

# INTERNATIONAL LAW ASSOCIATION

## BERLIN CONFERENCE (2004)

### INTERNATIONAL CRIMINAL COURT

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#### FIRST REPORT

Prepared by Professor William A. Schabas, *Co-Rapporteur*

This first report addresses two general issues that are of considerable interest with respect to the International Criminal Court, namely that of the Security Council resolutions adopted pursuant to article 16 of the Rome Statute, and the so-called 'Article 98 Agreements' or 'Bilateral Immunity Agreements' adopted by a number of States at the request of the United States of America.

A questionnaire was circulated to members of the Committee after the Workshop held during the New Delhi Conference, raising a number of specific points with respect to the two broad issues. Responses to the questionnaire were received from members of the Committee with respect to the following jurisdictions: Australia; Brazil; Bulgaria; Canada; Czech Republic; Germany; Ireland; Netherlands; South Africa; South Korea; Sweden; United Kingdom; Uruguay; United States of America. Several members of the Committee met in late-November 2003 in Germany, organized by the Chairman and with the generous support of the ASKO EUROPA FOUNDATION, to discuss an initial draft of this document. Additional information on these matters was derived from United Nations documents, documents of the Court itself, and various unofficial sources such as NGO materials and academic commentary.

#### I. Security Council resolutions pursuant to article 16 of the Rome Statute

Article 16 of the *Rome Statute* is subtitled 'Deferral of investigation or prosecution', and declares: '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.'

The issue of Security Council deferral, and more generally of the relationship between the Court and the Council, had been one of the thorniest in the negotiations leading to adoption of the Rome Statute. Article 23(3) of the International Law Commission draft of 1994 stated: '3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security

Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’<sup>1</sup> In effect, under the ILC proposal, the Court could not proceed without Security Council authorization, to the extent that ‘a situation’ was ‘being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII’. A summary review of the Security Council agenda in recent years indicates that this encompasses essentially any potential case likely to interest the Prosecutor. The compromise reflected in article 16 seriously diminishes the authority of the Council by requiring the Council to act to prevent a prosecution, rather than to act to authorise one.

Resolution 1422 was adopted by the Security Council at its 4572nd meeting, on 12 July 2002. It was adopted by the vote of all fifteen members, including seven States parties to the Statute, including two permanent members, France and the United Kingdom. The preamble declares that the Council is ‘Acting under Chapter VII of the Charter of the United Nations’. The heart of the Resolution, paragraph 1, directly refers to article 16 of the Rome Statute: ‘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...’

Adoption of the Resolution was provoked by the threat of the United States, in June 2002, to veto renewal of the mandate of the United Nations mission in Bosnia and Herzegovina.<sup>2</sup> In a matter of a few weeks, three successive resolutions were adopted by the Council, in effect rolling over the mission for days at a time as negotiations with the United States continued. On 10 July 2002, the Council held a public session at which all Member States were invited to participate. Many States took the floor to criticize the position taken by the United States.<sup>3</sup> Some of them claimed that the proposed resolution was inconsistent with the Charter of the United Nations.<sup>4</sup>

On 12 June 2003, at its 4772<sup>nd</sup> meeting, the Council adopted Resolution 1487, which is essentially identical to Resolution 1422. The Council expressed its intention, as it had done the previous year, to renew the resolutions ‘under the same conditions each 1 July for further 12-month periods for as long as may be necessary’. Only twelve members voted in favour of the resolution, however. Germany, France and Syria all abstained.

On 1 August 2003, in Resolution 1497, the Council authorised the establishment of a Multinational Force in Liberia. Such a force would appear to fall under the terms of Resolution 1487. But the Council decided to take the matter a step further, providing, in paragraph 7: ‘Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State...’ The consequence of paragraph 7 would appear to be a form of permanent

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<sup>1</sup> UN Doc. A/49/355.

<sup>2</sup> (2002) 96 *Am. J. Int'l L.* 725-727. See also the statement by the United States’ representative at the Council’s meeting of 10 July 2002 (UN Doc. S/PV/4568, pp. 9-10). For academic comment on the subject, see: C. STAHN, ‘The Ambiguities of Security Council Resolution 1422’, (2003) 14 *Eur. J. int'l L.* 85; Mohamed EL ZEIDY, ‘The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422’, (2002) 35 *Vanderbilt J. Transnat'l L.* 1503; Roberto LAVALLE, ‘A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court’, (2003) 14 *Crim. L. Forum* 195.

<sup>3</sup> For the full range of views officially expressed by states on the problem, see, in addition to the two letters referred to in notes 25 and 40 *infra*, the *procès-verbal* of the two-part meeting held by the Council on 10 July 2002, at which the United States’s position was roundly criticised (UN Doc. S/PV.4568 and S/PV.4568 (Resumption 1)).

<sup>4</sup> See UN Doc. S/PV.4568, page 3 (Canada), page 16 (Jordan) and S/PV.4568 (Resumption 1), pages 7 (Samoa), and 9 (Germany). On behalf of the United Kingdom, Sir Jeremy Greenstock said: ‘Finally, I have listened carefully to the comments of several representatives about the powers of the Security Council in this matter. The United Kingdom shares the concern that actions of the Council should remain within the scope of its powers. Article 39 of the United Nations Charter is relevant in this respect. We are equally firm that solutions to this problem should be consistent with the ICC Statute.’

immunity to the International Criminal Court, rather than a simple deferral as is contemplated by article 16 of the Rome Statute and Resolutions 1422 and 1487.

### **1.1 Has your State taken a public position with respect to Resolution 1422 and its successor?**

A relatively limited number of States appear to have taken a public position in favour of Resolutions 1422 and 1487. The United Kingdom stated that ‘resolution 1422 (2002), and now resolution 1487 (2003), are, in our view, consistent with article 16 of the ICC Statute. The Security Council accepted that unanimously on 12 July 2002. It does not undermine the Court; nor does it infringe upon the integrity of the Rome Statute...’<sup>5</sup> On 12 June 2003, on the occasion of the adoption of Resolution 1487, Spain said it did not quarrel with the legality of the resolution: ‘...Spain has unreservedly supported the International Criminal Court. In the matter under discussion, we consider that article 16 of the Rome Statute is mentioned in the resolution adopted today in accordance with the Statute. As a result, we understand that the renewal of the provision in paragraph 1 of resolution 1422 (2002) does not affect the integrity of the Statute...’<sup>6</sup> Pakistan supported the resolution, justifying this as a major sending state of peacekeeping forces.<sup>7</sup> Bulgaria spoke in favour: ‘We believe that support for resolution 1422 (2002) and for the resolution adopted today allows the Council to continue efforts to arrive at a solution that will not undermine the credibility of the ICC and will not affect in any way United Nations peacekeeping operations...’<sup>8</sup>

Several submissions by members of the ILA Committee indicated that their governments had not, to their knowledge, taken a public position on the matter. No particular explanation was given except in the case of the Czech Republic, where it was noted that the State has not yet ratified the Statute and that a public position on these resolutions would not be appropriate under the circumstances. Australia apparently spoke against the idea of such resolutions, in general terms, during the July 2002 session of the ICC Preparatory Commission.

Peru on behalf of the Rio Group (which includes Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela) made a neutral and innocuous statement, stating that the resolution should not be a permanent one.<sup>9</sup> Some other States have made general and rather neutral statements about preserving the integrity of the Court, such as Burkina Faso,<sup>10</sup> Cambodia,<sup>11</sup> Cameroon,<sup>12</sup> and China.<sup>13</sup>

The United States has of course also made statements justifying the resolutions. On 12 June 2003, its representative stated:

Like resolution 1422 (2002), resolution 1487 (2003) exempts States that are not parties to the Rome Statute but that participate in United Nations operations from the ICC’s jurisdiction in a manner consistent with the Charter of the United Nations and with the 1998 Rome Statute. The resolution is consistent with a fundamental principle of international law: the need for a States to consent if it is to be bound. That principle is respected by exempting from ICC jurisdiction personnel and forces of States that are not parties to the Rome Statute. It is worth noting that the resolution does not in any way affect parties to the Court, or the Rome Statute itself. Nor does it, as some today have suggested, elevate an entire category of people above the law. The ICC is not the law.

