
A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court

Neha Jain*

Abstract

Security Council Resolutions 1422 (2002), 1487 (2003) and 1497 (2003), excluding the jurisdiction of the ICC, give rise to the fundamental issue of whether the legitimacy of an international institution such as the International Criminal Court may be eroded by an act of the Security Council, the political organ of the United Nations. This article analyses the legal validity of such resolutions within the framework of limitations that have been imposed upon the Council in international law. It discusses the relationship between the resolutions and the provisions of the Rome Statute, and concludes that their cumulative effect operates to modify the Rome Statute. It then deals with the effect of the illegality of these resolutions on the obligations of Member States of the UN, as well as on the ICC.

1 Introduction

International support for the setting up of an institution depends on the need for, and the purpose behind, its creation. The development of international institutions is a result of various challenges faced by the international community, and the efforts of the members of the community to collectively respond to these challenges. The driving force behind the development of particular institutions has differed, depending on time and place. After the First and Second World Wars, the maintenance of international peace and security was of overriding importance to the international community – hence, the creation of the United Nations (UN) and the vesting of almost plenary powers in its political organ, the Security Council, to further this objective. Today, while the maintenance of peace retains this distinction, a narrower concern of significant antiquity has gained prominence – that of the prevention of impunity for certain crimes regarded as heinous in international law. After several unsuccessful attempts,

* National Law School of India University, Bangalore. Email: neha@nls.ac.in.

the institution that has come into being in response to this pressing concern is the International Criminal Court (ICC).¹

Currently, 92 states have ratified the Rome Statute of the International Criminal Court (Rome Statute), and 139 states in all are signatories to it. This represents a larger number of states than the membership of the United Nations at the time of its inception in 1945. In its Preamble, the Rome Statute, while reaffirming the purposes and principles of the UN Charter,² establishes the ICC as a permanent institution independent of the UN structure.³ In light of its purpose, as well as the widespread respect it commands, it is paradoxical that its legitimacy should be undermined by the Security Council, an organ entrusted with the maintenance of international peace. This is precisely the result that has been achieved by the passage of Security Council resolutions which exclude the jurisdiction of the ICC in respect of actions committed by personnel in the course of peacekeeping missions.⁴

This paper addresses the repercussions of the clash between the Security Council and the ICC with respect to the ICC's jurisdiction over members of peacekeeping missions. Section 2 gives an overview of the Security Council resolutions excluding the jurisdiction of the ICC. Section 3 discusses the kind of powers enjoyed by the Security Council and the limitations imposed upon the exercise of these powers in international law. Section 4 analyses the legal validity of Council resolutions excluding the jurisdiction of the ICC. Finally, Section 5 deals with the consequences of these resolutions upon Member States of the ICC, as well as upon the ICC as an independent organization.

2 Background

Security Council Resolutions 1422, 1487 and 1497 excluding the jurisdiction of the ICC are a result of concerted opposition by the United States to the jurisdictional regime of the ICC.⁵ They represent a compromise to persistent US demands to prevent the ICC from exercising jurisdiction over its peacekeepers. Initially, the US request to the Security Council pertained to the grant of immunity to US soldiers in Bosnia and Herzegovina from the ICC's jurisdiction for a period of one year.⁶ The US threatened to

¹ For a history of the efforts of the international community to create an institution that would prevent impunity for the most serious crimes, see Brierly, 'Do We Need an International Criminal Court', 8 *BYBIL* (1927) 81; Caloyanni, 'An International Criminal Court', 14 *Transactions of the Grotius Society* (1928) 69; Murray, 'The Present Position of International Criminal Justice', 36 *Transactions of the Grotius Society* (1950) 191.

² Preambular Para. 7 of the Rome Statute of the International Criminal Court, 1998, 37 *ILM* (1999) 999 (hereinafter Rome Statute).

³ Preambular Para. 9 read with Art. 1 of the Rome Statute.

⁴ SC Res. 1422 (2002), UN Doc. S/RES/1422 (2002) (hereinafter SC Res. 1422); SC Res. 1487 (2003), UN Doc. S/RES/1487 (2003) (hereinafter SC Res. 1487); SC Res. 1497 (2003), UN Doc. 1497 (2003) (hereinafter SC Res. 1497).

⁵ For a summary of US efforts to thwart the jurisdictional regime of the ICC, see Scheffer, 'Staying the Course with the International Criminal Court', 35 *Cornell Int'l LJ* (2002) 47.

⁶ See President's Letter to Congressional Leaders Reporting on Continued Operations of United States Forces in Bosnia and Herzegovina, 38 *Weekly Comp. Pres. Doc.* 1243 (29 July 2002).

use its veto power to stop the renewal of the Council mission in Bosnia and Herzegovina, which was to expire on 15 July 2002, if the Council declined its proposal.⁷ Finally, as a compromise, Resolution 1422 was adopted, excluding the jurisdiction of the ICC over personnel from non-party states, amidst protests from several states.⁸ This scenario repeated itself in Resolution 1487 (renewing Resolution 1427), from which France, Germany and Syria abstained.⁹ Resolution 1497, passed in response to the conflict in Liberia, authorizes the deployment of a Multinational Force to support, to secure the environment for the delivery of humanitarian assistance, and to prepare for the introduction of a longer-term United Nations stabilization force to relieve the Multinational Force. This resolution was passed 12-0, with France, Germany and Mexico abstaining.¹⁰

Resolution 1422, in relevant part, requests the ICC under Article 16, to refrain from commencing or proceeding with investigation or prosecution of any case involving actions related to a United Nations authorized operation for a 12-month period starting 1 July 2002, unless otherwise decided by the Security Council.¹¹ The resolution is renewable under the same conditions for further 12-month periods for as long as may be necessary.¹² Resolution 1487 has identical wording in Operative Paragraphs 1 and 2 of the resolution. Resolution 1497 is worded differently. The exclusion of the ICC's jurisdiction is not in the form of a request under Article 16 of the Rome Statute. Operative Paragraph 7 provides for exclusive jurisdiction of the contributing states over the acts of their personnel, unless expressly waived by the contributing state. No time period is specified for the operation of the exclusion, or for its renewal.

