

HUMAN RIGHTS WATCH

350 Fifth Ave, 34th Floor
New York, NY 10118
Phone: 212.290.4700
Fax: 212.736.1300
hrwnyc@hrw.org
Website: <http://www.hrw.org>



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Close the Door to Impunity:

Human Rights Watch Recommendations to U.N. Member States on the Renewal of Resolution 1487

Updated May 13, 2004

I. Introduction

One of the key components of the Bush administration's campaign to undermine the International Criminal Court ("ICC") is Security Council Resolution 1487. The resolution, adopted on June 12, 2003, grants immunity from the ICC to personnel from ICC non-states parties involved in United Nations (U.N.) established or authorized missions, for a twelve-month period. Resolution 1487 represents the renewal of Security Council Resolution 1422, and the effect of Resolution 1487 is identical to Resolution 1422.

The Security Council adopted Resolution 1422 on July 12, 2002, following an intense debate on the U.N. Peacekeeping Mission in Bosnia-Herzegovina (UNMIBH). In an extraordinary step two weeks earlier, United States Ambassador to the U.N. John Negroponte vetoed the mission's renewal, and Bush administration officials threatened to veto the renewal of all peacekeeping operations, if Council members did not agree to the text of the resolution. Wanting to preserve peacekeeping operations, Security Council members adopted the text despite its serious flaws. Resolution 1422 included text stating the intention of the Security Council to renew it each year.

Human Rights Watch opposes Resolution 1422/1487 primarily for two reasons: (i) it grossly distorts the meaning of Articles 16 and 27 of the Rome Statute in ways that weaken the independence of the court; and (ii) by amending a multilateral treaty in this way the Security Council has overstepped its authority under the United Nations Charter. An analysis of Resolution 1422/1487 is provided below in Section III.

Human Rights Watch believes that states should take a principled course and work together to bring about an end to renewal of Resolution 1422/1487. Recent events underscore the importance of ensuring that the rule of law applies equally to all without any exceptions.

Human Rights Watch believes that three objectives are vitally important and achievable as part of the process to hasten the ultimate elimination of Resolution 1422/1487: 1) a greater number of abstentions by Security Council members in the vote to renew Resolution 1487 than in the vote last year; 2) statements by Security Council members at the Security Council debate on renewal expressing support for the ICC; and 3) an open meeting at the Security Council prior to the vote on the resolution in which both regional groups and individual delegations make considered statements expressing support for the ICC. As the vote on renewal of the resolution could come up quickly without substantial notice, advance preparation as soon as possible will be essential to achieving these objectives.

II. Human Rights Watch's Recommendations

With the vote on renewal fast approaching (it is expected anytime in the next two months), Human Rights Watch urges U.N. member states who are ICC states parties and signatory parties to take the initiative now. While ultimately the decision of whether to renew Resolution 1487 will be in the hands of Security Council members, all ICC states parties and signatory parties have an important role to play in pressing the Council to respect the Rome Statute.

Human Rights Watch believes that ICC states parties and signatory parties' efforts around the vote on renewal will be an important measure of credibility with respect to commitment to combating impunity by supporting the ICC. Human Rights Watch further believes that civil society around the globe will follow closely the vote on the renewal of Resolution 1487.

Human Rights Watch urges U.N. member states who are ICC states parties and signatory parties to:

- In your discussions with Security Council members, urge them to abstain from the vote to renew Resolution 1487, and make statements at the Security Council debate supporting the ICC, affirming the need for equal application of the rule of law, and emphasizing that renewal will not be tolerated indefinitely;
- Request an open meeting at the Security Council on renewal of Resolution 1487;
- Work with your capitals in the coming weeks to develop statements intended for an open meeting at the Security Council in light of the possibility that there will be little advance notice prior to proposal of the resolution; and
- Make substantial and considered statements, as regional groups and individual delegations, at an open meeting at the Security Council opposing renewal of Resolution 1487, supporting the ICC, affirming the need for equal application of the rule of law, and emphasizing that renewal will not be tolerated indefinitely.

It is important to stress that we are not advocating in any way that ICC states parties and signatory parties make provocative or confrontational statements against the interests of the United States, but rather to express the need for the equal application of the rule of law and support for the ICC.

U.N. members states who are ICC states parties and signatory parties face a vastly improved political climate in which to implement the above recommendations than existed leading up to the vote on renewal of Resolution 1422 one year ago. Resolution 1422 was adopted by a unanimous vote in favor of the resolution. However, when the Security Council renewed Resolution 1422 by adopting Resolution 1487, three Security Council members – France, Germany, and Syria – abstained. Moreover, in the Security Council open meeting on Resolution 1487, the European Union and other states made strong statements underscoring that renewal would not be tolerated indefinitely. In particular, the Greek presidency made the following statement on behalf of the European Union and associate countries:

“The EU is of the view that the inclusion in Resolution 1422 of the phrase ‘renew the request...under the same conditions each 1 July for further 12-month periods for as long as may be necessary’ cannot be interpreted as permitting the automatic renewal of that resolution.... The EU firmly believes that an automatic renewal of that resolution would be undermining the letter and the spirit of the Statute of the ICC and of its fundamental purpose that is to put an end to impunity....”

