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The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute

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The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422

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ABSTRACT

This Article discusses the recent adoption of the Security Council Resolution 1422 and its impact on international law. The Author asserts that the United States—a major proponent of Resolution 1422—desires to immunize its leaders and soldiers from the International Criminal Court’s jurisdictional powers. The Author begins by describing the drafting history of Article 16 and its legal consequences. Upon highlighting the most significant reasons for opposing Resolution 1422, the Author delineates how the Resolution mirrors the inconsistency with the United Nations Charter and the Law of Treaties. Finally, the Author concludes that Resolution 1422 should be rejected because it violates certain peremptory norms and it conflicts with the letter and the spirit of existing international laws.

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I. INTRODUCTION

On July 12, 2002 the Security Council (Council) adopted Resolution 1422, which is based on Article 16 of the International Criminal Court Statute (ICC Statute). For a renewable period of twelve months, the Resolution grants the Council authority to stop the commencement or continuation of a criminal investigation or prosecution.

Interpreters of Resolution 1422 have used different constructions to analyze the Resolution's meaning and its ramifications. One dominant theory posits that the adoption of Resolution 1422 delineates the Council's intent to augment its powers by amending the International Criminal Court Treaty. Thus, critics have urged against its adoption because the Resolution contradicts the letter and the spirit of existing international laws.

This Article sheds light on the essence of Resolution 1422 by challenging its legality and measuring its compatibility with different principles of international law. Part II describes why the United States supported the adoption of Resolution 1422 in light of the ICC's jurisdictional powers under Article 16 of the ICC Statute. Part III highlights drafting history and the legal consequences of Article 16. Part IV then examines the most significant statements made by formal and informal state representatives, which reflect their unanimous opposition to the Resolution's adoption. Part V discusses Resolution 1422's effect on the U.N. Charter and the Law of Treaties by describing how the Resolution mirrors the inconsistency with the two laws and the dangerous consequences resulting from such inconsistency. Part VI advocates for the invalidation of Resolution 1422, via the use of peremptory norms, because the Resolution violates those norms. Finally, Part VII examines, *inter alia*, the different possibilities of interpretation of the Resolution and concludes that the language of the Resolution is contradictory and, because of its misformulation, there may be practical problems in its application.

II. BACKGROUND

On July 12, 2002, the Security Council passed a dangerous resolution that paralyzed the International Criminal Court's (ICC) jurisdiction over U.S. soldiers participating in the peacekeeping operations in Bosnia and Herzegovina.¹ The original draft resolution intended to protect only the U.S. forces. Yet, due to international criticism against the United States, the Council adopted the current resolution protecting not only U.S. soldiers, but all non-member countries of the Rome Treaty from lawsuits under the ICC Statute.²

At the outset, the United States requested that the Security Council grant immunity to U.S. soldiers in Bosnia and Herzegovina from the ICC's jurisdiction for one year.³ If the Council would not accept the proposal, then the United States threatened to use its veto power to stop the renewal of the period of their mission in Bosnia-Herzegovina, which was to expire on July 15, 2002.⁴ Even after extensive debates regarding the ICC's jurisdiction over peacekeeping forces from non-party states, the Council nonetheless adopted Resolution 1422.⁵

Resolution 1422 exempts "current or former officials or personnel from a contributing [non-party State] to the Rome Statute" from

1. See S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg. at 1, U.N. Doc. S/RES/1422 (2002) [hereinafter S.C. Res. 1422].

2. Hua Jiang, *Highlights of the Noon Briefing*, at <http://www.un.org/News/ossghilites.htm>. In his meeting with the Nigerian President, the U.N. Secretary General issued the following statement regarding the above-mentioned dispute: the Resolution "resolves the conflict in the sense that the Americans themselves backed away from the blanket immunity they were asking for American Soldiers and American Personnel. . . ." He further added that "it is also taking away the potential conflict that would have ended the UN peacekeeping operation in Bosnia and perhaps in other locations." *Id.*

3. See President's Letter to Congressional Leaders Reporting on Continued Operations of United States Forces in Bosnia and Herzegovina, 38 WEEKLY COMP. PRES. DOC. 1243 (July 29, 2002); Alaa Reyad, *The US Proposed a One Year Immunity for Its Soldiers To Rescue Peacekeeping Mission in Bosnia From the Veto Power*, AL-AHRAM WEEKLY, July 12, 2002, at <http://weekly.ahram.org.eg>.

4. *Id.* See also Jiang, *supra* note 2. On June 30, 2002 the Security Council adopted a technical, "rollover resolution" to extend United Nations Mission In Bosnia and Herzegovina's (UNMIBH) mandate for three days after the United States had vetoed a proposed text that would have renewed their Mission until Dec. 31, 2002. S.C. Res. 1420, U.N. SCOR, 57th Sess., 4564th mtg. at 1, U.N. Doc. S/RES/1420 (2002) [hereinafter S.C. Res. 1420]. However, following that action, the Council agreed to extend the deadline for three days. On July 3, 2002, the latter adopted another technical text extending the Mission until July 15, 2002. S.C. Res. 1421, U.N. SCOR, 57th Sess., 4566th mtg. at 2, U.N. Doc. S/RES/1421 (2002) [hereinafter S.C. Res. 1421]. In this respect, see S.C. Res. 1423, U.N. SCOR, 57th Sess., 4573d mtg. at 1, U.N. DOC. S/RES/1423 (2002) [hereinafter S.C. Res. 1423].

5. S.C. Res. 1422, *supra* note 1.

standing trial before the ICC for a renewable one-year period beginning July 1, 2002.⁶ The language of the Resolution impedes the ICC prosecutor⁷ from commencing or continuing an investigation, or prosecuting troops whenever any "case arises" pursuant to Articles 6, 7, and 8 of the ICC Statute.⁸

Upon the ICC Statute's enactment on July 1, 2002, the United States chose not to gamble with its soldiers by silently remaining as an observer. Under Article 12(2)(a) of the ICC Statute, U.S. soldiers were required to stand trial before the ICC⁹ even though the United States was not a party to the Rome Treaty.¹⁰ Ambassador David

6. *Id.* para. 2. It is argued that the Resolution would not be limited to those actually undertaken by the United Nations, but would also include those approved by the United Nations, such as the NATO mission in Afghanistan. This classification is very dangerous and places an entire group of individuals above the rule of international law. In addition, a further imminent danger could arise—namely, any U.S. attack on Iraq. If such an attack took place, one could argue that the United States could still invoke Resolution 1422 to protect its soldiers. This could be based on the early Security Council resolutions regarding Iraq in addition to the wording of Paragraph 1 of the current resolution.

7. *See id.*

8. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, arts. 6-8, U.N. Doc. A/CONF.183/9 (establishing, by treaty, an international criminal court with the power to investigate and prosecute acts of genocide, crimes against humanity, war crimes and the crime of aggression) [hereinafter ICC Statute].

9. ICC Statute, *supra* note 8, art. 12(2)(a) (stipulating that, "In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute . . . a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft."). Thus, based on the principle of territoriality, the United States feared that the Court could exercise its jurisdiction over U.S. soldiers involved in the UNMIBH because Bosnia and Herzegovina is currently a State Party to the ICC Statute. Accordingly, either the State Party could refer a case to the prosecutor or the prosecutor acting *proprio motu* could exercise power over nationals of non-Party States by virtue of Article 12(2)(a) of the Statute. In this respect, see the statement made by Ambassador David Scheffer during the drafting negotiations, whose government favored the consent regime. He said,

There is a reality and the reality is that the United States is a global military power and presence. Other countries are not. We are. Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to the legitimately operate internationally. We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power.

Daniel Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 CRIM. L.F. 87, 104-05 (1999).

10. Sharon A. Williams, *Article 12: Preconditions to the Exercise of Jurisdiction*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 340 (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE]. *See also* M. CHERIF BASSIOUNI, THE

Scheffer, who led the U.S. delegation in Rome, also recognized this danger, and thus, stated:

[A]rticle 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of a non-party state. Under Article 12, the ICC may exercise such jurisdiction over any one any where in the world . . . if either the state of the territory where the crime was committed or the state of nationality of the accused consents . . . [hence] the treaty exposes non-parties . . .¹¹

Accordingly, the ICC prosecutor has the power to initiate investigations *proprio motu*¹² under two main circumstances: (1) based on information about criminal activities within the ICC's jurisdiction,¹³ or (2) based on a state report, in accordance with Article 14, that "a situation in which" a crime enumerated in Article 5 was committed.¹⁴ Although the prosecutor had neither initiated an investigation on a particular country nor taken any positive movement resulting from any information that might have been received, the United States invoked the deferral provision under Article 16 of the ICC Statute.¹⁵ The U.S.'s preventive measures angered the international community.¹⁶

Past statements made by U.S. representatives reveal that Resolution 1422 was an obvious step toward thwarting the ICC's powers. For example, Ambassador Scheffer stated:

[I] regret to report that certain [U.S.] objectives were not achieved and therefore we could not support the draft that emerged. . . . [T]he Rome Treaty will become the single most effective brake on international and regional peacekeeping in the 21st century. . . . [The] fundamental flaws in the Rome Treaty mean that the United States will not sign the

INTERNATIONAL CRIMINAL COURT: ITS ESTABLISHMENT, THE STATUTE, A STUDY OF THE HISTORICAL PERSPECTIVE OF THE INTERNATIONAL INVESTIGATIVE COMMISSIONS & THE FORMER INTERNATIONAL CRIMINAL TRIBUNALS 150 (2001). See generally Sharon A. Williams, *The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond*, 38 OSGOODE HALL L.J. 298 (2000); Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 1 (2000).

11. David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999).

12. ICC Statute, *supra* note 8, arts. 13(c), 15(l).

13. *Id.*

14. *Id.* arts. 13(a), 14(1).

15. *Id.* art. 16.

16. See Statement of Richard Dicker, Director of Human Rights Watch's International Justice Program, July 12, 2002, at <http://www.hrw.org>. ("We are not happy that the U.S. has squeezed out a purported deferral of prosecution for peacekeepers . . . no group of people should be even temporarily beyond the reach of international justice.")

present text of the treaty, nor is there any prospect of signing the existing text in the future.¹⁷

Ambassador Scheffer's remarks clearly signal that the United States opposed the Rome Treaty. Moreover, his statements reflect U.S. concerns regarding the role of its peacekeeping soldiers in current or future missions. Though the United States signed the Rome Treaty on December 31, 2000, its purpose, as expressed by former President Clinton, was "to be in a position to influence the evolution of the court."¹⁸ While participating and negotiating at the ICC Preparatory Commission's Sessions, the United States aimed to insulate itself from the effects of the Rome Treaty.¹⁹ In fact, the U.S. delegation "pushed for Elements of Crimes that narrowed the scope of the ICC Statute, and it lobbied in vain for a provision that would place U.S. nationals out of the reach of the court."²⁰

Though some of the U.S.'s concerns have been assuaged, some commentators argue that "the most significant ones were not."²¹ Arguably, the ICC's jurisdictional regime did not adequately protect U.S. troops if the United States were to become a party to the Rome Treaty.²² The ICC claims jurisdiction over non-party nationals as well.²³

Including a crime of aggression in the Rome Treaty's final text both surprised and disappointed the United States because some of the delegates desired to define the crime without requiring a consistent Council determination.²⁴ The United States felt that proponents of the ICC had an inherent goal to restrain U.S. forces.²⁵ When unable to influence U.S. foreign policy directly, an alternative method was to indirectly impact policy by targeting the policymakers themselves.²⁶ "An overzealous prosecutor who disagrees with U.S. policies could bring U.S. military personnel before the court."²⁷

17. William K. Lietzau, *International Criminal Law After Rome: Concerns From a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 125 (2001).

18. Diane Amann, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section IV The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 381 (2002).

19. David Scheffer, *Staying the Course With the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 66-67 (2001).

20. Amann, *supra* note 18, at 383.

21. Lietzau, *supra* note 17, at 124.

22. *Id.* at 125. See also Amann, *supra* note 18, at 387.

23. Lietzau, *supra* note 17, at 125.

24. *Id.*; Amann, *supra* note 18, at 389.

25. Lietzau, *supra* note 17, at 126-27.

26. *Id.*

27. Roseanne Latore, *Escape Out the Back Door or Charge in the Front Door: The U.S. Reactions To the International Criminal Court*, 25 B.C. INT'L & COMP. L. REV. 159, 160 (2002).

Concerns about the overarching powers of the ICC²⁸ induced the United States to act in two ways: (1) withdraw its signature from the Rome Treaty, and (2) adopt Resolution 1422.

