

# WAS THE UNITED STATES JUSTIFIED IN RENEWING RESOLUTION 1487 IN LIGHT OF THE ABU GHRAIB PRISONER ABUSE SCANDAL?

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## I. INTRODUCTION

On May 19, 2004, the United States introduced a Resolution to the United Nations Security Council for a third year in a row, requesting it to exempt from the International Criminal Court (ICC) all current and former troops and personnel from non-International Criminal Court member states, like the United States, who serve on United Nations' missions.<sup>1</sup> If approved this year, the Resolution would have renewed Resolution 1487, which was adopted by the Security Council on June 12, 2003 and which was itself a renewal of Resolution 1422, adopted by the Security Council on July 12, 2002.<sup>2</sup> The vote for the Resolution was scheduled for May 21st, but was later postponed indefinitely when the Security Council realized that the United States might not receive enough support to secure the passage of the Resolution, given the recent revelations of prisoner abuse at the Abu Ghraib prison in Iraq.<sup>3</sup> In order for the Resolution to pass, nine out of the fifteen members of the Security Council had

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1. *U.S. Renews Demand for ICC Exemption for UN Peacekeepers*, CITIZENS FOR GLOBAL SOLUTIONS, June 22, 2004, at [http://globalsolutions.org/programs/law\\_justice/news/unsc\\_renewal.html](http://globalsolutions.org/programs/law_justice/news/unsc_renewal.html).

2. CITIZENS FOR GLOBAL SOLUTIONS, *U.S. POLICY ON THE ICC* (June 30, 2004), at [http://globalsolutions.org/programs/law\\_justice/icc/resources/uspolicy.html](http://globalsolutions.org/programs/law_justice/icc/resources/uspolicy.html).

3. *U.S. Renews Demand for ICC Exemption for UN Peacekeepers*, *supra* note 1.

to vote in favor of it.<sup>4</sup> However, seven member countries including Spain, Brazil, France, Germany, Benin, Chile and China, had already made clear their intentions to abstain during this round of votes, thus making it impossible for the Resolution to attain the required votes.<sup>5</sup>

In light of the ubiquitous reports published around the world, revealing United States soldiers torturing Iraqi prisoners, and given the Security Council members refusal to immunize from the International Criminal Court's jurisdiction United States troops and personnel, especially those responsible for the prisoner abuses, the United States decided not to pursue the renewal of Resolution 1487 any further.<sup>6</sup> Finally on June 23rd, the United States withdrew its request from the Security Council to renew Resolution 1487.<sup>7</sup> The decision not to seek a renewal of Resolution 1487, which expired on June 30, 2004, did not change, however, the position of the United States regarding the exemption of United States troops from the International Criminal Court's jurisdiction.<sup>8</sup> In fact, during a State Department's Press Briefing carried out on the same day the United States announced its decision to withdraw the Resolution, the United States spokesman, Richard Boucher, expressed the following:

[W]e believe that the jurisdiction of the International Criminal Court ... can't be established over nationals of states that are not party to the Rome [S]tate and that, therefore, that Americans and others who are not members of the Rome [S]tate, who participate in United Nations peacekeeping, need to be protected from some kind of misguided prosecution because of actions they might undertake while participating in those operations.<sup>9</sup>

The question that arises then, is whether despite withdrawing the Resolution, the United States was justified this year in seeking an exemption for its troops and personnel from the International Criminal Court's jurisdiction, in light of the Abu Ghraib prisoner abuse scandal?

This issue deserves some attention for various important reasons. Since the International Criminal Court, which prosecutes criminals that have committed war crimes, crimes of genocide, and crimes against humanity,<sup>10</sup> came into being

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4. *Id.*

5. *Id.*

6. *See U.S. Withdraws Its Demands for Peacekeeping Exemption Renewal*, CITIZENS FOR GLOBAL SOLUTIONS, June 23, 2004, at [http://globalsolutions.org/programs/law\\_justice/news/no\\_unsc\\_renewal.html](http://globalsolutions.org/programs/law_justice/news/no_unsc_renewal.html).

7. *Id.*

8. *See* Richard Boucher, U.S. Department of State Spokesman, Press Briefing (June 23, 2004), <http://www.state.gov/r/pa/prs/dpb/2004/33845.htm>.

9. *Id.*

10. Makau Mutua, *America and the International Criminal Court*, NATION (Nairobi), Jan. 11, 2004, <http://www.globalpolicy.org/intljustice/icc/2004/0111america.htm>.

on July 1, 2002, the United States has consistently opposed it and has expressed its opposition by seeking exemptions for its troops from prosecution by the International Criminal Court.<sup>11</sup> The exemption the United States sought this year was the third consecutive one.<sup>12</sup> The reason this exemption deserves attention, is that it was sought at a time when the United States was being criticized for committing the same type of crimes it went to war with Iraq to prevent.<sup>13</sup> This issue deserves additional attention because although American troops tortured the Abu Ghraib prisoners, they will not, however, be prosecuted for these crimes by the International Criminal Court, given that the International Criminal Court currently has no jurisdiction over the action of United States soldiers in Iraq.<sup>14</sup> This means that current United States war crimes committed in Iraq will go unpunished by the International Criminal Court.<sup>15</sup> There is a possibility in the future, however, that United States troops accused of engaging in massive human rights violations in International Criminal Court member states could be subject to prosecution by the International Criminal Court.<sup>16</sup> In such cases, if the Security Council had granted the United States an exemption for its troops from prosecution by the International Criminal Court, then it would have placed the United States above international law and these crimes would have once again gone unpunished by the International Criminal Court.<sup>17</sup>

In light of the aforementioned facts, this article aims to establish that the United States was not justified in seeking an exemption of its troops from prosecution by the International Criminal Court, in light of the prisoner abuse scandal. The first section of the article will provide the background history of the International Criminal Court and the detailed reasons why the United States has opposed the International Criminal Court in the past and continues to do so today. The second section of the article will illustrate the past and current efforts made by the United States to exempt its troops from the International Criminal Court's jurisdiction. Lastly, this paper will analyze why the United States was not justified in seeking the exemption for its troops from the International Criminal Court this year.

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11. See also *U.S. Renews Demand for ICC Exemption for UN Peacekeepers*, *supra*, note 1.

12. *Id.*

13. See Matua, *supra* note 10.

14. See Associated Press, *U.S. Drops U.N. Bid for War Crime Shield*, N.Y. TIMES, June 24, 2004 (explaining that American troops in Iraq are currently not open to prosecution by the ICC, given that neither Iraq nor the US are member states of the ICC).

15. See *id.*

16. See Colum Lynch, *U.S. Alters Its Plan for Exemption at Court*, WASH. POST, June 23, 2004, at A13, (explaining that US troops that have committed human rights violations could be subject to prosecution by the ICC if US courts refuse to try them).

