in using the word or phrase being interpreted. The many rules and maxims which have crystallized out and abound in the text-books and elsewhere are merely *prima facie*

The requirement that the treaty be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty" does not, of course, mean a simplistic, literal interpretation of the words. As Article 31 (1) makes clear, they must be interpreted both "in their context" and "in the light of [the treaty's] object and purpose". As a leading authority on the law of treaties has explained, "while a term may be 'plain' *absolutely*, what a Court adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term *relatively*, that is, in relation to the circumstances in which the treaty was made".[141]

Article 31 (2) of the Vienna Convention explains that the context of the terms includes the text and preamble of the treaty. Article 31 (3) requires that subsequent agreements and practice of the parties, as well as relevant rules of law applicable in the relations between the parties, must be taken into account. The overwhelming rejection by governments, including most of the states parties to the Rome Statute, of the US proposals, much of which was incorporated in Resolution 1422, together with their extensive legal analysis, is compelling evidence of state practice, supported by *opinio juris*, that must be taken into account in interpreting the scope of Article 16 of that Statute.

In addition, under customary international law, as reflected in Article 32 of the Vienna Convention, recourse may be had to supplementary means of interpretation to confirm the meaning determined in the manner outlined above or when this method leads to ambiguity or absurd or unreasonable results:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable."[142]

It is up to the International Criminal Court, an independent international judicial body, to determine what legal effect under the Rome Statute to give to the request in Resolution 1422 purportedly made pursuant to Article 16. The context of Article 16 in the overall structure of the Rome Statute, the object and purpose of the Statute and the drafting history of that article

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> guides to the intention of the parties and must always give way to contrary evidence of the intention of the parties in a particular case. If they are allowed to become our masters instead of our servants these guides can be very misleading."

Ibid., 185.

[141] *Ibid.,* (emphasis in the original).

[142] Vienna Convention on the Law of Treaties, *supra,* n. 138, Art. 32. The International Court of Justice has stated that Articles 31 and 32 of the Vienna Convention reflect customary international law. *Case concerning the territorial dispute (Libyan Arab Jamahiriya v. Chad),* 1994 ICJ Rep., para. 41.

demonstrate that it was not designed to give impunity to nationals of non-states parties - even if they were permanent members of the Security Council.

B. Article 16 not designed to give impunity to nationals of non-states parties

The context of Article 16 in the overall structure of the Rome Statute, the object and purpose of the Statute and the drafting history of that article demonstrate that it was not designed to give impunity to classes of individuals, such as nationals of non-states parties - even if they are permanent members of the Security Council.

Article 16 an exceptional provision. Article 16 is an exceptional provision in the overall structure of the Rome Statute and must, therefore, be read narrowly, both in terms of its scope and temporal effect, in the light of the purposes of the Rome Statute. [143] This teleological approach is fully consistent with the overall object and purpose of the Statute, to ensure that *all* those within the International Criminal Court's jurisdiction responsible for the worst possible crimes are brought to justice in *all* cases. The Rome Statute makes clear that although states bear the primary responsibility to bring such persons to justice, if they prove unable or unwilling to do so, then the International Criminal Court may do so as a last resort. Any attempt to use Article 16 to bar the International Criminal Court from exercising jurisdiction for more than a short while would be incompatible with the very purposes of the Rome Statute as set forth in the Preamble. There the states parties declare that the crimes within the International Criminal Court's jurisdiction "must not go unpunished", that "their effective prosecution must be ensured at the national level", that there must be an "end to impunity" and that the Court must be "complementary to national jurisdictions" when they are unable or unwilling to investigate and prosecute these crimes; they also resolve "to guarantee lasting respect for and the enforcement of international justice".[144]

The intent of the drafters that Article 16 be used rarely and only in exceptional circumstances. As the drafting history demonstrates, Article 16 was based on the dubious view

143 For the requirement that constituent instruments of international organizations must be interpreted in the light of their object and purpose, see *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case, I.C.J. Rep. (1996), para. 19*; International Law* 914-915 (4th ed. 1997).

144 The object and purpose of the Rome Statute is set forth in the Preamble, in particular in the following paragraphs:

> "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,
>
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
>
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,
>
> . . . .
>
> Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,
>
> Resolved to guarantee lasting respect for and the enforcement of international justice[.]"

that the Security Council might be impeded in an exceptional situation when it was attempting to restore international peace and security if the International Criminal Court were to investigate or prosecute persons suspected of genocide, crimes against humanity or war crimes while these attempts were continuing. However, Article 16 must be considered in the light of the fundamental principle recently reiterated by the UN Secretary-General:

> "There are times when we are told that justice must be set aside in the interests of peace. It is true that justice can only be dispensed when the peaceful order of society is secure. But we have come to understand that the reverse is also true: without justice, there can be no lasting peace."145

There was widespread opposition in the Preparatory Committee for the Establishment of an International Criminal Court (1996 to 1998) to including the International Law Commission's draft Article 23 (3) (the forerunner of Article 16). That provision would have required the Security Council to approve all prosecutions arising out of a situation that was being dealt with by the Council as a threat to or breach of international peace and security or as an act of aggression. The minority of states (initially including all five permanent members of the Security Council) that supported including draft Article 23 (3) contended that it would be "unacceptable" if the International Criminal Court had the power "to act in defiance of the Charter of the United Nations and to interfere in delicate matters under consideration by the Security Council", whether under Chapter VII or any other chapter.[146] The Preparatory Committee squarely rejected this draft provision, which would have permitted any permanent member of the Security Council to veto a prosecution when a situation was being considered by the Security Council.[147]

145 UN Secretary-General Kofi Annan, Statement at the Inaugural Meeting of the Judges of the International Criminal Court, The Hague, The Netherlands, 2 (*obtainable at:* http://www.iccnow.org).

[146] Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/51/22 (1996) (1996 Preparatory Committee Report), vol. I, para. 141. *See also* Morten Bergsmo & Jelena Pejić, Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft 1999) 374.

147 These concerns were aptly reflected in subsequent comments by one expert on the law governing the Security Council. She explained that, had Article 23 (3) of the ILC draft been retained,

> "this would have constituted the most extensive reach of the Council's creeping jurisdiction in the field of international criminal law, for it would have allowed the Security Council to bar the commencement of a prosecution by the ICC in respect of a situation being dealt with under Chapter VII as a threat to or breach of the peace or act of aggression until the Council allowed it to proceed.
>
> In the absence of temporal limitations, this would have implied in practice the potential power of a permanent member of the Security Council to obstruct the Court for an indefinite time, as the open-ended nature of the sanctions adopted against Iraq well illustrate, and in respect of any of the crimes within the Court's jurisdiction, since these have been or could be linked to Council determinations under Article 39. Article 23 (3) would have effectively served to shrink the Court's jurisdiction, for not only would the Court have had to await prior approval from the Security Council, but certain situations implicating the permanent members could have been excluded from the scope of the Court's jurisdiction. In other words, granting the Security Council the power to bar Court proceedings would have effectively extended the veto to the Court thus seriously calling into question the principle of equality of individuals before the law – a fundamental principle of criminal justice – by serving to shield certain individuals from the administration of justice by the Court.

Article 23 (3) was replaced by the Singapore compromise, which is now reflected in Article 16. Under the compromise, the Security Council cannot block an investigation or prosecution, unless a majority of nine states, including all five permanent members, approve a proper request to the International Criminal Court to defer it temporarily. However, at no time in the discussions either in the Preparatory Committee or at the Rome Diplomatic Conference did the drafters envisage that the Security Council could use Article 16 to provide immunity from arrest or surrender to the International Criminal Court of entire classes of persons, such as the nationals of non-state parties participating in UN peace-keeping operations.[148] Although the US did seek to exempt nationals of non-states parties from the International Criminal Court's jurisdiction, it did not seek to do so through draft Article 23 (3).[149]

States that opposed including what became Article 16 argued that even the Singapore compromise could be misused by the Security Council to protect nationals of permanent members or of their allies by giving them impunity from international justice. However, they were repeatedly assured by supporters of this provision that it was intended solely to enable the Security Council to undertake delicate peace negotiations for a period of time in certain exceptional circumstances when it thought that the prospect of investigations or prosecutions by the International Criminal Court would impede those negotiations.[150] Indeed, the intent of the

> How, as some representatives had put it, could a government have been persuaded to become a party to a treaty that would apply to all states except the permanent members of the Security Council?"

Vera Gowland-Debbas, *in* Laurence Boisson de Chazournes & Vera Gowland-Debbas, eds, *The International Legal System in Quest of Equity and Universality:* Liber Amicorum *Georges Abi-Saab* 637 (The Hague/London/Boston: Martinus Nijhoff Publishers 2001).

[148] For the discussion in the first year of the Preparatory Committee, see the 1996 Preparatory Committee Report, *supra,* n. 146, paras 140 - 144. A recent article by the head of the US delegation at the Rome Diplomatic Conference confirms that the purpose of Article 16 was to enable the Security Council to restore or maintain international peace and security; nothing in that law journal article, which outlines the safeguards against frivolous or politically motivated investigations or prosecutions of US nationals, suggests that Article 16 was intended to be used to exempt US nationals from the International Criminal Court's jurisdiction:

> "The Security Council can prevent the ICC from investigating and prosecuting crimes for one year, and can renew any such resolution under the same conditions. This power can be a substantial protection for U.S. interests but only if the United States has the credibility, as a constructive signatory of the ICC Treaty, to persuade other Council members, both permanent and non-permanent, that such suspension of ICC action is not intended as an assault on the ICC or as a challenge to its legitimacy but rather as a necessary action to restore or maintain international peace and security."

David J. Scheffer, *Staying the Course with the International Criminal Court,* 35 Cornell Int'l L.J. 47, 91 (2002) (footnote omitted).

[149] For example, on the last day of the Rome Conference, the USA sought to exclude from the International Criminal Court's jurisdiction acts by nationals of a non-states party committed on the territory of a state party unless the non-state party had accepted the Court's jurisdiction. U.N. Doc. A/CONF.183/C.1/L.90, 17 July 1998.

[150] Thus, the assertion in a recent note published a few days after the adoption of Resolution 1422 that nothing in the preparatory work has been cited to exclude the approach taken in that resolution is not correct. *See* MacPherson, *supra,* n. 124.

drafters that Article 16 not be a tool for impunity is further confirmed by their decision to limit its scope to investigations and prosecutions by the International Criminal Court and not to include investigations and prosecutions by national courts of states parties exercising territorial or universal jurisdiction.

