KEEPING THE PEACEKEEPERS AWAY FROM THE COURT: THE UNITED STATES OF AMERICA, THE INTERNATIONAL CRIMINAL COURT AND UN SECURITY COUNCIL RESOLUTION 1422

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HAD IT NOT BEEN FOR THE GENEROUS FINANCIAL SUPPORT OF THE ROTARY FOUNDATION OF ROTARY INTERNATIONAL AND THE INDIVIDUAL ENCOURAGEMENT FROM ROTARIANS, BOTH IN THE UNITED KINGDOM AND IN QUEBEC, THIS THESIS WOULD NOT HAVE BEEN POSSIBLE. MY HEARTFELT THANKS GO OUT TO THE REPUTABLE MEMBERS OF THIS DISTINGUISHED ORGANISATION.

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ABSTRACT

Diplomatic stalemate at the seat of the UN Security Council is by no means a recent problem. Nevertheless, it may be argued that 'American unilateralism' reached its apex in July 2002, when the United States stood its ground and demanded immunity from prosecution before the International Criminal Court ("ICC") for US peacekeepers. This request was accompanied by the heavy-handed and deadly serious threat to veto the renewal of the UN peacekeeping mission in Bosnia, a threat which was realised over the course of the debates. This political brinkmanship, which pitted the United States against friends and foes alike, finally ceased when the US agreed to accept a Security Council Resolution offering a twelve-month deferral of prosecution for peacekeepers before the ICC. It is the legality of this Resolution which is the focus of this thesis. This thesis will expose the Resolution to the limits of international law and question the legitimacy of the tactics employed by the US. It will argue that in order to appease the recalcitrant superpower, the Security Council passed a Resolution contrary to both the Rome Statute of the ICC and the UN Charter. With the ICC still in its embryonic stage, this thesis will suggest the responses available to the Court when faced with a Resolution of such dubious legality which affects its jurisdiction to try the most heinous crimes known to humanity.

RESUME

L'impasse diplomatique au siège du Conseil de Sécurité des Nations Unies est une problématique récurrente. Néanmoins, « l'unilatéralisme américain » atteignit un sommet en juillet 2002, lorsque les États-Unis défièrent les oppositions des autres membres et réclamèrent l'immunité des gardiens de la paix américains devant la Cour Pénale Internationale (« CPI »). Au moment de formuler leur requête, ils menacèrent fermement la communauté internationale d'utiliser leur veto contre le renouvellement de la mission de maintien de la paix en Bosnie ; une menace qui fut concrétisée en cours de négociation. Cette politique du bord de l'abîme exaspéra les relations entre les Etats-Unis et leurs opposants et ébranla leurs liens avec leurs alliés traditionnels. La stratégie cessa finalement lorsque les Américains consentirent à l'adoption d'une Résolution du Conseil de Sécurité, en vertu de laquelle les procès des gardiens de la paix devant la CPI seront différés pour une période de douze mois. La présente thèse examine la légalité de cette Résolution au regard du droit international et questionne la légitimité des tactiques employées par les Etats-Unis. Elle argumentera qu'afin d'adoucir la position de la superpuissance récalcitrante, le Conseil de Sécurité a, en fait, adopté une résolution illégale, contraire tant au Statut de Rome de la Cour Pénale Internationale qu'à la Charte des Nations Unies. La thèse présentera les avenues de réponses qui s'offrent à la CPI, toujours au stade embryonnaire de son développement, lorsque confrontée à une Résolution si contestable d'un point de vue légal et qui a pour effet de limiter sa juridiction quant au traitement de crimes parmi les plus horribles qu'aient connus l'humanité.

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INTRODUCTION

On 1 July 2002, the Rome Statute[1] establishing the International Criminal Court ("ICC") entered into force, having achieved its 60th ratification. Eleven days later the United Nations Security Council unanimously adopted Resolution 1422, a succinct instrument which effectively deferred, for a renewable twelve-month period, the investigation or prosecution of certain UN peacekeepers by the ICC.[2] This same text was approved by the Security Council for another twelve months on 12 June 2003.[3]

It was on 17 July 1998 when it became apparent that, for the first time in over fifty years, the international society of states was prepared to accept an international criminal jurisdiction to prosecute genocide, war crimes and crimes against humanity. The United Nations had pushed for a statute to establish such a jurisdiction and in July 1998, 120 states voted in favour of such an instrument. The target of 60 ratifications for the entry into force of the Rome Statute was rapidly attained; furthermore, the speed with which states have ratified the instrument could not have been anticipated beforehand. At the time of writing the statute has been ratified by 91 states and signed by a total of 139 states.[4]

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[1] *Rome Statute of the International Criminal Court*, UN. Doc. A/CONF.183/9 (1998). Online: <http://www.un.org/law/icc/statute/romefra.htm> (date accessed: 12 August 2003) [hereinafter *Rome Statute*]

[2] *Resolution 1422*, SC Res. 1422, 57th Year, UN Doc. S/RES/1422 (2002). Online: <http://www.un.org/Docs/scres/2002/sc2002.htm>. See UN SCOR, 57th Year, 4572d Mtg., UN Soc. S/PV.4572 (2002) at 2. (date accessed: 10 July 2003) [hereinafter *Resolution 1422*].

[3] *Resolution 1487*, SC Res. 1487, 57th Year, UN Doc. S/RES/1487 (2003). Online: <http://www.un.org/Docs/sc/unsc_resolutions03.html> (date accessed: 10 July 2003) [hereinafter *Resolution 1487*]. Resolution 1487 is an exact reproduction of Resolution 1422. Resolution 1487 was adopted by the UN Security Council with France, Germany and Syria abstaining. See UN SCOR, 58th Year, 4772d Mtg., UN Doc. S/PV.4772 (2003) at 22. For the purposes of this thesis, references made to Resolution 1422 will incorporate Resolution 1487 unless otherwise stated.

[4] The most recent ratification came from Guinea on 14 July 2003 the most recent signatory was Albania on 18 July 2002. For a full breakdown of ratification and signatory details see <http://www.iccnow.org/countryinfo/worldsigsandratifications.html> (date accessed: 10 June 2003).

However, the Court has also provoked a marked opposition. The vote in favour of the Rome Statute in 1998 was not unanimous and there are still states today which oppose the jurisdiction of the Court over their nationals. Of these states the United States of America has been by far the most vociferous and the most active in its opposition. What may be described as apathy towards the Court under the Clinton administration has become explicit opposition under the Bush administration. This opposition has furthermore provoked a campaign to undermine the Court and limit its jurisdiction over US citizens suspected of the crimes it covers.

This thesis will focus on one such example of the tactics employed by the US to protect its citizens from the Court. Resolution 1422 is of great concern to the international society of states since it puts into question the legitimacy not only of the ICC, but also of the Security Council which bowed to US pressure to produce a resolution of dubious legality.

The Resolution in question deals with peacekeepers sent from states not party to the Rome Statute. Such individuals have been accorded a reprieve of a total of 24 months from prosecution before the ICC. Although there are a number of countries which, like the US, are not party to the Rome Statute, it is fair to say that securing the protection of peacekeepers from the jurisdiction of the ICC was exclusively a US campaign.

This campaign began in July 2002 when, amidst the euphoria surrounding the entry into force of the Rome Statute, the President of the United States was encouraged to establish immunity from the ICC for US citizens working as peacekeepers abroad.[5] The first warning as to the extent of the determination of the US came on 17 May 2002, when the subject was raised in relation to peacekeepers in East Timor. The proposal for peacekeepers immunity was rejected and in response the US made it clear that such a position may result in US citizens being pulled out of the East Timor mission.[6] The

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[5] Letter from H. J. Hyde, Z. Miller, T. Delay, J. Helms, and B. Stump to Secretary of State Colin Powell (11 April 2002). Online: <http://www.house.gov/international_relations> (date accessed: 5 May 2003).

[6] S.D. Murphy, "Contemporary Practice of the United States Relating to International Law: Efforts to Obtain Immunity from ICC for U.S. Peacekeepers" (2002) 96 Am. J. Int'l L. 725. [hereinafter "Efforts to Obtain Immunity"].

subject was again broached in mid-June when the Security Council met to vote upon the continuation of the peacekeeping mission in Bosnia Herzegovina. It was on this occasion when the US laid the first ultimatum on the table: either peacekeepers were to be granted immunity by the Security Council or US personnel would be removed from all UN peacekeeping missions.[7] The US laid before the Council a draft resolution offering immunity for peacekeepers from the ICC, but no agreement could be reached to satisfy the US request.

The denouement came on 30 June 2002 when the US vetoed a Security Council resolution which would have prolonged the peacekeeping mission in Bosnia for a further six months. The severity of such a tactic provoked the Secretary-General to warn that "the whole system of United Nations peacekeeping operations is being put at risk".[8]

The political stalemate provoked by the unyielding US position finally shifted when the US volunteered the application of article 16 of the Rome Statute, as the legal basis for their request.[9] By invoking article 16, the US settled for a renewable deferment of prosecution rather than immunity from prosecution for US peacekeepers. It is impossible to state definitively whether such an outcome was a direct result of the ultimatum presented by the US to the Security Council, just as it is impossible to state the contrary; such is the nature of diplomatic debates. Nevertheless, such developments are of great interest in determining the current state of international law.

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[7] S. Schmemann, "U.S. Links Peacekeeping to Immunity from New Court" *New York Times* (19 June 2002.) 3 and Editorial, "Peacekeeping Held Hostage" *New York Times* (27 June 2002) 28.

[8] Letter from Kofi Annan to Colin Powell (3 July 2002). Online: <http://www.iccnow.org/documents/otherissues1422.html> (date accessed: 11 June 2003).

[9] Art. 16 reads:

> Deferral of investigation or prosecution
> 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.

Resolution 1422 is presented as being in accordance with international law. The principal task of this piece, therefore, is to analyse the validity of this assertion. However, it is worth noting that the Resolution may have various practical effects which were not examined during the tense negotiations at the seat of the Security Council. For instance, it may well be argued that deferral of prosecution is simply immunity by any other name. UN peacekeepers, much like diplomatic officials, are immune from prosecution in the host state, during such time as they enjoy an official capacity which requires a functional immunity.

Although it is unlikely that a peacekeeper would commit the crimes dealt with in the Rome Statute, it is worth noting that a continuous renewal of Resolution 1422 would create a situation whereby a suspected peacekeeper could only be prosecuted for such crimes in the following circumstances: if they cease to be a peacekeeper, if their country of nationality prosecutes them, or if the Secretary-General waives their immunity.[10] The possibility of the ICC prosecuting such individuals is blocked by Resolution 1422. This is important since the jurisdiction of the Court was designed to be widespread and blind to official immunities.[11] Indeed, one of the principal driving forces behind the creation of an international criminal court was the desire to put an end to official immunities from jurisdiction.

Furthermore, the Resolution is a testament to the fact that the Security Council responded to a series of threats created by the US and produced a resolution of dubious legality. In this regard various questions remain unanswered: Did the Security Council correctly apply article 16 of the Rome Statute? What was the source of the threat to international peace and security referred to in Resolution 1422? Is this document in accordance with international treaty law and international customary law?

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[10] There is a possibility that a national court could call upon the universal principal in order to have jurisdiction over the subject-matter of such a case, although such a possibility is slight. H.M. Kindred, *et al.*, *International Law Chiefly as Interpreted and Applied in Canada* 6th ed. (Canada: Edmond Montgomery Publications, 2000) at 519.

[11] *Rome Statute,* Art. 27 para. 2. This article notes that official immunity is not a bar from prosecution.

Finally, the Resolution effectively limits the jurisdiction of the ICC and, as a result, if a case were to come before the Court involving peacekeepers the Court may well be entitled to examine the legality of the Resolution. Such a possibility presents an interesting indicator of the future relationship between the ICC and the Security Council, and reopens the debate concerning the review of Security Council resolutions.

This analysis will therefore begin by examining the ideology behind the creation of an international criminal court and will introduce the progressively bitter approach taken towards the Court by the US. This initial chapter will also develop the US position which resulted in the creation of Resolution 1422, looking in particular at the situation facing peacekeepers on UN missions.

Chapter II of this piece will then dissect the words of Resolution 1422 itself, in an attempt to determine its legality or otherwise at international law. The language of Resolution 1422 will be pitted against the relevant provisions of the Rome Statute, the UN Charter and international law in general.

Although no definite decision may be reached as to the legality of the Resolution, it will be argued that the aforementioned instrument is contrary to international law. The third and final chapter of this piece will therefore look at the consequences of an illegal resolution and the impact of this instrument upon those states which are both party to the Rome Statute and members of the United Nations. Furthermore, the impact it may have upon the international institutions will be considered, looking in particular at which institutions, if any, are entitled to pronounce upon the legality of the first Security Council resolution dealing with the nascent ICC.

CHAPTER I:
RESOLVING TO OPPOSE: THE UNITED STATES, THE INTERNATIONAL CRIMINAL COURT AND THE RESULTING COMPROMISING SECURITY COUNCIL RESOLUTION

INTRODUCTION

The ICC has been a long-term project of the international community of states. It has been heralded as "[a] gift of hope for future generations"[12] and "a triumph for all peoples of the world"[13]. The opposition of the US to this Court has resonated with both allies and states hostile to the US alike, compromises have been made and concessions accepted. Nevertheless, to this day the US is not a ratifying country of the treaty, nor is it, for all intents and purposes, even a signatory.[14]

The context out of which this opposition arose will be explained in this chapter as will the opposition itself before going on to look at the steps taken to pacify the US, concentrating in particular upon Resolution 1422. However, before moving on to those considerations it is worthwhile examining the historical development of the ICC from its conception to its present status. In painting this picture it is hoped that the extent of progress made by the international community in this arena will become evident.

I. From historical tentative steps to the Rome Statute

A. The war to end all wars

Following the end of World War I, positive steps were made to prosecute individuals suspected of having committed war crimes. State representatives at the Paris Peace

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[12] K. Annan (18 July 1998) in H.A.M. Van Habel, J.G. Lammers & J. Schukking, eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser Press, 1999) at 2.

[13] M.C. Bassioui, Speech at the Rome Ceremony (18 July 1998) in C. Bassiouni, "Negotiating the Treaty of Rome" (1999) 32 Cornell Int'l L.J. 443 at 468.

[14] See below at 31 with accompanying notes.

Conference in January 1919 created a Commission on the Responsibility of Authors of War and on the Enforcement of Penalties. This Commission was innovative in deciding that state officials, however high their position, were not immune from prosecution.[15]

Such a conclusion was highly controversial since, at that time, the obligation to comply with the laws of war as set out in the Hague Convention of 1907 was one imposed upon the state and did not entail individual responsibility.[16] Nevertheless, in spite of such developments the attempt to prosecute the German Kaiser before an international court and others before national military tribunals, met with overall failure due to a lack of enthusiasm on the part of other states to see heads of state personally prosecuted.[17]

It is probably a fair observation to note that during this period the doctrine of state sovereignty was understood to be "the bedrock norm of the international community".[18] The controversy surrounding the idea that a head of state, or even a state official, could be denied official immunity and brought before a court was to block any significant developments in this area for some time.

Nevertheless, apathy did not set in entirely and in 1920 the League of Nations appointed a committee to discuss the creation of a Permanent Court of Justice. It was on this occasion that plans were made to create a High Court of International Justice as a forum for the punishment of certain criminal acts. However, this proposal did not meet with a general consensus and from 1920 until 1934, the debate was essentially of academic interest only. In 1934 France proposed the creation of an International Terrorism Convention to be

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[15] H. von Hebel, "An International Criminal Court - A Historical Perspective" in H.A.M. Van Habel, J.G. Lammers, & J. Schukking, eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser Press, 1999) 13 at 15.

[16] R. Horton, "The Long Road to Hypocrisy: The United States and the International Criminal Court" (2003) 24 Whittier L. Rev. 1041 at 1043.

[17] Kaiser Wilhelm was granted asylum in the Netherlands and Germany refused to surrender any of the 900 German war criminals. See Hebel, *supra* note 15 at 13.

[18] A. Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court" in A. Cassese, P. Gaeta, J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*" (Oxford: Oxford University Press, 2002) 3 at 5.

accompanied by a Convention for the creation of an International Criminal Court. Although a diplomatic conference took place to finalise such proposals, the former Convention received just one ratification, the latter none.[19]

Further tentative steps were taken in the right direction after the end of the Second World War. The universal outrage provoked by extreme examples of tyrannical behaviour throughout the war lead to the creation of the Nuremburg and the Tokyo Tribunals.[20] It was before these International Military Tribunals where the crimes against humanity and crimes against peace gained international, documented recognition. This was an important achievement.[21] Also important was the erosion of state sovereignty. Although the cases before these war tribunals may well represent examples of victor's justice,[22] states were at least prepared to recognise that it is unconscionable to offer official impunity for such atrocious crimes, especially when the activities pervaded every level of government.

B. Reactions to the human rights trio

By the late 1940s, the struggle for international justice had reached impressive dimensions. Both International Military Tribunals were underway and the UN recognised the important role such institutions could play. It was at this opportune time when three documents of international proportions were laid before the UN: the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and a proposal to commence work on an international criminal court.[23] Although the first two documents rapidly succeeded in achieving adoption by the

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[19] Hebel, *supra* note 15 at 18.

[20] *Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 280 and *Charter of the International Military Tribunal for the Far East* 19 January 1946, , T.I.A.S. 1589, online: <http://www.yale.edu/lawweb/avalon/imtfech.htm> respectively. (date accessed 11 June 2003).

[21] Nevertheless, the true extent of this achievement is debatable since the crimes in question were determined ex post facto.

[22] Cassese, *supra* note 18 at 8.

[23] UN General Assembly asks the International Law Commission to consider the possibility of creating an international judicial organ to try persons suspected of genocide, the ILC is also requested to consider the possibility of a criminal chamber of the ICJ. See P. Kirsch & V. Oosterveld, "Negotiating an Institution

member states[24] it would take over fifty years before the proposition for an international criminal court was effectively implemented.

It seems almost ironic that, following a brutal conflict and a frightening testament to the capabilities of human evil, although the norms of behaviour were finalised and accepted via a universal standard of human rights, it was not deemed necessary to create a new international forum to judge the individuals suspected of carrying out such crimes. Nevertheless, such reticence may be explained by two important principles of international law. Firstly, even in the 1940s the doctrine of state sovereignty was prevalent; states were keen to retain control over what was happening within their borders and to their citizens. In the 1940s, as today, states had jurisdiction over crimes committed on their territory and individuals were to be tried before national courts according to national laws.[25] Secondly, the practical benefits of amnesty as a political tool made it difficult for states to completely abandon this tactic, since putting peace before justice was sometimes the only workable option.

C. The International Law Commission

From 1949 up until the mid-1950s, the International Law Commission ("ILC") for the establishment of an international criminal court produced extensive preparatory work. Due, however, to the political stalemate of the Cold War from 1954-1989, no further action was taken upon their proposals. It is no coincidence that the UN General Assembly did not ask the ILC to reconsider the drafting of a statute for the creation of an

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for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court" (2001) 46 McGill L.J. 1141 at 1145.

[24] *Universal Declaration of Human Rights,* GA Res. 217A(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948); *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277.

[25] R.S. Lee, "Introduction: The Rome Conference and Its Contributions to International Law" in R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) 1at 5.

international criminal court until 1989, when the thawing of the Cold War was well underway and the political stalemate at the seat of the UN had shifted significantly.[26]

D. The Rome Conference

In 1994 the ILC adopted the Draft Statute for the ICC,[27] and in 1995 an Ad Hoc Committee on the Establishment of an International Criminal Court ("Ad Hoc Committee") produced a report considering in detail the logistics of an international criminal jurisdiction.[28] Then, in 1996 the Preparatory Committee on the Establishment of an International Criminal Court ("PrepCom") was created.[29] The task of the PrepCom was to discuss and elaborate upon the Draft Statute which it did over a two-year period. From the outset, the intention was that the final document produced by the Committee would be presented to a diplomatic conference. Under the auspices of a resolution of the UN General Assembly, a decision was taken to hold a Diplomatic Conference of Plenipotentiaries in Rome from 15 June – 17 July 1998, it was decided that the outcome of this conference would be a finalised version of a statute for the establishment of an international criminal court.[30]

The 1998 diplomatic conference managed to achieve great things since in just five weeks an overwhelming majority of the 160 participatory states had agreed to a statute. The

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[26] The request followed a call from Trinidad and Tobago in December 1989 that an international criminal court be established to deal with international drug trafficking. Online: <http://www.un.org/law/icc/general/overview.htm> (date accessed: 12 June 2003). See also Kirsch & Oosterveld, *supra* note 23 at 1145.

[27] *Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court* GA, 49th Sess., Supp. No.10, UN Doc. A/49/10 (1994) at paras. 23-91. [hereinafter *Draft Statute*]

[28] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* GA 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995).

[29] *Establishment of an International Criminal Court*, GA Res. 50/46, UN GAOR, 50th Sess., Supp. No. 49, UN Doc. A/50/49 (vol.I) (1995) 307. See Cassese, *supra* note 18 at 17.

[30] *Establishment of an International Criminal Court*, GA Res. 52/160, UN GAOR, 52d Sess., Supp. No. 651, UN Doc. A/52/651.

statute was adopted by 120 states with 21 abstentions and 7 votes against.[31] On 18 July 1998, 27 states signed the Rome Statute of the International Criminal Court.[32]

The Rome Statute today, as in 1998, stands as a brave testament to the individual perseverance of state representatives and, in particular, the work of members of civil society organisations, since these latter participants played a vital role.[33] The statute is furthermore a testament to the ability of individuals to reach a compromise on matters where cultural divisions were striking.

II. The ideology behind the ICC

It has been suggested that the ICC is the most important achievement of the United Nations since its conception in 1945.[34] Such an encouraging accolade deserves closer attention: what was the intention of the ardent supporters of the Court; how did they see this court fitting into the overall UN structure? These questions will be explored in the following section as the values of the ICC are enumerated.

