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**EUROPEAN UNIVERSITY INSTITUTE  
LAW DEPARTMENT**

**Working Group on International Criminal Law**  
*Meeting of 23 January 2008*

Participants to the meeting were:

Professor Francesco Francioni, Professor Annalisa Ciampi, Professor Pierre-Marie Dupuy, Professor John Jackson (Fernand Braudel Senior Fellows), Professor Ana Vrdoljak (Marie Curie Fellow), Noora Arajärvi, Valentina Falco, Dov Jacobs, Axelle Reiter and Patricia Pinto Soares.

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Patricia Pinto Soares held a presentation on ‘The Security Council Performance within the System drawn by the Statute of Rome: abusive practice or due exercise of competences?’ Patricia’s presentation is attached below. The presentation was followed by a discussion on both the substance and methodology of the topic.

Noora and Dov introduced the latest issues relating to the conference (Fighting Impunity in a Fragmented World - New Challenges for the International Criminal Court) to be organized in the framework of the Working Group 23-24 May 2008.

It was agreed that the next meeting of the Working Group will take place 12<sup>th</sup> March 2008, and Noora Arajärvi will present on the topic ‘State Sovereignty and International Criminal Law’.

The meeting was closed at 16:50.

**The Security Council Performance within the System drawn by the Statute of Rome:  
abusive practice or due exercise of competences?**

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Since the coming into force of the Statute of Rome the UN SC has adopted some resolutions which may be considered as an excessive interference in the work of the ICC. This presentation intends to highlight some of the most controversial aspects of those decisions

**1. Resolutions 1422 (2002) and 1593 (2005)**

Through Resolution 1422<sup>1</sup>, the SC requested the ICC not to initiate any investigations or prosecutions over peacekeepers of non-States Parties to the Rome Statute as well as manifested its intention to renew the request for successive periods of 12 months as long as necessary. This settlement was the cost to pay as to ensure the non opposition of the USA to the renewal of UN peacekeeping missions in Bosnia Herzegovina.

Through Resolution 1593<sup>2</sup>, the SC referred the Situation in Darfur to the ICC but not only exempted from the Court's jurisdiction all peacekeepers nationals of non-States Parties to the Statute as well as ensured exclusive jurisdiction to the State of nationality.<sup>3</sup> As the former, also this Resolution was the price to pay in order to avoid the veto of the USA to the referral.

The presentation will be developed based on Resolution 1422 since essentially all remarks done with regard to it are also valid as far as Resolution 1593 is concerned. In the end I will draw your attention to the particularities of the latter.

Before examining the legality of the Resolutions, a preliminary issue needs to be underlined. That is, the ICC enjoys legal personality<sup>4</sup>. In this sense, it is independent from States, the UN and in particular the SC.<sup>5</sup> Therefore, it is legitimate to conclude that it is not automatically bound by SC decisions even if States may be so. One can raise the question of whether international organizations may be endowed with powers bigger than the ones that States which have created them are entitled to. In other words, can the ICC, as a creation of States, be considered not bound by SC resolutions when States obliged to carry them out. In my view, States, by investing the Court with detached legal personality, have expressed their sovereign will to edify an institution different from States themselves, probably aware of the controversies that the establishment of the first permanent international criminal court would raise. One may, in addition, counter-argue that States are obliged to ensure the obedience of SC decisions in and by the agencies they are part to. However, this argument cannot prevail with regard to the ICC which is a court and therefore bound to discharge the judicial activity in absolute independence.

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<sup>1</sup> Resolution 1422 (2002), 12 July.

<sup>2</sup> Resolution 1593 (2005), 31 March.

<sup>3</sup> See also SC Resolution 1497 (2003). As to ensure the UN operations in Liberia, which is a State Party to the Statute of Rome, the SC gave in once more before the demands of the USA. Accordingly, it passed Resolution 1497 (2003), which contents are basically the same as the ones of Resolution 1593 (2005).

