

International Criminal Court: Security Council must refuse to renew unlawful Resolution 1422

Amnesty International is deeply concerned that on 12 July 2002, the United Nations (UN) Security Council adopted Resolution 1422 (2002). The resolution, which expires on 30 June 2003, seeks to prevent the International Criminal Court (Court), from exercising its jurisdiction over persons involved in operations established or authorized by the UN, if they are nationals of states which have not ratified the Rome Statute of the International Criminal Court (Rome Statute). The International Criminal Court acts as a court of last resort when states are unable or unwilling to investigate or prosecute people accused of genocide, crimes against humanity and war crimes. Amnesty International believes that no one should have impunity for the worst crimes known to humanity.

On 1 May 2003, Amnesty International issued *International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice* (AI Index: IOR 40/006/2003), an 82-page legal memorandum analysing Resolution 1422, which concludes that the resolution violates the Rome Statute, the United Nations Charter and other international law. The memorandum calls on the Security Council not to renew the resolution. This short paper summarizes the organization's concerns.

What does Resolution 1422 provide?

Resolution 1422 seeks to give perpetual impunity from investigation or prosecution by the recently established International Criminal Court, to nationals of states that have not ratified the Rome Statute accused of genocide, crimes against humanity and war crimes when these persons were involved in operations established or authorized by the UN.

The resolution:

- Requests the International Criminal Court, purportedly in accordance with Article 16 of the Rome Statute, not to commence or proceed with investigation or prosecution for a 12-month period - starting 1 July 2002 - any case involving current or former officials or personnel from a country that has not ratified the Rome Statute over acts or omissions relating to a UN established or authorized operation;
- Expresses the intention to renew the resolution under the same conditions each 1 July for further 12-month periods for as long as may be necessary;
- Decides that UN member states shall take no action inconsistent with the resolution and with their international obligations.

Why does Amnesty International oppose Resolution 1422?

Amnesty International, together with the vast majority of states, opposes the resolution as a direct attack against the new International Criminal Court, which has been established as a cornerstone of a new system of international justice to end impunity for the most serious crimes under international law. In upholding the rule of law by investigating and prosecuting people accused of genocide, crimes against humanity and war crimes when national courts are unable or unwilling to do so, the International Criminal Court promises to be an essential deterrent to people planning these crimes, as well as an important mechanism for ensuring justice for the worst crimes and reparations to victims. It is clearly the object and purpose of the Rome Statute to ensure an end to impunity where no one - regardless of their status or nationality - has impunity for these crimes.

The Security Council, by misusing the provisions of the Rome Statute and acting contrary to the UN Charter, as well as other international law (as described below), has sought to weaken the Court and international justice by establishing a system of impunity for nationals of non-states parties to the Rome Statute participating in UN authorized or established missions by (1) requesting the International Criminal Court to defer all such cases and (2) obliging all UN member states not to cooperate with the International Criminal Court should it decide to proceed with such investigations and prosecutions.

Resolution 1422 is contrary to the Rome Statute, the UN Charter and other international law and, therefore, it is not binding on the International Criminal Court or UN member states.

Why was Resolution 1422 adopted?

Resolution 1422 was adopted at the insistence of one state - the United States of America (USA). On 30 June 2002, after the 14 other members of the Security Council initially rejected its proposal for impunity for US nationals involved in peacekeeping missions, the USA vetoed the renewal of the UN Mission in Bosnia and Herzegovina UNMIBH mandate and threatened to use its veto to stop all other UN peace-keeping operations.

The initiative forms part of a worldwide campaign by the USA to undermine the International Criminal Court and to ensure that members of its armed forces stationed abroad, as well as its military and civilian leaders, could never be subject to the jurisdiction of the International Criminal Court for these crimes. In the last year, the USA has also been exerting huge pressure on states to sign illegal impunity agreements committing them not to surrender US nationals accused of genocide, crimes against humanity and war crimes to the

International Criminal Court, if requested.¹ As of 1 May 2003, 27 states are reported to have signed such agreements, although not a single state has ratified such an agreement. In many cases, the USA threatened to withdraw military and other assistance, if states refused to sign. As a result of the limited success of this effort, the USA may well seek, at the Security Council or via other initiatives, broader protection for its citizens and others it seeks to protect abroad.