A. An end to impunity

When deciphering the ideology behind the ICC, it is clear that, primarily, the participants were motivated by a common desire to eradicate immunity as far as politically possible.

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[31] There are various contradictory reports circulating as to which states cast negative votes. This is because the vote was officially non-recorded following a request from the US. Nevertheless, of the seven states voting against the *Rome Statute*, the US, China and Israel decided to make their opposition public and give reasons for their decisions. (See Lee, *supra* note 25 at 26.)

[32] According to Art. 126 of the *Rome Statute*, the instrument required 60 ratifications before it would enter into force on the 60th day following the deposit of the 60th ratification.

[33] See generally L. Weschler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC" in S.B. Sewall & C. Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law* (Maryland: Rowman & Littlefield Publishers, 2000) 85. See also Kirsch & Oosterveld, *supra* note 23 at 1148.

[34] M.C. Bassiouni, "Preface" in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Germany: Baden-Baden, 1999) XIX at XIX. [hereinafter Bassiouni, "Preface"].

By severely limiting and condemning the use of immunity by heads of state and official representatives, the ICC may well have chosen the fight against immunity as its central aim.[35]

When Austria spoke on behalf of the EU and the associated countries[36] following the adoption of the Rome Statute it highlighted the importance of the end to a culture of impunity stating, "the Court would add a new dimension to international relations by reinforcing individual accountability".[37] Similarly, Australia spoke of the Rome Statute as marking a significant step towards the goal of deterring "potential perpetrators of the most heinous crimes against humanity in ensuring that they could not act with impunity".[38] Hence, the ICC is there to remind governments that the *Realpolitik* which once dominated international relations and encouraged political settlements at the expense of justice is no longer tolerated.[39]

B. Formative characteristics of the ICC

a. Independence

As early as at the first session of the Ad Hoc Committee in 1995 it was decided that the ICC should be established as an independent body by a multilateral treaty. Such a compromise would allow for an impartial court whilst satisfying concerns regarding state

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[35] S.B. Sewall, C. Kaysen & M.P. Scharf, "The United States and the International Criminal Court: An Overview" in S.B. Sewall & C. Kaysen, eds., *The United States and the International Criminal Court: National Security and International Law* (Maryland: Rowman & Littlefield Publishers, 2000) 1at 2.

[36] The associated countries are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Iceland.

[37] See R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) at Appendix [hereinafter "Appendix to 'Making of the Rome Statute'"]

[38] *Ibid.*

[39] Bassiouni, "Preface", *supra* note 34 at XXI.

sovereignty.[40] By 1996, when the PrepCom met for its initial two sessions, the decision was taken to make the Court an independent, autonomous and permanent entity.[41]

b. Permanence

A permanent institution was envisaged in order to avoid start-up delays and selective justice. However, the importance of permanence goes much wider than that. The very nature of international law is that the obligations it contains are not enforceable in the traditional sense of the term.[42] The system is horizontal and decentralised and as a result, often only as good as its participants. In 1899, Christopher Greenwood highlighted the weak spot in international law when he noted that "[w]hile the laws of war undoubtedly have their defects and difficulties; the most important weakness in the laws of war today lies not in their substance but in their implementation".[43]

It was therefore of utmost importance to create a culture in the international community whereby crimes against humanity and genocide would not go unpunished. The lack of prosecutions for crimes against humanity along with the political controversies which arise when such individuals are pursued, are testaments to the fact that an international forum is needed whereby states are obliged to comply.[44]

Although the ICC is created via a multilateral treaty, which was dependant upon a set number of ratifications for its entry into force, it must be noted that this is a specific kind of treaty. It is not necessary for a state to be party to the Rome Statute for its nationals to

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[40] A. Bos, "From the International Law Commission to the Rome Conference (1994-1998)" in A. Cassese, P. Gaeta, J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*" (Oxford: Oxford University Press, 2002) 35 at 40.

[41] O. Triffterer, "Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality" in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Germany: Baden-Baden, 1999) 17 at 22.

[42] Kindred, *supra* note 10 at 8.

[43] Quoted in Hebel, *supra* note 15 at 14.

[44] Despite the fact that since WWII some 250 conflicts of both international and domestic scope have taken place few have been made to pay for violations of humanitarian law. See Cassese, note 18 at 17.

risk prosecution by the Court. According to article 12 of the Statute, the ICC has jurisdiction over genocide, crimes against humanity and war crimes, either if a national of a state party committed the crime or if it occurred on the territory of a state party. Indeed, it is this extension of jurisdiction over non-party states which inspired the various US actions to secure immunity for its citizens, these measures will be developed further on in this analysis.

Other options were also circulated to allow the creation of an international criminal court, such as amending the UN Charter to allow for such an institution. This was not approved, however, since such a process is difficult for both political and practical reasons. Alternatively, it was proposed that the Court have its origins in a UN resolution from the General Assembly. The problem with this is that although such a process would allow for a rapid creation of a court, it would also mean that the Court would stand subordinate to the General Assembly and hence be subject to amendments or limitations according to the whim of the respective members.[45] Furthermore, General Assembly resolutions are not binding upon member states and so any further acceptance of jurisdiction would be dependant upon unilateral concessions by the states concerned.

Finally, the mechanism of the Security Council to produce a binding resolution could not be employed since the invocation of Chapter VII requires a threat to international peace and security. This topic will be dealt with in more detail later but it is worth noting here that such an option was not deemed workable in the preliminary stages of the ICC's creation. This was because the Chapter VII condition would compromise the permanence of the Court, with the future of the Court being dependent upon a continuation of the *status quo*. Hence, a multilateral treaty was deemed to be the most suitable means for the creation of a permanent court.

c. Complementarity

Another important indicator of the ideology behind the ICC is found in its design to complement national jurisdictions, since the Court will only have jurisdiction when the

[45] Bos, *supra* note 40 at 40.

national state of the individual is 'unwilling' or 'unable' to act.[46] This principle of 'complementarity' is designed to address concerns that through creating an international criminal jurisdiction, state sovereignty over prosecution would be seriously eroded. It also highlights the fact that the ICC is not subsidiary to the national courts; it is complementary and designed to function in harmony with the latter forums.

This characteristic of the ICC is as much an important element of the Court as it is a significant indicator of the political difficulties which prevent effective prosecution of individuals for international crimes at national levels. It has been recognised in international law that national courts may prosecute such crimes since it is possible to argue that universal jurisdiction exists in respect of the crimes covered by the Rome Statute.[47] Such universal jurisdiction is justified by the fact that these crimes are international in nature and of a level of severity which concerns all states. However, states have been reticent to pursue such avenues.[48]

Such reticence may be explained by several factors. Firstly, there may often be logistic difficulties involved in the act of bringing someone to justice for these crimes. Secondly, there may be political reasons which encourage either the recognition of amnesty in the name of securing peace or to placate another state of significant political influence.[49] Furthermore, national courts may be obliged to bow to official amnesties which heads of state, state officials and diplomats benefit from,[50] whereas the ICC is not so limited.[51]

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[46] See *Rome Statute*, Preamble and Art. 19.

[47] Kindred, *supra* note 10 at 519. The ICC has jurisdiction over genocide, crimes against humanity and war crimes. (*Rome Statute*, Art. 5(1)) It will also have jurisdiction over the crimes of aggression once a definition has been agreed upon. (*Rome Statute*, Art. 5(2)).

[48] J.Holmes, "Complementarity: National Courts *versus* the ICC" in A. Cassese, P. Gaeta, J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*" (Oxford: Oxford University Press, 2002) 667 at 668.

[49] Consider, for example, the political wrangling between the US and Belgium involving Belgium's controversial war crimes law which eventually led to the repealing of the legislation. See *e.g.* P. Lannin, "Belgium to Scrap War Crimes Law" *Washington Post* (13 July 2003) 19.

However, it is not only the unwillingness to act which provoked the complementarity mechanism, it is also the fact that a willingness to act, and a declaration that justice has been served, may sometimes be employed by states to conceal the fact that a sham trial was held. It is for this reason that if a state shields an individual from responsibility, or conducts proceedings either following an unacceptable delay, or in circumstances which put into question the independence or impartiality of the decision, then the case is nevertheless admissible before the ICC.[52]

Effectively, by signing and ratifying the Rome Statute, individual states are making a tacit declaration that they will not tolerate the commission of the crimes within the Rome Statute by their nationals. If it transpires that they do condone such criminal activity, because they choose not to act against their nationals or they do so ineffectively, then the Court may step in and the ratifying state is fully aware of this.[53] The principle of complementarity also points to a wider notion of co-operation between individual states and the ICC in general, such co-operation is vital for the ICC to function effectively and to address its mandate.

Having established the guiding principles behind the creation of the ICC, it is now necessary to consider the reasons behind the US opposition towards the Court along with the tactics employed by the US which are of concern to the ICC in its present embryonic stage.

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[50] The ICJ recently held that a national court cannot invoke universal jurisdiction to arrest a current head of state or cabinet minister on suspicion of war crimes, unless the state of the said individual has recognised such jurisdiction in an international treaty (*Case Concerning the Arrest Warrant of 11 April 2000 Democratic Republic of the (Congo v. Belgium)* [2002] I.C.J. Rep. 121) [hereinafter *Belgium case*]

[51] *Rome Statute,* Art. 27(2).

[52] *Rome Statute,* Art. 17(2).

[53] J. Mayerfeld, "Who Shall be Judge?: The United States, The International Criminal Court and the Global Enforcement of Human Rights" (2003) 25 Human Rights Quarterly 93 at 97

III. The US opposition to the ICC[54]

A. An exceptional superpower

The role played by the US in international affairs has been qualified as exceptional.[55] It has often been argued by US officials that the position of their country is unique because the US invariably leads coalitions in military actions. According to the politics of the US, taking on the burden of an important role in promoting peace and security merits special protection for those involved in striving towards such a goal.[56] For instance, Ambassador David Scheffer stated:

> [t]he US military is called upon to undertake missions under UN authority, to carry out mandates from the Security Council, to fulfil our commitments to NATO, to help defend our allies and friends, to achieve humanitarian objectives...No other government shoulders the burden of international security as does the United States.[57]

The argument basically asserts that since the US deploys military forces in numerous zones of conflict, the individuals involved need special protection to avoid compromising their effectiveness whilst on mission. The US delegation at the Rome conference gave an example of the US intervening in a state not party to the Rome Statute, where the rogue

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[54] For further details of the US opposition to the Court in general see *e.g.* S.A. Williams, "The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond" (2000) 38 Osgoode Hall L.J. 297, M. D. Mysak, "Judging the Giant: An Examination of American Opposition to the Rome Statute of the International Criminal Court" (2000) 63 Sask. L. Rev. 275, L. Casey, "The Case against the International Criminal Court" (2002) 25 Fordham Int'l L.J. 840. Horton, *supra* note 16. Sewall, S.B. & Kaysen, C., eds., *The United States and the International Criminal Court: National Security and International Law* (Maryland: Rowman & Littlefield Publishers, 2000).

[55] On the notion of American exceptionalism in the realm of international affairs see generally B.E. Shafer, ed., *Is America different? : A new look at American exceptionalism* (Oxford: Clarendon Press, 1991); S.M. Lipset, *American Exceptionalism: A double-edged sword* (New York: W.W.Norton, 1996); J. Lepgold & T. McKeown, "Is American Foreign Policy Exceptional? An Empirical Analysis" (1995) 110 Pol. Sci. Q. 369; J. D. van der Vyver, "American Exceptionalism: Human Rights, International Criminal Justice and National Self-Righteousness" (2001) 50 Emory L.J. 775; H. Hongju Koh, "On American Exceptionalism" (2003) 55 Stan. L. Rev. 1479.

[56] Sewall, Kaysen & Scharf, *supra* note 35 at 3.

[57] See Ambassador David J. Scheffer, "US Policy and the Proposed Permanent International Criminal Court", Address before the Carter Center (13 November 1997),

government was attacking dissidents. If, during the US-led coalition, bombs were to go astray and result in civilian casualties, the rogue state could ask for the US soldiers to be prosecuted whilst the members of the government responsible for attacking dissidents would not be brought to justice before the Court.[58]

Although it is true that the US military is heavily involved in international action and often leads such missions, such exceptionalism is increasingly difficult to justify. This is particularly so since it goes hand in hand with a reticence to commit to international obligations. Furthermore, this particular stance does not sit well with the ICC, an institution which actively promotes the equality of all those before it and hence the equality of states.

B. A case of judicious multilateralism

When delegates from around the world over gathered in Rome on 15 June 1998, for the diplomatic conference on the establishment of an ICC they produced a strong statute containing the 'cornerstone' objectives identified by the "Like-Minded" group.[59] These objectives included automatic jurisdiction, an independent prosecutor, jurisdiction over internal armed conflicts, a court not subordinate to the Security Council, and a court with the authority to make rulings on jurisdiction and admissibility.[60]

Nevertheless, the United States did not vote in favour of the Rome Statute, nor did the Clinton Administration sign the treaty until the last date possible.[61] The philosophy behind this approach was that although the US position conflicted with that of the ICC, it

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<http://www.state.gov/www/policy_remarks/971113_scheffer_tribunal.html> (date accessed: 10 July 2003).

[58] "Appendix to 'Making of the Rome Statute'", *supra* note 38.

[59] This coalition was comprised of over 60 states from Asia, North and South America, Africa, Europe and Oceania. Online: <http://www.hrw.org/press98/july/icc-frnc.htm> (date accessed: 10 June 2003).

[60] P. Kirsche & D. Robinson, "Reaching Agreement at the Rome Conference" in A. Cassese, P. Gaeta, J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*" (Oxford: Oxford University Press, 2002) 67 at 88.

[61] *Rome Statute*, Art. 125. The last date possible was 31 December 2000.

needed to be in a position to influence the shaping and direction of the Court, to ensure that US requirements were met. This position could not be attained from the outside looking in.[62]

Mention must be made, however, of the fact that the US was heavily involved in the ICC project in the years leading up to the diplomatic conference as well as during the conference. A number of worthy provisions were supported and encouraged by the US delegation. For instance, the definitions of crimes, due process, the inclusion of internal conflicts and the recognition of crimes against women.[63] However, it was the issue of jurisdiction which created problems for the US, arguing for an exception to be made for its citizens, given its exceptional role in international peace and security.

C. The question of jurisdiction

A particular sticking point during the diplomatic conference in Rome was the issue of jurisdiction. The US pressed for the nationality of the suspect as a cumulative condition for jurisdiction thus preventing the Court from prosecuting individuals from non-party states. David Scheffer spoke on behalf of the Clinton Administration and asserted the need for a cumulative condition to the exercise of the Court's jurisdiction. He argued that the Court should not be able to act unless the government of his/her nationality had accepted the jurisdiction of the Court.[64] Such a position lends credence to the accusation that the US had no intention of accepting the jurisdiction of the ICC and yet wished to be party to the treaty in order to be able to influence it from the inside.

The fight for the inclusion of nationality as a condition for jurisdiction was, therefore, motivated by a desire to obtain immunity for US citizens involved in military or

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[62] D. Scheffer, "Staying the Course with the International Criminal Court" (2002) 35 Cornell Int'l L.J. 47 at 63.

[63] See J. Washburn, "The International Criminal Court Arrives - The U.S. Position: Status and Prospects" (2002) 25 Fordham Int'l L.J. 873. See also Weschler, *supra* note 33.

[64] K. Roth, "The Court the U.S. Doesn't Want" (1998) 45:18 N.Y.R.B. 45. Online: <http://www.nybooks.com/articles/article-preview?article_id=676> (date accessed: 20 May 2003).

peacekeeping action. This was in spite of the fact that US servicemen and women could, in theory, be brought before courts in foreign jurisdictions even before the drawing up of the Rome Statute, since the crimes dealt with by the statute call for the exercise of universal jurisdiction.[65] The argument most often used to dispel fears that US peacekeepers would be subject to politically-motivated prosecution is that proceedings before the Court are complementary in nature. The US would simply be required to investigate the said individuals for war crimes to avoid any involvement of the ICC.

The US plea for a cumulative basis of jurisdiction was eventually rejected by the conference, emphasising the universal nature of these crimes and the importance of a co-ordinated global response. Endowing the Court with jurisdiction which is not subject to too many conditions and which manages to respect the autonomy and sovereignty of states was of principle importance in Rome. It has already been mentioned that the essential purpose of the ICC is the condemnation of impunity and if the Court's jurisdiction were subject to cumulative conditions and dependant upon the whim of individual states, this would effectuate a certain degree of immunity from prosecution for nationals of reticent states.

The fact that the statute was adopted by states willing to abide by article 12(1), which decrees that states ratifying the statute automatically accept the jurisdiction of the ICC, means that granting the Court jurisdiction, even over the nationals of non-party states, is of fundamental importance. In hindsight, therefore, one can argue that a strong treaty with a large consensus and a negative vote from the US was preferable to a weak treaty with full US support.

D. The US rapid reactions

In response to not being able to limit the jurisdiction of the ICC during the diplomatic conference, the US launched a four-pronged attack against the Court. Each of these measures will be examined successively below.

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[65] Further discussion of this can be found at 22 above.

a. Article 98 agreements

Firstly, having lost the battle but not the war, the US has been concluding bilateral agreements with various states since the adoption of the Rome Statute. These agreements provide that neither country will extradite the citizens of the other to the ICC unless mutual consent is obtained. To date, 53 states have either agreed to or signed such agreements with the US, 25 of these states are parties to the Rome Statute.[66] The most recent bilateral agreements were accepted by Cambodia, Senegal and Zambia. According to recent reports Australia is currently negotiating an agreement with the US and is likely to sign in the near future.[67]

Although the majority of these agreements are awaiting ratification, the extent to which they have been agreed to is of great symbolic value. Their popularity can most probably be explained by the reports of threats made by the US to various countries that if such agreements were not signed, US military or other aid would be stopped.[68]

The European Union initially rejected a blanket agreement proposed by the US which would include all EU countries, although the EU later agreed that US government staff suspected of war crimes would not be extradited to the ICC. Hence, each of the 15 member states is free to conclude a bilateral agreement with the US, although such practice has been criticised. The political implications of this impasse involving the EU

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[66] Report by the NGO Coalition for the International Criminal Court (21 July 2003). Online: <http://www.iccnow.org/documents/otherissuesimpunityagreem.html>
Note that some of the agreements have been reportedly signed in secret.

[67] See chart produced by the NGO Coalition for the International Criminal Court (25 July 2003). Online: <http://www.iccnow.org/documents/otherissuesimpunityagreem.html>

[68] B. Mason, "International court dispute resurfaces" *BBC News* (11 June 2003) Online: <http://news.bbc.co.uk/2/hi/americas/2983066.stm> (date accessed: 10 July 2003). See also G. Younge & I. Black, "War crime vote fuels US anger at Europe" *The Guardian (London)* (11 June 2003) 12. In July 2003 the US froze $47m in military aid which was due to assist 35 countries which had not yet signed bilateral agreements. Colombia was particularly affected since it relies heavily on US aid. See BBC News, "US blocks aid over ICC row" *BBC News* (2 July 2003) online: <http://news.bbc.co.uk/2/hi/americas/3035296.stm> (date accessed: 5 August 2003).

and the US cannot be ignored. Recently, the US criticised the warnings made by the EU to accession countries regarding the signing of bilateral agreements, following the succumbing of Romania, Albania and Georgia to such deals. A note sent by the US to the EU read: "[t]his will undercut all our efforts to repair and rebuild the transatlantic relationship just as we are taking a turn for the better after a number of difficult months."[69]

The legality of these agreements is not within the scope of this paper. Nevertheless, they are worth noting as they reflect the current sentiment of the US vis-à-vis the ICC. Their legality has been justified by reference to article 98 of the Rome Statute[70]. However, this article was designed to deal with amnesties offered by states to individuals. The article calls for the recognition of an amnesty since the national state of the suspect in question must consent to the surrender of the individual to the ICC. It was clearly not designed to offer states the chance to conclude sweeping immunity agreements to benefit their citizens.[71]

Furthermore, even if the use of article 98 could be justified, it is clear that asking states to conclude these bilateral agreements is asking them to violate their international obligations. It is possible to separate the states into two groups: those who have ratified the Rome Statute and those which are merely signatory states. By entering into a bilateral

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[69] H. Clerc "ICC war crimes court on trial as EU and US square up" *Agence France Presse* (15 June 2003)

[70] Art. 98 reads:

Cooperation with respect to waiver of immunity and consent to surrender

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.

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

[71] Human Rights Watch, "United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements." (5 September 2002) Online: <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm> (date accessed: 26 May 2003)

agreement, the former group is in violation of article 86 of the Rome Statute which asks state parties to cooperate fully with the Court[72]. Furthermore, the statute was designed to ensure that all citizens, regardless of rank or nationality, would be held accountable for their crimes. As a result, the signing of such bilateral agreements is an effective breach of the international law principle of *pacta sunt servanda.*[73] For the signatory states, they may be criticised as being in breach of the Vienna Convention and their obligation as signatory states not to defeat the object and purpose of the Rome Statute.[74]

b. The Hague Invasion Act

Secondly, the Bush administration has agreed to a domestic law containing various provisions including one which authorises the current incumbent to "use all means necessary and appropriate" to rescue US and allied personnel imprisoned by the ICC. The official title of this legislation is the American Servicemembers' Protection Act,[75] although certain authors have facetiously dubbed it the "Hague Invasion Act" since it effectively allows for the use of force to free detained citizens from the Netherlands.[76] This same piece of legislation also prevents the US from complying with the ICC by providing for US military to be withdrawn from ratifying countries and making the contribution of US troops to UN peacekeeping operations contingent upon immunity.[77]

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[72] Art. 86 reads:
General obligation to cooperate
States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

[73] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S. 331, Art. 26 [hereinafter *Vienna Convention*].