17. See *id.*

## II. HISTORY OF THE INTERNATIONAL CRIMINAL COURT AND THE UNITED STATES OPPOSITION

Attempts by the international community to create a permanent international war tribunal have is not a recent trend. The international community had attempted numerous times in the past to establish an international tribunal responsible for prosecuting egregious crimes against humanity. For example, after the failed attempts to establish an International Tribunal after World War I, the international community successfully established the Tribunals of Nuremberg and Tokyo, and in so doing, laid the foundation for international criminal justice.<sup>18</sup> A few decades later international justice was further pursued when the ad hoc Tribunals of Rwanda and former Yugoslavia were also established, and which have now been operating for nearly ten years.<sup>19</sup> Most recently, in 1995, negotiations on the Rome Statute of the International Criminal Court began at the United Nations, based on a draft statute prepared and then adopted by the International Law Commission in July 1994.<sup>20</sup> If ratified by sixty states, the Rome Statute, which details the Courts jurisdiction, structure, and function, would enter into force, thereby establishing the world's first independent and permanent International Criminal Court.<sup>21</sup>

Finally, on July 7, 1998, the Rome Statute establishing the International Criminal Court was adopted at an international conference in Rome by 120 states.<sup>22</sup> Four years later, on July 1, 2002, after the sixtieth instrument of ratification was delivered to the Secretary General, the Statute entered into force, making the International Criminal Court the first permanent international tribunal.<sup>23</sup> As of May 2004, with the ratification of Congo, the International Criminal Court currently has ninety-four state parties, those states that have ratified the Rome Statute, and 137 signatories.<sup>24</sup>

Although the United States supported the creation of the International Criminal Court back in 1994, it nevertheless, remained highly critical of the Court.<sup>25</sup>

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18. INTERNATIONAL CRIMINAL COURT, CHRONOLOGY OF THE INTERNATIONAL CRIMINAL COURT, at <http://www.icc-cpi.int/ata glance/whatistheicc/chronology.html> (last visited Nov. 4, 2004).

19. *See id.*

20. *Id.*

21. INTERNATIONAL CRIMINAL COURT, HISTORICAL INTRODUCTION, at [www.icc-cpi.int/ata glance/whatistheicc/history.html](http://www.icc-cpi.int/ata glance/whatistheicc/history.html) (last visited Sept. 29, 2004).

22. *Id.*

23. *Id.*

24. CITIZENS FOR GLOBAL SOLUTIONS, STATUS OF THE ICC AND U.S. POLICY, JANUARY–MAY 2004 (June 9, 2004), at [http://www.globalsolutions.org/programs/law\\_justice/faqs/spring2004.html](http://www.globalsolutions.org/programs/law_justice/faqs/spring2004.html).

25. Foreign Relations Authorization Act of 1994 and 1995, Pub. L. No. 103-236, §517(a) - (b), 108 Stat. 382 (1994). The United States Senate expressed its full support for the establishment of the ICC in the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995. *Id.* In Section 517 titled *Sense of the Senate on the Establishment of an International Criminal Court*, the Senate expressed the following:

In 2000 when President Clinton signed the Rome Statute,<sup>26</sup> he brought to light the concerns he had over the scope of the International Criminal Court's expansive jurisdiction.<sup>27</sup> In a statement made by President Clinton the same day he signed the Rome Statute, he expressed that although he had signed the statute, he did not support its ratification since significant flaws still remained in the statute.<sup>28</sup> His main concern was that when the Court would start functioning, it would not only exercise jurisdiction over troops and personnel of states that had ratified the Rome Statute, but would also claim jurisdiction over troops and personnel of states that had not ratified the Statute.<sup>29</sup> Despite his dissatisfaction with the scope of the International Criminal Court's jurisdiction, President Clinton acknowledged that he had approved the signing of the Statute to "reaffirm the United States strong support for international accountability."<sup>30</sup>

The concerns articulated by President Clinton in 2000, were similar to those shared by President Bush in 2002, when he decided to nullify the United States signature of the Rome Statute.<sup>31</sup> President Bush was concerned that aside from having jurisdiction to prosecute war crimes, crimes of genocide and aggression, and crimes against humanity,<sup>32</sup> the International Criminal Court would have jurisdiction not only over crimes committed by officials and personnel from states that are a party to it, but also over crimes committed on

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The freedom and security of the international community rests on the sanctity of the rule of law. The international community is increasingly threatened by unlawful acts such as war crimes, genocide, aggression, crimes against humanity... It is the sense of the Senate that (1) the establishment of an international criminal court with jurisdiction over crimes of an international character would greatly strengthen the international rule of law; (2) such court would thereby serve the interests of the United States and the world community; and (3) the United States delegation should make every effort to advance this proposal at the United Nations.

*Id.*

26. *U.S. Signs Rome Treaty Establishing ICC*, UNITED NATIONS ASS'N OF THE UNITED STATES OF AMERICA, Jan. 3, 2001, at <http://www.unausa.org/newindex.asp?place=http://www.unausa.org/policy/NewsActionAlerts/info/dc010301.asp> (explaining that on December 31, 2000, the last day a country could sign the Rome Statute without at the same time depositing an instrument of ratification, President Clinton signed the Statute. In addition, he believed that "a properly constituted and structured ICC would make a profound contribution in deterring egregious human rights abuses worldwide.").

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *See generally Issues Update: U.S. Has No Legal Obligation to the International Criminal Court*, CITIZENS FOR GLOBAL SOLUTIONS, May 6, 2002 at [http://globalsolutions.org/programs/law\\_justice/icc/resources/prosper\\_unsigning.html](http://globalsolutions.org/programs/law_justice/icc/resources/prosper_unsigning.html) (explaining that President Bush decided not to become a party to the ICC because he believed that the document "was flawed in many regards").

32. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 5, 2187 U.N.T.S. 90, 92 [hereinafter Rome Statute].

the territory of a party state.<sup>33</sup> In this way, citizens from countries that have not joined the Court might still be subject to trial before it, if they are accused of committing any of the crimes mentioned above in a country that is a member of the International Criminal Court.<sup>34</sup> In light of this, given that that the United States has not ratified the Rome Statute and thus is not a member state of the International Criminal Court, the only time that American soldiers or personnel can be prosecuted by the International Criminal Court without the consent of the American government, is if the crime was committed in a state other than the United States and the other state is a state party of the International Criminal Court.<sup>35</sup> Due to this expansive jurisdiction of the Court and given that United States military forces and civilian personnel are active in peacekeeping and humanitarian missions in almost 100 countries at any given time,<sup>36</sup> the United States fears that International Criminal Court member states will use the International Criminal Court to pursue politically motivated war crimes prosecutions against American soldiers and personnel abroad.<sup>37</sup> Ambassador John Negroponte clearly articulated this concern in a United Nations Security Council Press Release, when he stated “[w]e cannot accept a structure that may transform the political criticism of America’s world role into the basis for criminal trials of Americans who have put their lives on the line for freedom.”<sup>38</sup>

The international community, however, believes that United States fears are greatly exaggerated, given that the Rome Statute contains numerous safeguards, which limit the possibility of the International Criminal Court pursuing cases for political rather than legal motives against United States troops.<sup>39</sup> One of the safeguards that the Rome Statute provides in order to preclude politically motivated prosecutions, is that the crimes that fall under the International Criminal Court’s jurisdiction have been meticulously defined to exclude random

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33. Anthony Dworkin, *Introduction to The International Criminal Court: An End to Impunity?*, CRIMES OF WAR PROJECT: THE MAGAZINE, Dec. 2003, [http://crimesofwar.org/icc\\_magazine/icc-intro.html](http://crimesofwar.org/icc_magazine/icc-intro.html).