These resolutions have provoked strong criticism from the international community. At the time of passage of these resolutions, declarations made by states put forward the opinion that the resolutions are inconsistent with the Rome Statute, as well as

⁷ On 30 June 2002, the Security Council adopted a Resolution extending the mandate of the UN Mission in Bosnia and Herzegovina by 3 days, following the US veto of a proposal that would have renewed the Mission until 31 Dec. 2002. SC Res. 1420, UN SCOR, 57th Sess., 4564th mtg., UN Doc. S/RES/1420 (2002). The Council however, agreed to extend the deadline for 3 days. On 3 July 2002, another text was adopted extending the Mission until 15 July 2002. SC Res. 1421, UN SCOR, 57th Sess., 4566th mtg., UN Doc. S/RES/1421 (2002).

⁸ Statements of Representatives of Fiji, Ukraine, Canada, Colombia, Samoa, Malaysia, Germany, Syrian Arab Republic, Argentina, Cuba (SC Res. 1422, *supra* note 4; UN SCOR, 57th Sess., 4568th mtg., UN Doc. S/PV.4568) (hereinafter UN Doc. S/PV.4568).

⁹ New Zealand, Jordan, Switzerland, Liechtenstein, Greece, Islamic Republic of Iran, Uruguay, Malawi, Brazil, Trinidad and Tobago, Argentina, South Africa, Nigeria, Pakistan, Netherlands, France, Syrian Arab Republic (SC Res. 1487, *supra* note 4; UN SCOR, 58th Sess., 4772nd mtg., UN Doc. S/PV.4772). It must be noted that attempts to renew Resolution 1487 in May 2004 failed, as the US withdrew its proposal for renewal, given the lack of support for the Resolution among Security Council members. For a narration of the sequence of events preceding the withdrawal of the US proposal, see <http://www.iccnw.org>.

¹⁰ Mexico, France, Germany (SC Res. 1497, *supra* note 4; UN SCOR, 58th Sess., 4803rd mtg., UN Doc. S/PV.4803).

¹¹ Operative Para. 1, SC Res. 1422, *supra* note 4.

¹² *Ibid.*, Operative Para. 2.

with international law.¹³ A similar apprehension was expressed by the Secretary-General, in the aftermath of Resolution 1487, about the legality of a Council resolution that flies in the face of treaty law.¹⁴

In order to analyse the validity of these concerns, a study of the kind of powers that may be exercised by the Security Council acting under Chapter VII is essential.

3 Discretionary Powers of the Security Council

It is widely accepted that the maintenance of international peace and security is the principal objective of the UN,¹⁵ and that this objective assumes precedence over all other commitments of the Organization.¹⁶ According to the scheme of the UN Charter, the Security Council is the primary organ entrusted with the responsibility of fulfilling this objective.¹⁷ The Council is thus required to act in situations that necessitate swift and urgent action on its part. It is therefore only natural that the Security Council should enjoy broad powers in the discharge of its functions with a view to maintaining international peace.

The drafting history of the UN Charter indicates that unsuccessful attempts were made during the San Francisco Conference to qualify the words ‘maintenance of international peace and security’ in Article 1, with the words ‘in conformity with the principles of justice and international law’. Such attempts failed due to apprehensions that such qualification would unduly limit the powers of the Council and prejudice effective action on its part.¹⁸ The wide measure of discretion thus accorded to the Council is particularly true of enforcement measures taken by the Council acting under Chapter VII.¹⁹ Under Article 39, the Council’s powers to decide which situations constitute a threat to international peace and security, as well as what kind of responsive measures should be taken to quell a threat, are

¹³ See, e.g., Letter from the Representative of Canada to the UN President of the Security Council (3 July 2002), UN Doc. S/2002/723 before the adoption of Resolution 2241: ‘... the issue is a potentially irreversible decision negatively affecting the integrity of the Rome Statute of the International Criminal Court, the integrity of treaty negotiations more generally, the credibility of the Security Council, the viability of international law with respect to the investigation and prosecution of grievous crimes, and the established responsibilities of States under international law to act on such crimes.’ Similar sentiments were expressed by Argentina, Brazil, Cameroon, China, Colombia, Costa Rica, Cuba, France, Germany, Guinea, Ireland, Islamic Republic of Iran, Jordan, Liechtenstein, Malaysia, Mauritius, Mexico, New Zealand, Samoa, South Africa, Switzerland, Syrian Arab Republic, United Kingdom, and Venezuela: UN Doc. S/PV.4568, *supra* note 8.

¹⁴ Statement of the Secretary General, UN SCOR, 58th Sess., 4772nd mtg., UN Doc. S/PV.4772 (2003).

¹⁵ Art. 1(1) of the Charter of the United Nations, 1945, 1 UNTS 16 (hereinafter UN Charter).

¹⁶ L. Goodrich, E. Hambro, and A. Simons, *Charter of the United Nations: Commentary and Documents* (1969), at 16; Eagleton, ‘The Jurisdiction of the Security Council over Disputes’, 40 *AJIL* (1946) 513.

