The Ambiguities of Security Council Resolution 1422 (2002)

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Abstract

SC Resolution 1422 (2002) is one of the most controversial resolutions of the Security Council. In order to surmount the United States' threat to block future UN peacekeeping missions, the members of the Council voted in favour of a resolution that requests the ICC to defer potential prosecutions of peacekeepers from non-state parties to the Statute for a 12-month period. What has been praised as a 'pragmatic solution' to the US demands is in fact a highly questionable legal compromise challenging not only the framework of the Rome Statute, but also the role and powers of the Security Council. This article discusses both the interplay between the Council's request and the Rome Statute, and the possible implications of the resolution for the ICC and its member states.

1 Introduction

On 12 July 2002, the United Nations Security Council adopted Resolution 1422 (2002), requesting the International Criminal Court (ICC) to refrain from initiating investigations or proceedings related to peacekeepers of non-states parties to the Statute, while reaffirming its intention to 'renew the request ... under the same conditions each 1 July for further 12-month periods ...'.[1] This compromise has dissolved the threat of a US veto against future United Nations peacekeeping operations. Furthermore, it represents a significant retreat from the initial US demand for permanent immunity of US military personnel within the framework of peacekeeping operations. But many critical questions remain. The resolution sends

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[1] See SC Res. 1422 (2002) of 12 July 2002, UN. Doc. S/RES/1422 (2002), available at http://www.un.org. See on this issue also MacPherson, 'Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings', *ASIL Insight*, July 2002, available at http://www.asil.org/insights.htm.

the message that peacekeepers from non-state parties to the Statute are more equal before the law than peacekeepers from state parties, because they benefit from a 12-month exemption from war crimes and other charges under the Statute. Such an exception breaks with the non-discriminatory character of international criminal law and is certainly not in keeping with the treaty regime of the ICC, which has jurisdiction over nationals of third states.[2] Every state may prosecute the crimes committed by foreign nationals on its territory, irrespective of their nationality. It is difficult to see why a different rule should apply to the ICC, which exercises its powers on the basis of the delegated territorial jurisdiction of its member states.[3]

Security Council members argue that the deal reached on 12 July 2002 was necessary in order to counter the US threats to block the collective security system of the Charter. While that threat was indeed troubling,[4] the disturbing precedent set by SC Resolution 1422 (2002) is no less troubling. The application of this resolution leaves many uncertainties, which make it unlikely that the compromise of 12 July 2002 will, in fact, mark the final say in the dispute over the immunity of US servicemen from the jurisdiction of the ICC.

2 The Link to Chapter VII

Resolution 1422 (2002) was approved unanimously by the Council and was based on Chapter VII of the Charter. However, it is doubtful how the exemption of peacekeepers from the jurisdiction of the ICC may be linked to a threat to the peace within the meaning of Article 39 of the Charter, which is a pre-requisite for the application of Chapter VII. It is well known that the Council has adopted a very broad interpretation of the notion of threat to the peace.[5] Nevertheless, the establishment of immunities on the basis of Article 39 of the Charter marks a novelty in the practice of the Council. Immunities and privileges of peacekeepers have so far been defined by Status-of-Mission Agreements concluded between the territorial state and the United Nations, but not directly under Chapter VII of the Charter.[6] Although the Council did not go so

[2] For a full analysis, see Paust, 'The Reach of ICC Jurisdiction over Non-signatory Nationals', 33 *Vanderbilt Journal of Transnational Law* (2000), at 1 *et seq.*; Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States', in S. B. Sewall and C. Kaysen (eds), *The United States and the International Criminal Court* (2002), at 213 *et seq.*; Stahn, 'Gute Nachbarschaft um jeden Preis', 60 *ZaöRV* (2000) 631, at 642 *et seq.* But see Wedgwood, 'The International Criminal Court: An American View', 10 *EJIL* (1999) 93, at 99.

[3] See Article 12(2)(a) of the ICC Statute.

[4] Due to the lack of support for its proposal to obtain immunity for peacekeepers, the US vetoed the renewal of the Bosnian mandate on 30 June 2002 and suggested that it would cease paying its 25% share of the UN peacekeeping operations budget.

[5] One of the most far-reaching precedents is SC Res. 748 (1992), in which the Council determined that 'the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security.' See para. 7 of the preamble of SC Res. 748 (1992) of 31 March 1992, UN. Doc. S/RES/748 (1992). For a survey of the practice of the Council, see Frowein, 'On Article 39', in B. Simma (ed.), *Charter of the United Nations* (1994), at 610.

[6] See Bothe and Dörschel, 'The UN Peacekeeping Experience', in D. Fleck (ed.), *The Law of Visiting Forces* (2001) 487, at 491–492.

far as to qualify the potential prosecution of peacekeepers by the ICC as such as a threat to the peace, its determinations in paragraphs 6 and 7 of the preamble of Resolution 1422 (2002) come close to such a finding. Only a very general link to Article 39 of the Charter may be derived from paragraph 6 of the preamble to the resolution, where the Council points out that peacekeeping operations are usually 'deployed to maintain or restore international peace and security'. Far more significant is the Council's reference to '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' in paragraph 7 of the preamble, which illustrates the curiosity of the argument: the threat to the peace seems to be based less on the existence of a specific conflict situation than on the potential inability of the United Nations to address future threats without US military personnel. Such an assumption raises serious concerns, because it ultimately implies that the non-contribution of troops to United Nations peacekeeping operations is in itself a threat to the peace. Any generalization of this principle would render Article 39 borderless.[7]

The only plausible argument which might be employed to justify the invocation of Chapter VII is that the adoption of Resolution 1422 (2002) was closely linked to the extension of the mandate of the UN military presence in Bosnia,[8] and that it does not make a difference in substance, whether its content is drafted once and for all in general terms or incorporated individually in every resolution establishing or authorizing a United Nations peacekeeping operation. Nevertheless, this argument does not provide a satisfying answer to the more far-reaching question as to what extent the exemption of peacekeeping personnel from criminal jurisdiction lies in the interests of the maintenance of peace and security in a given conflict situation.

Finally, US forces were not even exposed to a concrete 'threat of prosecution' by the ICC at the time of adoption of the resolution. The UN statistics on troop-contributions to peacekeeping missions reveal that the ICC lacked jurisdiction over US military personnel involved in peacekeeping operations deployed in July 2002 because US troops were either stationed in states not parties to the ICC Statute or subject to the primary jurisdiction of the ICTY.[9]

[7] It does not come as a surprise that such an understanding of the notion of threat to the peace has encountered criticism by several states in a public hearing of 10 July on a draft of Resolution 1422 (2002). See the statements of New Zealand, Canada and Mexico at the 4568th meeting of the Security Council on 10 July 2002, UN. Doc. SC/7445/Rev.1. The full wording of the statements is available at http://www.iccnow.org.