34. *Id.*

35. Johan D. Van der Vyver, *Jurisdiction of the International Criminal Court*, Case Western Reserve School of Law, Frederick K. Cox Int’l Law Center War Crimes Research Portal, (Sept. 23, 2003), at [http://law.case.edu/War-Crimes-Research-Portal/instant\\_analysis.asp?id=5](http://law.case.edu/War-Crimes-Research-Portal/instant_analysis.asp?id=5).

36. Press Release, U.S. State Department, Under Secretary Calls It “Clearly Inconsistent With American Standards” (Nov. 4, 2003), 2003 WL 64738615 (quoting John R. Bolton, Under Secretary of State for Arms Control and International Security, Remarks at the American Enterprise Institute (Nov. 3, 2004)).

37. Warren Hoge, *U.S. Drops Plan to Exempt G.I.’s from U.N. Court*, N.Y. TIMES, June 23, 2004, at A1.

38. Press Release, United States Mission to the United Nations, Explanation of Vote and Remarks by Ambassador John D. Negroponte, United States Permanent Representative to the United Nations, Following the Vote on UN Security Council Resolution 1422 on the International Criminal Court at the Security Council Stake-Out, July 12, 2002 (July 12, 2002), [http://www.un.int/usa/02print\\_098.htm](http://www.un.int/usa/02print_098.htm) (last visited Sept. 25, 2004).

39. See Dworkin, *supra* note 33.

and isolated acts that a peacekeeper might conceivably commit.<sup>40</sup> For example, according to Article five of the Rome Statute, the jurisdiction of the International Criminal Court is limited only “to the most serious crimes of concern to the international community as a whole,” which include genocide, war crimes, and crimes against humanity.<sup>41</sup> The Statute further prevents the International Criminal Court from pursuing politically motivated crimes by restricting its jurisdiction to cover only acts that have been committed as part of a “widespread or systematic attack” (crimes against humanity), or crimes that have been committed “as a part of a plan or policy” (war crimes).<sup>42</sup>

The most important safeguard provided by the Statute is that the International Criminal Court was created as a “complementary court system,” which means that its jurisdiction will not take precedence over a competent national court.<sup>43</sup> In other words, the Statute allows the International Criminal Court to begin investigation and prosecution only “where a state that has jurisdiction over the case shows itself unwilling or unable to genuinely carry out the prosecution.”<sup>44</sup> Thus, under Article Seventeen, the International Criminal Court cannot take a case if a state is already investigating or prosecuting it or if a state has investigated and then decided not to prosecute.<sup>45</sup> This principle, essentially, makes the International Criminal Court a court of last resort.<sup>46</sup>

Despite these numerous safeguards, the United States still insists that it is inappropriate to subject United States troops participating in United Nations peacekeeping operations to the International Criminal Court, which cannot provide adequate guarantees of due process.<sup>47</sup> The United States further asserts that United States courts and not the International Criminal Court should be responsible for investigating and prosecuting its own citizens for committing war crimes, crimes against humanity or genocide.<sup>48</sup> Only this way will citizens be afforded constitutional guarantees of due process.<sup>49</sup> As a result of these concerns, the United States has launched an aggressive campaign to exempt its troops from prosecution by the International Criminal Court.<sup>50</sup>

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40. U.N. SCOR, 57th Sess., 4568th mtg. at 3, U.N. Doc. S/PV.4568 (2002).

41. Rome Statute, *supra* note 32, 2187 U.N.T.S. at 92.

42. *Id.*

43. Alex Ionides, *Above the Law?*, EGYPT TODAY, Sept. 11, 2003, 2003 WL 60480647.

44. Dworkin, *supra* note 33.

45. *The ICC is Unlikely to Try U.S. Soldiers*, HUMAN RIGHTS FIRST, at [http://www.humanrightsfirst.org/international\\_justice/icc/us\\_role/us\\_role\\_03.htm](http://www.humanrightsfirst.org/international_justice/icc/us_role/us_role_03.htm) (last visited Sept. 25, 2004).

46. Dworkin, *supra* note 33.

47. Ambassador James B. Cunningham, Deputy U.S. Representative to the United Nations, Statement at the Security Council Stakeout (June 23, 2004), [http://www.un.int/usa/04\\_111.htm](http://www.un.int/usa/04_111.htm).

48. U.N. SCOR, 57th Sess., 4568th mtg., *supra* note 40, at 9.

49. Hoge, *supra* note 37.

50. See U.S. POLICY ON THE ICC, *supra* note 2 (explaining that not only has the United States sought exemption for its troops from the ICC by introducing Resolution 1422 and 1487 to the Security Council, but

### III. UNITED STATES EFFORTS TO EXEMPT ITS TROOPS FROM ICC JURISDICTION

On July 12, 2002, just eleven days after the International Criminal Court came into being, the United Nations Security Council adopted the first resolution, Resolution 1422, which provided troops and personnel from non-International Criminal Court member states participating in United Nations authorized missions, with one year exemption from the International Criminal Court.<sup>51</sup> The Resolution was adopted only after the United States/ United Nations Ambassador, John Negroponte vetoed the extension of the Bosnian peacekeeping mission,<sup>52</sup> and other Bush Administration officials further threatened to veto the renewal of all peacekeeping operations in the future, if Council members did not adopt Resolution 1422.<sup>53</sup> Eager to preserve peacekeeping operations, the Security Council members had little choice, but to adopt Resolution 1422 despite its serious flaws and despite the aggressive opposition voiced by numerous countries during the Security Council meeting, just two days before the adoption of the Resolution.<sup>54</sup>

At the July 10th meeting at the United Nations Security Council, Ambassador Negroponte expressed on behalf of the United States, that the United States veto of the resolution on the United Nations Mission in Bosnia and Herzegovina did not in any way reflect its rejection of peacekeeping in Bosnia.<sup>55</sup> The veto did reflect, however, the United States frustration over its inability to persuade Security Council members to seriously consider United States concerns with regards to the legal exposure that United States peacekeepers have under the Rome Statute.<sup>56</sup> The United States further conveyed, that while peacekeepers do act in a lawful manner, they still find themselves in difficult and ambiguous situations.<sup>57</sup> As a result, the United States stressed that peacekeepers from states that are not parties to the Rome Statute should not face additional unnecessary legal jeopardy, in addition to the hardships of deployment that they already face.<sup>58</sup>

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it has also pursued bilateral agreements with countries around the world to prevent the surrender of U.S. nationals to the ICC).