Authoritative statements by two senior members of the UK delegation at the Rome Diplomatic Conference, both of whom played a major role in drafting Article 16, confirm that the intent of the drafters was that Article 16 be invoked only to permit peace negotiations to proceed under the auspices of the Security Council in rare cases, after individualized determinations and then only for a short while. The head of that delegation explained that the intent of the drafters of Article 16 was that it would be "a minor and a necessary departure given the very special circumstances" when the Security Council was acting pursuant to Chapter VII.[151] He declared that

> "[t]he onus lies with the Security Council to decide from case to case (with full application of the veto) whether its action would or would not be jeopardized by proceedings before the Court; and the suspensive effect of any such decision is limited in its duration. These two facts taken together offer the necessary guarantee that the process will be managed with restraint."[152]

The deputy head of the UK delegation stated that despite concerns about the provision in Article 16 permitting the Security Council to request a deferral,

> "at the end of the day there was a recognition that not to include such a provision in the Statute might lead in the rare case to the Court and the Council, two entities working for the maintenance of peace and security, aiming their efforts in different directions; and that would be deleterious to the common goal. An example given was the case where the dictator of a country was under investigation by the Court at the same time that his presence was necessary in peace negotiations under Council auspices. In such a case should the prospect of peace be put at risk by Court investigations?
>
> 'No peace without justice': yes. But in such as case as this, justice might need to be deferred for a while in order to ensure the adoption of a peace settlement. This will be a very rare case, and I cannot envisage that the Council will often ask for a deferral under Article 16."[153]

151 Sir Franklin Berman, *The Relationship between the International Criminal Court and the Security Council,* Herman A.M. von Hebel, Johan G. Lammers & Jolien Schukking, eds, *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* 173, 177 (The Hague: T.M.C. Asser Press 1999).

152 *Ibid.*, 177-178.

153 Elizabeth Wilmshurst, *The International Criminal Court: The Role of the Security Council, in* G. Nesi & Mauro Politi, eds, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 40 (Aldershot: Ashgate Publishing Ltd 2001) (emphasis in original). The author wrote this essay when she was the Deputy Legal Adviser of the Foreign and Commonwealth Office.

Statements by governments cited above on 3 and 10 July 2002 in Section II.D and E confirm that Article 16 was included in the Rome Statute to address the supposed *temporary* conflict that might occur between investigations or prosecutions by the International Criminal Court and peace efforts that were being undertaken by the Security Council. For example, Canada recalled on 3 July 2002 that "Article 16 was intended to be available to the Security Council on a case-by-case basis, where a particular situation required a twelve-month deferral in the interests of peace and security". The New Zealand delegate, who was one of those involved in drafting Article 16, stated on 10 July 2002 that Article 16

> "was intended to be used on a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other".

Switzerland explained on 3 July 2002 that Article 16 "concerns an authorization to suspend criminal proceedings to give chances for peace".

As a leading commentary on this provision written by two persons present at the Rome Diplomatic Conference indicates:

> "In practice, Article 16 allows the Council to request the Court not to investigate or prosecute when the requisite majority of its members conclude that judicial action - or the threat of it - might harm the Council's efforts to maintain international peace and security pursuant to the Charter. Article 16 will be the vehicle for resolving conflicts between the requirements of peace and justice where the Council assesses that the peace efforts need to be given priority over international justice."[154]

In the light of the above, it is clear that the request in Resolution 1422 for a blanket prohibition of investigations and prosecutions of an entire class of persons, without any individualized determinations that a temporary deferral was necessary to restore or maintain international peace and security, is not a request within the meaning of Article 16 and it cannot be given any legal effect under the Rome Statute by the International Criminal Court.

No intention to give effect to requests for endless renewals. As governments made clear in their statements on 3 and 10 July 2002 cited in Section II.D and E, the drafters of Article 16 did not intend to permit a request to be perpetually renewed. For example, Brazil declared on 10 July 2002 that the provisions of Article 16 "were never intended to give place to *ad*

[154] Bergsmo & Pejić, *supra,* n. 146, 378. *See also* Lionel Yee, *The International Criminal Court and the Security Council: Articles 13 (b) and 16, in* Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute - Issues - Negotiations - Results* 149-150 (The Hague/London/Boston: Kluwer Law International 1999) ("Supporters of the text [draft Article 23 (3)] pointed to the need to prevent the risk of interference by the Court in the Council's discharge of its primary responsibility for the maintenance of international peace and security.").

aeternam deferrals of the Court's jurisdiction". Switzerland emphasized on 3 July 2002 that "Article 16 envisages the renewal of a deferral, but not a mechanism of successive unlimited deferrals".

Even a one-year deferral could seriously undermine the ability to conduct an effective investigation or prosecution; a two-year delay occasioned by a renewal would be even more serious; and giving effect to perpetual renewals of a request would be a major setback for international justice. Any interpretation permitting renewals in perpetuity would lead to the absurd, as well as unreasonable, result that a request could prevent any investigation or prosecution in the International Criminal Court for the worst possible crimes in the world, when states were unable or unwilling to investigate or prosecute, forever, or until the Court's ability to investigate or prosecute would have been severely undermined because witnesses had died, been intimidated or killed and evidence had deteriorated, been concealed or been destroyed.

Such endless renewals would deny victims their right to reparations, deny an accused the right to a prompt trial and, if the accused were in custody, lead to indefinite detention without trial. Given that the International Criminal Court is a court of last resort, perpetual renewals would, as a practical matter, amount to amnesties prior to trial and judgment for genocide, crimes against humanity and war crimes - amnesties which are prohibited under international law.[155] In short, perpetual deferrals – or even a few successive deferrals - would be contrary to the Purposes of the UN, which include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[156] The ordinary meaning of the terms of the article are that the original request, but not subsequent renewals, may be renewed. It expressly states: "that request may be renewed by the Council under the same conditions", it does not say that the renewal may be renewed.[157] Even if the

[155] Thus, the contention by one commentator, MacPherson, *supra,* n. 124, that it was within the discretion of the Security Council to use Article 16 to grant a perpetual deferral as a *de facto* amnesty for such crimes, which violate *jus cogens* prohibitions, is not correct. For analyses of the prohibition in international law of such amnesties, see Amnesty International, *Universal jurisdiction: The duty to enact and implement legislation - Chapter Fourteen, VII*, AI Index: IOR 53/017/2001, September 2001 (*obtainable from:* http://www.amnesty.org or as a CD-ROM from Amnesty International's International Justice Project); *Amicus Curiae brief on the incompatibility with international law of the full stop and due obedience laws, presented by the International Commission of Jurists, Amnesty International and Human Rights Watch before the National Chamber for Federal Criminal and Correctional Matters of the Republic of Argentina* (June 2001) (*obtainable from:* http://www.icj.org).

[156] UN Charter, Art. 1 (3).

[157] This interpretation is consistent with the analysis of the author of the Singapore compromise that led to the adoption of Article 16, who explains that the Statute does not authorize indefinite renewals of the request for a deferral. He noted that "[i]nvestigations or prosecutions can only be stopped or prevented if the Council adopts a resolution under Chapter VII of the Charter of the United Nations making a request to that effect. The suspension or prevention of such proceedings will also be limited to a renewable 12-month period." Yee, *supra,* n. 154, 152 (footnote omitted). He then makes clear that the Statute does not provide for indefinite renewals of the request and that the Security Council would have to claim to act under the Charter, although, as explained below, his conclusion that the Council could in fact compel states parties from cooperating with the Court in conflict with their rights and obligations under the Statute in order to defer investigations or prosecutions beyond the 12-month renewal is incorrect. He states: "The reference to

International Criminal Court were to conclude that more than one renewal were possible, it would certainly determine, for the reasons given above, that Article 16 was not intended to permit endless renewals for the purpose of preventing an entire class of persons from ever being brought to justice before the Court.

V. THE RELEVANT LEGAL CONSTRAINTS ON ACTION BY THE SECURITY COUNCIL

As noted in Section III, the International Criminal Court does not have to determine that the Security Council exceeded its powers in order to determine that the request in Resolution 1422 fails to satisfy the requirements of Article 16 and other provisions of the Rome Statute. However, as explained below in this section, which develops and expands the legal arguments made by governments on 3 and 10 July 2002, a further reason that the International Criminal Court should determine that the request in that resolution should be rejected is that the resolution exceeded the powers of the Security Council under the UN Charter and under other relevant international law. Of course, as noted above, the Court could also choose to make this determination based solely on Article 16 itself, since that article requires that the request by the Security Council must have been made "in a resolution adopted under Chapter VII of the Charter of the United Nations" and, as shown below in this section, the Council failed to comply with the legal requirements of the Charter before attempting to invoke Chapter VII. In addition, the measure taken, purportedly "under Chapter VII" – giving impunity to an entire class of persons from international justice for the worst possible crimes, with the apparent intent that the impunity be perpetual - is not one the Security Council can take under the UN Charter or other international law.

The doctrine of *ultra vires* applies to the Security Council (Section V.A.1). This means that the Security Council cannot act in excess of its powers and that it must exercise those powers consistently with the Purposes and Principles of the UN (Section V.A.2). As is clear from the Preamble of the UN Charter, which states that "the peoples of the United Nations determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained", the Security Council must also act consistently with conventional and customary international law, except to the extent that the UN Charter permits the Council to do otherwise (Section V.A.3). These principles apply with equal force when the Security Council is acting pursuant to Chapter VII (Section V.B). One of the requirements for a request by the Security Council to constitute a request under Article 16 is that the Security Council must have made the request "in a resolution adopted under Chapter VII of the Charter of the United Nations". However, in order to invoke Chapter VII, the Security Council must always make a determination, as required under Article 39 of the UN Charter, that there is a threat to or breach of international peace and security or an act of aggression (Section V.B.1). No such determination was made when the Security Council adopted Resolution 1422 and no such threat or breach existed.

the 12-month time limit might raise the possiblity of a conflict if, for instance, a Council resolution requests an indefinite duration or a duration in excess of 12 months." *Ibid.,* 152 n. 31.

Once the Security Council properly invokes Chapter VII, the measures it takes must be consistent with the Purposes and Principles of the UN and with other international law (Section V.B.2). In particular, this means that the Security Council must not violate *jus cogens* prohibitions (Section V.B.3) and it must act consistently with human rights and international humanitarian law (Section V.B.4). Moreover, as governments emphasized on 3 and 10 July 2003, the Security Council has no power to *amend* treaties that are consistent with obligations under the UN Charter, although it may *temporarily suspend* the operation of certain treaty provisions, such as bilateral commercial trade agreements, when they would conflict with measures taken under Chapter VII after the required determination under Article 39 that there was a threat to or breach of international peace and security (Section V.B.5).

The purported request in Resolution 1422, which seeks to give certain nationals of non-state parties to the Rome Statute who are accused of genocide, crimes against humanity and war crimes, impunity in all cases by preventing their surrender to the International Criminal Court when it has determined that states are unable or unwilling to investigate these crimes, is contrary to the Purposes of the UN. In particular, the resolution facilitates the violation of *jus* cogens prohibitions and is contrary to international human rights and humanitarian law. The request also attempts to amend a treaty that is fully consistent with obligations under the UN Charter. Moreover, the Security Council's powers do not extend to ordering intergovernmental organizations to take particular actions.

As explained below, Resolution 1422 exceeded the Security Council's powers and it cannot bind the International Criminal Court or member states.

A. The Security Council as subject to law

1. The applicability of the doctrine of ultra vires to the Security Council

It goes without saying that each political organ of the UN, an international organization established pursuant to international law, may only exercise powers it has under its constitutive instrument, the UN Charter. This principle has been emphasized by international courts.[158] The Appeals Chamber of the ICTY in the *Tadić* case declared:

> "The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. These powers cannot, in any case, go beyond the limits of

[158] As one eminent judge stated more than three decades ago: "This is a principle of international law that is as well-established as any there can be, - and the Security Council is as much subject to it (for the United Nations is itself a subject of international law) as any of its individual member States are." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276,* Advisory Opinion, 1971 ICJ Rep. (Fitzmaurice, J., dissenting), 294, para. 115.