<sup>4</sup> See Article 4 and the Preamble of the Statute of Rome.

<sup>5</sup> Contrarily to the *ad hoc* Tribunals, the ICC is not a subsidiary organ of the SC.

If the ICC is not automatically bound by SC resolutions, seems fair to conclude that the eventual obligation of the Court to follow those decisions draws from the Statute itself.

## **2. The Statute of Rome**

The first provision to be taken into account is Article 16 of the Statute which bars the commencement or continuance of investigations and prosecutions after a request to that effect presented through a resolution adopted under Chapter VII of the UN Charter.

The SC passed Resolution 1422 (2002) on the premise that it is empowered to adopt Resolutions in general and abstract terms; that is to say, in this specific case, without the existence of a concrete conflict and, consequently, a specific group of people that, for reasons of international peace and security, would be worthy of exemption before ICC's proceedings. Such claim cannot, in my view, be considered free from large scepticism.

The wording of Article 16 determines that investigations and prosecutions may not be *proceeded with*, thus it is logic to infer that investigations or prosecutions had to be in motion at the moment of the request. It is then needed a concrete case to display Article 16. Difficulties arise with regard to the words 'no investigations or prosecutions may be *commenced*' after the request. There is no doubt that the SC can bar ICC's proceedings but the question is whether it can do it in hypothetical terms. The literal element of interpretation does no longer suffice to supply a coherent answer. One shall consider, in accordance with Articles 31 and 32 of the VCLT, the *travaux préparatoires*, the systematic placement of Article 16 and the *telos* of the provision.

The negotiation of Article 16 shows that it was intended to work on a case-by-case basis.<sup>6</sup> This view was expressed by some countries during the Rome Conference. Furthermore, if other had been the will of the negotiators of the Statute, they would have accepted some of the USA proposals, namely that advocating that the request referred to in article 16 should be automatically renewed each 12 months if the SC did not say anything on the contrary. These proposals were, nonetheless, rejected.

From a systematic perspective, one shall bear in mind that Articles 13, 14 and 15 determine the conditions under which the Prosecutor may initiate investigations. Logically, it seems that the placement of the norm after and not before these provisions indicates that the exercise by the SC of the powers enshrined in Article 16 requires that at least some proceedings probable to lead to the opening of investigations are in motion.

As for the intent of Article 16, I consider it is to permit the SC to suspend Court's proceedings when otherwise interests of international peace and security may be at risk. However, threats to international peace and security cannot be evaluated in hypothetical terms, most of all due to the effects of a Resolution adopted under Chapter VII of the UN Charter. That is even more the case if one takes into consideration that Article 16 functions as a guardian of corner-principles of the Statute. It directly jeopardizes the principle of complementarity since Resolution 1422 entails a species of veiled prohibition on States to cooperate with the ICC. It diminishes Article 27 which recognizes no immunities. In addition, the parameters of equality seem to rest at the SC disposal. Being this a strictly political organ, delicate problems may arise from a legal perspective.

The negotiators of the Statute did not intend to provide the SC with a 'blanket immunity' power to be exercised in general and abstract terms. A different view appears as a camouflaged

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<sup>6</sup> See, namely, the proposals of Costa Rica, Singapore and United Kingdom, Bergasmo and Pejic, "On Article 16", in O. Triffterer and C. Rosbaud (eds.), *The Rome Statute of the International Criminal Court*, (2000), p. 375 *et seq*

way of awarding the SC with a controlling supremacy that was vehemently denied by times of the Rome Conference.

### **3. The Charter**

After concluding that Resolution 1422 is not in accordance with the Statute of Rome, the question arising is whether the UN Charter supplies any ground imposing the prevalence of the Resolution over the discipline established by the Statute of Rome. This matter begs for the consideration of the powers recognized to the SC, namely when acting under Chapter VII.