[8] See SC Res. 1423 (2002) of 12 July 2002, UN. Doc. S/RES/1423 (2002), available at http://www.un.org.

[9] See the Chart of the Coalition for an International Criminal Court of July 2002, illustrating the non-exposure of US peacekeepers to the jurisdiction of the ICC, at http://www.iccnow.org/html/press.html.

3 The Interplay between the Council's Request and the Rome Statute

Even more controversial is the relationship between the operative part of SC Resolution 1422 (2002) and the Rome Statute. The legal construction of the resolution reveals some of the difficulties that its drafters encountered in the negotiating process. Although the resolution was based on Chapter VII, its para. 1 was not drafted in the form of a binding 'decision', but as a 'request' to the ICC.[10] This approach may be explained by two factors: first, the fact that the Court enjoys its own, independent legal personality under Article 4 of the Rome Statute[11] and is therefore not directly bound by resolutions of the Council addressed to United Nations Member States;[12] second, the obvious intention of the members of the Council to bring the text of the resolution into compliance with the wording of Article 16 of the Statute, which expressly speaks of a 'request' in a resolution adopted under Chapter VII. This construction suggests that the legal obligations of the Court do not arise from the determinations of the Council but from the legal framework of the Statute, which imposes a deferral of investigations or prosecutions in the case of a Security Council request under Article 16 of the Statute.

The troublesome development is that the interpretation of Article 16 in SC Resolution 1422 (2002) is not identical with that reflected in the Rome Statute. The wording of the resolution itself is based on the understanding that the compromise adopted on 12 July 2002 meets the requirements of the Statute. This follows clearly from paragraph 1 of SC Resolution 1422 (2002), which makes reference to a request 'consistent with the provisions of Article 16 of the Rome Statute'. This clause can only be interpreted in the sense that the Council considers its resolution to be consistent with the Statute. But the interpretation of the Council is not necessarily an authoritative interpretation of the Statute. On the contrary, a closer look at the history and context of Article 16 reveals that it is highly questionable whether the reading of the provision in Resolution 1422 (2002) reflects its meaning under the Statute.

A *SC Resolution 1422 (2002) versus Article 16 of the Statute*

1 *The* ex ante *Deferral of Proceedings*

Paragraph 1 of Resolution 1422 (2002) is based on the assumption that a request under Article 16 of the Rome Statute may be made in generic terms, even in the absence of a specific conflict between the diverging interests of justice and the maintenance of peace and security in a concrete situation. Such an interpretation may be compatible with the wording of Article 16, which simply states that no investigation or prosecution may be commenced or proceeded with after a deferral

[10] See para. 1 of SC Res. 1422 (2002).

[11] See on the international legal personality of the ICC, Lüder, 'The Legal Nature of the International Criminal Court and the Emergence of Supranational Elements in International Criminal Justice', *International Review of the Red Cross*, No. 845, 79.

[12] For further discussion, see Section 4B.

request, without spelling out when such a request may be made. But it is hard to reconcile with the purpose of the provision and its systematic position in the Statute. The drafting history of Article 16 makes it quite clear that the founding fathers of the Statute intended to limit the use of the deferral possibility to case-by-case interventions by the Council.[13]

The current version of Article 16 has its origin in Article 23 of the International Law Commission's Draft Statute of an International Criminal Court, which provides that '[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.'[14] But, in particular, the flabby expression 'being dealt with' has come under criticism in the Preparatory Committee, because it seemed to imply the Council could bar the exercise of jurisdiction of the ICC by merely putting a given situation on its agenda.[15] It was therefore replaced by a proposal submitted by Singapore, which was guided by the intention to limit the suspension of the jurisdiction of the ICC to cases in which the Council requests the Court not to initiate or continue specific proceedings.[16] The Singapore text read: '[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 direction to that effect.'[17] This proposal was later amended by a proposal of Costa Rica, which required a 'formal and specific decision' of the Security Council,[18] and a British proposal, which replaced the word 'direction' by 'request'[19] and became the basis of the current Article 16 of the Statute. The purpose of this provision is quite clear. It was negotiated to enable the Council to delay the exercise of jurisdiction by the ICC in situations in which the resolution of a specific conflict warrants a deferral of prosecution. Perhaps the most classical example is the suspension or omission of

[13] See also the statements of New Zealand and Canada at the hearing of 10 July 2002. Furthermore, The Permanent Representative of Germany at the United Nations noted: 'It is the strong belief of Germany that — beyond the case-by-case possibilities clearly contained in Article 16 of the ICC Statute — the Security Council would do itself and world community a disservice if it passed a resolution under Chapter VII of the UN Charter, to, in effect, amend an important treaty ratified by 76 states.'

[14] See ILC, Draft Statute for an International Criminal Court, Report of the International Law Commission on the work of its forty-sixth Session, 1 September 1994, UN Doc. A/49/355 of 21 February 1997, available at: http://www.npwj.org/iccrome/statute.html.

[15] See Bergsmo and Pejic, 'On Article 16', in O. Triffterer and C. Rosbaud (eds), *The Rome Statute of the International Criminal Court* (2000), at 377, para. 9.

[16] See Zimmermann, 'The Creation of a Permanent International Criminal Court', *Max Planck Yearbook of United Nations Law*, Vol. 2 (1998) 169, at 218.

[17] Reprinted in Bergsmo and Pejic, *supra* note 15, at 375, para. 4.

[18] The proposal of Costa Rica read: 'No 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.' See *ibid.*, at 376, n. 21.

[19] The British proposal read: 'No investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve 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.' See *ibid.*, at 376, para. 5.

proceedings that might destabilize peace negotiations. But Article 16 was certainly not meant to provide a basis for the immunity of a whole group of actors in advance and irrespective of any concrete risk of indictment or prosecution.

Furthermore, a systematic interpretation of the provision under the Statute lends support to the view that it was merely supposed to serve as a basis for a case-by-case deferral by the Council. In particular, the specific position of Article 16 in the Statute indicates that the Council may only bar the exercise of jurisdiction by the Court once a concrete 'investigation' or 'prosecution' is taking place. Articles 13, 14 and 15 of the Statute determine that investigations may be initiated by the Prosecutor upon the referral of a situation either by a state party to the Statute or the Security Council, or by a *proprio motu* action of the Prosecutor. The fact that Article 16 was inserted after, and not before Articles 14 and 15, illustrates that the deferral request was not conceived as an instrument of preventive action for the Council, but requires instead the initiation of specific ICC proceedings. Any action of the Prosecutor presupposes, at least, the existence of a situation, which may give rise to investigations or prosecutions. The logical sequence underlying the functioning of the Court under Articles 13 to 16 of the Statute is that such a situation must exist before the Council may make a request under Article 16.

