Jurisdiction over Peacekeeping Forces Before and After the Establishment of the International Criminal Court and the Impacts of Security Council Resolution 1422 and So-Called “Art.98 Agreements”

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws (LL.M.) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws (LL.M.) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.
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I. Introduction

This essay will focus on the question of who has jurisdiction over peacekeeping forces in the case that these forces commit crimes.

Peacekeeping forces are the military personnel contributed by the UN member states to a peacekeeping operation. A peacekeeping operation has come to be defined as an operation involving military personnel, but without enforcement powers, undertaken by the United Nations to help maintain or restore international peace and security in areas of international conflict. Peacekeeping is not explicitly provided for in the UN Charter. However, since 1945, peacekeeping has been the technique most frequently used by and associated with the UN to bring conflicts to an end and establish peace. The power to establish peacekeeping operations is derived from the powers of the Security Council to deal with actual and potential situations threatening the international peace under Chapter VI (Arts 33, 36) and VII (Arts 39, 40) of the UN Charter, respectively, in conjunction with its powers to establish subsidiary organs (Art 29) or to entrust the Secretary-General with certain functions (Art 98).

The legal rules governing the establishment, functioning, administration and status of these operations are very complex. This paper will analyse the rules governing jurisdiction before and after the establishment of the International Criminal Court. Particular attention will be paid to the validity of Security Council Resolution 1422 adopted on 12 July 2002, requesting the International Criminal Court (ICC) to refrain from initiating investigations or proceedings related to peacekeepers of non-states parties to the Rome Statute, while reaffirming its intention to ‘renew the request .... under the same conditions each 1 July for further 12-month periods ...’. Resolution 1422 has been renewed through the adoption of Resolution 1487 on 12 June 2003. It will be discussed whether Resolution 1422 complies with the relevant provisions of the Rome Statute. Moreover this paper will consider

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1 O Ramsbotham and T Woodhouse Encyclopedia of International Peacekeeping Operations (Santa Barbara/Denver/Oxford, 1999), XII.
2 Ibid at XI.
3 Ibid.
whether the Security Council exceeded its powers under the UN Charter or possible extra-Charter boundaries by adopting Resolution 1422.

In the wake of the enactment of the American Servicemembers’ Protection Act (ASPA), the US has concluded several bilateral agreements with the aim to exempt US military and civilian personnel – including peacekeepers – from the jurisdiction of the ICC and to maintain exclusive jurisdiction over ICC crimes for US national courts. The last part of this paper examines the conformity of these so called ‘Art 98-Agreements’ with the Rome Statute and Customary International Law.

II. Jurisdiction over Peacekeepers before the Establishment of the ICC

Before the establishment of the International Criminal Court, the question of criminal jurisdiction over members of peacekeeping forces was regulated by agreement as part of a whole system dealing on the one hand with the relationship between the UN and the states contributing contingents to the UN peacekeeping operations and on the other hand with the relationship between the UN and the host state. These agreements were in some cases formal written agreements. There is now an established Model Agreement system to which the parties can refer which gives sufficient content to any informal agreement to be construed in the absence of written agreements.7 According to these Model Agreements, the UN peacekeeping forces become organs of the UN under their exclusive command.8 However, these agreements exempt the members of the peacekeeping forces, to a certain extent, from the criminal jurisdiction of the host state and reserve criminal jurisdiction for the troop contributing states.9

One reason for this is that states see criminal jurisdiction over their nationals as an aspect of their hallowed sovereignty, especially when those nationals are outside of the state’s borders and therefore more vulnerable to claims of criminal jurisdiction by other states or entities.10

A. Model Status-of-Forces Agreement for Peacekeeping Operations (SOFA)

7 Bothe and Dörschel, above n 4, at XVI.
8 Ibid at XV.
10 Ibid.
The Model Status-of-Forces Agreement for Peacekeeping Operations\(^{11}\) (also called Status-of-Mission Agreement) deals with the relationship between the UN and the host country in which the peacekeeping operation takes place. The Model Agreement is based upon established practice and draws extensively upon earlier and current agreements.\(^{12}\) It is intended to serve as a basis for the drafting of individual agreements to be concluded between the UN and countries on whose territory peacekeeping operations are deployed. The parties may therefore agree upon modifications in each particular case.\(^{13}\)

The Status-of-Forces Agreement affirms the international nature of the UN peacekeeping operation as a subsidiary organ of the UN and defines the privileges and immunities, rights and facilities as well as the duties of the UN peacekeeping operation and its members.

Paragraphs 47 (b) of the Annex to the Report of the Secretary-General deals with the issue of jurisdiction. According to paragraph 47 (b):

> Military members of the military component of the United Nations peacekeeping 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].

Thus, in the case of military personnel, the Status-of-Forces Agreement accords exclusive criminal jurisdiction to the participating state.

The Status-of-Forces Agreement states that the Convention on the Privileges and Immunities of the UN applies to the UN peacekeeping operation, and that military observers, UN civilian police and civilian personnel are considered ‘experts’ on missions within the meaning of Art VI of the Convention.\(^{14}\) The Convention accords to such ‘experts’ ‘in respect of words spoken or written or acts done by them in the course of the performance of their mission, immunity from legal process of any


\(^{12}\) Ibid at para.1.

\(^{13}\) Ibid.

\(^{14}\) Ibid at para.26.
kind\(^\text{15}\). This means all personnel (military and civilian) on a UN peacekeeping operation are exempted from legal prosecution for crimes committed within the course of their duties.

In the case that the host state is not a party to the UN Convention on Privileges and Immunities, the Model Status-of-Forces Agreement includes alternative language that mirrors the Convention’s provisions. Paragraph 46 states that:

> All members of the United Nations peacekeeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue even after they cease to be members or employed by the United Nations peacekeeping operation and after the expiration of the other provisions of the present Agreement.

It is worth noting that in the case of civilian personnel who commit crimes, the Status-of-Forces Agreement leaves open the possibility of criminal proceedings by the host country, subject to immunity granted by the Convention on Privileges and Immunities. Paragraph 47 (a) sets out:

> If the accused is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted.

In other words, although a participating state has exclusive jurisdiction for all crimes committed by military personnel and for crimes committed by civilian personnel in the performance of duties (as they enjoy immunity), a person belonging to the civilian personnel and accused of committing a crime outside of his or her duties will not receive immunity from legal process by the host nation.

Moreover the Model Status of Forces Agreement provides in paragraph 48 that:

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\(^{15}\) Convention on the Privileges and Immunities of the United Nations, UN Doc. A/64 of 1 July 1946, Section 22, Art VI.
The Secretary General of the United Nations will obtain assurances from Governments of participating States that they will be prepared to exercise jurisdiction with respect to crimes or offences which may be committed by members of their national contingents serving with the peacekeeping operation.

This last provision was inserted in the Model Agreement in order to cover all issues pertaining to this section. It should be seen in the context of the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations peacekeeping operations which is discussed below.

B. Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations (Participation Agreement)

As the Status-of-Forces Agreement deals only with the relationship between the UN and the host state, there is another Model Agreement meant to serve as a basis for the drafting of individual agreements to be concluded between the UN and countries contributing personnel and equipment to a UN peacekeeping operation. As with the Status-of-Forces Agreement, the content of the Participation Agreement is based on established practice and draws extensively upon current agreements between the UN and contributing states.16

Art. VIII of the Participation Agreement deals with the issue of jurisdiction. Paragraph 24 states that:

Questions relating to allegations of criminal offence and civil liability of personnel provided by [the Participating State] shall be settled in accordance with procedures provided for in the Status Agreement.

Paragraph 25 sets out that:

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[The Participating State] agrees to exercise jurisdiction with respect to crimes and 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.

Thus the Participation Agreement confirms the arrangements provided for in the Model Status-of-Forces Agreement, leaving it in general to the state of nationality of a peacekeeper to prosecute crimes committed during a peacekeeping operation.

C. Criticism on these Arrangements

However, these arrangements recorded in the Model Agreements have been criticised.

1. Variations in National Criminal Laws

First, the criminal law of states contributing troops may vary. An example of the problems encountered in the application of national criminal law to offences committed by peacekeepers is provided by an Italian case.

Italy participated with its own contingent (Operation IBIS-ITALFOR) in both UNITAF (Unified Task Force) and UNOSOM II (United Nations Operation in Somalia II) in Somalia. After publication of alleged maltreatment and violence to Somali citizens by Italian soldiers, the competent authorities commenced investigations. The question arose which law could be applied. A specific legal regime for operations of the kind under examination, namely peacekeeping operations, does not exist in Italy. The Military Penal Code of War (Codice Penale Militare di Guerra- c.p.m.g) contains a title which deals with crimes committed by military persons against civilian and military enemies. According to Art 9 of the Military Penal Code of War the provisions of the Code are extended to Italian military contingents abroad. However, not the Military Penal Code of War but the Military Penal Code of

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18 Ibid at 376.
19 Ibid.
Peace has been deemed applicable to peacekeeping operations. Under the Military Penal Code of Peace, however, violation, torture and maltreatment against civilians are not punishable offences.\(^\text{20}\) This case reveals that the operations directed and promoted by the UN cannot be easily framed within the national criminal law of war of certain states.

Secondly, for various reasons, individual states may not be willing or able to punish peacekeepers' crimes that should or could be punished.\(^\text{21}\) But it is not acceptable that crimes committed by peacekeepers remain unpunished. Peacekeepers purportedly act in the name of international justice.\(^\text{22}\) Consequently, they themselves must be held to the highest standards of justice. This is in particular the case if international crimes are at stake.

Another problem is that the unwillingness or inability to prosecute certain peacekeepers may also result in an inconsistency in the prosecution of similar offences committed by the members of a certain peacekeeping operation who are of different nationality. Such an inconsistency in the prosecution seems to be particularly intolerable if members of a peacekeeping operation commit crimes of international concern such as war crimes or crimes against humanity.

### 2. Responsibility of the UN for the Peacekeeping Forces

Moreover, it appears illogical that the exercise of criminal jurisdiction is left in general to the troop-contributing states though the UN is responsible for the troops under her command.

By the mid-1990s, the excesses committed by UN forces in situations of armed conflict\(^\text{23}\) and the extent of personal injury and property damage caused by the troops in their ordinary operational activities, lead the UN to reaffirm the applicability of international humanitarian law to UN forces and redefine the international responsibility of the Organisation.\(^\text{24}\)

The internal review of the scope of UN responsibility for peacekeeping operations prompted the Secretary-General to adopt a Bulletin on the Observance by United Nations Forces of International

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\(^{20}\) Ibid.
\(^{21}\) Zwanenburg, above n 9, at 128.
\(^{22}\) Ibid at 142.
Humanitarian Law and the establishment of principles of third-party liability of the Organisation.\textsuperscript{25} The Secretary-General's Bulletin is binding upon members of UN forces in the same way as are all other instructions issued by the Secretary-General in his capacity as ‘commander in chief’ of UN operations.\textsuperscript{26}

However, it is not the UN, but the troop-contributing state, which is obliged to prosecute violations of international humanitarian law according to its national criminal law. A conviction based on national criminal law must be regarded at the same time as a sanction for the violation of international humanitarian law.\textsuperscript{27} As the UN is responsible for the UN peacekeeping operations under international law, it appears contradictory that the troop contributing states bear the responsibility for carrying out the obligations under international humanitarian law and to prosecuting the offenders.\textsuperscript{28}

It could be argued that the UN does not have any criminal courts and is therefore not able to prosecute offenders. However, the objection that the UN is lacking an apparatus to sanction violations of international humanitarian law lost significance since the establishment of the ICTY and the ICTR\textsuperscript{29} and, recently, the International Criminal Court.

D. Conclusion

Thus, the established arrangements have certain disadvantages with respect to the jurisdiction over peacekeeping forces. They cannot ensure an effective and equal prosecution of offences committed by peacekeepers. Furthermore it seems to be contradictory that the exercise of criminal jurisdiction is left in general to the troop contributing states although the UN remains responsible for the troops under her command.

III. Criminal Jurisdiction after the Establishment of the ICC

The following part of this essay will discuss what has changed after the Rome Statute with regard to criminal jurisdiction over peacekeeping forces.