III. ARTICLE 16

A. *Drafting History*

Article 16 may be considered one of the most dangerous and sensitive provisions in the ICC Statute. The Article governs situations regarding deferrals by the Council, and it is deemed to negatively frustrate the ICC's powers.²⁹ Article 16 also deters the establishment of an independent and impartial jurisdictional mechanism.³⁰ Nevertheless, the drafting history of Article 16 demonstrates that some of its drafters intended to reduce the Council's powers through the provision itself. Thus, Article 16 is a product of many compromises and is better than the initial International Law Commission's (ILC) proposal where the ICC was slated to be dependant upon the Council and subordinate to its action.

Article 23(3) of the 1994 ILC Draft states in part: "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides."³¹ Article 23(3) provides that a prosecution arising from a situation "being dealt with" by the Security Council under Chapter VII of the U.N. Charter may not be initiated unless the Council itself

28. For a thorough discussion regarding all U.S. concerns, see generally Amann, *supra* note 18; Bruce Broomhall, *The United States & The International Criminal Court: Toward U.S. Acceptance of the International Criminal Court*, 64 LAW & CONTEMP. PROBS. 141 (2001); Latore, *supra* note 27; Lietzau, *supra* note 17; John Seguin, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85 (2000); Scheffer, *supra* note 19; Amann, *supra* note 18. Inevitably, one might argue that the U.S. withdrawal of its signature mirrors a prima facie case that it was planning to act contrary to Article 18 of the Vienna Convention on the Law of Treaties, thus, such withdrawal was a significant step for the U.S. to take in order to overcome the inconsistency with the Law of Treaties. Nevertheless, adopting Resolution 1422 in such a manner placed the United States in a situation to be in violation not only to the Law of Treaties but also the U.N. Charter and other norms under international law as seen below.

29. See ICC Statute, *supra* note 8, art. 16.

30. See *id.*

31. Draft Statute for an International Criminal Court Prepared by the International Law Commission, in *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 84, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Draft Statute].

provides its authorization.³² The provision also recognizes the priority of the Council's action in sustaining peace and security, as well as the need to coordinate activities between the Council and the ICC.³³

Many delegates opposed Article 23(3) of the ILC Draft on various grounds, including the possibility that the Council may disrupt the ICC's ability to function independently.³⁴ The ICC may be deprived of its jurisdiction in a particular situation if the situation remains under the Council's consideration for an indefinite period of time.³⁵ One veto by a permanent Council member can sufficiently thwart or block the ICC from action, which makes the ICC vulnerable to the Council's political motivations.³⁶

The search for a compromise between the ICC and the Council's powers coalesced around the "Singapore Compromise."³⁷ During PrepCom's August 1997 session, Singapore formally proposed an amendment revising the relationship structure between the ICC and the Council.³⁸ Singapore's proposal became the basis for the second option in Article 23(3) in the ILC Draft.³⁹

Singapore's proposal states, "[n]o investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has acting under Chapter VII of the Charter of the United Nations, given a direction to that effect."⁴⁰ The Singapore Compromise proposes the opposite of what was required by Article 23(3) of the ILC Draft.⁴¹ Thus, ICC proceedings may continue unless the Council formally decides to stop the process.⁴² Since the adoption of a Security Council decision requires a minimum of nine affirmative votes in the Council, the ICC's proceedings may only be blocked by a "concerted effort" of the Council members.⁴³

32. *Id.*

33. Pietro Gargiulo, *The Controversial Relationship Between the International Criminal Court and the Security Council*, in 1 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 86 (William Schabas et al. eds., 1999).

34. Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 150 (Roy Lee ed., 1999).

35. *Id.*

36. Morten Bergsmo et al., *Deferral of Investigation or Prosecution*, in *COMMENTARY ON THE ROME STATUTE*, *supra* note 10, at 377.

37. The "Singapore Compromise" is now embodied in Article 16 of the ICC Statute. ICC Statute, *supra* note 8, art. 16. See also Brian Keatts, *The International Criminal Court: Far From Perfect*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 137, 149 (2000).

38. The structure of the relationship was provided by the 1994 ILC Draft Statute. 1994 ILC Draft Statute, *supra* note 31.

39. *Id.* art. 23(3).

40. Bergsmo et al., *supra* note 36, at 375.

41. 1994 ILC Draft Statute, *supra* note 31, art. 23(3).

42. Bergsmo et al., *supra* note 36, at 375.

43. Yee, *supra* note 34, at 150.

Theoretically, an ICC proceeding cannot be impeded even if all five permanent Council members joined to block the proceeding; nine positive votes are required to inhibit the block, including those from the five permanent members.⁴⁴ Based on Singapore's proposal, a "negative veto" by the ILC text would be replaced by a positive vote.⁴⁵ Consequently, the ICC can exercise its jurisdiction unless it is directed not to do so by the Council.⁴⁶

In addition to the terms of the Singapore proposal, Canada recommended a 12-month renewable deferral period.⁴⁷ Costa Rica also suggested that deferral requests be made by a "formal and specific decision" by the Security Council.⁴⁸ Furthermore, Singapore's proposal became the groundwork for Article 16 of the ICC Statute.

44. U.N. CHARTER art. 27, para. 3. Accordingly, matters treated by the Security Council as falling within the category of "other matters" as set out in Article 27(3) have included, *inter alia*, those relating to the discharge of its responsibility for the maintenance of international peace and security. Thus, such matters require nine votes including the "concurring votes of the permanent members." See also EDWARD HAMBRO ET AL., CHARTER OF THE UNITED NATIONS 215 (3d ed. 1969).

45. Yee, *supra* note 34, at 150.

46. See *id.* at 151.

47. Gargiulo, *supra* note 33, at 88. The Canada proposal stated,

No Investigation or Prosecution may be commenced or proceeded with under this Statute for a period of twelve months where the Security Council has, acting under Chapter VII of the Charter of the United Nations, notified the Court to that effect. Notification that the Security Council is continuing to act may be renewed at twelve months intervals.

Id. However, see the Spanish proposal, which limited the extension of the initial period of suspension requested by the Security Council to a single further period not extending twelve months:

1. Where the Security Council is actively dealing with a dispute or a situation affecting international peace and security and a matter related directly to that dispute or situation is referred to the Court, the Council, acting under Chapter VII of the Charter, may call on the Court to desist from commencing or continuing the corresponding proceedings for a specified period not exceeding 12 months; 2. Upon the expiry of the initial period for which the Security Council has called for the proceedings before the Court to be suspended, the Council may similarly call for an extension of the suspension for a further period not exceeding twelve months, in order to enable it to continue its action for the maintenance of international peace and security; 3. Both in the case of the initial request and in that of any subsequent request by the Security Council, the Court (The Pre-Trial Chamber), having heard the Prosecutor and any interested State Party, shall decide to suspend the proceedings and concurrently shall take all necessary measures for the preservation of the evidence and any other precautionary measures in the interests of justice.

Id. See also U.N. Doc. A/CONF.183/C.1/L.20.

48. Bergsmo et al., *supra* note 36, at 375-76. Costa Rican text stipulates that "[n]o investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, taken a formal and specific decision, and limited for a certain period of time, to that effect." *Id.*

The United Kingdom was the first permanent Security Council member to advocate changes in the relationship between the ICC and the Security Council.⁴⁹ A British draft for Article 10(2)⁵⁰ submitted during the March-April session of PrepCom in 1998 became the basis for the final draft of Article 16.⁵¹

B. *Legal Consequences*

Under Article 16, the Council may request that the ICC not investigate or proceed with a prosecution when the requisite majority of its members conclude that judicial action, or the threat of it, might harm the Council's efforts to maintain international peace and security pursuant to the U.N. Charter.⁵² The ICC Statute does not define what it considers an "investigation and prosecution."⁵³ The statute indicates, however, that an "investigation" involves an action that may be taken with respect to both a situation or an individual, while a "prosecution" involves actions taken with respect only to a specific person.⁵⁴

The ICC prosecutor may initiate investigations upon receiving a referral about a particular situation by a State Party to the ICC Statute or the Security Council.⁵⁵ Upon commencement, an investigation must comprise the totality of investigative actions undertaken by the prosecutor under the ICC Statute in order to confirm the charges against a suspected individual or group.⁵⁶ After evaluating the available information, the ICC prosecutor can initiate an investigation if there is a reasonable basis to proceed.⁵⁷

49. *Id.* at 376.

50. Article 10(2) was formerly Article 23, Paragraph 3 of the 1994 ILC Draft Statute. *See* 1994 ILC Statute, *supra* note 31.

51. Bergsmo et al., *supra* note 36, at 376. Pursuant to the U.K. proposal, which was also included in the Draft ICC Statute which the PrepCom forwarded to the Rome Conference,

no investigation or prosecution may be commenced or proceeded with under this Statute [for a period of 12 months] after the Security Council [, acting 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.

Id. *See also* Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. DOC. A/CONF.183/10, art. 10, at 46 [hereinafter Draft Final Act].

52. ICC Statute, *supra* note 8, art. 16.

53. *Id.*

54. *See, e.g.*, ICC Statute, *supra* note 8, arts. 13, 14, 15, 18(1) (2), 19. *See also* Bergsmo et al., *supra* note 36, at 378.

55. ICC Statute, *supra* note 8, arts. 13(a), 14. With regard to the S.C. art. 13(b).

56. Bergsmo et al., *supra* note 36, at 378.

57. ICC Statute, *supra* note 8, arts. 15(2), 53(1).

Accordingly, one could conclude that still there are steps prior to the authorization of an investigation that the prosecutor is not precluded from taking, despite the fact that a Security Council's deferral under Article 16 took place. The Statute clearly permits the prosecutor to do the following: (1) conduct a preliminary examination as described in Article 15; (2) evaluate the information made available;⁵⁸ (3) seek "information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate;" and (4) receive "written or oral testimony at the seat of the Court."⁵⁹

The language of Article 16 is unclear, which makes interpreting the law problematic and difficult. Article 16 provides that "[n]o investigation or prosecution may be commenced or proceeded" after the Security Council issues a request.⁶⁰ Hence, that provision begs the question: "When does an investigation or prosecution 'commence?'"

The commencement of an investigation may not necessarily depend on how the ICC's jurisdiction is triggered. The investigation commences when the ICC prosecutor determines that there is a "reasonable basis to proceed" and renders a decision to that effect.⁶¹ This is obviously a further or subsequent step to the preliminary examination and is probably based upon the decision of the Pre-Trial Chamber if the prosecutor is acting *proprio motu*.⁶²

Article 16 suggests that it may not only prevent the start of an investigation or prosecution, but it also may stop an investigation or a prosecution that is already underway.⁶³ Thus, one might wonder how problems arising from the Council's issuance of a deferral may be solved, especially once proceedings have begun. The deferral request raises a number of interesting questions. First, does a person arrested by a custodial state have to be set free? Second, what happens to a person who appeared before the ICC pursuant to a surrender request in accordance with Article 89(1)? Must that person stay in custody until the 12-month period lapses, or remain in custody as long as the Council decides? Third, what are the legal consequences of this decision with regard to that person's human rights? Fourth, what are the precautions required for the preservation of evidence?

Neither the Statute nor the Rules of Procedure and Evidence appear to have definite answers to the above questions. From an

58. *Id.* art. 53(1).

59. *Id.* art. 15(2). All of these steps are considered proceedings taken before the commencement of the investigation. Thus, Article 16 does not cover such steps.

60. *Id.* art. 16.

61. *Id.* arts. 15(3), 53(1).

62. *Id.* art. 15(4).

63. *Id.* art. 16.

analytical standpoint, however, one could draw a conclusion to the first question, beginning with an examination of the deferral decision. Although all states are bound by the Security Council's decisions, could the effects of that decision go beyond suspending the proceedings? In other words, a literal reading of Article 16 suggests that its power is limited by blocking the commencement of an investigation or prosecution, or stopping an on-going proceeding.⁶⁴ Hence, under a strict interpretation, a deferral decision does not mean that the defendant is no longer incriminated; rather, because the decision is procedural and based on political reasons, the proceedings are merely suspended for a specified period. A different interpretation would imply that the Council would be acting as a judicial body, which is obviously incorrect.