> the jurisdiction of the organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law)."[159]

Long before this decision, the International Court of Justice had declared in a 1948 advisory opinion:

> "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers and criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of the constitution."[160]

This principle is also well recognized by scholars.[161] Although the Security Council has certain general powers under the UN Charter other than the specific powers in Chapters VI, VII, VIII and XII, these powers are not unlimited.[162] Like any other body established under law, it cannot act in excess of its powers (*ultra vires*), whether by usurping the powers of other organs

159 *Prosecutor v. Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 (*Tadić* 1995 Appeals Chamber decision), para. 28.

160 *Conditions of Admission of a State to Membership in the United Nations,* Advisory Opinion, ICJ Rep. 64 (1948).

161 Rudolf Bernhardt, *Article 103, in* 2 Simma 2nd ed., *supra*, n. 124, 1299 ("Even if the SC has wide discretionary powers under this Chapter, these powers are not unlimited. The Charter is a legally binding document and no organ is endowed with complete freedom to act or not to act. The present author holds the opinion that in case of manifest *ultra vires* decisions of any organ, such decisions are not binding and cannot prevail in case of conflict with obligations under other agreements."); Yoram Dinstein, *War, Aggression and Self*-Defence 281-282 (Cambridge: Cambridge University Press 3rd ed. 2001) ("But it must not be forgotten that the Council's powers and competence flow from the Charter. Consequently, if any resolution adopted by the Council is *ultra vires* the Charter itself (owing to exceptional circumstances rebutting the presumption [of validity]), the [International Court of Justice] may have no choice but to declare it invalid."); Jochen Abr. Frowein & Nico Krisch, *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, in* 1 Simma (2nd ed.), *supra,* n. 124, 710 ("The SC, as any other organ of an international organization, enjoys powers only insofar as they are conferred on it by or implied in the constituent instrument of the Organization."); Susan Lamb, *Legal Limits to UN Security Council Powers, in* Guy Goodwin-Gill & Stefan Talmon, eds, *The Reality of International Law: Essays in Honour of Ian Brownlie* 361, 365 (Oxford: Clarendon Press 1999) (footnotes omitted) ("[I]t is clear that questions of *ultra vires* are relevant to the UN system as there is little question that in principle, its organs may commit acts which are beyond the scope of the powers conferred by the UN Charter. . . . Even though the Council may enjoy a high degree of political discretion, especially when determining the existence of a threat to international peace and security under Chapter VII of the UN Charter, its powers are not unlimited. It remains at all times a body constituted by the UN Charter, and must operate within the circumscribing boundary of Charter norms."); David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice* 165 (The Hague: Kluwer Law International 2001) ("It is a truism to state as an organ deriving its powers from a constituent treaty, the Council must abide by that same treaty.").

162 *See also* Thomas Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?,* 86 Am. J. Int'l L. 519, 523 (1992) (noting that "the legality of actions by any UN organ must be judged by reference to the Charter as a 'constitution' of delegated powers").

in the UN or by attempting to exercise powers it does not possess under its constitutive instrument or in violation of that instrument.[163]

Article 25 of the UN Charter and the requirement that members carry out decisions of the Security Council only that are in accordance with the Charter. Further evidence that the discharge of the Security Council's duties and the exercise of its specific and general powers must be in accordance with the UN Charter is that members of the UN are required to comply with decisions of the Security Council only when they are in accordance with the UN Charter. Article 25 of the UN Charter expressly states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

The phrase "in accordance with the present Charter", as its placement indicates, modifies the phrase "the decisions of the Security Council", not the verb "agree". This interpretation is confirmed by the International Court of Justice.[164] Scholars are in accord. 165

[163] Delbrück, *Article 24, in* 1 Simma (2nd ed.), *supra,* n. 124., 448 ("[G]iven the fact that the range of powers of the SC is open in principle, the discretion of the SC in taking action is not completely unlimited. In discharging its functions, the SC also has to stay within the liberally drawn limits set by the delimitation of the functions and purposes provided for in the UN Charter. As the Charter states, the SC 'in discharging these duties shall act in accordance with the Purposes and Principles of the United Nations', i.e., it may not act arbitrarily.").

[164] In the *Namibia* case, the Court held that the obligation in Article 25 applies to decisions of the Security Council that have been adopted in conformity with the Charter: "[w]hen the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member states to comply with that decision." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970, Advisory Opinion,* 1971 I.C.J. Rep. 16, 54.

165 As Derek Bowett noted,

> "when [the Security Council] does act *intra vires,* the members of the Organisation are bound by its actions and, under Article 25, they agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

The Law of International Institutions 33 (London 4th ed. 1982). One of the leading commentaries on the UN Charter notes that the text of what became Article 25 was changed by the drafters "to make it clear that members were obligated to carry out only those decisions of the Council that were legally mandatory". Leland M. Goodrich *et al.*, *Charter of the United Nations* 208 (3rd ed. 1969). Susan Lamb, citing Kelsen (see below in Section V.B.2) and Bowett (cited above), concluded,

> "it seems clear that Article 25 does not mean that Members are obliged to carry out all decisions of the Security Council, and the Article appears to reinforce the obligation upon the Security Council to adhere to the legal limits set by the Charter. Hence, there is room for the view that only resolutions that are *intra vires* the UN Charter acquire binding force in terms of Article 25."

Lamb, *supra,* n. 160, 366-367 (footnote omitted). Malcolm Shaw has stated that Article 25 means that "the Charter provisions must be observed, including by necessary implication the provisions in Articles 24 (2) and 1 (1)". ."); Malcolm N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function, in* A.S. Muller, D Raič & J.M. Thuránsky, eds, *The International Court of Justice: Its Future Role after Fifty Years* 219, 228 (1997). *See also* Hervé Casson, *Article 24, in Jean-Pierre Cot & Alain Pellet, La Charte des Nations Unies: Commentaire article par article* 461 *(Paris: Economica 2d ed. 1991)*; Delbrück, *Article 25, in* 1 Simma (2nd ed.), *supra,* n. 124, 459-460; J.J. Paust, *Peace-making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions,* 19 So. Ill.

Thus, states are not required to carry out decisions of the Security Council that are not in accordance with the UN Charter. One frequently cited example is that the Security Council cannot violate the procedural requirements of the UN Charter.[166] However, this principle applies with equal force to decisions that are not in accordance with its Purposes and Principles or with other substantive rules.[167] As explained below, for a number of reasons, Resolution 1422 is not "in accordance with the present Charter".

Intent of the drafters that the Security Council not have unlimited powers. The discussions that took place during the drafting of Article 25 of the UN Charter demonstrate that the drafters intended that the Security Council have limited powers. Indeed, three of the future permanent members of the Security Council made this point clear in response to two proposals made at the San Francisco conference in 1945, one by Belgium that would have limited the

U. L. J. 131, 141, n. 33.

The minority view is that the words "in accordance with the present Charter" apply to the obligations of member states to accept and carry out Security Council decisions, rather than to the decisions, which must be accepted and carried out only if they are in accordance with the Charter. Erik Suy, *Article 25, in* Cot & Pellet, *supra*, 477. However, this view is contrary to the interpretation of the International Court of Justice, the views of most scholars that have examined the question, the drafting history of the article and to normal principles of treaty interpretation, since the words would otherwise be superfluous. If this interpretation were to be accepted, it would mean that all member states would have to carry out *any* decision of the Security Council, even a decision that was contrary to the UN Charter or required them to violate *jus cogens* prohibitions, such as the prohibitions of genocide and grave breaches of the Geneva Conventions of 1949, or to give impunity to those who commit such crimes.

166 Dinstein, *supra,* n. 161, 282 (noting that, "should a professed decision of the Council run foul of the procedural requirements laid down in the Charter, the result may be held by the [International Court of Justice] to be null and void.").

[167] The contention that, "[i]f one has to understand Art. 25 as saying that only those decisions by the SC which are in accordance with the Charter are binding, this will have to be taken in a formal sense, i.e., that decisions are binding if arrived at according to the procedure provided for in the Charter", Delbrück, *Article 25, in* Simma, *supra,* n. 124, 414, is certainly too restrictive an interpretation. In any event, it would, of course, prohibit Resolution 1422, which was adopted without the determination required in Article 39 before the Security Council can take enforcement measures under Chapter VII.

Delbrück's view is largely based on the author's fear that if member states were free to examine the substance of Security Council decisions, it would weaken the UN peace-keeping system since states would have to make value judgements rather than objective assessments. *Ibid.* However, decisions requiring states to violate human rights and international humanitarian law, are certainly capable of objective assessment by states and judicial determinations by courts. For example, the legality of the decision in Resolution 1422 to require states parties not to comply with their obligations under the Rome Statute is capable of objective assessment, as evidenced by the overwhelming response by states on 3 and 10 July 2002 and since.

In any event, the decision to request arrest and surrender nationals of non-states parties serving in UN established or authorized operations will have been made by a judicial body in accordance with strict legal criteria - the International Criminal Court - not by the state acting on its own view of the legality of the Security Council's decision. Such an event, one would hope, would rarely arise. However, it would certainly not lead to a breakdown in the UN peace-keeping system any more than decisions by national courts that the use of force by the executive authorities had violated national law or decisions by other international courts or treaty bodies that national executive actions have violated international law. Indeed, it would strengthen the legitimacy of the international legal system by reaffirming that no one, not even members of a UN established or authorized operation, is above the law.

obligations of states to carry out decisions of the Security Council and one by Norway that would have expanded the Security Council's powers.

Belgium proposed to amend paragraph 4 of Chapter VI, Section B of the Dumbarton Oaks Proposals, which was the original version of what is now Article 25 of the UN Charter. The amendment would have limited the obligations of states to carry out decisions of the Security Council to those taken under Chapter VIII of the Dumbarton Oaks Proposals (now Chapter VII of the UN Charter). According to the summary record, the Belgian delegate explained that if member states were obliged to carry out all decisions of the Security Council, including those taken pursuant to other chapters, they "would be giving the Security Council a blank cheque".[168] Although the UK delegate objected to limiting the obligations of member states in the manner proposed by Belgium, according to the summary report, "[h]e suggested that the phrase, 'in accordance with the provisions of the Charter,' sufficiently met the point raised by the Belgian delegate".[169] Similarly, although the USSR delegate also objected to limiting the obligations of member states in the way Belgium had suggested, according to the summary report, he declared that "Paragraph 4 did not give unlimited powers to the Security Council."