51. *Id.*

52. *The ICC and Security Council: Res. 1422 Legal and Policy Analysis*, HUMAN RIGHTS WATCH (May 2003), <http://www.globalpolicy.org/intljustice/icc/crisis/0609hrwreport.htm> [hereinafter *Policy Analysis*].

53. *Id.*

54. *Id.*

55. U.N. SCOR, 57th Sess., 4568th mtg., *supra* note 40, at 9.

56. *Id.*

57. *Id.*

58. *Id.* at 10.



The countries that participated in the Security Council meeting did not, however, agree with United States justifications for seeking a one year exemption for its troops.<sup>59</sup> Instead, they saw United States insistence on receiving immunity for its troops as an attempt by the United States to place its troops and personnel above international law.<sup>60</sup> As Mr. Heinbecker, the Canadian representative who participated in the debate, put it: “[a]t stake today are ... issues that raise questions about whether all people are equal and accountable before the law....”<sup>61</sup> At the end of his speech Mr. Heinbecker called for an end to impunity from prosecution for genocide, crimes against humanity, and war crimes.<sup>62</sup> Mr. MacKay from New Zealand, who also participated in the debate, similarly saw no need for exemptions of peacekeepers from the jurisdiction of the Court.<sup>63</sup> Instead, he argued that the exemptions placed peacekeepers above the law, in addition to placing the moral authority of the peacekeepers and the United Nations in serious jeopardy.<sup>64</sup>

All together, across the board, countries generally argued that Resolution 1422 was unnecessary, given the numerous safeguards imbedded within the Statute, that it was outside the scope of the Security Council’s authority, and that it was inconsistent with the Rome Statute.<sup>65</sup> Even leading Non-Governmental Organizations (NGOs) expressed similar views.<sup>66</sup> In fact, Amnesty International’s eighty two page legal memorandum analyzing Resolution 1422, is by far the most complete and thorough compilation of arguments expressed against this Resolution.<sup>67</sup> It stressed two main points already shared by the international community.

First, Amnesty International stressed that Resolution 1422 is contrary to the Rome Statute.<sup>68</sup> Resolution 1422 in part reads as follows:

Acting under Chapter VII of the Charter of the United Nations, 1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the International Criminal Court, if a case arises involving current or former officials or personnel from a contributing

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59. *See id.*

60. *See* U.N. SCOR, 57th Sess., 4568th mtg., *supra* note 40.

61. *Id.* at 3.

62. *Id.* at 4.

63. *Id.* at 5.

64. *Id.*

65. U.S. POLICY ON THE ICC, *supra* note 2.

66. *See Policy Analysis, supra* note 52; *See* AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: THE UNLAWFUL ATTEMPT BY THE SECURITY COUNCIL TO GIVE US CITIZENS PERMANENT IMPUNITY FROM INTERNATIONAL JUSTICE (May 2003), [http://www.iccnw.org/documents/declarationsresolutions/UN1422\\_2003.html](http://www.iccnw.org/documents/declarationsresolutions/UN1422_2003.html) [hereinafter PERMANENT IMPUNITY].

67. *See id.*

68. *Id.* at 36.

State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise....<sup>69</sup>

Article sixteen of the Rome Statute, which the Resolution speaks of, allows the Security Council to request the International Criminal Court, pursuant to Chapter VII of the United Nations Charter and in the interest of peace and security, to postpone an investigation or a prosecution for twelve months.<sup>70</sup> The drafting history of Article sixteen reveals that the Article was only intended to be used in rare cases, such as when the Security Council considers that the peace negotiations which it is overseeing with a government leader, would be impeded by an investigation or prosecution.<sup>71</sup>

Resolution 1422, however, sought to invoke Article sixteen contrary to the drafter's intent. Article sixteen requires the Security Council to request the International Criminal Court to grant a temporary deferral of investigation or prosecution of a case, on a case by case basis.<sup>72</sup> With each case the Security Council has to determine, whether the deferral would be necessary to help it maintain international peace and security.<sup>73</sup> Resolution 1422, on the other hand, was not adopted after an ad hoc determination.<sup>74</sup> Instead, the Resolution provided a general exception for a whole class of people before any case had arisen, and the Security Council had not determined whether special circumstances existed to make the deferral necessary to maintain peace and security.<sup>75</sup> In addition, the fact that the United States included in Resolution 1422 its intention to "renew the request... under the same conditions each July for further 12-month periods for as long as maybe necessary," makes this Resolution further contrary to Article sixteen.<sup>76</sup> Article sixteen includes a specific twelve month deferral, after which time the Security Council can renew the request under the same conditions.<sup>77</sup> However, considerations of any proposal for renewal have

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69. U.N. SCOR, 57th Sess., 4572nd mtg. at 1, U.N. Doc. S/RES/1422 (2002).

70. AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: SECURITY COUNCIL MUST REFUSE TO RENEW UNLAWFUL RESOLUTION 1422 (May 2003), <http://www.iccnw.org/documents/otherissues/1422/Amnesty1422SumMay2003Eng.pdf> [hereinafter REFUSAL TO RENEW].

71. PERMANENT IMPUNITY, *supra* note 66, at 42-43.

72. REFUSAL TO RENEW, *supra* note 70, at 4.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. REFUSAL TO RENEW, *supra* note 70, at 4.

to be made on a case by case basis at the time the resolution is to be renewed.<sup>78</sup> In light of the aforementioned facts, Amnesty International stressed that the Security Council's intention to renew Resolution 1422 automatically, as expressed in the Resolution, illustrates the Council's complete disregard for the true purpose of Article sixteen and its intentions to provide perpetual impunity to officials and personnel of non-International Criminal Court member states from International Criminal Court 's jurisdiction.<sup>79</sup>

The second point that Amnesty International stressed, also shared by the international community, is that Resolution 1422 is contrary to the United Nations Charter (UNC).<sup>80</sup> The Security Council, which is a political organ of the United Nations established pursuant to international law, can only exercise those powers contained under the United Nations Charter.<sup>81</sup> Like any other political organization established under law, it cannot act beyond its own powers.<sup>82</sup> However, by adopting Resolution 1422, the Security Council exceeded its powers set out in the United Nations Charter.<sup>83</sup>

In Resolution 1422, the Security Council purported to act under Chapter VII of the United Nations Charter.<sup>84</sup> Chapter VII gives the Security Council specific powers that it can use to take action with respect to threats to the peace, breaches of peace, and acts of aggression.<sup>85</sup> However, the Security Council cannot act under this Chapter unless it first complies with certain procedural requirements of the United Nations Charter, by making the specific determinations that Article thirty nine requires.<sup>86</sup> Article thirty nine of the United Nations Charter expressly provides that, "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression...."<sup>87</sup> Thus, any action, which the Security Council takes under Chapter VII, must be based upon a determination of the existence of a threat, breach of peace, or an act of aggression.<sup>88</sup> The drafting history of Resolution 1422 illustrates, however, that for the first time in fifty seven years,<sup>89</sup> the Security Council failed to make such determination before acting under Chapter VII.<sup>90</sup>

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78. *Id.*

79. *Id.*

80. See PERMANENT IMPUNITY, *supra* note 66, at 51.

81. REFUSAL TO RENEW, *supra* note 70, at 5.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. PERMANENT IMPUNITY, *supra* note 66, at 59.