Amnesty International, together with the vast majority of the international community, believes the US concerns of politically motivated prosecutions against US nationals are unfounded as the Rome Statute contains substantive safeguards and fair trial guarantees to ensure that such a situation would never arise. The organization has repeatedly called on the USA to reconsider its position and to join the international effort to end impunity.

For two weeks following the US veto of the extension of the UNMIBH mandate, the Security Council debated the matter in detail. On 10 July 2002, the Security Council held an open session during which approximately 70 UN member states individually or in joint statements called on the Security Council not to adopt any resolution that would undermine the Rome Statute. Nevertheless, on 12 July 2002, the Security Council adopted Resolution 1422 by consensus.

Why is Security Council Resolution 1422 contrary to the Rome Statute?

When drafting the Rome Statute, it was decided to include a provision – Article 16 - that allows the Security Council in the interests of international peace and security, to request the International Criminal Court, pursuant to Chapter VII of the UN Charter, to defer for 12 months an investigation or prosecution. There was in fact widespread opposition by most states to the inclusion of Article 16 in the Rome Statute, on the grounds that it could be used to protect nationals of permanent members of the Security Council. However, states were assured by supporters of the provision that it was intended solely to enable the Security Council to undertake delicate peace negotiations for a period of time in certain exceptional circumstances. For example, the deputy head of the United Kingdom delegation stated that ‘This [a request by the Security Council] will be a very rare case, and I cannot envisage that the Council will often ask for a deferral under Article 16.’² Several states, including Canada,

¹ For more information about Amnesty International’s position on US impunity agreements see: *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes* (AI Index: IOR 40/025/2002) and *International Criminal Court: The need for the European Union to take more effective steps to prevent members from signing US impunity agreements* (AI Index: IOR 40/030/2002).

² Elizabeth Wilmschurst, *The International Criminal Court: The Role of the Security Council*, in G. Nesi & Mauro Politi, eds, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* 40 (Aldershot: Ashgate Publishing Ltd 2001) (emphasis in original). The author wrote this essay when she was the Deputy Legal Adviser of the Foreign and Commonwealth Office.

Switzerland and New Zealand raised concern that the Security Council was considering using Article 16 contrary to the intention of its drafters, when they addressed the Security Council on 10 July 2002.

The drafters of the Rome Statute deliberately limited the circumstances in which the Security Council could request deferral to when it was acting under Chapter VII of the UN Charter to address a threat to international peace and security. Furthermore, Article 16 requires that all five permanent members of the Security Council must support or abstain from making such a request – if one of those states used their veto power, an Article 16 request could not be made. In fact, the limited powers given to the Security Council in the Rome Statute is one of the main reasons for US opposition to the Rome Statute. The USA had demanded and was refused Security Council control – with the USA able to veto any investigation or prosecution by the Court.

Resolution 1422 seeks to invoke Article 16 in a manner that the drafters of the Rome Statute did not intend:

- ***The Security Council cannot use Article 16 to make general exceptions to the jurisdiction of the International Criminal Court***

As stated above, Article 16 was only intended to permit the Security Council to request the Court to grant a temporary deferral of the investigation or prosecution of a case in exceptional circumstances. It is clear from the drafting history that Article 16 requires the Security Council to consider making a request for deferral on a case-by-case basis determining in each case that a deferral would be necessary to help it to restore or maintain international peace and security. Resolution 1422, however, was not adopted after such a case-by-case determination. Instead, it provides for a general exception for a whole class of people before any case has arisen, without determining that exceptional circumstances exist making a deferral necessary to restore or maintain international peace and security.