The prosecutor can proceed with the investigation or prosecution once the deferral period has lapsed and the Council has not renewed the deferral.⁶⁵ Because releasing the person is not a legal consequence from that decision, it seems to be discretionary and not dependent on the decision.⁶⁶ A person should not be set free, however, when a case deals with the most heinous crimes. If a deferral continues for several years, then a person's right to "be tried without undue delay" might be violated regardless of whether the person is under custody.⁶⁷

Although the prosecutor may conduct preliminary examinations after a deferral request is made, the prosecutor's efforts may be entirely futile or inadequate when destruction of evidence is imminent.⁶⁸ Absent the Security Council's guidance, the prosecutor may, under Article 54(3)(f), "take necessary measures, or request the necessary measures be taken [for] . . . the protection of any person or the preservation of evidence."⁶⁹ Yet Article 54 might be limited to the investigative stage, which is supposed to be suspended by the Security Council's resolution not to commence or proceed with an investigation.⁷⁰ As a result, the prosecutor may be deterred initially

64. *Id.*

65. *Id.*

66. There are two observations worth mentioning. First, the Security Council decision should be treated with great cautious and interpreted narrowly, and thus, should not amount to any further legal effects other than those mentioned in the text of Article 16. Thus, the only effects are to block the commencement or stop ongoing proceedings. Second, from a humanitarian stand point that person may be set free. However, there is a risk that the person may escape.

67. Luigi Condorelli et al., *Referral and Deferral By the Security Council*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 652-53 (Antonio Cassese et al. eds., 2002).

68. At the Rome Conference Belgium submitted a proposal pointing to the need for "further discussion" of preservation of evidence. See Gargiulo, *supra* note 33, at 90.

69. ICC Statute, *supra* note 8, art. 54(3)(f). See also Bergsmo et al., *supra* note 36, at 381.

70. See generally *id.* art. 54.

from pursuing an investigation or taking any further steps related to the investigation stage.

From an analytical standpoint, measures taken to ensure the protection of any person or to preserve evidence could be deemed as protecting what has already been done during the investigation stage and prior to the deferral decision. Thus, one could argue that those further measures taken are not contrary to the decision not to proceed.⁷¹ The latter interpretation serves both the spirit and purpose of the ICC, absent any clarification regarding the procedures to be taken in a case of sudden deferral of an ongoing investigation.⁷²

Article 16 poses another obstacle regarding the number of times a deferral request may be renewed. A request to defer an ICC proceeding may be renewed if the renewal is affected by a Security Council resolution adopted under Chapter VII of the U.N. Charter.⁷³ Article 16 does not limit the number of times a deferral request may be renewed, which could be read literally to permit infinite renewals. Such an interpretation is very dangerous and may ultimately block the ICC's jurisdiction over many cases. Interestingly, such an inconceivable observation has taken place, as seen below.

Notwithstanding the fact that among the leading scholars who argue that the practical legal effects of Resolution 1422 will not be severely detrimental, because the Court could still examine the validity of the aforesaid Resolution, it is unclear, however, how the Court would address such an examination.⁷⁴ Professor William Schabas stated, "the [ICC] could assess whether or not the Council was validly acting pursuant to Chapter VII."⁷⁵ But how could the Court perform such an examination if required to rule on this issue,

71. Condorelli shares a similar view:

The administrative duties of the Court linked with the deferred cases should be completed, [and that some exceptional judicial activities can still be pursued] after the deferral. That should certainly be the case for those measures considered appropriate by the Court for the protection of witnesses and victims, since it would be unacceptable for their safety and well-being to be affected by the deferral of the Security Council.

Condorelli et al., *supra* note 67, at 654. However, Condorelli based his argument on a different premise and different article—namely, Article 68 of the Statute. *See id.* at 651-52.

72. See for example the Spanish Proposal to amend Draft Article 10(7), Gargiulo, *supra* note 33, at 88-89, which allowed the Court, during the suspension according to the request of deferral, to take all the necessary measures for the preservation of evidence and any other precautionary measures in the interest of justice. See also the Belgium Proposal, which requested adding a sentence at the end of Article 10(2): "Without prejudice to Art. 86, paragraph 4, such request shall not affect the right of the Prosecutor to take the necessary measures to preserve evidence." *Id.* at 90.

73. ICC Statute, *supra* note 8, art. 16.

74. SCHABAS, *infra* note 83, at 66.

75. *Id.*

given the fact that both the Statute and the Rules of Procedure and Evidence lack such procedural clarification?

Because the deferral decision hampers the ICC's jurisdiction, the problem touches the essence of jurisdiction *lato sensu*. Hence, the Pre-Trial, Trial, or Appeals Chamber could rule on this question during the various stages of the proceedings.⁷⁶ This Chamber examines the compatibility of the deferral decision with the requirements posed by Article 16 of the ICC Statute and Article 39 of the U.N. Charter.⁷⁷

In conclusion, Article 16 stands in contrast to Article 13(b). Security Council action in accordance with Article 13(b) can trigger the jurisdiction of the ICC by alerting the prosecutor to situations in which one or more of the crimes listed in Article 5 "appears to have been committed."⁷⁸ The prosecutor has wide discretion and can decide not to proceed in accordance with Article 53.⁷⁹ Thus, the prosecutor and the ICC can block the Security Council's referral. Simultaneously, one may analyze the effect of Article 16 on this scenario differently: the Security Council may be viewed as the ruler that can block the ICC's jurisdiction over any case simply by asserting that proceeding with a particular situation or case threatens international peace and security.

As Morten Bergsmo has observed, Article 16's drafting history gives rise to some important issues. First, political considerations are given as much, if not more, weight than legal arguments in determining the Security Council's role during ICC proceedings.⁸⁰ Second, "the Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict."⁸¹ Third, "Article 16 provides the Council an unprecedented opportunity to influence the work of a

76. By virtue of Articles 15, 19, 57, 64(2) and 82, the aforementioned Chambers have the competence to examine this situation through the various stages. For a thorough discussion regarding the jurisdictional mechanism, see El Zeidy, *infra* note 128, and also see Condorelli et al., *supra* note 67, at 649-50, that discusses a similar view and explains in detail how this scenario could be performed.

77. ICC Statute, *supra* note 8, arts. 19, 82.

78. *Id.* art. 13(b).

79. *Id.* art. 53(1),(2)(c)

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute . . . [and] the Prosecutor shall inform the Pre-Trial Chamber . . . or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

Id.

80. Bergsmo et al., *supra* note 36, at 377.

81. *Id.*

judicial body.”⁸² This third observation could be interpreted to impose legal obstacles on the functions of the ICC. The best example of such an interpretation can be seen through Resolution 1422, which invoked Article 16 in an abusive manner.

IV. ARTICLE 16 IN LIGHT OF SECURITY COUNCIL RESOLUTION 1422

Article 16 proved to have de facto the opposite effect of what its drafters originally intended—namely, reducing the Security Council’s exclusive power under Article 23 of the ILC Draft. Practically, Article 16 showed that it has a negative effect similar to Article 23(3) of the ILC Draft. It is not the formulation of Article 16 itself, rather than its existence, which caused this negative effect. At the opening of the Rome Conference, states feared that the Security Council’s powers might be bolstered even with the adoption of Singapore’s proposals. Numerous states refused to grant the Security Council any authority to delay ICC proceedings out of fear that the Council might abuse its power or obstruct the impartiality of the Court.⁸³ Those States refusing to grant this authority included Canada,⁸⁴ Sweden,⁸⁵ Trinidad and Tobago,⁸⁶ Czech Republic,⁸⁷ Estonia,⁸⁸ Poland,⁸⁹

82. *Id.*

83. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66 (2001).

84. Gargiulo, *supra* note 33, at 89. Mr. Lloyd Axworthy (Canada) expressed his concerns through the following words: “We must not, however, allow the Court to be paralysed simply because a matter is on the Security Council agenda.” See Statement of Lloyd Axworthy, Minister of Foreign Affairs of Canada, June 15, 1998, available at <http://www.un.org/icc/index.htm>.

85. Laila Freivalds (Sweden) said, “We have serious doubts, however, that just the fact that the Council is Seized with a matter should stop a case, pertaining to that matter, from being brought before the Court, unless the Council so allows.” See Statement of Laila Freivalds, Minister of Justice of Sweden, June 15, 1998, available at <http://www.un.org/icc/index.htm>.

86. Ramesh Lawrence Maharaj (Trinidad & Tobago) said, “[W]e must be cautious in setting up a Court which would have to await a determination from the Security Council before it could launch its investigation.” Statement of Ramesh Lawrence Maharaj, Attorney General of the Republic of Trinidad and Tobago, available at <http://www.un.org/icc/index.htm>.

87. Pavel Telicka (Czech Republic) said, “[W]e cannot support the idea that the Security Council should have the power to preclude proceedings before the Court.” Statement of Pavel Telicka, Deputy Minister for Foreign Affairs for the Czech Republic, available at <http://www.un.org/icc/index.htm>.

88. Ivan Raig (Estonia) said, “[I]n order to ensure the respect for the basic principle of law that a Court must be impartial and independent, prosecution should not be subordinated to a prerogative conferred on the Security Council to prevent or delay prosecution when it is dealing with a situation under Chapter VII of the Charter.” Statement of Ivan Raig, Deputy Head of the Delegation of the Republic of Estonia, June 17, 1998, available at <http://www.un.org/icc/index.htm>.

89. Hanna Suchova (Poland) said, “[W]e reject the proposal enabling the Security Council to obstruct the prosecution for the sole reason that the Council is

Iran,⁹⁰ and India.⁹¹ Regardless of the support provided by prominent scholars, Singapore's changes to Article 23 (3) of the ILC Draft did not alleviate the negative effects of current Article 16 as seen below.

Some commentators argue that the Security Council had a difficult time passing a deferral decision pursuant to Article 16 because a majority vote was needed, consisting of nine affirmative votes, and including those of the five permanent members.⁹² One may argue, however, that the adoption of Resolution 1422 evinces the U.S.'s overwhelming political influence upon international law. The United States showed that it could attain the same or equivalent demanded powers (single veto) as those formerly included in Article 23(3) of the ILC Draft and absent in the current text of Article 16. The U.S. threatened to veto the U.N. Mission in Bosnia and Herzegovina (UNMIBH) and the International Police Task Force's (IPTF) renewal if the aforementioned Resolution was not adopted. With a single vote, the United States succeeded to paralyze the ICC from exercising future jurisdiction over those particular parties of the U.S.'s choosing (non-party states). Thus, the United States indirectly attained the intended goals—namely, the same powers provided in former Article 23(3) of the ILC Draft, however, it did so through Article 16.

Despite the adoption of Resolution 1422, statements made by the majority of the formal⁹³ and informal⁹⁴ delegates demonstrate a

involved in a specific situation." Statement of Hann Suchova, Minister of Justice of Poland, June 17, 1998, available at <http://www.un.org/icc/index.htm>.

90. Javan Zarif (Iran) said, "Initiating the Court's proceedings . . . should not be depended upon the Security Council's permission or approval." Statement of Javan Zarif, Deputy Foreign Minister to the Islamic Republic of Iran, June 17, 1998, available at <http://www.un.org/icc/index.htm>. See also Gargiulo, *supra* note 33, at 89.

91. India said it was hard to understand or accept any power of the Security Council to block prosecution,

On the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees.

SCHABAS, *supra* note 83, at 66.

92. SCHABAS, *supra* note 83, at 66. Professor Schabas argues that Article 16 in its current form makes it difficult for the Council to adopt a resolution regarding its use. He expressed his idea in the following words: "In practice, this should make it extremely difficult for the Council to obstruct prosecutions." *Id.* See also Bergsmo et al., *supra* note 36, at 377. Bergsmo argued a similar idea in the following words: "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." *Id.*

93. United Kingdom, France, China, Ireland, Mexico, Colombia, Syrian Arab Republic, Cameroon, Guinea, and Mauritius.

94. Canada, Samoa, Malaysia, Germany, Argentina, Cuba, New Zealand, South Africa, Costa Rica, Islamic Republic of Iran, Jordan, Liechtenstein, Brazil, Switzerland and Venezuela.

significant failure and a dramatic step backwards in international law. The majority of the participants, including the Council members, pointed to the dangerous consequences that would likely result from adoption of Resolution 1422. They emphasized the Resolution's potential negative impact on international law, as well as the impact on credibility of the current and future Council decisions. Canada's representative, Paul Heinbecker, expressed his concerns in the following words:

[M]y Government is deeply worried by the discussions that have been taking place in the Security Council concerning sweeping exemptions for peace keepers from prosecution from the most serious crimes known to humanity. . . . First, the issue at stake is larger than the International Criminal Court; fundamental principles of international law are in question. Secondly, the Council has not been empowered to rewrite treaties; the draft resolutions that are circulating contain elements that exceed the Council's mandate, and passage of them would undermine the credibility of the Council.⁹⁵

Sir Jeremy Greenstock shared similar concerns by accentuating the U.K.'s opposition toward the U.S. position:

[W]e understand, but do not share, the concerns of the United States about the International Criminal Court . . . I have listened carefully to the comments of several representatives about the powers of the Security Council in this matter. The United Kingdom shares the concern that actions of the Council should remain within the scope of its powers. Article 39 of the United Nations Charter is relevant in that respect. We are equally firm that solutions to this problem should be consistent with the ICC Statute.⁹⁶

95. See Statement by the Representative of Canada, U.N. SCOR, 57th Sess., 4568th mtg., U.N. Doc. S/PV.4568 (2002), available at <http://www.un.org> [hereinafter U.N. Doc S/PV.4568]. See also Letter from the Representative of Canada to the U.N. President of the Security Council (July 3, 2002), U.N. Doc. S/2002/723. In this letter, Mr. Heinbecker expressed his concerns to the U.N. Secretary General before the adoption of Resolution 1422 as follows:

What is at issue in the Council's deliberations of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) item is not just the extension of a United Nations mission that will end in six months time in any case. Rather, the issue is a potentially irreversible decision negatively affecting the integrity of the Rome Statute of the International Criminal Court, the integrity of treaty negotiations more generally, the credibility of the Security Council, the viability of international law with respect to the investigation and prosecution of grievous crimes, and the established responsibilities of States under international law to act on such crimes.