The authority of the Council under Article 16 to bar even the '*commencement*' of 'investigations' does not provide a more extensive basis for preventive action. The initiation of investigations is not the first stage of proceedings conducted under the auspices of the Prosecutor. On the contrary, it may be inferred from Article 15(6) that the Statute formally distinguishes the stage of investigations from 'preliminary examinations'[20] undertaken by the Prosecutor in the period before the Pre-Trial Chamber's authorization under Article 15(4).[21] The powers of the Council to block the commencement of 'investigations' under Article 16 can therefore only be interpreted in the sense that the Council may defer investigations conducted by the Prosecutor after the Pre-Trial Chamber's authorization under Article 15(4), but shall not intervene in the activities of the Court before that stage.[22]

[20] Art. 15(6) states: 'If, after the *preliminary examination* referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information' (emphasis added). The stage of preliminary examinations is further described in Art. 15(2) of the Statute, which provides that the Prosecutor 'may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the Seat of the Court.'

[21] The expression '[n]o investigation . . . may be commenced' in Art. 16 is visibly linked to Art. 15(4), which provides: 'If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the *commencement of the investigation*, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case' (emphasis added).

[22] See Bergsmo and Pejic, *supra* note 15, at 379, para. 15. 'It may not be concluded, however, that by referring to both "investigation" and "'prosecution", article 16 extends the Security Council's deferral power to the totality of activities of the Prosecutor . . . Among the steps which the Prosecutor can take before an investigation starts are seeking "information from States, organs of the United Nations,

SC Resolution 1422 (2002) seeks to avoid a conflict between its own terms and the case-by-case approach enshrined in the Statute by noting that no investigation or prosecution shall be commenced or proceeded with '*if a case arises* involving current or former officials or personnel from a contributing State not a Party to the Rome Statute.'[23] But this compromise does not solve the problem because it does not address the main concern, which is that the request itself is made *ex ante* and only linked to a hypothetical case.

B *The Quasi-permanent Nature of the Deferral*

Further ambiguities arise from para. 2 of SC Resolution 1422 (2002), in which the Council '[e]xpresses 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'. The 'intent clause' conflicts with the general conception of Article 16 as a temporary bar to the activity of the Court after a deferral request of the Council. Article 16 of the Statute states that a request is limited to a 12-month period, but renewable under the same conditions. The Statute does not determine how many times the request may be repeated. The Council could therefore formally uphold its request indefinitely. However, the 12-month limitation as such makes it clear that the creation of a permanent exception to the exercise of jurisdiction by the Court on the basis of Article 16 was not envisaged by the drafters of the Statute, even though the number of renewals was not specifically limited.[24] The original proposal made by the US in the preliminary stages of the drafting of SC Resolution 1422 (2002) directly contravened this intention by providing for an automatic renewal of the immunity exception contained in the resolution.[25] But this solution was openly rejected by the vast

intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate", receiving "written or oral testimony at the Seat of the Court", as well as analysing the information received. The Security Council cannot prevent the Prosecutor from taking these steps on the basis of article 16.'

[23] See para. 1 of SC Res. 1422 (2002) (emphasis added).

[24] To avoid an unlimited deferral by the Council was precisely the object and purpose of the widely supported Singapore proposal. On the background, see Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *AJIL* (1999) 22, at 26–27.

[25] The US Draft Resolution of 19 June 2002 operated on the principle that immunity was the rule, which could only be lifted by a waiver of either the contributing state or the Security Council. The proposal read as follows: 'The Security Council . . . [a]cting under Chapter VII of the Charter, 1. Decides that Member States contributing personnel participating in operations established or authorized by the UN Security Council to promote the pacific settlement of disputes or to maintain or restore international peace and security shall have the responsibility to investigate crimes with respect to which they have jurisdiction and, as appropriate, prosecute offenses alleged to have been committed by their nationals in connection with the operation; 2. Decides that persons of or from contributing states acting in connection with such operations shall enjoy in the territory of all Member States other than the contributing State immunity from arrest, detention, and prosecution with respect to all acts arising out of the operation and that this immunity shall continue after termination of their participation in the operation for all such acts; 3. Decides that the contributing state may waive such immunity whenever and to the extent that, in its judgment, the interests of justice will be served; 4. Decides further that in the absence of a waiver by the

majority of states.[26] The search for a compromise addressing the concerns of both sides has led to the adoption of the formula contained in paragraph 2 of SC Resolution 1422 (2002), which requires an annual renewal of the request by an affirmative vote of at least nine of the 15 Security Council members, including all permanent members, but highlights at the same time the Council's expressed intention to do so 'each 1 July . . . for as long as may be necessary'.

This approach is formally in line with Article 16 of the Statute because the granting of immunity depends on a new request each year. However, it does not need much wisdom to tell where its shortcomings lie. Both the obligation of the Council to put the issue on its agenda and the factual pressure on its members to renew the deal make it rather obvious that the solution enshrined in paragraph 2 of SC Council Resolution 1422 (2002) entails *de facto* much more than a provisional limitation on the powers of the ICC.[27] Furthermore, the concrete legal significance of the 'intention clause' itself is ambiguous. The clause appears to be unprecedented in the practice of the Council. It goes beyond the usual finding of the Council to 'remain seized of the matter'.[28] But

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contributing state, the Security Council shall have the exclusive authority to waive the immunity in the interests of justice . . . .' See US Draft Resolution of 19 June 2002, in CICC, *ICC Update*, Assembly of States Parties Special Edition, Sept. 2002, at 4. A later draft circulated by the US on 3 July 2002 provided that 'the request not to commence or proceed with investigations or prosecutions as set forth in paragraph 1 shall be renewed and extended during successive twelve-month periods thereafter unless the Security Council decides otherwise.' The proposal read in full: 'The Security Council, Acting under Chapter VII of the Charter, 1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC for a twelve-month period shall not commence or proceed with any investigations or prosecutions involving current or former officials or personnel from a contributing State not a Party to the Rome Statute for acts or omissions relating to UN established or authorized operations; 2. Decides by this resolution, acting consistent with Article 16 of the Rome Statute, that on July 1 of each successive year, the request not to commence or proceed with investigations or prosecutions as set forth in paragraph 1 shall be renewed and extends during successive twelve-month periods thereafter unless the Security Council decides otherwise and directs the Secretary-General to communicate these annual requests of the Security Council to the ICC; 3. Decides that Member States shall take no actions, such as arrest or surrender, inconsistent with the requests set forth in paragraphs 1 and 2.'