87. *Id.* at 60.

88. *Id.*

89. REFUSAL TO RENEW, *supra* note 70, at 6.

90. PERMANENT IMPUNITY, *supra* note 66, at 60.

The third major point stressed by the international community in opposition of Resolution 1422 is best articulated by another NGO, the Human Rights Watch.<sup>91</sup> Resolution 1422 exempted officials and personnel from non-International Criminal Court member states participating in United Nations peacekeeping missions from the International Criminal Court.<sup>92</sup> However, Human Rights Watch stressed that this Resolution is in clear violation of Article twenty seven of the Rome Statute.<sup>93</sup> Article twenty seven of the Rome Statute which reads in part, “[t]his Statute shall apply equally to all persons without any distinction based on official capacity ...,”<sup>94</sup> expressly prohibits any state or international organization from making distinctions on the basis of official capacity.<sup>95</sup> This provision, contained in the Rome Statute, was a crucial one because it encompassed the fundamental purpose of the Statute, to ensure that no person is placed above the law, including politicians, heads of state, and United Nations peacekeepers.<sup>96</sup> Contrary to this provision, Resolution 1422 exempted an entire class of individuals from prosecution by the International Criminal Court and thus opened the door to impunity in cases where national courts of non-International Criminal Court member states fail to carry out good faith prosecutions of its own troops and personnel.<sup>97</sup>

Despite the visible opposition voiced by NGOs and countries around the world against Resolution 1422, the exemption for United States troops and personnel from International Criminal Court’s jurisdiction was renewed for a second year in a row on June 12, 2003.<sup>98</sup> The second time around, however, Security Council members, France, Germany, and Syria, abstained from the vote.<sup>99</sup> Kofi Annan, along with more than seventy countries, also expressed their strong disapproval for Resolution 1487 during an open meeting at the Security Council.<sup>100</sup>

In his opening speech, Kofi Annan conveyed the reasons why the Security Council was compelled to renew the Resolution in spite of the strong opposition.<sup>101</sup> Although he felt that the request to renew Resolution 1422 was unnecessary, due to the numerous safeguards provided by the Rome Statute, he nevertheless understood that the Council members felt it necessary to renew the

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91. See *Policy Analysis*, *supra* note 52.

92. *Id.*

93. *Id.*

94. Rome Statute, *supra* note 32, 2187 U.N.T.S. at 106.

95. *Policy Analysis*, *supra* note 52.

96. *Id.*

97. *Id.*

98. See U.S. POLICY ON THE ICC, *supra* note 2.

99. *Id.*

100. See U.N. SCOR, 58th Sess., 4772nd mtg., U.N. Doc. S/PV.4772 (2003).

101. *Id.* at 3.

Resolution for another year, given that the “Court [was] still in its infancy and no case [had] yet been brought before it.”<sup>102</sup> The main concern that Kofi Annan and the other countries expressed at the debate, was over United States insistence that the Security Council renew the Resolution as a “technical roll-over.”<sup>103</sup> Kofi Annan along with the other countries, have expressed the opposite view, that this Resolution was never intended to be renewed indefinitely as a technical roll-over.<sup>104</sup> As Kofi Annan pointed out, “allow me to express the hope that this does not become an annual routine. If it did, I fear the world would interpret it as meaning that the Council wished to claim absolute and permanent immunity for people serving in the operations it establishes or authorizes.”<sup>105</sup> Other countries expressed similar sentiments.<sup>106</sup>

The United States attempts to exempt its troops and personnel from the International Criminal Court’s jurisdiction did not stop, however, with the adoption and renewal of Resolution 1422.<sup>107</sup> The United States government representatives have been seeking Bilateral Immunity Agreements (BIAs) with countries around the world to shield its citizens from prosecution by the International Criminal Court.<sup>108</sup> These bilateral agreements provide that neither country that is party to the agreement would transfer the other’s government officials, military and other personnel to the International Criminal Court’s jurisdiction.<sup>109</sup> Contrary to the assurance provided by high-level United States officials that the United States would respect the rights of those countries that support the International Criminal Court; the Bush Administration has used coercive tactics to secure bilateral agreements with these countries.<sup>110</sup> The most coercive of these tactics involves the American Servicemembers’ Protection Act (ASPA), which was signed into law by President Bush on August 2, 2002, and

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102. *Id.*

103. *Fact vs. Fiction: Security Council Members Never Intended Renewal to Become Automatic*, CITIZENS FOR GLOBAL SOLUTION (June 22, 2004), at [http://www.globalsolutions.org/programs/law\\_justice/icc/unsc/2004/boucher\\_vs\\_reality.html](http://www.globalsolutions.org/programs/law_justice/icc/unsc/2004/boucher_vs_reality.html) [hereinafter *Fact vs. Fiction*].

104. *Id.*

105. U.N. SCOR, 58th Sess., 4772nd mtg., *supra* note 100, at 3.

106. *See Fact vs. Fiction*, *supra* note 103 (explaining that Sir Jeremy Greenstock from Great Britain also expressed that, “[w]e regard Security Council Resolution 1422 (2002) as an exceptional measure. It is not permanent; nor is it automatically renewable.”). *See also* U.N. SCOR, 58th Sess., 4772nd mtg., *supra* note 100, at 24 (explaining that Mr. Duclos, the French representative that abstained from the vote, also expressed the following: “Paragraph 2 of Resolution 1422 (2002) did not contain a commitment to automatic renewal...Such a renewal risks lending credence to the perception that such exemptions are permanent. That appearance of permanency can only weaken the Court and harm its authority.”).

107. *See* COALITION FOR THE INTERNATIONAL CRIMINAL COURT, U.S. BILATERAL IMMUNITY OR SO-CALLED “ARTICLE 98” AGREEMENTS (2003), <http://www.iccnw.org/pressroom/factsheets/FS-BIAsSept2003.pdf> [hereinafter U.S. BILATERAL IMMUNITY].

108. *Id.*

109. *Id.*

110. *Id.*

which allows him to cut off United States military assistance to International Criminal Court member states that have not signed the Bilateral Immunity Agreement's.<sup>111</sup>

This coercive law allows the Administration to pick and choose, which countries should continue receiving United States military aid in spite of not signing the Bilateral Immunity Agreement's with the United States.<sup>112</sup> Broad waivers and exemptions included within the Act allow the President to continue providing aid to countries that choose not to conclude these agreements and which the President deems important for United States national security.<sup>113</sup> In accordance with ASPA, major United States allies including the nineteen members of NATO and other major non-NATO allies have been exempted from it.<sup>114</sup> On July 1, 2003, the deadline set out in the ASPA for the cut off of United States military assistance to International Criminal Court member states that had not signed the Bilateral Immunity Agreement's, President Bush granted waivers to twenty two International Criminal Court member states that receive United States military aid and which had not signed agreements.<sup>115</sup> Since then, he has issued additional waivers, covering a total of thirty two countries.<sup>116</sup> According to the most current figures, as of May 28, 2004, eighty nine countries had signed a Bilateral Immunity Agreement with the United States.<sup>117</sup> Of the International Criminal Court member states, fifty eight out of the ninety four currently existing member states refused to sign a Bilateral Immunity Agreement's with the United States, leaving only thirty six International Criminal Court member states which had signed these agreements with the United States under the threat of losing military aid.<sup>118</sup> Out of those International Criminal Court member states that have refused to sign Bilateral Immunity Agreement's, over twenty states to this day have been left without any military assistance from the United States.<sup>119</sup>

In addition to aggressively pursuing Bilateral Immunity Agreement's with other countries, the United States requested the Security Council to renew Resolution 1487 in May of this year for a third year in a row.<sup>120</sup> This year, however, the circumstances were different than in the previous two years. This

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111. U.S. POLICY ON THE ICC, *supra* note 2.