[74] *Vienna Convention*, Art. 18.

[75] *American Servicemembers' Protection Act of 2002,* Pub. L. No. 107-206, 116 Stat. 820

[76] The Act was signed in by President Bush on 5 August 2002. See Human Rights Watch, "Hague Invasion Act Becomes Law – White House Stops At Nothing in Campaign Against War Crimes Court" (3 August 2002). Online: <www.hrw.org/press/2002/08/aspa080302.htm> (date accessed: 16 July 2003)

[77] R. Chibueze, "United States Objection to the International Criminal Court: A Paradox of 'Operation Enduring Freedom'" (2003) 9 Ann. Surv. Int'l & Comp. L. 19-54.

c. Resolution 1422

Thirdly, the US was highly instrumental in the unanimous adoption by the Security Council of Resolution 1422 which will be examined in detail in the following chapter.

The combined effect of the above measures effectively means that certain countries have negotiated a temporary immunity for both US soldiers and US citizens involved in UN peacekeeping missions.

d. The 'unsigning' of the Rome Treaty

Finally, even though the Clinton administration had been prepared to sign the Rome Statute, albeit with a fatalistic warning,[78] under the Bush administration the policy was significantly amended.

On 6 May 2002, almost one month after the 60th ratification of the Rome Statute was attained;[79] the US administration officially announced its opposition to the statute in a letter addressed to the UN. The letter stated that the US was no longer bound by the obligation resulting from the signing of the Rome Statute. Jack Bolton declared that "[t]his is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000."[80]

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[78] President Clinton stated that: "I will not, and do not recommend that my successor, submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied" (See S.D. Murphy, "U.S. Notification of intent not to become a party to the Rome Statute" (2002) 96 Am. J. Int'l L. 724.) Furthermore, in spite of Clinton's support for the ICC he knew that the Senate would not agree to the ratification of the *Rome Statute*. (See Casey, *supra* note 54.)

[79] The 60th ratification came on 11 April 2002 from Bosnia and Herzegovina.

[80] Letter from John Bolton (Under Secretary of State for Arms Control and International Security) to UN Secretary-General Kofi Annan (6 May 2002). Available as a footnote to the US signature date online: <www.un.org/law/icc/index.html> (date accessed: 1 July 2003). Mention ought to be made of Article 18 of the *Vienna Convention*. This article requires that a signatory to a treaty has an obligation not to defeat the object and purpose of the instrument. Although the US has not ratified this treaty, it is likely that this principle has acquired customary law status. Hence, the aforementioned letter is a novel break away from this common understanding of a minimum obligation. See Scott, D.C., "Presidential Power to "Un-sign" Treaties" (2002) 69 U. Chi. L. Rev. 1447.

This interesting move by the US administration is yet another example of the US opposition towards the ICC. However, it is the passing of Resolution 1422 by the Security Council which is of greatest concern for the ICC. This document compromises the jurisdiction of the ICC by eliminating certain individuals from its scope. What is clear is that the attempt by the ICC to ensure that every individual stands equal before it is in jeopardy since the passing of Resolution 1422. Whether the instrument goes so far as to temper the enthusiasm and fragile hope out of which the Rome Statute was born is another matter.

It is now necessary to consider the argument initially proposed by the US in favour of immunity from prosecution for UN peacekeepers before the ICC. It has already been noted that the renewal of Resolution 1422 as Resolution 1487 creates a certain immunity of sorts. As such, it is necessary to consider and debate the US position, having regard to the current system of immunities within the UN peacekeeping structure and considering whether such a system could viably be extended to an immunity of sorts before the ICC.

IV. Protecting the peacekeepers: Resolution 1422

Resolution 1422 was passed unanimously by the Security Council on 12 July 2003.[81] In its substantive elements it reads as follows:

> 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;

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[81] *Resolution 1422, supra* note 2. See UN SCOR, 57th Year, 4572d Mtg., UN Soc. S/PV.4572 (2002) at 2.

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.

Hence, the aim of the instrument is to defer the prosecution of peacekeepers from non-party states by the ICC for a period of 12 months. In order to appreciate the effect and influence of this Resolution it is necessary to examine the status of UN peacekeeping prior to the passing of the document.

A. The changing face of UN peacekeeping – a cause for concern?

The Charter of the United Nations does not explicitly mention peacekeeping as an activity of the UN and yet its prevalent nature cannot be ignored.[82] The legal justification for the activity is often found in the principle purpose of the UN to maintain international peace and security as set out in article 1 of the UN Charter.[83] The Secretary-General defined the concept of peacekeeping as "[t]he deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations

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[82] There have been 56 peacekeeping operations undertaken by the United Nations since 1948. Of those, 14 are currently in operation: UNTSO; UNMOGIP; UNFICYP; UNDOF; UNIFIL; UNIKOM; MINURSO; UNOMIG; UNMIK; UNAMSIL; MONUC; UNMEE; UNMISET; MINUCI. As of May 2003 a total of 34,941 individuals were serving on UN Peacekeeping operations.
See online: <http://www.un.org/peace/bnote010101.pdf> (date accessed 20 April 2003).

[83] *Charter of the United Nations,* 26 June 1945, Can. T.S. 1945 No.7.[hereinafter *UN Charter*] See J. Murray, "Note: Who will Police the Peace-builders? The Failure to Establish Accountability for the Participation of United Nations Civilian Police in the Trafficking of Women in Post-conflict Bosnia and Herzegovina" (2003) Colum. Human Rights L. Rev. 475. [hereinafter "Who will police the Peace-builders?"]. However, peacekeeping is not the exclusive domain of the UN since recent developments have seen both the European Union and NATO involved in important peacekeeping activities even outside the EU. C. Morris, "EU force deploys in Macedonia" *BBC News* (31 March 2003) online: <http://news.bbc.co.uk/1/hi/world/europe/2902201.stm> (date accessed: 1 August 2003), I. MacWillam, "Analysis: Nato's new Afgan mission" *BBC News* (11 August 2003) online: <http://news.bbc.co.uk/1/hi/world/south_asia/3140353.stm> (date accessed: 12 August 2003).

military and/or police personnel and frequently civilians as well.[84] As such, in its traditional sense, the concept refers to both 'observer missions' involving unarmed officials and 'peacekeeping forces' whereby individual states contribute their military personnel to such a mission.

Nevertheless, it is clear that since the end of the Cold War period, peacekeeping has developed from maintaining the peace, whereby officials would simply observe compliance with ceasefires, to active peace-making or peace-building, whereby individuals are involved in the establishment of transitional governments and in encouraging respect for the rule of law and democracy.[85] As such, the status of UN peacekeepers on foreign soil has progressed from one of neutral observers to active participants in assisting post-conflict societies. The clearest example of a more involved mission was the work carried out by the UN in Bosnia. There the UN force developed from a protection force into a veritable society-building effort.[86] The second UN mission was created by the Dayton Peace Agreement following horrific violence in Bosnia that escalated in mid-1995. This mission was comprised of an International Police Task Force, a civil affairs unit, a human rights office and a judicial watchdog.[87]

The US position is that it is not possible for individual peacekeepers to effectively fulfil their functions in this new age of building the peace if they are not immune from prosecution before the ICC and free from the risk of political prosecutions. Before going on to analyse this argument it is helpful to draw a distinction between immunity from

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[84] *An Agenda for Peace: preventative diplomacy, peacemaking and peace-keeping* [Report of the Secretary-General pursuant to the statement adopted by the Summit meeting of the Security Council on 31 January 1992] UN Doc., A/47/277 - S/24111 (1992) at 10.

[85] C. Gray, *International Law and the Use of force* (Oxford: Oxford University Press, 2000) at 165.

[86] The United Nations Protection Force (UNPROFOR) was set up by the Security Council on 21 February 1992. On 31 March 1995 it became the United Nations Mission in Bosnia and Herzegovina (UNMIBH), this latter operation ran until 31 December 2002 when the responsibility for peacekeeping in the area was handed over to the police mission of the European Union (EUPM). Online: <http://www.un.org/Depts/dpko/dpko/home.shtml> (date accessed: 12 July 2003) and "EU Takes on Bosnia Policing" *BBC News* (1 January 2003) Online: <http://news.bbc.co.uk/1/hi/world/europe/2620317.stm> (date accessed: 12 July 2003).

[87] "Who will Police the Peace-builders?" *supra* note 83 at 486.

jurisdiction and impunity. The source for the former is found in international customary law; it is connected to one's official capacity and is designed so that the individual can carry out their functions effectively. According to the Vienna Convention, the purpose of immunity is to "ensure the efficient performance of the functions of diplomatic missions as representing states".[88] Whereas immunity simply bars an individual from prosecution, often in respect of a certain time period (for as long as they hold the position), or in respect of certain crimes, impunity implies an exoneration from all criminal responsibility irrespective of eternal factors.[89]

The following section will consider the extent of immunities which are already in place to assist UN peacekeepers in the carrying out of their functions.

B. Immunities enjoyed by UN staff

The most usual way for a UN peacekeeping operation to be administered is through Participation Agreements between the UN and the contributing state[90] and Status of Forces Agreements (SOFA) between the UN and the host state. The latter agreements provide that the participating military personnel are immune from the criminal law of the host state; it is the contributing state which continues to exercise criminal jurisdiction over their nationals.[91] As such, the decision to prosecute a peacekeeper would lie solely with the sending state.[92] Hence, military personnel on UN missions are protected by

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[88] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 U.N.T.S. 95. Preamble.

[89] *Belgium case, supra* note 50 at paras. 60-61.

[90] *Model Agreement between the UN and Member States Contributing Personnel and Equipment to UN Peace-keeping Operations*, UN Doc. A/46/185 (1991) at para. 25.

[91] *Draft Model Status-of-Forces Agreement Between the United Nations and Host Countries*, UN Doc. A/45/594 (1990). See also M. Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" (1999) 10 EJIL 124 at 127-8. [hereinafter "Peacekeepers under Fire"]

[92] M. Zwanenburg, "Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces" (1998) 11 LJIL 229 at 238.

SOFA and high-ranking UN officials often enjoy diplomatic status. Nevertheless, the situation surrounding UN staff and field personnel is unclear.[93]

The primary source for immunity for UN officials is found in article 105 of the UN Charter:

1. The Organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes

2. Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

It may be deduced from the above that United Nations staff have been accorded a functional immunity. Such an argument was accepted by the International Court of Justice ("ICJ") in 1949.[94] In order to obtain a clearer notion of what a functional immunity entails it is necessary to turn to the provisions of the Convention on the Privileges and Immunities of the United Nations.[95] This instrument responds to the request in article 105 para. 3 of the UN Charter for a precise document setting out the privileges and immunities of UN staff.

According to this document, UN officials on mission have immunity for "words spoken and written and for...acts performed by them in their official capacity".[96] Nevertheless, whether it is a question of UN staff or those officials who enjoy diplomatic status, the Convention makes clear that the immunity does not appertain to the individual in their own right, instead it flows from the organisation and, as such, the organisation can decide whether to waive or grant the immunity. Essentially, the Secretary-General may wave

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[93] P.C. Szasz & T. Ingadottir, "The UN and the ICC: The Immunity of the UN and Its Officials" (2001) 14 LJIL 867 at 870-873.

[94] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, [1949] I.C.J. Rep. 174.

[95] *Convention on the Privileges and Immunities of the United Nations* 13 February 1948, 1 U.N.T.S. 15, Can. T.S. 1948 No. 2.

[96] *Convention on the Privileges and Immunities of the United Nation* s. 18(a).

these immunities in cases where "the immunity would impede the course of justice" and where it may be waived "without prejudice to the interests of the United Nations".[97] Hence the final decision as to whether the immunity will be effective remains with the Secretary-General.

As the immunities in question are functional it seems unlikely that they could be invoked in a case alleging crimes under the Rome Statute. The Statute embodies "the most serious crimes of concern to the community as a whole"[98] as such it is highly likely that an individual peacekeeper charged with genocide, crimes against humanity or war crimes would have their immunity waived by the Secretary-General.

C. Extending immunity to peacekeepers before the ICC

According to the US, holding such individual peacekeepers to account for their individual criminal responsibility under the terms of the Rome Statute would compromise their contributions to missions. The provisions of the statute "could inhibit the ability of the US to use its military to participate in multinational operations".[99] Hence, the US initially took the position that complete immunity for peacekeepers before the ICC was essential. As the diplomatic conference in Rome progressed it became evident that the fear behind such reticence was the idea of politicised prosecutions of US nationals.[100]

The US demand was supported by the recognition that UN peacekeepers were already immune from prosecution before Bosnian courts by virtue of the Dayton Accords.[101] The utility of such a comparison is, however, debatable since the neutrality, independence and

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[97] *Ibid.* s. 20

[98] *Rome Statute*, Preamble.

[99] US Department of State, Ambassador D.J. Scheffer, "Developments at Rome Treaty Conference", Testimony Before the Senate Foreign Relations Committee (23 July 1998). Online: <http://www.state.gov/www/policy_remarks/1998/980723_scheffer_icc.html> (date accessed: 14 June 2003).

[100] "Peacekeepers under Fire" *supra* note 91at 126.

[101] "Efforts to Obtain Immunity", *supra* note 6.

respect for due process which the ICC embodies may well be less obvious in the Bosnian national criminal courts. Furthermore, it has been argued by the US that immunity from the ICC ought to be accompanied by permanent immunity from the International Criminal Tribunal for the former Yugoslavia ("ICTY"). This was deemed important, "particularly in view of the ICTY's decision three years ago to investigate the United States and other NATO allies for possible war crimes in the Kosovo operation in 1999".[102] Such reticence to establish a system of international tribunals to investigate and serve justice ought to be of great concern to the international community.

A number of arguments have been advanced, both at the Rome Conference and in numerous subsequent articles, to dispel the fears of the US that politically motivated prosecutions will be common. The strongest of such retorts is found in the principle of complementarity. It has been argued that this principle is sufficient to protect US nationals since only if the US were 'unwilling or unable' to investigate an individual suspected of crimes within the remit of the Rome Statute would the ICC intervene.[103] However, the argument has been advanced in response that complementarity is not an adequate safeguard since the decision as to the adequacy of the national investigation rests with the ICC judges. Furthermore, Ambassador Scheffer pointed out that complementarity is flawed since it "involves States investigating the legality of humanitarian interventions or peacekeeping operations that they already regard as valid official actions to enforce international law".[104] The US delegation feared that the ICC would be able to step in to investigate the actions of peacekeepers which the US deemed valid under international law, since the US would have no reason to prosecute the individuals involved in the national courts.[105]

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[102] Letter from H. J. Hyde, Z. Miller, T. Delay, J. Helms, and B. Stump to Secretary of State Colin Powell (11 April 2002). Online: http://www.house.gov/international_relations

[103] *Rome Statute,* Art. 17. See also "Peacekeepers under Fire" *supra* note 91at 131.

[104] US Department of State, Ambassador D.J. Scheffer, "The International Criminal Court", Statement Before the Sixth Committee of the 53rd General Assembly (21 October 1998). Online: <http://www.un.int/usa/98_179.htm> (date accessed: 26 May 2003).

Such an argument overlooks the fact that it is the individual criminal liability of the perpetrator which is to be judged according to international principles concerning the most serious crimes known to humanity. The position argued by the US, whereby a political decision could realign such principles, cannot be accepted. Nevertheless, this position does point to the wider implications of this debate. It soon becomes clear that the US position is motivated by more than a fear of a biased court; it is the whole notion of an international definition of war crimes which does not sit well with the US.[106]

Another problem with the initial call for immunity from prosecution or investigation before the ICC is that a grant of immunity to UN peacekeepers from would be a non-discriminate, sweeping immunity, without regard to rank, role or the gravity of the crime. As was mentioned earlier, the traditional position regarding immunity is dependant upon whether the individual in question is a UN official or has diplomatic status.

The above arguments point to the conclusion that a call for immunity for peacekeepers before the ICC is neither necessary nor desirable. Furthermore, it is merely another indicator of the reticence of the US to accept multilateral definitions of international crimes and to accept the jurisdiction of an international court to implement such multilateral definitions. Before concluding this section it is worth noting finally that although there was little discussion, during the Resolution 1422 debates, regarding plausible scenarios whereby peacekeepers could find themselves before the ICC, such a possibility is not as remote as was presumed.

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[105] C.M. Van de Kieft, "Uncertain Risk: The United States Military and the International Criminal Court" (2002) 23 Cardozo L. Rev. 2325 at 2336.

[106] The definition of war crimes in the *Rome Statute* was another source of extensive debate at the diplomatic conference in Rome. The US delegation succeeded in watering down the definition but they did not manage to eliminate all risk. According to *Rome Statute,* Art. 8(2)(b)(i) war crimes include "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities". Indignation was expressed at the diplomatic conference and prior to the conference that, had the *Rome Statute* been in force in before WWII, such a definition would include the bombing of Hiroshima. See Mayerfeld, *supra* note 53 at 119-120. The author notes that such indignation is misplaced since the killing of civilians is the "paradigmatic war crime".

D. Who needs protecting from the peacekeepers?

The fact that the Rome Statute is progressive in its recognition of the severity of sexual crimes is relevant to the possible implication of individuals on peacekeeping missions. The practice of trafficking women and girls into sexual slavery or for sexual exploitation is prevalent in Bosnia[107] and as one author notes, numerous individuals working for the International Police Task Force in Bosnia have been reprimanded for their involvement in the trafficking of women or the purchase of such women.[108] There have also been accounts of high-ranking UN officials patronising brothels where women are often kept against their will in violent and degrading working environments.

It is possible that such impropriety on the part of these officials could constitute a crime against humanity under the terms of the Rome Statute if it were "part of a widespread or systematic attack directed against any civilian population".[109] Although most of the reported incidents were isolated in nature, it is sadly not difficult to envisage a scenario whereby a UN official authorises acts of sexual slavery, or commits rape with knowledge of the widespread and systematic nature of the preceding trafficking crimes.[110] This leads to the conclusion that the US position which was motivated by a fear of political persecution and which provoked the demand for sweeping immunity before the Court may well jeopardise justice being served in the above scenarios.

E. Conclusion

It is somewhat of a relief that the Security Council did not accept the US demand for sweeping immunity for peacekeepers. Nevertheless, Resolution 1422 is still of significant importance since it requests the deferral of prosecution of certain 'current or former

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[107] International Organisation for Migration, "Victims of Trafficking in the Balkans: A Study of Trafficking in Women and Children for Sexual Exploitation to, through and from the Balkan Region" (2001) Online: <www.iom.int//documents> (date accessed: 26 May 2003).

[108] "Who will Police the Peace-builders?" *supra* note 83 at 503

[109] *Rome Statute,* Art. 7.

[110] "Who will Police the Peace-builders?" *supra* note 83 at 512.

officials or personnel' working on UN peacekeeping missions for a readily renewable 12 months and is therefore very close to an official immunity. The main difference is that if at some point the Resolution is not renewed, prosecutions may be brought against such individuals. However, although this difference is significant, the Resolution has already been renewed once with little difficulty by the Security Council and if the bilateral 'article 98 agreements' continue to be concluded, their impact upon the work of the Court may be significant enough to construct an effective immunity for US peacekeepers.

Having examined the history behind the creation of the ICC and the subsequent US opposition towards the Court, along with the particular situation facing peacekeepers, it is now necessary to consider in depth the legality of the instrument which was the end result of such political wrangling. In the following chapter, against this backdrop, I will dissect this brief resolution and examine the legality of its provisions under the Rome Statute, the UN Charter and international law in general. Such an analysis will assist in the determination of whether or not Resolution 1422 is a valid legal instrument. The conclusion reached will be instrumental, as I go on in the third chapter to examine the implications of Resolution 1422 upon the interplay between the Security Council, the ICC and individual states players.

CHAPTER II: DETERMINING THE LEGALITY OF RESOLUTION 1422

INTRODUCTION

A. From immunity to deferral

On 3 July 2002, an historic ten-day debate began with a plenary session of the PrepCom for the ICC. Over the course of this debate the US proposal for immunity for peacekeepers was discussed along with the limits of the Security Council's legal powers. At a landmark meeting on 10 July 2002, representatives of UN member states were invited to discuss the latest US proposal to protect their citizens acting as peacekeepers abroad.[111] The text before member states at this stage in the debate did not carry a 12-month time limit, since the deferral from prosecution was designed to be automatically renewed. However, this US proposal was nevertheless backed up by a reference to article 16 of the Rome Statute. This was the first time in the debate that the constitutive statute of the Court had been relied upon. This altered the discussions significantly since the issue became one involving the Security Council in the workings of a court set up via a multilateral treaty. The suggested application of article 16 to this situation did not sit well with the Secretary-General or with a large majority of participating states.[112]

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[111] UN SCOR, 57th Year, 4568th Mtg., UN Doc. S/PV.4568 (2002). On 10 July 2002 two meetings took place. The following state representatives made comments during the morning: Mr. Heinbecker (Canada); Mr. MacKay (New Zealand); Mr. Kumalo (South Africa); Mrs. Løj (Denmark); Mr. Negroponte (United States of America); Mr. Levitte (France); Mr. Tafrov (Bulgaria); Mr. Nambiar (India); Mrs. Chassoul (Costa Rica); Mr. Fadaifard (Iran); Prince Zeid Ra'ad Zeif Al-Hussein (Jordan); Mr. Wang Yinfan (China); Mr. Gatilov (Russian Federation); Mr. Ryan (Ireland); Mr. Enkhsaikhan (Mongolia); Mrs. Fritsche (Liechtenstein); Mr. Fonseca (Brazil); Mr. Staehelin (Switzerland); Mr. Mahbubani (Singapore); Mr. Koonjul (Mauritius); Mr. Aguilar Zinser (Mexico); Mr. Kolby (Norway); Mr. Kasemsarn (Thailand); Mrs. Pulido Santana (Venezuela). Whilst comments were made during the afternoon session by: Mr. Naidu (Fiji); Mr. Kusljugić (Bosnia and Herzegovina); Mr. Kuchinsky (Ukraine); Mr. Diallo (Guinea); Mr. Valdivieso (Colombia); Mr. Slade (Samoa); Mr. Hasmy (Malaysia); Mr. Schumacher (Germany); Mr. Wehbe (Syria); Mr. Tidjani (Cameroon); Mr. Kamara (Sierra Leone); Mr. Listre (Argentina); Mr. Šahović (Yugoslavia); Mr. Rodríguez Parrilla (Cuba); Sir Jeremy Greenstock (United Kingdom). [hereinafter "10 July 2002 meeting"]

[112] Letter from Kofi Annan to Colin Powell, *supra* note 8.