[26] On 3 July 2002, the UN Preparatory Commission for the ICC convened a meeting to discuss the US draft. Most delegations opposed the proposals, arguing that they amended or misused Art. 16 of the Rome Statute. For a survey of Government and UN responses concerning the US Draft Proposal, see the statements collected at: http://www.iccnow.org. Furthermore, the UN Secretary-General addressed a Letter to US Secretary of State Colin Powell, which states: 'The United States has put forward a proposal invoking the procedure laid down in Article 16 of the Rome Statute of the ICC. This provision means that the Security Council can intervene to prevent the Prosecutor of the ICC to proceed with a particular case. The article, which is meant for a completely different situation, is now proposed to be used by the Security Council for a blanket resolution, preventing the Prosecutor from pursuing cases against personnel in peacekeeping missions. Contrary to the wording of Article 16, which prescribes that such resolutions by the Council can be adopted for a period of 12 months, which period is renewable, it is proposed that the resolution is automatically prolonged, unless the prohibition is lifted.' See Letter from UN Secretary-General Kofi Annan to US Secretary of State Colin Powell of 3 July 2002, at http://www.iccnow.org/html/press.html.

[27] See also the Letter signed by the Ambassadors of New Zealand, South Africa, Brazil and Canada of 12 July 2002: 'Further, the request to the Court in the draft resolution would be renewable on an annual basis which, for all intents and purposes, would amount to creating a perpetual obstacle to Court action.'

[28] This finding is contained in para. 4 of SC Res. 1422 (2002).

what does it mean in legal terms? The expressed intention to renew the request certainly imposes an obligation on all Council members to seriously consider the matter on an annual basis. Moreover, the anticipated declaration of intent by the Council may entail special responsibilities for the permanent members not to exercise their veto powers on purely political grounds. But what about future non-permanent members? Are their voting rights in the Council equally curtailed in advance by paragraph 2 of SC Resolution 1422 (2002)?

Finally, the greatest paradox of the 'intent clause' is that it seems to invite state parties to the Statute, which are at the same time members of the Council, to regularly reapprove a legal instrument that runs counter to the objectives of the Rome Statute.

C *SC Resolution 1422 (2002) and Other Provisions of the Statute*

The proposed exemption of peacekeepers from proceedings before the ICC conflicts not only with Article 16 but also with several other provisions of the Statute.

1 Article 12(2) of the Statute

The envisaged creation of a permanent immunity for peacekeepers on the basis of paragraph 1 of SC Resolution 1422 (2002) establishes a distinction between individuals from state parties and third states that is not provided for under the jurisdictional regime of the ICC. Article 12(2) of the Statute, which was at the heart of discussions until the very last hours of the Rome Conference, stipulates that the Court operates on the basis of two alternative bases of jurisdiction: the jurisdictional nexus of the nationality of the accused and territorial jurisdiction. The request under paragraph 1 of SC Resolution 1422 (2002) severely limits the territorial jurisdiction of the Court for a specific group of persons, namely peacekeepers from non-state parties to the Statute, if it is practised on a permanent rather than on a provisional basis by the Council. Although such a limitation does not have a severe impact on the functioning of the Court in terms of numbers, it is nevertheless troubling, because it calls into question the jurisdictional reach of the Court. The territorial jurisdiction of states over foreign nationals may be limited in the field of peacekeeping[29] because peacekeepers usually enjoy privileges and immunities through two types of agree-

[29] Art. 4 of the Bulletin on the Observance by United Nations Forces of Humanitarian Law of 6 August 1999 provides that '[i]n case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.' See United Nations, Secretary-General's Bulletin, ST/SGB/1999/13 of 6 August 1999, in 38 ILM (1999), at 1656. Thus, the United Nations position appears to be that contributing states are the only authorities able to prosecute their own peacekeepers in cases of war crimes. This position is questionable because the agreements usually concluded within the framework of peacekeeping missions are only binding upon its parties, namely the United Nations, the host state, and the troop-contributing states. A state that is neither a party to the SOFA nor to the Contribution Agreement cannot be bound by them. It is therefore difficult to see how Art. 4 of the Bulletin on the Observance by United Nations Forces of Humanitarian Law could prevail over the universal jurisdiction of third states. The only justification may be found in Art. 105(2) of the Charter. But it is doubtful whether this provision grants peacekeeping forces immunity for war crimes.

ments concluded by the United Nations for each peacekeeping mission: a Status-of-Forces Agreement (SOFA) with the host country, which accords exclusive criminal jurisdiction to the troop-contributing state in the case of military personnel[30] and a Troop Contribution Agreement between the UN and the sending state, which specifies that peacekeeping personnel shall enjoy the privileges and immunities accorded in the SOFA[31] and be tried for criminal offences by the sending state.[32] But this practice does not per se limit the jurisdiction of the ICC. The approach reflected in the Statute is clearly that the ICC has jurisdiction over peacekeepers committing crimes under the Statute on the territory of a contracting party. The Statute treats the problem of the immunity of peacekeepers under the heading of cooperation and surrender of persons to the Court (Art. 98),[33] but not as an issue of jurisdiction.[34] The introduction of an additional, quasi-permanent bar to the exercise of jurisdiction over peacekeepers on the basis of Art. 16 is therefore a critical step, which does not fit within the overall structure of the Statute. Perhaps the only comfort lies in the fact that by pushing for the adoption of Resolution 1422 (2002) the US has incidentally recognized that the jurisdiction of the ICC extends to nationals of third states.

2 Article 27 of the Statute

The exemption of peacekeepers from proceedings before the ICC is also difficult to reconcile with Article 27 of the Statute which rules out immunities based on official capacity.[35] It is quite clear that peacekeepers do not enjoy immunity from crimes

[30] The United Nations usually concludes a Status-of-Mission Agreement (SOMA) with the host country, currently based on a 1990 model SOFA. Para. 47(b) of the SOMA accords exclusive jurisdiction to the military personnel of the sending state. It provides: 'Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory].' See Model Status-of-Forces Agreement for Peacekeeping Operations, UN. Doc. A/45/594 of 9 October 1990, reprinted in Fleck, *supra* note 6, at 603 *et seq*.