112. See WASHINGTON WORKING GROUP ON THE INTERNATIONAL CRIMINAL COURT, U.S. IMPUNITY AGREEMENTS: A SUMMARY, at <http://www.wfa.org/issues/wicc/article98/article98home.html> (last visited July 1, 2004).

113. *Id.*

114. U.S. BILATERAL IMMUNITY, *supra* note 107.

115. U.S. IMPUNITY AGREEMENTS: A SUMMARY, *supra* note 112.

116. *Id.*

117. STATUS OF THE ICC AND U.S. POLICY, JANUARY-MAY 2004, *supra* note 24.

118. *Id.*

119. *Id.*

120. U.S. Renews Demand for ICC Exemption for UN Peacekeepers, *supra* note 1.

year the United States was requesting from the Security Council an exemption for troops of non-International Criminal Court member states, at a time when the Abu Ghraib prisoner abuse scandal took a prominent place on the front page covers of newspapers around the world.<sup>121</sup> The question that has remained unanswered then, is whether the United States was justified this year in seeking an exemption for its troops from prosecution by the International Criminal Court, given that its own troops committed grievous war crimes against Iraqi prisoners at the Abu Ghraib prison?

#### IV. WAS THE UNITED STATES JUSTIFIED IN SEEKING THE EXEMPTION FOR ITS TROOPS FROM THE INTERNATIONAL CRIMINAL COURT THIS YEAR?

The United States has always been an active advocate of international justice.<sup>122</sup> Not only did it help establish the Nuremberg tribunals and the International Criminal Tribunals for the Former Yugoslavia and Rwanda, but it also became a key signatory to numerous international humanitarian treaties, such as the Geneva Convention.<sup>123</sup> However, despite being at the forefront of international justice and despite its role as the world's policeman and as a major contributor to United Nations peacekeeping missions around the world, the United States demonstrated this year that it too is capable of committing heinous war crimes, as the Abu Ghraib prisoner abuse scandal illustrated.<sup>124</sup>

On April 28, 2004, the Abu Ghraib prisoner abuse became public when the first images depicting Iraqi prisoners at the Abu Ghraib being subjected to a variety of abuses by United States soldiers, were broadcast on "60 Minutes II."<sup>125</sup> Following this broadcast, other photographs depicting Iraqi prisoner abuses became public.<sup>126</sup> These photographs speak for themselves. One photograph shows that an Iraqi prisoner is naked.<sup>127</sup> His hands are clasped behind his neck and he is leaning against the cell door with great fear, as the dogs bark at him a few feet away.<sup>128</sup> Another photograph depicts an Iraqi prisoner who is

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121. See *U.S. Tries to Get Off the Hook On War Crimes*, HUMAN RIGHTS WATCH, May 20, 2004, [http://hrw.org/english/docs/2004/05/20/usint8602\\_txt.htm](http://hrw.org/english/docs/2004/05/20/usint8602_txt.htm).

122. President Bill Clinton, Statement on Signature of the Rome Treaty of the International Criminal Court (Dec. 31, 2000), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON, 2000-2001 2816-17 (2002).

123. *Id.*

124. See CITIZENS FOR GLOBAL SOLUTIONS, U.S. ABUSE OF PRISONERS AND THE NEED FOR INTERNATIONAL LAW (2004), [http://www.globalsolutions.org/programs/law\\_justice/news/iraqi\\_prisoners.html](http://www.globalsolutions.org/programs/law_justice/news/iraqi_prisoners.html).

125. Seymour M. Hersh, *Chain of Command*, NEW YORKER, May 17, 2004 [hereinafter *Chain of Command*].

126. See *id.*

127. *Id.*

128. *Id.*

lying on the ground in great pain, with a soldier sitting on top of him, with his knees pressed to his back and blood is streaming from this prisoner's leg.<sup>129</sup> In yet another photograph, a naked prisoner from his waist to his ankles is captured, lying on the floor, with a bite on his right thigh.<sup>130</sup> There is another larger wound on his left leg, covered with blood.<sup>131</sup>

These abuses were not uncommon, however, during Saddam Hussein's era. During his regime, the Abu Ghraib prison was one of the world's most notorious prisons for the weekly executions and the vile living conditions.<sup>132</sup> Torture was also a common practice at the Abu Ghraib, which included isolation, beatings, rapes, attack dogs, electric shocks, and starvation.<sup>133</sup> Following the collapse of Saddam's regime, the United States turned the Abu Ghraib into a military prison.<sup>134</sup> Unlike in Saddam's times, most of the prisoners captured by United States troops were civilians, including women and teenagers, many of whom had been picked up randomly during the military sweeps and at highway checkpoints.<sup>135</sup> The other prisoners fell into three distinct categories: 1) common criminals, 2) security detainees suspected of "crimes against the coalition", and 3) a small number of suspected "high-value" leaders of the insurgency against the coalition forces.<sup>136</sup> What stunned the world as the images of United States soldiers torturing Iraqi prisoners flooded newspapers and T.V. news, was the United States was committing the same crimes it went to war with Iraq to prevent.<sup>137</sup> Instead of ending the prisoner abuses and human rights violations prevalent during Saddam's regime, the United States was contributing to the abuses.<sup>138</sup>

Before the pictures were released to the media, however, on January 31, 2004, Commander, Coalition Forces Land Component Command (CFLCC) Lieutenant General David McKiernan, appointed Major General (MG) Antonio Taguba to conduct an investigation under Article fifteen-six into the 800th Military Police Brigade's detention and internment operations.<sup>139</sup> This investigation came about as a result of the criminal investigation initiated by the United States Army Criminal Investigation Command of the specific allegations of detainee abuse committed by members of the 372nd Military Police

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129. *Id.*

130. *Chain of Command*, *supra* note 125.

131. *Id.*

132. Seymour M. Hersh, *Torture at Abu Ghraib*, *NEW YORKER* May 10, 2004.

133. Remnick, David, *Hearts and Minds*, *NEW YORKER*, May 10, 2004.

134. Hersh, *supra* note 132.

135. *Id.*

136. *Id.*

137. *See* Matua, *supra* note 10.