Several speakers mentioned that the adoption of the US proposal circulating on 10 July 2002 would put member states in a very difficult situation. For instance, on behalf of Liechtenstein, Mrs. Fritsche stated that "[w]e do not want to see the Council put itself in a position where the United Nations membership at large is forced to question the legality of one of its decisions".[113] Such a position was echoed by Canada's representative, Paul Heinbecker, who noted that "adoptions of the Resolutions currently circulating could place Canada and...others in the unprecedented position of having to examine the legality of a Security Council resolution".[114]

The concerns as to the legality of the proposed Resolution, voiced by over thirty states upon the occasion of the 10 July meeting can be grouped under three main categories:

1. The Security Council was not following the letter of article 16 of the Rome Statute;
2. The Security Council was acting *ultra vires* in passing a Chapter VII resolution in the absence of a threat to international peace and security;
3. The Security Council was purporting to alter a multilateral treaty.[115]

Over the next two days only one amendment, albeit significant, was made to the proposed texts according to which the Resolution would last for a limited period of 12 months unless renewed by a Security Council resolution.

Following the wealth of emotive comments made on behalf of various states as to the illegality of the US proposals it came as somewhat of a surprise that just 48 hours later, the amended resolution was unanimously adopted in the Security Council. It is likely that the members of the Security Council were influenced by a strong desire to reach a compromise, in particular in light of the severity of the threats made by the US.

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[113] "10 July 2002 meeting", *supra* note 111. Morning session at 20.

[114] *Ibid.* Morning session at 4.

[115] For a breakdown of positions taken on 10 July 2002 by individual states see NGO Coalition for the International Criminal Court, "Chart summarizing Governmental opposition to US proposals" (10 July 2002). Online: <http://www.iccnow.org/documents/otherissues1422.html> (date accessed 10 June 2003).

Furthermore, it is important to bear in mind that the above discussion relates the events surrounding a political decision. The significant amount of pressure imposed by the US is an important factor to consider throughout the following chapter. As is the fact that the statements made during the July debate highlight the importance of pragmatism and a desire to reach a compromise. The finer legal debate as to whether Resolution 1422 is in compliance with article 16 of the Rome Statue, or whether the Security Council was acting *ultra vires* was not resolved on this occasion.

As mentioned in the previous chapter, one hopes that it is highly unlikely that such a circumstance could arise whereby peacekeepers were pursued for such crimes. Nevertheless, although several attempts were made to placate the US by noting the lack of validity behind the fears of the Bush administration, along with highlighting the safeguard in the principle of complementarity, the Resolution was the only compromise the Security Council seemed able to reach with the recalcitrant state.

The resulting Resolution 1422 is a watered-down version of the original request mainly since it does not offer sweeping immunity for all UN peacekeepers as originally requested by the US. Furthermore, it is not automatically renewable and if the instrument were not renewed it would be possible for the ICC to investigate crimes committed during the deferral period.[116] Nevertheless, the Resolution has been renewed and the language of the document smacks of a Security Council intention to continuing renewing it.[117] As such, it is worthwhile exploring the circumstances surrounding this re-adoption of the Resolution where the exact text of Resolution 1422 became that of Resolution 1487.

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[116] "Efforts to Obtain Immunity", *supra* note 6.

[117] The Security Council "Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-months periods for as long as may be necessary." *Resolution 1422*, *supra* note 2 and *Resolution 1487*, *supra* note 3.

B. One step forward two steps back: the renewal of Resolution 1422

Fast approaching the expiry date of Resolution 1422, the international press speculated as to the extent of political brinkmanship this debate would bring.[118] However, although Resolution 1487 was not accorded the stability a unanimous vote brings, it did nevertheless squeeze through the Security Council relatively unscathed.

There was once again an opportunity for state representatives to debate the matter and 19 countries spoke out about the renewal of the Resolution.[119] Three countries: France, Syria and Germany, decided to add weight to their opposition by abstaining from the vote.[120] Hence, the Resolution passed with 12 votes to 0. The abstentions, however, should not be passed over lightly, especially since one of the permanent members made the decision to protest in this way. According to the UN Charter, the concurring vote of all five permanent members is required to ensure the validity of a non-procedural Council decision.[121] However, over time, a customary rule has grown from Council practice so that such decisions remain valid despite abstentions by one or more permanent members.[122] Effectively, an abstention does not signal opposition but nor does it denote

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[118] See *e.g.* F. Barringer, "U.S. Resolution on World Court Revives Hostility" *New York Times* (11 June 2002) 6; M. Turner, "UN in fix over US call on world court" *Financial Times* (7 June 2003) 7; D. Usborne, "US Clashes with Europe over War Crimes" *The Independent* (11 June 2003). F.Barringer, "U.N. Renews U.S. Peacekeepers' Exemption From Prosecution" *New York Times* (13 June 2003) 18.

[119] UN SCOR, 58th Year, 4772d Mtg., UN Doc. S/PV.4772 (2003). Online: http://www.un.org/Depts/dhl/resguide/scact2003.htm. The following state representatives made comments prior to the vote: Paul Heinbecker (Canada); Mr McIvor (New Zealand); Prince Zeid Ra'ad Zeif Al-Hussein (Jordan); Mr. Staehelin (Switzerland); Mr. Wenaweser (Liechtenstein); Mr. Vassilakis (Greece); Mr. Zarif (Iran); Mr. Paolillo (Uruguay); Mr. Lamba (Malawi); Mr. Viotti (Brazil); Mr. de Rivero (Peru); Mr. Edghill (Trinidad and Tobago); Mr. Listre (Argentina); Mr. Kumalo (South Africa); Mr. Mbanefo (Nigeria); Mr. Mukongu Ngay (Democratic Republic of the Congo); Mr. van den Berg (Netherlands); Mr. Akram (Pakistan); Mr. Tidjani (Cameroon). Following the vote the following representatives made statements: Sir Jeremy Greenstock (United Kingdom); Mr. Cunningham (United States); Mr. Duclos (France); Mr. Pleuger (Germany); Mr. Arias (Spain); Mr. Wehbe (Syria) ; Mr. Raytchev (Bulgaria); Mr. Lucas (Angola); Mr. Traoré (Guinea); Mr. Cheng (China); Mr. Lavrov (Russian Federation). [hereinafter "12 June 2003 meeting"]. Sir Jeremy Greenstock (United Kingdom) did not speak out against the renewal of the deferral.

[120] *Ibid.* at 22. See F.Barringer, " U.N. Renews U.S. Peacekeepers' Exemption From Prosecution" *New York Times* (13 June 2003) 18.

[121] *UN Charter,* Art. 27(3).

[122] B. Conforti, *The Law and Practice of the United Nations* 2nd ed. (The Hague, Kluwer Law International, 2000) at 66-67.

concurrence. As such, the action taken by France was of greater symbolic than practical effect, but no less important for that.

Strong words abounded during the meeting prior to this vote. For instance, Mr. Mbanefo of Nigeria was vocal in his discord arguing that "[j]ust as international terrorism is an affront to civilized conduct and a threat to international peace and security, so also are impunity and crimes against humanity an affront to the world's conscience, and indeed a threat to international peace and security".[123]

The Secretary-General did not hide his discomfort with the renewal of the Resolution, declaring his fear that "the world would interpret it as meaning this Council wished to claim absolute and permanent immunity for people serving in the operations it authorises. [That] would undermine not only the authority of the ICC but also the authority of this Council, and the legitimacy of United Nations peacekeeping."[124] He also argued that article 16 was not designed for such a purpose; this argument will be explored further in the proceeding section.

The concerns voiced by various country representatives as to the legality of the proposals were not quelled during the debates which preceded the voting of either resolution. As such, they remain highly pertinent today. In the sections which follow I intend to initially examine Resolution 1422 according to the principles of international law as referred to in the Resolution. I will then move on to discuss the wider principles of international law which apply in a more general way to the Resolution.

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[123] "12 June 2003 meeting", *supra* note 119 at 18.

[124] *Ibid.* at 3. M. Turner, "Paris, Berlin hold back as UN exempts peacekeepers from prosecution" *Financial Times (London)* (13 June 2003) 10.

I. The deferral provision: Article 16 of the Rome Statute

Introduction

The analysis of the compatibility of Resolution 1422 with article 16 of the Rome Statute is potentially the most important in determining the legality or otherwise of this instrument. Article 16 is referred to in the Resolution as authorising exactly what the Resolution proposes to do, i.e. defer the investigation or prosecution of certain peacekeepers by the ICC for a period of twelve months.

The article is one of two provisions in the Rome Statute which involve the Security Council in the running of the ICC, the other provision being article 13(b), which allows the Council to refer cases to the ICC. There is a slight difference in language between the two similar provisions of article 13(b) and article 16. The former refers to the Security Council "acting under Chapter VII" while the latter requires "a resolution adopted under Chapter VII". Hence, the legality of Resolution 1422 is of great importance as it is an explicit requirement for the appropriate use of article 16.

Article 16 reads as follows:

> 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 manner in which article 16 is employed in the Resolution is questionable for a number of reasons. However, before moving on to analyse this application it is worth highlighting the fact that initially these provisions were relied upon in a tense political situation which led ultimately to the extraordinary use of the veto by the US when called upon to renew the peacekeeping mission in Bosnia. The amount of blood already spilled in that unstable part of the world meant that such an action had to be taken very seriously indeed. As such, it may well be that the unanimous vote which Resolution 1422 received

can be explained by a desire to ensure peace and stability in Bosnia.[125] This conclusion may not be drawn, however, with regard to Resolution 1487 whereby the same exact text suffered only three abstentions.

A. The controversy of article 16

a. The ordinary meaning of article 16

In order to decipher the meaning of article 16 we can turn to the Vienna Convention on the Law of Treaties.[126] According to article 31 of this Convention, treaties are to 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".

According to the ordinary language of article 16, Resolution 1422 is legally compatible with the provisions of the article. It expresses a request to the ICC under Chapter VII of the Charter that prosecutions and investigations be deferred for a 12-month period. However, upon a closer examination of article 16, there are a number of ambiguities concerning the requirements of the provision. For instance, it is not clear whether the deferral can apply to a generic group of individuals or whether it can be made in advance in relation to a hypothetical scenario. Such ambiguities may lead to the conclusion that the ordinary meaning of the article is not clear. In such circumstances, according to the Vienna Convention, it is possible to have regard to the context within which the article is situated.[127] This context may be established by considering the drafting history of the instrument, along with the preamble. Indeed, the preamble of an international treaty is often vitally important in setting the overall objectives of the document.

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[125] Since then the peacekeeping mission in Bosnia has been handed over to an EU force. *Supra* note 83.

[126] *Vienna Convention, supra* note 73.

[127] *Vienna Convention,* Art. 32.

b. With regard to the preamble of the Rome Statute

The preamble to the Rome Statute affirms an intention to punish the perpetrators of "the most serious crimes of concern to the international community as a whole" and to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". Given that article 16 is the principal legal authority upon which Resolution 1422 is based, it is difficult to argue that using the provision to obtain effective immunity from prosecution for a certain class of individuals is in accordance with the overall objective of a treaty which attempts to secure an end to impunity.

Furthermore, the opening lines of the preamble remind states of the fragile cultural mosaic which nations attempt to preserve. This is of utmost importance since it serves as a reminder that the contents of this Statute do not simply provide the legal framework for a judicial institution. Rather, the words highlight the importance of this nascent system of international criminal responsibility in assisting the progression and protection of civilisation.

At this stage it is possible to provisionally conclude that the purported use of article 16 in Resolution 1422 is not in accordance with the overall aim of the Rome Statute, as enumerated in the preamble. However, it is necessary to interrogate the individual provision further by examining the *travaux préparatoires*.

c. The drafting history of article 16

According to article 32 of the Vienna Convention, it is possible to consider supplementary sources of interpretation such as the drafting history of the article, when the above steps result in an ambiguous conclusion.

Article 16 originally appeared as article 23 para. 3 of the International Law Commission's Draft Statute which read as follows:

> [n]o 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.[128]

The negotiations surrounding this provision demonstrate its controversy since there was reticence amongst certain states to allow the Security Council the power to become politically involved in the judicial activities of the Court. On the other hand, those in favour of the draft text highlighted the need to prevent the Court from becoming involved in the work of the Council in maintaining peace and security. In particular, the five permanent members of the Security Council asserted that it would be unacceptable to grant the ICC the power to investigate politically sensitive matters under consideration by the Council.[129] A further concern for the reticent states was the ease with which the jurisdiction of the Court could be effectively limited if the Security Council simply placed an issue on its agenda, since the ICC would then be prevented from becoming involved indefinitely.[130]

A proposal was voiced by the Singapore delegation and developed into what became known as the 'Singapore compromise'. In essence, it was suggested that the international criminal court could investigate any matter unless the Security Council decided otherwise by taking a formal decision. Such a formal decision would require positive votes from nine members of the Council. This compromise reversed the original situation whereby the presumption was that the Court could not investigate matters unless the Security Council passed a resolution giving it permission to do so.[131]

Nevertheless, certain states were doubtful that even the Singapore compromise could avoid the abuse of article 16 to protect nationals of allied states by offering immunity.

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[128] *Draft Statute, supra* note 27 at para. 84.

[129] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, GA 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996) (Vol I) at para. 141.

[130] L. Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16" in R.S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) 143 at 150.

[131] *Ibid.* at 151.

Such fears were dispelled by setting out the real purpose of article 16, which is to ensure that tentative peace negotiations carried out by the Security Council would not be jeopardised. The emphasis lay on the exceptional nature of such circumstances:

> The 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 jeopardised 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.[132]

The drafting history of the provision leads to the following conclusions. Firstly, that article 16 was designed to ensure that there would be no overlapping of sensitive political events being dealt with by the Security Council so that peace may temporarily be chosen over justice. Secondly, that article 16 was designed for specific cases and thirdly that article 16 was to be invoked as a temporary measure. Indeed, prior to Resolution 1422, article 16 was very much seen as a provision to be interpreted restrictively as absolutely exceptional in its nature.[133]

At the Rome Conference an example was offered of a situation in which the article 16 mechanism could be put to use. One author recounts that "[a]n 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." The same author goes on to note that "...in such a 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."[134]

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[132] F. Berman, "The Relationship between the International Criminal Court and the Security Council" in H.A.M. Van Habel, J.G. Lammers, & J. Schukking, eds., *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser Press, 1999) 173 at 177. (The author was Head of the delegation of the United Kingdom to the Rome Conference.)

[133] L. Condorelli & S. Villalpando, "Referral and Deferral by the Security Council" in A. Cassese, P. Gaeta, J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*" (Oxford: Oxford University Press, 2002) 627 at 646. [hereinafter "Referral and Deferral"]

[134] E. Wilmshurst, "The International Criminal Court: The Role of the Security Council" in G.Nesi & M. Politi, eds., The Rome Statute of the International Criminal Court: A Challenge to Impunity (Aldershot: Ashgate Publishing, 2001) 36 at 40.

The early meetings of the Ad Hoc Committee on the Establishment of an International Criminal Court also reflect a desire to limit the provision to particular situations. Some delegations noted that the draft article "was too vague and should be reformulated so as to expressly limit the application of the paragraph to situations in which the Council was taking action with respect to a particular situation, as indicated in the commentary of the article".[135]

Furthermore, in this international climate where political stances can add weight to legal analysis, it is important to note the explicit comments made in relation to article 16 and its specific nature at the meetings from 3 July up until the adoption of the Resolution.[136] For instance, Canada's Paul Heinbecker pointed out that "[t]he 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 – would warrant a twelve-month deferral."[137]

Similar comments were voiced by Don MacKay of New Zealand:

> Attempts to invoke the procedure laid down in Article 16 of the Rome Statute in a generic resolution, not in response to a particular fact situation, and on an ongoing basis, is inconsistent with both the terms and purpose of that provision...its wording – as well as its negotiating history – makes clear that it was intended to be used on a case by case basis by reference to particular situations.[138]

As such, it is possible to conclude from the above that article 16 of the Rome Statute was intended to respond to specific cases where temporary conflicts may have arisen between investigations by the ICC and peace talks by the Security Council. However, Resolution 1422 applies to a hypothetical scenario and allows for the immunity, albeit temporary, of a group of individuals, absent any ongoing risk of prosecution before the Court. As such,

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[135] *Report of the Ad Hoc Committee, supra* note 28 at para. 126.

[137] "10 July 2002 meeting", *supra* note 111 at 4.

[138] *Ibid.* at 5.

the compatibility of the Resolution with the purpose of article 16 is dubious. It is now necessary to explore whether the Resolution managed nevertheless to respond to each of the requirements set out in the provision.

B. The requirements of article 16

a. An investigation or prosecution

By referring to an investigation or prosecution in the singular, the article responds to the drafting history in requiring a specific example of an investigation or prosecution. However, Resolution 1422 deals with peacekeepers from states which are not party to the Rome Statute. Furthermore, the Resolution deals with a hypothetical scenario and does not relate to a particular prosecution or investigation currently before the ICC.

b. A resolution adopted by the Security Council under Chapter VII

Article 16 requires that a resolution be adopted by the Security Council under Chapter VII of the UN Charter. Such an official decision ensures that the Council seriously considers the matter. A Resolution was indeed adopted under Chapter VII, however, the legality of this Resolution is dubious given the way in which article 16 was employed.

Furthermore, by making a Chapter VII decision, the Security Council is effectively required to acknowledge that if the ICC were to proceed with a case it would pose a threat to international peace and security.[139] It is certainly difficult to respond to this requirement in the affirmative since no actual case involving peacekeepers was before the Court, indeed the Court has yet to commence proceedings.

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[139] M. Bergsmo & J. Pejić, "Article 16: Deferral of investigation or prosecution" in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Germany: Baden-Baden, 1999) 373 at 382.

Moreover, as will be explored in the following section, it is possible that the threat to international peace and security was in fact created by the US veto of the Resolution renewing the Bosnia peacekeeping mission. If the threat posed by the US did represent the threat to international peace and security, then the safeguard provided for in the Singapore compromise is of limited utility. The idea behind the compromise was that prosecutions would be initiated once the Chapter VII action had terminated. In the case of Resolution 1422, however, it is possible that a prosecution could never be brought since the US threat, which stems from the current policy towards the ICC, is unlikely to disappear.

This requirement of a Chapter VII resolution will be examined more closely in the context of the UN Charter and the law applicable to the actions of the Security Council in the following section.

c. A request from the Security Council to the ICC

It is certainly difficult to describe Resolution 1422 as a request to the ICC as explicitly required by article 16. Although the Resolution states that the Security Council "requests, consistent with the provisions of article 16 of the Rome Statute", the first operative chapter of the Resolution continues as follows "that the ICC shall for a 12-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case". Such imperative language is difficult to reconcile with an effective request as such. Furthermore, the Resolution itself was not passed until 12 July 2002. The fact that retroactive effect was given to the request before the ICC had actually begun in earnest and before the Resolution became public certainly makes it conceptually difficult to qualify the instrument as a request in compliance with article 16.

Prior to the passing of this Resolution, authors speculated that the request from the Security Council would pass from the Council to the presidency of the Court which would identify the case falling under the deferral request and advise the chambers accordingly. At this point, the decision as to whether the Court should comply with the

request would lie with the pre-trial chamber or the appeals chamber if necessary.[140] The way in which Resolution 1422 was produced bears little resemblance to these optimistic previsions.

d. For a renewable 12-month period

Of greater concern is the subtle indication of the intent of the Security Council to perpetually renew Resolution 1422. According to article 16, the request is effective for a period of 12 months and may be renewed under the same conditions, i.e. by means of a Security Council resolution. However, in Resolution 1422 the future of the Resolution is quite clear as the Security Council "*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."

As a result of this statement, one may conclude that the presumption is that the Resolution will continue *ad infinitum*. Such a conclusion adds weight to the above assertion that referring to the Resolution as a 'request' is not enough to actually make it a request. Furthermore, as was seen in the discussions above, article 16 was intended to act as a temporary bar to justice in the name of securing peace. If it were intended to grant the Security Council the powers to indefinitely limit the jurisdiction of the Court then the Singapore compromise would not have received the widespread approval it did.[141] Indeed, the first resolution proposed by the United States which incorporated a reference to Article 16 was opposed by states in the Security Council since it read as follows, "the request...shall be renewed and extended to include acts and omissions occurring during successive twelve-month periods thereafter".[142] It was noted that such requests could not be renewed automatically and the text was rejected.

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[140] "Referral and Deferral" *supra* note 133 at 649.

[141] C. Stahn, "The Ambiguities of Security Council Resolution 1422 (2002)" (2002) 14 Eur. J. Int'l L. 85 at 94.

[142] US-sponsored draft Resolution 3 July 2002.