Norway proposed to give the Security Council the power to enforce any final decision of the Permanent Court of International Justice (replaced by the International Court of Justice) in an interstate dispute or by any other tribunal whose jurisdiction in the matter had been recognized by the states parties to the dispute, even if the dispute did not involve international peace and security. The US delegate objected, indicating that the Security Council's powers should be limited to dealing with threats to international peace and security. According to the summary record, he

> "pointed out that the Norwegian amendment in effect proposed an enlargement of the Council's powers which had already been criticized as being too wide. The whole theory underlying the Dumbarton Oaks Proposals had been that the Security Council should have those powers necessary for meeting threats to the peace or suppressing them. It seemed unwise, therefore, to give additional powers to the Council and the United States could not support the Norwegian amendment."[170]

2. The requirement that the Security Council must exercise its powers consistently with the Principles and Purposes of the UN

Each organ of the UN, including the Security Council, must exercise its powers in a manner consistent with the UN Charter, including the Purposes and Principles of the UN and the intent of the founders, as evidenced in Article 24 (2), the Preamble, the *travaux préparatoires,*

168 Summary Report of Fourteenth Meeting of Committee III/1,Documents from the United Nations Conference on International Organization, San Francisco, 1945, U.N.C.I.O. Doc. 597, III/1/30, 26 May 1945, 2.
169 *Ibid.*
170 *Ibid.,* 4.

jurisprudence and scholarly commentary. The scope of the relevant Purposes of the UN is discussed below in Section V.B.2.

A basic limit on the powers of any organ of an intergovernmental organization is that it must act consistently with the purpose of the organization.[171] This principle is expressly incorporated in Article 24 (2) of the UN Charter, which states that the Security Council, when discharging its duties to maintain international peace and security, shall act in accordance with the Purposes and Principles of the UN Charter:

> "In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

The drafters concluded that Article 24 (2) and other provisions in Chapter V (The Security Council) were sufficient to ensure that the Security Council was obliged to act in accordance with the Purposes and Principles of the UN and with the UN Charter.[172] The legally binding purposes of the UN are to be found not only in Article 1 of the UN Charter, but also in the Preamble, and the Preamble must be taken into account in interpreting the scope of the Purposes of the UN as set forth in Article 1.[173]

Judges of the International Court of Justice have also emphasized that Article 24 (2) requires the Security Council to act in accordance with the Purposes and Principles of the UN. For example, Ad Hoc Judge Lauterpacht stated in his separate opinion in the *Bosnia and Herzegovina* case:

> "Nor should one overlook the significance of the provision in Article 24 (2) of the Charter that, in discharging its duties to maintain international peace and security, the

171 Schweigman, *supra,* n. 161, 167 ("A general limitation on the powers of an organ of an international organization is that it must act in accordance with the object and purpose of that organization.") (citing Hans Kelsen, *The Law of the United Nations* 230 ff. (1964)).

172 As the Rapporteur on Chapter VIII.B (the predecessor of Chapter VII) at the San Francisco Conference explained:

> "A number of amendments . . . were directed at limiting the great freedom which in the Dumbarton Oaks Proposals, is left to the Council in determining what action, if any to take.
>
> Some of these amendments were designed to make more precise the Council's obligations to act in accordance with the purposes and principles of the Organization and the provisions of the Charter. The Committee considered that, since such specifications were already stated in Chapter VI [now Chapter V] defining the powers of the Council, it was unnecessary to make special mention of them in the present Chapter."

Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII, Section B, Doc. 881 III/3/46, 12 U.N.C.I.O. Docs 504 –505, 10 June 1945, 3-4.

173 Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* 316 (1998).

> Security Council shall act in accordance with the Purposes and Principles of the United Nations."[174]

Similarly, Judge Weeramantry explained in his separate and dissenting opinion in the *Lockerbie* case that Article 24 (2) defines the boundary of the powers of the Security Council:

> "Article 24 itself offers us an immediate signpost to such a circumscribing boundary when it provides in Article 24 (2) that the Security Council in discharging its duties under Article 24 (1), "shall act in accordance with the Purposes and Principles of the United Nations". The duty is imperative and the limits are categorically stated."[175]

Scholars have repeatedly emphasized that the Purposes of the UN in Article 1 of the UN Charter are legally binding on the Security Council. For example, Delbrück states that the first sentence in Article 24 (2)

> "makes it clear that in discharging its duties, the SC shall act in 'accordance with the Purposes and Principles of the United Nations'. This is an indication that although the 'political approach' is intended to take priority in the actions of the Organization, at least the limits of the law of the Charter have to be observed".[176]

> Similarly, Bowett observed:

> "The Functions and Powers of the Security Council are stated in Articles 24-26 of the Charter. The Council . . . is . . . bound by the Purposes and Principles of the Organisation, so that it cannot, in principle, act arbitrarily and unfettered by any restraints."[177]

> Other commentary is in accord.[178]

174 *Bosnia and Herzegovina* case (separate opinion, Lauterpacht, J.), para. 101

175 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Provisional Measures) (Libya v. U.K.), Order of 14 April 1992, 1992 I.C.J. Rep. 3, 61 (separate and dissenting opinion, Weeramantry, J.).

176 Delbrück, *Article 24, in* 1 Simma (2nd ed.), *supra*, n. 124, 445; *see also ibid*., 448 ("[G]iven the fact that the range of powers of the SC is open in principle, the discretion of the SC in taking action is not completely unlimited. In discharging its functions, the SC also has to stay within the liberally drawn limits set by the delimitation of the functions and purposes provided for in the UN Charter.").

177 Bowett, *supra*, n. 165, 33.

178 Vera Gowland-Debbas, *Security Council Enforcement Action and Issues of State Responsibility,* 43 Int'l & Comp. L. Q. 55, 91 (1994); Schweigman, *supra,* n. 161 (the Purposes and Principles of the UN "contain rules binding on the Council"); Malcolm N. Shaw, *International Law* 877 (Cambridge: Cambridge University Press 4th ed. 1997) ("In particular, the Council must under article 24 (2) act in accordance with the Purposes and Principles of the Charter . . . ."); Eric Suy, *International Organization*, 43 Neth. Int'l L. Rev. 237, 244 (1996) ("The Council is bound by the Purposes and Principles of the Organization and discharges its duties on the basis of the specific powers granted by the Charter.").

3. The obligation to act consistently with conventional and customary international law, except to the extent that the UN Charter otherwise permits

The Security Council, like the other organs of the UN, is obliged to act consistently with conventional and customary international law, except to the extent that the UN Charter otherwise permits. The Preamble of the UN Charter declares that

> "the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . .".[179]

The UN and its organs, including the Security Council are subjects of international law . Therefore, the Security Council may derogate from international law only to the extent that the UN Charter permits it to do so. As Malcolm Shaw has explained, "there is little doubt that in the process of making a decision, the Council must follow the dictates of the Charter and the principles of international law to the extent that these have not been modified by the former".[180]

For the reasons discussed in this memorandum, Resolution 1422 undermines, rather than establishes, "conditions under which justice and respect for obligations arising from treaties and other sources of international law can be maintained".

B. Applicability of legal limits to action under Chapter VII

The legal limits outlined above in Section V.A on the Security Council generally apply with equal force when the Security Council is acting pursuant to Chapter VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) of the UN Charter. The Security Council's powers to maintain or restore international peace and security are limited to the specific and general powers it has under the UN Charter. Thus, it cannot act under Chapter VII unless it complies with the procedural requirements of the UN Charter by making the determination required under Article 39 (Section V.B.1). Moreover, once it properly has made a determination under Article 39, it must exercise its powers under Chapter VII consistently with the Purposes and Principles of the UN Charter and with other international law, except to the extent permitted under the Charter (Section V.B.2). In particular, it must not undermine jus

179 The Purpose of the UN found in Article 1 (1) "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace", applies to actions taken under Chapter VI, not under Chapter VII. *See* Rüdiger Wolfrum, *Purposes and Principles,* in 1 Simma (2nd ed.), *supra,* n. 124, at 42. However, it has been suggested that "[t]he legislative history of Art. 1 (1) makes it doubtful whether the [Security Council] may take permanent measures, for example, concerning the territorial situation of a State, that are not in conformity with international law." *Ibid.*, 43.

180 Shaw, *Security Council, supra,* n. 165, 228.

cogens prohibitions and must respect human rights and international humanitarian law (Section V.B.3 to 4).

As the drafting history of Resolution 1422 makes clear, the Security Council failed to make a determination under Article 39 that there was a threat to or breach of international peace and security, and, in the circumstances, it could not have done so. Moreover, that resolution, by seeking to prevent the International Criminal Court from exercising its jurisdiction over an entire class of persons – nationals of non-states parties to the Rome Statute involved in UN established or authorized operations- is not consistent with these requirements.

1. The necessity for a determination under Article 39 in order to invoke Chapter VII

Article 39 of the UN Charter, the first article of Chapter VII (Articles 39 to 51), expressly provides:

> "The 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."

Thus, action under Chapter VII must be based on a determination of the existence of a threat to or breach of peace or an act of aggression. Even if there may not be a requirement under the UN Charter that Article 39 be expressly mentioned, it is still necessary for the Security Council to make such a determination before it can invoke Chapter VII. Indeed, its own practice prior to Resolution 1422 demonstrates that the Security Council has never invoked Chapter VII unless it has made such a determination, even if the validity of some of those determinations have not been entirely free from controversy.[181]

Necessity for an Article 39 determination. A recent study by a distinguished Italian international lawyer of every single Security Council resolution adopted under Chapter VII since

181 A number of international legal experts have questioned the legal validity of several recent determinations under Article 39. *See, for example,* Benedetto Conforti, *The Law and Practice of the United* Nations 179 (The Hague/London/Boston: Kluwer Law International 1997) (expressing "serious doubts" about the finding that the failure to extradite was a threat to peace); Bernard Graefrath, *Leave to the Court What Belongs to the Court: The Libyan Case,* 4 Eur. J. Int'l L. 184, 196 (1993) (stating that, with regard to the Security Council's determination in response to the Lockerbie incident, "it remains absolutely unclear why or how the failure to renunciate [sic] terrorism by concrete actions . . . or the failure to surrender suspects, or the refusal of compensation claims which are not established under any legal procedure, could constitute a threat to the peace".); Lamb, *supra,* n. 161, 379 ("It is therefore controversial in the extreme to view Libya's subsequent failure to respond fully to the United States' requests to surrender suspects to the United States or to the UK, and to pay compensation, as a threat to international peace within the meaning of Article 39, especially where it had not been established that Libya had violated international law."); M. Weller, *Premature End to the 'New World Order'?,* 4 Afr. J. Int'l & Comp. L. 303 (1992) (expressing doubt about the labeling by the Security Council of the Lockerbie incident as a threat to international peace and security "retroactively to deal with a case which, when it occurred some three years earlier was not considered a threat to international peace and security").

1946 has demonstrated that in each case the Council made a determination that there was a threat to or breach of international peace and security. She concluded that "[t]he absence of such a finding is unprecedented in the 57 years of practice of the Security Council itself!" [182]

Leading commentators on the UN Charter agree that a determination under Article 39 is essential before the Security Council can act under Chapter VII. For example, Frowein and Krisch state that "the first portion of the sentence constituting Art. 39 refers to a threat to or breach of 'the peace' as a prerequisite for action by the SC" and adds that

> "[a]s the wording of Art. 39 shows, the SC must 'determine' whether a threat to the peace, a breach of the peace, or an act of aggression exists. Through the construction of the sentence, the determination is clearly singled out as a condition for the use of the particular competences provided in Chapter VII. . . . While Art. 39 does not define the conditions for action in great clarity, it insists that the SC reach agreement on them before using its coercive tools. To some degree, this requirement forces the SC to adopt a consistent practice with regard to the threshold for its action under Chapter VII, since it cannot decide simply on the basis of political expediency but must enter into a principled discussion on the minimum conditions for enforcement action, applicable also in similar cases."[183]

Similarly, other commentators have reached the same conclusion.[184]

182 Flavia Lattanzi, *La Corte penale internazionale: una sfida per le giurisdizioni degli Stati,* 2002-III *Diritto Pubblico Comparato ed Europeo* 1365, 1372-1374 (unofficial translation).