\textsuperscript{26} Shraga, above n 24, at 409.
\textsuperscript{27} H-P Gasser ‘Die Anwendbarkeit des humanitären Völkerrechts auf militärische Operationen der Vereinten Nationen’ (1994) 4 Schweizerische Zeitschrift für internationales und europäisches Recht 453, fn.35.
\textsuperscript{28} Ibid at 454.
\textsuperscript{29} Ibid at 456.
A. Background

As shown above, the traditional practice of reserving criminal jurisdiction over members of peacekeeping operations in general for troop contributing states has certain disadvantages. The drafting of the International Criminal Court provided an opportunity to re-evaluate this practice.

In July 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted a Statute for such a court. This was the outcome of a process that started 50 years ago, when the United Nations General Assembly recognised the need for an international court to prosecute genocidal acts.\(^{30}\) However, the idea was put on hold until 1989. In that year the General Assembly requested the International Law Commission (ILC) to resume work on the Court.\(^{31}\) The ILC completed a Draft Statute in 1994.\(^{32}\) This Draft Statute was revised by a General Assembly Ad Hoc Committee on the Establishment of an International Criminal Court and later by the Preparatory Committee (Prep Com) on the Establishment of an International Criminal Court. Both the work of the ILC and the Committees formed the basis for the negotiations at the Rome Conference.

The final text of the Rome Statute of the International Criminal Court\(^{33}\) was adopted with a vote of 120 for, 7 against\(^{34}\) and 21 abstentions. One of the states that voted against the Rome Statute was the United States.

The Rome Statute entered into force on 1 July 2002.

B. Jurisdiction under the Rome Statute

Looking back to the Rome Conference, jurisdiction appears to have been the most important, politically the most difficult and therefore the most contentious question of the negotiations as a whole.\(^{35}\)


\(^{34}\) Besides the United States, China, Libya, Iraq, Israel, Qatar and Yemen voted in opposition to the Rome Treaty.

\(^{35}\) H-P Kaul and C Kreß ‘Jurisdiction and Cooperation in the Statute of the International Criminal Court:
The ICC has jurisdiction to try individuals – but not states – for the most serious crimes of international concern: genocide, crimes against humanity, war crimes and possibly aggression if the latter can be satisfactorily defined at a later date.

The negotiations at the Rome Conference on the question of jurisdiction lead to a jurisdictional regime mainly consisting of the following four elements:

- The precondition for the ‘normal’ complementary jurisdiction of the Court to apply is that either the territorial state or the state of nationality of the suspect is a party to the Statute.\(^{36}\)

- The transitional rule in Art 124 gives states parties, by way of exception to the ordinary rule, the possibility of excluding the prosecution of war crimes committed on their territory or by their nationals for seven years following their accession to the Statute. Such a ‘partial withdrawal’ from the Statute can only be repeated under very narrowly defined circumstances since the transitional provision is linked to the strict conditions for amendments to the Statute.

- In the case of non-state parties on whose territory or by whose nationals crimes under the Rome Statute have been committed, the jurisdiction of the Court may also be based on their acceptance expressed by a special declaration.\(^{37}\)

- Notwithstanding the above mentioned hypotheses, the Court has jurisdiction when the Security Council, acting under Chapter VII of the UN Charter, refers a country situation to it in which crimes under the Rome Statute are presumed to have been committed on a large scale.\(^{38}\) In such a case, it does not matter whether the state concerned is a party to the Statute or not.

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\(^{36}\) Art 12 (2) of the Rome Statute.

\(^{37}\) Art 12 (3) of the Rome Statute.

\(^{38}\) Art 13 (b) of the Rome Statute.
To sum up, the ‘normal’ regime is one of jurisdiction based on an alternative application of the criteria of territoriality and nationality.\(^{39}\) This normal regime is modified by the possibility of opting-out of the jurisdiction regulated in Art 124 and by the jurisdiction triggered by the Security Council. However, it is important to note that the actual exercise of jurisdiction under the ‘normal regime’ (Art 12 (2) of the Rome Statute) is severely restricted by subsequent provisions of the Rome Statute, which are intended to assure that primacy of jurisdiction is retained either by the territorial sovereign or by the state of nationality of the accused unless that state is ‘unwilling or unable genuinely to carry out the investigation or prosecution’.\(^{40}\)

There is no particular provision dealing with the issue of jurisdiction over peacekeeping forces. However, peacekeepers are subject to the jurisdiction of the ICC under the same conditions as any other person. The approach reflected in the Statute is clearly that the ICC has jurisdiction over peacekeepers if they commit crimes under the Statute on the territory of a contracting party or are nationals of a contracting party.\(^{41}\)

C. US Objections with Regard to the Establishment of an International Criminal Court

One of the main arguments adduced by the United States for rejection of the Rome Statute was the fear that US soldiers participating in peacekeeping operations might be subject to politicised prosecutions before the Court.\(^{42}\) Since the beginning of the negotiations, the main goal of US negotiators has been to seek a guarantee that US military personnel participating in peacekeeping operations be exempted from prosecution by the ICC before the United States becomes a party to the treaty.\(^{43}\) US officials criticised that the Statute purports to establish an arrangement whereby US armed forces operating overseas – namely peacekeepers – could conceivably be prosecuted by the ICC even if the United States had not agreed to be bound by the treaty. State officials argued that because the

\(^{39}\) Kaul and Kreß, above n 35, at 157.
\(^{40}\) Art 17 of the Rome Statute.
\(^{42}\) See eg the Statement by Bill Richardson, United States Ambassador to the UN, to the Rome Conference at <http://www.un.org/icc/speeches/617usa.htm>.
United States is expected to intervene in humanitarian crisis around the world, US soldiers would be particularly vulnerable to being rendered subject to the jurisdiction of the ICC.\textsuperscript{44}

Therefore the United States tried to implement a requirement of consent by the state of nationality of the accused as a key condition for the court’s jurisdiction if the accused is acting under the overall direction of a non-party state.\textsuperscript{45} The overwhelming majority of states, however, could not agree to requiring the consent of the state of nationality of the suspect as a prerequisite for the court’s jurisdiction as, in their view, it would paralyse the court.\textsuperscript{46}

Though the United States signed the Rome Treaty on 31 December 2000, its purpose, as expressed by former president Clinton, was ‘to be in a position to influence the evolution of the court’.\textsuperscript{47} While participating and negotiating at the ICC Preparatory Commission’s Sessions, the United States aimed to insulate itself from the effects of the Rome Treaty.\textsuperscript{48} President Bush effectively renounced the signature on 6 May 2002, by declaring that the US has no intention of ratifying it.\textsuperscript{49}

In this context, it is worth noting that the US, as the sole remaining superpower, is often called upon to execute a Security Council Mandate and is therefore crucial to multinational peacekeeping efforts.\textsuperscript{50} A considerable number of forces to the UN peacekeeping missions are contributed by the United States whose troops also play a major role in operations carried out by regional organisations such as SFOR in the former Yugoslavia. Furthermore the United States musters essential logistics for peacekeeping operations that other states are not capable of providing.\textsuperscript{51} An example is the United Nations Operation in Somalia (UNOSOM II) in 1994, which was particularly dependant on the troops of the United States.\textsuperscript{52} The operation was seriously weakened when the United States withdrew its military personnel and its logistics from the operation. Besides the contribution of military personnel and logistics, the United States’ financial support is vital to multinational peacekeeping operations.\textsuperscript{53}

\textsuperscript{44} See ibid.
\textsuperscript{46} Arsanjani, above n 45, at 26.
\textsuperscript{50} Zwanenburg, above n 9, at 126.
\textsuperscript{51} Ibid.
\textsuperscript{53} Zwanenburg, above n 9, at 127.
These facts reveal that US military forces and political support are central to peacekeeping operations and the present level of peacekeeping operations would be difficult to maintain without American support.

1. Violation of Pacta Tertiis Rule

The United States brought forward different legal arguments in support of its position that Art 12 of the Rome Statute is inconsistent with international law. This essay will only discuss the most frequently quoted arguments in support of the US objection as a comprehensive discussion of all relevant arguments would go beyond the scope of this paper. The main argument has been that the jurisdictional scheme of the ICC conflicts with the most fundamental principles of treaty law according to which states cannot be bound by a treaty without their consent, because it allows the ICC to try individuals for serious international crimes without the consent of their national governments. Only states that are party to a treaty can be bound by its terms. The pacta tertiis rule prohibits the creation of obligations for non-state parties. Yet Art 12 of the ICC treaty reduces the need for ratification of the treaty by national governments by providing the court with jurisdiction over the nationals of non-party states.

However, the US argument that the ICC Statute is illegal because it contemplates the possibility that the ICC may judge nationals of non-party states is based on a confusion between the notions of obligation and interest. The jurisdiction of the Court concerns individuals and not the individual’s home state. Clearly the Rome Statute does not create any obligations on non-state parties. Under the terms of the Rome Treaty, the contracting parties are obliged to provide funding to the ICC, to extradite indicted persons to the ICC, to provide evidence and other forms of co-operation to the court. Those are the only obligations the Rome Treaty establishes on states, and they apply only to state parties.

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56 Scheffer, above n 54, at 18.
It is true that a non-party state may protect its nationals from prosecution by the Court by conducting its own investigations.\(^{59}\) Thus the ICC treaty may have an effect on the practice of non-party states. If a national of a non-contracting state is accused of committing a crime on the territory of a state party, the ICC may exercise jurisdiction if it determines that neither state is able or willing to prosecute. In order for a non-state party to protect its nationals from prosecution by the Court, it must, according to the Statute’s complementarity provisions, prosecute its nationals itself.\(^{60}\) But the non-state party is under no obligation to do so and it is under no obligation to co-operate with the Court. The state’s negligence in prosecuting its nationals will merely be judged as a factor entering into the Court's evaluation of whether a given case is admissible or not under the standard of complementary contained in Art 17 of the Statute.\(^{61}\) Certainly a prosecution of nationals of non-state parties coincides with interests of that state. But a mere interference with interests clearly does not provide a ground for saying that the Statute violates international law.\(^{62}\)

The Rome Statute does not create legal obligations for non-state parties and, therefore, does not infringe the *pacta tertiis rule*. There is little basis for the US position that treaty law prohibits jurisdiction over the nationals of non-party states.

### 2. Universality Principle

US officials also claim that the crimes within the ICC’s jurisdiction go beyond those arguably covered by universal jurisdiction.\(^{63}\) This again, is an unsubstantiated assertion. Art 12 of the Rome Statute explicitly bases the ICC’s jurisdiction on the principles of territoriality and nationality. Both principles are well recognised in international law.\(^{64}\) States do not have exclusive jurisdiction over crimes committed by their nationals, instead it is very well established in international law, that states may have concurrent jurisdiction when the crimes affect the interests of more than one state. If states parties to the Rome Statute may exercise jurisdiction over persons accused of international crimes unilaterally, they may also exercise jurisdiction over them jointly.\(^{65}\) A precedent for the collective

\(^{59}\) Stahn, above n 43, at 660.
\(^{60}\) Hafner et al., above n 58, at 117.
\(^{61}\) Mégret, above n 57, at 249; Hafner et al., above n 58, at 118-119.
\(^{62}\) Mégret, above n 57, at 249.
\(^{63}\) Scheffer above n 54, at 18.
\(^{64}\) Stahn, above n 43, at 660.
\(^{65}\) Ibid.
delegation of jurisdiction through a treaty to an international court exists in the form of the post-World War II Nuremberg Tribunal.  

Hence, there is no basis for the US arguments that the jurisdictional scheme of the Rome Statute does not comply with international law.

D. Evaluation of the Achievements in Rome with Regard to the Issue of Jurisdiction over Peacekeeping Forces

It is obvious that the Rome Statute does entail changes with regard to criminal jurisdiction over peacekeepers. It establishes a novel international jurisdiction, next to the existing national jurisdiction. Conceptually, the establishment of a novel international jurisdiction is a significant achievement as the traditional arrangement with leaving criminal jurisdiction in general to the troop contributing states has many disadvantages.

Furthermore, the establishment of the ICC fits in a development towards the acceptance of an international criminal jurisdiction for the crimes of international concern which is also reflected by the establishment of the ICTY and the ICTR.