¹⁷ Art. 24 of the UN Charter.

¹⁸ R.B. Russell, *A History of the United Nations Charter* (1958), at 637.

¹⁹ *Case Concerning the Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v United Kingdom)*, Provisional Measures, 94 ILR 478 (Dissenting Opinion of Judge Weeramantry, at 549) (hereinafter *Lockerbie*, Provisional Measures).

almost plenary.²⁰ It would scarcely be compatible with the functions of the Council to allege otherwise. Decisions of the Security Council, while acting under Chapter VII, are essentially political decisions,²¹ and unless the Council can exercise a wide measure of discretion, its functioning would be paralysed. The Security Council has therefore in the past exercised a wide array of powers while acting under Chapter VII, including the establishment of international tribunals with primary jurisdiction over national courts²² and the settlement of border disputes between nations.²³

Nevertheless, while the Security Council may enjoy an extensive range of powers under the UN Charter, it cannot act *legibus solutus* (unbound by law).²⁴ While any decision of the Security Council while acting under Chapter VII must necessarily be a political decision, that does not automatically imply that the Council can act without any deference to the principles of international law. The Security Council is a creature of treaty, and may not overstep the bounds of that treaty. Further, the Security Council is a delegatee of the discretionary powers of its Member States.²⁵ Under Article 24, while discharging its function of maintaining international peace, the Security Council acts as an agent of the Member States of the UN. It is thus unlikely that the Council can act in a manner that is unconstrained by any norms of international law.

Several restraints have thus been implied on the powers of the Security Council and these operate regardless of whether the Council acts under Chapter VII or any other part of the UN Charter.²⁶ Article 24 itself sets out one limitation – the Council must act in accordance with the purposes and principles of the UN. Secondly, since the UN Charter cannot be in derogation of any norm of *jus cogens*,²⁷ the Council that has been set up by that treaty cannot be conferred the power to act in violation of any *jus cogens* norm.²⁸ Aside from these obvious limitations on the Council's powers, certain other

²⁰ Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', 64 *AJIL* (1970) 1, at 16; McDougal and Reisman, 'Rhodesia and the United Nations: The Lawfulness of International Concern', 62 *AJIL* (1968) 1, at 9.

²¹ *Case Concerning Conditions of Admissions of a State to Membership in the United Nations* [1947–1948] ICJ Rep 57 (Dissenting Opinions of Judges Basdevant, Winiarski, McNair, and Read, at 85).

²² Security Council Resolution on the Establishment of the International Tribunal for the Former Yugoslavia, SC Res. 827 (1993), UN SCOR, 48th Year, UN Doc. S/RES/827 (1993); Security Council Resolution on the Establishment of the International Tribunal for Rwanda, SC Res. 935, UN SCOR, 49th Year, UN Doc. S/RES/935 (1994).

²³ SC Res. 687 (1991) passed under Chap. VII enjoined Iraq and Kuwait to recognize the inviolability of the international boundary as set out in the minutes between the two countries. The Resolution also called upon the Secretary-General to draw upon appropriate material to demarcate the boundary between Iraq and Kuwait; SC Res. 687 (1991), UN SCOR, 46th Sess., Res. & Dec., UN Doc. S/INF/47 (1991).

²⁴ *Prosecutor v Tadic*, Case No. IT-94-1-AR72, at para. 28.

²⁵ Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of the Council's Legality?', 86 *AJIL* (1992) 519, at 523.

²⁶ Brownlie, 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law', *Recueil des Cours* (1999-V) 9, at 218–219.

²⁷ Art. 53 of the Vienna Convention on the Law of Treaties, 1969, 8 ILM (1969) 679 (hereinafter VCLT).

²⁸ The position that the Council cannot act in violation of *jus cogens* norms was articulated by Judge Lauterpacht in his separate opinion in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, *Provisional Measures*, 95 ILR 43 (Separate Opinion of Judge Lauterpacht, at 157).

restraints on its discretion have also been implied. It has been argued that the Council may not violate certain fundamental institutional principles, such as the principle of *aut dedere aut judicare*,²⁹ and essential elements of sovereignty.³⁰ The Council must also discharge its functions in good faith, and not act on the basis of ulterior motives.³¹

Since these limitations on the powers of the Security Council would apply equally to resolutions passed under Chapter VII, the validity of resolutions excluding the jurisdiction of the ICC must be analysed within this framework.

4 Legality of SC Resolutions Excluding ICC Jurisdiction

A *The Link between the Threat to International Peace and the Resolutions*

Chapter VII measures taken by the Security Council must be in response to a threat to international peace and security, once the Council has made a determination to this effect under Article 39. The Council has in the past determined what constitutes a threat to international peace fairly broadly. An example of the wide interpretation made by the Council is the determination that the failure by the Libyan Government to demonstrate its renunciation of terrorism and to respond to Council requests in SC Resolution 731 (1991) constituted a threat to international peace and security.³² Further, it is widely acknowledged that as decisions of the Council are political, it would be unwise to second-guess the validity of their determination.³³

Despite this wide measure of discretion accorded to the Council, in the case of Resolutions 1422 and 1487, it is debatable whether there was in effect any threat to international peace that justified the granting of exclusive jurisdiction. There was no immediate provocation for the passage of these resolutions excluding ICC jurisdiction, except the threat that the UN Mission in Bosnia and Herzegovina would not be renewed. The suggestion that this threat in itself would constitute a threat to international peace and security is of doubtful validity.³⁴

The situation in Resolution 1497, which was passed in response to the conflict in Liberia, is somewhat different, as the threat to international peace and security clearly existed. Operative Paragraph 7 which forms part of this resolution provides for exclusive jurisdiction of contributing states that are non-parties to the Rome Statute

²⁹ Dugard, 'Judicial Review of Sanctions', in V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (2001), at 83, 89.

