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Closing the Door to Impunity:

Human Rights Watch Recommendations for Renewing Resolution 1422

I. Introduction

One of the key prongs in the Bush administration's campaign to undermine the International Criminal Court (ICC) is Security Council Resolution 1422. The resolution grants immunity to personnel from ICC non-states parties involved in United Nations (U.N.) established or authorized missions for a renewable twelve-month period.

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 UN Ambassador John Negroponte vetoed the mission's renewal. In addition, Bush administration officials threatened to veto the renewal of all peacekeeping operations, if council members did not agree to the text of Resolution 1422. Eager to preserve peacekeeping operations, Security Council members adopted the text despite its serious flaws.

With the date for 1422's renewal fast approaching, Human Rights Watch urges ICC states parties and signatory parties to take the initiative now. Whether the U.S. attempts to make renewal a mere formality or tries to go further by obtaining a permanent blanket immunity for its forces, there are compelling reasons for ICC supporting states to act. If Resolution 1422 is renewed, it will likely consolidate the exemption obtained last year and codify the immunity as a permanent "amendment" to the Rome Treaty. Human Rights Watch believes the stakes are far higher this year than last.

While ultimately the decision is 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 recognizes the political difficulties involved. States that opposed the recent U.S. military actions in Iraq may be reluctant to engage in another tense wrangle with the Bush administration at the Security Council. Opposing 1422's renewal is not an easy prospect, but the issues raised by Resolution 1422 are too important to ignore. The legitimacy of the ICC is at stake.

Human Rights Watch opposes Resolution 1422 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.

We urge states to pursue a principled course and build opposition to renewing Resolution 1422 at all. At the same time, Human Rights Watch realizes that an outright rejection of 1422 may prove to be impossible. If renewal becomes unavoidable, then, at a minimum, states parties and signatory states (on and off the council) should urge council members to adopt a resolution consistent with the Rome Statute and the U.N. Charter.

Ultimately, the decision rests with the members of the council. However, last year's debate demonstrates the important role non-members have to play in pressing the council to respect the Rome Statute.

II. Human Rights Watch Analysis

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. But by ignoring the "case-by-case" requirements of Article 16, the current text of 1422 does exactly the opposite, subjugating the ICC to the politics of the Security Council. Others appear to agree. During the Security Council Open Meeting on July 10, 2002, one ambassador asserted, "[Resolution 1422] would have the Council, Lewis Carroll-like, stand Article 16 of the Rome Statute on its head." This same mistake should not be made when the resolution is renegotiated.

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. Without strict adherence to this principle, the door to impunity will remain open. In contrast, Resolution 1422 allows an entire class of individuals to escape 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, 1422 would not damage the "core" of the ICC'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. And Human Rights Watch has recently documented crimes of sexual violence, including rape, allegedly perpetrated by ECOMOG and UNAMSIL peacekeepers in Sierra Leone (*see "We'll Kill You if You Cry"* at <http://www.hrw.org/reports/2003/sierraleone>). These disturbing allegations highlight the necessity to preserve Article 27 intact.

Resolution 1422, 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. Ultimately, of course, the court has the final word in determining the legal and practical effect of the resolution; however, all states parties have the obligation now to avoid renewing a resolution that violates the Rome Statute.

An Additional Reason to Reject Renewal of 1422: Security Council Overreach

Human Rights Watch's chief concerns with Resolution 1422 relate to its interface with the Rome Statute, as it effectively amends this important multilateral treaty. But renewing Resolution 1422 should be resisted for another important reason: so that the Security Council does not overreach its authority and acts within the U.N. Charter.

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 1422. 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.

III. Human Rights Watch's Recommendations

Human Rights Watch believes, for the reasons stated above, that the principled course is for states to work together to reject any proposed renewal of Resolution 1422 by the Security Council.

As an alternative, and only if renewal becomes unavoidable, the current text of the resolution should be changed to reflect the requirements of the Rome Statute. We support a text requiring the Security Council, before requesting a deferral, to make a case-by-case analysis of specific situations or incidents when investigations or prosecutions are underway. This text should also require Security Council renewal every twelve months.

This amendment of 1422 is necessary based on a fair and reasoned analysis of Articles 16 and 27 of the Rome Statute.

The key component of an acceptable solution, along the lines of a proposal circulated by a state member last year, would be:

The Security Council expresses its readiness, pursuant to Article 16 of the Rome Statute, to consider on a case-by-case basis requesting the ICC to defer, for a renewable period of 12 months, investigations or prosecutions involving nationals of states not party to the Rome Statute participating in United Nations Security Council established or authorized operations only if necessary to maintain or restore international peace and security.

Inclusion of a firm requirement to renew after twelve months is commanded by Article 16, and cannot be interpreted otherwise. All states should resist any efforts by the United States to pass a resolution granting permanent immunity from the ICC.

Human Rights Watch urges all states to promote the adoption of provisions similar to this text with Security Council members over coming weeks and months.

IV. Conclusion

Human Rights Watch believes that the legal and policy arguments calling for a rejection of 1422, or a significant reworking of its operative provisions, are compelling.

States should approach the upcoming Security Council negotiations aware that the Bush administration's push for a renewal of Resolution 1422 is not based on principled objections to the court, or out of concern for the future of international peacekeeping. Instead, the U.S. remains suspicious of international institutions that are not under its control. For this reason, the Bush administration seeks to undermine and marginalize the ICC, which is poised to become a truly independent and impartial arbiter of international justice and the rule of law.