#### **a. The Purposes and Principles of the Charter**

The purposes of the Organization are enshrined in Article 1. For their systematic placement and considering that they are not only established in the Preamble of the Charter but reinstated in an autonomous provision, I consider that they give rise to legal obligations rather than merely programmatic indications. This means that each decision taken by the organs of the Organization needs to reflect the Purposes and in case of doubt the interpretation of such decisions shall be made in light of Article 1. Paragraph 1 of Article 1 is divided in two parts: the first posits the prime purpose of the Organization whereas the second sets out the means to achieve the purpose. Nonetheless, *peaceful means, justice and international law* are to be considered as a purpose in themselves and not only as a means. The Organization cannot pursue international peace and security through despotic or unlawful acts.

Article 2 of the Charter enshrines that the *Organization is based on the principle of sovereign equality of all its Members*. States enjoy the same general rights and obligations independently of their economic, military and political power, size or population. It intends to exclude the superiority of one State before another at the same time establishing the States' status to be respected by the Organization.<sup>7</sup>

Kelsen sustained that *'the State is then sovereign when it is subject only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States'*.<sup>8</sup> Through the mentioned Resolutions the SC permitted the perversion of Article 2/1. The USA could not impose their laws and political views on other sovereign States. Consequently, it used its influence within the SC and managed the approval of decisions contrary to the intent of States and international law. The SC supplied the United States with a mechanism to override sovereign rights and derogate international obligations. It consisted on a fraud to the law, namely that of the UN Charter.

According to Tomuschat *sovereignty is in a process of progressive erosion, where the international community places ever more constraints on the freedom of action of States ... driven by a global change in the perception of how the right balance between individual State interests and interests of mankind as a whole should be established*.<sup>9</sup> I agree with the Author. This process permits to limit abuses and ensure the protection of human rights. States are affected concerning the insight of their 'sovereignty', but conversely they are somehow compensated as they are main actors in the process of disclosing the *interests of mankind as a whole*, namely through the conclusion of international treaties.<sup>10</sup> This right is prominent and the SC cannot ignore it most of all when the Statute of Rome counts today with a number of States Parties that is superior to half of the Members States of the UN.

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<sup>7</sup> Article 2/1 establishes the principle of equality before law.

<sup>8</sup> Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', *YLJ*, 53, 1944, p. 208.

<sup>9</sup> C. Tomuschat, 'Obligations Arising for States Without or Against their Will', *Rec. de Cours* 241, 1993, p. 195-375, at 292.

<sup>10</sup> In this sense, see Fassebender/Bleckmann, 'Article 2', *Charter of the United Nations...*, as *supra*, p. 86.

b. The Principle of Good Faith

The Principle of Good Faith is enshrined in Article 2/2 of the UN Charter<sup>11</sup>. An important feature of the duty to act in good faith is that it addresses both States and the organs of the UN.<sup>12</sup>

In the san Francisco Conference it was stated that '*the expression 'sovereign equality of all Members' in Art 2(1) was chosen on the understanding and condition that while each State enjoyed the rights inherent in full sovereignty, each member was still required to comply faithfully with international duties and obligations. The good faith clause was therefore intended to blunt the principle of sovereignty...In legal terms, therefore, no State can invoke its sovereignty in order to evade its international obligations as determined by the duty of good faith and in accordance with the Charter*'.<sup>13</sup> I conclude, *a contrario sensu*, that the powers recognized to the SC by means of Chapter VII are only duly exercised if in accordance with the Purposes that were at the basis of the creation of the UN and the fundamental principles of the Charter. When the SC disregards this obligation, States are legitimated to evoke their sovereignty in order not to follow the former decisions. They would behave in this way not to violate the Charter, the duty to act in good faith or international obligations but precisely to act in accordance with all of them.