³⁰ Herdegen, 'The "Constitutionalisation" of the UN Security System', 27 *Vanderbilt J Transnat'l L* (1994) 135, at 154–159; Schachter, 'United Nations Law in the Gulf Conflict', 85 *AJIL* (1991) 452, at 468.

³¹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 3 (Dissenting Opinions of Judge Fitzmaurice, at 293; Judge Gros, at 340); Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *ICLQ* (1994) 55, at 96.

³² SC Res. 748 (1992), UN Doc. S/RES/748 (1992).

³³ Schachter, 'The UN Legal Order: An Overview', in C.C. Joyner (ed.), *The United Nations and International Law* (1997), at 3, 12.

³⁴ Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', 14 *EJIL* (2003) 85, at 86–88.

over acts of their officials related to the forces. The only circumstance in which the validity of Operative Paragraph 7 could be challenged is if it were permissible to look at each clause of the resolution to determine whether or not it is linked to the ultimate objective of achieving peace. No precedent for such an exercise can be found in international law.

Moreover, the argument that the grant of exclusive jurisdiction is entirely unconnected to the successful functioning of peacekeeping missions is hard to sustain. Providing for exclusive jurisdiction of contributing states over the acts of their personnel in the case of peacekeeping forces is not unknown in international law.³⁵ Exclusive jurisdiction of states over the acts of their nationals has been provided in the case of several UN forces in the past.³⁶ Exclusive jurisdiction of contributing states over offences committed by their personnel in the course of duty has been recognized by the UN Model Status of Forces Agreement for Peacekeeping Operations.³⁷ Further, primary jurisdiction of the contributing state in such cases has been provided in two of the most widely ratified Status-of-Forces Agreements (SOFA) signed between states – the NATO SOFA, and the Brussels Treaty Powers SOFA.³⁸ A survey of decisions of courts of various jurisdictions during the Second World War indicates that the provision of such exclusive jurisdiction in Agreements signed between states during the war period was fairly common.³⁹

The grant of such exclusive or primary jurisdiction to the state of nationality is considered important for the successful functioning of the force stationed in another country. In most cases of peacekeeping missions, the justice delivery system in the host state would have broken down. Under such circumstances, states contributing peacekeeping personnel would be doing an injustice to their citizens if they subjected them to the uncertain laws and non-working justice delivery system of the host state. Since the contributing state may be deterred by the prospect of a potentially unstable alien judicial system exercising jurisdiction over its nationals, exclusive jurisdiction would facilitate contributions to the force, especially in an emergency.

Hence, it is extremely difficult to assail the validity of Resolution 1497 on the ground that there is no link between the resolution and the Security Council's mandate of maintaining international peace and security.

³⁵ J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (1963), at 270; R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1996), i, at 1159–1160.

³⁶ Exchange of notes constituting an agreement relating to jurisdiction over offences by the United States forces in Korea, 12 July 1950, 222 UNTS 229; Exchange of letters constituting an agreement concerning the status of the United Nations Emergency Force in Egypt, 8 Feb. 1957, 260 UNTS 61; Agreement relating to the legal status, facilities, privileges and immunities of the United Nations Organization in the Congo (Leopoldville), 27 Nov. 1961, 414 UNTS 229.

³⁷ Art. 6(47)(b) of the Model Status of Forces Agreement for Peacekeeping Operations, Report of the Secretary General, UN Doc. A/45/594 (1990).

³⁸ Art. VII(3)(a)(ii) of the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 1951, 199 UNTS 67; Art. 7 of the Agreement on the Status of Armed Forces of the Brussels Treaty Powers, 1949, Cmd. 7868.

³⁹ *Ministère Public v Triandifilou*, Annual Digest, Suppl. Vol. 1919–42, case No. 86; *Re Gilbert*, Annual Digest, 1946, case No. 37; *Ministère Public v Tsoukharis*, Annual Digest, 1943–45, case no. 46.

B The Resolutions in the Context of the Framework of the Rome Statute

1 The Rome Statute as a Limitation on Security Council Powers

The relationship between the ICC and the Security Council as regards any limitation on the jurisdictional reach of the ICC is spelt out in Article 16 of the Rome Statute, under which the Security Council acting under Chapter VII can seek a deferral of investigation or prosecution for a renewable period of 12 months. Since there is a specific provision delineating this relationship, it could be argued that Article 16 is meant to be exhaustive of the kind of limitations that Security Council actions may impose upon the ICC, an institution independent of the UN structure. This inference is supported by the drafting history of the Rome Statute. In the initial draft of the International Law Commission's proposal, the ICC was given a status subordinate to the Security Council by providing that a prosecution arising from a situation dealt with by the Security Council could not be initiated unless authorized by the Council.⁴⁰ This formulation was opposed on the ground that it would disrupt the ability of the ICC to function independently.⁴¹ A compromise was sought by the Singapore proposal, whereby no prosecution or investigation could be commenced by the ICC in the event of a 'direction' to this effect by the Security Council.⁴² In addition to the terms of the Singapore proposal, Canada recommended a 12-month renewable deferral period.⁴³ The final changes were made with the Costa Rican and the British proposals, which required a formal and specific decision of the Security Council, and replaced the word 'direction' with 'request'.⁴⁴

The debate surrounding the framing of Article 16 demonstrates the intention of the drafters to regard the ICC as an independent institution, and have as little interference by the Security Council as possible in its functioning.