The three abstentions in the vote on renewal last year represented a dramatic shift that, along with statements in the open meeting, U.N. member states who are ICC states parties and signatory parties can

and should build upon this year. Human Rights Watch believes that this effort will make an immensely important contribution to bringing about the end of renewal of Resolution 1422/1487.

III. Human Rights Watch Analysis of Resolution 1422/1487

Article 16

The terms of Article 16 are clear. It states: “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.”

The article establishes a mechanism for deferring investigations or prosecutions on a case-by-case basis, subject to time limitations and a formal renewal process. This interpretation is derived from reading the article “in good faith in accordance with the ordinary meaning” of the words, as required by the Vienna Convention on the Law of Treaties. It is also consistent with the drafting history of Article 16.

The phrase, “no investigation or prosecution may be commenced or proceeded with,” presupposes the existence of a particular “investigation” or “prosecution” that relates to a specific incident or the potential culpability of an individual regarding specific conduct. Article 15 of the Rome Statute spells this out. The Pre-Trial Chamber must authorize the commencement of a specific “investigation.” All prosecutor inquiries up to this point are not “investigations,” but only “preliminary examinations” – *see* Article 15(6). Only after Pre-Trial Chamber authorization of an “investigation” is the Security Council entitled to request a deferral under Article 16.

The structure of the Rome Statute further underscores the requirement that any Security Council deferral request must respond to a specific case. Article 16 appears after Articles 12 – 15 (dealing with the mechanisms triggering ICC jurisdiction), demonstrating that, as a matter of logic, an Article 16 deferral request is not meant to be a tool for Security Council preventive, indiscriminate action, but a response to specific ICC proceedings.

Any such deferral must be temporary, subject to the 12-month limit stipulated in Article 16, so that the perpetrators of any atrocities would ultimately be brought to account for their crimes – either via national judicial systems or the ICC. It is clear, then, that Article 16 does not sanction blanket immunity in relation to unknown, future events.

The above interpretation of Article 16 is consistent with one of the Rome Statute's key features: to limit the role of the Security Council vis-à-vis the ICC, and specifically to prevent the court's investigations and prosecutions from being subject to prior Security Council approval. However, by ignoring the “case-by-case” requirements of Article 16, the text of 1487 does exactly the opposite, subjugating the ICC to the politics of the Security Council.

Article 27

Article 27 of the Rome Statute expressly prohibits making distinctions on the basis of official capacity. It is a crucial provision that encompasses the fundamental object and purpose of the treaty to ensure that no person is above the law. This includes peacekeepers, as well as politicians and heads of state. In contrast, Resolution 1487 allows an entire class of individuals to escape the judgment of the ICC, opening the door to impunity if national courts of non-states parties fail to carry out good faith investigations and prosecutions. It is a clear violation of Article 27 of the Statute.

Defenders of the resolution argued that, as a matter of practice, 1487 would not damage the “core” of the court's jurisdiction by exempting a class of individuals from ICC jurisdiction because the risk of U.N.

peacekeepers committing Rome Statute crimes was said to be very low. Even if this is true most of the time, it is still no justification for violating Article 27.

Moreover, Human Rights Watch has documented crimes of sexual violence, including rape, allegedly perpetrated by U.N. peacekeepers in Sierra Leone (*see* “We’ll Kill You if You Cry” at <http://www.hrw.org/reports/2003/sierraleone>). On May 7, 2004, the U.N. peacekeeping mission in the Democratic Republic of the Congo also commenced an investigation into reported sexual exploitation and sexual abuse of civilians by its personnel. These disturbing allegations highlight the necessity to preserve Article 27 intact.

Resolution 1487, by bestowing blanket immunity from the court's jurisdiction to an entire class of persons in advance of unknown future events, is in manifest violation of the Rome Statute.

Security Council Overreach

The powers of the Security Council are subject to important limitations, governed by the U.N. Charter and customary international law. Before invoking its powers under Chapter VII of the U.N. Charter, the Security Council is required to make a finding of a threat to peace (*see* Article 39 of the U.N. Charter). The Security Council never made this determination in Resolution 1487. It is beyond the legal authority of the council to have invoked Chapter VII of the U.N. Charter without clearly identifying the threat to international peace and security.

A Broken Promise

When Resolution 1422 was first proposed, its supporters argued its acceptance on the grounds that it would result in the United States ceasing to make immunity for personnel from ICC non-states parties an issue each time the Security Council voted on a U.N. mission. However, as shown by Resolution 1497 establishing a U.N. peacekeeping mission in Liberia, this has not been the case. At the insistence of the United States, Resolution 1497 includes a paragraph allowing certain personnel associated with the Multinational or U.N. Stabilization Force in Liberia complete immunity and possibly impunity for crimes. Paragraph 7 of the resolution states:

“*Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute for the International Criminal Court, shall be subject to the *exclusive jurisdiction* [emphasis added] of that contributing State for [any acts arising from participation in the mission] unless such jurisdiction has been expressly waived by the contributing State.”

The United States took advantage of the tragic circumstances in Liberia and the urgent need for international intervention to secure inclusion of this provision in a country-specific resolution despite the previous adoption of Resolution 1487.