

THE SECRETARY GENERAL

3 July 2002

His Excellency
Mr. Colin L. Powell
Secretary of State
of the United States of America, Washington, D.C.

Excellency,

I am writing to you because I am seriously concerned at the development in the Security Council with respect to the extension of the United Nations Mission in Bosnia Herzegovina (UNMIBH) and the issue that the United States has raised in that connection following the entry into force on 1 July 2002 of the Rome Statute of the International Criminal Court (ICC).

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. Any decision to this effect is subject to the necessary majority in the Council.

I think that I can state confidently that in the history of the United Nations, and certainly during the period that I have worked for the Organization, no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC. The issue that the United States is raising in the Council is therefore highly improbable with respect to United Nations peacekeeping operations. At the same time, the whole system of United Nations peacekeeping operations is being put at risk.

It is of course for the United States to decide what is in its interest. But let me offer the following thoughts.

First, the establishment of the ICC is considered by many, including your closest allies, as a major achievement in our efforts to address the impunity that is also a major concern for the United States. The development of this matter is followed by many and, in particular, the States that have ratified the Rome Statute and by non-governmental organizations. I fear that the reactions against any attempts at, as they perceive it, undermining the Rome Statute will be very strong.

Secondly, the method suggested in the proposal, and in particular its operative paragraph 2, flies in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty.

My concern is that the only real result that an adoption by the Council of the proposal would produce - since the substantive issue is moot - is that the Council risks being discredited. The purpose of this letter is to ask you to consider this aspect. I am confident that you share my view that it is not in our collective interest to see the Council's authority undermined.

The members of the Council do realize - as indeed I do - that the United States has a problem to which a satisfactory solution must be found. I am also aware that this may take some time. As a matter of fact, on 30 June, I pleaded with the members of the Council to give themselves sufficient time find such a solution.

In order to create additional time to solve the overarching issue, may I suggest that the United States at the present juncture relies on the fact that the jurisdiction of the ICC, as a matter of law, is overtaken by the jurisdiction of the International Tribunal for the former Yugoslavia. In reality, the situation with respect to international criminal jurisdiction in the territory of the former Socialist Federal Republic of Yugoslavia is the same after 1 July 2002, as before that date.

One solution may be for the Security Council to reconsider the extension of UNMIBH as proposed on 30 June, adding this time a preambular paragraph, in which the Council notes that the International Tribunal for the former Yugoslavia, which is established under Chapter VII of the Charter of the United Nations as a subsidiary organ of the Security Council, has primacy to exercise, on behalf of the international community, international jurisdiction over genocide, war crimes and crimes against humanity committed in the territory of the former Socialist Federal Republic of Yugoslavia.

However, there might also be other solutions to avoid that the Council is precipitated into adopting a resolution, the effects of which may soon be deeply regretted by all.

Please accept, Excellency, the assurances of my highest consideration.

-Kofi A. Annan