[31] See para. 5 of the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations, UN Doc. A/46/185 of 23 May 1991, reprinted in Fleck, *supra* note 6, at 615: 'Accordingly, the military and/or civilian personnel provided by [the Participating State] shall enjoy the privileges and immunities, rights and facilities and comply with the obligations provided for in the status agreement.'

[32] See para. 25 of the Model Contribution Agreement: '[The Participating State] agrees to exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with [the United Nations peacekeeping operation]. [The Participating State] shall keep the Head of Mission informed regarding the outcome of such exercise of jurisdiction.'

[33] See Prost and Schlunck, 'On Article 98', in Triffterer, *supra* note 15, at 1131, para. 1: 'The article recognizes protections flowing from international obligations relating to diplomatic or state immunity and those arising from an agreement such as Status of Forces Agreements.'

[34] See on the general distinction between the issues of jurisdiction and cooperation within the context of peacekeeping also Kaul and Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises', *Yearbook of International Humanitarian Law*, Vol. 1 (1999), at 143 *et seq*.

[35] See also *Human Rights Watch*, U.S. Proposals to Undermine the International Criminal Court Through a U.N. Security Council Resolution, Statement of 25 June 2002, available at http://www.hrw.org/campaigns/icc/usproposal.htm.

within the jurisdiction of the Court under the rules of the Rome Statute.[36] The basic rule is that if peacekeepers operate on the territory of a contracting party, they may generally be prosecuted by the ICC.[37] This may be derived from the drafting history of the Statute and Article 27.

The issue, whether peacekeepers are immune from the jurisdiction of the ICC, has been discussed in the negotiations before the Rome Conference. France had originally proposed the inclusion of a provision in the Statute, which exempted peacekeepers from international criminal responsibility. The proposal was contained in Article 26(2) of the Draft Report of the Intersessional Meeting of 19–30 January 1998 in Zutphen, the Netherlands. It provided that '[p]ersons who have carried out acts ordered by the Security Council or in accordance with a mandate issued by it shall not be criminally responsible before the Court'.[38] However, an accompanying footnote stated that there were 'widespread doubts about the contents and the placement of this paragraph'.[39] It therefore does not come as a surprise that the provision was neither included in the Report of the Preparatory Committee on the Establishment of an International Criminal Court,[40] nor in the Statute itself.

Furthermore, Article 27 of the Statute makes it quite clear that peacekeepers are not above the law by virtue of their position. The provision reads:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a

[36] The traditional thinking was that international humanitarian law did not even apply to United Nations peacekeepers because they were not deemed parties to a conflict. But the prevailing view today is that international humanitarian law applies to United Nations operations when they are engaged in hostilities. The original position of the United Nations was to encourage peacekeepers to observe the 'principles and spirit' of international law, but to deny that they were bound by such standards. However, as peacekeepers became more involved in using force within the framework of United Nations missions, the ICRC and others began to advocate that international humanitarian law applied to peacekeepers when they used force and became a party to the conflict, and to identify which rules applied to peacekeepers. In 1999, Secretary-General Annan issued guidelines that helped clarify the UN position on the question of the applicability of international humanitarian law to peacekeepers. These guidelines establish that the 'fundamental principles and rules of international humanitarian law . . . are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants.' See Art. 2 of the Bulletin on the Observance by United Nations Forces of Humanitarian Law, *supra* note 29. See generally on these guidelines Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations Related Damage', 94 *AJIL* (2000), at 406 *et seq.*

[37] Military forces operating on the territory of a foreign state usually enjoy immunity for acts committed in their official capacity. But these immunities do not extend to the core crimes of the Statute. The special status attached to foreign forces acting abroad does therefore not affect their prosecution by the ICC. See Wirth, 'Immunities, Related Problems, and Article 98 of the Rome Statute', 12 *Criminal Law Forum* (2001) 429, at 450.

[38] See M. C. Bassiouni, *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute before the Diplomatic Conference* (1998) 143, at 183.

[39] *Ibid.*

[40] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute & Draft Final Act, UN. Doc. A/Conf.183/2/Add.1, 1998, reprinted in Bassiouni, *supra* note 38, at 7.

> Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Although peacekeepers are not formally listed as persons with 'official capacity' in Article 27(1) sentence 2, they obviously fall under this category. The general rule enunciated in Article 27(1) sentence 1 is that *all* persons with 'official capacity' shall be treated equally in the sense that the nature of their capacity does not exempt them from their individual criminal responsibility under international law. Furthermore, the term 'official capacity' refers to activities which are carried out by the organs of a state, or at least attributable to a state.[41] These features are clearly met by military personnel. Moreover, the fact that peacekeeping forces may enjoy immunity under SOFA agreements with the host state is irrelevant because Article 27(2) reaffirms that such international agreements do not bar the jurisdiction of the Court. On the contrary, the general system of the Statute is again that bi- or multi-lateral agreements providing for immunity may prevent the ICC from ordering a request for surrender of persons under Article 98, but that they do not categorically exclude their individual criminal responsibility under the Statute.[42]

One might be tempted to argue that paragraph 1 of the Security Council Resolution does not call into question the principles enshrined in the Statute because it leaves states the power to try peacekeepers on the basis of their national jurisdiction. Some indications in this direction may be found in paragraph 5 of the preamble of the resolution, in which the Council notes 'that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes.' But the reference to domestic mechanisms of prosecution is only of limited value under the Statute. The exclusive reliance on the jurisdiction of the troop-contributing state within the framework of United Nations peacekeeping operations has so far been justified by the fact that there was no independent international institution to deal effectively with these abuses.[43] The object and purpose of the Statute is to close this gap through the establishment of a novel and independent law enforcement mechanism with jurisdiction over peacekeepers.[44] Although the Court does not replace domestic jurisdictions, it nevertheless modifies

[41] See Triffterer, 'On Article 27', in Triffterer, *supra* note 15, at 509, para. 13.

[42] See Triffterer, *supra* note 41, at 513, paras 24 and 514, para. 26; Prost and Schlunck, *supra* note 33, at 1132, para. 2 ('It is important to note that [Article 98] does not accord an immunity from prosecution to individuals, which the Court may seek to prosecute. Art. 27 makes it clear that no such immunity is available').

[43] See Zwanenburg, 'Compromise or Commitment: Human Rights and International Humanitarian Law Obligations for UN Peace Forces', 11 *Leiden Journal of International Law* (1998) 229, at 243.