However, it is doubtful whether the Rome Statute’s practical implications are as far-reaching as its conceptual implications. These practical implications are determined by the specific provisions of the Statute. The US reaction to the Statute suggests that these provisions of the Rome Statute make politically motivated prosecutions of peacekeeping forces possible. This part of the essay will show that the Statute is based on a number of principles and contains a number of provisions that effectively safeguard peacekeepers against politicised prosecution before the Court.

1. Principle of Complementarity

The principle of complementarity establishes that the court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction. Thus, in cases of concurrent

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67 Zwanenburg, above n 9, at 129.
68 Ibid.
69 Ibid.
70 Art 17 (1) (a) of the Rome Statute.
jurisdiction between national courts and the ICC, the former in principle have priority and the ICC comes only into operation when domestic prosecutors or courts fail to act.\textsuperscript{71} The understanding of the majority of participating states was that states have a fundamental interest in remaining responsible and accountable for investigating and prosecuting violations of their laws.\textsuperscript{72} Indeed, it seems as if the complementarity principle had to be inserted in the Rome Statute in order to ensure acceptance for the Statute. This is in sharp contrast to the ICTY and the ICTR which have primacy over national courts. The complementarity principle is spelt out in Art 17 (1), according to which a case is inadmissible before the Court if

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution.

(b) The case has been investigated by a State who has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

Further criteria for determining unwillingness are laid down in Art 17 (2) of the Rome Statute:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring a person to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

\textsuperscript{71} Arsanjani, above n 45, at 24-25.

\textsuperscript{72} Ibid at 25.
One of these conditions set out in Art 17 (2) must be fulfilled to declare a case against a peacekeeper admissible before the ICC. This is very unlikely as far as a national criminal justice system like the one of the US is concerned.\(^{73}\) Generally the US system of criminal justice functions very elaborately and the proceedings are conducted independently and impartially as required by Art 17 (2).\(^{74}\)

Hence, the strict concept of complementarity will make it very difficult to declare a case admissible before the Court if a decently working national criminal justice system, such as the one in the United States, has initiated an investigation or a prosecution of an offence falling within the jurisdiction of the ICC.\(^{75}\)

2. Scope of Crimes

The Statute is designed to deal only with the most serious crimes of concern to the international community as a whole.\(^{76}\) Art 5 of the Rome Statute limits the jurisdiction of the ICC to genocide, crimes against humanity, war crimes and aggression once aggression has been defined.

Genocide requires a special intent to destroy, in whole or in part, a national, ethnical, racial or religious group. With regard to this required special intent and the particular gravity of the crime, it is very difficult to imagine that a peacekeeper, who has in certain situations the specific task of protecting a group, will be easily accused of genocide.\(^{77}\)

At Rome it was agreed that crimes against humanity are not limited to times of armed conflict but must be committed ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.\(^{78}\) The words ‘attack directed against any civilian population’ are defined in subparagraph 2 (a) of Art 7 as ‘a multiple commission of acts .... pursuant to or in furtherance of a State or organisational policy to commit such an attack’. Accordingly, isolated crimes are excluded from the jurisdiction of the ICC which constitutes a significant threshold on the jurisdiction of the Court.\(^{79}\) This limitation makes it difficult to imagine that a peacekeeping operation or individual peacekeepers would commit multiple offences as qualified in subparagraph 2 (a)

\(^{73}\) Zwanenburg, above n 9, at 131.
\(^{74}\) Ibid.
\(^{75}\) Ibid at 132.
\(^{76}\) Arsanjani, above n 45, at 25.
\(^{77}\) Zwanenburg, above n 9, at 133.
\(^{78}\) See Art 7 (1) of the Rome Statute.
\(^{79}\) Zwanenburg, above n 9, at 134.
following a state or organisational policy. In any case, allegations against peacekeepers in general do not involve large numbers of victims and perpetrators and investigations characteristically confirm the isolated nature of peacekeepers’ criminal conduct. Crimes committed by peacekeepers will therefore most likely not fall within the jurisdiction of the Court as crimes against humanity.

War crimes are covered by the ICC’s jurisdiction ‘in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes’. This definition has as its object that the Court focuses on larger crimes, although it does not limit the Court’s jurisdiction to larger crimes. Nevertheless, if it is to be expected that peacekeepers commit any crime falling within the jurisdiction of the ICC at all, it is a war crime as for the commission of a war crime neither a special intent nor a proof of widespread and systematic attack is required. However, under Art 124 states parties can, after the Statute enters into force, ‘opt out’ on the Court’s jurisdiction over war crimes for seven years. This provision particularly constitutes an important limitation to the ICC’s jurisdiction with regard to peacekeepers.

3. Proprio Motu Prosecutor

Under the Rome Statute there is a proprio motu prosecutor, namely a prosecutor with the power of initiative. The prosecutor may initiate investigations on the basis of information of crimes within the jurisdiction of the Court. The US feared that a prosecutor with such wide powers would initiate politically motivated proceedings against peacekeepers. This fear, however, seems to be unjustified as the investigation by the prosecutor must first be authorised by the pre-trial Chamber of the Court consisting of three judges, which shall decide if there is a reasonable basis to proceed with an investigation and that the case appears to fall within the Court's jurisdiction.

4. Conclusion

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80 Ibid.
81 See eg Lupi, above n 17, at 378.
82 Art 8 (1) of the Rome Statute.
83 Zwanenburg, above n 9, at 136.
84 Ibid.
85 Art 15 (1) of the Rome Statute.
86 Leigh, above n 45, at 129.
87 Art 15 (4) of the Rome Statute.
To sum up, under the current system and with the Rome Statute in force, American peacekeepers can in fact legally be surrendered to the ICC if they commit crimes under the Rome Treaty on the territory of a state party.

The Statute, however, is based on principles and provisions that effectively safeguard peacekeepers against prosecution before the Court and thus the practical implications of the Rome Statute with regard to the issue of jurisdiction over peacekeepers are not as far reaching as the concerns of the US let assume. With all the safeguards built into the Treaty to prevent inappropriate prosecutions, the fears of the US with regard to politicised prosecutions of their peacekeepers are not justified at all. Therefore US insistence on still more protection is unreasonable.

It may be concluded that the traditional arrangements for the exercise of criminal jurisdiction in the form of the Status-of-Forces and Participation Agreements will only be affected in very rare cases, particularly as the scope of the crimes falling within the jurisdiction of the ICC is very limited so that most of the offences committed by peacekeepers will fall within the jurisdiction of the national courts.

However, the provisions of the Rome Statute provide that prosecution of peacekeepers will be ensured whenever peacekeepers commit crimes under the jurisdiction of the ICC and the contributing state or the state in whose territory the crimes are committed are not willing or able to prosecute. This is of particular significance with regard to the problems of primary responsibility of national authorities in investigation and prosecution of peacekeepers.

Thus, the establishment of the ICC guarantees an equal and effective prosecution of peacekeepers who have committed international crimes.

IV. US Initiatives to Exclude Non-Party States’ Peacekeepers from the Jurisdiction of the ICC

With the Rome Statute in force, US peacekeepers can in fact legally be surrendered to the ICC. Though US insistence on still more protection from prosecution of peacekeepers seems unreasonable because of the safeguards built into the Rome Treaty to prevent unjustified prosecutions, the US has started different initiatives to exclude its peacekeepers from the jurisdiction of the ICC.

A. Security Council Resolutions 1422 and 1487

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88 Stahn, above n 43, at 661.
89 Zwanenburg, above n 9, at 141.
In May 2002, the US first threatened to destabilise UN peacekeeping operations by promising to veto the UN mission in East Timor unless its military personnel were granted immunity from the ICC. The operation, however, was renewed without such a provision.

But on 12 July 2002, the Security Council adopted Resolution 1422 at its 4572nd meeting. The resolution exempts personnel from ICC non-party states involved in UN established or authorised peacekeeping missions from the jurisdiction of the ICC for a renewable 12-month period.

The adoption of Resolution 1422 followed an intense debate on the UN peacekeeping mission in Bosnia-Herzegovina (UNMIBH). In an extraordinary step two weeks earlier, United States UN Ambassador John Negroponte vetoed the mission’s renewal. The veto was prompted by the concern that US personnel serving in the peacekeeping operation could be subject to unwarranted, politically motivated prosecutions by the ICC. In addition, US officials threatened to veto the renewal of all peacekeeping operations, if the Security Council did not agree on the text of Resolution 1422.

The adoption of the Resolution by the Security Council despite serious concerns must be seen as a compromise to preserve peacekeeping operations. The pact came after weeks of impassioned negotiations between the US and states, who strongly support the ICC and publicly opposed the US efforts to use the Security Council to establish special protections from the jurisdiction of the ICC for individuals from countries like the US that are not party to the Rome Statute. Among those states who opposed the US position were Mexico, Canada and the closest allies of the US in Europe. Thus the 15-0 vote did not reveal the deep concerns that some delegates expressed about the final compromise.

Resolution 1422 has been renewed through the adoption of Resolution 1487 on 12 June 2003.

1. Content of Security Council Resolution 1422

The text of Resolution 1422 reads as follows:

The Security Council,

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Taking note of the entry into force on 1 July 2002, of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

Emphasising the importance of international peace and security of United Nations operations,

Noting that not all states are parties to the Rome Statute,

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes,

Determining that operations established or authorised by the United Nations Security Council are deployed to maintain or restore international peace and security,

Determining further that it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorised by the United Nations Security Council,

Acting under Chapter VII of the Charter of the United Nations,

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to United Nations established or authorised operation, shall for a 12-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;

3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;

4. Decides to remain seized of the matter.

It is questionable whether the adoption of Security Council Resolution 1422 is consistent with the Rome Statute and within the limits of the powers of the Security Council. The following part of this paper will analyse the validity of Security Council Resolution 1422 in the light of the relevant provisions of the Rome Statute and the UN Charter.
2. Consistency with the Rome Statute

The relationship between the operative part of Security Council Resolution 1422 and certain provisions of the ICC Treaty is very controversial.

a. Article 16 of the Rome Statute

Resolution 1422 is based on Chapter VII of the UN Charter. Para.1 of the resolution, however, is not drafted in the form of a binding ‘decision’ but in the form of a ‘request’ to the ICC. This approach may be explained on the one hand by the fact that according to Art 4 of the Rome Statute the ICC is an independent legal personality and for this reason not directly bound by Security Council resolutions addressed to member states of the United Nations. (This paper will consider the binding force of Resolution 1422 in more depth below.) On the other hand, this formula can be explained by the obvious intention of the drafters of the resolution to bring the text of the resolution into compliance with the wording of Art 16 of the Rome Statute.\(^{94}\)

This theory suggests that the legal obligations of the Court are not based on the determinations of the Security Council, but on the legal framework of the Rome Statute, namely Art 16.\(^{95}\)

Art 16 of the Statute endows the Security Council with the power to block the jurisdiction of the Court. Art 16 of the Rome Statute sets out that:

\begin{quote}
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.
\end{quote}

It is, however, questionable whether Resolution 1422 is consistent with Art 16 of the Rome Statute. Para.1 of Resolution 1422 suggests that the Security Council considers its resolution to comply with Art 16 as the text refers to a request ‘consistent with the provisions of Article 16 of the Rome Statute’.

\(^{94}\) See para.1 of SC Res 1422 (2002).
\(^{95}\) Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>. 
But the interpretation of Art 16 by the Security Council is not necessarily a convincing and correct interpretation of the provision.\footnote{Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>.}

According to customary international law, as reflected in Art 31 (1) of the Vienna Convention on the Law of Treaties, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose’.\footnote{Vienna Convention on the Law of Treaties, Art. 31 (1).}

Therefore, not only the wording, but also the drafting history and the context of the provision as well as the object and purpose of the treaty are relevant factors for the interpretation of the provision. A closer look at the drafting history and the context of Art 16 in the light of the object and purpose of the ICC treaty reveals that it is highly doubtful whether the Security Council’s understanding of the provision in Resolution 1422 accords with its meaning under the Rome Statute.