However, it must be recognised that although the expressed intention to renew is unusual and certainly beyond the usual intention to "remain seized" of the matter, such an intention is not binding upon the members of the Security Council and is closer to reflecting a political pressure as opposed to a legal one. Nevertheless, its presence in the Resolution did not go unnoticed by certain state representatives. Following the unanimous vote upon Resolution 1422, the representatives of New Zealand, South Africa, Brazil and Canada pointed out that "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."[143]

Essentially, by expressing an intention to renew the Resolution, the Security Council has elevated the consideration of this document to a level of greater importance. As the Resolution passed again on 12 June 2003 without great incident and without a single amendment to the text, it may well be suggested that this request for a temporary deferral of prosecution or investigation is in fact neither temporary nor a request.

Hence, it is not difficult to reach the conclusion that Resolution 1422 was not drawn up within the legal requirements of article 16 of the Rome Statute. The Resolution relates to a hypothetical situation concerning a group of individuals, it is not specific and it does not respond to the main purpose of article 16. That is to say, "as 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 criminal justice."[144]

As such, if the Security Council states that it is acting within the terms of article 16 and yet in reality is paying only a passing reference to the provision, can such an action have an effect upon the interpretation of the provision itself? Criticisms along these lines were

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[143] Letter from Ambassadors of New Zealand, South Africa, Brazil and Canada specifically rejecting US Proposal of 12 July 2002 (12 July 2002) 1. Online: <http://www.iccnow.org/html/gov_t.html> (date accessed: 15 May 2003).

[144] Bergsmo & Pejić, *supra* note 139 at 378.

voiced by various country representatives during the meeting of 10 July 2002. The legal response to such concerns will be explored in the following section.

C. Considering whether the application by the Security Council of article 16 amends or interprets the terms of the Rome Statute

During the open meeting on 10 July 2002, a number of comments were made reflecting the view that the US proposals as they then stood would amend the Rome Statute, thus extending the mandate of the Security Council to unacceptable lengths.[145] For instance, Mr. Heinbecker on behalf of Canada remarked that "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...through a Security Council resolution"[146]

Furthermore, Kofi Annan stated in his open letter to Colin Powell that "[t]he 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."[147]
Of the various speakers who asserted that the Resolution would constitute an amendment of the treaty, the large majority did not delineate the specifics of their argument. It is not clear, therefore, whether the fact that the proposed Resolution would apply a blanket immunity was the modifying factor[148] or whether the speakers were unhappy with article 16 being quoted by the US to justify a deferral which would be renewed automatically. If the latter was the main concern the point is moot since this issue was dealt with in the

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[145] "10 July 2002 meeting" *supra* note 111. See *e.g.* Morning Session: Mr. MacKay (New Zealand) at 5; Mr. Kumalo (South Africa) at 6; Mr. Fadaifard (Iran) at 15; Mrs. Fritsche (Liechtenstein) at 20. Afternoon session: Mr. Naidu (Fiji) at 2; Mr. Schumacher (Germany) at 9.

[146] *Ibid.* Morning session at 3.

[147] Letter from Kofi Annan to Colin Powell, *supra* note 8.

[148] "10 July 2002 meeting" *supra* note 111. Morning session at 6. New Zealand made it clear that employing Article 16 to justify a blanket immunity would be an attempt to amend the terms of the Rome Statute absent the consent of the States Parties.

final adopted Resolution. However, in spite of the amendments to the final Resolution the fact remains that similar comments were made on the day of the adoption of Resolution 1422 by Canada in particular.[149]

Prior to the renewal of Resolution 1422 in the form of Resolution 1487 various groups expressed their opposition to the renewal in similar terms, "[i]f Resolution 1422 is renewed, it will likely consolidate the exemption obtained last year and codify the immunity as a permanent "amendment" to the Rome Treaty".[150]

Nevertheless, it is unlikely that an interpretation of article 16 by the Security Council as offering blanket immunity and not applying on a case-by-case basis would amend the treaty. According to the Vienna Convention, any modification of a multilateral treaty may only be carried out with the permission of the signatories concerned.[151]

It is more likely that Resolution 1422 could constitute an interpretation of the provision. Certain state representatives argued that even to interpret an international treaty is outside the powers of the Security Council[152] since it is only for the parties to the treaty to interpret it. The interpretation of treaties would usually fall to the International Court of Justice ("ICJ") and only when the parties demand the Court to do so. However, it is arguably the parties to the Rome Statute who can offer a legitimate interpretation of article 16, and many of them did so upon the occasion of the 10 July meeting.[153]

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[149] Z. Deen-Racsmány, "The ICC, Peacekeepers and Resolution 1422: Will the Court defer to the Council?" (2002) XLIX NILR 353 at 355. Mr. Heinbecker stated that the Security Council was acting *ultra vires* by interpreting an international treaty.

[150] Human Rights Watch, "Closing the door to impunity: Human Rights Watch recommendations for the renewal of Resolution 1422" 16 April 2003. Online: <http://www.iccnow.org/documents/otherissues1422.html> (date accessed: 15 May 2003).

[151] *Vienna Convention*, Art. 40.

[152] "10 July 2002 meeting", *supra* note 111. Mr. Fonseca (Brazil): Morning session at 22. Mr. Kumalo (South Africa) Morning session at 6.

[153] B. MacPherson, "Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings" (2002) July online: <www.globalpolicy.org> (date accessed: 16 May 2003).

The case as to whether the Security Council actually has the authority to act in such a manner will be examined in the next section where Resolution 1422 will be held up to the UN Charter and Chapter VII in particular. This is important since the question of whether Resolution 1422 is legal is not only dependant upon its compliance with the Rome Statute. The conditions set out in the UN Charter must also be met.

D. Conclusion

Article 16 is the first example of a treaty-based provision creating relations between the Security Council and a judicial entity. The ICJ is not under any obligation to defer or pause proceedings which may conflict with the work of the Security Council; nor are the national courts. This nascent relationship is of great interest to this debate, and it is worthwhile noting that the unprecedented nature of this relationship should encourage a hesitant application of article 16. This provision effectively allows the Security Council, albeit in exceptional circumstances, to become involved in the affairs of a judicial body.

Prior to Resolution 1422, authors expressed optimistic views as to how the provision would be applied. For instance, Otto Triffterer spoke of the slim chances that a resolution under article 16 would be passed, noting that "because of the public nature of such a resolution and, most likely, the public nature of the crimes that the Court will be asked to desist from addressing, deferral will be politically more difficult to justify than approval".[154] Today, in the aftermath of Resolution 1422 it is not difficult to see why the Resolution has caused such controversy.

Having explored the ethos behind article 16 and the various steps in its application, and having reached the conclusion that the provision was not applied appropriately by the Security Council, it is now necessary to move on to consider the legality of Resolution 1422 in light of the UN Charter.

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[154] Bergsmo & Pejić, *supra* note 139 at 377.

II. The crisis provisions: Chapter VII of the Charter of the United Nations

Introduction

In passing Resolution 1422, the Security Council declared that it was "[a]cting under Chapter VII of the Charter of the United Nations". Such a declaration was necessary in order to comply with the terms of article 16 of the Rome Statute and yet the reference to the provisions of Chapter VII ought not to be made lightly. The first article of Chapter VII, article 39, is the most relevant here and it reads as follows:

> 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.

Several questions arise in connection with the application of this article to the situation surrounding Resolution 1422. Firstly, is it simply sufficient for the Security Council to refer formally to Chapter VII without setting out the specifics of the threat to international peace and security? Secondly, although the Security Council did not mention a specific threat, it is necessary to evaluate the possible threats being referred to? This will entail an examination of current Security Council practice in deciding which situations may constitute a threat to international peace and security.

A. Determining whether there is a duty to determine

a. Imposed by the UN Charter

The UN Charter is deliberately vague on the matter of whether a formal determination of a threat to international peace and security is required of the Security Council in order to enact measures under Chapter VII. Neither article 39 nor articles 41-42 of the Charter state explicitly that a determination must be made. Articles 41-42 allow for steps to be taken at various levels of seriousness involving the use of force. It is unlikely that Resolution 1422 could be seen as taking steps under these articles, and it is easier to presume that the action by the Council would fall under the provisional measures taken in accordance with article 40. This article reads in part as follows:

> In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Art. 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.

According to current doctrine, the views are split as to whether article 40 provisions require a determination of a threat to peace and security by the Security Council. There are those who believe that even if the measures to be taken are only recommendations under article 40, the positioning of the provision immediately after article 39 and prior to articles 41-42 highlights a strong possibility that such a determination is mandatory.[155] Furthermore, during the infamous debate surrounding Resolution 1422 on 10 July 2002, various state representatives expressed their unease that no threat to international peace and security had been identified by the US proposals. Such statements may well be indicative of modern state practice as to the need for a determination once Chapter VII is invoked.[156]

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[155] J. A. Frowein & N. Krische, "Article 40" in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002) 729 at 731. [hereinafter Frowein & Krische "Article 40"]

[156] See "10 July 2002 meeting", *supra* note 111. Morning session: Mr. Heinbecker (Canada) at 3, Mr.MacKay (New Zealand) at 5, Prince Zeid Ra'ad Zeid Al Hussein (Jordan) at 16, and Mrs Fritsche (Liechtenstein) at 20. Afternoon session: Mr. Naidu (Fiji) at 2 and Mr Schumacher (Germany) at 9.

Opposing such views are authors who believe that since Article 40 does not impose binding measures upon member states and simply offers recommendations as to the action to be taken, it does not require an official determination of a threat to peace and security by the Security Council. According to this argument, a determination is only necessary in order to provoke article 41-42 enforcement measures.[157]

Nevertheless, the above arguments presuppose that in adopting Resolution 1422, the Security Council was relying upon article 40 when making its request to the ICC. Another possibility is to look to the object of the Resolution as opposed to making assumptions as to which article in the Charter the Security Council relied upon. It may well be that the purpose of a resolution dictates that a formal determination is not necessary.

For instance, it is worth noting that when the UN Security Council set up the ad hoc international criminal tribunals in the Former Yugoslavia and in Rwanda, it did so acting under Chapter VII.[158] Such a decision is understandable given the threat posed by the risk of instability in the area if the perpetrators of these terrible crimes in the Former Yugoslavia and in Rwanda were not brought to justice. However, the matters which the Security Council considers now in relation to these judicial bodies include administrative details such as deciding upon the nationality of the judges. Either the presumption is to be made that there is an ongoing threat to peace and security in both Rwanda and the Former Yugoslavia and such a determination is necessary for these measures. Or one could decide that such practice is indicative of a new precedent involving Security Council relations with international criminal tribunals whereby no determination is necessary for action under Chapter VII.[159]

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[157] See *e.g.* F.L. Kirgis, "The United Nations at Fifty: The Security Council's First Fifty Years" (1995) 89 Am. J. Int'l L. 506 at 512.

[158] *Statute of the International Criminal Tribunal for the Former Yugoslavia,* SC Res. 827, 47th Year, UN Doc. S/RES/827 (1993); *Statute of the International Criminal Tribunal for Rwanda* SC Res. 955, 48th Year, UN Doc. S/RES/955 (1994).

[159] Deen-Racsmány, *supra* note 149 at 376.

Yet, it is not difficult to distinguish matters regarding the ICC from those concerning the ad hoc tribunals. The latter entities were both created by Security Council resolutions. They are part of the overall UN network and their relationship with the Security Council is much closer than the relationship between the ICC and the Council. As was considered in the previous chapter, the ICC was designed to be a free-standing, independent court whose relations with the Security Council would be limited to the two circumstances enumerated above.[160] As such, even if a precedent were developing concerning Security Council resolutions dealing with the ad hoc tribunals, it is highly unlikely that it could be extended to apply to the ICC.

Hence, if the Security Council is acting under article 40, it is unclear from the UN Charter whether a determination is currently required. The comments of the states representatives lend weight to the argument that it is necessary and according to the recent interpretations of Chapter VII of the Charter this appears to be the case.[161] However, before concluding on this point, it is useful to examine whether the Rome Statute can illuminate this matter.

b. Imposed by the Rome Statute

The United Nations is not a party to the Rome Statute and if the usual treatment of third parties in international law were applied to the Security Council then the actions of the Council could not be affected by this instrument.[162] The law concerning the Security Council is derived from the UN Charter and the practice of the institution.[163] As such, it could be argued that a multilateral treaty external to the UN system cannot impose upon the Security Council an obligation to make a determination of a threat to international

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[160] See above at 47.

[161] Frowein & Krische, "Article 40" *supra* note 155 at 731. The authors argues that since the making of a determination is one of the few procedural restraints upon the Security Council when acting under Chapter VII it ought to apply to all Security Council action undertaken in connection with the Chapter. See also D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (The Hague: Kluwer Law International, 2001) at 34 - 36 and Kirgis, *supra* note 157 at 512.

[162] *Vienna Convention*, Arts. 34 and 35.

[163] P. Sands, & P. Klein, *Bowett's Law of International Institutions* 5th ed. (London: Sweet and Maxwell London, 2001) at 456. [hereinafter "Bowett's Law of International Institutions"]

peace and security under Article 39. Nevertheless, this situation needs to be distinguished from one involving the imposition of obligations upon a third party state. The Security Council, as a branch of the United Nations, is a creation of states. As such, it seems likely that the statute establishing the ICC could impose an obligation upon the Security Council to make a determination of a threat to peace and security. The Rome Statute would, in essence, not be imposing any obligations more onerous than those already found in the UN Charter.[164]

Further support for this argument may be found in the fact that Chapter VII is vague as to the requisite components for a determination of a threat to the peace, if the Rome Statute were to allow the Security Council simply to refer to the application of Chapter VII in any circumstance, this in itself would extend the powers of the organ since it would free the Council from any procedural restraints under Chapter VII. Article 16 of the Rome Statute merely refers to Chapter VII without mention of a determination being required. Nevertheless, having examined the drafting history of article 16 it soon becomes plain that the intention was to limit the influence of the Security Council, not to allow it to comply with Article 16 as freely as possible. Such an observation leads to the conclusion that the Rome Statute implicitly requires a determination of a threat to international peace and security from the Security Council.

c. Fluidity as to the form of the determination

Having considered the indications offered by the current interpretations of the UN Charter and the Rome Statute it appears likely that the Security Council in acting under Chapter VII of the Charter was required to make a determination in accordance with article 39. It is now necessary to decide whether a determination was in fact made.

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[164] See "Referral and Deferral", *supra* note 133 at 647. According to the authors a determination could be required by the *Rome Statute*.

As the reference to Chapter VII in Resolution 1422 is so brief it appears at first that the Council failed to meet this requirement. However, it is possible to interrogate the matter further by questioning whether the actual determination must be expressed or whether it suffices if it is merely implicit.[165] Lending support to the possibility of an implicit reference is the fact that Resolution 1422 is far from silent on the matter of international peace and security:

> "*Emphasizing* the importance to international peace and security of United Nations operations...
>
> *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"

It may be suggested, however, that such references are too general. Nevertheless, looking to previous Security Council practice on this matter it soon becomes clear that ambiguous references to article 39 and a threat to the peace are commonplace in resolutions. In actual fact, the terminology employed by the Security Council has been described as indicative of a "complete inconsistency".[166] Phrases range from international peace being 'threatened' to a 'disturbance' or 'endangerment' of the peace.[167] However, there does appear to be consistency in the simple use of the phrase "Acting under Chapter VII of the Charter" and according to one author such a phrase is sufficient to denote that the Council is indeed acting under article 39.[168] Furthermore, although there may well be inconsistency in the manner in which the determination is made, certain authors have argued that a determination can nevertheless always be found in various forms. Such

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[165] Deen-Racsmány, *supra* note 149 at 377.

[166] H.Freudenschuß, "Between Unilateralism and Collective Security: Authorisations of the Use of Force by the UN Security Council" (1994) 5 Eur. J. Int'l L. 492 at 523.

[167] Schweigman, *supra* note 161 at 157.

[168] *Ibid.*

practice has evolved into a condition in respect of article 41 and 42 measures "to the effect that an Article 39 determination must be made in advance of, or at the time of, enforcement action".[169]

The law concerning the functioning of international organisations allows for precedents to be established through practice. Such interpretations of the UN Charter are only binding, however, if mirrored by state practice.[170] As such, it is possible that the practice of merely referring to Chapter VII along with making references to the fact that international peace and security are at risk is sufficient to denote the existence of an implicit article 39 determination.

Having reached the conclusion that such a determination is required, and is in fact present in Resolution 1422, it is now necessary to consider the circumstances which may constitute a threat to the peace within the terms of Chapter VII.

B. Ascertaining the threat to the peace

With reference to the practice of the Council

As with the requirement of a determination of a threat to international peace and security, the UN Charter is once again silent as to the discretion of the Security Council in deciding what constitutes such a threat. According to the *travaux préparatoires*, the drafters had the intention of conferring almost unfettered discretion upon the Council. As the discussions at Dumbarton Oaks revealed, the decision was made "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression."[171] It has,

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[169] Kirgis, *supra* note 157 at 512.

[170] J. A. Frowein & N. Krische, "Introduction to Chapter VII" in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002) 701 at 710. [hereinafter Frowein & Krische, "Introduction"]

[171] See Schweigman, *supra* note 161 at 34.

however, been noted by the ICJ that the reference to a threat to the peace must be genuine and valid. The Court stated 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".[172]

Such discretion conferred upon the Security Council has lead to criticism, particularly by the judges of the ICJ. For instance, in 1992 the Security Council decided that the refusal of Libya to extradite individuals suspected of involvement in the bombing of Pan Am Flight 103[173] constituted a threat to international peace and security. This case will be examined in more detail in the following chapter. It is useful here to note that the actions of the Council towards Libya were criticised by certain judges and yet overall the Resolution was accepted as valid by the Court.[174]

Such a conclusion leads to the observation that the decision as to what constitutes a threat to international peace and security is ultimately a political one. As one author notes, the Charter "is based on a political, not a legal approach to peace maintenance – under the Charter, peace takes precedence over justice".[175]

With reference to the topical climate

As seen above, Resolution 1422 is highly succinct in its reference to Chapter VII of the UN Charter. It is therefore difficult to establish the actual source of the threat to international peace and security which the Security Council had in mind. The most

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[172] *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 at 293. [hereinafter *Namibia case*]

[173] *Resolution 748* SC Res. 748, 46th Year, UN Doc. S/RES/748 (1992) and *Resolution 731* SC Res. 731, 46th Year., UN Doc. S/RES/731 (1992). See below, Chapter III. The Court did not explicitly state that an omission could constitute such a threat; this was to be presumed

[174] See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Provisional Measures), (Libyan Arab Jamahiriya v. United Kingdom)* Order of 14 April 1992, [1992] I.C.J. Rep. 3. [hereinafter *Lockerbie case*] at para. 42. See also Schweigman, *supra* note 161 at 185.

[175] Frowein & Krische, "Introduction", *supra* note 170 at 710.

common example of a threat to the peace under the Charter was once that of rising hostilities and an impending conflict of national or, more often, international proportions.[176] However, as seen above, the concept of a threat to peace is becoming more fluid and has since been applied to internal conflicts and to post-conflict reconstruction scenarios where hostilities are still a possibility.[177] Today, the Security Council has even responded to the surge in international terrorism by qualifying any act of international terrorism as a threat to the peace.[178]

This shift in policy reflects the extent of the discretion conferred upon the Security Council but it also demands that the source of the threat to international peace and security within Resolution 1422 is established, even if there are several possible sources.

It is useful to turn initially to the comments made by state representatives on the occasion of the 10 July 2002 meeting. Several of the speakers stated that the proposals unwisely pitted peacekeeping against international justice and the ICC, when the two were compatible.[179] Such observations suggest that they felt that either the ICC or peacekeeping were being presented by the US as threats to international peace and security, an untenable position in either case. For instance, Prince Zeid Ra'ad Zeid Al Hussein, speaking on behalf of Jordan, asked: "[H]ow could [the Security Council] adopt a Chapter VII resolution on the Court, when the latter cannot by any stretch of the imagination, be considered a threat to international peace and security?"[180] Other States

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[176] J. A. Frowein & N. Krische, "Article 39" in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002) 717 at 722.

[177] *Resolution 687,* SC Res. 687, 45th Year, UN Doc. S/RES/687 (1991) (Kuwait); *Resolution 1244*, SC Res. 1244, 53rd Year, UN Doc. S/RES/1244 (1999) (Kosovo).

[178] *Resolution 1373* SC Res. 1373, 55th Year, UN Doc. S/RES/1373 (2001) and *Resolution 1377* SC Res. 1377, 55th Year, UN Doc. SC/RES/1377 (2001).

[179] See "10 July 2002 meeting", *supra* note 111 *e.g.* Morning session: Mrs. Fritsche (Liechtenstein)at 20; Mr. Fonseca (Brazil)at 21; Mr. Staehelin (Switzerland) at 22. Afternoon sessions: Mr. Naidu (Fiji) at 2 and Mr. Listre (Argentina) at 12.

[180] *Ibid.* Morning session Prince Zeid Ra'ad Zeif Al-Hussein (Jordan) at 16.

spoke of the absence of a threat to international peace and security and questioned whether such a resolution would be *intra vires*.[181]

Given the above analysis, even considering the discretion offered to the Council, reaching the conclusion that the ICC is a threat to international peace and security is problematic. However, the US position in this debate is that if peacekeepers are under the impression that they may risk political prosecution as a result of their nationality, they will not be able to effectively maintain or build peace.

Nevertheless, the Rome Statute provides ample safeguards to ensure that the cases which come before it do so based on the merits of the case and not as a result of political motivations.[182] Furthermore, the important principle of complementarity ensures that nation states will only find their nationals before the Court if they do not ensure that justice is served before national courts. Given such safeguards it is difficult to see how the ICC as a secondary jurisdiction could pose a threat to peace and security, not to mention the fact that such a position is entirely opposed to the objects and purpose of the Court.