Id.

96. U.N. SCOR, 57th Sess., 4568th mtg., U.N. Doc. S/PV.4568 (Resumption 1) (2002) [hereinafter Resumption 1].

Moreover, representatives from the following countries raised similar concerns: France,⁹⁷ China,⁹⁸ Ireland,⁹⁹ Mexico,¹⁰⁰ Colombia,¹⁰¹

97. U.N. Doc. S/PV.4568, *supra* note 95. Mr. Levitte (France) said,

France has made a specific proposal regarding article 16 and is ready to discuss that within the limits of authorized by law—I repeat, within the limits authorized by law. However, it cannot accept modification, by means of a Security Council resolution, of a provision of the treaty. Furthermore, even if the United States manages to persuade a majority of the Council to take that course of action, one may question the effect of such a resolution on the decisions to be taken by the Court. It is certainly not in the Council's interest to see any conflict of norms arise.

Id.

98. *Id.* Mr. Wang Yingfan (China) said,

We also believe that the most urgent current task is to find a practical solution. Such a solution must respect the letter and spirit of the ICC Statute and accommodate the views and wishes of ICC States Parties. At the same time, without violating the principles of the ICC, it should fully address the concerns and requests of countries sending peacekeepers regarding jurisdiction over crimes committed by such peacekeepers . . . [t]he Security Council is not far from such a solution.

Id. Although China is not yet a State Party to the ICC Statute, and was among those States that opposed its creation, this statement reflects the importance of respecting the provisions of such a treaty even by the Security Council when acting as the executive body of the United Nations.

99. *Id.* Mr. Ryan (Ireland) said,

The Development of international law is one of the great achievements of humankind in recent decades. International Treaties have their own integrity, which must be protected. This, for Ireland, is a fundamental principle. The Security Council must respect the spirit and letter of this wider fabric of international law and international cooperation. In that connection, we are disturbed by the possibility that, if it is not handled adroitly, the present exercise could have adverse effects on the credibility and prestige of the Security Council itself.

Id.

100. *Id.* Mr. Aguilar Zinser (Mexico) said,

[M]y Country is concerned about proposals that would grant countries contributing troops and other personnel to missions established or authorized by the Security Council any sort of immunity vis-a'-vis the jurisdiction of the International Criminal Court. My delegation has serious difficulties in subscribing to proposals that would establish such exemption regimes, because of their implications both for the functioning of peacekeeping operations and for the integrity of the system of international jurisdiction . . . [m]y delegation believes that the credibility of the Council's work may be adversely affected with the approval of decisions counter to the integrity of the international legal system. . . . The Security Council is without question the proper body in which to deal with matters relating to peacekeeping operations. But we doubt whether it is the proper forum in which to deal with matters relating to the International Criminal Court, particularly if what is at issue would undermine one of the essential features of any judicial body: the independent exercise of its jurisdiction . . . [w]e—the States parties to the Rome Statute and all States signatories that have committed ourselves to not taking any action, in any

Syrian Arab Republic,¹⁰² Cameroon,¹⁰³ Guinea,¹⁰⁴ Mauritius,¹⁰⁵
 Samoa,¹⁰⁶ Malaysia,¹⁰⁷ Germany,¹⁰⁸ Argentina,¹⁰⁹ Cuba,¹¹⁰ New

circumstances, that would undermine the Courts' objective and purpose—are faced with a dangerous precedent, which, if accepted, would represent a de facto amendment to the Rome Statute.

Id.

101. Resumption 1, *supra* note 96. Mr. Valdivieso (Colombia) said, “[A] resolution of this kind . . . would lead us to absurd conclusions . . . from the legal standpoint, one would be expecting the Court to act on the basis of the Council’s resolution and not in accordance with the Statute that brought it into being.” *Id.*

102. *Id.* Mr. Wehbe (Syrian Arab Republic) said,

In conclusion, we would stress once again that the Security Council does not have the right to take decisions under Chapter VII to amend an international treaty that has entered into force, because this would constitute a precedent that would destabilize and undermine the international legal regime. Such an action is also outside the purview of the Security Council, whose principle task, as set out in the Charter, is the maintenance of international peace and security.

Id.

103. *Id.* Mr. Tidjani (Cameroon) said, “We must make every effort to prevent the Court from being weakened and to make it effective and efficient. . . . There must be no clash between the International Criminal Court and the Security Council: both are working for peace.” *Id.*

104. *Id.* Mr. Diallo (Guinea) said, “In conformity with the principles of international law and bearing in mind the hierarchy of legal norms, no Security Council resolution could therefore modify a provision of an international treaty.” *Id.*

105. U.N. Doc S/PV.4568, *supra* note 95. Mr. Koonjul (Mauritius) said, “As a party to the Rome Statute, Mauritius firmly believes that any provision undermining the jurisdiction of the ICC as provided in the Statute would be inconsistent and incompatible with the precepts of international law based on the will of the comity of nations.” *Id.*

106. Resumption 1, *supra* note 96. Mr. Slade (Samoa) said, “We do recognize and we do respect the concerns of the United States. . . . Putting the Rome Statute at risk in the process cannot be an option.” *Id.*

107. *Id.* Mr. Hasmy (Malaysia) said,

What is at stake is a fundamental principle of international law. It is vitally important for the Council not to take a decision that would have the effect of changing or amending the terms of an international treaty, which the United States draft resolution sets out to do in respect of the Rome Statute. . . . We fear that adoption of the United States proposal would place the Security Council in a difficult position. Its credibility would be questioned.

Id.

108. *Id.* Mr. Schumacher (Germany) said, “[T]he Security Council would do itself and the world community a disservice if it adopted a resolution, . . . in effect, amend an important treaty ratified by 76 States.” *Id.*

109. *Id.* Mr. Listre (Argentina) said, “The proposals that are being considered in the Security Council might be detrimental to the ICC and to the Security Council itself. More generally, they might be injurious to the United Nations and to the rule of law.” *Id.*

110. *Id.* Mr. Rodriguez Parrilla (Cuba) said,

The Security Council is not the appropriate organ . . . to discuss the International Criminal Court (ICC) simply because the Charter of the United

Zealand,¹¹¹ South Africa,¹¹² Costa Rica,¹¹³ Islamic Republic of Iran,¹¹⁴ Jordan,¹¹⁵ Liechtenstein,¹¹⁶ Brazil,¹¹⁷ Switzerland,¹¹⁸ and

Nations does not confer on it powers to do so. However, the issue being discussed today has implications for the very essence of the United Nations system and its capacity for maintenance of international peace and security. It has to do with the principles of international law. . . . In essence, what we are debating today is the validity of the Charter of the United Nations and the mandate it has conferred on the Security Council.

Id.

111. U.N. Doc S/PV.4568, *supra* note 95. Mr. MacKay (New Zealand) said, "Member States would have to question the legitimacy and legality of this exercise of the role and responsibility entrusted to the Council were that [resolution] to occur." *Id.*

112. *Id.* Mr. Kumalo (South Africa) said, "We urge the Security Council to stand firm and protect the peace mission in the Balkans, while reinforcing—certainly not jeopardizing—the International Criminal Court and the norms of international law it has established." *Id.*

113. Mrs. Chassoul (Costa Rica) said,

The States Members of the Rio Group cannot accept any erosion of the Rome Statute. . . . We are therefore concerned at any initiative attempting to substantially modify the provisions of the Statute by means of a Council resolution. To adopt this kind of proposal would exceed the competence of the Security Council and would have a serious impact on the Council's credibility and legitimacy.

Id.

114. *Id.* Mr. Fadaifard (Islamic Republic of Iran) said, "[W]e expect that all members of the Security Council take note of and accept the fact that the Council is not authorized to interpret or amend treaties." *Id.*

115. *Id.* Prince Zeid Ra'ad Zeid Al-Hussein (Jordan) said,

And should the Council consider again the adoption of a draft resolution on the ICC falling under chapter VII, it will edge itself toward acting *ultra vires*—that is, beyond its authority under the Charter. . . . We are opposed, however, to any course of action by the Security Council the effect of which would be not only to undermine the Court, but to also deliver a crippling blow to the manner by which the international community negotiates multilateral treaties in the future.

Id.

116. *Id.* Mrs. Fritsche (Liechtenstein) said,

We do not want to see the Council put itself in a position in which the United Nations membership at large is forced to question the legality of one of its decisions. Such a situation would have a devastating impact on the credibility of the Council and thus of the Organization as a whole.

Id.

117. *Id.* Mr. Fonseca (Brazil) said,

We came here to make a strong appeal to all members of the Council not to take hasty decisions that might cause irreparable damage to peacekeeping, to the rule of international law and the very credibility of the Council. We strongly discourage proposals or initiatives that ultimately seek to reinterpret or review the Rome Statute.

Id.

118. *Id.* Mr. Staehelin (Switzerland) said,

Venezuela.¹¹⁹ The views expressed by all of these countries, although not identical, intersect at a point that reflects and touches the heart of the main dilemma—namely, the potential dangers of adopting the Resolution.

Resolution 1422 was adopted despite the reservations held by the international community. How and why the Council reached the majority of nine affirmative votes, despite the obvious opposition toward the Resolution by many Member States, remains a mystery. The votes contradicted the Council members' early statements and attitudes de facto.

From an analytical standpoint, one may draw two distinct conclusions. First, the members could have re-examined the Resolution and discovered that it conformed to Article 16 of the ICC Statute. This is questionable, however, because the main dilemma is not limited to interpretation of Article 16. The Resolution raises some doubts about its conformity with the fundamental norms of international law as embedded, for example, in the U.N. Charter and the Law of Treaties. The competence of the Council to amend treaties without states' consent and to act as a judicial body in order to interpret a provision set out in a treaty is uncertain. On the other hand, it would be unreasonable to argue that the ten members of the Council who positively commented on the Resolution suddenly and unanimously changed their views.¹²⁰

Second, the final outcome suggests that political pressure prevailed and paved the way toward the adoption of the

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

Id.

119. *Id.* Ms. Pulido Santana (Venezuela) said,

[W]e view with great concern the situation that has arisen within the Council concerning the possibility through a decision, this principal organ might weaken the Statute of the International Criminal Court. . . . A decision by the Council to [amend the Statute] that effect . . . would be questionable both politically and legally. Such a decision would exceed the Council's competence and would disrupt the international legal order.

Id.

120. It is interesting to note that, despite the statement made by the U.K. Representative, President of the Council, opposing the Resolution, it has been reported that the U.S. and U.K. alliance led to adoption of the Resolution. In this respect, see CICC, *UN Security Council Passes ICC Resolution in Contravention of UN Charter*, at <http://www.iccnw.org/html/PressAntiICCProposalPasseSC.doc> (last visited Oct. 1, 2002).

Resolution.¹²¹ The possibility that the United States might exercise its veto power to deter the UNMIBH's renewal and keep the latter as a hostage for the adoption of Resolution 1422 was probably the controlling factor in the Council's decision.¹²² Though the United States politically achieved its inherent goals, it failed, together with the members of the Council, to adopt a proper legal resolution that was consistent with the essence of the Statute, and that conformed to international law principles.