[183] Frowein & Krisch, *Action with Respect to Threats, in* 1 Simma (2nd ed.), n. 124, 727.

[184] Gowlland-Debbas, *Security Council Enforcement Action, supra,* n. 178, 61 (« [B]efore applying mandatory measures of Articles 41 and 42 of the Charter, the Council has to make a preliminary finding under Article 39 »); _____, *The Role of the Security Council in the New International Criminal Court from a Systemic Perspective, in* Boisson de Chazournes & Gowlland-Debbas, *The International Legal System, supra*, 637 ("Since the resolution to defer action by the ICC is one adopted under Chapter VII, a prior determination under Article 39, the prerequisite for any action, must presumably have to be made."); T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter,*26 Neth. Y.B. Int'l L. 33, 39 (1995) (« Although the Council rarely invokes specific articles of the Charter, including Article 39, in its decisions or recommendations, it has always based enforcement measures on the terms of that provision. Without a determination that a given situation poses either a threat to the peace or constitutes a breach of the peace or act of aggression, the Council cannot take enforcement measures under Chapter VII. »);Gérard Cohen Jonathan, *Article 39, in* Cot & Pellet, *La Charte des Nations Unie, supra*, 651 (*"Avant d'en venir contre un Etat en rupture de paix aux mesures conservatoires ou de contrainte que la Charte l'autorise à prendre, le Conseil de sécurité doit donc déterminer s'il existe une menace contre la paix, un rupture de la paix ou un acte d'agression. A cet égard, le Conseil doit non seulement établir ce qui s'est passé effectivement, il doit apprécier et qualifier les faits à la manière d'un juge. Cette "constation" est un prélable à l'action."*) (footnote omitted) ; N. Schrijver, *The Use of Economic Sanctions by the UN Security Council : An International Law Perspective, in* H.H.G. Post, ed., *International Economic Law and Armed Conflict* 123, 144 (1994) ("This consistent practice emphasizes that sanctions under Article 41 can only be instituted after a prior determination of the Security Council under Article 39.").

Thus, the UN Charter, consistent Security Council practice and scholarly commentary establish that decisions contained in a resolution, such as Resolution 1422, seeking to invoke Chapter VII when the Security Council has not made a prior determination under Article 39 are not binding decisions under that Chapter.[185]

Discretion under Article 39 not without limits. Although a determination pursuant to Article 39 is a discretionary and largely political one, even this very broad discretion is not unlimited. The Security Council may only make a determination under Article 39 when there is a bona fide threat to international peace and security. That the determination by the Security Council pursuant to Article 39 is subject to this legal limit has been decided by one international criminal court and has been recognized by a number of eminent jurists of the International Court of Justice.

In the *Tadić* case, the Appeals Chamber of the ICTY squarely rejected the decision of the Trial Chamber that the Security Council's determination under Article 39 was a non-justiciable political question that could not be subject to judicial review.[186] It then expressly considered and decided the question: "Was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?"[187] The Appeals Chamber explained that, although the Security Council "exercises a very wide discretion" under Article 39 of the UN Charter,

185 Frowein & Krisch, *Action with Respect to Threats, supra,* n. 161, 727 ("Resolutions that cannot be considered as adopted under Chapter VII . . . for lack of the necessary determination . . . do not create binding effects for states".); Schweigman, *supra,* n. 161, 185 ("[D]ecisions contained in a resolution that does not include a prior determination under Article 39, cannot be considered binding decisions under Chapter VII of the Charter.").

186 The Trial Chamber had held with respect to both the Article 39 determination and the measures taken under Chapter VII after that determination:

> "The making of a judgement as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again, pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review that step."

Prosecutor v. Tadić, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, Trial Chamber, 10 August 1995, para. 23. The Appeals Chamber reversed the Trial Chamber on both points and declared:

> "The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', national honour', etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the 'political question' argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.
>
> The Court has consistently rejected this argument as a bar to examining a case. It considered it unfounded in law. As long as the case before it or the request for an advisory opinion turns on a legal question capable of a legal answer, the Court considers that it is duty-bound to take jurisdiction over it, regardless of the political background or the other political facets of the issue."

Tadić, 1995 Appeals Chamber Decision, *supra*, n. 159, para. 24.

187 *Tadić,* 1995 Appeals Chamber Decision, *supra,* n. 159, para. 27.

> "this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. These powers cannot, in any case, go beyond the limits of the jurisdiction of the organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law)."[188]

The Appeals Chamber added, "the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter".[189]

Even before the Appeals Chamber resolved this question once and for all, judges on the International Court of Justice had recognized the existence of such legal limits on the Security Council's determinations under Article 39. More than three decades ago, Judge Fitzmaurice stated in the 1971 *Namibia* case that "the Security Council can act in the preservation of peace and security, provided the threat said to be involved is not a mere figment or pretext".[190] He added that

> "limitations on the powers of the Security Council are necessary because of the all too great ease which any acutely controversial international situation can be represented as involving a latent threat to peace and security, even where it is really too remote genuinely to be one."[191]

In the same case, Judge Gross concluded: "To assert that a matter may have a distant repercussion on the maintenance of peace is not enough to turn the Security Council into a world government."[192]

A decade ago, shortly before the Appeals Chamber of the ICTY resolved the issue, the International Court of Justice addressed this question in the *Lockerbie* case in 1992 (discussed further in Section V.B.5). The Security Council had determined pursuant to Article 39 that the failure of Libya to surrender two Libyan nationals suspected of bombing an aircraft over Scotland in 1988 and to pay compensation was a situation involving a threat to or breach of

188 *Ibid.*, para.28.

189 *Ibid.,* para. 29. Similarly, Judge Sidhwa stated in a separate opinion in this case:

> "All exercise of discretionary power is subject to the rules of fairness and reasonableness and to the jurisdictional limits provided, or which fairly and inherently can be assumed out of the objects and purposes that call for its exercise and the surrounding circumstances that create its need."

Ibid. (separate opinion, Sidhwa, J.), para. 21.

190 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) nothwithstanding Security Council Resolution 276,* Advisory Opinion, ICJ Rep. 293 (1971).

191 *Ibid.,* 294.

192 *Ibid.* (separate opinion, Gross, J.), 340.

international peace and security. The International Court of Justice, however, concluded that this determination was *simply presumptively valid* and it reserved decision on challenges to its legality. It held that UN member states "are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter"; that "prima facie this obligation extends to the decision contained in Security Council Resolution 748 (1992)"; and that this obligation prevailed over obligations under the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[193] It stated that "the Court, while thus not at this stage called upon to determine definitively the legal effect of Security Council resolution 748 (1992), considers that, whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures".[194] However, other judges indicated at this stage of the proceedings that there were legal limits governing such Security Council determinations.[195] The Security Council adopted a second resolution in which it determined that Libya's failure to comply with Resolution 748 and another resolution constituted a threat to international peace and security.[196] In 1998, the International Court of Justice denied the preliminary objections by the USA and the UK to its jurisdiction because the measures requested were not exclusively of a preliminary character and, if granted, would have prevented it from reaching a decision on the merits.[197] The case was still pending as of the date

193 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Request for Indication of Provisional Measures), Libya v. U.S.,* Order of 14 April 1992, ICJ Rep. (1992), para. 44.

194 *Ibid.*, para. 43.

195 For example, Judge Shahabuddeen on the International Court of Justice had strongly hinted that the ability of the Security Council to make determinations under Article 39 was subject to legal limits when he stated:

> "The question now is whether a decision of the Security Council may override the legal rights of States, and, if so, whether there are any limitations on the power of the Council to characterize a situation as one justifying the making of a decision entailing such consequences. Are there any limits to the Council's power of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?"

Ibid. (separate opinion, Shahabuddeen, J.), 142.

Similarly, Judge Bedjaoui in the same case expressed doubts about the validity of the Security Council's determination under Article 39. *Ibid.* (separate opinion, Bedjaoui, J.) (noting that "no small number of people may find it disconcerting that the horrific Lockerbie bombing should be seen today as an urgent threat to international peace when it took place over three years ago"). Even Judge Weeramantry of the International Court of Justice, who took a very restrictive view of the scope of judicial review of measures taken pursuant to Security Council resolutions under Chapter VII, accepted that decisions of the Security Council under Chapter VII are only *presumptively valid*, thus recognizing that some decisions purportedly taken under Chapter VII may not be valid. He stated: "[A]ny matter which is the subject of a valid Security Council decision under Chapter VII does not appear, prima facie, to be one with which the Court can properly deal." *Ibid.* (separate and dissenting opinion, Weeramantry, J.), 625.

196 S.C. Res. 883 (1993), 11 November 1993.

197 *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Preliminary Objections), Libya v. U.S.,* 1998 ICJ Rep., para. 49.

of this paper and the Court could still decide whether the Security Council resolutions were legally valid or not.

Most commentators agree that Security Council determinations under Article 39, although open to a wide degree of discretion, are subject to the legal limits that there be a bona fide threat to international peace and security.[198] It is true that in the past a minority of commentators seemed to see the Security Council as the ultimate Hobbesian sovereign having unfettered discretion to determine that any situation whatsoever is a threat to or breach of the peace. However, such views are no longer tenable after the 1995 Appeals Chamber decision in *Tadić*.[199]

For all the above reasons, even assuming that the Security Council had made a determination under Article 39, it would have exceeded its powers under the UN Charter since

[198] *See, for example,* Ian Brownlie, *The Decisions of the Political Organs of the United Nations and the Rule of Law, in* R. St. J. MacDonald, ed., *Essays in Honour of Wang Tieya* 91, 96 (1994) ("A determination of a threat to the peace as a basis for action necessary to remove the threat to the peace, cannot be used as a basis for action which – if the evidence so indicates – is for collateral and independent purposes, such as the overthrow of a government or the partition of a State."); Conforti, *supra,* n. 181, 178 (stating that in addition to the limit on determinations under Article 39 "in those principles in the preamble to the Charter and in Article 1 which bind the U.N. to pursue justice and cooperation among people", the conduct of a state cannot be condemned by the Security Council when the condemnation is not shared by the opinion of most states and their peoples); Thomas Franck, *Fairness in International Institutions* 221 (Oxford: Clarendon Press 1995) (paper 1997) (noting that the Security Council may take enforcement measures in areas that would normally fall within a state's domestic jurisdiction only if it "has discovered a *bona fide* 'threat to the peace, breach of the peace, or act of aggression'"); Vera Gowland-Debbas, *Collective Responses to Illegal Acts in International Law - United Nations Action in the Question of Southern Rhodesia* 444-456 (1990); R. St. J. MacDonald, *Changing Relations between the International Court of Justice and the Security Council of the United Nations,* 1999 Can. Y.B. Int'l L. 3 ("[w]hen the Council exercises its judgment as to whether a matter should be dealt with under Chapter 7, pursuant to Article 39, it must act reasonably and respond only to bona fide threats to international peace and security."); Shaw, *Security Council, supra*, n. 165, 234 (stating that the Security Council's discretion in making determinations under Article 39 was "limited only by inherent notions of good faith and non-abuse of rights").