(1) Blanket Deferral of Proceedings

Para. 1 of Resolution 1422 is based on the understanding of the Security Council that a request under Art 16 can be made in general terms, independent of the existence of a concrete conflict between the contending interests of maintenance of peace and security and the prosecution of international crimes. Resolution 1422 requests the ICC not to commence or proceed with investigation or prosecution ‘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 United Nations established or authorised operations’. Thus the resolution does not refer to a specific case, but provides a basis for the immunity of a whole group of actors in advance and irrespective of any concrete risk of indictment or prosecution.

Such an interpretation might be consistent with the terms of Art 16 as the provision does not determine the conditions under which such a request can be made, but it is not compatible with the drafting history of the provision and its systematic position in the ICC treaty.\footnote{Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>.} The drafting history of Art 16 reveals that the drafters of the Rome Statute intended to limit the application of Art 16 to case-by-case interventions.\footnote{Human Rights Watch ‘Closing the Door to Impunity: Human Rights Watch Recommendations for Renewing Resolution 1422’ at <http://www.hrw.org/campaigns/icc/docs/1422legal.pdf>.} Any other construction would suggest that the Council can block the ICC’s
jurisdiction by virtue of a fictional future existence of threat to the peace, and not a factually existing or imminent situation of threat to the peace.¹⁰⁰

(2) Drafting History

The relationship between the ICC and the Security Council was one of the major sources of controversy in the negotiation of the Rome Statute. Obviously the power to defer proceedings under Art 16 was the most contentious aspect of the role of the Security Council as this power is very problematic in that it can undermine the establishment of an independent and impartial jurisdictional mechanism.¹⁰¹

The drafting history of Art 16 demonstrates that the drafters of the Statute intended to reduce the Council’s powers through the provision itself.¹⁰² The actual version of Art 16 has its origin in Art 23 (3) of the ILC’s Draft Statute of an International Criminal Court.¹⁰³ Art 23 (3) of the ILC’s Draft stated that ‘no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides’.¹⁰⁴ Thus, Art 23 (3) provides that a prosecution arising from a situation ‘being dealt with’ by the Security Council under Chapter VII of the UN Charter may not be initiated by the Court unless the Security Council gives its approval.

Art 23 (3) of the ILC’s draft was criticised by many delegates in the Preparatory Commission. They said that it amplified the Council’s powers unduly and, above all, strengthened the blocking effect of the Court’s jurisdiction.¹⁰⁵

The Draft provision implies that the Security Council may deprive the ICC of its jurisdiction in a particular situation merely by putting the situation on its agenda.¹⁰⁶ Moreover the ‘authorisation’ of the

¹⁰² El Zeidy, above n 100, at 1509.
¹⁰³ Gargiulo, above n 101, at 86.
¹⁰⁵ See Gargiulo, above n 101, at 86.
Security Council to initiate a prosecution was conditioned by the need for all the permanent members to come to an agreement.\textsuperscript{107} This was regarded as impeding the ICC’s ability to exercise jurisdiction inappropriately and as disrupting the ICC’s ability to function as an independent judicial body.\textsuperscript{108} It was also feared that a situation might remain under the Council’s consideration for an indefinite period of time as there was no time limit in the provision.\textsuperscript{109} During this time one veto by a permanent member to the Security Council would have been sufficient to block the ICC from any action which would have made the ICC exposed to political considerations.\textsuperscript{110} Draft Art 23 (3) was also strongly criticised by some non-governmental organisations involved in the Coalition for the ICC. It was argued that the Security Council, as a political organ, must not be able to prevent or delay a prosecution by an International Criminal Court because this would undermine the rule of law and the very reason for a permanent international Court and would be inconsistent with the fundamental principle that there can be no peace without justice.\textsuperscript{111} In response to these criticisms, Art 23 (3) of the ILC Draft was replaced by a proposal submitted by Singapore, which stated that ‘[n]o investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given direction to that effect’.\textsuperscript{112} This proposal was guided by the intention to limit the possibility of suspension of the ICC’s jurisdiction to cases in which the Council formally decides to stop specific ICC proceedings.\textsuperscript{113} Thus, the ICC can exercise its jurisdiction unless it is directed by the Security Council not to do so. As for the adoption of a Security Council decision, a minimum of nine positive votes (including those from the five permanent members) is necessary, the initiation or continuation of ICC proceedings may only be stopped by a majority decision and not by a veto of a


\textsuperscript{107} See Gargiulo, above n 101, at 86.


\textsuperscript{109} Ibid.

\textsuperscript{110} See Bergsmo and Pejic ‘On Article 16’, above n 106, at 377.

\textsuperscript{111} Gargiulo, above n 101, at 87, fn. 51.

\textsuperscript{112} Reprinted in Bergsmo and Pejic ‘On Article 16’, above n 106, at 375.

permanent member. The Singapore proposal was later amended by a British proposal which replaced the word ‘direction’ by ‘request’ and became the basis for the final draft of Art 16. Thus, the drafting history reveals that the drafters of Art 16 intended to reduce the Security Council’s exclusive power under Art 23 (3) of the ILC Draft. The provision was introduced into the Statute to allow the Security Council to delay the exercise of jurisdiction by the ICC in situations in which the maintenance of peace and security in a specific conflict situation required a deferral of proceedings. An example given was the case where the dictator of a country was under investigation by the Court at the same time as its presence was necessary in peace negotiations under Council auspices. Otherwise, it is difficult to imagine a situation where a conflict could arise when the ICC deals with a situation with which the Council is seized, as the ICC deals with the criminality of individuals while the Council’s primary responsibility is the maintenance of peace and security between states. As a consequence, the powers of the Security Council under Art 16 must be interpreted narrowly and cannot provide as a basis for the immunity of a whole group of actors – namely peacekeepers from non-party states – in advance and irrespective of any actual risk of indictment or prosecution.

(3) Context

Moreover, the structure of the Rome Statute gives support to the view that any Security Council deferral request must respond to a specific case. The position of Art 16 in the Statute reveals that the Council may only issue a request under this provision once a concrete ‘investigation’ or ‘prosecution’ is taking place. Art 16 follows Arts 13-15, determining 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 Art 16 appears after these Articles demonstrates, as a matter of logic, that the deferral request is not meant to be a tool for preventive
action by the Security Council but requires instead the initiation of specific proceedings or at least a situation which may give rise to investigations or prosecutions.\textsuperscript{122}

Thus, the position of Art 16 in the Rome Statute illustrates that the provision does not cover blanket immunity in relation to indefinite future situations.

It could be argued that a request under Art 16 does not have to relate to a specific case as Art 16 enables the Security Council to prevent the ICC from ‘commencing’ investigations. However, Art 15 of the Rome Statute suggests that this interpretation is incorrect. According to Art 15 (4), the Pre-Trial Chamber must authorise the ‘commencement’ of a specific investigation. All prosecutor inquiries up to this point are not investigations, but only ‘preliminary examinations’ (Art 15 (6)). Thus, the Security Council is entitled to request a deferral under Art 16 only after the Pre-Trial Chamber authorises an investigation.\textsuperscript{123} This implies that a deferral under Art 16 requires the existence of an ‘investigation’ that relates to a specific incident or the potential culpability of an individual regarding specific conduct.

\textbf{(4) The Intent to Renew the Deferral}

In para.2 of Resolution 1422, the Security 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’. Art 16 of the Rome Statute states that a request is limited to a 12-month period but is renewable under the same conditions. Art 16 does not limit the number of times a deferral request may be renewed, which could be read literally to permit indefinite renewals. However, such an interpretation is very dangerous and can ultimately block the ICC’s jurisdiction over certain cases.\textsuperscript{124} Moreover, an indefinite renewal of the request to defer proceedings seems to be difficult to reconcile with the object and purpose of the Rome Treaty to put an end to impunity for the perpetrators of the most serious crimes.\textsuperscript{125} The 12-month limitation as such reveals that the creation of a permanent exception to the exercise of jurisdiction by the Court on the basis of Art 16 was not intended by the


\textsuperscript{123} Ibid.

\textsuperscript{124} El Zeidy, above n 100, at 1515.

\textsuperscript{125} Elaraby, above n 119, at 45.
drafters of the Statute, even though the number of deferrals was not explicitly limited.\(^\text{126}\) Avoiding an unlimited deferral by the Council was precisely the object and purpose of the Singapore proposal.\(^\text{127}\) The text of Resolution 1422 formally complies with Art 16 as the exemption of non-party states’ peacekeepers from the jurisdiction of the ICC depends on a new request each year. But the ‘intent’ clause in the resolution apparently conflicts with the idea of Art 16 as a temporary bar to the exercise of jurisdiction through the Court. The wording of the resolution expressly suggests that the Council intends to block the ICC’s jurisdiction not only for 12 months but for an indefinite duration.\(^\text{128}\) The anticipated declaration of intent by the Council imposes pressure on the members to renew the resolution and thus Resolution 1422 *de facto* leads to a quasi-permanent limitation on the ICC’s jurisdiction.\(^\text{129}\)

Furthermore, specific conditions must be met to renew deferrals. According to the final clause of Art 16 – ‘request may be renewed by the Council under the same conditions’ – the Council must follow all the necessary steps for initiating a deferral request.\(^\text{130}\) These steps demand inter alia that a resolution is adopted by virtue of Chapter VII. Acting under Chapter VII requires the existence of a threat to peace according to Art 39 of the UN Charter. By expressing in advance the intention to renew a deferral after 12 months, the Security Council ignores and undermines an essential element necessary to invoke Art 16, namely the determination of a threat to peace, as the existence of a threat to peace unquestionably cannot be precisely determined in advance.\(^\text{131}\)

(5) Conclusion

To sum up, Art 16 establishes a mechanism for deferring investigations or prosecutions on a case-by-case basis, subject to time limitations and a formal renewal process. Resolution 1422 does not meet the requirements of Art 16 and must therefore be regarded as being in conflict with this provision.

**b. Art 27 of the Rome Statute**

\(^\text{126}\) Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>.
\(^\text{127}\) See Arsanjani, above n 45, at 26-27.
\(^\text{128}\) El Zeidy, above n 100, at 1525.
\(^\text{129}\) Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>.
\(^\text{130}\) El Zeidy, above n 100, at 1526.
\(^\text{131}\) Ibid at 1528.
Resolution 1422 is difficult to reconcile not only with Art 16 of the Rome Statute but also with Art 27 of the Statute. Resolution 1422 has the effect of rendering peacekeepers from non-party states immune from proceedings before the ICC. Art 27 of the Statute expressly prohibits making distinctions on the basis of official capacity and rules out immunities based on official capacity. 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 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.

Art 27 is a crucial provision that encompasses the fundamental object and purpose of the ICC treaty to put an end to impunity and to ensure that no person is above the law. Art 27 makes clear that it is the endeavour of the Rome Statute to bring to court all the offenders participating in one way or another in the commission of the most serious crimes of concern to the international community as a whole. This includes peacekeepers. The basic rule is that if peacekeepers are deployed on the territory of a state party to the Rome Statute and commit crimes under the Statute, they may generally be tried by the ICC.

It could be argued that Art 27 does not apply to peacekeeping forces as they are not explicitly mentioned in Art 27 sentence 2 as persons with ‘official capacity’. However, the enumeration in Art 27 (1) sentence 2 can only be regarded as non-exhaustive in view of the use of the phrase ‘in particular’. The basic rule spelt out in sentence 1 of Art 27 (1) is that all persons with ‘official capacity’ shall be treated equally in the sense that the very nature of their capacity does not exempt

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133 Triffrer ‘On Article 27’, above n 106, at 509.
134 Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>.
135 Ibid.
them from the jurisdiction of the ICC. The term ‘official capacity’ aims to include all the capacities which might tempt the person to claim immunity from criminal responsibility and to hide behind any position which might be strong enough to support his or her endeavours to achieve impunity.

Personnel of international organisations are within the non-exhaustive Art 27 (1) of the Rome Statute. Hence, persons having any ‘official capacity’ on the international or on the domestic level should be treated equally in the sense that the nature of their capacity is irrelevant with respect to their responsibility under international criminal law.

By exempting all peacekeepers from non-party states to the Rome Statute from the jurisdiction of the ICC, Resolution 1422 has the effect of rendering an entire class of individuals immune from prosecution by the ICC.