Is it possible that the source of the threat was the continuing instability in Bosnia and elsewhere? This appears likely at first, since, although Resolution 1422 deals specifically with the renewal of the Bosnia mandate, it refers in its preamble to the important relation between international peace and security and peacekeeping missions in general. However, if this argument is taken to its logical conclusion, the position held is that peace and security would be threatened in Bosnia and elsewhere if states did not feel comfortable volunteering their citizens to take part in such missions. This is supported by the preamble of Resolution 1422 which speaks of peacekeeping in general and not merely with reference to Bosnia:

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[181] *Ibid.* Morning session: Mr. Heinbecker (Canada) at 3 and Prince Zeid Ra'ad Zeif Al-Hussein (Jordan) at 16. Afternoon session: Mr. Slade (Samoa) at 8. These three state representatives referred to the possibility that *Resolution 1422* would be *ultra vires* the competence of the Security Council. See above at 61.

[182] *Rome Statute,* Art. 18 deals with the role of the Pre-Trial Chamber in the admissibility of cases to the Court, along with the possibility for a state to appeal against the decision of the chamber.

> *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.

The desire of the Security Council to facilitate contribution of troops stems in all likelihood from Resolution 1353 whereby the UN Security Council declared its intention to encourage the participation of states in peacekeeping activities and its promise to strengthen cooperation.[183]

However, it is worthwhile interrogating this possible threat further. As the comments made by state representatives have shown, those countries which are renowned for contributing the most troops[184] did not fear prosecution of their nationals by the ICC. It may be argued that this is because states party to the Rome Statute can opt out from the jurisdiction of the ICC in respect of their nationals for a seven year one-off period.[185] Nevertheless, whatever the reasons, the US was the only state which was not comfortable contributing troops to peacekeeping missions unless an immunity of sorts could be agreed to.

Hence, the threat to international peace and security was that the US would not contribute troops because they risked prosecution before the ICC. But is this not merely a question of semantics? Was the threat that if the *status quo* remained, the US would not contribute troops to future missions because they would risk prosecution? Or was the threat more

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[183] *Resolution 1353*, SC Res. 1353, 56th Year, UN Doc. S/RES/1353 (2001).

[184] As of June 2003 a total of 36,369 nationals of 89 countries were participating in UN peacekeeping operations. Of these, the highest ten contributors were: Pakistan (4218), India (2719),Bangladesh (2642), Nigeria (2520), Ghana (2002), Uruguay (1803), Kenya (1790), Jordan (1588), South Africa (1397), Ukraine (1038). Online: <http://www.un.org/Depts/dpko/dpko/contributors/June2003Countrysummary.pdf> (date accessed: 12 July 2003) Both Fiji and Canada have contributed individuals to almost every peacekeeping operation. The US contribution as of June 2003 was 530 of which 515 are civilian.

[185] *Rome Statute,* Art. 124. At the time of writing France and Columbia have reserved the right to invoke Article 124 and benefit from the 7-year exemption period. Declarations attached to the Ratification statute of the *Rome Statute* online: http://www.un.org/law/icc/index.html. See also Reporters Without Borders, "Victim's Guide to the ICC" (2003) online: <http://www.rsf.org/IMG/pdf/doc-2255.pdf> (date accessed: 22 June 2003) at 29.

imminent and based entirely on the US promise to withdraw all of its citizens from ongoing peacekeeping missions, and possibly veto future renewals of missions, unless its citizens could be protected from prosecution before the ICC?

In the words of Kofi Annan, "[t]he issue that the United States is raising is...highly improbable with respect to United Nations peacekeeping operations. At the same time, the whole system of United Nations peacekeeping operations is being put at risk". Such comments made by the Secretary-General highlight the fact that the fear in the Security Council was not the collapse of peacekeeping missions absent US citizens, indeed such a conclusion is hardly tenable given the fact that only 46 US policemen were working under the UN mandate in Bosnia and that the average contribution by the US to international peacekeeping amounts to around 700 individuals. Furthermore, the mission in Bosnia was due to be handed over to the EU in January 2003 and an early transfer of power was not unimaginable.[186] On the contrary, it is argued that it was the US veto of the renewal of the Bosnia mission and the risk this posed to future peacekeeping missions, combined with the threat to remove US troops from ongoing operations, which chilled the spine of the Security Council. As a result it provoked both Resolutions 1422 and 1487 and may well go on to provoke others.[187] As the Coalition for the International Criminal Court put it:

> The NGO Coalition believes that this Resolution violates international law because the Council contravened Chapter VII of the UN Charter. This chapter mandates the Security Council to act only when there is a threat to or breach of international peace and security or an act of aggression. It was this US contrived "crisis" in peacekeeping that was the pretext for invoking Chapter VII.[188]

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[186] Editorial, "Right to the Brink", *The Economist* US Edition (6 July 2002)

[187] *Ibid.*

[188] Coalition for the International Criminal Court, "UN Security Council Passes ICC Resolution in Contravention of UN Charter" (12 July 2002) Online: <http://www.iccnow.org/pressroom/ciccmediastatements/2002/07.12.2002SecCouncil.doc> (date accessed: 26 July 2003).

Hence, there was a threat to international peace and security because the US effectively held the Security Council to ransom in concluding that either US servicemen and women were to be granted immunity or it would continue to veto the Resolution allowing for the continuation of the Bosnia peacekeeping mission and possibly future Security Council peacekeeping resolutions. Such a conclusion is of great concern for the future of Security Council matters. The position taken by the US was backed up by the strength of its veto and the extent to which the state opposes the jurisdiction of the ICC over its nationals.

Although the position may be taken that there is little risk that US peacekeepers will commit crimes which could bring them before the ICC, and as such there is little cause for concern since the Resolution will not impact heavily upon the workings of the Court; it is arguable that the way in which Resolution 1422 was agreed upon rendered Chapter VII of the UN Charter devoid of any legitimacy. The extent of political sway available to the US was clearly confirmed and by effectively amending the jurisdiction of the ICC the Security Council has demonstrated that the political appeasement of the US is of greater necessity than protecting the integrity of the most recent international institution.

Having established that the Security Council misapplied article 16 of the Rome Statute and that the Council based its determination of a threat to international peace and security upon dubious grounds, it is now necessary to determine the consequences of such findings.

III. Did the Security Council act ultra vires in passing Resolution 1422?

The above discussion established the existence of a wide discretion conferred upon the Security Council. However, such discretion does not entail unlimited powers and does not prevent the possibility of an act being qualified as *ultra vires*.[189] As Professor Brownlie noted, there is not necessarily a dichotomy of discretionary powers and legality. For a

[189] *Prosecutor* v. *Dusko Tadić* (1995), Case No. IT-94-1-AR72 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: <http://www.un.org/icty/ind-e.htm at para. 42> (date accessed 29 June 2003) [hereinafter *Tadić case*]

power to be discretionary it must still remain with the boundaries of the law.[190] The following section will attempt to delimit the legal limits applicable to the actions of the Security Council according to the UN Charter and the principles of international law in general.

A. The law applicable to the Security Council

Although the Security Council is clearly a unique institution, it remains an international institution and the same principles apply to it as to other international organs, regarding the law which binds it. As Professor Shaw notes, "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. This is the overarching structure."[191]

Professor Bowett has noted that the functions and powers of the Security Council are derived from articles 24-26 of the UN Charter.[192] According to article 24 para. 2 of the Charter, the Security Council is required to abide by the purposes and principles of the Charter. The importance of these provisions was affirmed in an important case before the ICTY which will be examined in greater detail in the following chapter. The judges held that "the determination that there exists 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".[193]

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[190] Professor Brownlie as quoted in S. Lamb, "Legal Limits to United Nations Security Council Powers" in G.S. Goodwin-Gill, & S. Talmon, eds., *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford: Oxford University Press, 1999) 361 at 375.

[191] M.N. Shaw, "The Security Council and the International Court of Justice: Judicial Drift and the Judicial Function" in A.S. Muller, D. Raič & A.M. Thuránszky, eds., *The International Court of Justice: Its future role after Fifty Years* (The Hague: Kluwer Law International, 1997) 219 at 228.

[192] "Bowett's Law of International Institutions", *supra* note 163 at 42.

[193] *Tadić case, supra* note 189 at para. 27.

As the reference to the purposes and principles of the United Nations follows immediately after the article declaring that the Security Council has "primary responsibility for the maintenance of international peace and security", it is clear that referring to these provisions is essential in determining the legality of a Security Council resolution.

The purposes and principles of the UN are set out in articles 1 and 2 of the Charter and include rather vague aspirations regarding respect for human rights (article 1(3)) and the self-determination of peoples (article 1(2)). The purposes are dealt with in article 2 and the provision of particular interest here is set out in article 2(2):

> All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

Such an obligation echoes that found in the Vienna Convention which speaks of parties to treaties as being required to exercise their obligations in good faith.[194] As a result of the application of this purpose of the Charter to the Security Council via article 24 para. 2, the Council is prevented from acting arbitrarily and must remain within the limits of its designated powers.

Hence, the Security Council, as an international organisation, is bound to follow the law of its constituent document, the UN Charter. However, it can also be seen as acting within the internal law of the organisation if it follows an established practice.[195] Is it possible, therefore, that allowing a permanent member of the Security Council to pose a threat to the peace and responding to it accordingly demonstrates a change in practice?

Difficulties arise with such a theory when the obligation of the Security Council to act in good faith is examined. The corollary to this obligation is that the Council is prevented

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[194] *Vienna Convention*, Art. 26.

[195] "Bowett's Law of International Institutions", *supra* note 163 at 456.

from committing an abuse of rights in its decision-making; such an abuse must be "manifest, self-evident or gross".[196] This principle will be interrogated further in the following section, prior to examining the general principles of international law which the Security Council is required to comply with.

a. An obligation to act in good faith

According to M. Bothe the Security Council has a simple *"marge d'appréciation"*, meaning that *"il est implicite dans le concept même de marge d'appréciation qu'il ne s'agit pas d'un pouvoir illimité"*.[197] Such a view was supported in the advisory opinion delivered by the ICJ involving the presence of South Africa in Namibia, Judge Fitzmaurice noted that the discretion conferred upon UN entities must not be abused.[198] Furthermore, the Council was accused of acting in bad faith and, as such, of an abuse of powers, since it was argued that the situation was classified as a threat to international peace and security simply to avoid applying the relevant multilateral treaty.[199]

In applying the above to the current Resolution at hand, it is clear that if the threat to international peace and security was that posed by the US then the US acted in bad faith contrary to its obligations under article 2(2) of the Charter. However, can the Security Council suffer the same criticism? It has been argued that in responding to the threat posed by the US, the Security Council attempted to reach a solution within the terms of the Rome Statute and, accordingly, the UN Charter. Such a response on the part of the Council provoked certain authors to conclude that the Council acted in good faith.[200]

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[196] Schweigman, *supra* note 161 at 177.

[197] As quoted in Lamb, *supra* note 190 at 385.

[198] *Namibia case, supra* note 172 at 293.

[199] See Lamb, *supra* note 190 at 385.

[200] Deen-Racsmány, *supra* note 149 at 381.

However, as seen above, the application of article 16 to this scenario is taking the terms of the provision too far. As such, the position taken here is that by responding to the threat posed by the US, a permanent member of the Council, the Security Council acted in bad faith and produced a Resolution which can be classified as *ultra vires.* The situation was succinctly explained by South Africa's representative at the 10 July 2002 meeting when he stated that "[t]he fact that any permanent member can unilaterally decide to exercise its veto privilege to defeat the efforts of all the other 14 members of the Council to extend the mandate of an agreed United Nations peacekeeping missions holds disturbing implications for the rest of the 174 members of the UN and the entire world in general"[201]

The threats posed by the United States to withdraw its citizens from UN peacekeeping missions and to use its veto to prevent the renewal of future UN missions was a threat posed in bad faith to ensure the requirements of the US were met. By responding to such a threat the Security Council too acted in bad faith.

As to whether such an abuse of rights was manifest, self-evident or gross, it is worth noting that such terminology, as with the majority of limits to the powers of the Security Council, is deliberately vague. As such it may be concluded that the response of the Security Council in this case does fulfil these requirements since the political pressure imposed by the US and hence, the Council's response to the ultimatum, was self-evident.

b. Squaring Resolution 1422 with general principles of international law

The Security Council is not necessarily limited in its actions according to the principles of international law.[202] It is, however, susceptible to have the legality of its resolutions examined in light of these principles. At present this role falls to legal commentators and

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[201] "10 July 2002 meeting", *supra* note 111. Morning session at 7.

[202] Frowein & Krische, "Introduction", *supra* note 170 at 711.

state representatives since the International Court of Justice has shied away from becoming the international equivalent of a municipal judicial review body.[203]

According to Article 1(1) of the UN Charter, the first purpose of the United Nations and the Security Council by virtue of article 24(2) is

> [T]o 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 lead to a breach of the peace.

As such, the Security Council is bound to respect the principles of justice and international law. However, as a result of article 103 of the UN Charter, if a conflict arises between an international treaty and the Charter, it is the Charter which prevails. As a result of this provision, it is implicit in every treaty that Charter obligations will override contradictory treaty obligations. However, it is highly unlikely that this provision could also apply to the *jus cogens* principles of international law which are recognised as non-derogable principles which treaty arrangements cannot override.[204] Although article 103 does not mention them specifically as being an exception to the pre-eminence of the UN Charter, it is to be presumed that they are. Indeed, the *jus cogens* principles have been recognised as applying to the Security Council.[205]

It is indeed more controversial to attempt to establish which norms may be classified as *jus cogens*. Perhaps the only certainty is that the prohibition of genocide has been classified as a *jus cogens* principle of international law.[206] It has been argued that the

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[203] The debate surrounding the possible review capacity of the International Court of Justice will be examined below in Chapter III of this analysis.

[204] *Vienna Convention,* Art. 53.

[205] Frowein & Krische, "Introduction", *supra* note 170 at 711.See also Judge Lauterpacht Separate Opinion in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures)*, Order of 13 September 1993, [1993] I.C.J. Rep. 325. para 104 at 120 [hereinafter *Genocide case*] and *Tadić case, supra* note 189 at para 93.

[206] See *Genocide case, ibid.* See also *Case concerning Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) Second Phase.* [1970] I.C.J. Rep. 3.

Security Council could be accused of violating a *jus cogens* principle in the adoption of Resolution 1422, since it allows in theory for the perpetrators of the most heinous crimes to go unpunished.[207] However, such an argument is not feasible for two reasons. Firstly, it is not clear that ensuring such perpetrators are punished could be defined as *jus cogens*, since amnesty is still called upon in an attempt to secure peace over justice. Secondly, as has been noted earlier, Resolution 1422 only effects a deferral of prosecution and if ever the Resolution were not renewed it would be possible to bring to justice those suspected of such crimes. Although it is unlikely that the Resolution will meet effective opposition in the Security Council in the near future, it cannot *prima facie* be described as violating a *jus cogens* principle.

B. Conclusion

The above discussion has examined the sources of law referred to in Resolution 1422 along with the general principles of international law and has set them against the provisions of the controversial Resolution. The result is that Resolution 1422 was not made in accordance with article 16 of the Rome Statute, nor Chapter VII of the UN Charter. Such conclusions are important from a legal point of view. However, politically it must be recognised that examples of challenges to the methods employed by the Council are few and far between.

Such reticence to legally question and hold to account the Security Council is symptomatic of a desire not to confuse political and judicial accountability. This is evident in the ongoing debate surrounding the ICJ and a possible capacity of judicial review of Security Council resolutions. At present, as will be expanded upon in the following chapter, there is no explicit power of review accorded to the Council. Hence, within the Council, as exemplified during the debates concerning Resolutions 1422 and 1487, it is political strength which will out. As one author noted:

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[207] M. El Zeidy, "The United States dropped the atomic bomb of Art.16 of the ICC Statute: Security Council power of deferrals and Resolution 1422", 35 Vand. J. Transnat'l L at 1535.

> Many members of the United Nations with little or no voice in the deliberations of the Council are probably somewhat surprised to find that it may order them to take major steps that they consider contrary to their national interest and that, moreover, are incongruent with expectations created by multilateral treaties to which they are parties.[208]

It initially appeared that a compromise was found during the unsettling period in the Security Council in July 2002 whilst the peacekeeping mission in Bosnia was held hostage by the US demands. It was believed to be a compromise since the US backed down on initial claims for blanket immunity and agreed to fit its demands into the provisions of the Rome Statute. However, as has been explored above, although this may have been the intended result it was not the factual outcome.

The fact remains that the hostility of the US towards the ICC shows no signs of abating. Statements made by the US representatives in no uncertain terms, during the Resolution 1422 discussions, still ring true. In particular, the words of America's UN ambassador, John Negroponte, still resonate clearly:

> We will use the coming year to find the additional protection we need using bilateral agreements. We will seek your cooperation in achieving the agreement...Should the I.C.C. eventually seek to detain any American, the United States would regard this as illegitimate - and it would have serious consequences...No nation should underestimate our commitment to protect our citizens.[209]

Having progressed through the debate from the political climate surrounding the birth of the International Criminal Court, to that of the first significant instrument effecting the new institution and having reached a conclusion as to the illegality of this purported limitation, it is now necessary to consider the effects of such a conclusion. What are the practical effects of an illegal resolution for the Security Council, for the members of the

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[208] T.M. Franck, "Comment: The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?" (1992) 86 Am. J. Int'l L. 519 at 523.

[209] B. Estrade, "Dispute over ICC could leave diplomatic scars" *Agence France Presse* (13 July 2002). S. Schmemann, " U.S. Peacekeepers Given Year's Immunity From New Court" *The New York Times* (13 July 2002) 3

UN, for the ICC and even the ICJ? These questions are highly pertinent in an attempt to gauge the way in which the ICC fits into the contemporary system of international law and they will examined successively in the following chapter. The conclusions which will be drawn, coupled with this examination of the legality of a resolution and the role played by one state in particular, will highlight the turbulent times ahead for the ICC and its ardent supporters.

CHAPTER III:
CONSIDERING THE EFFECT OF RESOLUTION 1422 UPON THE PROTAGONISTS OF INTERNATIONAL LAW

INTRODUCTION

Having established the history of the ICC and examined the legality of the first Security Council resolution affecting the jurisdiction of the Court, it is now necessary to interrogate this Resolution further by looking at the possible effects of the instrument. It is worthwhile considering whether a Security Council resolution which is deemed to be illegal can nonetheless continue to be effective. In order to carry out such a study it is necessary to imagine the likely hypothetical reactions from the various players in international law towards the Resolution.

There exist several examples whereby the legality of Security Council resolutions was deemed dubious, on such occasions the Council has been reproached indirectly, either by the members of the United Nations or by the ICJ itself.[210] However, in this debate there now exists a possible third player: where does the ICC stand in such protests as to the illegality of Security Council resolutions? Ought the Court take on a similar position to that of the ICJ when resolutions are passed by the Security Council which deal with its jurisdiction? Or should the Court not become involved in the interpretation of such resolutions which are primarily political and often the result of attempts to assuage member states?

In order to commence this analysis it is necessary to begin with those directly involved in the creation of Resolution 1422, that is to say the individual member states. This section will be divided into two, the first looking at member states faced with contradicting international obligations, the second considering the options available to member states when faced with an illegal resolution.

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[210] Schweigman, *supra* note 161 at 206.

Following this, the role of the ICJ, as principal guardian of international law and mediator of disputes between states, will be explored. To open this section it is necessary to consider the prospect of the Resolution coming before the Court and the likely response of the Court as to the legality of the instrument, given its history of jurisprudence. This section will touch upon the controversial debate surrounding the judicial review powers of the ICJ.

Finally, the effect of Resolution 1422 upon the ICC will be considered. This section will initially examine whether the ICC is bound by the Resolution regardless of its legality or otherwise and will interrogate the nature of the 'request' made to the Court. It will then look at a hypothetical case whereby peacekeepers are brought before the ICC and question whether the ICC could judge upon the legality of Resolutions 1422 and 1487 in such circumstances. This section will draw upon jurisprudence from both the ICJ and the ICTY. Moreover, it will develop the principle of *kompetenz-kompetenz,* (also known as *compétence de la competence*) in relation to the Court.

I. Member States of the United Nations

A. When faced with opposing international obligations

Throughout this debate, there has been strong evidence of the discord both within the Security Council and the UN in general, regarding the proposals of the US and the subsequent limitation of the jurisdiction of the ICC. Member states that are also states party to the Rome Statute found themselves in a novel situation, bound by the UN Charter to respect Security Council decisions but also obliged by the Rome Statute to respect the ICC and ensure its effectiveness.[211]

[211] *Rome Statute,* Art. 86.

The dilemma needing to be resolved is whether such member states, parties to both international instruments[212] are to disregard their obligations under one in favour of the other.

a. The pre-eminence of the UN Charter

Highly important to this debate is the effect of article 103 of the UN Charter. According to this article, if there is a conflict between the "obligations of the Members of the United Nations" under the UN charter and their "obligations under any other international agreement", the former obligations take precedent and must be complied with.

The importance of article 103 is not to be underestimated. Although it falls under Chapter XVI of the Charter, under the heading of miscellaneous provisions this does not distract from its essential nature since it shares the chapter with other provisions of equal importance such as the rules on capacity and immunity. Furthermore, it has been held that decisions made by the Security Council fall under the category of article 103 obligations under the Charter.[213]

The effect of article 103 is such that it is not necessary to explicitly refer to the article for it to take effect. Indeed, there is no such mention of the primacy of the UN Charter in the Rome Statute. Such an omission cannot mean that the latter has primacy, since this would suggest that the statute represents a complete and accurate enumeration of the powers of the Security Council. This position is however untenable, since the powers stretch much wider than those considered by the ICC statute and arise in the main from the UN Charter.

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[212] It is not clear in *Resolution 1422* whether the instrument is only addressed to those member states also party to the *Rome Statute*. Since nothing is indicated to the contrary, and as the Resolution is also of great importance to states which are not party to the *Rome Statute*, one may presume that all member states are addressed.