The provisions of this resolution are as relevant and necessary today as resolution 1422(2002) was a year ago. We all know that United Nations operations are

<sup>5</sup> UN Doc. S/PV.4772, at 22-23.

<sup>6</sup> UN Doc. S/PV.4772, at 25.

<sup>7</sup> UN Doc. S/PV.4772, at 20-21.

<sup>8</sup> UN Doc. S/PV.4772, at 26.

<sup>9</sup> UN Doc. S/PV.4772, at 13-14.

<sup>10</sup> H.E. Ambassador Michel Kafando, Permanent Representative of Burkina Faso to the UN (15 October 2002) 6<sup>th</sup> Committee of the 57<sup>th</sup> session of the UN General Assembly, Agenda Item 158.

<sup>11</sup> H.E. Ambassador. Sun Suon, Deputy Permanent Representative of Cambodia to the UN (15 October 2002) 6<sup>th</sup> Committee of the 57<sup>th</sup> session of the UN General Assembly, Agenda Item 158<sup>c</sup>

<sup>12</sup> UN Doc. S/PV.4772, at 22.

<sup>13</sup> UN Doc. S/PV.4772, at 27.

important if the Council is to discharge its primary responsibility for maintaining or restoring international peace and security. We also all know that it is not always easy to recruit contributors, and that it often takes courage on the part of political leaders to join military operations established or authorized by the Council. It is important that Member States not add concern about ICC jurisdiction to the difficulty of participating...

This resolution represents a compromise that respects the strongly held views of those who support the ICC and the equally strongly held views of those who do not. Such respect is important to maintain. This compromise, therefore, is important to maintain.<sup>14</sup>

In the Sixth Committee, the United States said that '[w]hile sovereigns have the right to try non-citizens who have committed offenses against their citizens or on their territory, the United States has never recognized the right of an international organization to do so absent consent or a UN Security Council mandate and Security Council oversight'.<sup>15</sup>

Most statements from governments on the subject of the controversial resolutions have been highly critical. Some have cited the 'deep injustice' of discrimination between peacekeeping forces from sending States that are parties to the Rome Statute and those that are not.<sup>16</sup> It has been argued that the resolutions seek to modify the terms of the Rome Statute indirectly, without amendment of the treaty.<sup>17</sup> The automatic renewal implication in the resolutions has also been seriously challenged.<sup>18</sup> In the Security Council, during the debate on Resolution 1487, the Netherlands referred to the *travaux préparatoires* to indicate that real intent of the drafters of article 16 of the Rome Statute:

Article 16 reads that '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'. From both the text and the *travaux préparatoires* of this article follow that this article allows deferrals -only on a case by case basis; -only for a limited period of time; -and only when a threat to or breach of peace and security has been established by the Council under Chapter VII of the UN Charter. In our view, article 16 does not sanction blanket immunity in relation to unknown future events. The Secretary-General has followed this line of reasoning before the adoption of resolution 1422 as well. The Netherlands firmly believes that resolution 1422 undermines the letter and the spirit of the ICC and that a repeated renewal is to be rejected. Adoption of this resolution today should not in any way be interpreted as moving in the direction of automatic yearly renewal.<sup>19</sup>

Germany publicly opposed adoption of Resolution 1422. In the public debate on 10 July 2002, Germany stated:

Chapter VII of the United Nations Charter requires the existence of a threat to the peace, a breach of 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 [by adopting the draft Resolution].<sup>20</sup>

With Germany, Canada took one of the most aggressively opposed positions to the resolutions. Canada said that Resolution 1422 set 'a negative precedent' under which the Security Council could change the negotiated terms of any treaty it wished. It said the Resolution would undermine the treaty-making process. Canada also said the Resolution would 'dramatically alter and undermine' the Rome Statute. It noted that article 16 was the product of delicate negotiations, and that it was intended to be available

<sup>14</sup> UN Doc. S/PV.4772, at 23-24.

<sup>15</sup> Mr. Nicholas Rostow, General Counsel, US Mission to the United Nations, 6<sup>th</sup> Committee of the 57<sup>th</sup> session of the UN General Assembly, Agenda Item 158, 14-15 October, 2002).

<sup>16</sup> Uruguay, 12 June 2003.

<sup>17</sup> 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 2.2002.747 currently under consideration by the Security Council under the agenda item Bosnia-Herzegovina, 12 July 2002, UN Doc. S/2002/754.

<sup>18</sup> UN Doc. S/PV.4772, at 8-9.

<sup>19</sup> UN Doc. S/PV.4772, at 20.

<sup>20</sup> UN Doc. S/PV.4568 (Resumption 1), 10 July 2002, 9. See "Erklärung von Bundesaußenminister Joschka Fischer zur Entscheidung des VN-Sicherheitsrates vom 12.07. 2002, erschienen am 13.07.2002", available under: <http://www.auswaertiges-amt.de>.

to the Security Council on a case by case basis. Canada added: 'Most states were opposed to any Security Council interference in ICC action, regarding it as inappropriate political interference in a judicial process.' Canada attacked the suggestion, implicit in the resolution, that upholding the ICC was in some way a threat to international peace and security.<sup>21</sup>

Syria, on behalf of Arab countries, stated: '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.'<sup>22</sup> In the Security Council during debate on Resolution 1487, Syria said:

The Syrian Arab Republic does not see any necessary justification for renewing resolution 1422 (2002) this year...Our vote this year is based on the conviction that articles 16 and 17 of the Rome Statute respond to the preoccupations and problems involved in the renewal of resolution 1422 (2002)... Eleven months have passed since the adoption of resolution 1422 (2002), without any need arising that requires the reaffirmation of the importance of continuing to give permanent immunity to peacekeeping forces of those States that are not parties to the International Criminal Court from coming before the Court and having its Statute implemented against them.

Secondly, we are fully confident that peacekeeping forces and those working in international forces established by the Security Council for the maintenance of international peace and security in many parts of the world are assumed to be above all form of suspicion vis-à-vis crimes that come under the jurisdiction of the ICC as war crimes or crimes against humanity or genocide...

Thirdly, when resolution 1422 (2002) was adopted last year, the ICC was in its first days of establishment...The Court has become almost universal, since the number of States ratifying the Rome Statute has reached 90 and there are 140 signatory States. Hence, we believe that the adoption of this resolution would result in the gradual weakening of the Court's role in prosecuting those who have perpetrated the most heinous crimes that come under its jurisdiction...

Fourthly, we have full confidence in international criminal justice...<sup>23</sup>

The Heads of State or Government of the Non-Aligned Movement 'observed with concern actions geared at establishing a process to grant immunity to the members of the United Nations established or authorised peacekeeping operations. These actions seriously affect treaty law, are not consistent with the provision of the Rome Statute and severely damage the Court's credibility and independence.'<sup>24</sup>

Finally, it is useful to refer to the remarks of the Secretary-General:

In making this decision, you will again rely on article 16 of the Rome Statute. I believe that that article was not intended to cover such a sweeping request, but only a more specific request relating to particular situation... "I accept that [the Council] is acting in good faith...I wish to place on record, however, that, in addition to my concern about its conformity with article 16 of the Rome Statute, I do not believe this request is necessary... Allow me to express the hope that this does not become an annual routine. If it did so, I fear the world would interpret it as meaning that this Council wished to

<sup>21</sup> Statement made at a Special Plenary as part of the 10<sup>th</sup> Preparatory Commission for the International Criminal Court, convened to discuss the proposals before the Security Council with regard to immunity for peacekeepers on 3 July 2002, unofficial record prepared by the NGO Coalition for the International Criminal Court.