The question that then arises is whether a Treaty independent of the UN system can ever act as a limitation upon the Security Council's powers under Chapter VII. In other words, whether, in the presence of this specific delineation of the role of the Security Council in limiting the exercise of jurisdiction of the ICC, it would be legally permissible for the Council to limit the ICC's jurisdiction in any other way it pleases.

⁴⁰ Art. 23(3) of the 1994 ILC Draft states in part: '[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or a breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides'. See Draft Statute for an International Criminal Court Prepared by the International Law Commission, in Report of the International Law Commission on the Work of its Forty-Sixth Session, UN GAOR, 49th Sess., Supp. No 10, at 84, UN Doc. A/49/10 (1994).

⁴¹ Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999), at 150.

⁴² Singapore's proposal read: '[n]o investigation or prosecution may be commenced or proceeded with under this Statute where the Security Council has acting under Chapter VII of the Charter of the United Nations, given a direction to that effect'. See Bergsmo and Pejic, 'On Article 16', in O. Triffterer and C. Rosbaud (eds.), *The Rome Statute of the International Criminal Court* (2000), at 375, para. 4.

⁴³ Gargiulo, 'The Controversial Relationship Between the International Criminal Court and the Security Council', in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute Of the International Criminal Court* (1999), i, at 67, 88.

⁴⁴ Bergsmo and Pejic, *supra* note 42, at 376.

To answer this question, it is necessary to first examine whether the resolutions comply with the provisions of the Rome Statute.

2 Resolutions 1422 and 1487 versus Article 16 of the Rome Statute

SC Resolutions 1422 and 1487 are in the form of requests to the ICC to defer investigation or prosecution of cases for a 12-month automatically renewable period unless the Council decides otherwise. On the face of it, these resolutions are in compliance with the terms of Article 16. However, the drafting history of the Rome Statute clearly points to the conclusion that Article 16 was not meant to be used as a blanket provision exempting a class of persons from the jurisdiction of the ICC, but rather as a mechanism to ask for deferral on a case-by-case basis.⁴⁵ Resolutions 1422 and 1487 both deal with a class of persons – that is, peacekeepers involved in UN missions, who would be exempt from the jurisdiction of the ICC, and that too, not in the aftermath of the offence having occurred when the Prosecutor seeks to commence investigation or prosecution, but even before the event has occurred.

Further, in both resolutions, an automatic renewal for further 12-month periods is provided.⁴⁶ It is true that Article 16 does not provide for any limitation as to the number of times a request under Article 16 may be made in respect of the same case. Theoretically, therefore, this deferral may be for an unlimited period.⁴⁷ Even then, the manner in which Resolutions 1422 and 1487 are worded would go against the object and purpose of Article 16. Article 16 clearly states that the deferral of investigation or prosecution is to be in accordance with a resolution passed by the Council acting under Chapter VII, which implies that there must be a threat to international peace and security that necessitates the deferral of proceedings by the ICC. Any automatic renewal clause in a resolution would go against the obligation imposed on the Council to examine whether a situation constitutes a threat to international peace and security, and then pass a resolution under Chapter VII requesting the ICC to defer proceedings in a particular case.

3 The Resolutions versus Article 98 of the Rome Statute

While Resolutions 1422 and 1487 are in the form of requests to the ICC under Article 16, SC Resolution 1497 is not in the nature of a request adopted under Article 16.⁴⁸ Furthermore, the effect of Resolution 1497 is not only to ask the Court to defer

⁴⁵ Statements of New Zealand and Canada at the hearing of 10 July 2002; the Permanent Representative of Germany at the UN noted that beyond the case-by-case possibilities clearly contained in Art. 16 of the Rome Statute, the Security Council would do itself and the world community a disservice if it passed a resolution under Chap. VII of the UN Charter to, in effect, amend an important treaty ratified by 76 states: Stahn, *supra* note 34, at 91.

⁴⁶ Operative Para. 2 of both Resolutions reads: '[e]xpresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary'.

⁴⁷ W. A. Schabas, *An Introduction to the International Criminal Court* (2001), at 65.

⁴⁸ Operative Para. 7 of Resolution 1497, *supra* note 4, reads: '[d]ecides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State'.

proceedings under the Rome Statute, but to exclude the ICC's jurisdiction altogether by providing for exclusive jurisdiction of states that are non-parties to the Rome Statute over the acts of their personnel. Since SC Resolution 1497 has obviously not been adopted under Article 16, its legal validity must be sought in some other provision of the Rome Statute.

While Article 16 may be the only provision in the Rome Statute that permits the Security Council to defer proceedings under the Rome Statute, it does not represent the sole mechanism by which the ICC's jurisdiction may be excluded. The Rome Statute itself provides for the suspension in some cases of those obligations of the state that has the custody of the accused, which are in conflict with its international agreements. Under Article 98(2), if by virtue of such an agreement, the consent of a sending state is required to surrender its national to the ICC, the ICC must first obtain the cooperation of that state for surrender. Examples of such international agreements would be extradition treaties⁴⁹ and SOFAs.⁵⁰ The United States has made extensive use of Article 98(2) to enter into SOFAs with other nations excluding the jurisdiction of the ICC.⁵¹

A Security Council resolution under Chapter VII may also be regarded as an international agreement between Member States of the UN.⁵² This is by virtue of the fact that the Security Council, while discharging its function of maintaining international peace and security, acts as an agent of the Member States of the UN.⁵³ Therefore,

⁴⁹ An extradition treaty negotiated in 1999 with the Republic of Korea contained provisions preventing the extradition of US citizens to the ICC and vice versa: see Rosenfeld, 'Application of US Status of Forces Agreements to Article 98 of the Rome Statute' 2 *Washington U Global Studies LR* (2003) 273, at 291.