[44] See Zwanenburg, 'The Statute of the International Criminal Court and the United States: Peacekeepers under Fire?', 10 *EJIL* (1999) 124, at 129.

the traditional system of prosecution of peacekeepers by establishing a complementary jurisdiction for cases in which states prove to be unable or unwilling to prosecute peacekeepers.[45] The re-introduction of the exclusive jurisdiction of states under SC Resolution 1422 (2002), on the contrary, marks a severe setback, because it deprives the Statute of its intended complementary effect.

4 The Effect of SC Resolution 1422 (2002)

The multiple inconsistencies between SC Resolution 1422 (2002) and the Rome Statute raise the questions about whether and to what extent the determinations of the Security Council prevail over the provisions of the Statute. The answer to this question mainly depends on two factors: (1) the authority of the Council to adopt a resolution that runs counter to provisions of the Statute, and (2) its binding effect on the Court.

A *The Legality of Security Council Resolution 1422 (2002)*

The Council is not bound by the provisions of the Rome Statute. Its authority to adopt SC Resolution 1422 (2002) must therefore be assessed on the basis of its Chapter VII powers under the Charter.

1 SC Resolution 1422 (2002) and the Chapter VII Powers of the Council

Although the Council enjoys broad freedom of judgement concerning action under Chapter VII, it is not above the law. In discharging its functions, the Council is expressly bound by the restrictions laid down in Articles 1(1) and 24 of the Charter, namely the duty to act in accordance with the 'purposes and principles of the Organization'.[46] Furthermore, a strong case can be made that a decision of the Council taken in violation of the Charter is not binding upon UN member states, because Members of the United Nations have only agreed 'to accept and carry out . . . decisions of the Security Council in accordance with the . . . Charter' (Article 25 of the Charter).[47] This position finds support, in particular, in the Advisory Opinion of the ICJ in the *Admissions* case, where the Court held that '[t]he political character of an organ cannot release it from the observance of treaty provisions established by the Charter, when they constitute limitations on its powers or criteria for its judgment.'[48]

[45] See Art. 17 of the Statute.

[46] See Delbrück, 'On Article 24', in Simma, *supra* note 4, at 404, at para. 11. For a full analysis, see Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of The Charter', 26 *Netherlands Yearbook of International Law* (1995) 33, at 72 *et seq*.

[47] See Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1994) 89, at 95; Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences', 1 *Max Planck Yearbook of United Nations Law*, (1997) 98 ('The position that the whole peacekeeping system of the United Nations would collapse if states would be free to judge themselves about the legality of resolutions and to deny binding effect to an autonomous judgment, may be conclusive but not coherent and, in the end not convincing. This position would result in an obligation to do wrong').

[48] See ICJ, *Conditions of Admission to the United Nations*, Advisory Opinion, ICJ Reports (1948), at 64.

But it is questionable whether the Council did in fact overstep such limits when adopting SC Resolution 1422 (2002). Some states have taken this view at the open Council meeting convened on 10 July 2002. The Representative of Jordan stated that the Council would 'edge itself toward acting *ultra vires* — that is, beyond its authority under the UN Charter' if it considered 'the adoption of a draft resolution on the ICC falling under Chapter VII'.[49] Moreover, the Permanent Representative of Canada emphasized at the same meeting that the 'adoption of the resolutions currently circulating could place Canada and, we expect, others in the unprecedented position of having to examine the legality of a Security Council resolution.'[50]

However, this *ultra vires* claim is difficult to justify in legal terms. The Council's wide interpretation of Article 39 of the Charter would hardly suffice to establish that SC Resolution 1422 (2002) has no basis in the Charter. While it is critical to invoke Chapter VII in a situation in which the threat to peace stems primarily from the declared intent of a Council member not to support future UN peacekeeping operations, the determination of a given situation as a threat to the peace remains in substance a political decision which lies at the heart of the Council's discretion and should not be subject to review by individual UN Member States.[51]

Furthermore, SC Resolution 1422 (2002) does not appear to violate *jus cogens* or the purposes and principles of the United Nations, to which the Council is bound by virtue of Article 24 of the Charter. A valid *ultra vires* argument could be made if peacekeepers from non-state parties to the ICC had been exempted from individual criminal responsibility (and not only from the jurisdiction of the Court) because such a decision would have entailed a flagrant violation of the principle of equality.[52] But this is obviously not the case because para. 1 of the resolution refers only to proceedings before the ICC, leaving the whole system of national prosecution of peacekeepers for core crimes under the Statute unaffected.[53] Moreover, there is no rule of customary international law which would require that peacekeepers be brought before an international jurisdiction.[54]

Some states have challenged the lawfulness of SC Resolution 1422 (2002) arguing that the Council was not vested with treaty-making and treaty-reviewing powers and could not alter the content or the meaning of international agreements, such as the Rome Statute, freely entered into by states.[55] But this argument is not persuasive.

[49] See the Statement of the Representative of Jordan to the United Nations at the meeting of 10 July 2002, at http://www.iccnow.org.

[50] See the Statement of the Representative of Canada to the United Nations at the meeting of 10 July 2002, at http://www.iccnow.org.

[51] See Bowett, *supra* note 47, at 94.

[52] See Gowlland-Debbas, 'The Relationship between the Security Council and the Projected International Criminal Court', 1 *Journal of Armed Conflict Law* (1996) S. 97 (114).

[53] See also para. 5 of the preamble to Resolution 1422 (2002). 'Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes.'

[54] See also MacPherson, *supra* note 1.

[55] See the Statement of the Representative of Brazil to the United Nations at the meeting of 10 July 2002, at http://www.iccnow.org.

Article 2(7) second sentence of the Charter contains an express limitation of the *domaine réservé* of states in relation to measures under Chapter VII of the Charter. One may therefore hardly claim that the Council exceeded its powers by interfering in the exclusive rights of states to conclude or amend treaties. Furthermore, it follows from Articles 25 and 103 of the Charter that the Council may override specific rights and obligations of states under an existing treaty regime by using its authority under Chapter VII. In fact, Article 103 of the Charter does not directly state that a Chapter VII decision of the Council prevails over any other inconsistent treaty provision. But the obligation of UN Member States under Article 25 of the Charter to 'accept and carry out decisions of the Security Council' is an 'obligation under the Charter' within the meaning of Article 103. UN Member States are therefore bound by Article 103 to give obligations arising from binding Chapter VII resolutions of the Council priority over any other commitments.[56] This view has been taken by the Security Council in its Resolution 670 (1990), in which the Council expressly recalled the 'provisions of Article 103 of the Charter', and then went on to decide

> that all States, *notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement* or any contract entered into or any license or permit granted before the date of the present resolution, shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances.[57]

The same reasoning underlies the practice of the Council in the *Lockerbie* case, in which the Council decided that Libya must surrender the persons charged with the terrorist action against PanAm flight 103 to the United Kingdom and the United States, despite the applicability of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971, which is based on the principle *aut dedere aut judicare*.[58] The ICJ accepted this view in its two Orders of 14 April 1992,[59] in which the Court noted:

> Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over the obligations under any other international agreement, Including the Montreal Convention. . . .[60]

[56] See Bernhardt, 'On Article 103', in Simma, *supra* note 5, at 1120, para. 10.