<sup>22</sup> Statement made at a Special Plenary as part of the 10<sup>th</sup> Preparatory Commission for the International Criminal Court, convened to discuss the proposals before the Security Council with regard to immunity for peacekeepers on 3 July 2002, unofficial record prepared by the NGO Coalition for the International Criminal Court.

<sup>23</sup> UN Doc. S/PV.4772, at 25-26.

<sup>24</sup> Excerpt on the ICC and UNSC res. 1422 from the Final Document adopted by the Non-Aligned Movement (NAM) at its 2003 meeting of Heads of States & Governments held in Kuala Lumpur, Malaysia, 25 February 2003.

claim absolute and permanent immunity for people serving in the operations it establishes or authorizes. And if that were to happen, it would undermine not only the authority of the ICC but also the authority of this Council, and the legitimacy of United Nations peacekeeping.<sup>25</sup>

## 1.2 Do you consider that Resolution 1422 *et al.* are consistent with article 16 of the Rome Statute?

Most members of the ILA Committee consider that Resolutions 1422 and 1487 are inconsistent with article 16 of the Rome Statute, and constitute a misuse of the provision. To the extent that the actual text of article 16 may allow for differing interpretations, the *travaux préparatoires* of article 16 make clear that resolutions 1422 and 1487 were certainly not contemplated by the drafters. The provision was intended to deal with a concrete situation in which article 39 of the *Charter of the United Nations* would apply, thereby permitting some justification for the Security Council to intervene and, in effect, temper the need for justice with the imperatives of international peace and security. The view that the case by case application is the correct interpretation of article 16 gains support from the references to the intention of the drafters in statements made at the tenth session of the Preparatory Commission for the Establishment of the ICC, the letter of Kofi Annan to United States Secretary of State Colin Powell, and the open meeting of the Security Council held on 10 July 2002.<sup>26</sup>

Several members noted that inconsistencies between the impugned resolutions and article 16 reinforced the argument that this was never intended by article 16. María del Luján Flores from Uruguay noted that article 16 authorised the Security Council to ask the Court to discontinue any investigation or prosecution already started, but that it did not empower the Court to ask not to start procedures, which is the import of Resolution 1422.<sup>27</sup> Pavel Sturma of the Czech Republic observed that the resolutions, including Resolution 1497 to some extent, were ‘incompatible *ratione temporis* because the Security Council resolutions intend to prevent the ICC from taking any steps in advance, when any crimes under consideration have not even been committed. This does not seem to be in conformity with the text and drafting history of article 16.’ Young Sok Kim of South Korea observed that ‘article 16 of the Rome Statute was intended to cover a concrete case, not to give a blanket immunity’. These views were shared by many members of the Committee.

Considering the issue of the intent of the drafters of the Rome Statute, it was observed that article 16 was included in the Rome Statute so that the Security Council would not be impeded in attempting to restore international peace and security by cases the ICC was investigating or prosecuting. The intent was to permit to defer justice in such cases in order to achieve peace. During the political debates, some States focussed on a technical argument, namely that Resolution 1422 does not refer to a breach of the peace.<sup>28</sup>

Article 16 was a substantial modification of what had originally been proposed by the International Law Commission, in 1994. Article 23 of the ILC draft stated that ‘no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the SC as a threat to or breach of peace or an act of aggression under Chapter VII of the Charter, unless the SC otherwise decides’. Over the four-year negotiating process, this was substantially altered

<sup>25</sup> QExcerpts from the Public Meeting at the United Nations Security Council on the Renewal of Resolution 1422, 12 June 2003, [Note: This is an unofficial record of the statements made at the Public Meeting of the Security Council on 12 June 2002, prepared by the NGO Coalition for the International Criminal Court.]

<sup>26</sup> See, for example: 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).

<sup>27</sup> For further reading on this, see: A. Zimmermann, ‘Acting under Chapter VII (...)’ - Resolution 1422 and Possible Limits of the Powers of the Security Council, in: J.A. Frowein et al. (eds.), *Negotiating for Peace – Liber Amicorum Tono Eitel* (2003) p. 253 et seq.; C. Kreß, *Der Internationaler Strafgerichtshof und die USA – Hintergründe der Sicherheitsratsresolution 1422*, *Blätter für deutsche und internationale Politik* 2002, p. 1087 et seq.; C. Stahn, *The Ambiguities of Security Council Resolution 1422* (2002), <http://www.ejil.org/journal/new/new0210-01.html>, J. Herbst, *Immunität von Angehörigen der U.S.-Streitkräfte vor der Strafverfolgung durch den IStGH? Zur Resolution 1422 (2002) des UN-Sicherheitsrates vom 12. Juli 2002*, *EuGRZ* 2002, S. 581 ff.

<sup>28</sup> e.g., Germany: UN Doc. S/PV.4568 (Resumption 1), 10 July 2002, 9.

to reflect concerns that it would make the Court far too dependent upon the Security Council. As Andreas Zimmermann and Karin Oellers-Frahm of Germany noted,

First, the drafting history of Art. 16 of the Rome Statute shows that this provision, as adopted, was not meant to automatically exclude cases from the jurisdiction of the International Criminal Court which are concurrently being dealt with by the Security Council under Chapter VII. Thus as a result, the absence of jurisdiction of the Court with regard to the Security Council – as constituting an exception – must be construed narrowly. On contrast thereto, Resolution 1422, by providing that the Security Council expresses its “intention to renew the request (...) under the same conditions each 1 July for further 12- month periods for as long as it may be necessary”, rather provides for a general exclusion without requiring a case by case determination of the Security Council.

Besides, the very reference to Chapter VII of the United Nations Charter in Art. 16 itself envisages a concrete situation where an ongoing conflict poses a threat to the peace, or constitutes a breach of the peace or an act of aggression and where an investigation or prosecution by the International Criminal Court would then limit the Security Council’s ability to maintain or restore international peace and security. In contrast thereto, Resolution 1422 instead provides for a generalized approach not contemplated by Art. 16.

Doubts concerning the consistency of Resolution 1422 with Art. 16 of the Rome Statute might also arise due to the fact that a general proposal to exclude Security Council mandated operations from the jurisdiction of the ICC was not included in the Statute.<sup>29</sup> Such proposal did however not find support but instead encountered serious objections by the vast majority of States participating in the negotiations.<sup>30</sup>

During the meeting of the Committee, attention was also devoted to resolution 1497, which had not been addressed by the reports, because it was so recent. Resolution 1497 does not refer to article 16, leaving unanswered the question as to whether it is an attempt to invoke its provisions. Some have asked why article 16 is necessary at all, if the Security Council is empowered to intervene to frustrate jurisdiction of certain tribunals, as it has done in Resolution 1497. The answer would seem to be that article 16 is necessary because Security Council resolutions speak to States, not international organisations like the International Criminal Court. Article 16 is therefore required in order to ensure that the Court complies with relevant Security Council resolutions.

A few members of the ILA Committee consider that Resolutions 1422 and 1487 are ‘generally consistent’ with article 16 of the Statute. Arguments about the consistency of the impugned resolutions with article 16 of the Rome Statute generally rely upon both a textual interpretation of the provision and reference to the intent of the drafters. Christopher Ward of the Australian branch and Charles Garraway of the United Kingdom focussed on the text of article 16, describing it as the ‘ambiguous’ result of a drafting process that quite intentionally left certain questions unresolved.

