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COLLECTION OF LEGAL SCHOLARS OPINIONS
ON THE LEGAL AND POLITICAL IMPLICATIONS OF RES. 1422

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In early July 2002, more than 100 States denounced the legality and/or disagreed with the content of UN Security Council Resolution 1422 (2002). Their Statements are reported in a number of documents of the Coalition for the ICC (CICC) and NGOs, particularly in the Amnesty International's upcoming paper that comprehensively comments on the legal and political implications of the resolution.

On 13 August 2002, the UN Sub-Commission on Human Rights (Geneva) adopted Resolution 2002/4, which opposes the "immunities" purportedly granted under the terms of UNSC 1422.

In September 2002, the Parliamentary Assembly of the Council of Europe and the European Parliament regretted the adoption of Resolution 1422 in their parliamentary resolutions on the ICC respectively approved on 24 and 25 September 2002.

In February 2003, the largest international political grouping of the UN, the Non-Aligned Movement (NAM), pronounced itself at the highest level (Heads of States) with great concern regarding the legality of the resolution.

All these manifestations of will of sovereign States contribute to the formation of an *opinio juris* on the dubious legal foundation of UNSC res. 1422. The pronouncements of international legal scholars are also contributing to the formation of States' position on this subject.

The below collection of excerpts from writings of legal scholars on UNSC res. 1422 is in no way complete or exhaustive, but it attempts to provide the reader with some of the most interesting opinions of experts on this resolution, which is unprecedented in the history of the United Nations and in the practice of international law.

(DDC; New York, April 18, 2003)

In July 2002,

Professor Flavia LATTANZI (Italy), Member of the International Humanitarian Fact-Finding Commission, Geneva Conventions (Geneva) and Professor of International Law at the University Roma III, *inter alia* wrote [N.B. All footnotes are omitted]:

"Concerning this resolution [1422], it must be stressed that it was the result of a compromise that led to the conclusion that States are not obliged to investigate and prosecute international crimes committed by peacekeepers of Non-States Parties to the ICC Statute. Yet, the resolution does not respect the specific functions attributed by the UN Charter to the Security Council. Therefore, it is legitimate for States to contest the legality of this resolution, as correctly pointed out by Canada in the open sessions of the Security Council on 10 July 2003 and of the Preparatory Commission for the ICC.

Article 16 of the Rome Statute does not provide for what is affirmed in paragraph 1 of the res. 1422, namely that this resolution is consistent with article 16. Indeed, if the resolution would have been really in conformity with the Rome Statute, why was it necessary to repeat it in its text? The truth is that article 16 simply provides that "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions". [This language applies to specific situations in which an investigation or a prosecution could jeopardize the success of a specific peace-negotiation conducted by the Council or by a third party as a reaction to a concrete threat to the peace, breach of the peace or act of aggression.]

This is profoundly different than to establish that "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". [Here, the intent is to suspend the ICC jurisdiction over an entire class of people, regardless of whether or not their investigation or prosecution would have negative effects on a concrete peace-process, as envisaged in article 16]."

[...]

"Resolution 1422 is ultra vires [not founded in law] also under the inherent norms of the United Nations Charter system. In fact, the Council adopted the resolution pretending to act "under Chapter VII of the Charter of the United Nations", but it did so in the absence of the preventive finding that a threat to the peace, a breach to the peace or an act of aggression exists under article 39 of the UN Charter. Such a finding is mandatory to trigger the Council enforcement powers under Chapter VII. The absence of such a finding is unprecedented in the 57 years of practice of the Security Council itself! Even though in other circumstances and resolutions the Council might have expanded beyond article 39 its finding that a threat to peace actually existed in a given case, as indeed in the Lockerbie case, the Council always had the decency to justify its interventions through the preventive finding, as mandated by article 39 [...]. Here, instead, the objective finding of the existence of - at least - a threat to the peace is replaced by an "observation" that "operations established or authorized by the United

Nations Security Council are deployed to maintain or restore international peace and security", followed by an assessment that "it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council". But this is absolutely obvious, and there is no finding of a threat to the peace in this language. At the end of day, how could have the Council sustained the untenable position that the possibility of a fair trial for a peacekeeper would have represented a threat to the peace?