[213] See *Lockerbie case, supra* note 174 and R. Bernhardt, "Article 103" in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002) 1292 at 1300. [hereinafter "Bernhardt, Article 109"]

This conclusion is furthermore supported by the fact that the contents of article 103 are referred to in paragraph 4 of Resolution 1422 without directly citing the source. Such practice is not uncommon in international texts. There are several examples of international treaties which note that they are subject to the overriding nature of the UN Charter such as the Charter of the Organization of American States Charter[214] or article 19(2) of the Common Foreign Security Policy of the European Union.[215] Such provisions are held to mean that permanent members which are also members of the OAS or the EU are not obliged to veto a resolution running contrary to their respective treaties.

The logical conclusion in the current case is that, in case of conflict, member states must comply with Resolution 1422 rather than their obligations to the ICC under the Rome Statute. Nevertheless, it is appropriate, given the current debate, to examine a decision by the ICJ whereby a Security Council resolution was in direct contradiction with a multilateral treaty.

b. Considering Lockerbie and the role of the ICJ

(i) The background diplomatic standoff

The political wrangling which surrounded the infamous diplomatic conflict concerning the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, began when two Libyan nationals were indicted by the US on suspicion of planting the bomb. The UK and the US issued a joint statement expressing their insistence that the individuals be extradited.[216] Libya, however, wished to resolve this debate in accordance with the procedure set out in the Montreal Convention for the Suppression of Unlawful Acts

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[214] *Charter of the Organization of American States*, 4 April 1948, 119 U.N.T.S. 4. Art. 137. See "Bernhardt, Article 103", *supra* note 213 at 1295.

[215] Stahn, *supra* note 141 at 107.

[216] Schweigman, *supra* note 161 at 63.

Against the Safety of Civil Aviation.[217] Libya stated that it had acted in accordance with the relevant articles of this Convention, having taken all the necessary steps to bring the suspects to justice.

As a result of the claims presented by the UK and the US to the Security Council, Resolution 731 was adopted in 1992, requesting Libya to comply with the requests made by the UK and the US. Libya responded by commencing proceedings before the ICJ against the UK and the US, arguing that it was not required to extradite the suspects since, according to the Montreal Convention, the appropriate action was to submit the dispute between the states to arbitration.[218] Furthermore, it requested the use of interim measures to protect it from methods of coercion which could be utilised by the UK or the US to persuade Libya to yield.[219]

The outcome of the case will be examined below. Of interest here is that the Security Council was seized of the matter and just three days after the closing of the oral hearings in the 1992 case before the ICJ, the Council produced a Resolution in which it determined the existence of a threat to international peace and security under Chapter VII of the Charter.[220] Effectively, this Resolution was to take precedent over the rights of Libya under the Montreal Convention.

In this Resolution, the Security Council asked that Libya hand over the suspected criminals, stating in the preamble that the "suppression of acts of international terrorism, including those in which States are directly or indirectly involved, is essential for the maintenance of international peace and security."[221] If Libya refused to comply with the

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[217] *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage)*, 23 September, 1971, 974 U.N.T.S. 177. [hereinafter *Montreal Convention*]

[218] *Montreal Convention,* Art. 14(1).

[219] See *Lockerbie case, supra* note 174.

[220] *Resolution 748.* See generally Schweigman, *supra* note 161 at 244-258.

[221] *Resolution 748.*

Resolution then sanctions would be enforced. Libya did refuse and the sanctions were imposed[222] and subsequently widened in 1993 when the Security Council reviewed the situation.[223] Eventually in 1999 a compromise was reached which solved this political deadlock; the suspected individuals were to be tried in the Netherlands under Scottish criminal law.[224]

The Lockerbie provisional measures case is perhaps the clearest example of the ICJ and the Security Council going head to head on the same issue. Let us now turn to the reaction of the ICJ when faced with a Resolution which contradicted a multilateral treaty.

(ii) A cautious judiciary

Due to the presence of Resolution 748, the judges in the ICJ were quite cautious in reaching their decision. A majority of the judges in the ICJ were of the opinion that Resolution 748 had a significant effect upon the case before it. The Court based its decision as to the effect of the Resolution upon articles 25 and 103 of the UN Charter. The judges concluded that the obligations to be found in Security Council resolutions made under Chapter VII prevailed over any rights to be found in the multilateral Montreal Convention. Furthermore, the Court held that the request for provisional measures was to be declined given the presence of Resolution 748. As Judge Oda noted, "[s]ince a decision of the Security Council properly taken in the exercise of its competence, cannot be summarily reopened, and since it is apparent that Resolution 748 (1992) embodies

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[222] Sanctions were imposed on 31 March 1992 via *Resolution 748.*

[223] *Resolution 883* SC Res. 883, 47th Year, UN Doc. S/RES/883 (1993).

[224] On 31 January 2001, Abdelbaset Ali Mohmed Al Megrahi was found guilty of planting the bomb on Pan Am Flight 103, he lost his appeal against conviction on 14 March 2002. ("What the judges said", *BBC News,* (31 January 2001), online: <http://news.bbc.co.uk/1/hi/world/1146642.stm> (date accessed: 1 June 2003) and "Lockerbie bomber loses appeal", *BBC News*, (14 March 2002), online: <http://news.bbc.co.uk/1/hi/world/1868394.stm> (date accessed: 1 June 2003)
On 14 August 2003 an agreement was made as to the compensation to be paid out by Libya to the families of victims, a letter was expected from Libya to the UN Security Council to accept responsibility for the 1988 bombing. "Libya agrees Lockerbie deal", *BBC News,* (14 August 2003), online: <http://news.bbc.co.uk/2/hi/uk_news/scotland/3149431.stm> (date accessed: 14 August 2003).

such a decision, the Court has at present no choice but to acknowledge the pre-eminence of that resolution."[225]

This latter point is of pertinent relevance to the current debate; the pre-eminent nature of Resolution 748 was based on the presumed legitimacy, or rather legality, of the Resolution. Only one judge felt that the Resolution should not have an effect upon the Court quite simply because its first paragraph was *ultra vires*.[226]

Although the decision of the ICJ in Lockerbie meant that Libya was required to accord pre-eminence to the Security Council Resolution, in spite of its rights under the Montreal Convention, it is worth noting that article 103 actually speaks not of 'rights' but of 'obligations' at international law. Of relevance to the present case is the fact that the Rome Statute confers not rights but obligations upon member states to comply with the Court and ensure that suspects are tried before the Court.[227] Hence, it is all the more likely that such obligations could be overridden, even by a resolution of such dubious legality as Resolution 1422.

The above discussion has established that according to the UN Charter, member states are obliged to follow Security Council Resolutions which contradict their other obligations at international law. However, it is necessary to interrogate further to establish whether there are any options available to such parties if they believe that the resolution is illegal.

B. When faced with an illegal resolution

It has generally been accepted that states have the ability to determine whether their own acts and those of other subjects of international law are legal.[228] Furthermore, if there are

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[225] See *Lockerbie case supra* note 174. Declaration Oda at 129.

[226] *Ibid.* Dissenting Opinion of Judge El-Kosheri. See also Schweigman, *supra* note 161 at 252.

[227] *Rome Statute,* Art. 86.

[228] Schweigman, *supra* note 161 at 207.

doubts as to the legality of a resolution it is possible for individual states to protest and claim that the resolution is illegal.[229] Nevertheless, it is necessary to take this contention to its logical limit by questioning whether such states would be free not to comply with the said resolution.

As already noted, the functions and powers of the Security Council are derived from articles 24-26 of the UN Charter. Article 25 may assist in this debate this debate as it alludes to the consequences of an *ultra vires* resolution as it reads:

> 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 language of article 25 is not without ambiguities and it is not clear whether members are obliged to carry out all decisions of the Security Council by virtue of being parties to the Charter, or whether they are not bound by those not made in accordance with the Charter. Current doctrine and jurisprudence appear to lean towards the latter interpretation. As Professor Bowett notes, once the Security Council acts *intra vires* the consequence is that the members of the UN are bound by its decisions.[230] By enumerating the consequences of a decision made *intra vires* the author opens up the possibility of an *ultra vires* resolution but does not expand upon the consequences of such illegality.

However, it may be argued that there is a problem with this analysis in the present context. Paragraph 1 of Resolution 1422 is not addressed to states; it is addressed to the ICC since it requests that the ICC defers proceedings. Nevertheless, to infer that as a result member states are not affected by the scope of the Resolution is to ignore the underlying effect of the instrument. Paragraph 3 clearly states that "member states shall take no action inconsistent with paragraph 1 and with their international obligations". Hence, one could assert that the Resolution is actually addressed more to member states

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[229] *Ibid.* at 207.

[230] "Bowett's Law of International Institutions", *supra* note 163 at 43.

than to the ICC. Paragraph 3 of the Resolution is an imperative direction calling upon member states to comply with the Resolution.

It would seem that there are two options available to the member states faced with an illegal resolution. Firstly, if the state did not have voting rights in the Council to be able to express its discontent it could protest against the Resolution and hope that the Council would ask the legal opinion of the ICJ.[231] The chances of such a request are slim and the possible response by the ICJ, as will be examined below, is unlikely to be of great assistance. The second option would be to state that the Resolution is deemed to be void of its own volition as a result of its illegality. However, it would only be possible to do this if the Resolution were examined by the ICJ and the Court recognised the illegality of the instrument. Both options effectively require the exercise of review by the ICJ of a Security Council resolution, the likelihood of which will be considered in the section below.

II. The International Court of Justice as "the principle judicial organ of the United Nations"[232]

The role played by the ICJ in the UN structure is of vital importance. As Judge Lachs stated in his separate opinion in the Lockerbie case: "the Court is the guardian of legality for the international community as a whole, both within and without the United Nations".[233] The ICJ acts principally as a forum for resolving contentious disputes between states and only states are able to bring a case before the Court.[234] It is also the

[231] Schweigman, *supra* note 161.

[232] *UN Charter*, Art. 92.

[233] *Lockerbie case, supra* note 174. Separate Opinion of Judge Lachs.

[234] *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7, online: <http://www.icjcij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> (date accessed: 12 June 2003). Art. 34. [hereinafter *ICJ statute*]

source of advisory opinions on matters of international law referred to it by either the General Assembly or the Security Council.[235] Such opinions are seen as interpretations of international law although they are not binding. Similarly, the contentious cases only bind the states which are involved in the litigation. However, the judgments of the ICJ do have a considerable persuasive effect upon the development of international legal principles.

The likelihood that Resolution 1422 could come before the ICJ is quite slim. It would require either a dispute between two states involving the Resolution or for the General Assembly or Security Council to request an advisory opinion of the legality of the Resolution; either situation is not likely to occur although it is not entirely inconceivable. It is of greater controversy to consider whether the Court could interrogate Resolution 1422 and pronounce upon its legality or otherwise.

A. Does the ICJ have a power of judicial review?

The debate surrounding the judicial review capacity of the Court is still ongoing and the extent of the discussion is well beyond the scope of this analysis. Nevertheless, it is worth nothing that the majority of authors tend to either dismiss the possibility of judicial review altogether[236] or agree that although in theory the ICJ may have a power akin to that of judicial review, the scenarios in which such power may be exercised are highly limited.[237]

Several comments were made by the judges during the Lockerbie case as to the dubious validity of Resolution 748 (1992) and some comments went so far as to pronounce upon such tactics. According to Judge Oda, "[t]here is certainly nothing to oblige the Security Council, acting within its terms of reference, to carry out a full evaluation of the possible

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[235] *ICJ statute,* Art. 65.

[236] See *e.g.* Shaw, *supra* note 191 at 250. The author notes that there is nothing in the statute of the ICJ or the UN Charter giving such powers.

[237] See generally Schweigman, *supra* note 161.

relevant rules and circumstances before proceeding to the decisions it deems necessary"[238] However, if Resolution 1422 were to come before the ICJ it is not certain that the Court would allow itself the possibility of review, judging by the controversy of the Lockerbie legislation and the fact that only one judge decided to speak out against the *vires* of the Resolution. This is so even though it may be difficult for the judges to assert that Resolution 1422 was a legally valid Security Council decision. Given the lack of enthusiasm for the Court to become embroiled in decisions made by a body which is first and foremost political, such statements were exceptional.

In an early ICJ case the Court stated that there was no procedure for determining the validity of acts of UN organs, thus ruling out the possibility of even a tacit power of review.[239] The contentious issue in this case was whether the ICJ could determine whether or not UN Security Council resolutions authorising peacekeeping expenses were made in accordance with the Charter. The Court states that "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[240] Although this initially appears to be a presumption in favour of the legality of Security Council decisions, it is nevertheless conditional upon the correct application by the Security Council of the purposes of the United Nations.[241]

In the ICJ case involving Namibia,[242] the ICJ offered an advisory opinion after being presented with a choice of either assuming the *prima facie* validity of UN Security Council resolutions or reviewing their legality. Although the Court was clear to state that it was not vested with judicial review capabilities, it did go on to consider the objections advanced against the Resolutions before deciding what 'legal consequences' they

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[238] See *Lockerbie case, supra* note 174. Declaration Oda at 129.

[239] *Certain Expenses of the United Nations*, Advisory Opinion [1962] I.C.J. Rep. 151

[240] *Ibid.* at 168

[241] P.F. King, "Sensible Scrutiny: The Yugoslavia Tribunal's Development of limits on the Security Council's Powers under Chapter VII of the Charter" (1996) 10 Emory ILR 509 at 533.

[242] *Namibia case, supra* note 172.

produced.[243] For instance, as Judge Onyeama opined, "I do not conceive it as compatible with the judicial function that the Court will proceed to state the consequences of acts whose validity is assumed, without itself testing the lawfulness of the origin of those acts." [244]

As such, it can be seen that although the ICJ does not possess an express power of review, it will examine the legality of a Security Council resolution if to act otherwise would prevent it from proceeding with the case at hand. For example, Judge De Castro in the Namibia case spoke of "[t]he principle of 'legal-ness' - the Court, as a legal organ, cannot co-operate with a resolution which is clearly void, contrary to the rules of the Charter, or contrary to the principles of law".[245]

Therefore, it is possible to conclude that although the possibility of judicial review exists it is far from being openly recognised and in the majority of cases in which a review tactic was employed, there are no explicit statements in favour of the practice. Furthermore, such cases are often used both to support and refute the possibility of a review power. Having examined the review capacity of the ICJ, it is important to consider what the effect of a ruling by the ICJ as to the legality of Resolution 1422 would be.

B. Is an illegal Security Council resolution void *ab initio*?

Judge Lauterpacht suggested in the Genocide case[246] that an illegal resolution ought to be sent back to the Council to remedy the problem. Nevertheless, in that case the Resolution was criticised for being contrary to a *jus cogens* principle and effectively calling upon members to act in a way that supported the genocidal crimes of the Serbian citizens.[247]

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[243] *Ibid.* at para. 45.

[244] *Ibid.* at 45C.

[245] *Ibid.* at 180C.

[246] *Genocide case, supra* note 205. Separate Opinion of Judge Lauterpacht, para 104 at 120.

[247] Schweigman, *supra* note 161 at 282. The controversy surrounded Security Council action to ban the sale of weapons with the result that the victims were effectively deprived of a means of defence.

Such a case is far removed from the political situation surrounding the creation of Resolution 1422. Of prime interest to the present debate is whether an, albeit cautious, determination by the ICJ as to the illegality of Resolution 1422 would render the Resolution ineffective or whether it would take a further process to render the instrument void.

According to doctrine, the answer to this question depends upon whether the ICJ is in reality an effective review body for decisions of the Security Council, i.e., whether taking a case before the ICJ offers an effective procedural exercise.[248]

As the above discussion has shown, the ICJ cannot yet offer such an effective review capacity. This leads to the understanding that the decisions of the Security Council must be automatically void if illegal.[249]

Having determined that an illegal resolution is effectively void of its own volition, does it then follow that member states are free to ignore Resolution 1422? Article 103 does not stand in the way of such a conclusion. If it can be held that a Security Council decision is manifestly *ultra vires* then it is unlikely that the Resolution would prevail over other international obligations.[250] However, such a conclusion, although legally valid, is not politically or practically tenable. The fact that the United Nations depends upon the compliance of its members for the existence of the organisation as a whole makes such protests and non-compliance highly unlikely. As such, it is now necessary to turn to other forums to determine whether Resolution 1422 can be the object of serious and effective criticism.

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[248] *Ibid.* at 284.

[249] *Ibid.* at 284-5.

[250] "R. Bernhardt, Article 103", *supra* note 213 at 1299.

III. The new arrival: The International Criminal Court

At the time of writing there has been no response by the ICC to Resolution 1422 and the request it contains. It will be interesting to see how the Court responds to the Resolution. Until then this debate will consider the hypothetical response the Court may make. This section will proceed in the following manner: it will first be examined whether the ICC has any options regarding how to respond to the request contained in Resolution 1422 or whether it is simply a binding instruction upon the Court to respond in a certain fashion. Following this analysis, comparisons will be drawn between Resolution 1422 and the first case to come before the ICTY, that of Prosecutor v Tadić.[251] The situation before the ICTY will be compared to the hypothetical situation which could arise before the ICC if a case involving peacekeepers came before it. Finally, conclusions will be drawn as to the likelihood and desirability of the ICC performing a judicial review function in respect of Resolution 1422.

A. The responses available to the ICC

It is essential to firstly establish whether the ICC has any options regarding its response to Resolution 1422. The debate surrounding Resolution 1422 has been divided between those authors who are of the opinion that the use of the word 'request' in the Resolution is not enough to qualify it as such and that Resolution 1422 purports to bind the ICC; and those who believe that the ICC is free to disregard Resolution 1422.

a. Analysing the compromising nature of an article 16 request

In support of the former assertion, one may point to the assertive language of the Resolution.[252] In addition, although the word 'request' is employed, it may be argued that the lack of discretion accorded to the Court by the Rome Statute, to decide whether to comply with such a request, is indicative of a requirement upon the Court to conform.

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[251] *Tadić case, supra* note 189

Further support for this argument may be found in the doctrine of substitution.[253] According to this doctrine, the ICC as an international institution created by states is obliged to adopt the obligations of its constitutive member states.[254] However, this doctrine may be less relevant in the case of the ICC, which from the outset was seen as an independent court free from political constraints. In addition, the doctrine of substitution meets problems when the role of the independent prosecutor is considered. The Rome Statute created this role so that an individual may act independently of political concerns to attempt to bring alleged perpetrators of heinous crimes to justice. The prosecutor is not tied to the whim of individual states and in theory is free from the limitations which Resolution 1422 places upon member states. Such a conclusion, however, leads to the interesting scenario in which an international institution created by states has greater powers than the states themselves, since the states are limited by their deference to Resolution 1422.[255]

Such a situation is of great academic interest and yet it must be remembered that in practical terms it will not have a noticeable effect upon the Court since the ICC is dependent upon states to arrest suspects and transfer them to the Court; it is a weak institution without their support.

b. Considering the discretion accorded to the ICC

In support of the assertion that the ICC is not bound to comply with the Resolution 1422 request is the fact that article 16 requires a request to the ICC to defer proceedings and that, objectively, is exactly what Resolution 1422 purports to do. It is possible to assert, therefore, that the ICC has been accorded a certain amount of discretion in this matter. However, this discretion is nevertheless limited to a legal consideration of whether the

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[252] MacPherson, *supra* note 153.

[253] Deen-Racsmány, *supra* note 149 at 373.

[254] MacPherson, *supra* note 153.

[255] *Ibid.*

request satisfies the requirements of the Rome Statute. If the Court determines that it does, then it would appear that the ICC is obliged to implement the request.

The source of this obligation is not to be found in article 103 of the UN Charter, however, because this instrument only binds states.[256] During the discussions surrounding the 1986 Vienna Convention, it was considered of importance to recognise that international organisations were not subject to the UN Charter. It is still the case today that multilateral treaties, including those of special status such as the UN Charter, cannot bind third parties.[257] Article 103 is designed to bind states only and not the international organisations which they create.[258] Rather, the source of this obligation is to be found in article 16 of the Rome Statute.

Therefore, the discussion must proceed as follows: if the relevant provision of the Rome Statute has been correctly applied by the Security Council, the ICC is obliged to implement the request. If, on the other hand, only the provisions of the UN Charter dealing with a determination of a threat to the peace have not been complied with, it would seem that the ICC must nevertheless comply with the request since the ICC is only built upon the Rome Statute.[259]

For the purposes of this analysis, therefore, it is argued that the ICC does have the authority to reject the request in Resolution 1422 if it determines that the request was not made in conformity with article 16. Nevertheless, such a conclusion is based on a preliminary assumption that the Court is capable of making such a determination, which is essentially a review of the Resolution. The accuracy of this assumption will be examined in the following section.

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[256] *UN Charter,* Art. 48(2).

[257] *Vienna Convention*, Arts. 34 and 35.

[258] "R. Bernhardt, Article 103", *supra* note 213 at 1294.

[259] In comparison to both the ICTY and the ICTR and indeed the ICJ which is part of the overall UN structure. Stahn, *supra* note 141 at 109-110 and see generally A. Reinisch & B. Bryde, "Article 48" in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd ed. (Oxford: Oxford University Press, 2002) 775.

B. Judicial review before the ICC?

It must be noted that in order for the ICC to examine the Resolution in such a way it is necessary that it has before it a case involving allegations of crimes within the Rome Statute perpetrated by peacekeepers. It is still possible for such a situation to arise, for example if the prosecutor, being an independent authority, were to initiate such proceedings.

a. A question of competence

If a case were to come before the ICC involving peacekeepers from non-party states, then the first step for the Court would be to determine whether it had jurisdiction over the matter. According to article 19(1) of the Rome Statute, the ICC must "satisfy itself that it has jurisdiction in any case brought before it".[260] This is a reflection of *kompetenz-kompetenz*, a general principle of international law whereby a judicial body is entitled to make a decision as to whether it has jurisdiction to judge the case before it.[261] Instrumental in reaching such a decision would be a consideration of Resolution 1422. This is because the Resolution effectively limits the jurisdiction of the Court, albeit temporarily.