[57] See the preamble and para. 3 of SC Resolution 670 (1990) of 25 September 1990, UN Doc. S/RES/670 (1990) (emphasis added).

[58] See para. 1 of SC Resolution 748 (1992) of 31 March 1992, UN. Doc. S/RES/748 (1992).

[59] See also Mosler, 'On Article 92', in Simma, *supra* note 5, at 991, para. 87.

[60] See ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom), ICJ Reports (1992), at 16, at para. 39.

The question is therefore not so much whether the Council violated its obligations under the Charter when adopting Resolution 1422 (2002), but rather whether states that are both Council members and parties to the Rome Statute violated their obligations under the Statute, when voting in favour of the resolution in the Council.

2 SC Resolution 1422 (2002) and the Obligations of Council Members under the Statute

Permanent members like France or the United Kingdom face a difficult conflict in the Council when they adopt decisions related to the ICC. They are, on the one hand, part of the Council as an organ of the United Nations and, on the other hand, bound by the provisions of the Rome Statute.[61] The conflict between the exercise of voting rights in the Council and the obligation to act in accordance with the provisions of an existing treaty regime has been directly addressed in the context of the Common Foreign and Security Policy (CFSP) of the European Union. Article 19(2) of the European Union Treaty[62] states:

> Member States which are also members of the United Nations Security Council will concert and keep the other Member States fully informed. Member States which are permanent members of the Security Council will, in the execution of their functions, ensure the defence of the positions and the interests of the Union, without prejudice to their responsibilities under the provisions of the United Nations Charter.

This provision makes it clear that France and the United Kingdom remain bound by the general principles of the CFSP, when acting in the Council. But the disclaimer clause ('without prejudice to their responsibilities under the provisions of the United Nations Charter') clarifies that they continue to enjoy political discretion in their decision-making process in the Council.[63] They are, in particular, not obliged to veto any Security Council resolution, which runs counter to the goals of the CFSP.[64] The Rome Statute, however, does not contain a similar disclaimer. Does this mean that its contracting parties may not act contrary to the terms of the Statute when they adopt decisions in their capacity as members of the Council?

The answer is yes, if one takes the position that the provisions of the Statute contain an accurate and conclusive reflection of the powers of the Council under the

[61] See Art. 26 of the Vienna Convention on the Law of Treaties.

[62] See on the ambiguities of this clause, Frowein, 'Auf dem Weg zu einer Gemeinsamen Außen- und Sicherheitspolitik', 36 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1997) 11, at 16–17; Fink-Hoijer, 'The Common Foreign and Security Policy of the European Union', 5 *EJIL* (1994) 173, at 188.

[63] See Winkelmann, 'Europäische und mitgliedstaatliche Interessenvertretung in den Vereinten Nationen', 60 *ZaöRV* (2000) 413, at 416.

[64] See Cremer, 'On Article 19', in C. Calliese and M. Ruffert (eds), *Kommentar zu EU-Vertrag und EG-Vertrag* (1999), at 166, para. 3.

Charter.[65] Any more far-reaching limitation of the powers of the ICC through a decision of the Security Council would then be a violation of the state's duties under the Statute because the primacy of the Charter over other international agreements under Article 103 is limited to 'obligations' of UN Members under the Charter and does not extend to the exercise of their rights, such as voting rights in the Council.[66]

Nevertheless, even if one accepts this view, it remains questionable whether such a violation occurred in the case of the adoption of SC Resolution 1422 (2002) because the resolution itself contains many ambiguous passages, which leave its impact on the Statute and its contracting parties unclear.

B *The Binding Force of SC Resolution 1422 (2002)*

1 SC Resolution 1422 (2002) and the ICC

The compromise formula adopted by the Council on 12 July 2002 leaves some doubts as to whether the resolution binds the ICC. The current framing of the resolution would suggest that it does not. The US had originally proposed a Chapter VII decision of the Council, stating

> that persons of or from contributing states . . . shall enjoy in the territory of all Member States other than the contributing State immunity from arrest, detention, and prosecution with respect to all acts arising out of the operation and that this immunity shall continue after termination of their participation in the operation for all such acts.[67]

This approach did not meet the approval of the state parties to the Statute, which preferred a solution in accordance with Article 16 of the Statute. The Council finally refrained from issuing a binding 'decision' under Chapter VII, addressing instead a 'request' to the Court.[68] This 'request' represents more than a mere 'recommendation' under Article 39 of the Charter.[69] Nevertheless, the very nature of a request is that it has no binding force on the ICC per se, even if it has been pronounced under the

[65] See in this sense P. Arnold, *Der UNO-Sicherheitsrat und die Verfolgung von Individuen* (1999), at 176, who argues that the 12-month deferral under Art. 16 of the Statute is consistent with Art. 103 of the Charter because it reflects the position of the broad majority of states as to when a deferral of ICC procceedings by the Council is proportional under Chapter VII of the Charter. See also Zimmermann, *supra* note 16, at 236 ('It is worth noting that the powers of the Security Council to act under Chapter VII of the Charter have thereby for the first time been limited in an international instrument, since the Security Council would eventually by virtue of article 16 of the Statute of the ICC be forced to renew any such request for deferral but could not provide for a deferral *sine die*').

[66] The duty to act in accordance with the Statute does not collide with an *obligation* under the Charter, because Security Council members enjoy wide discretion in their decision-making process in the Council.

[67] See the first US proposal of 19 June 2002 ('Acting under Chapter VII of the Charter . . . Decides that'), *supra* note 25.

[68] See para. 1 of SC Resolution 1422 (2002).