Even more: besides the lack of the necessary determination that a threat to the peace existed under art. 39, the intervention of the Council - aimed at maintaining or restoring international peace and security under the Charter - must always target a concrete and imminent situation, as stated in Chapter VII of the Charter. Such an intervention cannot be decided on the basis of an abstract possibility of a general and future nature, as it is portrayed in resolution 1422. And it cannot be even preventively planned that, every July 1st in the years to come "for as long as may be necessary", such an intervention should be renewed! The Security Council pretends to condition its future action without any reasonable motive!"

Cf. pp. 1372-1374, F. LATTANZI, La Corte penale internazionale: una sfida per le giurisdizioni degli Stati, in *Diritto Pubblico Comparato ed Europeo*, 2002 - III (1365-1382).

In July and October 2002,

Dr. Kai AMBOS (Germany), senior fellow of the Max Planck Institute for International and Comparative Criminal Law at Univ. of Freiburg and expert member of the working group set up by the German Ministry of Justice that drafted the German Code of International Criminal Law (*Völkerstrafgesetzbuch*), wrote:

"There was a principle, which read: 'All persons are equal before the law.' It is this achievement of the French revolution with its quest for 'égalité,' which is today enshrined in international human rights treaties and national constitutional law, including the American Constitution. This principle no longer seems to apply since the passage of Security Council Resolution 1422(2002) of July 12th, at least not in international criminal law. It now reads:

'All persons are equal before the law, with the exception of those that are citizens of the United States of America.' That the principle was set aside at the same time for other non-treaty parties of the International Criminal Court (ICC), above all China, Russia and India, does not improve the matter. They are joyful beneficiaries of the US initiative." [...]

"Resolution 1422 does not only re-interpret the ICC-Statute, in particular its Article 16, but it in fact turns the past logic of peacekeeping measures in the UN system upside down. If the ICC could, so far, be understood - by proponents as well as opponents - as a

peacekeeping measure, because, according to the Statute's preamble, it shall prevent the threat to peace and security of mankind by grave international crimes, it now takes on a whole new nature. In light of the Council's resolution, the Court becomes itself a threat to peace, because only under this condition can the Security Council adopt a resolution under Chapter VII of the UN-Charter. Let us pause to assess this truly grotesque logic: a resolution as it was adopted by the Security Council on July 12th presupposes that the ICC must be labelled as a threat to peace, which can only be averted by granting immunity before the Court!" [...]

"The damage to public international law and international relations caused by the Resolution of July 12th is not yet foreseeable, as the discussion has only just begun. It is, nevertheless, clear that resolution 1422 creates a two-tier system for international criminal law: it draws a distinction between those states that subject their national soldiers in UN Peacekeeping missions to the jurisdiction of the new ICC, and those states that enjoy immunity from this jurisdiction. But how can this discrimination be reconciled with a sense of fundamental justice if, for instance, a German soldier can be brought before the ICC for alleged war crimes - possibly engaged in the same combat mission - while his American colleague enjoys immunity? How will this affect the motivation and the mutual solidarity in UN Peacekeeping missions? How are we to assess the legitimacy of UN Peacekeeping operations that are tainted by the stain of immunity from ICC-jurisdiction?"

And, how reliably can the Security Council in the future decide on Peacekeeping measures, if, in order to do so effectively, it must regularly dismantle mankind's (so far) grandest achievement in the fight against impunity from the gravest human rights violations?"

Cf. p. 3, K. AMBOS, International Criminal Law has Lost its Innocence, in German Law Journal, No.10, 1 October 2002 (obtainable from: <http://www.germanlawjournal.com>), English translation by Dr. Frank Schorkopf of an article that appeared in Süddeutsche Zeitung, 16 July 2002, at 13.