### **1.3 Do you consider that Resolution 1422 *et al.* are within the powers of the Security Council pursuant to the Charter of the United Nations?**

The answers to this question flow from those of the previous one. Several members of the Committee, most of whom were opposed to the resolutions, nevertheless considered that the Security Council had the authority to adopt them. Arguments here relied on the threat to international peace and security posed by the threat of the United States to veto peace support operations. The debate is not one concerning the text of article 16, as it does nothing to define the powers of the Security Council, which are established by the Charter of the United Nations alone. Apart from the Charter, the only limitation on Security Council powers would appear to be peremptory norms of international law, which even the Charter cannot violate.

<sup>29</sup> See UN Doc. A/AC.249/1998/L.13, Art. 26.

<sup>30</sup> See in that regard UN Doc. A/AC.249/1998/L.13, note 124 according to which “[t]here were widespread doubts about the contents (...) of this paragraph.”

According to Adriaan Bos, Bert Swart and Alfons Orije, ‘one may conclude that a threat to the peace in the sense of article 39 seems to be whatever the Security Council says is a threat to the peace, which is a political decision and as a matter of principle not easily subject to legal evaluation’.<sup>31</sup>

But several members, echoing views expressed in the political bodies, noted that the Security Council was not empowered to modify treaties in force between sovereign States. Pavel Sturma wrote:

It is at least arguable that Resolutions 1422 et al. are *ultra vires*, because the conditions provided in Chapter VII were not fully met. The SC did not determine the existence of any threat to the peace or other grounds under Art. 39 (and indeed could hardly do so, as at the moment of the adoption of the said resolution there was no such situation, in particular in respect of any investigation over any members of any troops established or authorized by the UN Security Council). Chapter VII does not seem to give to the SC the powers to make law (*i.e.*, binding resolutions) *in abstracto*, without any limits and links to situations which endanger international peace and security.

The Parliamentary Assembly of the Council of Europe described resolutions 1422 and 1487 as *ultra vires*.<sup>32</sup>

Andreas Zimmermann and Karin Oellers-Frahm made a strong case for the illegality of the resolutions:

In Resolution 1422, no determination in the sense of Art. 39 of the Charter of the United Nations has been made. Even if one takes the position that no formal determination has to be made by the Security Council as to the existence of a threat to the peace, breach to the peace or act of aggression to be included in the Resolution under consideration, such situation must nevertheless still objectively exist. The very existing of such a situation is however – to say the least – more than doubtful with regard to Resolution 1422. Furthermore, even if one was to agree – *arguendo* – that the threat to the continuation of the peacekeeping mission in Bosnia and Herzegovina by SFOR did indeed constitute an Art. 39 situation, it has to be noted it was the US itself which had brought about that situation by its threat to eventually veto any further extension of the respective mandate.

Besides in Resolution 1422 the Security Council simply determines that

‘... it is in the interests of international peace and security to facilitate Member State’s ability to contribute to operations established or authorized by the United Nations Security Council.’

Such determination is however not equivalent to a positive determination of the existence of a situation prescribed by Art. 39 of the United Nations Charter.

Even if there is no requirement of a formal determination by the Security Council, several members of the Committee noted that there must still exist the objective conditions enabling the Security Council to invoke Chapter VII, and these were not present when the impugned resolutions were adopted.

Árpád Prandler of Hungary said that he could not agree that it was correct to describe the resolutions as being *ultra vires* the Security Council. Responding to the argument that no determination in the sense of article 39 of the Charter was made by the Council, he noted that ‘the Council, when it acts under Chapter VII of the Charter, is not obliged to make, in each case, a determination under Article 39. It should be recalled that, especially, during the last ten to fifteen years, the Council acting under Chapter VII has established a great number of peacekeeping operations without referring to and/or singling out Article 39.’

With recent developments in international criminal law, it may be argued that the powers of the Security Council to interfere with international justice are implicitly limited, by virtue of a form of

<sup>31</sup> Referring to: Akehurst, *Modern Introduction to International Law*, 7th revised edition, p. 426

<sup>32</sup> Provisional Edition, *Threats to the International Criminal Court*, Resolution 1336 (2003)(1). Assembly debate on 25 June 2003 (20th Sitting) (see Doc. 9844, report of the Committee on Legal Affairs and Human Rights, rapporteur: M. Marty). Text adopted by the Assembly on 25 June 2003 (20th Sitting). Available at: [www.iccnw.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25june03Eng.doc](http://www.iccnw.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25june03Eng.doc)

'separation of powers' doctrine. In the past, when there was no prospect of international prosecution, the only real basis for intervention by the international community was political. The Council adopted measures under Chapter VII that were essentially political because there was no alternative. But international law and international institutions have evolved considerably in recent years. The previously almost unlimited power of the Security Council ought now to be balanced with other prerogatives, such as the need to preserve the independence and integrity of international criminal justice initiatives. Although the concept had been afloat for several years, the delegates to the San Francisco Conference did not contemplate a permanent international criminal court as an operative part of the post-war international system, and it is therefore not surprising that the problem is not addressed expressly in the *Charter*. But the landscape has evolved, and with the existence of the International Criminal Court it is absolutely essential that international political and legislative bodies ensure that they do not encroach upon international justice. The Security Council must now apply its mandate in such a way as to enhance and promote newer institutions, even if they have been established outside the framework of the Charter itself. From this standpoint, interference with the operations of the International Criminal Court (the case with resolutions 1422 and 1487) and with international justice more generally (Resolution 1497) amounts to a very unsettling attempt by a fundamentally political institution to distort the operations of international criminal justice.

#### 1.4 If Resolution 1422 *et al.* are illegal (or *ultra vires*), what if any is the consequence?

This question raises the issue of the body competent to rule on the authority of the Security Council, if any exists. The International Court of Justice has not definitively pronounced itself on the validity of Security Council resolutions, and has acted upon a presumption of validity.<sup>33</sup> However, the separate and dissenting opinions of judges indicate that controversy persists on this point. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia considered itself entitled to sit in a form of judicial review of Security Council resolutions, but on the rather special basis that it was necessary to do this in order to rule on its own *compétence de la compétence*.<sup>34</sup>

The basic argument against allowing the International Court of Justice from sitting in review of Security Council resolutions is based on the logic and structure of the Charter of the United Nations. It establishes several principal organs, including both the Security Council and the International Court of Justice, and does not contemplate the prospect of one body sitting in review of the other. As the International Criminal Court is not an organ of the United Nations, and sits outside this structure, the argument does not apply. The view that the International Criminal Court itself could effect a form of 'judicial review', assuming jurisdiction despite a Security Council resolution, was widely held by members of the ILA Committee.

Invoking article 103 of the Charter of the United Nations, Árpád Prandler disagreed that the ICC could effect a form of judicial review of Security Council determinations. He added that there is nothing in the ICC Statute to suggest the authority to sit in judicial review of the Council. As a participant in the drafting process, he said he cannot recall any proposal to substantiate a thesis authorising judicial review.

Charles Garraway felt the matter would be resolved pragmatically, expressing the 'doubt that either the ICC itself or the ICJ would be particularly willing to rule upon the issue and in the absence of a legal challenge, the consequences will be nothing. For the ICC to "pick a fight" with the US at this stage of its development would cast severe doubts on its long term viability.'

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<sup>33</sup> Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. US; Libya v. UK) Provisional Measures. ICJ. Report 1992; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia (Serbia & Montenegro). Requests for Provisional Measures I.C.J. Report 1993 and Case mentioned in footnote 6. The Court held that the request was outside the scope of article 41 Of the Statute of the ICJ since it asked for a declaration of rights and not for steps to be taken for the preservation of rights.

<sup>34</sup> "Strengthening the Role of the Court as the Principal Judicial Organ of the UN." Page 277. In: "Increasing the Effectiveness of the International Court of Justice." Edited by Connie Peck and Roy S. Lee. Martinus Nijhoff Publishers/Unitar.