[69] See generally on recommendations of the Security Council under Art. 39, Frowein, *supra* note 5, at 614, paras 29 *et seq*.

heading of Chapter VII. Article 25 of the Charter establishes only a duty to carry out 'decisions' of the Council. The obligation to implement the request follows therefore not from the Charter itself,[70] but from Article 16 of the Statute,[71] which states that 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months' after a Security Council request in a resolution adopted under Chapter VII. The fact that the Council noted that the ICC 'shall ... not commence or proceed with investigation or prosecution', does not lead to a different result because the legal impact of this formulation is again expressly linked to the terms of the Statute.[72]

The interpretation that SC Resolution 1422 (2002) does not directly bind the Court is further reinforced by the current construction of the Charter as an instrument which creates legal duties for its members, but does not impose obligations on other international organizations or entities themselves.[73] Article 48(2) of the Charter posits the principle that Council decisions are carried out through the intermediate action of UN member states in 'the appropriate international agencies of which they are members'. This rule applies equally to the ICC which enjoys its own international legal personality under Article 4 of the Statute. Even Article 103 of the Charter cannot be invoked in support of the claim that the ICC is directly bound by binding secondary law of the Security Council because Article 103 merely binds states, but not the Court.[74]

Accordingly, the main question is whether the ICC may dismiss a deferral request of the Security Council under the rules of its own Statute. Some doubts as to the existence of such a power arise from the wording of Article 16 ('[n]o investigation or prosecution may be commenced or proceeded with ... after the Security Council ... has requested the Court to that effect'), which does not appear to grant the Prosecutor any discretion in its decision over the suspension or continuation of proceedings before the Court after a Chapter VII request. But the Court is the final arbiter over the interpretation of the Statute. One may therefore infer that it is vested with the authority to refuse to implement a Council request that exceeds the limits of Article 16 of the Statute.

[70] But see Bergsmo and Pejic, *supra* note 15, at 381, para. 23 ('Obliging the Council to issue a Chapter VII resolution serves two other purposes as well. First, it ensures that the deferral of an investigation or prosecution is undertaken on the basis of a legally binding Security Council decision, thereby establishing a legal duty on the Court to comply with the request').

[71] Para. 1 of the resolution speaks of requests, 'consistent with the provisions of Article 16 of the Rome Statute'.

[72] *Ibid.* But see MacPherson, *supra* note 1, sub. II. D. who notes that the Council's intent was to bind the Court 'shown by the Council's express reliance on Chapter VII of the Charter and its use in the operative part of the resolution of the words "shall ... not commence or proceed".

[73] See Bryde, 'On Article 48', in Simma, *supra* note 5, at 653, para. 10.

[74] See Hoffmeister and Knoke, 'Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof — Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht', 59 *ZaöRV* (1999) 785, at 805.

2 SC Resolution 1422 (2002) and the Obligations of State Parties to the Rome Statute

The sole fact that the ICC may possibly disregard paragraph 1 of SC Resolution 1422 (2002) does, of course, not significantly enhance the risk of prosecution of peacekeepers from third states because the ICC's trial system lays dormant if states are pre-empted from surrendering suspects to the Court. The introductory part of paragraph 3 of SC Resolution 1422 (2002) seems to establish a prohibition of states to cooperate with the Court in cases involving peacekeeping personnel from third states. The relevant passage states that the Security Council '[d]ecides that Member States shall take no action inconsistent with paragraph 1 . . .'. Being drafted as a binding decision under Chapter VII, this obligation would override the obligations of UN Members under the Rome Statute by virtue of Article 103 of the Charter. But it is controversial whether such a far-reaching obligation was in fact envisaged by the resolution. Paragraph 3 declares that Member States shall take no action inconsistent with paragraph 1, but continues '. . . and with their international obligations'. This last passage can be read as a reference to Article 103 of the Charter, clarifying that state parties to the Statute must comply with their obligations under the UN Charter. However, the language chosen by the drafters of the resolution deviates from that used in Article 103. Paragraph 3 does not speak of action 'not consistent with obligations under the Charter', but uses the much broader notion of 'international obligations'. A case can be made that these 'international obligations' include obligations under the Rome Statute. The impact of the resolution on state parties to the Statute would then be much more limited, leaving their rights and obligations under the Statute virtually unaffected. One may therefore conclude that the effect of the compromise formula embodied in paragraph 3 of the resolution on parties to the Statute depends largely on its interpretation.

5 The Scope of Application of Resolution 1422 (2002)

Further interpretational difficulties arise from the proposed scope of application of the resolution. The resolution applies to any 'United Nations established or authorized operation'. There may be different understandings of what constitutes a 'UN authorized' operation. The wording of paragraph 1 of the resolution suggests that the deferral request extends to all operations that have been explicitly authorized by the Security Council. But what about cases for which Security Council authorization is less evident? It is well known that cases of doubt have arisen in the practice of the Council. The most recent example is the (non-)authorization of Operation Enduring Freedom by the Security Council.[75] Paragraph 2(b) of SC Resolution 1373 (2001) contains a clause which states that 'all States shall . . . [t]ake the necessary steps to prevent the commission of terrorist acts'. This phrase has been interpreted as an

[75] For further discussion, see Stahn, 'Security Council Resolutions 1368 and 1373: What They Say and What They Do Not Say', at http://www.ejil.org/forum-WTC.

'almost unlimited mandate to use force', providing 'the U.S. with an at least-tenable argument whenever it decides for political reasons, that force is necessary to "prevent the commission of terrorist acts".'[76] The US may, in fact, claim that its counter-terrorist operations are 'UN authorized'. However, such an interpretation would, most likely, conflict with the view of other states according to which the deferral applies only to operations explicitly authorized by the Council.

Finally, one may note that the current wording of the resolution will most likely have at least one unattended, but highly welcome, side-effect. The risk of divergent interpretations of SC Resolution 1422 (2002) may, in fact, present an incentive for the Council to refrain from issuing ambiguous Chapter VII mandates and authorizations in the future.

6 Conclusion

SC Resolution 1422 (2002) is one of the most controversial resolutions of the Security Council. The Council stretched its Chapter VII powers to its utmost limits when treating the issue of the immunity of peacekeepers as a matter of international peace and security under Article 39 of the Charter. Moreover, the resolution may mark a deplorable setback for the development of international law if it is used as an instrument to permanently bar the exercise of jurisdiction of the ICC over peacekeepers of non-state parties. Such a step would not only severely limit the independent prosecutorial powers of the Court, which was one of the major achievements of the Rome Conference, but also call into question the principle of equality before the law. However, it is still uncertain whether international legal practice will finally develop in this direction. The compromise adopted on 12 July 2002 leaves significant room for interpretation. The ICC may find that the request is not binding on it because it exceeds the limits of Article 16 of the Statute. State parties to the Statute may claim that their obligations under the Statute continue to apply. Finally, Council members may simply refuse to renew the request. Therefore, SC Resolution 1422 (2002) certainly sets a dangerous, but not an irreversible, precedent in international law.

[76] See Byers, 'Terrorism, the Use of Force and International Law', 51 *ICLQ* (2002) 401, at 402.