In October 2002,

Carsten STAHN of New York University (NYU) School of Law and fellow of the Max Planck Institute for the Advancement of Science, wrote on the European Journal of International Law:

"[...] 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."

Cf. p. 103, C. STAHN, *The Ambiguities of Security Council Resolution 1422 (2002)*, in *European Journal of International Law*, 2003-Vol. 1 (pp. 85-103) (obtained from <http://www.ejil.org/journal>).

In January-March 2003,

Dr. Claus KRESS (Germany) of the Department of International Criminal Law at the University of Cologne, Germany, wrote [UNPUBLISHED-DRAFT. BEFORE FURTHER QUOTING, PLEASE CHECK WITH THE AUTHOR]:

"Resolution 1422 and International Law

On 31 December 2000, the signature of the ICC Statute by the then President Clinton gave reason to hope that a relationship of friendly co-existence between the ICC and the U.S.A. could at least be established. But the opposition of the U.S.A hardened under the Bush administration which took the extraordinary step to "unsign" the ICC Statute. Shortly afterwards, in June 2002, the U.S. government took the issue before the UN Security Council. The U.S.A. announced that it would veto the extension of the expiring mandate for the multinational Stabilization Force in Bosnia and, beyond that, the renewal of all ongoing and the establishment of any new peace-keeping operations, unless American soldiers were exempted from the jurisdiction of the ICC. The U.S. delegation based its claim on Article 16 of the ICC Statute which reads as follows: [...]

The U.S. initiative provoked the overwhelming opposition of those States represented in the Preparatory Commission for the ICC which, at the time, held its final session. The general mood was well captured in the following words of the remarkable letter which UN Secretary General Kofi Annan wrote to U.S. Secretary of State, Colin Powell:

"[T]he method suggested in the proposal [...] flies in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty [...]. My concern is

[...] that the Council risks being discredited [...]. I am confident that you share my view that it is not in our collective interest to see the Council's authority undermined."

A great many States reiterated their opposition against the U.S. proposal in an open debate before the Security Council on 10 July 2002. The ambassador of Jordan to the UN expressed his disbelief by asking "How can the Security Council adopt a Chapter VII resolution on the Court, when the latter cannot by any stretch of the imagination, be considered a threat to international peace and security?" and the Canadian ambassador to the UN indicated that the "adoption of the resolutions circulating could place [Canada] in the unprecedented position of having to examine the legality of a Security Council resolution."

In spite of this almost unanimous reaction, the U.S.A. insisted on the essence of its proposal and upheld its veto threat. Under this threat, and in light of the support which the U.S.A., at the crucial juncture of the tense negotiations, received by the United Kingdom, the other members of the Security Council finally gave in and Resolution 1422 was adopted.

The reactions were - somewhat surprisingly - mixed. The UN Secretary General declared to be "deeply gratified" about the consensus which had finally emerged within the Security Council. Could this statement not easily be reconciled with the previous letter, the characterization of Resolution 1422 as a "positive compromise" by the then Danish presidency of the European Union remains a mystery in light of the position adopted by the overwhelming majority of the Member States over the preceding days. In sharp contrast with the statement issued by the EU presidency, New Zealand, South Africa, Brazil and Canada, had - immediately before the vote in the Security Council - questioned the legitimacy of the proposed resolution and had asked the members of the Security Council to reject it. The Convenor of the Coalition of the International Criminal Court, a network of more than 1.000 non-governmental organizations, used much stronger language to voice his dissatisfaction:

"The Security Council was damaged because it acted beyond its powers. Several Security Council members party to the Rome Statute shamed themselves by ignoring the UN Charter, international law and the International Criminal Court treaty."