It is possible to envisage such a situation arising at the time of writing since, as was mentioned earlier, the ICC has not yet made any formal response to the request in Resolution 1422. Although the possibility of a peacekeeper coming before the Court is slight, it is still a possibility and as such must be examined through to its logical conclusion. In making a decision as to its jurisdiction in this hypothetical case, could the ICC examine Resolution 1422 even if it does so only incidentally? Could the ICC provide an alternative forum whereby the legality of a Security Council resolution is openly assessed and reviewed? The clearest way to attempt to respond to these questions is to

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[260] See L. Condorelli & S. Villalpando, "Relationship of the Court with the United Nations" in A. Cassese, P. Gaeta, J. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary*" (Oxford: Oxford University Press, 2002) 219 at 230. [hereinafter "Relationship of the Court with the United Nations"]. In this regard the ICC has greater discretion than that accorded to the ICJ, see *ICJ Statute* Art. 36.

[261] Kindred, *supra* note 10 at 349.

draw upon the examples of ICJ practice mentioned above and to introduce the case law of the ICTY which considered a very similar question in relation to the Tribunal.

b. The consequences of the practice of the ICJ

As was seen above, the ICJ does not have an objective, official power of review of Security Council decisions. The conclusion may be drawn that, strictly speaking, since the decision to classify a certain situation as a threat to international peace and security is not officially susceptible to judicial review before the ICJ, as the guardian of legality within the UN structure, it cannot be challenged before the ICC either.[262]

However, as has been noted throughout this analysis, the ICC is not designed to have its actions tempered according to the politics of the United Nations. In this respect it may be distinguished from the ICJ which is clearly an organ within this overarching structure. That is not to say that the latter is not independent of the Security Council or the United Nations in general. Rather, by virtue of being an organ of the United Nations, even as the principle judicial organ, it is unavoidable that the cases coming before the Court will be political in nature. In order to effectively judge upon the case before it, the Court is required to take into account the political climate out of which the dispute has arisen. Such a method is not necessarily to be criticised, indeed it may well be argued that to ignore such contextual evidence would do the parties a disservice.[263] The point is that although the individual suspects standing trial before the ICC may well be the product of political wrangling between states; such conflicts are not the concern of the ICC. The latter is designed simply to apply the law contained in the Rome Statute along with the relevant international treaties and principles of international law as it sees fit. Hence, it seems likely that the reticence of the ICJ to recognise for itself a power of review of Security Council decisions is not directly transposable onto the ICC.

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[262] Deen-Racsmány, *supra* note 149 at 383.

[263] M.C.W. Pinto, "Pre-eminence of the International Court of Justice, in C. Peck & R.S. Lee, eds., *Increasing the Effectiveness of the International Court of Justice* (The Hague: Kluwer Law International, 1996) 281 at 286.

Furthermore, it is interesting to note that the hesitation of the ICJ to recognise a power of review was not influential in a case requiring judicial review of a Security Council resolution which came before the ICTY. This is in spite of the fact that the ICTY is a direct creation of the Security Council and much closer to the politics of the Security Council than the ICC is designed to be. It is therefore necessary to turn now to this controversial jurisprudence, where a review capacity was to be found, not in a primary competence but in a secondary competence of the Tribunal.

c. The trial of Dusko Tadić before the ICTY

(i) Introducing Tadić

The controversial topic of the 'reviewability' of Security Council decisions arose before the ICTY in the first case which came before the Tribunal.[264] The ICTY was created by Security Council resolution 827 which stated that "in the particular circumstances of the former Yugoslavia"; the establishment of the ICTY "would contribute to the restoration and maintenance of peace". The Council notes that in creating the Tribunal it was acting under Chapter VII.[265] The case against Dusko Tadić accused the defendant of crimes against humanity and he was found guilty on nine counts.[266] Of interest to the current debate is the early case in 1995 where the constitutionality of the ICTY was questioned and established.

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[264] *Tadić case, supra* note 189.

[265] *Statute of the International Criminal Tribunal for the Former Yugoslavia, supra* note 158.

[266] Dusko Tadić was found guilty on 7 May 1997. International Tribunal for the Former Yugoslavia, Press Release "*Tadić* sentence increased to 25 years imprisonment" (11 November 1999) online: <http://www.un.org/icty/pressreal/p447-e.htm> (date accessed 23 June 2003). See A. Klip & G. Sluiter, eds., *Annoted Leading Cases of International Criminal Tribunals: The International Criminal Tribunal of the former Yugoslavia 1999-2000* (Oxford: Intersentia, 2002) at 420. See also J.W. Davis, "Two Wrongs Do Make a Right: The International Criminal Tribunal for the Former Yugoslavia was Established Illegally - but it was the Right Thing to do ... So Who Cares?" (2002) 28 N.C.J. Int'l L. & Com. Reg. 395.

(ii) The substantive issue

Counsel for Dusko Tadić argued that the Tribunal did not have jurisdiction to try the case before it, since it had not been validly established.[267] The defence argued that the defendant had a right to a fair trial in a tribunal 'established by law' in accordance with Article 14, paragraph 1, of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention on Human Rights, and that the ICTY did not meet such a standard. It was argued that this was because the Security Council had acted illegally in establishing a judicial body.[268]

In response, the prosecutor argued that the ICTY did not have the authority to review its own establishment by the Security Council which had its source in a Security Council resolution. The prosecutor went on to cite various jurisprudence of the ICJ in support of his argument. He determined that since the ICJ does not recognise for itself a specific power of review, it was not possible to confer such a power upon the ICTY.[269] This argument is based upon the fact that the ICTY was a creation of the Security Council and is subordinate to this organ.

The Trial Chamber of the Tribunal agreed with this argument and held that it did not have the power to examine the legality of the establishment of the Tribunal. However, the judges noted that if it did have such power it would have upheld the Security Council resolution.

When the case came before the Appellate Chamber, however, the five judges found in favour of the defence and held that the ICTY did indeed have the right to establish its own jurisdiction as part of its "incidental or inherent jurisdiction".[270] The judges framed the issue as follows: "the question before the Appeals Chamber is whether the

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[267] See Defence Brief to Support the Motion on the Jurisdiction of the Tribunal, *Tadić case, supra* note 189.

[268] See King, *supra* note 241 at 529. See generally Alvarez, J.E., "Nuremberg Revisited: The *Tadic* Case" (1996) 7:2 Eur. J. Int'l L. 245

[269] *Tadić case, supra* note 189 at 10-11 Prosecutor Brief.

[270] *Tadić case, supra* note 189 at para. 14.

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".[271] They based their decision on the observation that "if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter...this issue is a preliminary to and conditions all other aspects of jurisdiction."[272]

The principle of *kompetez-kompetenz* was described by the ICTY as a "well-entrenched" principle of international law which could not be dispensed with implicitly. The judges held that it would require an explicit statement in the constitutive document of the institution for the principle not to apply.[273] Furthermore, the judges went so far as to suggest that the International Tribunal did not simply have the option to decide upon its jurisdiction, it had an obligation to do so.[274]

Essentially, the decision by the Appellate Tribunal established that the Tribunal had the right to determine its own jurisdiction in spite of the fact that reaching such a decision meant examining Security Council action under Chapter VII. Such a process may be described as a matter of preliminary jurisdiction.[275]

(iii) The methodology of review

Once the Tribunal had decided that it could, and indeed ought to, examine Resolution 827, it looked at the extent of the discretionary power accorded to the Security Council

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[271] *Ibid* at para. 20.

[272] *Ibid. at para. 12.*

[273] *Ibid. at para 19.*

[274] *Ibid.*

[275] *Ibid at paras. 14-22.* "Referral and Deferral", *supra* note 133 at 641

under Chapter VII of the Charter.[276] The Appeals Chamber was cautious in its methodology. Rather than analysing whether the Security Council's determination that the threat to the peace was to be found in the continued violations of humanitarian law in the area, the Tribunal took it upon itself to highlight that a threat to the peace existed (as a result of the continuing conflict in the area) and as such this was sufficient.[277] Such caution was exhibited to an even greater extent when the Appeals Chamber came to consider the appropriateness of the response taken by the Security Council in creating the ICTY. The Chamber simply cited article 39 as leaving a wide discretion to the Council.

As such, whereas the Trial Chamber did not believe it had the authority to review the Security Council decision, its dicta nevertheless indicate a willingness to review the Resolution extensively should such a power exist. For instance it went to great lengths to establish that the discretionary power accorded to the Security Council justified its finding of a threat to the peace, and furthermore that the creation of the Tribunal was an appropriate response. On the other hand, the Appellate Chamber, although keen to recognise an ability to review, was much more cautious in performing such a task.

It is worthwhile noting that the outcome of this decision was of great practical significance. The judges in the ICTY were aware of the need to legitimise the Tribunal, since if it were found that the Security Council had overstepped the borders of its discretionary powers then the ICTY would be without legitimacy and such an outcome was undesirable. Authors have argued that the need for a Tribunal was such as to outweigh criticism of Security Council action,[278] or that this practical reality was pressuring the judges to the extent that the decision itself is of little concrete utility, since the judges were influenced by such considerations.[279]

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[276] King, *supra* note 241 at 544.

[277] King, *supra* note 241 at 552.

[278] "It is essential to bear in mind that if Tadić were to prevail on any one of his challenges to the ICTY's legitimacy, there would have been two probable consequences: he would have been acquitted and the notion of the ICTY would have been shattered. The Tribunal's judges were conscious of both outcomes." Davis, *supra* note 266 at 408.

[279] See "Referral and Deferral", *supra* note 133.

Nevertheless, in spite of these reasons and the hesitation demonstrated by the Tribunal, it is argued here that the overall result of the Tadić decision in pronouncing upon the ability to review Security Council decisions affecting the jurisdiction of the Tribunal represents a significant development.

d. Situating the ICC in the shadow of the Tadić jurisprudence

It is under the authority of the Tadić decision that it may be argued that if a case involving peacekeepers from a non-party state were brought before the Court; the ICC would be able to examine whether Resolution 1422 was binding upon it. Logically, to reach a conclusion upon this issue, the Court would have to examine the legality of Resolution 1422 against article 16 of the Rome Statute and such a decision would be made as an incidental ruling.[280] It is true that amongst the lengthy rules of procedure and evidence to be found in the Rome Statute there is nothing which explicitly states that the ICC can evaluate a Security Council resolution which makes an article 16 deferral request.[281] Nevertheless, no statements to that effect were made in the constitutive instruments of the ICTY either.

It is to be made quite clear that the ICC would not have the ability to rule upon the political decision made by the Security Council, in that it could not hold that the threat to international peace and security was exaggerated.[282] On the contrary, the role of the Court is to examine the decision in accordance with article 16. As a valid Chapter VII decision is one of the requirements of article 16, the ICC would be required to determine whether a valid Chapter VII decision had been made according to the procedural steps required by the Charter.[283]

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[280] "Relationship of the Court with the United Nations", *supra* note 260 at 230-231.

[281] El Zeidy, *supra,* note 207 at 1515.

[282] "Referral and Deferral", *supra* note 133 at 648.

[283] Deen-Racsmány, *supra* note 149.

It is likely that the ICC would find a misapplication of article 16 in both scope and procedural constraints since the Resolution deals with a hypothetical category of cases which are neither specific nor imminent. It is not clear whether the ICC would reject the Chapter VII determination as based on the bad faith of a permanent member. Certain authors have argued that the Court would have the responsibility to decide whether the Security Council has acted within the purposes and principles of the UN Charter and whether the determination of a threat to international peace and security does in fact respond to settled UN practice.[284] This assertion was made in connection with the referral proceedings set out under article 13(b) of the Rome Statute. It may be argued that since a decision made by the Security Council under this provision is afterwards examined by the prosecutor and may also be considered by the pre-trial chamber,[285] the legality of a decision taken in accordance with article 16, which is not subject to such review, ought to be examined with even greater care.

It is asserted here that although it is necessary to impose such a responsibility upon the Court, it is not in the interests of the fluid functioning of the international institutions to ask that the ICC examine the Resolution in accordance with the purposes and principles of the UN Charter. It must be noted that at no point did the ICTY question the discretionary evaluation made by the Security Council as to a threat to peace based on the information before it. Rather, the tribunal looked at the procedural compliance by the Council in reaching its decision.

It must be stressed that the above conclusions do not advocate that the ICC become embroiled in the review of Security Council decisions generally. It is still for the ICJ to discuss such matters when they are absolutely necessary. In fact, the power of the ICJ in this area is considerably wider since it does not require a jurisdictional question before it

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[284] See "Referral and Deferral", *supra* note 133 at 641. Referring to *Tadić case, supra* note 189 at para. 51. See also W.A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) at 66.

[285] *Rome Statute,* Art. 53(3)(a).

tentatively examines the legality of a resolution; it does so as part of its primary jurisdiction. In Tadić, the question was whether such review could take place as incidental jurisdiction, prior to allowing the Tribunal to deal with its primary jurisdiction.[286]

The problem in the case of Resolution 1422 when compared to Resolution 827 is that it was adopted rapidly in response to the imminent threat posed by the US to withdraw troops from peacekeeping operations and to veto the peacekeeping mission in Bosnia. The marked difference with Resolution 827 was that this latter resolution had been produced over a certain time frame and the Security Council had ensured the involvement of both governments and NGOs. Furthermore, it was designed to respond over time to a continuous situation where peace was being threatened.

It has been argued that the circumstances surrounding the creation of Resolution 827 make it all the more likely that it could be the object of judicial review.[287] The reasoning behind this is that it is more difficult for a judicial body to question the legality of a resolution made in haste and in response to an ongoing situation. However, if it were the case that by virtue of making a serious and imminent threat, a Security Council member could force the adoption of an illegal resolution which hampered the jurisdiction of an international judicial body, and that such a resolution could not be critically reviewed as a result, then that would be an unfortunate situation indeed.

e. Interim Conclusions

Having examined the Tadić legacy and compared the case to one which may arise before the ICC, the conclusion can be drawn that the ICC may find itself in a position where it is called upon to consider the legality of Resolution 1422 against the requirements of article 16 of the Rome Statute. Such a review process would be most welcome since, as has been

[286] *Tadić case, supra* note 189 at para. 30.

[287] King, *supra* note 241

seen above, it is unlikely that the Resolution will come before the ICJ and the options available to member states to dispute the legality of the Resolution are limited.

The ICJ and the Security Council are both organs of the United Nations and benefit as such from a relationship of equality. This is not the case with the ICC in relation to the Security Council. Although the latter benefits from an objective independence from the UN structure, Resolution 1422 has demonstrated that it is nevertheless at the mercy of the Security Council permanent members. Such a scenario may well be an unavoidable aspect of the horizontal nature of the system of international law, in that certain political decisions will be produced absent any risk of criticism. However, given the particular circumstances surrounding the creation of Resolution 1442, the ICC ought to be accorded the possibility of reviewing this document which impinges upon its jurisdiction.

Much like the ICC, one of the reasons behind the creation of the ICTY was to allow the Security Council to delegate responsibility to a forum where important decisions could be made free from the constraints imposed by the political power struggle within the Council. The idea was that the Security Council would not be able to interfere in the decision-making process at the seat of the Tribunal. Indeed, it was a decision of the Council which was considered and accordingly legitimised by the Tribunal.[288]

C. Conclusion

Resolution 1422 is not only the first Security Council resolution implicating the ICC. It is also the first legal instrument since the Rome Statute which attempts to affect an aspect of the jurisdiction of the Court. Although the Resolution purports to restrict the Court from examining crimes committed by peacekeepers on a temporary basis only, the passing of Resolution 1487 with only three abstentions and the seriousness of the US threat to veto the Bosnian peacekeeping mission, which could quite easily be wielded again, are enough to jeopardise the stability of the Court and indeed the integrity of Security Council resolutions in general.

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[288] Alvarez, *supra* note 268 at 11.

The legitimacy of the Council and the ICC was at stake during the negotiations surrounding the US proposals. Following the adoption of resolutions 1422 and 1487 the situation has considerably worsened. As such, this final chapter has demonstrated that this issue goes beyond the practicality of ensuring that peacekeepers are susceptible to ICC prosecution. It aims to show that the indirect judicial review of this document is necessary in order to maintain a level of credibility in the legality of Security Council decisions and faith in the practice of the Security Council and the ICC alike. The necessity of such an examination cannot be underestimated.

CONCLUSION

The aim of this thesis was to establish the legality or otherwise of Resolution 1422 and from this conclusion, to determine the likely effects the instrument would provoke before individual members of the United Nations, before the International Court of Justice, and most significantly before the International Criminal Court itself.

The background to the legal wrangling which culminated in an international criminal court was a vital aspect in order to fully understand the extent to which the international society of states strove to reach a compromise; any instrument dealing with the newly inaugurated ICC would have required such a setting. It was particularly pertinent in the case of Resolution 1422, since the legality of this instrument was highly dubious. Not only was it possible to criticise the Security Council for its ineffective application of article 16 of the Rome Statute, but this analysis was able to go further and extend such criticism to the application of the UN Charter itself. As this thesis has highlighted, the predominant role played by the US in this debate led the Security Council to respond to a threat to international peace and security created by the very same permanent member which wished to benefit from the resulting Chapter VII resolution. Such a scenario is symptomatic of the current state of play in international law, where situations involving US rebellion generate criticism from states, NGOs and IGOs alike and yet the fact remains that, in the end, states will bend to the pressure of the US.

There is a certain irony in the fact that the US was able to employ the persuasive power of its veto in order to persuade the Security Council to perform a function created for it by the Rome Statute. The power of the veto has been dubbed "the main hegemonic norm of our time"[289] and its undemocratic influence upon the essential decisions taken at the seat of the Security Council has been well documented. The removal of the direct influence of the Security Council upon the ICC was deemed essential in the debates leading up to the

[289] P. Nel, "Between counter-hegemony and post-hegemony: The Rome Statute and normative innovation in world politics" in A.F. Cooper, J. English, & R. Thakur, eds., *Enhancing Global Governance: Towards a New Diplomacy?* (Tokyo: United Nations University Press, 2002) 152 at 156.

creation of the Court. In spite of this intention, and as a result of the extreme tactics employed by the US, Resolution 1422 is a testament to the fact that the power politics in the Council can still have an extensive influence upon the ICC.

This limitation to the jurisdiction of the ICC provoked by the tactics of one state in particular, along with the usurping of various articles of the Rome Statute designed for different purposes is of great concern and must not be tolerated. However, the analysis may go much further than that. This debate may matter on a wider symbolic scale to the progression of the UN. Given the history of the ICC and the ideologies which encouraged its creation, it may be argued that the ICC is effectively an indirect way in which a reform of the United Nations has taken place and can continue to take place.[290]

This contention may be explained *inter alia* by the fact that the Court represents the will of 120 states of various influence and, furthermore, that the part played by civil society in the creation of the Court was highly significant. In addition, the Court is not subject to the unyielding veto-power of the permanent members of the Security Council in order to function; rather, it is to stand independent, as a bastion of justice, refusing to allow the continuation of impunity, all in furthering the promotion of international peace and security. Could it be the case that the ICC represents a microcosm of the UN in a reformed state and thus a way around the political imbalance found in the Security Council? It is indeed possible to reach such a conclusion. The argument would be even stronger if it were the case that the ICC could judge upon the legality of Resolution 1422 in determining its own jurisdiction. It has been argued in this thesis, and it ought to be reiterated, that it can.

It is interesting to note, therefore, that if the ICC really is a reflection of the reform of the United Nations, the most powerful democracy is standing on the sidelines.[291] Furthermore, this last, great superpower is not only watching from a distance as the Court

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[290] Schabas, *supra* note 284 at 66.

[291] "The United States has not been alone in opposing the Court. The world's most brutal dictatorships, of course, have shunned it. But two democracies, India and Israel, have shared America's misgivings." Editorial, "Soon it will be dispensing justice" *The Economist* (15 March 2003).

progresses but is actively causing problems for the proper functioning of the Court. This thesis has examined one such problem in detail and has demonstrated its illegality in international law.

A secondary aim of this piece of work, however, is to point to the fact that Resolution 1422 is an example amongst many through which the US has attempted to impinge upon the role of the ICC. It has been suggested that the problem for the US is in reconciling its unique status as the last surviving superpower, and its respect for international hegemony, with its presence within a self-governing society of states.[292] It could be argued further that it is not international law as a system which represents the problem, but rather, the deference to international institutions which abiding by this law necessarily provokes.

The tactics which have been employed by the US are not new and yet the fact that an illegal resolution can slip through the net not once but twice sets a worrying precedent. The US is of course entitled to take a position on foreign policy, towards the UN and in respect of the ICC. Nevertheless, any moves it makes must be taken in accordance with the system of international law as it exists today, otherwise it is not only the ICC which is in jeopardy, but respect for international law as a whole is at risk.

The US could use similar tactics as those outlined in this thesis in the future, in order to secure its own political objectives; in theory of course it will not act in such a way because it is a democratic state which believes in the rule of law. However, the same logic appertains to this crisis which provoked Resolution 1422. That is to say, the ICC could welcome politically motivated prosecutions of US peacekeepers but it is unlikely to do so because it is a legitimate, neutral institution. If the Security Council is required to trust the US then the latter should be prepared to have faith in the ICC, which is built upon a common understanding that the most heinous crimes known to humanity cannot go unpunished.

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[292] J. Reed, "Why is the USA not a like-minded country? Some structural notes and historical considerations" in A.F. Cooper, J. English, & R. Thakur, eds., *Enhancing Global Governance: Towards a New Diplomacy?* (Tokyo: United Nations University Press, 2002) 55 at 64.

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