⁵⁰ For a description of the application of Art. 98(2) and SOFAs see Keitner, 'Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)', 6 *UCLA J Int'l L & Foreign Affairs* (2001) 215.

⁵¹ A standard form of such an agreement reads: 'A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes, B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction, C. Considering that the Government of the United States of America has expressed its intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals, D. Bearing in mind Article 98 of the Rome Statute, E. Hereby agree as follows: 1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party. 2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party, (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court. 3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X. [This para. is included only in reciprocal agreements] 4. When the Government of X extradites, surrenders, or otherwise transfers a person of the United States of America to a third country, the Government of X will not agree to the surrender or transfer of that person to the International Criminal Court by a third country, absent the expressed consent of the Government of the United States'.

⁵² H. Kelsen, *The Law of the United Nations* (1951), at 95.

⁵³ Art. 24 of the UN Charter.

Operative Paragraph 7 of SC Resolution 1497 may be taken to represent an international agreement for the purposes of Article 98(2) between UN members, undertaken through the instrumentality of the Security Council.

Operative Paragraph 7 would not, however, be a valid agreement under Article 98(2). State parties to a treaty are obligated not to act in a manner that undermines the spirit of the treaty, or is inconsistent with its object and purpose.⁵⁴ This restriction also applies in the fashioning of subsequent agreements with states that are not parties to the treaty.⁵⁵ The purpose of the Rome Statute is the prevention of impunity,⁵⁶ and the effective prosecution of crimes that are considered heinous in international law.⁵⁷ An agreement that does not provide any effective guarantees of investigation and prosecution undermines the purpose of the Rome Statute and will not therefore be a valid agreement for the purposes of Article 98(2). It is on this ground that SOFAs entered into by the US with other countries have been criticized by the European Union⁵⁸ and are considered invalid.⁵⁹

Unlike Resolutions 1422 and 1487, which suggest that States that are non-parties to the Rome Statute are under an obligation to ensure effective prosecution of crimes that are the subject matter of the ICC's jurisdiction,⁶⁰ Resolution 1497 does not talk of the responsibilities of States in international law with respect to the prosecution of these crimes. Therefore, a contributing State that is a non-party to the Rome Statute could choose not to prosecute crimes committed by its nationals, or grant amnesty in respect of these crimes. In such a situation, Operative Paragraph 7 would exclude not only the jurisdiction of the ICC, but also the jurisdiction of the territorial State which, under customary international law, enjoys a title of jurisdiction independent of that of the State of nationality.⁶¹ It is paradoxical that in order to exclude the jurisdiction of the ICC, which was meant to expand the existing bases of criminal jurisdiction in international law and increase international accountability for serious crimes, the Resolution should result in a situation where all traditional mechanisms of accountability are diminished.

⁵⁴ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14, at 138.

⁵⁵ Art. 30(5) VCLT.

⁵⁶ Wedgwood, 'International Criminal Law and the Role of Domestic Courts', 95 *AJIL* (2001) 120, at 123; Bassiouni, 'Combating Impunity for International Crimes', 71 *U Colo LR* (2000) 409, at 416.

⁵⁷ Preamble to the Rome Statute.

⁵⁸ EU Guiding Principles Concerning Agreements Between a State Party to the Rome Statute of the International Criminal Court and the United States Regarding the Conditions to Surrender of Persons to the Court, available at www.europa.int/comm/external_relations/human_rights/gac.htm.

⁵⁹ J. Crawford, P. Sands, and R. Wilde, *Joint Opinion in the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article 98(2) of the Statute* (2003), at 22–23.

⁶⁰ Preambular para. 5 of the Resolutions reads: '[n]oting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes'.

⁶¹ Harvard Research Draft Convention on Jurisdiction with Respect to Crime, 29 *AJIL Supp* (1935) 435, at 531; Mann, 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours* (1964-I) 1, at 88.

C *The Cumulative Effect of the Resolutions*

SC Resolutions 1422, 1487 and 1497 are a series of resolutions, the effect of which is to exclude the jurisdiction of the ICC, albeit through different mechanisms. While some amount of law-making by the Security Council is inevitable in the discharge of its function of maintaining international peace,⁶² this would not extend to the modification of the operation of a multilateral agreement. The cumulative effect of these resolutions is to carve out an exception from the Rome Statute for members of non-party states in UN peacekeeping operations. This exclusion would amount to an amendment of the Rome Statute and violate the law of treaties under which treaties may be amended only in the manner provided for in their constitutive instruments.⁶³

Furthermore, nothing in the UN Charter authorizes the Council to act in a manner that modifies another treaty. It is generally accepted that as the maintenance of international peace and security are basic and prerequisite to the achievement of all other legal goals of the UN Charter, states cannot invoke their customary-based rights to impede the Security Council in discharging this responsibility.⁶⁴ As far as treaty commitments that are inconsistent with the UN Charter are concerned, the Charter appears to provide a fairly straightforward solution. In case of any conflict between the two, the latter prevail over the former.⁶⁵ This was endorsed by the ICJ in the *Lockerbie* case, where the Court held that Libya's obligations under Article 25 of the UN Charter to comply with Resolution 748 passed by the Council acting under Chapter VII overrode its obligations under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971.⁶⁶

The implications of such a conclusion, though, are fairly far-reaching. Essentially, Article 103 has been interpreted in such a manner that the Security Council's actions, so long as they are consonant with the UN Charter's purposes and principles, may result in the derogation of the solemn treaty rights of states. This is different from saying that if there is a conflict between the obligations spelt out *in the text of the UN Charter* conflict with those under a subsequent multilateral treaty obligation, the former will prevail. The distinction lies in equating two unequals – a Council resolution, and a treaty obligation. Further, the intention of Article 103 was not to automatically 'abrogate' inconsistent treaty obligations,⁶⁷ but to prevent a situation where states

⁶² Alvarez, 'Judging the Security Council', 90 *AJIL* (1996) 1, at 22; Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL* (1995) 506, at 520–527.