V. RESOLUTION 1422 IN LIGHT OF THE U.N. CHARTER AND LAW OF TREATIES

Despite opposition by many states, it is possible to justify the fact that Resolution 1422 invokes Article 16 of the ICC Statute. Those states consider that the Resolution lacks an essential element that would have prevented its adoption: the existence of a threat to world peace or an act of aggression.¹²³ Though among those states who believed that the Resolution was contrary to Article 39 of the U.N. Charter,¹²⁴ they could not possibly deny that Bosnia and Herzegovina required international supervision through peacekeeping operations. Thus, determining whether a threat to peace existed in Bosnia and Herzegovina was a matter for the Security Council. The Council could probably witness that impeding

121. Professor Bassiouni expected such pressure and expressed his fears in the following words: "Real politicians will surely try to manipulate the ICC, as they do other international institutions, by limiting its effective administration, imposing financial controls, or frustrating the enforcement of its decisions. They will also try to bypass the ICC by the devise of amnesties." M. Cherif Bassiouni, *Combating Impunity For International Crimes*, 71 COLO. L. REV. 409, 421 (2000). Accordingly, it could be argued that the adoption of Resolution 1422 frames and mirrors the aforementioned wording.

122. See S.C. Res. 1423, *supra* note 4. This Resolution extends the mandate of UNMIBH, which includes the IPTF, for an additional period terminating on December 31, 2002. Adopting Resolution 1423 immediately after adopting Resolution 1422 demonstrates the aforementioned view—political pressure played a major role, and without the adoption of Resolution 1422, Resolution 1423 would have never come into being.

123. For example, see statements made by the representatives of Canada, Jordan, Samoa, and Germany. See U.N. Doc. S/PV.4568, *supra* note 95; Resumption 1, *supra* note 96, at 1.

124. For example, see statement made by the Representative of United Kingdom (President of the Council):

Finally, I have listened carefully to the comments of several representatives about the powers of the Security Council in this matter. The United Kingdom shares the concern that actions of the Council should remain within the scope of its powers. Article 39 of the United Nations Charter is relevant in that respect.

Resumption 1, *supra* note 96.

the contribution of peacekeepers by any means, including judicial interference, might harm the Council's efforts to maintain international peace and security.¹²⁵ This conclusion might be acceptable, particularly in light of the overwhelming international support to assist Bosnia and Herzegovina. Additionally, Resolution 1423 delineates the international community's desire to continue peacekeeping operations by extending the UNMIBH's mandate. A threat to international peace and security might still exist that induced the Security Council to act under Chapter VII of the U.N. Charter.¹²⁶ Nonetheless, if these findings justify the Council's action to invoke Article 16, they cannot justify its abusive application.

The main dilemma lies in Paragraphs 1 and 2 of Resolution 1422. Paragraph 1 states the following:

[The Security Council 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.

Paragraph 2 states: "[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."¹²⁷ Paragraph 2's reference to an automatic renewal procedure is problematic. In particular, the wording of the Resolution expressly suggests that the Council intended to block the ICC's jurisdiction not only for 12 months, but for an indefinite duration.

125. However, it might be argued that, it is hardly imaginable that judicial interference could be treated as threat to the peace. Moreover, preambular Paragraph 7 of Resolution 1422, S.C. Res. 1422, *supra* note 1, stipulates, "[I]t 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," and accentuates that the Council determination for the existence of threat to the peace is based on this paragraph and not that there exist a mere fact that the situation in Bosnia constitutes a threat to the peace. *Id.* Accordingly, it could be further argued that whereas peace keepers are not legally ceased from taking their missions; whereas the ICC cannot assert jurisdiction unless those soldiers commit the acts enumerated in Articles 6, 7, and 8 of the ICC Statute in a massive manner; whereas, by virtue of the principle of complementarity, the ICC would not be able to act as the Court of first instance; therefore, the situation of existence of threat to the peace and security that triggers Article 16 does not exist. Thus, any claim that invoking Article 16 would maintain peace and security should be disregarded. The ICC's main target is to work to maintain peace through putting an end to impunity. Thus, acting as a deterrent. However, the final outcome of Article 16 placed the ICC into this inconceivable position. Professor William Schabas, during one of his representations, said that Article 16 is a small price to be paid in order to keep the Council happy.

126. U.N. CHARTER art. 39.

127. S.C. Res. 1422, *supra* note 1.

Although the language of Article 16 appears to permit a deferral for an infinite period,¹²⁸ specific conditions must be met to renew deferrals. The Security Council has ignored those conditions. Article 16 stipulates that “[n]o Investigation or prosecution may be commenced . . . for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nation . . .,”¹²⁹ “that request may be renewed by the Council under the same conditions.”¹³⁰

From an analytical view, one might construe that the final clause—“request may be renewed by the Council under the same conditions”¹³¹—as requiring the Council to follow all the necessary steps for initiating a deferral request. These steps necessitate that a resolution be adopted by virtue of Chapter VII,¹³² requesting that the ICC defer the commencement or continuation of an investigation or prosecution for up to 12 months.¹³³ Moreover, any renewal request should be followed by a new resolution pursuant to Chapter VII soon after the initial deferral period’s expiration date and not exceeding the 12-month period.¹³⁴ Alternative methods of interpretation would lead to very dangerous consequences that would hamper the ICC’s operations and run counter to the main object and purpose of the Rome Treaty. This interpretation is consistent with Article 31 of the Vienna Convention on the Law of Treaties, which requires “Good Faith,” “Ordinary Meaning,” and “Context” when interpreting international treaties.¹³⁵

Article 31 combines all the schools of treaty interpretation into one rule to be used in a “single combined operation.”¹³⁶ Thus,

128. Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery To Implement International Criminal Law*, 23 MICH. J. INT’L L. (forthcoming November 2002). See also Bergsmo et al., *supra* note 36, at 382; Yee, *supra* note 34, at 151-52.

129. ICC Statute, *supra* note 8, art. 16.

130. *Id.*

131. *Id.*

132. M. Cherif Bassiouni, *Explanatory Note on the ICC Statute*, 71 REVUE INTERNATIONALE DE DROIT PENAL 1, 17 (2000).

133. ICC Statute, *supra* note 8, art. 16.

134. *Id.*

135. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, U.N. Doc. A/CONF. 39/26, reprinted in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 1459-60 (2d ed. 2000) [hereinafter Vienna Convention].

136. *Golder v. United Kingdom*, 14 Eur. Ct. H.R. (ser. A) at 9 (1975). See also MARTIN DIXON ET AL., CASES & MATERIALS ON INTERNATIONAL LAW 86-89 (3d ed. 2000). These schools are “intentions of the parties” or “founding fathers” school, the “textual” or “ordinary meaning of the words” school, and the “teleological” or “aims and objects” school.

[T]he ideas of these three schools are not necessarily exclusive of one another, and theories of treaty interpretation can be constructed (and are indeed normally held) compounded of all three For the “intentions” school, the prime, indeed the only legitimate, object is to ascertain and give effect to the

according to P.K. Menon, the principle of interpretation in good faith “flows directly from the rule *pacta sunt servanda*,”¹³⁷ which requires that the treaty is to be “read in some sense as a whole so that one clause may be called in aid to explain an ambiguity in another.”¹³⁸ Similarly, A.D. McNair stated:

[T]he performance of treaties is subject to an over-riding obligation of mutual good faith. This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation, which it was known to the negotiators of the treaty not to be the intention of the parties.¹³⁹

In addition, L. Oppenheim,¹⁴⁰ Anthony Aust,¹⁴¹ and P.K. Menon¹⁴² share the view that the ordinary meaning is not to be, “determined in the abstract [but] in the context of the treaty and in light of its object and purpose.”¹⁴³ In its Advisory Opinion on the Competence of the ILO to Regulate Agricultural Labour, the Permanent Court of International Justice accentuated the significance of examining the entire treaty as a whole.¹⁴⁴

[I]n considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases

intentions, or presumed intentions, of the parties: the approach is therefore to discover what these were, or must be taken to have been. For the “meaning of the text” school, the prime object is to establish what the text means according to the ordinary meaning or apparent signification of its terms: the approach is therefore through the study and analysis of the text. For the “aims and objects” school, it is the general purpose of the treaty itself that counts, considered to some extent as having, or as having come to have, an existence of its own, independent of the original intentions of the framers. The main object is to establish this general purpose, and construe the particular clauses in the light of it: hence it is such matters as the general tenor and atmosphere of the treaty, the circumstances in which it was made, the place it has come to have in international life, which for this school indicate the approach to interpretation.

Id. See also Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain other Treaty Points*, 1951 BRIT. Y.B. INT’L L. 1, 1 (1951).

137. Vienna Convention, *supra* note 135, art. 26. For a thorough discussion on the principle of good faith, see Anthony D’Amato, *Good Faith*, in II ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 599-601 (Rudolf Bernhardt ed., 1995).

138. P.K. MENON, *THE LAW OF TREATIES BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS* 78 (1992).

139. A.D. MCNAIR, *THE LAW OF TREATIES* 465 (1961).

140. *OPPENHEIM’S INTERNATIONAL LAW* 1273 (Robert Jennings et al. eds., 9th ed. Longman 1992).

141. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 188 (2000).

142. MENON, *supra* note 138, at 78.

143. AUST, *supra* note 141, at 188.

144. Advisory Opinion, International Labor Organization—Competence to Regulate Conditions of Agricultural Labor, Etc., 1922 P.C.I.J. (ser. B) nos. 2 & 3, at 23.

which, if detached from the Context, may be interpreted in more than one sense.¹⁴⁵

The context of the treaty shall be also comprised of its preamble in addition to its text.¹⁴⁶ Therefore, the ordinary meaning of Article 16 must be determined considering the totality of the previously mentioned elements. By applying these elements to the text of Article 16, one could deduce that the foregoing construction is grounded both in fact and in law.

Paragraph 2 of Resolution 1422 expressed an intention for renewing such deferrals in advance. Consequently, the mechanism for renewals affects an essential element required by Article 16: the determination of a threat to peace.¹⁴⁷ Acting under Chapter VII requires the existence of a threat to peace, which undoubtedly cannot be precisely determined in advance.¹⁴⁸ As a requirement, the Security Council obtains "particular information" by conducting an investigation pursuant to Article 34 of the Charter¹⁴⁹ on the basis of Chapter VI,¹⁵⁰ in order to determine whether a situation constitutes a threat to international peace. Thus, it is questionable whether the Council is capable of seeking unpredicted information one year in

145. *Id.* See also H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 73, 79-80 (1949). Professor Lauterpacht observed the idea of interpretation in light of the totality even before the adoption of the Vienna Convention on Law of Treaties. He expressed himself in the following words: "In these and similar cases the common intention in relation to the particular case must be derived from the common intention of the treaty as a whole—from its policy, its object, and its spirit." *Id.* Furthermore, in the early case of *The Ionian Ships*, Dr. Lushington insisted on the significance of looking "to the whole of the instrument and not to a part, [because] terms, however, strong and clear in themselves, whatever meaning may be attributed—necessarily attributed—to them standing alone, may be modified by other parts of the same instrument. . . . [T]he whole treaty creates one obligation." A.D. MCNAIR, *THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS* 198 (1938).

146. Vienna Convention, *supra* note 135, art. 31(2). The preamble to the ICC Statute, *supra* note 8, para. 5, reads: "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

147. ICC Statute, *supra* note 8, art. 16.

148. New Zealand for example held a similar view during the meetings: "Attempts to invoke the procedure laid down in article 16 of the Rome Statute in generic resolution, not in response to a particular fact situation, and on an ongoing basis, are inconsistent with both the terms and purpose of that article." U.N. Doc. S/PV.4568, *supra* note 95. Parliamentarians for Global Action, *Parliamentarians Take Action on Security Council Resolution 1422 To Prevent Its Renewal*, at <http://www.iccnw.org>.

149. U.N. CHARTER art. 34 ("The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.").

150. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 613 (Bruno Simma ed., 1994).

advance, given the fact that Paragraph 19 of Resolution 1423 declares that the mandate of UNMIBH terminates on December 31, 2002.¹⁵¹

The essence of Article 16 requires that situations involving a threat to peace be examined on a case-by-case basis. Any different construction would suggest that the Council is blocking the ICC's jurisdiction by virtue of a fictional future existence of threat to the peace, and not a factual existing or imminent situation of threat to the peace, a practice that is contrary to the letter of both Article 16 of the ICC Statute and Article 39 of the U.N. Charter.¹⁵² Consequently, the current language of Paragraph 2 of Resolution 1422 is an amendment to the text of Article 16, and thus, it is questionable whether the Council has authority to amend a provision in a treaty under Chapter VII.