Very much in the same vein went the following excerpt of a statement issued by the Convenor of the International Law and Human Rights Program of Parliamentarians for Global Action, an association of 1350 legislators from 103 countries:

"The Council's actions could be detrimental not only to the ICC and international law but more importantly to the Council's own legitimacy as it has exceeded its mandate by unlawfully amending a multilateral treaty." As is indicated by these reactions: With the adoption of Resolution 1422 the U.S.A. have, in essence, imposed its will: The deferral of investigation and prosecution goes beyond peace-keeping operations and covers even United Nations mandated peace-enforcement operations. And if the Security Council acts in accordance with its "expressed intention" to renew the deferral each 1 July, the U.S.A.

will, in fact, have reached its goal to revise the ICC Statute. The price to pay for this "victory" would, however, be significant - the credibility of the UN Security Council would be seriously damaged. The highly debatable legality of Resolution 1422 is the first reason for this.

In that it refers to a "resolution adopted under Chapter VII of the Charter of the United Nations", Article 16 of the ICC Statute alludes to the conditions under which the Security Council may decide on a deferral. This reference to the powers of the Security Council under the United Nations Charter is necessary, as the ICC Statute could not, by itself, limit those powers. It is interesting to note that the negotiations on Article 16 reveal a clear understanding of the nature of these powers. The commonly shared assumption was that the Security Council might conclude that, on the facts of an individual situation, a deferral under Article 16 was called for in the interest of international peace and security. The almost paradigmatic scenario, which the negotiators had in mind, was the need to preserve the dynamics of ongoing peace talks to end an armed conflict. Resolution 1422 has nothing to do, though, with the envisaged case-by-case approach. Rather, its deferral covers every ongoing and possible future United Nations mandated operations within the period in question.

It is highly doubtful whether, contrary to the assumption underlying Article 16 of the ICC Statute, such a "general deferral" can be seen as a measure necessary to "maintain or restore international peace and security" within the meaning of Article 39 of the United Nations Charter. Certainly, the abstract possibility of international investigations in cases of alleged customary crimes committed by peacekeepers, cannot be seen as the threat to international peace and security, to which the Security Council felt compelled to react. In its previous practice, the Security Council, quite to the contrary, considered the possibility of international investigations into alleged crimes under international law as a tool to restore international peace. Arguably, the U.S. withdrawal from a certain peacekeeping operation could be seen as a threat to international peace. But wide as the margin of appreciation of the Council may be, such an assessment would, in any event, have presupposed the evaluation of the concrete facts; Resolution 1422, instead, deals with the issue in a sweeping manner. If, for example, the Member States of the European Union were prepared to shoulder the Bosnian mission on their own, it would be difficult to see the withdrawal of the U.S.A. as a threat to the international peace. One might point to the fact that the U.S.A. did not only threaten to withdraw their forces but to veto this operation irrespective of their own involvement. But even then, a European peacekeeping operation not mandated by a resolution of the Security Council but based solely on the Bosnian consent remained a viable option.

On the (questionable) assumption that the U.S. veto threat, indeed, led to a situation under Art. 39 of the UN Charter, another question cannot be avoided: May a permanent Member of the Security Council make use of its veto right so as to create a threat to international peace and security? It is very hard to avoid the conclusion that the announced use of the U.S. veto power would have been the abuse of a competence. Whether the law of the UN Charter prohibits such an abuse, is an open question because the International Court of Justice has not yet had the

opportunity to specify whether a doctrine of abuse of power (détournement de compétence) can at all, and if yes, in what concrete manner be applied to the voting within the Security Council. In any event, it adds weight to the doubts as regards the legality of Resolution 1422 that the alleged threat to international peace and security can, if at all, be explained only as the result of the use of the veto power."