199 For a selection of such outdated views, see: Michael Akehurst, *A Modern Introduction to International Law* 219 (1987); Peter H. Kooijmans, *The Enlargement of the Concept 'Threat to the Peace'*, in J.R. Dupuy, *The Development of the Role of the Security Council* 111 (1993) (citing "the complete discretion the Security Council has with regard to the interpretation of the three concepts 'threat to the peace', breach of the peace' and 'act of aggression') and 117 (reiterating this point, but expressing doubt that Security Council Resolution 748 (1992) was "fully in conformity with the spirit of the Charter"); W. Michael Reisman, *Peacemaking*, 18 Yale J. Int'l L. 415, 418 (1993) (noting that the "United Nations system was essentially designed to enable the Permanent Five, if all agree, to use Charter obligations and the symbolic authority of the organization as they think appropriate to maintain or restore international peace, as they define it."); Oscar Schachter, *United Nations Law*, 88 Am. J. Int'l L. 1, 12 (1994) (stating that an Article 39 determination "is generally considered discretionary and final"). One of these commentators, then the Minister for Foreign Affairs for the Netherlands and now a judge on the International Court of Justice, has since modified his views and has conceded that Article 39 determinations are subject to judicial review, if only in the "exceptional – and therefore hypothetical – case that no one in their right senses could have come to the same conclusion as the Council". Peter H. Kooijmans, *The International Court of Justice: Where Does it Stand?, in* Muller, Raič & Thuránszky, *supra,* n. 165, 416.

there was no bona fide threat to international peace and security. As Flavia Lattanzi explained with regard to Security Council Resolution 1422:

> "[B]esides the lack of the necessary determination that a threat to the peace existed under art. 39, the intervention of the Council – aimed at maintaining or restoring international peace and security under the Charter – must always target a concrete and imminent situation, as stated in Chapter VII of the Charter. Such an intervention cannot be decided on the basis of an abstract possibility of a general and future nature, as it is portrayed in Resolution 1422."[200]

2. Requirement that measures taken pursuant to Chapter VII must be consistent with the Purposes of the UN and other international law

The same principle that the Security Council must act consistently with the Purposes of the UN and other international law, except to the extent the UN Charter otherwise provides, applies to measures taken pursuant to Chapter VII. As has been recognized by judges of the International Court of Justice, legal constraints apply even when the Security Council has properly invoked Chapter VII after it has made a determination pursuant to Article 39.[201] Similarly, the Appeals Chamber of the ICTY has declared that the choice of measures by the Security Council after such a determination "is not unfettered" and "it is limited to the measures provided for in Articles 41 and 42".[202] It then concluded that the measures taken pursuant to Chapter VII – the establishment of an international criminal tribunal – were lawful under that chapter.[203]

There are a number of well-recognized limits on Security Council action when it is acting to maintain or restore international peace and security.[204] For example, actions that are

200 Lattanzi, *supra,* n. 182, 1372-1374.

201 The existence of legal restraints on Security Council action, even under Chapter VII, was recognized by judges in the *Lockerbie* case, both by those joining in the judgments of the International Court of Justice, if only implicitly by reserving these issues for the merits phase, and by those dissenting. For example, in addition the doubts expressed by Judges Shahabuddeen and Bedjaoui mentioned above, Judge Weeramantry concluded after reviewing the drafting history of the UN Charter:

> "The history of the United Nations Charter thus corroborates the view that a clear limitation on the plenitude of the Security Council's powers is that those powers must be exercised in accordance with the well-established principles of international law. It is true this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in Chapter I of the Charter [citing opinion of the Secretary-General]. The restriction nevertheless exists and constitutes an important principle of law in the interpretation of the United Nations Charter."

Lockerbie, Order (separate and dissenting opinion, Weeramantry, J.), 170-175; *ibid.* (dissenting opinion, El-Koheri, J.) 209 (Security Council cannot issue a binding decision contrary to international law).

202 *Tadić,* 1995 Appeals Chamber Decision, *supra*, n. 159, para. 32 (see also the discussion of this decision above in Section V.B.1).

203 *Ibid.,* para. 39.

204 Indeed, although the Security Council has extremely broad discretion when acting pursuant to Chapter VII to choose whether to employ provisional measures under Article 40, measures not involving the use of armed force under Article 41 or measures involving the use of armed force under Article 42, even then it still

considered to be *ultra vires* even when the Security Council has properly invoked Chapter VII include denial of the right to self determination,[205] changing national boundaries and disposing of national territory[206] and guaranteeing the integrity and independence of an autonomous territory that is not a UN member state.[207] As discussed below in this section, more relevant actions by the Security Council acting pursuant to Chapter VII that would be *ultra vires* include acting in bad faith.[208] In particular, as explained below, the Security Council may not act contrary to the purposes and principles of the UN by requiring states to violate a *jus cogens* prohibition (Section V.B.3) or human rights or international humanitarian law (Section V.B.4). It necessarily follows that it may not prohibit states from taking steps, such as surrendering suspects to the International Criminal Court, acting as a court of last resort, that would prevent such violations. As governments emphasized in July 2002, the Security Council cannot amend treaties that are consistent with the obligations of member states under the UN Charter or ordering UN member states to violate their obligations under such treaties (Section V.B.5).

3. Duty of the Security Council not to violate jus cogens prohibitions

As an organ of an intergovernmental organization established by a treaty pursuant to international law, the Security Council is bound not to violate *jus cogens* prohibitions or to require states to take action that would necessarily violate or facilitate or encourage violation of such prohibitions. In particular, any attempt to give impunity to an entire class of persons for these crimes would inevitably facilitate and encourage violations of *jus cogens* prohibitions and, therefore, itself be a violation of *jus cogens* prohibitions.

Scope of* jus cogens *prohibitions. Crimes under international law, such as genocide, crimes against humanity and war crimes, all crimes within the jurisdiction of the International Criminal Court, and torture, violate *jus cogens* prohibitions (peremptory norms).[209] Article 53

must exercise its discretion in making this choice consistently with the UN Charter. For example, Article 42 requires the Security Council first to have made a determination that "measures provided for in Article 41 would be inadequate or have proved to be inadequate" before taking measures involving the use of armed force.

205 Gill, *supra,* n. 184, 74 (Security Council duty to respect principle of self-determination); Schweigman, *supra,* n. 161, 169 ("Council may not violate the right to self-determination").

206 Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations,* 9-228 *Recueil des Cours* 220 (1995) (demarcation of Iraq-Kuwait border); Gill, *supra,* n. 161, 85 (Security Council must respect territorial integrity of states); Lamb, *supra,* n. 161, 372 (disposing of national territory).

207 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* 833 (London 1950) (enforcement of guarantees of integrity and independence of autonomous territory).

208 Shaw, *Security Council, supra,* n. 165, 234.

209 The prohibition of genocide has been recognized as *jus cogens* for more than half a century. *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion, ICJ Rep. 23 (1951). Crimes against humanity are also contrary to *jus cogens* prohibitions. Ian Brownlie, *Principles of Public International Law* 515 (Oxford: Oxford University Press 5th ed. 1998). War crimes are contrary to *jus cogens* prohibitions. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International* Law 60 Am. J. Int'l L. 55, 59 (1966) (citing example of rights of prisoners of war); Decision of the Constitutional Court of Hungary, Case No. 53/1993 (X.13) (cited in Péter Mohacsi & Péter Polt, *Estimation of War Crimes and Crimes against Humanity According to the Decision of the Constitutional*

(Treaties conflicting with a peremptory norm of general international law (*jus* cogens)) of the Vienna Convention on the Law of Treaties, which is considered to reflect customary international law, provides:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[210]

Applicability of* jus cogens *prohibitions to the Security Council. The principle that *jus cogens* prohibitions apply to the Security Council apply with equal force when it is acting pursuant to Chapter VII. Ad Hoc Judge Lauterpacht, in a widely cited separate opinion in the *Bosnia and Herzegovina* case, applied these principles to claims by Bosnia and Herzegovina that Security Council Resolution 713 (1991), which imposed an arms embargo on that country, necessarily assisted genocide by preventing the victims from defending themselves – exactly the concern that the proponents of the concept of *jus cogens* sought to address (see note 209 above), and, therefore, was without effect and *ultra vires*. Although he thought that the International Court of Justice could not "substitute its discretion for that of the Security Council" in making Article 39 determinations (which, of course, is not the same as reviewing the legality of the exercise of its discretion) or in determining the political steps to be taken afterwards, he said that this doctrine did not apply in the current case

> "because the prohibition of genocide, unlike the matters covered by the Montreal Convention in the Lockerbie case to which the terms of Article 103 [of the UN Charter] could be directly applied, has generally been accepted as having the status not of an ordinary rule of international law, but of jus cogens",

Court of Hungary, 67 *Revue International de Droit Pénal* 33, 335 (1996); M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 Law & Contemp. Prob. 63, 68 (1996).

Although the concept of *jus cogens* is often seen as part of customary international law, as the original proponents of this concept made clear, it is better seen as *sui generis* and a general principle of law that prevails over conventional and customary international law. Alfred von Verdross, *Forbidden Treaties in International* Law, 31 Am. J. Int'l L. 571, 573 (1937). (rooting concept of *jus cogens* in general principles of law). The primary examples of *jus* cogens cited by the proponents were prohibitions against states depriving persons of the means to protect themselves from harm, such as the ability to maintain law and order, *ibid.*, exactly the problem posed by Resolution 1422, which deprives victims of the International Criminal Court as a deterrent when it acts as a court of last resort. Thus, the concept of *jus cogens* is reflected in the Martens clause, which is found in the Preamble to Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1899 and in almost every international humanitarian law treaty since. As worded in common Article 63/62/142/158 of the four Geneva Conventions, it provides that a denunciation of one of the conventions "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

210 Vienna Convention on the Law of Treaties, *supra*, n. 138, Art. 53.

citing the conclusion of the International Court of Justice on two separate occasions that genocide was "contrary to moral law and to the spirit and aims of the United Nations".[211]

He explained that the Security Council could not take action under Chapter VII contrary to a *jus cogens* prohibition:

> "[I]t is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately flouting a rule of jus cogens or requiring a violation of human rights."[212]

In addition, this general principle applies to deny legal effect to Security Council resolutions that unintentionally or indirectly violate or cause states to violate *jus* cogens prohibitions or deprive victims of the ability to protect themselves from such violations. Judge Lauterpacht then applied this general principle to Resolution 713, which "can be seen as having in effect called on members of the United Nations, albeit unknowingly and assuredly unwillingly, to become in some degree supporters of genocidal activity and in this manner and to that extent to act contrary to a rule of *jus cogens*."[213] One consequence was that

> "in strict logic, when the operation of paragraph 6 of Security Council Resolution 713 (1991) began to make members of the United Nations accessories to genocide it ceased to be valid and binding in its operation against Bosnia Herzegovina and that members of the United Nations then became free to disregard it."[214]

Scholars have agreed with Judge Lauterpacht's analysis.[215]

211 *Case concerning application of the Convention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further requests for the indication of provisional measures, Order of 13 September 1993, 1993 I.C.J. Rep., Separate opinion of Ad Hoc Judge Elihu Lauterpacht, para. 100 citing both the judgment in this case and the *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Rep. 22.