⁶³ Art. 40 VCLT.

⁶⁴ Reisman, 'The Constitutional Crisis in the United Nations', 87 *AJIL* (1993) 83, at 88. This position might be debatable in the light of Judge Oda's statement in the *Lockerbie* case that, had Libya's claim related to the violation of its sovereign rights (instead of its rights under a Treaty), this would have instituted a totally different litigation, and whether the Court had the jurisdiction to deal with the issue would have been a different matter. See *Lockerbie, Provisional Measures* (Declaration of Acting President Oda, at 502), *supra* note 19.

⁶⁵ Art. 103 of the UN Charter.

⁶⁶ *Lockerbie, Provisional Measures, supra* note 19.

⁶⁷ Kelsen, *supra* note 52, at 115–116.

would be subject to legal liability under other international agreements as a result of carrying out UN collective measures.⁶⁸ To use Article 103, time and again, as a justification for Council resolutions that modify the application of another multilateral Convention would go far beyond this intended scope.

This would also be inconsistent with the principle of *pacta sunt servanda*, which obliges parties to a treaty to perform their obligations under it in good faith.⁶⁹ The principle of *pacta sunt servanda* is a fundamental norm of international law in the nature of *jus cogens*.⁷⁰ Any resolution which forces parties to a treaty to consistently act in derogation of a specific treaty provision would be in violation of this principle. The UN Charter itself affirms the commitment of the UN to nurture respect for treaty obligations.⁷¹ The Preamble is an integral part of the Charter, and is as valid and operative as the other parts.⁷² The Preamble reflects the intent of the founders of the UN and informs the interpretation of the Charter.⁷³ The *travaux préparatoires* of the UN Charter indicate that this respect for treaty obligations is as essential for maintaining international order and stability as it is a morally compelling norm.⁷⁴

Therefore, while the provisions of the Rome Statute, as such, cannot act as a limitation on the powers of the Council acting under Chapter VII, if the resolutions passed by the Council have the effect of actually modifying the operation of the Rome Statute, the Council would be acting in a manner inconsistent with international law, and Article 103 would not come to its rescue.

Therefore, SC Resolutions 1422, 1487 and 1497 are inconsistent with the Rome Statute and *ultra vires* the powers of the Security Council.

5 Effect of Illegality of SC Resolutions on Obligations of Member States

International law does not provide any clear answer with respect to the consequences of an illegal act by an international organization, or an organ of that organization.⁷⁵ Irregular acts by an organization may be valid, null or voidable.⁷⁶ However, it is by no means certain as to what criteria must be applied to judge the outcome of an irregular

⁶⁸ Goodrich, *supra* note 16, at 616.

⁶⁹ Art. 26 VCLT.

⁷⁰ Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1954-59: General Principles and Sources of International Law', 35 *BYBIL* (1959) 183, at 196; Kunz, 'The Meaning and Scope of the Norm *Pacta Sunt Servanda*', 39 *AJIL* (1945) 180, at 192.

⁷¹ Preamble to the UN Charter.

⁷² Kelsen, *supra* note 52, at 9; Chakste, 'Justice and Law in the Charter of the United Nations', 42 *AJIL* (1998) 590, at 594.

⁷³ Art. 31(2) VCLT; *Asylum case (Columbia v Peru)* [1950] ICJ Rep 266, at 282; *Case Concerning Rights of Nationals of the United States of America in Morocco* [1952] ICJ Rep 176, at 196.

⁷⁴ UNCIO VI, p.359, Doc. 785, I/1/28.

⁷⁵ See Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations', 77 *AJIL* (1983) 239.

⁷⁶ *Certain Expenses of the United Nations* [1962] ICJ Rep 151 (Separate Opinion of Judge Morelli, at 221-223).

act.⁷⁷ In the absence of any identifiable criteria, the effect of the illegality of the resolutions must be gauged in light of the UN Charter.

A *Effect on Member States of the UN*

States that are parties to the UN Charter as well as the Rome Statute are placed in a position where they must fulfil their obligations under the latter, unless their obligations under the UN Charter are in conflict with those under the Rome Statute.⁷⁸ The only event in which a Security Council resolution may create an obligation under the UN Charter is when it is binding on Member States under Article 25 of the Charter. Council resolutions therefore do not *per se* constitute obligations under the UN Charter, but must fall within the ambit of Article 25.⁷⁹ In order to constitute binding obligations under Article 25, Council resolutions must be ‘in accordance with the Charter’.⁸⁰ In the event that decisions are *ultra vires* the powers of the Council, they do not give rise to any binding obligations under the Charter.⁸¹

Further, the very language of Resolutions 1422 and 1487 leaves open the scope for Member States to comply with their obligations under the Rome Statute. These resolutions expressly provide that states should not take any action that is contrary to a request to the ICC seeking the deferral of proceedings, or with their international obligations.⁸² The reference to international obligations apart from those relating to the request would suggest that Member States cannot act in derogation of their obligations under the Rome Statute.