Resolution 1422 and International Politics

The adoption of Resolution 1422 does not only raise serious legal questions, it also constitutes an illuminating, though not very encouraging, case study in current world politics. This true, first, for the role of the U.S.A. in the contemporary world: By having the Security Council adopt Resolution 1422, the "lonely superpower" imposed its will against the expressed and principled opinion of an overwhelming majority of States. One regrets to say that this successful exercise in power politics amounted to the first political abuse of the ICC by precisely that State which explains its opposition to the ICC by its "vulnerability for political abuse". Upon reflection, it appears doubtful whether the U.S. government did itself a favour by steering this course: At the time of writing, the weapon crisis on Iraq dramatically demonstrates that the authority of Security Council resolutions under Chapter VII of the UN Charter is an extremely precious good not just for weak States but also for the U.S.A. In this crisis, the legitimacy of the U.S. position relies on the authority of such resolutions. It is a principled position to insist that binding resolutions emanating from the organ, which is primarily responsible for the maintenance of international peace, must be respected and, in the absence of such respect, ultimately be enforced. This position becomes open to argument, however, if the Security Council, by its own practice, casts doubt on its determination to scrupulously respect its own legal framework, and if the Council yields to the abusive threat of a permanent member use its veto power. The U.S.A. would thus [have] strengthen their credibility in the Iraq crisis considerably if they did not push for a renewal of Resolution 1422 in July 2003.

The adoption of Resolution 1422 illustrates, second, how much the inexistence of a strong and coherent foreign policy of the European Union can favour the "loneliness" of the U.S.A. The latter would have got in serious troubles to push its draft resolution through the Security Council if Europe - together with New Zealand, South Africa, Brazil and Canada - had stood firm to its common position "to preserve the integrity of the ICC Statute" and if Europe had insisted to act within the letter and spirit of the UN Charter of the UN.

But due to the decision of the United Kingdom to support the U.S.A, it was impossible to form and to maintain such a united stand. Even in light of the limits of a "European foreign policy by consensus", it can only be deplored that the acting Danish presidency could not even refrain from praising Resolution 1422 as a "positive compromise". The adoption of Resolution 1422 and the reaction hereto, thus, drastically underlines the lack of a European foreign policy with regard to crucial issues.

[...]

The International Criminal Court, the U.S.A. and Europe - An Outlook

After a surprisingly short lapse of time, the ICC Statute has entered into force. Immediately afterwards, though, the new institution has got into the stormy waters of the contemporary world disorder. As long as Resolution 1422 is in place, the Security Council and the ICC will not form two complementary pillars of a strengthened international legal order. And Resolution 1422 is not even the end of the story: The current political leadership of the U.S.A. has enacted the so-called American Servicemembers Protection Act which, contrary to the UN Charter, includes the authorization to use armed force to liberate any U.S. soldier detained by or on the request by the ICC; an authorization which, above all, targets the Netherlands - the ICC host State and, after all, an ally of the U.S.A. Furthermore, the U.S. administration has decided to seek bilateral agreements from as many States Parties to the ICC Statute as possible, again to exempt U.S. personnel from the ICC jurisdiction.

By this series of decisions, the political leadership of the U.S.A. has escalated the controversy with its European allies over the ICC. This is all the more regrettable as America and Europe do not differ fundamentally on international criminal justice: Europe has supported the U.S.A. when this State felt the need to establish the international criminal tribunals for the former Yugoslavia and for Rwanda. And with respect to the now established system of permanent international criminal justice, all governments of the European Union share the American view that the ICC must neither be turned into a political forum nor be trivialized as a Tribunal to judge military border-line decisions made in good faith in the heat of the battle. As much as one would wish that the U.S.A. would help from within the ICC system to realize this common understanding, their sovereign decision to "wait and see the ICC working" must be respected.

It is not acceptable, however, to use the Security Council to curtail competences which have been entrusted to the ICC in consonance with international law. In July 2002, the European Union has failed to prevent such an abuse. One can only hope that a Europe, undivided between "old" and "new", will - together with others - speak up clearly against the renewal of Resolution 1422 in July 2003 to have the ICC rise above the assault on its effectiveness and credibility and to degrade Resolution 1422 to an isolated incident of bad practice, devoid of any precedential value.

N.B. This writing of Dr. C. KRESS will soon appear (2003) in legal publication(s) in English and Arabic.