The binding nature of the principle of good faith on the Organization reminds it of its own reality and limitation: mostly due to its highly comprehensive aims, it can only survive through the renewal of States consent and joint will which cannot not be forced..

c. Articles 24 and 25 of the UN Charter

Article 24 is not a black-hole endowing the SC with unlimited powers. Paragraph 1 attributes to the SC the main responsibility concerning international peace and security. States endowed it with such power presupposing that it would act in the behalf of the community of States. Furthermore, paragraph 2 establishes that *in discharging these duties the SC shall act in accordance with the Purposes and the Principles of the United Nations*. The SC only exercises its powers in behalf of States if it respects the principles and purposes of the Charter. Conversely, Article 25 establishes that States are only obliged to *accept an carry out ... decisions of the Security Council in accordance with the... Charter*. Some Authors argue that the wording *in accordance with the present Charter* refers to the Charter imposition on Member States to accept and carry out the decisions of the SC. To others, instead, Article 25 is to be read as granting binding effects only to those decisions which were taken in accordance with the provisions of the Charter. I follow the latter interpretation. The former is immediately contrary to the letter of the provision. However, if one considers Article 25 unclear, it should recall the Preamble of the Charter as to proceed to the interpretation of the norm. A teleological interpretation - always acknowledged as a valid and highly relevant means of interpretation<sup>14</sup> - of Article 25 supports the view advocated in this paper. Its *effect-utile* consists on the fact that between two possible interpretations, the one better serving the purposes of the treaty and the remaining provisions considered in overall terms must be chosen.

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<sup>11</sup> *All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.*

<sup>12</sup> *Vide* G. Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. III, 1976, p. 215, and J. Spiropoulos, ICJ, *Effects of Awards of Compensation Made by the UNAT*, Pleadings Series, 1954, p. 351.

<sup>13</sup> Müller/Kolb, 'Article 2', *The Charter of the United Nations*, as *supra*, p.95. See also UNCIO VI, p. 446 *et seq*

<sup>14</sup> *Vide* Article 36/5 of the ICJ Statute. See also *Aerial Incident*, ICJ Reports, 1959, p. 127 *et seq.*; and *Certain Expenses*, ICJ Reports, 1992, p. 162 *et seq.*

The protection of human rights, the principles of humanitarian law and respect for justice, referred to in the purposes and principles, play an essential role within the interpretative task. It is not forgotten that the action of the SC under Chapter VII is not primordially motivated by justice or the protection of human rights but by interests of international peace and security. Nonetheless, it must act based upon proportionality and good faith. This means that peace cannot be achieved through the sacrifice of those purposes that justified the creation of the UNO and the respective delegation of sovereignty made by Member States. The arm can not absorb the brain of the overall entity becoming itself *the* entity. It has no legitimacy for that and it is not prepared for the role.

d. A threat to, or breach of, international peace and security

The SC allegedly adopted Resolution 1422 under Chapter VII of the UN Charter. Essential condition for the exercise of the binding powers established therein is, in accordance with Article 39, the determination of a *threat to peace, breach of the peace, or act of aggression*.

The *travaux préparatoires* of Article 39 reveal the clear intent of States not to submit the SC to a large range of limitations when acting under Chapter VII.

The SC enjoys indeed a broad level of discretion concerning the determination of a threat to, or breach of, international peace and security: Article 39, 40 and 42 are quite elucidative in this respect. Nonetheless, the SC is not completely free when determining if the conditions to act under Chapter VII have been met.

The concept of ‘peace’ can be understood in broad or narrow terms. Bearing in mind the far-reaching and highly discretionary powers of the SC as well as the purpose of its action when acting under Chapter VII; the necessity and exceptional character of the measures adopted; and the will of States when negotiating the UN Charter, I consider that a narrow conception of peace is the most adequate. In this sense, it means the inexistence of use of force engaged by a State against another. The notion shall be adapted as to be applied to internal conflicts where violations of human rights achieve the threshold of gravity that claims for their classification as a threat to, or breach of, international peace and security. Furthermore, a threat to peace can be identified in situations not characterized as armed conflicts but where the disrespect for human rights and human dignity is outrageous. The point is that in such cases the population is kept controlled by physical or psychological coercion. Therefore, the requirement of the ‘use of force’ shall be retained fulfilled, especially considering the weak position of the people *vis-à-vis* the State or the dominating group.