- ***The Security Council cannot make a determination to renew the resolution indefinitely, possibly forever***

The inclusion in Resolution 1422 of the Security Council's intention to "renew the request...under the same conditions each 1 July for further 12-month periods for as long as may be necessary" is also contrary to Article 16. Article 16 specifically includes a 12-month deferral after which time the Security Council may renew that request under the same conditions. Consideration of any proposal for renewal should again be made on a case-by-case basis and at the time the resolution is to be renewed. The Security Council's expression of intention to renew Resolution 1422 automatically illustrates the Council's disregard for true purpose of Article 16 and its intention to provide perpetual impunity from the International Criminal Court to nationals of non-states parties involved in UN established or authorized operations. Due to the exceptional nature of Article 16, as well as the object and

purpose of the Rome Statute to end impunity, this article should be given its narrowest possible interpretation. Any attempt to use Article 16 to bar the Court from exercising jurisdiction for more than a short period would be incompatible with the purpose of the Rome Statute – to ensure that *all* those within the Court’s jurisdiction are brought to justice in *all* cases.

- ***Resolution 1422 creates a class of persons who have impunity from international justice***

The effect of Resolution 1422 is that persons involved in UN operations from non-states parties to the Rome Statute have impunity from the International Criminal Court, which only acts when states are unable or unwilling to do so. Some states, such as the USA, have not defined all the crimes in the Rome Statute as crimes under national law. It is therefore possible that the US would be unable to investigate or prosecute one of its citizens if they were accused of international crimes within the jurisdiction of the International Criminal Court. The exemption is therefore contrary to the object and purpose of the Rome Statute - to end impunity for genocide, crimes against humanity and war crimes. Furthermore, it violates other international treaties, including the Conventions against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment and the Geneva Conventions of 1949, both of which oblige states to bring people accused of these crimes to justice.

Why is Resolution 1422 contrary to the UN Charter?

The Security Council, like every political organ of the UN, an international organization established pursuant to international law, may only exercise powers it has under its constitutive instrument, the UN Charter. Like any other body established under law, it cannot act in excess of its powers (*ultra vires*) by attempting to exercise powers it does not possess under the UN Charter, or act in a way that is in violation of the Charter. As explained below, in adopting Resolution 1422, the Security Council exceeded its powers set out in the UN Charter.

- ***The Security Council failed to make a determination of a threat to the peace, breach of the peace, or act of aggression***

In Resolution 1422, the Security Council purported to act under Chapter VII of the UN Charter. However, it failed to make the essential determination of the existence of a threat to international peace and security required before it can take measures pursuant to Chapter VII. That Chapter gives the Security Council specific powers to take action with respect to threats to the peace, breaches of peace and acts of aggression. In order to use these Chapter VII powers, the Charter provides:

“The Security Council shall determine the existence of any threat to the peace, breach of peace or act of aggression ...” (Article 39)

The International Criminal Tribunal for the former Yugoslavia and leading international law scholars have recognized that, although Article 39 is open to a wide degree of discretion, the Security Council may not invoke Chapter VII unless there is a bona fide determination of a threat to international peace and security. The drafting history of Resolution 1422 shows that – for the first time in 57 years - the Security Council made no such determination before seeking to act under Chapter VII. This is understandable, although unlawful, since no breach or threat to international peace and security existed. As many states which opposed the adoption of the Resolution noted, the work of the International Criminal Court and peace-keeping are complementary. Indeed, the only such threat reportedly cited during the closed sessions of the Security Council was the threat by the USA to veto the extension of the Bosnia and Herzegovina and other peace-keeping operation. It is inconceivable that the UN Charter would allow a permanent member of the Security Council to create a “threat” to international peace and security simply by threatening to veto the extensions of UN peace-keeping mandates in order for the Council to act under Chapter VII.

- ***Resolution 1422 could facilitate and encourage violations of jus cogens prohibitions of international law and human rights and international humanitarian law***

There are certain prohibitions under international law that are so important that they cannot be derogated under any circumstances – these are called *jus cogens* prohibitions or peremptory norms. Crimes under international law, such as genocide, crimes against humanity and war crimes - all crimes within the jurisdiction of the International Criminal Court – and torture, violate *jus cogens* prohibitions.

Resolution 1422, which seeks to prohibit the international community from taking steps to prevent genocide, crimes against humanity and war crimes could facilitate and encourage violations of *jus cogens* prohibitions by providing impunity to an entire class of persons. Therefore, it is invalid and does not bind the International Criminal Court or UN member states.