It might be argued that the immunity is based on the nationality rather than the peacekeeping position of the offender, as Resolution 1422 exempts only peacekeepers from states that are not party to the Rome Statute from the jurisdiction of the ICC. Resolution 1422, however, does not exclude every citizen of non-party states to the Statute from the jurisdiction of the Court, but merely peacekeepers. Hence, the resolution is not only based on the nationality of the offender but also on his or her job as a peacekeeper and therefore makes in effect distinctions on the basis of ‘official capacity’.

In this context, it is worth noting that – as explained in the first part of this essay – peacekeepers may enjoy certain immunities under the relevant Status-of-Forces and Participation Agreements. According to Art 27 (2), however, this fact does not bar the Court from exercising jurisdiction. These agreements may be relevant under Art 98 and thus may prevent the ICC from ordering a request for surrender of persons, but they do not categorically exclude criminal responsibility under the Statute. Art 98 does not accord immunity from prosecution to individuals which the Court may seek to prosecute. Art 27 makes it clear that no such immunity is available. As far as peacekeepers are concerned, however, there is even doubt whether the Status-of-Forces and Contribution Agreements can be considered as agreements under Art 98 of the Rome Statute (see below).

Thus, the Resolution is not only inconsistent with Art 16 but also with Art 27 of the Rome Statute.

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136 Ibid.
137 Triffterer ‘On Article 27’, above n 106, at 509.
138 Ibid.
139 Ibid at 511.
140 Ibid at 514; Prost and Schlunck ‘On Article 98’, above n 106, at 1132.
c. Arts 12 (2) of the Rome Statute

By exempting an entire class of persons in advance of indefinite future events from the ICC’s jurisdiction, Resolution 1422 might also come into conflict with Art 12 (2) of the Rome Statute. The precondition for the ‘normal’ complementary jurisdiction of the Court to apply is that either the territorial state or the state of nationality of the suspect is a party to the Statute.141 Thus the ICC has jurisdiction over every person irrespective of his or her nationality who has committed the crime on the territory of a state party to the Statute. No distinction is made with respect to certain groups of persons. Para.1 of Resolution 1422 sets out that peacekeepers from a state not a party to the Rome Statute who commit crimes on the territory of a state-party to the Rome Statute shall not be subject to prosecution before the ICC for a renewable 12-month period. Hence, it might be argued that the request under para.1 limits the territorial jurisdiction of the ICC over peacekeepers from non-party states to the Statute.142

Resolution 1422, however, does not violate Art 12 (2) of the Statute as it must be differentiated between the jurisdiction itself and the exercise of jurisdiction. Security Council Resolution 1422 states that ‘the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to United Nations established or authorised operation, shall for a 12-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise’. Thus Resolution 1422 does not actually alter the jurisdiction of the ICC. It only defers the exercise of that jurisdiction i.e. investigation and prosecution for a certain period of time.

Consequently, Resolution 1422 does not conflict with Arts 12 (2) of the Rome Statute.

3. The Powers of the Security Council within the Context of the UN Charter

The adoption of Resolution 1422 raised serious concerns about the scope of the Security Council’s powers. The principal objection to Resolution 1422 is that the Security Council action was ultra vires. With regard to the inconsistency of Resolution 1422 with Arts 16 and 27 of the Rome Statute, the question arises whether the Security Council has the authority to adopt a resolution that runs counter to

141 Art 12 (2) of the Rome Statute.
142 Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-03.html#TopOfPage>. 
the provisions of the Rome Statute. Neither the Security Council nor the UN – the international organisation to which the Security Council is an organ – are parties to the Rome Statute. Hence, the Security Council is not bound by the provisions of the Rome Treaty although some of its members may be. The Council’s authority to adopt Resolution 1422 must therefore be assessed on the basis of its powers under the UN Charter and conceivable extra-Charter limitations.

a. Security Council Resolution 1422 in the Light of Art 39 of the UN Charter

Resolution 1422 was based on Chapter VII of the UN Charter. Art 39 of the UN Charter provides as a prerequisite for action under Chapter VII that the Council finds a ‘threat to the peace, breach of the peace, or act of aggression’. As far as Resolution 1422 is concerned, only the alternative ‘threat to peace’ is relevant.

The following part of this essay will consider whether Resolution 1422 can be linked to a ‘threat to peace’ within the meaning of Art 39 of the UN Charter.

Art 39 is generally interpreted as meaning that the Council must determine that a threat to the peace exists before it can take enforcement action under the relevant provisions of Chapter VII.143 Thus, the question arises, how the exemption of peacekeepers from the jurisdiction of the ICC can be linked to a threat to the peace within the meaning of Art 39 of the UN Charter.

One may ask how international peace – and subsequent threats to it – is to be defined. The Charter itself is silent on the term, and the travaux préparatoires indicate that this was done deliberately: it was decided ‘to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace’.144

On a minimum level the term peace includes the absence of inter-state use of force which may be called the negative definition of peace.145 However, when the ICTY was set up, the Council found a threat to peace in situations where there were massive violations of human rights.146

144 See D Schweigman The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice (The Hague/London/Boston, 2001), 34.
145 Ibid at 35.
Since 1945, the Security Council has exercised its discretion in determining what poses a threat to the peace in a wide variety of situations and has taken a remarkably activist stance since 1990, beginning with the Kuwait crisis.\(^{147}\) Several situations fall outside the traditional understanding of threats to international peace and security. One of the most far-reaching precedents is Security Council Resolution 748 in which the Council determined, inter alia, that Libya’s alleged support for state sponsored terrorism and the refusal to hand over suspected of involvement in the destruction of a Pan-Am airliner over Lockerbie, Scotland, constitute a threat to peace.\(^{148}\) It is widely accepted that it is completely within the Council’s discretion to determine what constitutes a threat to the peace\(^ {149}\) and that the Council has adopted a very broad interpretation of the notion of threat to peace. However, the establishment of immunities and privileges for peacekeepers on the basis of Art 39 shows a novelty in the practice of the Security Council.

Para.6 of the Preamble to Security Council Resolution 1422 refers only in a very general way to Art 39 by stating that peacekeeping operations are usually ‘deployed to maintain or restore international peace and security’. Of more value seems to be the Council’s determination in para.7 of the Preamble: ‘it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorised by the United Nations Security Council’. This section of Resolution 1422 implies that the ‘threat to peace’ is based on the potential inability of the UN to deal with future conflicts without peacekeepers from non-party states to the ICC Statute.\(^ {150}\) The non-contribution of troops to UN peacekeeping operations is apparently regarded as the threat to peace.

It does not come as a surprise that such an understanding of the notion of ‘threat to peace’ has encountered criticism by several states in a public hearing of 10 July on a draft of Resolution 1422.\(^ {151}\) The representative of Jordan, for example, 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’.\(^ {152}\) The critics contend that increased reluctance by a

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147 Schweigman, above n 144, at 1163.
149 Gill, above n 143, at 42.
few states to contribute to peacekeeping operations is hardly the type of threat to the peace contemplated in by Art 39 and therefore Resolution 1422 lacked the precondition of a threat to peace.\textsuperscript{153} Furthermore, it has been argued that the ‘threat to peace’ is not based on a specific conflict situation and a reference to a specific conflict situation is required to determine a threat to peace as any other interpretation of Art 39 would render the provision too wide.\textsuperscript{154} However, despite these criticisms by many states, Resolution 1422 can be linked to a ‘threat to peace’ within the meaning of Art 39 of the UN Charter.

First, Resolution 1422 must be seen in the context of Resolution 1423 which renewed the UN peacekeeping mission in Bosnia-Herzegovina.\textsuperscript{155} As mentioned above the adoption of Resolution 1422 followed an intense debate on the UN peacekeeping mission in Bosnia-Herzegovina (UNMIBH). The United States threatened to veto the Bosnia-Herzegovina mission’s renewal unless US personnel serving in the peacekeeping operation were granted immunity from the ICC’s jurisdiction through a Security Council resolution. The Council could probably observe that hampering the contribution of peacekeepers by any means, including judicial interference, might harm the Council’s efforts to maintain international peace and security in Bosnia-Herzegovina.\textsuperscript{156} As the adoption of Resolution 1422 was closely linked to the extension of the Bosnia-Herzegovina peacekeeping operation, it can be argued that Resolution 1422 refers impliedly to a specific conflict situation. Hence, Resolution 1422 must be seen in the context of the respective UN operation which has been established or will be established to restore and maintain peace in order to explain that the non-contribution of troops to the United Nations can constitute a ‘threat to peace’. So far, it does not make any difference in substance whether the content of Resolution 1422 is drafted once and for all in general terms (as happened) or is included individually in every resolution which establishes or authorises a UN peacekeeping operation.\textsuperscript{157}

Moreover, it must be taken into consideration that the determination of a specific situation as a threat to the peace remains in substance a political decision which lies at the heart of the Security Council’s discretion.\textsuperscript{158} Thus, the Council is empowered to interpret Art 39 of the UN Charter widely and an

\begin{footnotesize}
\begin{enumerate}
\item[154] Stahn, above n 41, at \text{<http://www.ejil.org/journal/Vol14/No1/art1-02.html#TopOfPage>}.  
\item[156] El Zeidy, above n 100, at 1524-1525.
\item[157] Stahn, above n 41, at \text{<http://www.ejil.org/journal/Vol14/No1/art1-02.html#TopOfPage>}.  
\end{enumerate}
\end{footnotesize}
ultra vires claim is difficult to justify in legal terms with respect to the political dimension of the
decision whether to invoke Art 39 or not.

Hence, under this argument, the Security Council did not exceed its powers under Art 39 of the UN
Charter by determining that the non-contribution of personnel to UN peacekeeping operations by non-
state parties to the ICC constitutes a threat to peace.

b. Security Council Resolution 1422 and the Chapter VII Powers of the Council

Once the Security Council has determined that a threat to peace exists, the Council has a wide
discretion concerning action under Chapter VII of the UN Charter.\textsuperscript{159} Because of this wide
discretionary competence, the exercise of the powers of the Security Council can have a far-reaching
impact upon rights that states normally possess under the Charter, under other international
conventions and under customary international law.\textsuperscript{160}

(1) Legal Limitations on the Powers of the Security Council

Usually, the Council is not bound by international law in making determinations under Chapter VII
and the very notion of ‘enforcement measures’ in Chapter VII implies that the Council has the
authority to infringe upon, restrict or suspend rights that states are normally entitled to exercise under
both customary and conventional international law.\textsuperscript{161} By virtue of Arts 24, 25 and 103 of the UN
Charter, the obligations arising from a Security Council resolution have supremacy and prevail.\textsuperscript{162} The
Security Council is charged under Art 24 with the primary responsibility for the maintenance of peace
and security and has a mandate from all member states to act on their behalf in this regard. By Art 25,
all members agree to accept and carry out its decisions. Art 103 states that in the event of a conflict
between the obligations of the Members of the United Nations under the Charter and their obligations
under any international agreement, their obligations under the Charter shall prevail.

All this leads to enormous power indeed and international law as established in the Charter requires all
states to recognise this power and act in accordance with the instructions issuing from it.\textsuperscript{163}

\textsuperscript{159} Gill, above n 143, at 61.
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid.
\textsuperscript{162} El Zeidy, above n 100, at 1530.
\textsuperscript{163} \textit{Libya v U.K.} (Provisional Measures) I.C.J Reports (1992), Dissenting Opinion of Judge Weeramantry.
This is, however, not to say that the Council is above the law or that legal considerations play no part in the Council’s exercise of its powers under Chapter VII of the UN Charter. In discharging its functions, the Council is not free from limitations. It is bound by the restrictions laid down in the Charter itself. As an organ deriving its powers from the UN Charter, the Council is bound to comply with its provisions. Under Arts 1 (1) and Art 24 of the UN Charter the Security Council has the duty to act in accordance with the ‘purposes and principles of the Organisation’.

The travaux préparatoires of the UN Charter also support the view that a clear limitation on the scope of the Security Council’s powers is that those powers must be exercised in accordance with the well-established principles and objectives which are laid down in the UN Charter.

(2) Violation of Jus Cogens Principle

Some commentators have argued that the Security Council is bound by jus cogens. This was recognised by Judge Lauterpacht in the following terms:

The relief which Art 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy – extend to a conflict between a Security Council resolution and jus cogens.