Andreas Zimmermann and Karin Oellers-Frahm suggested that States parties to the Rome Statute that supported the Security Council resolutions might be in breach of their obligations under the Statute.<sup>35</sup> In this context, they point to article 26 of the Vienna Convention on the Law of Treaties by which contracting parties to a treaty are under an obligation to perform their obligations under such treaty in good faith and to abstain from such acts that would put into jeopardy the object and purpose of the treaty. They said that this obligation encompasses the obligation not to take action in international organizations which run counter to the treaty they had previously entered into, *i.e.* in the case at hand the statute of the International Criminal Court.

Related to this question is the suggestion that States parties to the Rome Statute – as well, presumably, as all other States – might consider that they are not bound by an illegal resolution. Determination of the legality of the resolution is important because article 25 of the Charter of the United Nations requires Member States to accept and carry out those decisions of the Security Council adopted in accordance with the Charter.<sup>36</sup> Reference was made to the authoritative Commentary on the Charter edited by Bruno Simma et al., in which Frowein and Krisch note that ‘Resolutions that cannot be considered as adopted under Chapter VII ... for lack of the necessary determination ... do not create binding effects for states’.<sup>37</sup> During the Security Council debate, the Canadian Permanent Representative said adoption of the Resolution ‘could place Canada in the unprecedented position of having to examine the legality of a Security Council resolution’.<sup>38</sup>

Certainly, the prospect of criminal courts, be they national or the ICC itself, finding themselves required to address the legality of the Security Council resolutions cannot be excluded. This would be the case, for example, in the event of a request by the Prosecutor of the ICC for surrender of a member of the United States armed forces, for example, in a scenario where alleged crimes took place on the territory of a State party, or where the individual had dual nationality, including the nationality of a State party in addition to United States nationality. In the case of Resolution 1497, a situation where a national prosecutor attempts to proceed with prosecution of grave breaches of the Geneva Conventions in accordance with universal jurisdiction can also be imagined. The court would need to address whether the rule established in Resolution 1497 by which prosecutions of affected personnel can only take place in the sending state is in fact properly within the powers of the Security Council, and legally superior to either national legislation or to the grave breach provisions of the Geneva Conventions.<sup>39</sup>

<sup>35</sup> This includes Mauritius, Norway, Bulgaria and Ireland, but in particular France and the United Kingdom, who by their veto could have prevented the Council from adopting Resolution 1422. Besides, Mexico, the Russian Federation, Syria, Cameroon, Colombia and Guinea have signed the Statute and were thus at least under an obligation not to frustrate object and purpose of the treaty, see Art. 18 lit. a) of the Vienna Convention on the Law of Treaties.

<sup>36</sup> ICJ Rep. 1971, p. 54. This view is, *inter alia*, also confirmed by Art. 2, para. 5 of the Charter, which confirms that member States shall only provide assistance for those actions taken by the organization *in accordance with the Charter*; for further detailed arguments see *e.g.* E. de Wet, *Judicial Review of the United Nations Security Council by the International Court of Justice: an analysis of mechanisms for determining the limits to the powers of the Security Council under Chapter VII of the United Nations Charter* (forthcoming), Ch. 3, 6.

<sup>37</sup> Frowein and Krisch, “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”, in Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed. 2002, 727.

<sup>38</sup> Statement made at a Special Plenary as part of the 10<sup>th</sup> Preparatory Commission for the International Criminal Court, convened to discuss the proposals before the Security Council with regard to immunity for peacekeepers on 3 July 2002, unofficial record prepared by the NGO Coalition for the International Criminal Court

<sup>39</sup> During the Security Council debate on Resolution 1497, France stated: ‘We do not believe that the scope of the jurisdictional immunity thus created is compatible with the provisions of the Rome Statute of the International Criminal Court, the norms of French law or the principles of international law...’ Similarly, Germany declared: ‘Paragraph 7 goes far beyond what the Council decided just a few weeks ago in resolution 1487 (2003), on which we abstained. Paragraph 7 not only limits the jurisdiction of the International Criminal Court (ICC), it goes beyond that. It limits national jurisdiction of third countries with respect to crimes committed by members of the multinational force or a United Nations stabilization force if that member is the national of a State not party to the Rome Statute of the ICC. Therefore, it is our view that the proposed paragraph would prevent prosecutors in States that may have to exercise jurisdiction over crimes committed against their nationals abroad from investigating and prosecuting those crimes. In practical terms, for our legal system that would mean that if a German were killed in Liberia, no German court could prosecute the perpetrator. The second point is that prosecuting what we consider to be international crimes, such as trafficking in human beings — trafficking in women —

**1.5 Do Resolution 1422 *et al.* pose problems of legal interpretation, for example, and more specifically, the phrase ‘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....’?**

Several possible problems of interpretation have been identified. First, it is necessary to determine the scope of the phrase ‘a United Nations established or authorized operation’. It appears that the resolutions cover not only Chapter VII operations, but also traditional peacekeeping operations as well as action by regional organizations authorized under Chapter VIII read in conjunction with Chapter VI. There was general agreement that military actions taken on the basis of article 51 would not however be covered. For example, they would not apply to the occupying forces in Iraq, at least for the period prior to 16 October 2003, when Security Council Resolution 1511 was adopted. It appears to ‘authorise’ the presence of international forces in Iraq and might therefore fit the occupying forces within the ambit of Resolution 1487.

The term ‘relating to’ probably extends beyond the mission itself but also to action taken to support the mission, such as evacuation of peacekeeping troops, even if not strictly speaking within the mandate granted by the Security Council. Max du Plessis of South Africa observed that ‘relating to’ is particularly broad and could conceivably exempt from legitimate investigation and, where warranted, prosecution, a range of activities so wide as to include planning, training, or even the provision of logistics and intelligence to an operation.

According to Andreas Zimmermann and Karin Oellers-Frahm, the term ‘current or former officials or personnel’ seems to refer not only to those individuals currently forming part of a Security Council mandated operation, but that the immunity granted *rationae temporis* extends beyond the actual mandate of a peacekeeping of Chapter VII operation. For Max du Plessis, ‘[a]rguably an interpretative problem could arise where a *former* official or personnel member *now* commits a core crime; that is, the former official who by his previous official status was *then* covered by Resolution 1422’s grant of immunity continues *now* to enjoy the immunity provided by Resolution 1422 even though his acts were committed after he lost that official status.’

Young Sok Kim warned that ‘The fact the Resolution 1422 includes the phrase “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...” may encourage the major contributing states not to join the Rome Statute. Thus, it may give bad effect on the universality of the ICC.’

## II. Article 98 Agreements

Article 98 of the Rome Statute, entitled ‘Cooperation with respect to waiver of immunity and consent to surrender’, reads:

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

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piracy or other international crimes, under Germany law by any German court, regardless of where the crimes are committed and by whom, would not be possible. We feel that the purpose of that paragraph could have been met by concluding a bilateral status of forces agreement, as has been done in previous instances and in other peacekeeping operations. There is no precedent for that. There is no reason to limit the national jurisdiction of third countries.’ Mexico said: ‘Paragraph 7, to which Mexico has an objection, would set a serious precedent by doing away with the prerogatives of States whose legislation provides for the exercise of criminal jurisdiction in cases where crimes are committed against their nationals abroad. Mexico cannot support that; it is in specific contravention of our laws: article 4 of Mexico’s penal code clearly establishes that crimes committed abroad by a foreigner against a Mexican shall be prosecuted in Mexico, provided that the accused has not been the accused of a definitive trial in the country in which the crime occurred.’ See: UN Doc. S/PV.4803.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

In 2002, the United States began a campaign of requesting States, both States parties to the Rome Statute and non-States parties, to make bilateral agreements pursuant to article 98(2) sheltering nationals and sometimes even certain non-nationals from the co-operation regime of the Court. They have been christened 'bilateral impunity agreements' or 'BIAs'. According to the Coalition for an International Criminal Court, as of 31 October 2003 some sixty such agreements have been signed, and twelve ratified.<sup>40</sup> There have been four 'executive agreements' along similar lines. Thirty-one States parties have not signed, despite loss of United States aid. Thirty-three States have publicly refused to sign such agreements.