138. *Id.*

139. Article 15-6 Investigation of the 800th Military Police Brigade, [http://www.npr.org/iraq/2004/prison\\_abuse\\_report](http://www.npr.org/iraq/2004/prison_abuse_report) [hereinafter Investigation Report].



Company, 320th Military Police Battalion in Iraq, all which are part of the 800th Military Police Brigade.<sup>140</sup> MG Taguba was specifically asked to inquire into all the facts and circumstances surrounding the allegations of detainee abuse, especially over the allegations of the mistreatment of the Abut Ghraib prisoners.<sup>141</sup>

Following his investigation, on February 26th, MG Taguba submitted his report.<sup>142</sup> His report concluded that between October and December of 2003, at the Abu Ghraib prison, numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees.<sup>143</sup> He further concluded that the systemic and illegal abuse of the detainees was intentionally perpetrated by several members of the 372nd Military Police Company, 320th Military Police Battalion, 800th Military Police Brigade.<sup>144</sup> The intentional abuse of detainees by military police personnel included the following acts: “a) punching, slapping and kicking detainees ... b) videotaping and photographing naked male and female detainees, c) forcibly arranging detainees in various sexually explicit positions for photographing ... f) forcing groups of male detainees to masturbate themselves while being photographed and videotaped ... k) a male MP guard having sex with a female detainee....”<sup>145</sup> These allegations were substantiated by detailed witness statements and the discovered graphic photographs.<sup>146</sup> Several detainees also described the following acts of abuse performed on them: “a) breaking chemical lights and pouring the phosphoric liquid on detainees ... d) beating detainees with a broom handle and chair, e) threatening male detainees with rape ... h) using military working dogs to frighten and intimidate detainees with threats of attack.”<sup>147</sup>

After learning about these abuses, the international community heavily criticized the United States for having violated multiple international treaties, which the United States had ratified and upheld in the past.<sup>148</sup> For instance, the United States currently stands in violation of both the Third and the Fourth Geneva Conventions of 1949.<sup>149</sup> In time of war, every person in enemy hands must have some kind of status under international law.<sup>150</sup> If the person caught in enemy hands is a prisoner of war, then that person will protected by the Third

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140. *Id.* at 6.

141. *Id.*

142. *Chain of Command, supra* note 125.

143. Investigation Report, *supra* note 139, at 16.

144. *Id.*

145. *Id.*

146. *Id.* at 17.

147. *Id.* at 17-18.

148. See U.S. ABUSE OF PRISONERS AND THE NEED FOR INTERNATIONAL LAW, *supra* note 124.

149. See *id.*

150. *Id.*

Geneva Convention.<sup>151</sup> If, on the other hand, that person is a civilian, then he will be protected by the Fourth Geneva Convention.<sup>152</sup> In this case, because United States soldiers tortured both prisoners of war and civilians at Abu Ghraib prison, they violated both Article thirteen of the Third Geneva Convention of 1949,<sup>153</sup> and Article twenty seven of the Fourth Geneva Convention of 1949.<sup>154</sup> The United States also violated Article seven of the International Covenant on Civil and Political Rights of 1966,<sup>155</sup> and Article two of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.<sup>156</sup>

The inhumane treatment and the torture performed on Iraqi prisoners by United States soldiers, is not only a grave breach of these international treaties, but it is also considered a war crime under the International Criminal Court.<sup>157</sup> The International Criminal Court is based in part on the Geneva Conventions, therefore some of the protections extended to prisoners of war and civilians under the Conventions are also included under the definition of war crimes in the Rome Statute.<sup>158</sup> Under Article eight, war crimes mean:

- a) grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons ... under the provisions of the relevant Geneva Convention ... ii) torture or inhuman treatment ... iii) willfully causing great suffering or serious injury to body or health ... b) xxi) committing outrages upon personal dignity, in particular humiliating and degrading treatment ....<sup>159</sup>

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151. *Id.*

152. *Id.*

153. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 13, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. ("Prisoners of war must at all times be humanely treated. . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.").

154. Geneva Convention for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] ("Civilians who are not classified as POW's...shall at all times be humanly treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.").

155. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

156. G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd plen. mtg., U.N. Doc. A/RES/39/46 (1984). ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

157. See *Prisoner Abuse May Qualify As a War Crime*, DECCAN HERALD, June 6, 2004, <http://www.deccanherald.com/deccanherald/jun062004/f4.asp>.

158. U.S. ABUSE OF PRISONERS AND THE NEED FOR INTERNATIONAL LAW, *supra* note 124.

159. Rome Statute, *supra* note 32, 2187 U.N.T.S. 94-95.

If any one of these war crimes enumerated by the Rome Statute and committed by United States soldiers is broken down into its elements, one will find that every element of the crime has been met by the actions of United States soldiers, thereby making them guilty of war crimes.<sup>160</sup> For instance, looking closely to the war crime committed upon personal dignity under Article eight (two)(b)(xxi), the elements of the crime are:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>161</sup>

As to the first two elements, both the graphic photographs and the Taguba Report have confirmed, not only that United States soldiers did violate the dignity of Iraqi prisoners by using torture and inhumane ways of extracting information from them, but that these actions do rise to a level that could be considered an outrage upon personal dignity. As to the last two elements, the conduct of United States soldiers did take place in the context of and was associated with an international armed conflict, the War in Iraq. Furthermore, the perpetrators, in the case United States soldiers, were aware of the factual circumstances that established the existence of an armed conflict, given that they were fully aware that they had gone to Iraq to put an end to Saddam's terror and human rights abuses. As a result, the International Criminal Court currently does not have any jurisdiction over the actions of United States troops in Iraq and cannot prosecute them.<sup>162</sup> Therefore, the aforementioned evidence clearly shows that United States troops are, nevertheless, guilty of committing war crimes in violation of Article eight of the Rome Statute of the International Criminal Court.

Given that the United States breached international treaties and is guilty of war crimes under the Rome Statute for torturing the Abu Ghraib prisoners, was the United States justified this year in requesting impunity for its troops serving on United Nations missions from prosecution by the International Criminal Court? The answer to that question is of course, no. With this incident, the United States has demonstrated that even its own troops are capable of committing heinous war crimes. The United States insists, however, that because it is not a signatory to the Rome Statute, The United States courts instead of the

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160. See U.N. GAOR, 10th Sess., Annex 1, addendum pt. 2, U.N. Doc. PCNICC/2000/1/Add.2.

161. *Id.* at 33.

