

ANALYSIS: Scramble at the Council

Author: [Anthony Borden](#)

The UN is racing against time to avert a renewed American bid to block its peacekeeping operation in Bosnia

Diplomats at the Security Council are scrambling to devise a compromise position on the International Criminal Court that would forestall a US threat to veto a further extension of the UN mission in Bosnia and Herzegovina, due to expire July 15.

Following Washington's failure last week to garner any support for its demand for a permanent exemption from prosecution by the new international court, it is poised once again to block renewals of any UN peacekeeping missions unless the Security Council can come up with a resolution that satisfies the US.

The issue has polarised opinion among the Western allies, leaving little apparent room for manoeuvre. The European Union has maintained its fulsome support for the ICC, while the unilateralist Bush administration – encouraged by deep-seated opposition to international engagements by a core of hard-right Congressmen – has remained adamant in its rejection of the court.

Criticism of the administration – both for its opposition to the new legal body, formally established July 1, and for its heavy-handed threat against the Bosnian mission – has reached a crescendo.

Numerous editorials in leading US newspapers have called on Washington to reconsider its position. The vibrant activist coalition in support of the ICC has mobilised to urge Security Council members not to back down, warning that the US effort could fatally undermine the court at its birth and harm existing international legal bodies, such as the International Criminal Tribunal for the Former Yugoslavia which the US has backed.

Writing in *The Washington Post*, EU Commissioner for External Relations Chris Patten has called US fears over the court “perverse”, while Paddy Ashdown, the new High Representative, has raised practical concerns over an abrupt end to the UN mission in Bosnia – now primarily a civilian police training force – and political concerns over the message that waiving international support for the region would send.

In an extraordinary intervention, UN secretary general Kofi Annan wrote to US secretary of state Colin Powell last week warning that “the whole system of United Nations peacekeeping operations is being put at risk”. In a move likely only to stir further divisive argument, Canada has called for an open session of the Security Council, to be held July 10, which could allow as many as 40 states, members and non-members of the council, to air their support for the court and their strong opposition to any blanket exemption for US personnel.

Yet such high-level concern over Washington's attitude is matched by a fierce US opposition to the ICC, especially but not only among the hard-right, that is both pragmatic and visceral.

In many ways, US opposition to the ICC mirrors European anxiety over the European Union, raising concerns over sovereignty and national identity which, reasonable or not, are deeply felt. In light of the country's prominent role in all international military engagements, and certain international antipathy towards the US to which Americans are especially sensitive after September 11, fears over politically driven prosecutions are acute.

Despite the substantial safeguards incorporated into the Rome statute creating the ICC (and about which ignorance is widespread), a substantial proportion of US opinion refuses to countenance the idea of any foreigner sitting in judgement over a US citizen. Far from a powerful human rights mechanism, the ICC could be, according to the influential New York Times columnist William Safire, a “globocourt” – an uncontrollable body unrecognised by the US with a licence to prosecute American troops, diplomats or politicians at the whim of whatever unaccountable judges and prosecutors happen to be in place.

Supporters of the court now include 136 signatory nations - the Bush administration rescinded out-going president Bill Clinton’s approval, knowing that Congressional ratification could not be obtained – and 76 of them have ratified the statute which brings it into being.

They argue that America’s best safeguard would be to ratify the treaty so that it could engage constructively in creating the new court, including appointing US judges and other personnel to help determine its procedures, practices and cases.

Meantime, they insist that the stipulations hammered out in the Rome negotiations are robust and reliable.

Crucially, the international court can only take up a case against an individual where a national judiciary failed to pursue a reasonable investigation and (if necessary) prosecution. Unlike the Yugoslav tribunal, the ICC is the court of last, not first, resort, and can only act where national courts blatantly fail to do so.

To undertake any investigation and ultimately, like the Yugoslav tribunal, any prosecution, the prosecutor would have to apply to a panel of pre-trial judges, to confirm ICC jurisdiction and sufficient evidence.

Judges have to be approved by an Assembly of States Parties (those which have ratified the statute), and in exceptional cases the assembly can remove judges or prosecutors who abuse their office. Although independent of the United Nations, Article 16 of the statute does allow the Security Council to vote a (renewable) suspension of any prosecution in exceptional circumstances.

Most important of all are the limitations on the jurisdiction of the court, in terms of territory and crimes. The ICC applies only to individuals from ratifying states or to those operating in the latter. This means that US operations in Iraq and, for the moment, Afghanistan, would not be covered. (Operations in the Balkans are already covered by the more powerful Yugoslav tribunal, which concluded that there was no case to answer over the Kosovo bombing campaign.)