### **2.1 Has your State reached such an agreement with the United States?**

Christopher Ward of Australia reported on statements in the Australian parliament that suggest negotiations taking place, but no public timetable for those negotiations has been released; nor has a draft text. In the Sixth Committee discussions, in 2002, the Australian representative said:

Australia, while fully supporting the ICC, acknowledges that some States have chosen not to become Parties to the Statute. Australia believes States Parties should take what steps they can to ensure such States are able to accommodate the Court's existence... Like others, Australia has been approached by the United States to conclude a bilateral agreement, under Article 98(2) of the Statute, to prevent the surrender of certain U.S. citizens to the Court without consent. Australia is carefully considering this request. While the approaches of Australia and the United States to the ICC differ, Australia understands the concerns of the United States to protect its citizens from politically-motivated prosecutions in the ICC. At the same time, should Australia conclude an Article 98(2) Agreement with the U.S., the Government of Australia would ensure that its scope and operation were consistent with the ICC Statute, mindful that the Statute itself allows States the primary opportunity to investigate and, if necessary, prosecute their own citizens.<sup>41</sup>

Margarit Ganev reported that Bulgaria was about to sign such an agreement, but changed its mind when it became a candidate for membership in the European Union. Currently it seems Bulgaria is going to comply with the European Union position and refuse to sign an agreement or bind in other possible way with the United States.

### **2.2 Has your State refused to reach such an agreement, or in some other way contested or challenged the phenomenon?**

The Council of the European Union adopted a common position on article 98 agreements in its Conclusions and Guiding Principles of 30 September 2002. The essence of these guidelines is that such agreements are allowed under Article 98(2) of the Statute provided that they comply with the following basic principles:

- They must only cover persons who are not nationals of a State Party;

<sup>40</sup> The following countries have reached such agreements with the United States: Botswana, Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Ivory Coast/Cote D'Ivoire, Madagascar, Malawi, Mauritania, Mauritius, Mozambique, Rwanda, Senegal, Seychelles, Sierra Leone, Togo, Uganda, Zambia, Antigua and Barbuda, Bolivia, Colombia, Dominican Republic, El Salvador, Guyana, Honduras, Nicaragua, Panama, , Bahrain, Israel, Tunisia, Afghanistan, Bangladesh, Bhutan, Cambodia, East Timor, India, Maldives, Mongolia, Nepal, Pakistan, Philippines, Sri Lanka, Thailand, Albania, Azerbaijan, Bosnia-Herzegovina, Georgia, Kazakhstan, Macedonia, FYR, Romania, Tajikistan, Uzbekistan, Marshall Islands, Micronesia, Nauru, Palau, Solomon Islands, Tuvalu, Tonga.

<sup>41</sup> Mr. Richard Rowe, Advisor, Australian Mission to the UN (15 October 2002) 6<sup>th</sup> Committee of the 57<sup>th</sup> session of the UN General Assembly, Agenda Item 158.

- They must have operative provisions to ensure that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy immunity;
- They should cover only persons officially “sent” by the State in question on government business; it cannot cover all that State’s citizens.

The Guiding Principles read as follows:

- Existing agreements: Existing international agreements, in particular between an ICC State Party and the United States, should be taken into account, such as Status of Forces Agreements and agreements on legal cooperation on criminal matters, including extradition;- The US proposed agreements: Entering into US agreements – as presently drafted – would be inconsistent with ICC States Parties’ obligations with regard to the ICC Statute and may be inconsistent with other international agreements to which ICC States Parties are Parties;
- No impunity: any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity. Such provisions should ensure appropriate investigation and – where there is sufficient evidence - prosecution by national jurisdictions concerning persons requested by the ICC;
- Nationality of persons not to be surrendered: any solution should only cover persons who are not nationals of an ICC State Party;
- Scope of persons:
  - Any solution should take into account that some persons enjoy State or diplomatic immunity under international law, cf. Article 98, paragraph 1 of the Rome Statute.
  - Any solution should cover only persons present on the territory of a requested State because they have been sent by a sending State, cf. Article 98, paragraph 2 of the Rome Statute.
  - Surrender as referred to in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3 of the Rome Statute.
  - Sunset clause: The arrangement could contain a termination or revision clause limiting the period in which the arrangement is in force.
  - Ratification: The approval of any new agreement or of an amendment of any existing agreement would have to be given in accordance with the constitutional procedures of each individual state.<sup>42</sup>

Germany’s rather lukewarm attitude to the guidelines was discussed by Andreas Zimmermann and Karin Oellers-Frahm in their report to the Committee:

The German interpretation ... referred to the fact that the Conclusions do constitute a compromise. The German interpretation emphasises in particular the core obligation of State Parties of the Rome Statute to cooperate with the Court as specified in Part 9 of the Statute, insofar as the Conclusion deals with the US request for special bilateral non-surrender agreements. With a view to signatory States of the Rome Statute Germany points out that “they must interpret the EU Council Conclusion in full conformity with their obligation to “refrain from acts which would defeat the object and purpose” (Article 18 of the Vienna Convention on the Law of Treaties) of the Rome Statute, the principle of full cooperation with the Court as specified in Part 9 of the Statute being a centrepiece of the object and purpose of the Rome Statute.” The German interpretation also refers to the fact that the overwhelming majority of EU Member States are apparently opposed to special bilateral non-surrender agreements excluding a specific group of persons from cooperation with the ICC.

During the presentation of the EU Conclusions, German Foreign Minister, Mr Joschka Fischer, has ruled out the conclusion by Germany of a special bilateral non-surrender

<sup>42</sup>

ANNEX: EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, Council Of Europe Draft Council Conclusions on the ICC. Brussels, 30 September 2002. Available at: <http://www.iccnw.org/documents/declarationsresolutions/intergovbodies/EUConclusions30Sept02.pdf>

agreement with the US. With regard to the EU Conclusions he stated: "We would have wished a clear rejection of the agreements. Thanks to the 'Principles' we are very close to that." <sup>43</sup>

Besides, the German interpretation states "that any State Party to the Rome Statute (or, for that matter, any signatory State bound by Article 18 of the Vienna Convention on the Law of Treaties) which concluded such an agreement would act in breach of its obligations under the Rome Statute."

In a common position on the International Criminal Court adopted on June the 16<sup>th</sup> 2003 (doc.10400/03 CFSP), the member States of the European Union again referred to the Council Conclusions of 30 September 2002 on the International Criminal Court and to the EU Guiding Principles annexed thereto.

Bert Swart reported that the view of the Dutch government is 'for all practical purposes, identical to that of the European Union'.<sup>44</sup> He added:

It has been argued by non governmental organizations that Article 98, paragraph 2, of the ICC Statute rules out any new agreement between States Parties or between these States and third States in which restrictions on the duty to cooperate with the ICC are included, regardless of the nature and the scope of those restrictions. The EU Guiding Principles do not adhere to this point of view, nor does the Dutch government. We agree with the Joint Opinion of Crawford, Sands and Wilde that Article 98 leaves room for concluding new international agreements between States which allow the Contracting Parties to continue to make use of traditional forms of interstate cooperation that serve perfectly legitimate aims which, however, cannot always be achieved without indirect restrictions on the duty to cooperate with the ICC.<sup>45</sup> We also agree with the three experts in international law that new international agreements should, however, include provisions ensuring that persons who have committed crimes under general international law do not enjoy impunity. The EU has made this one of its Guiding Principles.