212 *Bosnia and Herzegovina* case (separate opinion of Ad Hoc Judge Lauterpacht), *supra*, n. 211, para. 102.

213 *Ibid*, para. 100.

214 *Ibid.,* para. 103.

215 *See, for example,* Dinstein, *supra,* n. 161, 282 (Security Council may not supersede peremptory norms of general international law (*jus cogens*); Karl Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences*, 1 Max Planck Y.B. U.N. Law 91, 99, 103-105, 108-1089 (1997) (Security Council must respect peremptory norms in its resolutions, and those that fail to do so are not binding); Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l L. 529, 590 (1998) ("The relief which Article 103 [of the UN Charter] may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – a matter of simple hierarchy of norm – extend to a conflict between a Security Council resolution and jus cogens."); Frowein & Krisch, *Action with Respect to Threats, supra,* n. 161, 711 (footnote omitted) ("Peremptory norms of international law have to a great extent been developed through the organs of the UN, and they must in principle be considered to be binding on the UN as well as on individual states."); Gill, *supra,* n. 184, 79 (*jus cogens* norms "apply to all Security Council enforcement measures, bothnon-military and military, regardless of whether such operations are carried out directly by the Organization, or by Member States acting upon Security Council authorization."); Vera Gowlland-Debbas, *Security Council Enforcement Action, supra*, n. 178, 91-93 (1994); Matthias J. Herdegen, *The "Constitutionalization" of the UN Security* System, 27 Vand.

Thus, a Security Council resolution that seeks to prohibit a state from taking steps to prevent violations of a *jus cogens* prohibition – thus, in effect, encouraging them by giving the authors impunity - is invalid and does not bind UN members. It follows that a resolution like 1422 that seeks to prohibit states, in effect in perpetuity, from taking steps to repress crimes under international law that violate *jus cogens* prohibitions by barring the surrender of persons accused of these crimes to a court that acts *only* when it has determined that states are unable or unwilling to bring them to justice is equally invalid and not binding.

4. The duty to act consistently with human rights and international humanitarian law

In the past decade, prior to the adoption of Resolution 1422, the Security Council had frequently acted under Chapter VII to strengthen human rights and international humanitarian law and often invoked Chapter VII to repress violations of human rights and international humanitarian law as threats to international peace and security. Indeed, it established both the ICTY and the ICTR to bring to justice those responsible for human rights violations such as genocide and crimes against humanity and violations of international humanitarian law amounting to war crimes. As discussed below, an examination of such sources as the Purposes of the UN, jurisprudence of international courts, statements of the Secretary-General and studies of scholars make it clear that the Security Council, as a UN organ, must act consistently with human rights and international humanitarian law, regardless whether they are categorized as *jus cogens* prohibitions or not, when acting under Chapter VII. It mayt not adopt resolutions that facilitate or encourage such violations.

Human rights. The requirement that the Security Council act consistently with human rights follows directly from the duty of the Security Council to act consistently with the Purposes of the UN. They include, in Article 1 (3) of the UN Charter, the Purpose: "To achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."

The obligation of the Security Council to act consistently with human rights was expressly recognized by the Appeals Chamber of the ICTY in the *Tadić* case when it stated that when the Security Council establishes a subsidiary UN judicial organ, the "court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments".[216] In particular, "[f]or a tribunal such as this one to be established according to

J. Transnat'l L. 135,156 (1994) ("[T]here are some elementary, justiciable principles that limit the Security Council's discretion. . . . [T]he peremptory norms of international law provide insurmountable limitations upon both the conferment and the exercise of competence flowing from the Charter."); Lamb, *supra,* n. 161, 372; Paust, *supra,* n. 165, 139 (". . . *jus cogens* prohibitions of . . . genocide, as well as other *jus cogens* norms, should condition and limit U.N. peace-keeping and peace-making competencies and operations. In particular, Security Council actions under Chapter VII must not generally serve and encourage . . . genocide"); Schweigman, *supra,* n. 161, 197 ("This non-derogatory character [of *jus cogens* prohibitions] means that all subjects of international law, including the Security Council, have to abide by them.") (footnote omitted); Shaw, *Security Council, supra,* n. 165, 228 (agreeing that "[I]t would be illogical and wrong for such core rules of international behaviour [*jus cogens* norms] to be breached even by the Security Council.").

216 *Tadić*, 1995 Appeals Chamber Decision, *supra,* para. 42.

the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognized human rights instruments."[217] After reviewing the Statute by which the Security Council established the ICTY, it concluded that "the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial."[218] Scholars have agreed that the Security Council cannot breach certain key human rights.[219]

By preventing states from surrendering persons suspected of grave human rights violations to the International Criminal Court, Security Council Resolution 1422 denies victims their right under international law to a remedy for such violations and their right to reparations.[220] The resolution also facilitates and encourages such violations by giving those responsible impunity from international justice.

International humanitarian law. Although at one time it was a matter of debate, now both the UN and commentators agree that the Security Council, and states carrying out its decisions, must comply with international humanitarian law regardless whether the Council is operating pursuant to Chapter VII or another chapter.[221] The UN Secretary-General has said on a number of occasions that armed forces participating in UN operations must respect international humanitarian law.[222] In addition, the Secretary-General recommended that the Security Council

> "underscore the importance of compliance with international humanitarian and human rights law in the conduct of all peacekeeping operations by urging that Member States disseminate instructions among their personnel serving in United Nations peacekeeping

217 *Ibid.,* para.45.
218 *Ibid.*, para. 46.
219 Gill, *supra,* n. 184, 79 (at a minimum, Security Council is bound by non-derogable human rights norms, including the right to life and integrity of the human person, the prohibition of torture and ill-treatment, the prohibitions of discrimination, slavery and genocide, the right to freedom of conscience and religion and the right to a fair trial); Shaw, *Security Council, supra,* n. 165, 230; Paust, *supra,* n. 165, 140 (Security Council cannot require member states to violate human rights, even those not implicating *jus cogens* norms because their obligations under Article 25 would be limited by their obligations under Articles 55 and 56 of the UN Charter).
220 The right to a remedy is recognized in Article 2 of the International Covenant on Civil and Political Rights. The right to reparations is guaranteed in Article 75 of the Rome Statute and it is also recognized in the Van Boven-Bassiouni Principles. UN Commission on Human Rights Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law (Final Draft), 18 January 2000, U.N. Doc. E/CN.4/2000/62/Rev.1 (2000).
221 Christopher Greenwood, *Scope of Application of Humanitarian Law, in* Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press 1995).
222 Secretary-General's Bulletin on "Observance by United Nations Forces of International Humanitarian Law", U.N. Doc. ST/SGB/1999/13, 6 August 1999.

> operations and among those participating in authorized operations conducted under national or regional command and control."[223]

The Security Council itself has welcomed the recommendation of the Secretary-General on the protection of civilians in armed conflict that all peace-keeping operations respect human rights and international humanitarian law.[224] The Appeals Chamber of the ICTY in the *Tadić* case in 1995 stated that common Article 1 of the four Geneva Conventions of 1949 "lays down an obligation that is incumbent, not only upon States, but also on other international entities including the United Nations".[225]

Leading experts have reached the same conclusion. For example, the *Institut de droit international* adopted a resolution declaring:

> "The humanitarian rules of the law of armed conflict apply to the United Nations as of right and they must be complied with in every circumstance by United Nations forces which are engaged in hostilities."[226]

Christopher Greenwood has stated that "the United Nations is subject to customary international humanitarian law".[227] Other experts in international humanitarian law are in accord.[228]

223 Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, U.N. Doc. S/1999/957, 8 September 1999, para. 61 (Rec. 30).
224 S.C. Res. 1296 (2000), para. 19.
225 *Tadić* (Appeals Chamber judgment on jurisdiction), *supra,* n. 159, para. 93.
226 Institut de droit international, Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged, Zagreb, 1971, Art. 2, *in* 54 (II) *Annuaire de l'institut de droit international* 465 (1971).
227 Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations,* 1 Y.B. Int'l Hum. L. 3, 15-17 (1998).
228 Dapo Akande, *The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?,* 46 Int'l & Comp. L. Q. 309, 320 (1997) (explaining that these constraints are part of the basic principle noted above that the Security Council is bound by international law except to the extent that it is permitted by the UN Charter to derogate from international law and that "the Security Council is empowered to use force in the maintenance of international peace but this does not relieve it of its duty in using such force to respect international humanitarian law in armed conflict (the *jus in bello*)"); Michael Bothe, *Peace-Keeping, in* 1 Simma (2nd ed.), *supra,* n. 124, 695 ("The UN is bound by general international law, the laws of war being no exception. . . . The fact that the UN is not a State and does not possess certain organs which a State normally possesses is no excuse for not applying the laws of war."); Judith Gardam, *Legal Restraints of Security Council Military Enforcement Action*, 17 Mich. J. Int'l L. 285, 319 (1996) ("It is inconceivable that with the current emphasis on human rights and humanitarian principles, the Security Council can be regarded as operating outside the constraints on the conduct of armed conflict that have been painstakingly developed over the years by States."). Gill, *supra*, n. 184, 82 (1995) ("Humanitarian law, like human rights law forms part of the core values and principles of the Organization, referred to in Chapters I and IX of the Charter. . . In founding the UN as primary repository of collective security, the Member States could not, in transferring or conferring the power to wage war and conduct military operations as an instrument of international policy, invest the Organization with the power to maintain international peace and security by means which would violate these fundamental precepts."); Shaw, *Security Council, supra,* n. 165, 230 (footnote omitted) ("One cannot easily envisage it being acceptable that the Council should by decision consciously breach the norms of the law of armed conflict."); Schrijver, *supra,*

Regrettably, however, the resolution could facilitate, and might even encourage, war crimes by seeking to prevent surrender to the International Criminal Court, acting as a court of last resort, of persons accused of such crimes.

5. No power to amend treaties that are consistent with obligations under the UN Charter or to order states to violate such treaties

As governments repeatedly emphasized on 3 and 10 July 2002 (see Section II.D and E above), the UN Charter does not authorize the Security Council to amend treaties that are consistent with their obligations under the Charter or to require member states of the UN to violate their obligations under such treaties. For example, on 10 July 2002, Brazil explained:

> "The Council cannot alter international agreements that have been duly negotiated and freely entered into by States parties. The Council is not vested with treaty-making and treaty-reviewing powers. It cannot create new obligations for the States parties to the Rome Statute, which is an international treaty that can be amended only through the procedures provided in articles 121 and 122 of the Statute."

On the same date, Fiji declared that "the Security Council's functions and powers, including those set out in Chapter VII, do not include amending treaties. To do that would violate established principles of international treaty law." [229]

Although member states are obliged not to enter into treaties that are inconsistent with their obligations under the UN Charter, nothing in the Charter gives the Security Council the authority to amend treaties that are consistent with the obligations of member states under the Charter - particularly international humanitarian law and human rights treaties such as the Rome Statute - or to require states to violate them. Indeed, as the Preamble to the UN Charter makes clear, the UN was founded to establish conditions under which justice and respect for treaty obligations was to be maintained.