Indeed, the Security Council has the power to create international judicial bodies in response to situations where international peace and security are compromised. Yet that does not mean that the Council has the competence to intervene in the technical and legal functions of those judicial bodies. The famous case arising in the International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Tadic*, supports that argument:

[T]he establishment of the International Tribunal by the Security Council does not signify, however, . . . that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an

151. S.C. Res. 1423, *supra* note 4, para. 19. Accordingly, there is no need to block the Court's jurisdiction indefinitely because that threat would not exist after the expiry date of UNMIBH. However, paragraph 10 of the same Resolution authorizes Member States "to continue for a further planned period of 12 months the multinational stabilization force (SFOR) as established in accordance with its resolution 1088 (1996)." *Id.* para. 10. Although the latter paragraph might support the Council in its decision regarding the determination of a current factual existence of a threat to the peace, it does not authorize the Council to determine an existence of threat to the international peace one year in advance.

152. ICC Statute, *supra* note 8, art. 16; U.N. CHARTER art. 39; LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 266 (2d ed., rev. 1949). "In the course of discussions in the Security Council, it was made clear that this did not mean that Article 39 was only applicable when 'the menace to peace' was 'on the point of being realized.'" GOODRICH ET AL., *supra*, at 266. Accordingly, it could be argued that this wording paves the way for accepting an interpretation that Security Council's action where a situation is imminent and did not actually exist could be valid. For clarity regarding the term "imminent," see Mohamed El Zeidy, *The ECHR and States of Emergency: Article 15-A Domestic Power of Derogation from Human Rights Obligations*, 4 SAN DIEGO INT'L L.J. (forthcoming 2003).

instrument for the exercise of its own principal function of maintenance of peace and security. . . .¹⁵³

Hence, the Security Council's powers cannot extend to cover issues beyond its original mandate.¹⁵⁴ Therefore, Paragraph 2 of Resolution 1422 is contrary to Article 40 of the Vienna Convention on the Law of Treaties, which limits amendments of multilateral treaties to its parties, "unless the treaty otherwise provides."¹⁵⁵ In a letter to U.S. Secretary of State Colin Powell on July 3, 2002, U.N. Secretary General Kofi Annan expressed his concerns regarding Resolution 1422. The U.N. Secretary General's famous words were that the Security Council must not take action that might "[fly] in the face of treaty law."¹⁵⁶

Despite the inconsistency between Resolution 1422 on one hand, and Article 16 and the Law of Treaties on the other, the Security Council's decision can be binding and can override any other treaty obligation.¹⁵⁷ By virtue of Articles 24, 25, and 103 of the U.N. Charter, the obligations arising from such a resolution have supremacy and prevail. This holds true, however, only if the requirements of these Articles have been legally satisfied.

Obtaining the force of law requires that the terms in Articles 24, 25, and 103 of the U.N. Charter be legally fulfilled. According to Article 24(1), the Security Council has the primary responsibility of maintaining international peace and security.¹⁵⁸ "In discharging [its] duties [to maintain international peace and security], the [Security Council] 'shall act in accordance with the purposes and Principles of the United Nations.'"¹⁵⁹ The language of the this sentence indicates that, while the political approach is intended in the actions of the

153. Prosecutor v. Tadic, No. IT-94-1-AR72, ¶ 36 (I.C.T.Y. Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996), available at <http://www.un.org/icty>.

154. This does not mean that the Council is not authorized to rule on legal issues because in various occasions the Council had to face both situations in its determination of existence of threat to the peace under Chapter VII. However, what is meant here is that the Council's legal powers should be limited within the framework of its mandate, thus preventing any political abuse of this power. Thus, Resolution 1422 reflects the latter inconceivable consequence.

155. Vienna Convention, *supra* note 135, art. 40.

156. Letter from Kofi Annan, U.N. Sec'y Gen., to Colin Powell, U.S. Sec'y of State (July 3, 2002), available at <http://www.iccnw.org/html/SGlettertoSC3July2002.pdf>.

157. U.N. CHARTER art. 103; OPPENHEIM'S INTERNATIONAL LAW, *supra* note 140, at 1215-16. See also Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 89, ¶ 42 (Apr. 14); (Libya v. U.K.), 1992 I.C.J. 88, ¶ 37 (Apr. 14). In the separate opinion, Judge Shahabuddeen stated that, "By virtue of Article 103 of the Charter, that obligation prevails over any conflicting treaty obligation which Libya may have." *Id.* (separate opinion of J. Shahabuddenn).

158. U.N. CHARTER art. 24(1).

159. *Id.* para. 2.

United Nations, the limits of the law of the Charter have to be observed.¹⁶⁰ Therefore, the Council cannot act arbitrarily.¹⁶¹

Meanwhile, Article 25 mandates that Member States accept and carry out the Security Council's decisions that arise under Articles 24(2) and 39 of the U.N. Charter.¹⁶² Nonetheless, accepting or carrying out the decisions of the Security Council has to be "in accordance with the [U.N. Charter]."¹⁶³ This construction has been affirmed by the "founding fathers" of the Charter.¹⁶⁴

One may reasonably deduce that the Security Council's decisions must be consistent with the entire Charter, including its principles and purposes. Additionally, one may argue that the goals intended and reflected in the Charter's Preamble and other provisions should not be interpreted in light of the circumstances in which the United

160. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 150, at 401.

161. *Id.* at 404.

162. U.N. CHARTER arts. 24(2), 25, 39. Article 39 stipulates, "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." *Id.* art. 39.

163. *Id.* art. 25.

164. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 150, at 410. However, the founding fathers of the Charter held another interpretation to the phrase "in accordance with the present Charter,"—namely, Article 25 might be read in such a way that the quoted phrase is related to the Charter obligation of the members to accept and carry out the decisions of the Security Council on the basis of the mere wording of Article 25. *Id.* Nonetheless, they argued that both interpretations are "quite acceptable." *Id.* Although it has been emphasized that the interpretation mentioned above in the text is acceptable, still, it has been countered that adopting such an interpretation that grants "such an extensive right to examine the decisions of the [Security Council], would, indeed, weaken the peace-keeping system of the UN and the proper functioning of the [Security Council], or would even destroy it altogether." See THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 459-60 (2d ed., Bruno Simma et al. eds., 2002). Despite the fact that this is a well constructed argument, it can still be contested. One cannot imagine that the Security Council would be granted unlimited powers that might even rise to contradict peremptory norms *jus cogens* without being challenged as seen in the next section of this Article. Moreover, to accept this argument means that states are asked to disregard the other purposes and principles of the Charter that are set out, for example, in its Preamble and Article 1 as mentioned in the above text. Thus, it is hardly imaginable that the phrase *in conformity with the principles of justice and international law* is superfluous and was inserted into the text for no need. Good faith and ordinary meanings are main components in treaty interpretations. However, one might wonder whether it is possible to counter that even the rules of interpretation set out in the Vienna Convention on the Law of Treaties could be overridden by virtue of Article 103 of the Charter, and thus, regular and appropriate rules of interpretation could be disregarded. Accordingly, the aforementioned phrase could be disregarded when reading Article 1(1). On the other hand, even if one presumes that the application of the phrase might be restricted to special situations for the sake of respecting the effectiveness of the Security Council's actions, one cannot accept the view that it could be derogated from even when conflicting with peremptory norms as seen below.

Nations was created, therefore giving priority to maintaining peace and security. While the goal or purpose of maintaining peace and security must be of great significance, it should not be achieved at the expense of compromising the United Nation's other objectives. After the development of the International Human Rights Law, all U.N. goals or objectives, including maintenance of peace and security, should be regarded as indivisible and equally important. Thus, the maintenance of peace should not be achieved solely, but within the framework of the other U.N. goals or objectives. This trend of "evolutionary interpretation" has been also followed by the ICJ on several occasions. In its advisory opinion on Namibia, the Court stated that "[i]nterpretation cannot remain unaffected by the subsequent development of law, . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."¹⁶⁵

In addition, in an early concurring opinion, Judge Alvarez expressed an opinion that is relevant for the interpretation of the Charter:

. . . [W]ith regard to the interpretation of legal texts [U.N. Charter], it is to be observed that . . . an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.¹⁶⁶

Among the other goals or purposes of the Charter is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."¹⁶⁷ In addition, the Charter has two other main purposes:

[To] bring about . . . in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to breach of the peace,¹⁶⁸ [and to promote and encourage] respect for human rights and for fundamental freedoms for all without distinction.¹⁶⁹

The Charter's most important criterion in the context of Resolution 1422, however, is that a situation demonstrating a factual or an

165. I.C.J. Reports 1971, at 31.

166. I.C.J. Reports 1947-8, at 67-68.

167. U.N. Charter pmb. para. 3

168. *Id.* art. 1(1). For a thorough discussion regarding the travaux preparatoires of Article 1 and its different interpretations, see Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 113-20 (1994).

169. *Id.* para. 3. See also ANTONIO CASSESE, INTERNATIONAL LAW 277-78 (2001).

imminent threat to peace should exist within the meaning of Articles 24(2) and 39.

Because the Security Council did not comply with the above prerequisites when adopting Resolution 1422, it is possible to argue that Articles 24 and 25 of the Charter have not been satisfied in order to invoke Article 103. It also follows that, Resolution 1422 may not be valid and imposes positive obligations because the Council, in discharging its duties pursuant to Chapter VII, did not comply with all of the requirements set out in Articles 24(2) and 25, the Preamble, and Article 1(1)(3) of the U.N. Charter. Moreover, initially the Council should not invoke Chapter VII where a threat to peace does not imminently or factually exist.¹⁷⁰ Consequently, Article 103 should not be invoked because conditions precedent or the obligations which were supposed to arise from the Resolution and required to activate the Article do not exist.¹⁷¹

VI. RESOLUTION 1422 AND *JUS COGENS*

The ICC's jurisdiction is limited to the most heinous crimes that affect the international community as a whole. They are known as offenses against the law of nations, *delicti jus gentium*.¹⁷² The ICC Statute considers "heinous" such crimes as genocide, war crimes, crimes against humanity, and aggression.¹⁷³ These heinous crimes require a high degree of human repression, and therefore, they lie under the subject matter jurisdiction of the ICC.¹⁷⁴

Heinous crimes—those most grave and extraordinary—are also categorized as *jus cogens* norms, which hold the highest hierarchical position among all other norms and principles.¹⁷⁵ According to Judge

170. It is interesting to note that paragraph (1) of Resolution 1422 "requests, [deferral to be] consistent with the provisions of Article 16." S.C. Res. 1422, *supra* note 1. Thus, the Resolution is contradictory because Article 16 itself requires the existence of a Chapter VII situation to be determined on a case-by-case basis. Hence, absent a factual situation of threat to the peace, the decision regarding renewal in advance is a clear demonstration of the inconsistency.

171. In such a case Article 103 cannot be triggered because there are no conflicting obligations arising from the Rome Statute and that Resolution, and because, arguably, the Security Council decision is not valid to render any obligations.

172. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 566 (3d ed. 1996).

173. ICC Statute, *supra* note 8, arts. 5-8.

174. *Id.* pmb. paras. 4, 5.

175. M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: CRIMES* 40, 41 (2d ed. 1999). See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 513 (4th ed. 1996); MALCOLM N. SHAW, *INTERNATIONAL LAW* 96 (4th ed. 2001); Prosecutor v. Furundzija, No. IT-95-17/1, § VI, ¶ 153 (Dec. 10, 1998) ("[J]us cogens . . . is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."); Prosecutor v. Delacic., No. IT-96-21-T, ¶ 454 (November 16, 1998); Prosecutor v. Kunarac, No. IT-96-23/1, ¶ 466 (Feb. 22, 2001).

Hersch Lauterpacht, “[t]he Concept of *jus cogens* operates as a concept superior to both customary international law and treaty.”¹⁷⁶ Recognizing those international crimes as being part of *jus cogens* results in a duty to extradite or prosecute, the non-applicability of statute of limitations, and the exercise of the universality of jurisdiction over offenders.¹⁷⁷

Categorizing certain crimes as *jus cogens* places upon the States the *obligatio erga omnes* not to grant impunity to the violators of such crimes.¹⁷⁸ The existing genesis of the *obligatio erga omnes* concept for *jus cogens* crimes is found in the ICJ’s advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide*.¹⁷⁹ The *erga omnes* and *jus cogens* concepts “[a]re often presented as two sides of the same coin: *Erga omnes* means flowing to all; [therefore], obligations deriving from *jus cogens* are presumably *erga omnes*. Legal logic supports the proposition that what is compelling law must necessarily engender an obligation that is

176. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Mont.)) (Indication of Provisional Measures), 1993 I.C.J. 325, 440 ¶ 100 (Sept. 13) (separate opinion of Judge Lauterpacht).