Another Guiding Principle adopted by the EU is that Article 98 agreements should not cover persons who are nationals of an ICC State Party. Why the restriction? This Guiding Principle can probably explained by the fact that, pursuant to Article 12, paragraph 2 (b), of the Statute, the ICC has jurisdiction over crimes committed by nationals of the States Parties to the Statute. Now that the ICC has jurisdiction over crimes committed by nationals of States Parties, nothing seems more natural and self-evident than an unconditional obligation for States Parties to surrender to the ICC their own nationals as well as nationals of other States Parties. It is also relevant to note here that Part 9 of the Statute does not permit States Parties to refuse to surrender their own nationals.

Meanwhile, one has to realize that, traditionally, persons belonging to the (armed) forces of a State who are performing their duties on the territory of another State do not always have the nationality of the State to whose forces they belong. The same is, perhaps to a larger extent, true for family member of these persons or for civilian personnel accompanying a force. In matters of criminal jurisdiction, traditional agreements on the status of military forces rarely, if ever, distinguish between persons according to their nationality. On the contrary, the decisive factor is whether or not a person "belongs" to, or has any other relevant connection with, a force of the sending State. As a consequence, this Guiding Principle of the EU deliberately deviates from existing international practices with regard to the legal status of military forces of a State on the territory of another State. As far as we are concerned, however, this departure from existing international practices is warranted by the necessity to support the ICC in its activities.

The third EU Guiding Principle to be discussed here has regard to transit of persons over the territory of a State Party to the Statute. According to the EU, "surrender as referred to

<sup>43</sup> See for this the German interpretation of the Conclusion.

<sup>44</sup> See the letter of the minister of foreign affairs, *supra* note 5, p. 4.

<sup>45</sup> See [www.iccnw.org](http://www.iccnw.org).

in Article 98 of the Rome Statute cannot be deemed to include transit as referred to in Article 89, paragraph 3, of the Rome Statute". Apparently, this Guiding Principle requires Member States of the EU to include in future agreements they might wish to conclude with States not Parties to the Statute a provision enabling them to give their consent to transit over their territory of a national of that State who has to be surrendered by a third State to the Court. Or they should, at the least, not conclude agreements which would, among other things, oblige them to refuse transit. This Principle seems to us to be a sensible one which may eliminate sudden surprises in the application of future agreements.

The language used in formulating this Principle suggests that it may also have been meant to provide help for the interpretation of already existing status of forces agreements. In our view, however, there is no need for such a clarification of existing international instruments. It is, for instance, all too obvious that a person who belongs to the forces of a State not Party to the Statute and whose transit over the territory of a State Party has been requested by the ICC, cannot be considered to enter or to remain on the territory of that State as a consequence of having been "sent" there by the State to whose forces that person belongs. This situation should not be confused with the one in which a person who belongs to the forces of a State not Party to the Statute and who has been sent by that State to a third State, is, within the framework of his official duties, transiting through the territory of a State Party. This might, depending on the content of a status of forces agreement between the two States, be a situation in which the ICC may not proceed with a request for surrender of the person by the State Party on whose territory that person is transiting.

Finally, what could be said of the two status of forces agreements to which the Netherlands has recently adhered and that have already been discussed above? As far as the Afghanistan Military Technical Agreement is concerned, it involves the Netherlands as a sending State only, and not as a receiving State. The same is not true for the 2001 Agreement on a Multinational Stand-by High Readiness Brigade concluded between Denmark, Italy, the Netherlands, Romania and Sweden.

Pursuant to the Afghanistan Military Technical Agreement Afghanistan may not, in its capacity as a receiving State, surrender a person to the ICC without the consent of the sending State. This does not in any way detract from the duty of the Netherlands to satisfy a request of the ICC for the surrender of a person who belongs to its forces. The EU Guidelines are not applicable here. The rather unpleasant aspect of the MTA, however, is that other Parties sending troops to Afghanistan may well use the MTA in order to prevent members of their forces from being surrendered to the ICC. Does this make adherence of the Netherlands to the MTA illegitimate? We do not believe so.

The second status of forces agreement recently concluded by the Netherlands with other States is an agreement to which only States that have become parties to the Statute of the ICC are parties. Here, one may presume that all parties to the agreement will live up to their obligations under the Statute. There is, therefore, no pressing need for incorporating the EU Guiding Principles in the agreement. The fact that one of the five Contracting Parties has also concluded an Article 98 Agreement with the United States and that this agreement is definitely not in harmony with the EU principles, is irrelevant in this respect.

Pavel Sturma from the Czech Republic reported: 'Since the Czech Rep. has not yet ratified the Rome Statute, it is for it easier to refuse such an agreement, at least for the time being. As a forthcoming Member State of the European Union, the Czech Rep., when and if such an agreement becomes politically unavoidable, will follow the EU Guiding Principles concerning Arrangements between a State Party to the Rome Statute of the ICC and the United States Regarding the Conditions to Surrender of Persons to the Court.'

María del Luján Flores of Uruguay reported on an approach made by the United States. A declaration was made by the International Affairs Commission of the Chamber of Representatives of Uruguay. It was resolved by unanimity that Uruguay should not sign any agreement due to article 98.

According to Max Du Plessis, South Africa was pressured by the United States but refused to sign an Article 98 agreement.

The US asserted a deadline of 31 June 2003 for the conclusion of such an agreement between the two States, backed up by the threat that South Africa's failure to sign would result in the suspension of US military aid to that country. Having refused to succumb to US advances by 31 June 2003, South Africa then found itself among thirty-five States blacklisted by the United States on 1 July 2003.<sup>46</sup>

In response to this blacklisting and the resultant suspension of military aid by the US, South Africa's foreign ministry spokesperson, Mr. Ronnie Mamoepa, said that the Government would study "the implications of that decision".<sup>47</sup> Having done so, the South African Cabinet announced on 24 July 2003 that it "will maintain its decision not to sign an agreement with Washington giving United States nationals immunity from prosecution by the International Criminal Court".<sup>48</sup> According to the US embassy in Pretoria, South Africa's decision would cost it some 7.2 million dollars in military aid; the South African Cabinet explained that the South African department of defence "will address the funding shortfalls through the normal budgeting and adjustment processes". The Cabinet's reasons for maintaining its position were said to be premised on South Africa's "commitment to the humanitarian objectives of the ICC and the country's international obligations".<sup>49</sup>

Just prior to Cabinet's announcement, on 20 July 2003 at a meeting for the formation of a South Africa-Kenya bi-National Commission in Nairobi, Kenya, officials of the South African government and the Kenyan government expressed their concern at the diplomatic intimidation displayed by the US in relation to Article 98 agreements. As a measure of challenge, Abdul Minty, Acting Director General in the South African Foreign Ministry, suggested that a joint effort with European countries was required to counter US advances.<sup>50</sup>

Reference should also be made to the detailed resolution adopted by the Parliamentary Assembly of the Council of Europe in 2002:

...

9. Moreover, the Assembly is greatly concerned by the efforts of some States to undermine the integrity of the ICC Treaty and especially to conclude bilateral agreements aiming at exempting their officials, military personnel and nationals from the jurisdiction of the Court ("exemption agreements").

The Assembly considers that these "exemption agreements" are not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and the purpose of a treaty...

...

13. Accordingly, the Assembly calls:

i. as regards the Council of Europe member States:

- a. on Azerbaijan and Turkey to adhere to the Rome Statute of the ICC;
- b. on Albania, Armenia, the Czech Republic, Georgia, Lithuania, Malta, Moldova, the Russian Federation and Ukraine to ratify the Rome Statute of the ICC;

<sup>46</sup> Cape Times, 'US Suspends all military aid to South Africa, July 02 2003.

<sup>47</sup> Mail and Guardian, 'US slaps military funding embargo on SA', July 02 2003.