Article 103 of the UN Charter provides:

n. 184, 156 (concluding with respect to the applicability of international humanitarian law and its relationship to obligations under Security Council resolutions under Chapter VII imposing economic sanctions, "[e]nforcement action should find its limit where the survival of the civilian population is at stake").

229 Other states emphasized that the Security Council did not have the power to amend treaties that were consistent with the UN Charter. Costa Rica, on behalf of the 19-member Rio Group, stated on 10 July 2002 that "any initiative attempting to substantially modify the provisions of the Statute by means of a Council resolution . . . would exceed the competence of the Security Council". On the same date, Iran stated that the Security Council was "not authorized to interpret or amend treaties concluded among States in accordance with the law of treaties – a law that recognizes that only parties to a treaty are competent to amend it." Also on the same day, Canada said that if the Security Council were to adopt the proposed resolution it would be "acting beyond its mandate" and "would set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished".

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Article 103 is not a provision designed to allow the Security Council unrestrained power to create obligations in member states that override their obligations under treaties. Of course, there are a very limited number of obligations under treaties or other international agreements that would *directly conflict* with the obligations of member states under the UN Charter and be void. For example, an agreement among states, such as Plan Condor, under which security forces of certain Latin American states, including Argentina, Brazil, Chile, Paraguay and Uruguay, agreed in the 1970s and 1980s to detain exiles secretly and to hand them over to the states from which they fled to be tortured, "disappeared" or extrajudicially executed, is an example of an agreement clearly prohibited by Article 103. Similarly, an agreement among two or more states to infringe the territorial integrity of another state or to commit aggression against another state would also conflict with their obligations under the UN Charter.[230]

In a few situations, the Security Council has ordered *temporary enforcement measures*, pursuant to a proper determination under Article 39 of the UN Charter that a threat to or breach of international peace and security or an act of aggression existed, where the obligations of member states to implement enforcement measures have priority over treaty obligations that are otherwise fully consistent with their obligations under the UN Charter. These resolutions usually involve the ordering a temporary embargo where the obligations of member states to respect the embargo during the period in which it remains in effect have priority over treaty provisions concerning economic relations between member states and the targeted state.[231] In

[230] For example, in S.C. Res. 787 of 16 November 1992, the Security Council strongly reaffirmed "its call on all parties and others concerned to respect strictly the territorial integrity of the Republic of Bosnia and Herzegovina, and affirm[ed] that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted". One commentator has stated that

> "[i]f the members of a regional arrangement, or even two States, agree that in case of internal disturbances or other events within one of the States concerned, the other State(s) can intervene with military forces without the consent of the *de iure* or *de facto* government, the compatibility of such a special agreement with the Charter becomes doubtful and must in principle be denied. Here, the territorial integrity of all States and the prohibition of the use of force are at stake. An agreement permitting forceful intervention would hardly be compatible with the Charter and would fall under Art. 103."

Bernhardt, *Article 103, in* 2 Simma (2nd ed.), *supra,* n. 124, 1297.

[231] For example, such resolutions have involved the express or implied temporary suspension of obligations under treaties which would have been in conflict with embargoes adopted as enforcement measures with respect to Iraq, S.C. Res. 670 of 25 September 1990 (deciding on measures "notwithstanding . . . any international agreement"), recalled in subsequent resolutions, including S.C. Res. 687 of 3 April 1991; the Federal Republic of Yugoslavia, S.C. Res. 713 of 25 September 1991 (calling upon all states and international organizations "to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement"), reiterated in S.C. Res. 757 of 30 May 1992 and recalled in subsequent resolutions, including S.C. Res. 724 of 15 December 1991, S.C. Res. Res. 740 of 7 February 1992, S.C. Res. 820 of 17 April 1993, Somalia, S.C. Res. 733 of 13 January 1992 (deciding under Chapter VII that all states "shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all

each situation, the Security Council was taking measures to end violations of international humanitarian law or other crimes under international law, such as acts of aggression, or to ensure that those responsible were brought to justice, not to give permanent impunity from international justice for such crimes to nationals of one of its permanent members, as in Resolution 1422.[232] Of course, the effect of such prior Security Council resolutions was simply *to suspend such obligations temporarily* during the period in which the measures were in force; they would *not be permanently abrogated*.[233]

In one controversial situation, now under consideration in the International Court of Justice, the Security Council, after making the required determination under Article 39 to invoke Chapter VII, ordered one state that the Council considered was not properly exercising its active personality jurisdiction under the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation to investigate two of its nationals accused of planting a bomb on an aircraft to surrender the accused to either of two other states parties to that treaty that were seeking their surrender for trial on the basis of territorial, passive personality or universal jurisdiction.[234] In that specific situation, although the dispute was not characterized by

deliveries of weapons and military equipment to Somalia until the Council decides otherwise"); Liberia, S.C. Res. 788 of 19 November 1992 (deciding under Chapter VII that all states "shall, for the purposes of establishing peace and stability in Liberia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Liberia until the Security Council decides otherwise")

[232] For example, in S.C. Res. 820 of 17 April 1993, the Security Council reaffirms its decision in S.C. Res. 808 (1993) to establish the ICTY; in S.C. Res. 788 of 19 November 1992, the Security Council calls upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law"; in S.C. Res. 733 of 23 January 1992, the Security Council urged all parties "to ensure full respect for the rules and principles of international law regarding the protection of the civilian population". For a study of these examples of temporary suspensions of treaty obligations, see Sydney D. Bailey, *The UN Security Council and Human Rights* (New York: St. Martin's Press 1994).

[233] Bernhardt, *Article 103, in* 2 Simma (2nd ed.), *supra,* n. 124, 1297-1298 ("When an SC resolution under Chapter VII prohibits the fulfilment of certain obligations pursuant to a treaty concluded between UN members which is not incompatible with the Charter *per se*, the treaty is only suspended and becomes applicable again when the measures have terminated. To this extent, invalidating the treaty concerned would not be appropriate.").

[234] After the bombing of Pan American flight 103 over Lockerbie, Scotland on 21 December 1988, British and US courts issued warrants for the arrest of two Libyan nationals. Libya denied that any of its nationals were responsible, but it apparently failed to conduct a proper investigation as required by Article 6 of the Montreal Convention or to submit their case to the prosecuting authority for the purposes of prosecution as required by Article 7 of that treaty. In the event of a failure to take these steps, Libya was obliged under Article 8 to extradite the two accused.

On 21 January 1992, in Resolution 731 (1992), the Security Council deplored Libya's refusal to grant the requests of the UK and the USA to surrender the two accused. On 3 March 1992, Libya instituted proceedings in the International Court of Justice against the UK and USA, arguing that they had failed to use the settlement procedure under Article 14 (1) of the Montreal Convention for disputes concerning the application of that convention and seeking provisional measures. The Security Council responded in Resolution 748 (1992) on 31 March 1992 by deciding, as required by Article 39, that the failure to surrender the two suspects constituted a threat to international peace and security. It required Libya had to comply without any further delay with paragraph 3 of Resolution 731 (1992) and it provided for a partial embargo against Libya if it failed to comply by 15 April 1992. The day before this deadline expired, the International

the parties in these terms, arguably the Security Council was not ordering the state concerned to *violate its obligations* under the Montreal Convention - at least with respect to the surrender of the two accused, but, in effect, was requiring it only to *fulfil its obligations* under that treaty to extradite an accused when the state where the accused was located was unwilling - in the view of the Security Council - to exercise its *right* under the treaty to investigate or prosecute the crime in good faith.

Rome Statute consistent with obligations under Charter. Not a single state is known to have argued since the Rome Diplomatic Conference that arresting and surrendering persons accused of genocide, crimes against humanity and war crimes to the International Criminal Court is inconsistent with its obligations under the UN Charter. Indeed, before it repudiated its signature, the USA implicitly recognized that the Rome Statute was fully consistent with the UN Charter by signing it on 31 December 2001. Its current opposition to the Rome Statute rests on other grounds - primarily its concern that its targeting strategy will be constrained by definitions of war crimes in the Statute.[235]

RECOMMENDATIONS

The implications of the adoption of the resolution – and any renewal of that resolution - for the future of international law and the legitimacy of the Security Council are potentially enormous.[236] Amnesty International is, therefore, making the following recommendations:

Court of Justice declined in two Orders to indicate provisional measures. It stated in the first Order concerning the UK (the Order concerning the USA was virtually identical):

> "Whereas both Libya and the UK, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter, whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention . . ."

Lockerbie, Decision on Provisional Measures, *supra,* n. 175, para. 39 (the same text appears in the order concerning the USA at para. 42). The Orders, however, were limited to a preliminary ruling on the question of the suitability of indicating provisional measures. The suspects were eventually surrendered for trial in a Scottish court sitting specially in the Netherlands, leading to a final judgment after an appeal. In 1998, the International Court of Justice rejected the UK and USA motions to dismiss the case for lack of jurisdiction, *Lockerbie,*Decision on Preliminary Objections, *supra,* n. 197, but, as of the date of this paper, the Court had yet to rule on the merits of Libya's application.

235 *See, for example,* Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 Am. U. Int'l L. Rev.35, 65 n. 80 (2001)

236 As a noted international criminal law scholar has observed:

> "The damage to public international law and international relations caused by the Resolution of July 12th is not yet foreseeable, as the discussion has only just begun. It is, nevertheless, clear that resolution 1422 creates a two-tier system for international criminal law: it draws a distinction between those states that subject their national soldiers in UN Peacekeeping missions to the jurisdiction of the new ICC, and those states that enjoy immunity from this jurisdiction. But how can this discrimination be reconciled with a sense of fundamental justice if, for instance, a German soldier can be brought before the ICC for alleged war crimes – possibly engaged in the same combat

To all states: All states should appeal to the Security Council not to renew the request in Resolution 1422, which expires on 30 June 2003, and for the Security Council not to renew that request.

To all members of the Security Council: All members of the Security Council should vote against any attempt to renew Resolution 1422.

To all states parties to the Rome Statute and other states: As required by Article 86 of the Rome Statute, all states parties should comply with any request by the International Criminal Court to surrender a national of a non-state party to the Rome Statute involved in operations established by or authorized by the UN.

To the International Criminal Court: If the issue arises, the International Criminal Court should determine that Resolution 1422 (and any renewal of that resolution) does not contain a request within the meaning of the Rome Statute, and that it has no relevance in determining whether to open an investigation or a prosecution of a national of a non-state party.

mission – while his American colleague enjoys immunity?

How will this affect the motivation and the mutual solidarity in UN Peacekeeping missions? How are we to assess the legitimacy of UN Peacekeeping operations that are tainted by the stain of immunity from ICC-jurisdiction? And, how reliably can the Security Council in the future decide on Peacekeeping measures, if, in order to do so effectively, it must regularly dismantle mankind's (so far) grandest achievement in the fight against impunity from the gravest human rights violations?"

Ambos, *supra,* n. 2.