Still more limiting, the ICC only has jurisdiction over war crimes, crimes against humanity and genocide. As Annan argued in his letter to Powell, “In the history of the United Nations . . . no peacekeeper or any other mission personnel have been anywhere near the kind of crimes that fall under the jurisdiction of the ICC. The issue that the United States is raising in the council is therefore highly improbable.”

Not satisfied, the US last week proposed a resolution to the Security Council that would, in advance, invoke the Rome statute’s Article 16 suspension of any potential prosecution against US personnel participating in UN approved missions, and at the same time make it effectively permanent. US officials were at pains to stress that they remain committed to Bosnia, and even, in the words of senior defence department hawk Paul Wolfowitz, to the “potentially laudable goal” of the court if “appropriate safeguards” could be secured.

Opposition was so fierce, however, that the US could not attract enough support to bring it to a vote. A non-member of the Security Council but speaking on behalf of the European Union, Danish ambassador to the UN Ellen Margrethe Løj “deeply regretted” the US position, stressing European resistance to any blanket immunity arrangement.

Speaking at a preparatory meeting on the ICC, Dejan Sahovic, the UN representative from Belgrade - another non-council member which has ratified the treaty - took evident delight in noting, "It is no secret that there is an ongoing and heated debate within Yugoslav society whether an ad hoc solution, the ICTY, was a proper response of the international community to the crimes committed in the former Yugoslavia in the 1990s, or whether selective justice was applied. The creation of the ICC provides an unambiguous answer to that question: the international justice is universal, not selective." Only council member Bulgaria, reportedly under heavy US pressure over its bid to join NATO, consented to abstain in any vote.

Yet serious opposition - including that of Britain, the US's most reliable ally - focused not only on grounds of politics or principle but also law. They argued that the US proposal represented such a fundamental issue that consenting to it would constitute an abrogation of their legal obligations under the Rome treaty.

As William Pace, convenor of the nongovernmental Coalition for the ICC argued, "Amending an international treaty is clearly outside of the Security Council's mandate, as set out in the Charter of the United Nations, and is therefore a violation of international law." As a spokesperson for the UK mission to the UN noted, "If the Security Council asks [parties to the ICC] to do something that is incompatible with the statute, then it is of little or no value."

With such polarisation, there would seem scant room for achieving a compromise by the expiry of the 12-day extension consented to by the US. Next Monday evening could see the stage set for a dramatic cancellation of the Bosnian mission, and a grave crisis for all UN peacekeeping. Or there could be a further short-term extension, which would buy more time but risk fuelling only more bitterness and distraction among allies who need to be working closely together on a world of crises.

All, however, may not be lost. The US is holding out hope that it might be able to finesse the question of an automatic renewal of immunity - in essence expressing the Security Council's intention to renew the US exemption regularly, without explicitly doing so. This, the Americans hope, would significantly reduce opposition to the resolution, while giving time over the coming year to strengthen the case for US immunity as well as look into other possible safeguards.

Amid the diplomatic corridors and think tanks there is also talk of an entirely different tack. Skirting the explosive question of a permanent Article 16 exemption for US personnel, some experts are floating the idea of a Security Council resolution not on the issue of prosecutions themselves but on custody.

Under this suggestion, the council would affirm that any accused that might be detained must be first held in - or returned to - his or her country of origin. A US soldier arrested in any country party to the ICC, whether in France or Fiji, would first have to be turned over to US authorities.

This would guarantee that the national court system had adequate opportunity to review any potential charges, while reserving Washington's ability to engage in a future extradition row, however unlikely. In any case, such a resolution would only underscore the ICC statute's confirmation of the pre-eminence of national jurisdictions - as long as they undertake reasonable procedures - and therefore could address US concerns without compelling the Security Council to override ratifying states' existing legal commitments under the treaty.

Whether either compromise could be forged and sold within the tight time frame and heated atmosphere facing the council remains to be seen.

Washington seems to be hoping to win backing from Russia, China, Bulgaria, Singapore, Columbia, Mauritius and possibly Mexico.

Such a line-up would present Britain with the difficult choice of either siding with its strong ally or holding

to its firm support for the ICC, and place France in the unenviable position as a permanent member of effectively vetoing a US proposal.

But if agreement could be reached, it may allow the crisis over UN peacekeeping to pass, and enable the ICC to begin its work in earnest. Indeed, Alton Frye of the Council on Foreign Relations remains hopeful that the US could ultimately support the ICC, “[If] America could welcome the creation of the court, and give it an opportunity to function in a situation where the fears and vulnerabilities were dampened, this would give the court a chance to demonstrate that it can function fairly. Then it could be re-judged in a different light.”

Anthony Borden is executive director of the Institute for War & Peace Reporting.

Location: Balkans
Macedonia
China
Albania

Focus: International Criminal Tribunal for the former Yugoslavia

Source URL: <https://iwpr.net/global-voices/analysis-scramble-council>