The critics of Resolution 1422 assert that it undermines jus cogens and erga omnes concepts by shielding the peacekeeping forces of non-party states to the Rome Statute from the ICC’s exercise of jurisdiction. It has been argued that Resolution 1422 violates the asserted jus cogens principle of customary international law that perpetrators of serious violations of humanitarian law must either be prosecuted or extradited to a state that will prosecute.

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164 Gill, above n 143, at 62.
168 El Zeidy, above n 100, at 1535.
169 Ibid.
The ICC’s jurisdiction is limited to the most serious crimes that affect the international community as a whole – genocide, crimes against humanity, war crimes and aggression (once it is defined). These heinous crimes are categorised by several commentators as jus cogens norms, which hold the highest hierarchical position among all other norms and principles and enjoy a higher rank than treaty law and customary rules. Some legal scholars argue that recognising these crimes as jus cogens places upon states the obligation *erga omnes* either to prosecute or extradite the perpetrators of such crimes to a state which is willing to prosecute. This implies the duty not to grant impunity to them. Critics of Resolution 1422 brought forward the argument that the adoption of Resolution 1422 and the intent to block permanently the jurisdiction of the ICC over peacekeepers from non-party states might actually permit perpetrators to escape justice and thus de facto legitimise impunity.

In any event customary international law does not require that violations of humanitarian law be tried by international tribunals like the ICC. Resolution 1422 exempts peacekeepers from non-party states to the ICC from the jurisdiction of the ICC but not from individual criminal responsibility. Para.1 of the resolution refers only to the jurisdiction of the ICC, leaving the whole system of prosecution of peacekeepers before national courts unaffected.

Moreover, para.5 of the Preamble to Resolution 1422 provides that ‘noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes’.

Hence, Resolution 1422 emphasises the obligations of national courts with respect to the prosecution of international crimes and cannot be regarded as violating the principle to either extradite or prosecute offenders of international crimes.

(3) Respect for Human Rights

As demonstrated above, a limitation on the powers of the Security Council is that it must act in accordance with the object and purpose of the UN Charter. Art 1 (3) of the Charter provides that one

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172 Ibid at 39.
173 El Zeidy, above n 100, at 1535.
of the purposes of the organisation is to promote and encourage ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’. This purpose probably provides for the most far-reaching limitation on the Council’s discretion under Chapter VII. From Art 1 (3) it follows inter alia that the Security Council must ensure that UN civil and military personnel observe human rights standards in the conduct of their operations.\(^{176}\) The ICC is intended to deter violations of international humanitarian law and thus would contribute to the prevention of human rights abuses by UN military and civilian personnel. The duty of the Security Council to ensure respect for human rights by UN peacekeepers, however, does not require the existence of an international criminal tribunal with the task to prosecute peacekeepers violating human rights. As already shown in the previous section of this essay, Resolution 1422 exempts peacekeepers from non-party states to the ICC from the jurisdiction of the ICC but not from individual criminal responsibility. Para.1 of the resolution restricts only the ICC’s exercise of jurisdiction, leaving the whole system of prosecution of peacekeepers before national courts untouched.\(^{177}\)

By the mid-1990s, moreover, the United Nations reaffirmed the applicability of international humanitarian law to UN forces and redefined the international responsibility of the Organisation.\(^{178}\)

**4) Amendment of Content of the Rome Statute**

Some states have found Security Council Resolution 1422 unlawful, arguing that the Council was not vested with treaty-making and treaty-reviewing powers and could therefore not amend the content or meaning of international agreements.\(^{179}\) From this point of view, the Security Council has interfered with the sovereign rights of states to enter into treaties and thus exceeded its powers by adopting a resolution which is not consistent with the Rome Statute.

However, under Art 2 (7) of the UN Charter the *domaine réservé* of states shall not prejudice the application of enforcement measures under Chapter VII and therefore is explicitly limited in cases where the Security Council acts by using its authority under Chapter VII of the UN Charter.

\(^{176}\) Gill, above n 143, at 78; Schweigman, above n 144, at 171.

\(^{177}\) Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-04.html#TopOfPage>.

\(^{178}\) Shraga, above n 24, at 406.

In addition, it can be argued that – as shown above – Arts 25 and 103 of the UN Charter reveal that the Council may override specific rights and obligations that states have under an existing treaty regime by using its authority under Chapter VII. Art 103 of the UN Charter does not set out explicitly that a decision of the Security Council overrides any inconsistent treaty provision, but the duty of UN Member States according to Art 25 of the UN Charter to ‘accept and carry out decisions of the Security Council’ is an ‘obligation under the Charter’ within the meaning of Art 103.

The same approach was adopted by the International Court of Justice in the *Lockerbie Case*. The Security Council decided in Resolution 748 that the Libyan Government had to return the persons charged with the terrorist attack against a Pan-Am airliner over Lockerbie to the United Kingdom and the United States. Libya took the case to the ICJ and sought interim measures of protection claiming a breach 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 to either prosecute or extradite (principle *aut dedere aut judicare*). The ICJ refused to make an order for interim measures and 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 stake 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 their obligations under any other international agreement, including the Montreal Convention.

Hence, in principal, Resolution 1422 would prevail over any provisions of the Rome Statute as the Statute is an international agreement.

(5) Independence of Courts

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180 El Zeidy, above n 100, at 1530.
I am, however, of the opinion that the case with respect to the Rome Statute must be seen differently. Art 103 of the UN Charter cannot be invoked since the Rome Statute is not a typical international agreement, creating only rights and obligations between states, but – like the UN Charter – a special treaty of a constitutional nature. It establishes a court, an independent legal body. The Preamble to the Rome Statute confirms the determination ‘to establish an independent permanent ICC’.\(^\text{183}\)

Obviously the power to defer proceedings under Art 16 is very problematic in that it can prevent the establishment of an independent, impartial and effective jurisdictional mechanism.

By amending de facto the provisions of the Rome Statute and hampering the ICC’s exercise of jurisdiction through the adoption of Resolution 1422, the Security Council not only interferes with the rights and duties of the state parties, but also with the powers of the ICC as an independent legal body. The ICC is under Resolution 1422 obliged to refrain from investigating cases which would normally fall under its jurisdiction. Hence, any improper application of the power to defer proceedings under Art 16 of the Rome Statute jeopardises the independence of the ICC as the Court can be made subject to political considerations and the power of the court to investigate cases can be restricted unjustifiably.

There are various arguments in support of the view that the Security Council has to accept the independence of the ICC and thus is not empowered to intervene with the jurisdictional scheme of the Rome Statute beyond what is explicitly provided for under Art 16 of the Rome Statute.

The first argument can be found in the reasoning of the Trial Chamber and the Appeals Chamber in the *Tadiæ case*. Both Chambers had to deal with the question whether the Tribunal could be established validly by a Security Council Resolution.

In addition to the Charter-based constraints on the powers of the Security Council (discussed above), the Chambers of the ICTY considered extra-Charter standards that required Security Council compliance in order to establish validly a court by a resolution. Although neither the Trial Chamber nor the Appeals Chamber explicitly took a stand on the issue, they seemed to agree that Security Council measures under Chapter VII of the UN Charter are subject to limitations derived from general principles of international law.\(^\text{184}\) The particular extra-Charter limitation that the Chambers apparently believed applicable to the Council’s *creation* of an international adjudicative institution, like the

\(^{183}\) See Preamble to the Rome Statute.

\(^{184}\) King, above n 146, at 588.
Tribunal, was that such an institution was required to provide the necessary safeguards to ensure a fair trial. The Tribunal tested the Security Council’s action – namely the adoption of the Statute for the Tribunal – in a context in which the fair trial guarantees were presented as constituting fundamental principles of international law.\textsuperscript{185} The Prosecutor stated in his presentation to the Trial Chamber that there was an international law requirement that the Tribunal be constituted so that it was independent and impartial.\textsuperscript{186} It was within these parameters that the Trial Chamber considered whether the Statute provided fundamental fair trial guarantees.\textsuperscript{187} The Appeals Chamber’s acceptance of boundaries of Security Council powers derived from general principles of international law was even more explicit. The Chamber specifically noted that the accused had argued that his right to have the criminal charges against him be determined by a tribunal established by law was a general principle of international law.\textsuperscript{188} It concluded that international tribunals must be ‘rooted in the rule of law and offer all guarantees embodied in the relevant international instruments’.\textsuperscript{189} Implicit in this holding is the conclusion that there are rules of law outside the Charter that circumscribe the limits on the Security Council’s powers to create judicial bodies.\textsuperscript{190} The accused characterised these limitations as deriving from general principles of international law. This assertion remained unchallenged by the Appeals Chamber.

Hence, both the Trial Chamber and the Appeals Chamber accepted impliedly that general principles of international law, such as fair trial rules, constitute an international law boundary on the Security Council’s power to \textit{create} judicial bodies. This body of rules must also apply to the powers of the Security Council to interfere with the jurisdictional mechanism of a Court. If the ICC had been established by a Security Council Resolution, the Council would have been subject to certain limitations deriving from the general principles of international law. Thus, the same general principles of international law must constitute a boundary to the powers of the Security Council to interfere with the legal functioning of an independent court which has been established by a multilateral treaty.


\textsuperscript{186} \textit{Prosecutor v Tadiæ}, Case No. IT-94-1-T, Prosecutor’s Response to the Motion of the Defence on the Jurisdiction of the Tribunal, at 14-15.

\textsuperscript{187} \textit{Prosecutor v Tadiæ}, Case No. IT-94-1 Decision on the Defence Motion on Jurisdiction, 10 Aug 1995, para. 8.

\textsuperscript{188} \textit{Prosecutor v Tadiæ}, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, para. 41-42.

\textsuperscript{189} Ibid, para. 42.

\textsuperscript{190} King, above n 146, at 588.
The reasoning in the *Tadiæ case* suggests that the Security Council’s power to take action is limited by certain general principles of international law. Some legal scholars even argue that the UN Charter purposes and principles themselves include well recognised and defined fundamental rules and principles of international law, which provide sufficient clarity, coherence and precision, and that these general principles serve as a legal basis to determine whether measures taken by the Council are lawful or unlawful.¹⁹¹

The term ‘general principles of international law’ means the ‘general principles of law recognised by civilised nations’ in Art 38 (1) (c) of the Statute of the ICJ, which are in turn regarded the general principles recognised in the legal systems of independent states.¹⁹² The principle that courts must be inherently independent in order to be courts is – just as the fair trial guarantee – a well established principle not only in national legal systems¹⁹³, but also at the international level. The ICJ, for example, as the principal judicial organ of the UN, is not subject to any restrictions or influences by the Security Council or the General Assembly. Even in its work dealing with crimes arising from situations on the Security Council’s agenda under Chapter VII, the ICJ is not under an obligation to defer proceedings upon a request by the Council.¹⁹⁴ This implies that the UN Charter recognises the independence of the ICJ.

Furthermore, it is worth noting that even in the cases where judicial bodies are created by the Security Council itself, the Council does not have the competence to intervene in the technical and legal functions of those judicial bodies.¹⁹⁵ Neither the ICTY nor the ICTR Statute recognises any power of the Council to prevent or stop the Tribunals from investigating cases or prosecuting specific individuals.¹⁹⁶

As shown above, the independence of the ICC is at stake if the Security Council acts beyond what is explicitly provided for in Art 16 of the Rome Statute as such action renders the Court subject to political considerations. Art 16 is the vehicle for resolving conflicts between the requirements of peace and justice where the Council assesses that the peace efforts need to be given priority over

¹⁹¹ Gill, above n 143, at 135.
¹⁹³ See eg Art 97 of the German Grundgesetz.
¹⁹⁵ El Zeidy, above n 100, at 1529.
international criminal justice.\(^{197}\) The provision, however, is unprecedented in terms of the legal relationship it establishes between the Security Council and a judicial body\(^ {198}\) and must be regarded as an exception to the otherwise recognised independence of courts. The independence of courts constitutes a general principle of international law, which the Security Council must abide.

Thus, the following conclusion can be drawn: although the Security Council is not directly bound by Art 16 of the Rome Statute as it is not a party to the Rome Treaty, the Security Council cannot act beyond the limits provided for in Art 16 of the Rome Statute as it would interfere inappropriately with the legal functions of an independent court.