The Security Council must also act consistently with human rights and international humanitarian law, regardless whether they are characterized as *jus cogens* norms. The promotion and protection of human rights is a primary purpose of the United Nations and, as an organ of the UN, the Security Council has a duty to act consistently with human rights. Statements by the UN Secretary-General and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia confirm that the Security Council and all those participating in UN operations must respect international humanitarian law. Efforts by the UN Security Council to provide impunity for those participating in UN operations will facilitate and encourage violations of human rights and international humanitarian law and, therefore, are clearly outside of its mandate.

Why is the International Criminal Court not bound by this resolution?

When the International Criminal Court receives a request to defer an investigation or prosecution, it must decide what legal effect under the Rome Statute to give to the request. Article 16 states that the Security Council can ‘request’ a deferral from the International Criminal Court, not ‘decide’ or ‘determine’ that a deferral must be given. The use of ‘request’ in Article 16 was deliberate. The Security Council has no power to order the International Criminal Court, an independent international judicial body, to take or cease action.

In making a decision in a relevant case, the International Criminal Court must be convinced that a decision has been taken that would impose a requirement under Article 16 of the Rome Statute – that is, an exceptional request in a particular case for a temporary delay. The request must have also been made in a resolution adopted under Chapter VII of the UN Charter, which can only be invoked if the Security Council has made a determination under Article 39 that there is a threat to international peace and security. No such determination was made before adopting Resolution 1422. The International Criminal Court must also determine whether the request is consistent with the Rome Statute as a whole. As noted above, it seems clear from the drafting history of Article 16 that a request to defer all investigations and prosecutions of any persons not nationals of a state party to the Rome Statute for conduct relating to UN established or authorized operations, without having made individualized determinations that such deferrals are necessary for the Security Council to restore or maintain international peace and security, is inconsistent with that article, as well as the object and purpose of the Rome Statute as a whole.

If a case were ever to arise that fit within Resolution 1422, the International Criminal Court could determine the legal effect of the resolution based solely on whether the nature of the request is one that was intended under Article 16 of the Rome Statute. That article requires that the request be in a resolution adopted under Chapter VII. However, the International Criminal Court also has the power to determine whether the Security Council exceeded its powers under the UN Charter, as an incidental part of its jurisdiction. The International Criminal Court must first be convinced that the Security Council has determined that there is a threat to or breach of international peace and security, and second, that such a threat or breach does actually exist.

Amnesty International intends to urge the International Criminal Court, if a relevant case arises, to determine that Resolution 1422 does not contain a request within the meaning of the Rome Statute, and that it therefore has no relevance in determining whether to open an investigation or a prosecution of a national of a non-state party.

Why are UN member states not bound by this resolution?

While Resolution 1422 makes a request to the International Criminal Court, the resolution “decides” that Member states shall take no action inconsistent with the resolution and “with their international obligations.”

The result of the Security Council's failure to make a determination as to whether there was a threat to international peace and security means that the decisions in Resolution 1422 are not binding decisions under Chapter VII and member states of the United Nations are not obliged to comply with them. Furthermore, it is fully consistent with states' "international obligations" to ensure that people accused of genocide, crimes against humanity and war crimes are investigated and prosecuted. Therefore UN member states should not take any measures to stop the International Criminal Court from investigating and prosecuting these crimes. In the event that the International Criminal Court decides to proceed with an investigation or prosecution of a national of a non-state party to the Rome Statute over acts relating to a UN authorised or established operation, states parties to the Rome Statute would be legally obliged to cooperate with the Court and non-states parties would be acting consistently with their obligations under international law if they also decided to cooperate.

What action does Amnesty International expect Security Council members and other states to take?

Amnesty International urges all 14 other Security Council members (Angola, Bulgaria, Cameroon, China, Chile, France, Germany, Guinea, Mexico, Pakistan, Russian Federation, Spain, Syrian Arab Republic and the United Kingdom) to oppose any attempt by the United States to renew Resolution 1422.

Amnesty International is urging all states to appeal to the Security Council not to renew the request.