Therefore, Member States of the UN would not be bound by Resolutions 1422, 1487 and 1497 and would be required to act in a manner that is consistent with their obligations under the Rome Statute.

B *Effect on the ICC*

The proposition that a resolution passed by the Security Council may bind another international organization⁸³ is fairly controversial. On the one hand, if the resolution were to be considered to be non-binding, all Member States would need to do

⁷⁷ See Lauterpacht, ‘The Legal Effect of Illegal Acts of International Organizations’, in *Cambridge Essays in International Law* (1965), at 88.

⁷⁸ Art. 103 of the UN Charter.

⁷⁹ Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’, 5 *EJIL* (1994) 89, at 93.

⁸⁰ There is a controversy with respect to the interpretation of the phrase ‘in accordance with the Charter’. There are several authorities that hold that the requirement under Art. 25 is mere compliance with the procedural provisions of the Charter. This is based on the reasoning that member states cannot be considered to be granted the right to scrutinize the decisions for their conformity with the substantive provisions of the Charter, as this necessarily involves the making of value judgements and may hamper the effective functioning of the Security Council: see Delbrück, ‘On Article 25’, in B. Simma (ed.), *The Charter of the United Nations* (1995), at 407, 414.

⁸¹ P. Sands and P. Klein (eds.), *Bowett’s Law of International Institutions* (2001), at 43; Herdegen, *supra* note 30, at 138.

⁸² Operative Para. 3 of the Resolutions reads: ‘[d]ecides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations’.

⁸³ H. G. Schermers, *International Institutional Law* (1972), ii, at 632.

in order to avoid their obligations under SC resolutions is to constitute another international organization that would perform the functions they are prevented from doing by virtue of the resolution. On the other hand, an international organization like the ICC has a separate legal personality independent of its Member States.⁸⁴ Under Article 25 of the UN Charter, mandatory SC resolutions only create binding obligations for states, and not for international organizations constituted by these states. Therefore, while resolutions passed by the Security Council may be binding upon Member States of the UN regardless of whether they have an impact on another organization,⁸⁵ this cannot extend to binding the organization itself. Hence, regardless of the validity of SC Resolutions 1422, 1487 and 1497, they would not have any binding effect on the ICC.

6 Conclusion

At the heart of SC Resolutions 1422, 1487 and 1497 excluding the jurisdiction of the ICC is the issue of a clash between two institutions – both of which enjoy considerable support in the international community, and the ultimate objective of both of which is the maintenance of international peace. The complex nature of the issue stems in part from the lack of a defined relationship between the UN structure and the ICC.⁸⁶ While the ICC, by the terms of its constitutive instrument, is an independent international organization, it cannot, by virtue of the principles of treaty law restrict the operation of the UN Charter. Thus, any restriction placed on the authority of the Security Council which has been entrusted with the primary responsibility of maintaining international peace and security under the UN Charter through the terms of the Rome Statute is controversial.

The Security Council, though enjoying a wide measure of discretion necessary for the efficient discharge of its functions under the UN Charter, cannot claim to have plenary powers. It must act within the framework of the treaty under which it has been constituted, and in accordance with peremptory norms of international law. By repeatedly passing resolutions that exclude ICC jurisdiction over peacekeepers involved in UN missions, it carves out an exception from ICC jurisdiction for a specific category of people, thus modifying its operation and acting, for all practical purposes, as an amendment of the Rome Statute. This law-making power exercised by the Council violates the principle of *pacta sunt servanda*, which obliges parties to a treaty to perform their obligations under it in good faith, and derogates from the UN's mandate to nurture respect for treaty obligations. Neither can Article 103 of the UN Charter be pressed in justification of such an exercise, as the intention of Article 103 was only to prevent a state from liability under any other international agreement for carrying

⁸⁴ Art. 4 of the Rome Statute.

⁸⁵ Thirlway, 'The Law and Procedure of the International Court of Justice Part VIII', 67 *BYBIL* (1996) 1, at 63.

⁸⁶ A defined relationship between the UN and the ICC through an agreement signed between the two organizations is envisaged in Art. 2 of the Rome Statute. No such agreement under Art. 2 has come into operation as yet.

out collective security measures under the UN Charter. It was never meant to modify the operation of another international agreement.

Security Council Resolutions 1422, 1487 and 1497, aside from their immediate impact upon the jurisdictional scope of the ICC, have grave repercussions for international institutional law. The mere fact that the UN occupied a pre-eminent position in international institutions for a significant period of time would not justify the erosion of other equally significant institutions by the acts of its political organs. The Security Council does indeed have the primary responsibility of maintaining international peace, but this does not entitle it to carry out any action it pleases at the cost of fundamental principles of international law. The paralysis of the Security Council due to the veto power being conferred on the permanent members is nothing new, and has never before been used as a justification for violating these principles.

In this context, the withdrawal of the US proposal for renewal of Resolution 1487, due to lack of support among Security Council members, is a welcome change. The statements made by the Secretary-General preceding the withdrawal were a clear indication of the fact that renewal of Resolution 1487 would discredit the Council and the UN.⁸⁷ It is to be hoped that this step represents a move towards recognition of the primacy of the rule of law by the Council. If the Council were to revert to its earlier stance, succumb to political pressures and act in derogation of international law as a compromise to enable it to carry out its duty to maintain international peace, this would only erode the legitimacy of the Council and the UN.

⁸⁷ Available at www.un.org/apps/sg/offthecuff.asp.