Critics might argue that the states which created the ICC had no power themselves to create an independent court in the first place – at least not one which could have power to exercise jurisdiction over the nationals of non-signatories. So, they might claim that there was no independent court to interfere with.

But if one state has the power in its municipal law alone to create municipal courts which can try aliens for offences committed on its territory or against its nationals, there is no reason why two states or any number of states cannot delegate the same powers to an international tribunal.

Moreover it can be argued that if the Security Council has the power to create independent courts, the assembly of states must have this power in any case. The establishment of the ICC by a multilateral treaty endows it with greater legitimacy than that it would have had under the establishment by a Security Council resolution.\(^ {199}\) The assembly of states must be regarded as the legislative power on the international level. Currently the Rome Statute of the ICC has 139 signatories and 93 ratifications.\(^ {200}\) The participation of such a generality of states demonstrates that the Court is widely supported within the international community.

Hence, the Security Council has to recognise the independence of the ICC and does not have the power to adopt a resolution that restricts the legal functioning of the ICC beyond the limits provided for in Art 16. Resolution 1422 must be considered as unlawful.

\(^{197}\) Ibid at 378.
\(^{198}\) Ibid.
\(^{200}\) See <www.iccnw.org/countryinfo/worldsigsandratifications.html>.

a. Resolution 1422 and UN Member States

Although Security Council Resolution 1422 is unlawful as it violates the independence of the ICC, the question remains whether the resolution is binding upon member states.

Para.3 of Resolution 1422 is directed at states and attempts to prohibit them from turning suspects over to the Court or from co-operating with it in any way that would be contradictory to the Resolution.

When the Security Council enacts unlawful decisions it must be asked whether the Charter has to be interpreted in a way that even those decisions produce binding force upon the members of the UN.

It is hardly in question that a state has a right to challenge the legality of acts of international organisations.\(^{201}\) Thus a member state can pass judgement on the legality of Security Council resolutions by itself.\(^{202}\) Whether non-compliance with a Council decision by the protesting state is lawful is, however, a separate question. An international organisation cannot function without the loyalty of its members. In other words, if a right to challenge the legality of Security Council decisions were to reside with individual member states, the binding character of these decisions would be undermined and Art 25 of the UN Charter would become a dead letter.\(^{203}\) Moreover, granting a state the right unilaterally to reject a Security Council resolution would seriously hamper the effectiveness of the organisation.\(^{204}\) It was argued that the whole peacekeeping system of the UN would collapse if states were free to judge for themselves on the legality of resolutions and to deny the binding effect due to an autonomous judgement.\(^{205}\) This would probably be the case with respect to Resolution 1422.

It can be assumed that the US would immediately stop contributing troops to UN peacekeeping operations if Resolution 1422 were regarded as non-binding upon member states.

The most a member state can do against a resolution it considers illegal is to protest. When doing so, the protestor should indicate the legal defects of the contested resolution and establish a *prima facie* case.\(^{206}\) If a *prima facie* case is established, the organisation could then consider the claim, if


\(^{202}\) Schweigman, above n 144, at 207.


\(^{204}\) Schweigman, above n 144, at 209.

\(^{205}\) See G Dahm *Völkerrecht* (Stuttgart, 1961), 212.

necessary, by referring the case to the International Court of Justice for an advisory opinion.\(^{207}\) As shown above, the Security Council does not have unlimited powers. If the extent of its powers or the legality of its acts are called in question in proceedings before the ICI, the latter has no competence of judicial review or appeal but it has the power – within as yet not wholly defined limits – to pronounce upon the questions raised through the exercise of its advisory jurisdiction.\(^{208}\)

Thus member states are bound to comply with allegedly illegal decisions of the Council, and their options are generally limited to protesting.\(^{209}\)

**b. Resolution 1422 and the ICC**

Resolution 1422, however, does not bind the ICC. This view finds support in the following argument.

The UN Charter is an instrument which creates legal duties for its members, but does not impose obligations upon other international organisations or entities themselves.\(^{210}\)

Art 48 (2) of the Charter stipulates 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’. It is, however, problematic to apply this rule to the ICC. The ICC enjoys its own legal personality under Art 4 of the Rome Statute. Furthermore, the ICC prosecutor is independent, and his or her decisions on whom to prosecute are not controlled by the state parties to the Rome Statute. Hence, Resolution 1422, which is incompatible with the principle of independence of courts and different provisions of the Rome Statute, cannot bind the prosecutor in his or her decisions. It might be argued that to the extent the parties to the ICC Statute are bound by Security Council determinations, the Court itself, as a creation of states, should also be bound.\(^{211}\) But the drafters of the Rome Statute intended to create an independent permanent Court\(^{212}\) with an independent prosecutor not under control by the state parties.\(^{213}\)

The obligation to implement the request in Security Council Resolution 1422 might, however, follow from Art 16 of the Rome Statute which states that ‘no investigation or prosecution may be commenced

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\(^{207}\) Schweigman, above n 144, at 209.


\(^{209}\) Schweigman, above n 144, at 210.

\(^{210}\) Bryde ‘On Article 48’, above n 165, at 653.


\(^{212}\) See Preamble to the Rome Statute.

\(^{213}\) See Arts 42 and 15 of the Rome Statute.
or proceeded with under this Statute for a period of 12 months’ after a Security Council request. The Security Council, however, acted inconsistently with Art 16 of the Rome Statute by adopting Resolution 1422. The Court cannot be regarded as being bound by Resolution 1422 by virtue of Art 16 if the resolution does not meet the requirements of Art 16. As the ICC is the final authority over the interpretation of the Rome Statute, the Court must be vested with the authority to refuse to implement a request by the Security Council that exceeds the limits of Art 16.214

This has the unpleasant effect that the ICC may request the surrender of a US soldier, but the state to whom the request is made may not comply with the request as it is bound by Resolution 1422.

5. Conclusion

Resolution 1422 exempts peacekeepers from non-party states to the Rome Statute committing crimes on the territory of a state party to the Statute from the jurisdiction of the ICC. The wording of the resolution suggests that the Council intends to block the ICC’s exercise of jurisdiction not only for 12 months but for an indefinite duration. This assumption is supported by the fact that the Security Council adopted on 12 June 2003 Resolution 1487, thereby renewing Resolution 1422 for another 12-month period.215

The ICC was intended as a court of last resort filling a void where states fail to undertake their responsibilities to prosecute perpetrators of grievous crimes. The establishment of the ICC should ensure an effective and equal prosecution of offences committed by peacekeepers. The adoption of Resolution 1422 undermines this goal. Under Resolution 1422 the prosecution of peacekeepers from non-party states to the Rome Statute committing crimes on the territory of a state party to the Statute is left exclusively to the national courts. Individual states, however, may not be willing or able to punish peacekeepers’ crimes that should or could be punished. Hence, the effective and equal prosecution of crimes committed by peacekeepers from third states on the territory of a contracting party cannot be guaranteed.

Resolution 1422 must be regarded as unlawful since it frustrates the ICC’s ability to function independently. The ICC has the authority to refuse to implement a request by the Security Council that interferes with the legal functioning of the ICC as an independent court. Nevertheless, UN member

states are bound by the terms of the resolution and, therefore, must refrain from co-operating with the ICC if the court requests the surrender of – for example – a US peacekeeper who has committed an international crime on the territory of a state party to the Rome Statute. In fact, the ICC’s trial system lies dormant if states are pre-empted from surrendering suspects to the court.

As a consequence, Resolution 1422 marks a deplorable setback for the development of international criminal law as it limits severely the independent powers of the ICC, which was one of the major achievements of the Rome Conference.\(^{216}\)

It is to be hoped that the Security Council does not continue to make itself subject to US political interests and will refuse to renew the request in the future.

**B. American Servicemembers’ Protection Act and Related Bilateral Agreements**

Resolution 1422 offers the United States only an unstable form of exemption. These limits to the ‘cover’ provided for by Resolution 1422 led the Bush administration to engage in other efforts to exempt US servicemen from the jurisdiction of the ICC.\(^{217}\)

On 14 July 2000, Senator Jesse Helms introduced in the US Congress the American Servicemembers’ Protection Act demonstrating the continuous effort of the US to shield American peacekeepers from prosecution by the ICC.\(^{218}\) In 2002, the Congress enacted the American Servicemembers’ Protection Act (ASPA).\(^{219}\) President Bush signed the ASPA on 2 August 2002. The ASPA addresses, as a matter of US law, the relationship between the United States and the ICC. It authorises the President to use ‘all means necessary and appropriate’ to bring about the release from captivity of US or allied personnel detained or imprisoned by or on behalf of the ICC. The bill prohibits US co-operation with the ICC while the US is not a party to the treaty and excludes US participation in UN peacekeeping operations, unless US military personnel is exempted from prosecution by the ICC.\(^{220}\) It expressly requires the President to ensure that US forces that participate in UN peacekeeping will be safe from prosecution by the ICC.\(^{221}\)

\(^{216}\) Stahn, above n 41, at <http://www.ejil.org/journal/Vol14/No1/art1-06.html#TopOfPage>.


\(^{218}\) Stahn, above n 43, at 659.


\(^{220}\) Stahn, above n 43, at 659.

The protection of US service members – and in particular of US peacekeepers – shall be achieved through the conclusion of bilateral agreements in which the states where US forces are deployed agree not to transfer members of those forces to the ICC.\(^\text{222}\) These agreements place the contracting state party under the obligation to obtain US consent before surrendering a US citizen to the ICC.

Moreover, the act bars military aid to nations that support the ICC (except for NATO countries and other major allies) unless the president waives the requirement, as he is authorised to do in the case of states that have entered into bilateral agreements with the US creating the obligation not to transfer US armed forces personnel to the ICC.\(^\text{223}\)

In the wake of the enactment of the ASPA, the US has concluded several bilateral agreements of the kind designed to satisfy the ASPA.\(^\text{224}\)

**1. Why is the US Seeking Bilateral Immunity Agreements?**

The goal of these agreements is to exempt US military and civilian personnel from the jurisdiction of the ICC and to maintain exclusive jurisdiction over ICC crimes for US national courts. These agreements are based on the assertion that parties to the Rome Statute may conclude such agreements pursuant to Art 98 (2) of the Rome Statute.

Art 98 (2) sets out that:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of the sending State is required to surrender a person of that state to the Court, unless the Court can first obtain the co-operation of the sending State for the giving of consent for the surrender.

Art 98 (2) was introduced in the Statute to address the question of the relationship between the obligations of states parties under the future Rome Statute and existing obligations of states parties


\(^{223}\) Ibid.

\(^{224}\) Until Aug 2003 approximately 50 states had signed bilateral immunity agreements with the US.
under international law.\textsuperscript{225} This provision was drafted in recognition of protections arising from pre-existing agreements such as the Status-of-Forces Agreements (SOFAs).\textsuperscript{226} Art 98 (2) provides that in the case of a conflict between the Rome Statute’s obligations to prosecute and a bilateral agreement that purports to first require the ‘sending state’s’ consent for the surrender, the bilateral agreement prevails. Therefore the Court must respect international agreements that require the consent of the sending state for the surrender of a suspect.

As far as peacekeepers are concerned, it is, however, doubtful whether the current Status-of-Forces Agreements and the Participation Agreements qualify as ‘international agreements’ under Art 98 (2) of the Rome Statute for the ICC.\textsuperscript{227}

Usually, a ‘sending state’ will contribute troops for the operations in the territory of the ‘requested state’. These troops are often regulated under Status-of-Forces Agreements between the sending and the receiving state, which typically impose an obligation on a requested state to recognise that a sending state has at least certain jurisdiction over its nationals even though the nationals of the sending state will operate in the territory of the requested state.

As explained in the first part of this essay, peacekeepers usually enjoy privileges and immunities through two types of agreements: The Status-of-Forces Agreement for Peacekeeping Operations between the UN and the host country, which accords exclusive jurisdiction to the troop contributing state in the case of military personnel and ensures immunities for peacekeeping personnel (both civilian and military). The Participation Agreement between the UN and the sending state specifies that peacekeeping personnel shall enjoy the privileges and immunities accorded in the SOFA and be tried for criminal offences by the sending state.

