Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 1336 (2003)[1]

Threats to the International Criminal Court

Parliamentary Assembly

1. The Parliamentary Assembly recalls its Resolution 1300 (2002) on the risks for the integrity of the Rome Statute of the International Criminal Court (ICC) posed by bilateral agreements granting immunity.

2. It welcomes the entry into operation of the ICC following the elections to its main 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 ICC, or have not yet ratified it, and that the United States has even officially announced that it will not ratify.

4. It is also concerned that only twenty-nine countries have so far signed, and only two countries (Norway and Costa Rica) have ratified, the Protocol on Privileges and Immunities of the ICC. The Assembly recognises that despite its politically unseemly title, this protocol is of vital importance for the court to begin functioning in practice.

5. The Assembly further recalls the importance of the introduction of national implementing legislation, which is unfortunately belated in many countries. The implementing legislation is required to put into practice the principle of "double subsidiarity" of the ICC: firstly, the ICC, which does not have its own investigative machinery, was designed to rely heavily on the practical co-operation of the states parties. Secondly, the states 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 consultationin 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 voted on 12 June 2003, of United Nations Security Council Resolution 1422 on United Nations peacekeeping, which had been adopted on 12 July 2002. This resolution had deferred, for a renewable twelve months, any prosecution by the ICC of nationals of states not parties to the statute suspected of offences committed in connection with United Nations initiated or authorised operations. The Assembly therefore commends those countries that insisted on an open debate being held in the Security Council, and on again limiting the exemption to one year.

7. It considers that United Nations Security Council Resolution 1422 and its renewal constitute a legally questionable and politically damaging interference with the functioning of the ICC. Its independence from the 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 according to Chapter VII

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

of the United Nations Charter – the existence of a present threat to international peace and security – did not exist. Secondly, Resolution 1422 violates the Rome Statute of the ICC (Articles 16 and 27). The Assembly considers that Article 16 does not provide blanket immunity in unknown, future situations. It further recalls that Article 27 of that instrument 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 United Nations peacekeepers, regardless of their nationality.

8. The Assembly regrets the ongoing campaign by the United States to convince state parties to the Rome Statute of the ICC, including member states of the Council of Europe, to enter into bilateral agreements aimed at subjecting these states' co-operation with the ICC, in cases concerning 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 that such agreements are in breach of the Rome Statute of the ICC (in particular its Articles 27, 86 and 98, paragraph 2 which allow only narrowly-defined exemptions within the framework of status of force agreements), and of Article 18 of the Vienna Convention on the Law of Treaties, 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 pressure 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 vis-à-vis the ICC on the basis of considerations of principle alone.

11. The Assembly considers that it is possible for bilateral exemption agreements to be construed narrowly, in such a way as to subject the refusal to co-operate with the ICC to strict conditions, in particular the credible assurance that persons suspected of crimes within the meaning of the Rome Statute will be prosecuted by the United States themselves, and to ensure that the scope of persons covered by the agreement is consistent with the text of Article 98, paragraph 2 of the ICC Statute.

12. The Assembly therefore:

12.1. 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 of the ICC;

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 ICC;

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

12.2. as regards United Nations Security Council Resolutions 1422 (2002) and 1487 (2003)

a. regrets the renewal for another year of United Nations Security Council Resolution 1422, which requests that the ICC refrain from prosecuting crimes under international law committed in connection with peacekeeping and other operations authorised by the Security Council, voted by the Security Council on 12 June 2003 (Resolution 1487);

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 the 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 did not consider that 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 United Nations Security Council, especially those having a permanent seat, to take all the necessary steps – in good time before the question of renewal reoccurs in 2004 – to prevent any further renewal of this exemption;

e. encourages the ICC, 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 ICC under the said resolution;

12.3. 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 in their continued adherence 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 Observerstates that have already signed such agreements (Azerbaijan, Israel and Romania) not to ratify them;

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