177. BASSIOUNI, *supra* note 175, at 39, 41. See also *Al-Adsani v. United Kingdom*, 34 E.H.R.R. 11, *283, *285 (2002).

178. Bassiouni, *supra* note 175, at 39. See also Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 393 (2001); M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 66 (1996); Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 32 (February 5). The ICJ defined the concept of *erga omnes* and its legal effect towards the entire community in the following terms:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Id.

179. Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of Genocide, 1951 I.C.J. Rep. 15 (May 28). See also *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bos. & Herz. v. Yugoslavia), 1996 I.C.J. 4, 27-33 ¶ 33 (July 11). The I.C.J. expressed itself regarding obligations *erga omnes* in the following words: “The Court is of the view that it follows from the object and purpose of the Convention that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.” *Id.* This wording emphasize that the Convention imposes an obligation *erga omnes* to punish and prevent the crime of Genocide. *Id.* at 25.

‘flowing to all.’¹⁸⁰ Consequently, obligations *erga omnes* to prosecute or extradite criminals will naturally flow from *jus cogens* crimes.¹⁸¹

Interestingly, Resolution 1422 in its current form seems to override the *jus cogens* and *erga omnes* concepts. Although the Resolution’s purpose is to shield the peacekeeping forces of non-state members of the Rome Treaty from ICC jurisdiction, the fact that heinous crimes enjoy a *jus cogens* status, however, should make it legally impossible to grant their perpetrators safe haven.¹⁸² Even though Resolution 1422 does not prevent other alternatives to prosecution, ironically, its adoption and the intention to permanently block the ICC’s jurisdiction, which might actually permit perpetrators to escape justice, is a *de facto* legitimization of impunity.¹⁸³

On the other hand, it could be argued that because treaties may not create obligations or rights for a third-party state without its consent, it is legally permissible for those offenders not to stand trial before the ICC.¹⁸⁴ Thus, Resolution 1422 is restricted to the preservation of the rights of third-party states. Nonetheless, that limit on jurisdiction is irrelevant when the most odious crimes are involved. In *Furundzija*, the ICTY emphasized that peremptory norms create a deterrent effect because “[they] signal to all States and individuals that the prohibitions they envisage are absolute values from which nobody must deviate.”¹⁸⁵

Some of the crimes listed under the ICC Statute have also been listed in other treaties as crimes deserving mandatory prosecution.¹⁸⁶ All of the crimes enumerated in those other treaties are recognized under customary international law,¹⁸⁷ which is binding on all

180. Bassiouni, *supra* note 175, at 44.

181. *Id.* at 46. Professor Bassiouni argues that the establishment of a permanent ICC having inherent jurisdiction over genocide, crimes against humanity, and war crimes “would be the convincing argument” that these crimes are part of *jus cogens*, and thus, obligations *erga omnes* to prosecute or extradite flow from them. *Id.*

182. Prosecutor v. Furundzija, No. IT-95-17/1, § VI, ¶¶ 155-56 (Dec. 10, 1998). The ILC stated in its commentary to draft Article 61 (Article 64 in the final text of the Vienna Convention) in 1966 that “a rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it of legality.” See LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 7 (1988).

183. Those other alternatives are prosecutions held at the national level by virtue of universal and other forms of jurisdiction. See Elizabeth Benito, *Justice for Peace: No To Impunity*, 14 NOUVELLES ETUDES PENAL 149, 152 (1998). Judge Benito argued that the best solution for the problem of impunity is a creation of a Permanent International Criminal Court. Thus, her view makes it clear that Resolution 1422 has a direct impact on impunity.

184. Vienna Convention, *supra* note 135, art. 34.

185. CASSESE, *supra* note 169, at 144. See also *Furundzija*, No. IT-95-17/1, § VI, ¶ 154.

186. See *infra* note 187.

187. Mark A. Chenin, *Game Theory And Customary International Law: A Response To Professors GoldSmith And Posner*, 23 MICH. J. INT’L L. 143, 162-63 (2001).

members of the international community regardless of whether those members were parties to a specific treaty. According to Article 38 of the Vienna Convention, “nothing . . . precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.”¹⁸⁸ In light of this conclusion, one could deduce that Resolution 1422 conflicts with both a peremptory *jus cogens* norm and a customary rule of international law.

The legal consequences of the above analysis may be best delineated by the following opinion from Judge Lauterpacht:

[O]ne possibility is that, in strict logic, when the operation of paragraph 6 of Security Council resolution 713(1991) began to make Members of the United Nations accessories to genocide, it ceased to be valid and binding in its operation . . . ; and that Members of the United Nations then became free to disregard it.¹⁸⁹

See also Report of the Secretary General Under Security Council Resolution 808, U.N. GAOR, 48th Sess., U.N. Doc. 512504 (1993) [hereinafter Secretary General Report]. Professor Chenin quoted the U.N. Secretary General, who listed some of the treaties that embody the abovementioned crimes and considered them as part of customary international law, as follows: the Geneva Conventions of August 12, 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945. However, one might suggest adding the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

188. Vienna Convention, *supra* note 135, art. 38.

189. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugoslavia (Serb. & Mont.)) (Indication of Provisional Measures), 1993 I.C.J. 325, 441 ¶ 103 (Sept. 13) (separate Opinion of Judge Lauterpacht). However, Judge Lauterpacht raised another possibility, which he believes is more in accord with the realities of the situation. He said,

It must be recognized that the chain of hypotheses in the analysis just made involves some debatable link – elements of fact, such as that the arms embargo has led to the imbalance in the possession of arms by the two sides and that that imbalance has contributed in greater or lesser degree to genocidal activity such as ethnic cleansing; and elements of law, such as that genocide is *jus cogens* and that a resolution which becomes violative of *jus cogens* must then become void and legally ineffective. It is not necessary for the Court to take a position in this regard at this time. Instead, it would seem sufficient that the relevance here of *jus cogens* should be drawn to the attention of the Security Council, as it will be by the required communication to it of the Court’s Order, so that the Security Council may give due weight to it in future reconsideration of the embargo. . . . While, of course, the principle thrust of a finding that paragraph 6 of Security Council resolution 713 (1991) may conflict with *jus cogens* must lie in the direction of third states which may be willing to supply arms to Bosnia-Herzegovina, that does not mean that such a conclusion could have no place in an order operative between Bosnia—Herzegovina in the present proceedings. There may well be advantage for Bosnia-Herzegovina (it is not for the Court to determine) in being able to say that the Court had

Based on Judge Lauterpacht's findings, Resolution 1422 ceases to be valid and binding in operation because Paragraphs 1 and 2 of the Resolution make U.N. members accessories or contributors to the commission of heinous crimes. Accordingly, Article 103 of the U.N. Charter cannot come into play.¹⁹⁰ This conclusion arguably would not be conceivable for those states that demanded adoption of Resolution 1422.

VII. FINAL OBSERVATIONS REGARDING RESOLUTION 1422

Drafters of Resolution 1422 chose to finalize the document by adding Paragraph 3, which states, "[Security Council Members] [decide] that Member States shall take no action inconsistent with Paragraph 1 and with their international obligations."¹⁹¹ The language of Paragraph 3 is broad, vague, and poses interesting legal questions. For example, are "Member States" limited to the Council's current members, or are all the members of the United Nations included? Second, what kinds of actions are inconsistent with Paragraph 1? Third, what is the implied meaning of the clause "Member States shall take no action inconsistent . . . with their international obligations" within the meaning of Paragraph 3?

Although there are no definite answers to these questions, an analysis of the main purpose of the Resolution is instructive. Regarding the meaning of the term "Member States," for example, because the purpose of adopting Resolution 1422 was to limit the ICC's jurisdiction over nationals of non-party states, it is inconceivable that the drafters were only referring to members of the Council. The drafters of Resolution 1422 demanded that all U.N. members comply with the Resolution, regardless of whether they

identified a source of doubt regarding the validity of the embargo resolution which, though not directly operative by itself, requires that the Security Council give the matter further consideration.

Id. at 441, ¶¶ 104, 106. In fact, it could be argued that in the case of Resolution 1422 the situation is different because that Resolution led directly to a violation of a *jus cogens* norm that the Council would have realized. Moreover, if the second construction is the more effective one, why didn't the Council pay attention this time to not overriding a peremptory norm? Judge Lauterpacht's separate opinion should have been taken into account; regretfully, the Council proceeded in the same manner.

190. *Id.* at 440, ¶ 100. However, Judge Lauterpacht in his separate opinion did not exclude Article 103 merely because of the invalidity of the Council's resolution, but because *jus cogens* norms prevail in the case of a conflict, even with a Security Council resolution. He expressed himself in the following words: "The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and *jus cogens*." *Id.*

191. S.C. Res. 1422, *supra* note 1.

were parties or non-parties to the ICC Statute.¹⁹² Requiring all U.N. members to comply with Resolution 1422 assures the highest quantitative results of compliance and the effective application of Paragraph 1 without any impediments.¹⁹³

Regarding the second and third questions, Paragraph 3 of Resolution 1422 imposes a duty upon U.N. members not to take any "action inconsistent" with Paragraph 1.¹⁹⁴ A thorough reading of Paragraph 3 suggests that its drafters desired to prevent states from taking any steps that might hinder the very essence of Paragraph 1: the ability to trigger the ICC's jurisdiction through the power of referrals pursuant to Articles 13(a) and 14(a) of the ICC Statute.¹⁹⁵ Because initially all members of the United Nations are bound by the Security Council's decisions, all U.N. members, whether parties or non-parties to the ICC Statute, may have to refrain from cooperating with the ICC.¹⁹⁶

Set aside the foregoing arguments and follow a different approach to that taken throughout this Article thus far. Specifically, use an analysis similar to the approach followed and intended by the drafters of Resolution 1422. Assume that Resolution 1422 is valid, or that states disregarded its invalidity and accepted its enforcement. One may then suggest that the drafters believed that all U.N. members should refrain from triggering an ICC proceeding or cooperating with the ICC during a deferral period (indefinitely in this situation) until the Council "decides otherwise." Moreover, the drafters might have known that Article 16 does not allow a deferral period of more than 12 months unless a new resolution has been adopted that determines the same requirements of the original

192. *Id.*

193. However, it could be argued that there is no need for the inclusion of paragraph 3 because, by virtue of Articles 2(5), 25 of the U.N. Charter, all Member States are obliged to comply with the Security Council decisions, and give assistance to any action the former takes. Nonetheless, it seems that the U.S.'s fear of facing any critical situations with the ICC made the latter stress for such compliance through this paragraph.

194. S.C. Res. 1422, *supra* note 1, para. 3.

195. *Id.* See also ICC Statute, *supra* note 8, arts. 13(a), 14(a).

196. See Giuseppe Nesi, *The Obligation to Cooperate with the International Criminal Court and States not Party to the Statute*, in *THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 39 (ICRC et al. eds., 2002). However, in such a situation there might arise conflicting obligations, on the one hand those arising as a result of the Security Council decision, while on the other hand those arising from other international treaties such as the 1949 Geneva Conventions, which imposed the duty "to respect and ensure respect." *Id.* Although Article 103 of the U.N. Charter says that the obligations arising from the Council prevail in terms of hierarchy of treaties, the norms enshrined in those Convention, being part of customary international law, makes it clear that the latter prevail and bind all states despite any conflicting treaty provisions, including those set out in the U.N. Charter. *Id.* See also *Case Concerning the Military And Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101-04, ¶¶ 215-20 (June 27).

decision. Thus, two conflicting obligations arise: (1) the exact interpretation of Article 16, which does not allow more than the 12 month period; and (2) the obligations arising from the U.N. Charter to comply with the Security Council's decision.

Pursuant to Article 103 of the U.N. Charter, the obligation to obey Security Council decisions prevails over all other obligations. As a result, all U.N. Member States have to comply and refrain from triggering proceedings before the Court or rendering cooperation until the requested period has expired. It seems that the Security Council wanted to achieve or reach such an inconceivable conclusion through the above scenario. Nevertheless, while the above scenario is well planned and grounded, after the initial 12-month deferral period, the ICC does not have to refrain from proceeding with a situation or case as a non-member to the U.N. Charter.¹⁹⁷ Pursuant to Articles 13(C) and 15, the ICC prosecutor can still initiate investigations *proprio muto* after the end of the initial 12-month deferral period.¹⁹⁸ The prosecutor, therefore, can seek information from reliable sources, such as inter- and non-governmental organizations that are not barred from providing assistance under the Security Council's decision.