It has been argued that Status-of-Forces Agreements must expressly state that ‘the consent of a sending state is required to surrender a person of that state to the Court’ in order to fall within Art 98 (2).\textsuperscript{228} This argument, however, is quite weak. Art. 98 (2) is intended to apply to existing Status of

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Forces Agreements, that is, to agreements concluded before the establishment of the ICC. Art 98 (2) was designed to address possible conflicts between existing obligations under SOFAs and under the Rome Statute and to give effect to the classical international law principle, that a subsequent treaty (here the Rome Statute) cannot of itself override pre-existing obligations of contracting parties to non-party states under other treaties.

Thus it is very unlikely that any pre-existing agreement would contain the formula ‘the consent of a sending state is required to surrender a person of that state to the Court’. Even the existing SOFAs between states would not satisfy the requirements of Art 98 (2) and the provision would lose its right to exist.

However, although this argument cannot persuade, there remains some dispute concerning whether the current UN agreements governing peacekeeping operations qualify as ‘international agreements’ under Art 98 (2).

As mentioned above, Art 98 (2) refers to ‘sending states’ and addresses agreements involving a sending state/receiving state relationship. Thus it can be argued that Art 98 (2) only applies to agreements between two states and not between an international organisation (such as the UN) and a state. Therefore, the UN agreements governing jurisdiction over peacekeeping forces could not qualify as international agreements under Art 98 (2).

Moreover, it must be taken into account that the UN agreements governing peacekeeping operations only ensure that the sending state has exclusive jurisdiction for all crimes committed by military personnel and for crimes committed by civilian personnel in the performance of duties (as they enjoy immunity). But a person belonging to the civilian personnel and accused of committing a crime outside of his or her duties will not receive immunity from legal process by the host nation. In this context, it is worth noting that it is difficult to imagine that any of the crimes under the Rome Statute can be committed within the performance of an official capacity. One might argue that certain crimes, by virtue of their identification as crimes under international law, cannot be regarded as valid ‘official’

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229 Kaul and Kreß, above n 35, at 165.
action. On the other hand, this argument is problematic in the light of the fact that a definitional requirement of systematic international crimes is the participation of an organised political body. As the systematic element is a definitional requirement of certain international crimes, it might be argued that international criminal law acknowledges that organised political bodies and thus persons within their ‘official capacity’ do indeed carry out such acts. But at the same time individual responsibility for international crimes is very well established under customary international. In the case of systematic crimes, this individual responsibility comes into conflict with possible immunities.

Hence, it must be inherent in the very criminality of the act that a claim to immunity is impossible. Thus, even if the UN agreements governing peacekeeping operations are regarded to satisfy the requirements of Art 98 (2), there remains the possibility that a person belonging to the civilian personnel could be surrendered to the ICC. The state which intends to surrender the offender might argue either that the crime at issue was not committed within the performance of his or her official capacity or that a claim to immunity is impossible in the case of systematic international crimes.

In response to these uncertainties, the US is seeking to persuade other states to sign bilateral immunity agreements promising not to hand over US personnel (both civilian and military) serving in that country in an official capacity.

2. Conformity of Bilateral Agreements with the Rome Statute and Customary International Law

The US officials argue that these immunity agreements concluded by the US are contemplated under Art 98 (2) and comply with the Rome Statute as the Statute is based on the principle of deference to national judicial systems reflected in the notion of complementarity.

Many legal, government and NGO representatives maintain that the US is misusing Art 98 of the Rome Statute, the provision of the ICC’s governing treaty that the US is using to justify seeking such agreements.

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233 Ibid 487.
234 Ibid.

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Moreover, several states and in particular the Parliamentary Assembly of the Council of Europe, regard these agreements as admissible neither under customary international law governing treaties—reflected in the Vienna Convention on the Law of Treaties—nor under the Rome Statute itself.236

a. Article 98 of the Rome Statute in the Light of the Object and Purpose of the Treaty and its Drafting History

First, this essay will examine whether these agreements are covered by Art 98 (2) of the Rome Statute. As already mentioned above, according to customary international law, as reflected in Art 31 (1) of the Vienna Convention on the Law of Treaties, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose’.237

The object and purpose of the Rome Statute is to put an end to impunity for the worst possible crimes in the world in accordance with the principle of complementarity—which places the primary responsibility of investigating and prosecuting these crimes on states, but ensures that the ICC will be able to exercise jurisdiction when states fail to fulfil these responsibilities.238 As the object and purpose of the ICC Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, a fundamental principle of the Rome Statute is that no one should be immune for these crimes.239 Any possible exceptions in the Rome Statute to this principle and the jurisdictional regime provided for in the Statute must, therefore, be construed

238 The object and purpose of the Rome Statute is set forth in the Preamble, in particular in the following paragraphs:

‘Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes,

…

Emphasising that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice [.]’

narrowly in a manner consistent with the object and purpose of the Statute. Hence, Art 98 (2) cannot be read to permit a non-party state to the Rome Statute to benefit by its provisions and remove crimes from the ICC’s jurisdiction. Indeed, any interpretation that Art 98 (2) did cover impunity agreements would lead to the absurd and unreasonable result, that a non-party state could subvert the fundamental principle in the Rome Statute that anyone committing genocide, crimes against humanity or war crimes on the territory of a state party is subject to the jurisdiction of the ICC if states are unable or unwilling genuinely to investigate and, if there is sufficient admissible evidence, to prosecute.

To permit a non-party state to use Art 98 (2) in this way would undermine the ICC’s capacity either to prosecute these most grievous crimes, or to ensure that good faith national prosecutions occur. In other words, Art 98 (2) must be interpreted consistently with the goals of the Rome Statute to bring the perpetrators of the most serious crimes to justice through the establishment of a strict jurisdictional regime. Therefore Art 98 (2) cannot be read to allow agreements that are designed to provide immunity from that regime.

Moreover, it is clear from the terms and the drafting history of Art 98 of the Rome Statute that the provision gives only limited room to accept waiver of immunity and consent to surrender by the states parties or the third parties. Art 98 was not designed as a loophole for impunity from the Court by letting states enter into subsequent bilateral agreements undermining the whole statutory scheme. As already mentioned above, Art 98 (2) was introduced in the Statute to address the question of the relationship between the obligations of states parties under the future Rome Statute and existing obligations of states parties under international law. Hans-Peter Kaul and Claus Kress – both members of the German delegation – explained that Art 98 (2) was designed to address possible – not certain – conflicts between existing obligations under Status-of-Forces Agreements and not to create

242 Ibid.
245 See ibid at p.6.
an incentive for (future) state parties to conclude agreements which amount to an obstacle to the
execution of requests for co-operation issued by the Court.\textsuperscript{246}

Thus, Art 98 (2) has been designed to take into account the obligations state parties might have under
pre-existing SOFAs, thereby giving effect to the classical international law principle, that a subsequent
treaty (here the Rome Statute) cannot of itself override pre-existing obligations of contracting parties
to non-party states under other treaties.\textsuperscript{247} But Art 98 (2) was not introduced to allow the conclusion of
agreements, which are drafted for the sole purpose of providing the nationals of states opposing the
ICC with immunity from its jurisdiction.\textsuperscript{248}

Furthermore, the language of the US-proposed agreements reveals that they cannot be considered as
agreements which fall under Art 98 (2).\textsuperscript{249} Art 98 (2) refers to agreements concluded with a ‘sending
state’ and thereby addresses Status-of-Forces Agreements and other agreements involving a sending
state/receiving state relationship. However, the agreements lobbied for by the US seek immunity for a
wide-ranging class of persons, without any reference to the traditional sending state – receiving state
relationship.\textsuperscript{250} This wide class of persons would include anyone found on the territory of the state
concluding the agreement with the US who works or has worked for the US government.\textsuperscript{251} Thus, the
US bilateral agreements reach far beyond the scope of, and thus violate, Art 98 (2).\textsuperscript{252}

Under Art 18 of Vienna Convention on the Law of Treaties, states must refrain from any action which
would not be consistent with the object and purpose of a treaty pending a decision whether to ratify the
treaty, even before that treaty has entered into force.\textsuperscript{253} This rule is considered to be a rule of
customary international law.\textsuperscript{254} Hence, a state entering into a US impunity agreement that had
previously signed the Rome Statute would be acting in a manner that would defeat the object and
purpose of the Statute and, thus, would violate its obligations under customary international law
governing treaties.

\begin{thebibliography}{99}
\bibitem{246} Kaul and Kreß, above n 35, at 165.
\bibitem{247} Vienna Convention on the Law of Treaties, Art 30 (4) (b).
\bibitem{249} Ibid.
\bibitem{250} Ibid.
\bibitem{253} Vienna Convention on the Law of Treaties, Art 18.
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b. Articles 86, 89 and 27 of the Rome Statute

In support of their view that these agreements do not comply with the Rome Statute, critics of the US immunity agreements also refer to Arts 86, 89 and 27 of the Rome Statute.

Under Art 86 of the Rome Statute, the states parties to the ICC treaty are obliged to co-operate fully with the Court in its investigation and prosecution of crimes within the Court’s jurisdiction. However, by concluding such agreements, which would in effect limit the Court’s jurisdiction, every state party would escape its responsibilities under Art 86 of the Rome Statute to arrest and surrender persons from non-state parties accused of having committed crimes under the jurisdiction of the ICC on their territory or the territory of another state party.255

Art 89 provides that the ICC may request states parties to arrest and surrender persons within their jurisdiction. It further provides that ‘states parties shall comply with requests for arrest and surrender’. An Art 98 (2) agreement with the US contravenes this provision.

A key component of the object and purpose of the Statute is the incorporation within Art 27 of the fundamental principle that no one should be immune for crimes under the jurisdiction of the Court. Art 27 sets out that the Rome Treaty applies equally to all persons without any distinction based on official capacity. Thus, any agreement creating the obligation not to transfer US armed forces personnel to the ICC would violate Art 27.

3. Conclusion

To sum up, the conclusion of exemption agreements is not admissible under the Rome Statute and infringes customary international law governing treaties as a state which has signed the Statute is obliged not to defeat the object and the purpose of the ICC Statute.

Therefore, these agreements should be considered as invalid and not creating obligations upon states parties to the Rome Statute. Nevertheless, different states, which have concluded such agreements, will refuse to abide by a request of the ICC to surrender a US peacekeeper.

Thus, these agreements will in effect hamper the functioning of the ICC and the exercise of jurisdiction over US peacekeepers in the same way as Resolution 1422.256

Moreover, these agreements provide a dangerous precedent. Other nations, particularly those opposed to the ICC, may be encouraged to pursue similar immunity for their own citizens. This would fundamentally undermine the jurisdictional scheme of the ICC.

V. Final Remarks

As the traditional mechanism of reserving criminal jurisdiction over members of peacekeeping operations for troop contributing states had certain disadvantages, the drafting of the ICC Statute provided an opportunity to re-evaluate this practice. The jurisdictional scheme of the Rome Statute should apply to peacekeepers under the same conditions as to any other person. Thereby the drafters of the Rome Statute intended to ensure an equal and effective prosecution of international crimes committed by peacekeepers.

This effort of the international community is undermined by various US initiatives to exclude its peacekeepers from the jurisdiction of the ICC. Resolution 1422 exempts personnel from ICC non-party states involved in UN established or authorised peacekeeping missions from the ICC’s exercise of jurisdiction for a renewable 12-month period. This resolution has been renewed through the adoption of Resolution 1487 on 12 June 2003. Moreover the US has concluded several bilateral so-called ‘Art 98 agreements’. These agreements place the contracting state party under the obligation to obtain US consent before surrendering a US citizen to the ICC. The goal of these agreements is to exempt US military and civilian personnel – in particular peacekeepers – from the jurisdiction of the ICC and to maintain exclusive jurisdiction over ICC crimes for US national courts.

Neither the adoption of Resolution 1422 nor the conclusion of these so-called ‘Art 98 agreements’ is admissible under the Rome Statute and the relevant rules of international law.

Both US initiatives must be opposed by the international community to guarantee the effective and equal prosecution of peacekeepers and to ensure compliance with the ICC. At stake are the independence and integrity of a vital instrument for international justice.

256 Though, it must be born in mind that the possibility of a surrender of a US peacekeeper to the ICC is in any event ruled out by Resolution 1422 at the moment.