The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute

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Introduction

On 12 July 2002, the United Nations Security Council adopted Resolution 1422, therein granting immunity from the jurisdiction of the International Criminal Court [hereinafter the ICC] to the current and former officials or personnel participating in any United Nations established or authorized operations, whose countries are not party to the Rome Statute.¹ To achieve this end, the United States employed a strategy of political arm-twisting, coupled with an intentionally distorted interpretation of Article 16 of the Statute. The actions of the US in this matter are in complete disharmony with the nation’s democratic history, and effectively dissolve all attempts to mask their antagonistic stance towards the embryonic ICC, an antagonism foreshadowed by the US vote against the text of the Statute at the 1998 Diplomatic Conference in Rome. Resolution 1422 and the legal questions it raises are the focus of this essay.

While not dedicated to the discussion of American arguments in defense of its opposition to the ICC, this study will attempt to shed light on some of the key issues and arguments. This is the focal point of Section I. Section II illustrates the drafting history of Article 16, beginning with Article 23(3) of the International Law Commission Draft, and ending with the final amendments that led to the adoption of Article 16 in its present form.

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Section III provides a legal analysis of the conditions stipulated under Article 16 in conjunction with the conditions set forth in Article 39 of the United Nations Charter [hereinafter UN Charter]. It further examines the inconsistency of Resolution 1422 with both Article 16 and Article 39 of the UN Charter.

The next section considers the conformity of Resolution 1422 with the purposes and principles of the United Nations [hereinafter the UN]. The blatant inconsistency of Resolution 1422 with these purposes and principles is brought to light, together with the legal consequences of such inconsistency.

Section V argues that the SC exceeded its mandate by adopting Resolution 1422. It further discusses the impact of the aforesaid resolution on two main points of the law of treaties. The first point is that the adoption of Resolution 1422 is in fact an amendment to Article 16 of the Rome Statute. The second is that the States Parties to the Rome Statute who voted in favour of Resolution 1422 have betrayed their treaty obligations by defeating the object and purpose of the Rome Statute.

Finally, Section VI addresses the impact of Resolution 1422 on various aspects of international law. It tackles the inconsistency of Resolution 1422 with peremptory norms, obligations *erga omnes*, customary international law, and the general principles of law.

I. US opposition to the Rome Statute

After the Rome Conference, the US proclaimed that it would not sign\(^2\) or ratify, at present or in future, the treaty in its current form.\(^3\) Additionally, some US officials suggested that US policy may go beyond mere non-participation to ‘actively opposing’ the ICC.\(^4\) For instance, after returning from the Diplo-

\(^2\) However, on 31 December 2000, the US Government made a last-minute decision and signed the Rome Statute. For the major arguments elucidating the merits of the US signature as envisaged by David J. Scheffer, see his *Staying the Course With the International Criminal Court*, 35 Cornell International Law Journal 147, 2002. In his Statement in the Sixth Committee of the General Assembly on the International Criminal Court, 21 October 1998, US, David J. Scheffer stated following, “Mr. Chairman, having considered the matter with great care, the United States will not sign the treaty in its present form. Nor is there any prospect of our signing the present treaty text in the future”. See, Bartram S. Brown, *US Objections to the Statute of the International Criminal Court: A Brief Response*, 31 NYU J. Int’l L. & Pol. 855, summer 1999.


\(^4\) Brown, supra note 2 at 856.