<sup>48</sup> 'South Africa will not sign agreement with US on international court', statement by the Cabinet of the Government of the Republic of South Africa, Pretoria, July 24, 2003.

<sup>49</sup> Agence France Press, July 24, 2003.

<sup>50</sup> Panafrican News Agency (PANA) Daily Newswire, "Kenya, South African Oppose US Stand on UN Court", 20 July 2003.

c. on Romania not to ratify the bilateral “exemption agreement” signed with the USA, given that it was among the first countries to ratify the Rome Statute of the ICC;

ii as regards the Council of Europe observer States:

a. on Japan to adhere to and on the United States of America to ratify the Rome Statute of the ICC;

b. on Mexico to ratify the Rome Statute of the ICC;

c. on Israel, having observer status with the Parliamentary Assembly, to ratify the Rome Statute of the ICC and not to ratify the bilateral “exemption agreement” signed with the USA:

iii. on all member and observer States of the Council of Europe:

a. to establish a joint and solidary position with a view to ensuring the efficient functioning of the ICC;

b. to refrain from any action which might compromise the integrity of the ICC Treaty and efficient work of the Court;

c. not to enter into any bilateral “exemption agreements” which would compromise or limit in any manner their cooperation with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court;

d. to provide all necessary cooperation and assistance with a view to ensuring the earliest possible effective functioning of the Court;

e. not to avail themselves of the provision in the ICC Treaty which makes it possible to escape the Court’s jurisdiction on war crimes for seven years.<sup>51</sup>

It adopted another resolution on the subject in 2003:

iii. as regards bilateral immunity agreements:

a. supports those member and observer states of the Council of Europe that have resisted entering into bilateral immunity agreements to persist in adhering to their principles, and commends in particular those countries that are candidates for accession to the European Union for their solidarity with the vast majority of European countries’ in supporting the ICC;

b. encourages those member and observer states that have signed such agreements (Azerbaijan, Israel, Romania) not to ratify them;

c. invites those member and observer states that have ratified such agreements (Albania, Bosnia-Herzegovina, Georgia) to apply them, as the case may be, in the manner that is most consistent with their legal obligations as State Parties to the Rome Statute.<sup>52</sup>

The Twenty-Fourth Meeting of the Conference of Heads of Government of the Caribbean Community considered requests made to each Member State of the Community by the United States of America to enter into bilateral immunity or ‘non-surrender’ agreements that exempt US nationals and other persons who have worked for the US Government from the jurisdiction of the ICC.

Heads reaffirmed their strong support for the principles and purposes of the ICC and their confidence that it would carry out its important mandate with the highest integrity and professionalism. They recalled the vanguard role played by CARICOM, particularly Trinidad and Tobago, in the establishment of the Court and noted with satisfaction that those CARICOM Member States that had not yet ratified or acceded to the Rome Statute establishing the Court would do so expeditiously. Heads also recognised that some Member States may wish to negotiate bilateral ‘non-surrender’ agreements with the United States if they are advised by their legal authorities that any agreement into which they enter is consistent with their obligations under the Rome Statute. They were deeply

<sup>51</sup> Parliamentary Assembly of the Council of Europe, ‘Risks for the integrity of the Statute of the International Criminal Court’, Provisional edition Resolution 1300 (2002)[1], text adopted on 25 September 2002 (29th Sitting). Available at <http://www.iccnw.org/documents/otherissues/impunityart98/coe20020925english.doc>

<sup>52</sup> Provisional Edition, Threats to the International Criminal Court, Resolution 1336 (2003)(1). Assembly debate on 25 June 2003 (20th Sitting) (see Doc. 9844, report of the Committee on Legal Affairs and Human Rights, rapporteur: M. Marty). Text adopted by the Assembly on 25 June 2003 (20th Sitting). Available at: [www.iccnw.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25june03Eng.doc](http://www.iccnw.org/documents/declarationsresolutions/intergovbodies/CoEResBIAs25june03Eng.doc)

disturbed at the punitive action taken by the US Government, with effect from July 1st, 2003, against the six CARICOM member states which are parties to the International Criminal Court. They stressed that this development was at complete variance with the spirit of the special relationship which has traditionally existed between the United States and the Caribbean, a relationship which has always been characterized by mutual respect and cooperation, and strict adherence to the rule of law, to international obligations, and constructive dialogue which Heads are committed to continuing. They also stressed that the effective protection of the “Third Border” of the United States could not be achieved unilaterally, and that continued military and security cooperation between the Caribbean and the United States was in the national security interest of all countries which comprise our common Caribbean neighbourhood. Heads resolved to explore the possibility of establishing mutual legal arrangements on military matters among their member states, and in addition, to seek partnerships in the international community to protect and enhance the security of the Caribbean Community.<sup>53</sup>

### **Are such agreements consistent with article 98 of the Statute?**

The majority view of the Committee is that mere adoption of such an agreement constitutes a breach of the Rome Statute. The agreements are not what was contemplated at Rome, and simply cannot be validated by a reasonable interpretation of the Statute. This is a question of states respecting the provisions of the treaty in good faith. The purpose of the agreements is to protect nationals, not peacekeepers. A few members of the Committee consider article 98(2) to be a political compromise, subject to interpretation that provides some justification for the agreements.

On the assumption that the agreements are not consistent with the Statute, other difficulties arise. The first involves dispute settlement, a matter that can be dealt with by the Assembly of States Parties in accordance with article 119 of the Statute.

Some have questioned whether article 98(2) applies to agreements reached after the entry into force of the Rome Statute. Were such an argument to succeed, it would, albeit indirectly, challenge all of the article 98 agreements adopted since 1 July 2002. The Committee was in agreement that to the extent that legitimate status of forces agreements are adopted, there is no valid argument to claim these are in violation of article 98(2) merely because they were subsequent to the entry into force of the Rome Statute. As one member said succinctly: ‘Whilst many States wished that it be interpreted as applying only to existing agreements, the wording does not rule out agreements made after the fact.’

### **Can such agreements be challenged judicially, and if so, in what forum?**

Several members indicated that the legality of article 98 agreements could be examined by the International Court of Justice, to the extent that the concerned States had accepted the jurisdiction of the Court. It was not explained, however, in what manner such a challenge might unfold. A suggestion was made that the General Assembly might request an advisory opinion from the Court on this issue.

Another submission contemplated a scenario whereby the agreement would be examined by the Pre-Trial Chamber of the ICC:

If the Prosecutor were to apply for a warrant of arrest to the Pre-Trial Chamber under Article 58, the Court would have to decide whether it had authority to proceed. This would include an assessment of the provisions of Article 98 and it would be a matter that the Court would have to rule upon. However, it would seem to me that in the light of the constructive ambiguity of Article 98, the Court would be reluctant to hold against such an agreement as it would undoubtedly lead to a clash between the Court and the US. Regrettably, I do not consider that it is entirely practicable to separate law and politics in this area.

Similarly,

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<sup>53</sup> Press Release 95/2003, 4 July 2003, Statement Issued by the Conference of Heads of Government of the Caribbean Community on Bilateral Agreements under Article 98 of the Rome Statute Establishing the International Criminal Court.

While the Court is unlikely to consider the question in the abstract, that is, simply on account of a State party having concluded an impunity agreement, it could be seized with the matter where it (the Court) requests under Article 89(1) that a person be transferred to the Court. If the Court has proceeded with an Article 89(1) request (after a State party has refused to surrender a person by relying on an impunity agreement it is party to), the Court may make a finding in terms of Article 87(7) to the effect that the State Party, through its reliance on a unlawful impunity agreement, has prevented the Court from exercising its functions and powers under the Statute.

There was some speculation about the possibility of the legality of article 98 agreements being considered by national courts.:

**Follow-up:**

Subsequent to the Berlin meeting, in August 2004, the Committee proposes to examine the domestic implementation of the Rome Statute.