The notion of ‘threat to international peace and security’ inherently implies a high threshold of gravity which should be evaluated in light of concepts as ‘widespread’ and ‘systematic’.

If a ‘threat to peace’ is conducive to the eminent or probable outbreak of armed conflicts or gross violations of human rights, a ‘breach of peace’ is the consummation of the threat, the concrete outburst of the conflict or derogation dreaded.

Accordingly, I retain that Chapter VII’s powers can never be invoked with regard to a ‘threat’ determined in abstract, that is, without the existence of at least some tension achieving the threshold of gravity that permits and advises its qualification in accordance with Article 39 of the Charter.

‘International security’ corresponds to the existence of objective conditions without which peace cannot subsist. International security assures to every State that peace will not be breached or at least the impact of the breach will be limited.<sup>15</sup> Likewise, it implies the right of

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<sup>15</sup> The concept of ‘international security’ was dealt with by a group of governmental experts following the GA Resolution 37/99, 13<sup>th</sup> December, 1983, which sustained a *comprehensive study of concepts of security, in particular security policies which emphasise co-operative efforts and mutual understanding between States, with a view to developing proposals for policies aimed at preventing the arms race, building*

every State to benefit from any legitimate and efficient system of security, at the same time establishing the duty of States to support those available systems.<sup>16</sup> When States ratified the Statute of Rome they were contributing to a comprehensive system of international security and consequently accomplishing with an obligation imposed on them by the Charter. No one can seriously argue that a community where core crimes are committed in large scale without a proportional and prompt criminal reaction has achieved the satisfactory standards of international security. Therefore, States' effort to ensure prosecution and punishment of perpetrators is not only in accordance with the principles of justice and international law to which Article 1/1<sup>17</sup> refers but constitutes likewise a means to bring efficiency to the system of international security.

e. The powers of the SC under Chapter VII

It is submitted that the SC, under Chapter VII, only enjoys of police powers. Inasmuch as it is not a judge it cannot recall Chapter VII in order to decide disputes with binding and definitive effects which was precisely what it did through the mentioned Resolutions. It settled a controversy existing between the USA, on the one hand, and the States Parties to the Statute and the ICC, on the other. No provision of the Charter empowers the SC to decide *ex novo* and by itself which party in conflict is right in its claims.<sup>18</sup> Worst is the fact that such decision was only supported as a response to a State's claim. During the S. Francisco Conference, it was stressed by a Declaration of the USA and the United Kingdom that the SC could only recommend the terms for disputes' settlement under Article 37 of the Charter, but could not evoke Chapter VII to decide compulsory on the matter.<sup>19</sup> Partly as a result, States decided not to adopt the provision of Chapter VII, section B, n° 1, which referred to the possibility of a threat to peace arising from the failure of a pacific settlement of disputes in accordance with Chapter VI. The UN Charter limits the intervention of the SC under Chapter VII to preliminary and short-term measures. To assert States and individuals' rights and obligations with binding effects raises a species of 'compulsory jurisdiction' while the Charter as opted for a system of voluntary submission of States to third-party settlement.

The SC is not a legislator either. It is not entitled with law-making powers even after the determination of a threat to peace made in regular terms. Precisely, it cannot modify the interpretation, the content and the effects of a treaty, namely the ICC Statute, in a sense contrary to the one of the signatory States. The amendment system enshrined in the Statute is complex and demandable and completely independent from the UN or the SC.<sup>20</sup> According to Article 103, a resolution of the SC may prevail over an international agreement. Attending, however, to the 'police' function of the SC activity under Chapter VII the prevalence of the resolution over the treaty has to be understood as temporary. Thus, the agreement will recover its initial efficacy

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*confidence in relations between States, enhancing the possibility of reaching agreements on arms limitation and disarmament and promoting political and economic society* ( UN Doc. A/40/533).