162. U.S. ABUSE OF PRISONERS AND THE NEED FOR INTERNATIONAL LAW, *supra* note 124.

International Criminal Court should prosecute its own troops guilty of committing war crimes in another country.<sup>163</sup> The United States objects to its troops being prosecuted by the International Criminal Court not because it refuses to bring to justice its own citizens, who have committed war crimes in other countries, but because the Court does not provide adequate guarantees of due process, which United States courts do provide.<sup>164</sup> In fact, the United States maintains that the international community has nothing to fear because United States citizens guilty of committing egregious war crimes will not go unpunished, especially since the United States already has a well-functioning system for military justice that does ensure accountability.<sup>165</sup> The United States Constitution, for instance, gives Congress the power to order court-martials for war crimes committed by United States troops.<sup>166</sup> The Uniform Code of Military Justice, gives general court-martials jurisdiction over any person who by the law of war is subject to trial by a military tribunal, including for crimes under international law.<sup>167</sup> Lastly, the War Crimes Act of 1996 gives United States courts authority to try either troops or civilians for violations of the laws of war.<sup>168</sup>

If granting United States troops impunity from prosecution by the International Criminal Court means not that they will escape criminal liability, but that they will be prosecuted by United States courts with adequate guarantees of due process, which the United States Constitution affords them, then has the United States punished those responsible for the prisoner abuses? It has been recently reported that seven American soldiers have been already charged.<sup>169</sup> The first soldier to face court martial proceedings went on trial in Iraq on May 19.<sup>170</sup> But seeing that these charges were brought only against lower-level soldiers, the Human Rights Watch has publicly criticized the United States for not investigating the superiors of these soldiers to see whether they ordered or knowingly tolerated these abuses.<sup>171</sup> In fact, recent press reports have uncovered that the torture the United States soldiers submitted Iraqi prisoners to at Abu Ghraib, was not an isolated act of a few deviant soldiers.<sup>172</sup> On the

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163. See Statement of Ambassador Cunningham, *supra* note 47.

164. *Id.*

165. *Id.*

166. *The ICC is Unlikely to Try U.S. Soldiers, supra* note 45.

167. *Id.*

168. *Id.*

169. *Q & A: Iraq Prison Abuse Scandal*, BBC NEWS, June 21, 2004, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/americas/3701941.stm> (last visited June 28, 2004).

170. *Id.*

171. *Iraq: U.S. Prisoner Abuse Sparks Concerns Over War Crimes*, HUMAN RIGHTS WATCH, Apr. 30, 2004, [http://hrw.org/english/docs/2004/04/30/iraq8521\\_txt.htm](http://hrw.org/english/docs/2004/04/30/iraq8521_txt.htm).

172. Alex Lefebvre, *U.S. Press Accounts Confirm: Rumsfeld, Bush Approved Iraq Torture Policy*, WORLD SOCIALIST WEB SITE (May 18, 2004), [http://www.wsws.org/articles/2004/may2004/tort-m18\\_prn.shtml](http://www.wsws.org/articles/2004/may2004/tort-m18_prn.shtml).

contrary, interviews and government documents have brought to light, that true responsibility for the torture at Abu Ghraib lies not within a few Army reservists, but within the very highest levels of the Bush Administration.<sup>173</sup>

It has been revealed and verified by numerous sources, that Defense Secretary Donald Rumsfeld, assisted by his Undersecretary for Intelligence, Stephen Cambone, set up a secret program in 2001 called Special Access Program (SAP) to assassinate targeted individuals in the Bush Administration's war on terror.<sup>174</sup> This program was subsequently brought to Iraq in the summer and fall of 2003 to remedy the growing insurgency United States forces faced in Iraq.<sup>175</sup> The solution to stopping this growing insurgency, which Rumsfeld endorsed and Cambone carried out, was to get tough with the Iraqis in the Army prisons who were suspected of being insurgents.<sup>176</sup> This entailed turning United States prisons in Iraq into torture camps to extract information from the prisoners about the resistance.<sup>177</sup> To achieve this, Cambone removed the military intelligence officers carrying out the interrogations from the authority of the normal military chain of command, and incorporated them into the Special Access Program.<sup>178</sup> Rumsfeld and Cambone even went a step further and expanded the scope of Special Access Program, by bringing unconventional methods to Abu Ghraib, such as exposing the prisoners to sexual humiliation.<sup>179</sup> These operations did not go unnoticed, however, by both Condoleezza Rice, the national-security advisor who approved the operations, and President Bush who was informed of the existence of the programs.<sup>180</sup>

If United States courts fail to prosecute the top officials for the prisoner abuse committed at Abu Ghraib, then these war crimes would go unpunished here in the United States. The International Criminal Court, which normally ensures accountability when national courts either fail or refuse to punish its own nationals, would not be able to step in and prosecute these officials, given that the International Criminal Court currently has no jurisdiction over United States actions in Iraq. As a result, these heinous crimes committed at Abu Ghraib will go unpunished. But what if United States soldiers and top officials had committed war crimes in one of the fifty eight International Criminal Court member states that did not sign Bilateral Immunity Agreements with the United States, and which are member states of the International Criminal Court? In such a case, even if United States courts failed to prosecute its own troops and

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173. *Id.*

174. Seymour M. Hersh, *The Gray Zone*, NEW YORKER, May 24, 2004, [http://www.newyorker.com/fact/content/?040524fa\\_fact](http://www.newyorker.com/fact/content/?040524fa_fact).

175. *Id.*

176. *Id.*

177. Lefebvre, *supra* note 172.

178. *Id.*

179. *The Gray Zone*, *supra* note 174.

180. *Id.*

officials in order to protect them, the International Criminal Court would, nevertheless, have jurisdiction to prosecute them in its tribunal. The International Criminal Court in that case would ensure accountability for the grievous war crimes committed by United States soldiers and officials. The Resolution sought this year by the United States, however, would have exempted those responsible for committing war crimes in International Criminal Court member states from prosecution by the International Criminal Court, for a period of one year. This means that, if in the future United States courts decide not to prosecute its own troops and officials, once again the heinous war crimes would go unpunished by both national United States courts and the International Criminal Court. Given that United States troops are capable of committing war crimes in any part of the world, the United States was not justified in protecting its troops from the rule of law by seeking exemptions for their actions from the International Criminal Court.

United States insistence this year on an exemption for its troops and personnel from the International Criminal Court, in light of the prisoner abuses, sent a powerful message throughout the world, that the United States is placing itself above international law and does not have to abide by it. This is not a good message for the United States to advocate if it wants to maintain the support of the international community in the future. At the moment, the ramifications of United States policy and practice in Iraq, in light of the prisoner abuse scandal, have already been severe. Not only did the United States lose credibility in Iraq, the very same country it was trying to rebuild, but it also hurt America's prospects in the war on terror.<sup>181</sup> The United States further undermined its ability to demand humane treatment for its soldiers and civilians in the hands of its enemies.<sup>182</sup> Given that the United States has already secured a bad name for itself due to prisoner abuse, it does not need to alienate itself further from the international community by attempting to place itself above the rule of law. Doing so would further impair United States credibility.

## V. CONCLUSION

The United States started out by demanding the Security Council to renew Resolution 1487, which it was not justified to do. In the end, however, it did the right thing by withdrawing the Resolution from the United Nations floor. Its reasons for doing so are questionable. However, actions speak louder than words, and for now the withdrawal of the Resolution could be the sign the international community needs from the United States, to assure it that the United States will not seek special treatment from international law any time soon.

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181. U.S. ABUSE OF PRISONERS AND THE NEED FOR INTERNATIONAL LAW, *supra* note 124.

182. *Id.*