In contrast, one may construe the first part of Paragraph 3 in a different manner. When reading this part in light of Paragraph 1 of Resolution 1422, one may reach a different conclusion. Paragraph 1 states, "[r]equests, consistent with the provisions of article 16 of the Rome Statute . . . that the ICC, if a case arises . . . shall for a twelve-month period starting [July 1, 2002] not commence or proceed . . . unless the Security Council decides otherwise."¹⁹⁹ Paragraph 3 states, "Members States shall take no action inconsistent with paragraph 1."²⁰⁰ From a literal reading of Paragraph 1, one might infer that suspending the commencement of an investigation must be "consistent with the provisions of article 16." In other words, the ICC should not commence or proceed with an investigation or prosecution only if the requirements of Article 16 have been met. Because it has been demonstrated previously that Paragraph 2 of the Resolution is inconsistent with Article 16 of the ICC Statute, the ICC may not be barred from beginning its investigations or continuing an ongoing investigation or prosecution. Based on this interpretation of Paragraph 1 and in light of the first part of Paragraph 3, one could argue that, if any Member State attempted to trigger proceedings

197. Thus, one might suggest that the possibility of the above-mentioned scenario is the reason for adding the first part of Paragraph 3—namely, to ensure that if such a situation arose, all states would be banned from assisting the Court.

198. ICC Statute, *supra* note 8, arts. 13 (c), 15, 16.

199. S.C. Res. 1422, *supra* note 1, para. 1.

200. *Id.* para. 3.

before the ICC, then that state would not be in violation of Resolution 1422 because this action would not be inconsistent with Paragraph 1.

The above-mentioned scenarios demonstrate that Resolution 1422 is *ultra vires*. Additionally, the Resolution might be disregarded in order to overcome the diversity of its interpretation. Despite the above-mentioned conclusions, Paragraph 3 still entails some technical issues. The second part of Paragraph 3 requires that Member States take no action inconsistent with Paragraph 1 and with their international obligations.²⁰¹ Using the conjunction "and" to link the two parts of Paragraph 3 suggests that the drafters intended to oblige states with duties other than those arising from Paragraph 1.

Presumably, the drafters intended to reference Articles 24(1), 25, and 103 of the U.N. Charter. This is to emphasize that all states should comply with the letter of the Resolution, as embedded in Paragraph 1. According to a broader construction, however, one could construe the clause—"shall take no action inconsistent with paragraph 1 and with their international obligations"—to mean that any action taken should be consistent with the states' entire international obligations. Some of those obligations are described in various international instruments, including the U.N. Charter,²⁰² 1949 Geneva Conventions,²⁰³ Genocide Convention,²⁰⁴ Apartheid Convention,²⁰⁵ and Convention Against Torture.²⁰⁶

201. *Id.*

202. U.N. CHARTER arts. 1(3) ("The Purposes of the United Nations are . . . [t]o achieve international co-operation . . . and in promoting and encouraging respect for human rights."), 55(3) ("[T]he United Nations shall promote . . . universal respect for, and observance of human rights."). Thus, according to these wordings, one might wonder how such a resolution could be seen as observing human rights.

203. Common Article 1 to the 1949 Geneva Conventions imposes a duty on States to *respect and ensure respect* for the Conventions in all circumstances. *See generally* Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit*, 2 Y.B. OF INT'L HUMANITARIAN L. 3 (1999).

204. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. 1, 78 U.N.T.S. 277 ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.").

205. The Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 832, U.N. GAOR, art. 4 (Nov. 30, 1973) ("The States Parties to the Present Convention undertake [] to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.").

206. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, art. 2, U.N. Doc. A/39/51 (1984) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."), *reprinted in* 23 I.L.M. 1027 (1984), 24 I.L.M. 535 (1985), 5 H.R.L.J. 350 (1984).

The term “international obligations” is quite broad and embodies all norms under public international law.²⁰⁷ If the drafters desired to benefit from obligations arising from Articles 24, 25, and 103 or the common duty imposed by the previously cited conventions to repress the heinous crimes in the domestic fora, then they overlooked the fact that some of these international conventions impose a general duty upon the states to “prevent” these crimes as well by all legal means.²⁰⁸ Hence, the following question remains: “How can accepting Resolution 1422 prevent war crimes if the Resolution blocks the ICC’s jurisdiction while providing a clear signal to soldiers that they are immune from standing trial?”

U.S. Representative John D. Negroponte’s statement shows that Resolution 1422 does more than block the ICC’s jurisdiction. The Resolution tolerates possible acts of genocide and war crimes committed by U.S. soldiers. He stated:

[P]eacekeeping is one of the hardest jobs in the world. While we fully expect our peacekeepers to act in accordance with established mandates and in a lawful manner, peacekeepers can and do find themselves in difficult, ambiguous situations. Peacekeepers from States that are not parties to the Rome Statute should not face, in addition to the dangers and hardship of deployment, additional, unnecessary legal jeopardy. If we want troop contributors to offer qualified military units to peacekeeping operations, it is in the interest of all United Nations Member States to ensure that they are not exposed to unnecessary additional risks.²⁰⁹

The Statement expressed by Negroponte emphasizes that, adoption of Resolution 1422 legitimized impunity for heinous crimes. Its language highlights the exact intention behind the adoption of this Resolution. The first target is to paralyze the ICC; the second is to take no action, even at the national level. It follows from this analysis that if national courts take no action against heinous crimes then there is no other international judicial body that may prosecute those acts even where the state is “unwilling” or “unable to carry out” the proceedings within the meaning of Article 17 of the ICC Statute.²¹⁰ In turn, Member States should not carry out the Security

207. Thus, it includes *inter alia*, *custom* and *jus cogens*, which, as mentioned previously, should not be overridden by this Resolution.

208. U.N. CHARTER arts. 24, 25, 103. This argument suggests that the drafters intended full compliance with the Resolution by virtue of Articles 24, 25, and 103 because the duty these Articles impose is part of the states “international obligations.” Meanwhile, although there is a common duty imposed by the aforementioned cited conventions to repress these odious crimes at the domestic level, it should not be forgotten, however, that some of these conventions impose another duty, wider in scope, to “prevent” these crimes. Accordingly, the Council should consider all these factors when adopting a decision of that type.

209. U.N. Doc. S/PV.4568, *supra* note 95.

210. Inevitably, the ICTY has a limited time mandate. However, even if it is competent to try future acts committed by UNMIBH, it would refrain from doing so

Council's decision because the Resolution is contrary to the expressed language of Paragraph 3, which requires that states' actions be consistent with their international obligations.²¹¹

Finally, set aside the legality of the Resolution and think about its application. Under Paragraph 1, if a case involving current or former officials developed, then the ICC shall "not commence or proceed with [an] investigation or prosecution of any such case" for a 12-month period beginning July 1, 2002, unless the Security Council decided otherwise.²¹² The plain meaning permits one to conclude that the Council used the term "case" within the technical meaning of the ICC Statute in contrast to the word "situation."

On the other hand, an analytical reading might permit one to argue that if a "case" did not arise, then the prosecutor is not barred from commencing or proceeding with an investigation into a situation. This is because the key requirement is a "case" and not a "situation," which is a broader term. Therefore, the use of the term "case" permits the prosecutor to conduct a formal proceeding in two instances even before a particular situation culminates into a "case" per Article 19: (1) beyond the initiation of an investigation in response to a referral, and (2) at a later stage than the questioning of a suspect under Article 55, who is free from incarceration until a situation is considered a "case."²¹³ Formal proceedings might include an application for an arrest warrant under Article 58.²¹⁴ It seems

because it is politically controlled by the Security Council, unlike the ICC, which is a separate institution. Accordingly, one might argue: why didn't the U.S. oppose the creation of the ICTY as it has done with the ICC? One might suggest that the foregoing words explain the reason.

211. S.C. Res. 1422, *supra* note 1, para. 3.

212. *Id.* para. 1.

213. However, it could be argued that the reference to the term "case" appears even at a very early stage under Article 15(4) of the Statute. Thus, the term mentioned in the Resolution could refer to this stage. Nonetheless, one could counter that the Pre-Trial Chamber decision, pursuant to Article 15(4), to authorize the prosecutor to commence an investigation *proprio motu* would not bring a case "before" the Court within the meaning of Article 19(1), even though it mentions the word "case," because the history and structure of Articles 13(c) and 15 demonstrate that their purpose is to permit the Prosecutor to investigate an entire "situation," not to make a definitive decision whether an individual case is admissible. Under Article 15(4), the Pre-Trial Chamber does not formally determine that a case "brought before it" is admissible, but simply makes a determination "that there is a reasonable basis to proceed with an investigation" and that the case "appears" to fall within the jurisdiction of the Court. Accordingly, the aforementioned argument could go both ways. See Christopher K. Hall, *Challenges to the Jurisdiction of the Court or the Admissibility of a Case*, in COMMENTARY ON THE ROME STATUTE, *supra* note 10, at 407, 408 n.8 (emphasis added) (text mistakenly refers to Article 15(3) instead of 15(4)).

214. El Zeidy, *supra* note 128. Obviously, the aforementioned argument or conclusion could be countered and reversed as seen in the preceding footnote. It could be further argued that what is meant by the term "case" in the Resolution is a "situation," because the Resolution "requests the non commencement of an investigation," and the latter does not arise except at the very early stage of the

that the political desire to adopt the Resolution led to its legal dilemmas on one hand, and its inconsistency with the main principles of international law on the other.

VIII. CONCLUSION

Proponents of Resolution 1422, particularly the United States, desired to compromise and override international justice by granting its leaders and soldiers blanket immunities. Although the United States tried to defend its position, the United States did not succeed in convincing the international community. Unfortunately, Negroponte's assertions made during the 4568th meeting do not justify, and in fact condemn, the U.S. position.

Some of the U.S.'s fears that were not officially disclosed by its representative have been thoroughly discussed and remedied through the meetings by other state representatives. One such fear is how the ICC impinges upon on the rights of third-party states.²¹⁵ Yet a thorough reading of the classical basis of jurisdiction demonstrates that the ICC is based on the classical forms of jurisdiction. In particular, those forms of jurisdiction are based on territoriality and active personality, which any state can exercise even in interstate relations.²¹⁶

In addition, it should not be forgotten that some of these crimes have been codified in treaties that render part of customary international law.²¹⁷ The ICC Statute mirrors the very essence of those treaty provisions, thus binding all states, including non-party states, to those provisions. The fact that those crimes are *ius cogens* makes it clear that every state has a duty to prevent those crimes and to punish those who commit them.

Some commentators presume that the United States fears arbitrary prosecutions by the ICC. This presumption is true, but only when the ICC operates as the court of first resort. The ICC is based on the principle of "complementarity" and it does not involve itself in a particular case until the national court proves that it is unwilling or unable to fulfill its duties.²¹⁸ Yet it is hardly imaginable that any state acting in a bona fide manner would face this situation.

proceedings even before the authorization of the Pre-Trial Chamber. However, the argument demonstrates one of the legal problems of the Resolution's formulation.

215. See, e.g., U.N. Doc S/PV.4568, *supra* note 95.

216. For a thorough discussion on the basis of jurisdiction, see Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in *INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS* 33-70 (M. Cherif Bassiouni ed., 2d ed. 1999); BASSIOUNI, *supra* note 172, at 295-312.

217. See Chenin, *supra* note 187; Secretary General Report, *supra* note 187, at ¶¶ 33, 5.

218. El Zeidy, *supra* note 128.

Additionally, Article 17 of the ICC Statute sets detailed criteria on how the ICC may begin an assessment on a case. Pursuant to Articles 18 and 19, states can challenge the admissibility of an investigation or a case in the hands of the ICC so as not to make the ICC's jurisdiction arbitrary.

The main problem, however, goes beyond the U.S.'s position. Resolution 1422 does more than frustrate the ICC's ability to function properly; it conflicts with international law principles engrained in the U.N. Charter, the Law of Treaties, and certain customary and peremptory norms. Nevertheless, one might conclude that the Resolution may cease to have legal effects. Though various constructions may have produced different interpretations of the Resolution, there remains one common conclusion: the Resolution should cease to have effect because it is incongruous and contradicts major principles of international law. The legal arguments of some scholars that the practical legal effects of Resolution 1422 are not extremely dangerous because the Court still has the final assessment, do not, however, reduce the drastic negative impact of the aforementioned Resolution on the precepts and principles of international law. Resolution 1422, therefore, is a significant, harmful compromise to international law. Under this Resolution, it seems that politics can override law whenever the situation demands.