<sup>16</sup> Through Resolution 41/90, Dec. 4, 1986, the General Assembly avowed that national and international security have been intermeshing increasingly, which underscores the need for States to approach international security in a comprehensive and co-operative manner.

<sup>17</sup> The Declaration on the Strengthening of International Security, the General Assembly reaffirmed the *universal and unconditional validity of the Purposes and Principles of the Charter of the United Nations as the basis of relations among States irrespectively of their size, geographical location, level of development or political, economic and social system*. Res.2734 (XXV), 16<sup>th</sup> December, 1970.

<sup>18</sup> The SC acknowledged those limitations when stating, with respect to the creation of the *ad hoc* tribunals, that existing law would be applied but no new law created. See SC Resolution 827 (1993).

<sup>19</sup> See UNCIO XII, p. 162, Doc. 1027 III/2/31 (1).

<sup>20</sup> Amendment shall be proposed by States Parties to the Statute and approved by the Assembly of states Parties or a Revision Conference (See Article 121 and 5/2 of the ICC Statute). Unilateral amendments are excluded.

once international peace and security are reinstated. The SC resolutions do not abrogate treaty-law; they may only provisionally 'freeze' treaty's effects and their normal place within the international law system.

It is argued that the competences of the SC under Chapter VII of the UN Charter comprise such general political discretion that no legal evaluation can be made concerning its action. I do not agree with such view since also within the Charter governs the Rule of Law. Some scholars sustain that through its decisions the SC creates obligations on States thus generating law. Again, my view is different. Law is general and abstract, enacted to rule the behaviour of subjects of law and emerges from a democratically legitimated process. The resolutions of the SC cannot, obviously, aspire to such democratic legitimacy. Furthermore, its enactments shall be temporary and concrete.

#### **4. Conclusion**

I conclude by citing Bernhardt, according to whom *'Even if the SC has wide discretionary powers under this Chapter, these powers are not unlimited. The Charter is a legally binding instrument and no organ is endowed with complete freedom to act or not to act. The present author holds the opinion that in case of manifest ultra vires decisions of any organ, such decisions are not binding and cannot prevail in case of conflict with obligations under other agreements'*.<sup>21</sup>

Resolution 1422 was passed without the existence of a concrete conflict. It was taken in general and abstract terms, without consideration for international law, the equality of sovereign States and the battle for more accurate guaranties of justice. It runs counter the Statute of Rome and the UN Charter. It is, in my view, abusive and therefore illegal.

As referred above, the considerations drawn above are valid as well with regard to Resolution 1593. However, I wish to draw your attention to some particularities of the latter. It is true that it flows from a specific conflict but it might be considered even more dangerous than Resolution 1422 because it blocks both States and ICC's jurisdiction. On the one hand, this resolution establishes exclusive jurisdiction to the national State, which means that it ignores the rule of territorial jurisdiction so well established in international law. Besides, it ignores the trend advocating the existence of a rule of customary law permitting States to exercise universal jurisdiction as far as core crimes are concerned. On the other, the SC at the same time that referred a situation to the ICC, equally established a limitation *ratione personae* of the Court's jurisdiction. It is empowered to do so neither by the Statute nor any other instrument. The SC can discretionally decide to refer a situation to the ICC or not to. From the moment it decides to do so, it has to follow and respect the rules of procedure and the independence of the Court as enshrined in the Statute of Rome. The ICC is a permanent court. Its legal capacity includes, in accordance with the doctrine of inherent powers, all necessary prerogatives to ensure the exercise of its judicial functions in independent terms. That is to say that the ICC can and shall analyse all SC resolutions able to interfere with its activity, blur its independence and violate the Statute of Rome. Inasmuch as the Court is the last interpreter of the Statute and independent from the SC it can conclude for the abusive nature of particular decisions and not follow them.

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<sup>21</sup>See Bernhardt, "On Article 103", in B. Simma (ed.), *Charter of the United Nations*, 2002, p. 1299.