

Provisional edition

## Threats to the International Criminal Court

Resolution 1336 (2003)<sup>1</sup>

1. The Parliamentary Assembly recalls its Resolution 1300 (2002), which refers to the risks for the integrity of the Statute of the International Criminal court posed by bilateral agreements granting immunity.
2. It welcomes the entry into operation of the Court following the elections to its most important organs - the judges, the President, and the prosecutor - in February and April 2003. It considers that the ICC is poised to become a truly independent and impartial arbiter of international justice and the rule of law at the international level, whose importance cannot be underestimated in the current international situation.
3. However, it continues to be concerned that certain Council of Europe member and observer states have still not acceded to the Rome Statute of the International Criminal Court or have not yet ratified it, and that the United States has even officially announced that it would not ratify .
4. It is also concerned that only 29 countries have so far signed, and only two countries (Norway and Costa Rica) ratified the Protocol on Privileges and Immunities of the International Criminal Court. The Assembly recognizes that despite its politically unseemly title, this Protocol is of vital importance for the Court to begin functioning in practice.
5. The Parliamentary Assembly further recalls the importance of national implementing legislation, which is unfortunately lagging behind in many countries. The implementing legislation is required to put into practice the "double subsidiarity" of the ICC: firstly the Court, which does not have its own investigative machinery, was designed to rely heavily on the practical cooperation of the State Parties. Secondly, the State Parties must also make sure that their national substantive criminal law is compatible with the Rome Statute so that they are in a position to fulfil their obligation under the Rome Statute to prosecute such crimes themselves, the ICC only coming into play when the national courts are unable or unwilling to prosecute. In this context, the Assembly welcomes the initiative announced by the Committee of Ministers in its reply to Recommendation 1581 (2002) to consider convening a third Multilateral Consultation, in September 2003, on the implications of the ratification of the Rome Statute in the domestic legal order of member States. The Assembly intends to accept any invitation extended by the Committee of Ministers to participate in this consultation.
6. The Assembly regrets the renewal, as decided on 12 June 2003, of Security Council Resolution 1422 (adopted on 12 July 2002). This Resolution had deferred for a renewable 12 months any prosecution by the International Criminal Court of those suspected of offences committed in connection with a United Nations authorised operation who are nationals of states that are not parties to the Statute. It commends those countries which insisted that an open debate was held in the Security Council and that the exemption was again limited to one year.

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<sup>1</sup> *Assembly debate* on 25 June 2003 (20<sup>th</sup> Sitting) (see Doc. 9844, report of the Committee on Legal Affairs and Human Rights, rapporteur: M. Marty). *Text adopted by the Assembly* on 25 June 2003 (20<sup>th</sup> Sitting)

7. It considers that Resolution 1422 and its renewal constitutes a legally questionable and politically damaging interference with the functioning of the International Criminal Court. Its independence from the UN Security Council, with regard to the opening of procedures against persons suspected of international crimes, is one of the most important advances in the Rome Statute. Resolution 1422 is legally questionable for two reasons: firstly, it is *ultra vires* in that the legal basis for a Security Council Resolution under Chapter VII of the UN Charter – a present threat to international peace and security – was not present. Secondly, Resolution 1422 violates the Rome Statute (Articles 16 and 27). The Assembly considers that Article 16 does not cover blanket immunity in relation to unknown, future situations. It further recalls that Article 27 of the Rome Statute expressly prohibits making distinctions on the basis of official capacity in order to ensure that no person is above the law. The Assembly considers that this should also apply to UN peacekeepers, independently from their nationality.

8. The Assembly regrets the ongoing campaign by the United States to convince State Parties to the Rome Statute, including member states of the Council of Europe, to enter into bilateral agreements aimed at subjecting these states' cooperation with the ICC, as regards United States citizens accused of crimes giving rise to the jurisdiction of the ICC, to prior agreement by the United States government.

9. The Assembly considers such agreements to be violations of the Rome Statute of the ICC (in particular Articles 27 and 86, Article 98 (2) allowing only narrowly defined exemptions in the framework of status of force agreements), and of the Vienna Convention on the Law of Treaties (Article 18), according to which states must refrain from any action which would not be consistent with the object and purpose of a treaty.

10. The Assembly condemns the pressures exercised on a number of member states of the Council of Europe to enter into such agreements and regrets that the contradictory demands made on them by the United States on the one side and the European Union and the Council of Europe on the other confronts them with a false choice between European and transatlantic solidarity. The Assembly considers that all countries should be left free to decide on their stance towards the International Criminal Court on the basis of considerations of principle alone.

11. The Assembly considers that it is possible for bilateral exemption agreements to be construed narrowly, such as to subject the refusal to cooperate with the ICC to strict conditions, in particular the credible assurance of national prosecution of persons suspected of ICC crimes by the United States themselves and to ensure that the scope of persons affected by the agreement is consistent with the text of Article 98 (2) of the ICC Treaty.

12. The Assembly therefore,

i. as regards the signature, ratification and implementation process:

a. renews its appeal to Council of Europe member and observer states, where appropriate, to accede to and ratify the Rome Statute establishing the International Criminal Court;

b. appeals to those Council of Europe member and observer states (other than Norway, which has taken all the necessary steps) which have not yet done so to sign and/or ratify the Protocol on Privileges and Immunities of the International Criminal Court.

c. appeals to those Council of Europe member and observer states which have not yet done so to adopt the necessary national implementing legislation at the earliest opportunity.

ii. as regards Security Council Resolution 1422 (2002) / 1487 (2003):

a. regrets the renewal for another year of Resolution 1422, which requests the International Criminal Court to refrain from prosecuting crimes under international law committed in connection with peacekeeping and other operations authorised by the UN Security Council, decided by the UN Security Council on 12 June 2003 (Resolution 1487 (2003));

b. regrets that all Security Council members that are members of the Council of Europe did not maintain a united, unequivocal stance in favour of the integrity of the ICC;

c. thanks those member and *observer* States of the Council of Europe (in particular *Canada* and *Switzerland*) that insisted on an open debate in the Security Council on this issue, voiced their principled

stance, and made clear that they do not consider that renewal of Resolution 1422 should be automatically renewed;

d. opposes any further renewal of the exemption of peacekeeping missions from the jurisdiction of the ICC, and invites the member and observer States of the Council of Europe that are members of the UN Security Council, especially those having a permanent seat, to take all the necessary steps - in good time before the question of renewal re-arises in 2004 - to prevent any further renewal of this exemption;

e. encourages the International Criminal Court, if a situation arises in which Resolution 1422 or its possible successor may become relevant, to assess independently the legal validity of and, as the case may be, the precise interpretation that shall be given to any request addressed to the Court under the said Resolution.

iii. as regards bilateral immunity agreements:

a. supports those member and observer states of the Council of Europe that have resisted entering into bilateral immunity agreements to persist in adhering to their principles, and commends in particular those countries that are candidates for accession to the European Union for their solidarity with the vast majority of European countries' in supporting the ICC;

b. encourages those member and *observer states* that have signed such agreements (Azerbaijan, *Israel*, Romania) not to ratify them;

c. invites those member and observer states that have ratified such agreements (Albania, Bosnia-Herzegovina, Georgia) to apply them, as the case may be, in the manner that is most consistent with their legal obligations as State Parties to the Rome Statute.