

**Authority of Security Council to Stop the Jurisdiction of International
Criminal Court: Case Study of Security Council Resolution Number 1497
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Abstract

Though United Nation Security Council is a permanent organ within the UN, this organ is not party of the Rome Statute 1998. As Such, the Security Council is not entitled by the right to amend section 16 of the Rome Statute 1998 which eliminate the jurisdiction of ICC on the UN troops who are the citizen of Non Party in the Rome Statute 1990

Keywords: International Criminal Court, Security Council's Resolution no. 1497
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Introduction

The existence of a clear hierarchical rule between sources of law also between law enforcement institutions are commonly found as it plays a significant role in the National Jurisdictional system of States. One example that might be mention is that commonly fundamental values of the society is given the status of Constitution, therefore, treated as supreme in nature whenever there are conflicting laws ratified by the legislative or administrative bodies. Administration regulation itself must be in accordance with legislative mandate.

Written regulation usually took precedence of the custom. Jurisdictional norm will be prioritized from a non-jurisdictional norm (Political and Moral).¹

However, these do not apply to International Law where it often said that hierarchy does not apply in International Law system.² Except for *jus cogens* or peremptory norms or international public order, there are no hierarchy among the existing legal sources. Even the Statute of International Court do not have regulations about the hierarchy except a statement in Article 38 (1) International Court Statute which states that legal opinion and court decisions are subsidiary legal sources. However, this statement does not mean that court decisions, legal opinion, or publicized writing cannot be contradictory with higher legal source.³

Aside from the absence of hierarchy in its legal sources, international law does not regulate a hierarchy system among formal institution. There are no “super body” institutions which have higher position than others. There are also no supranational institutions that are above countries in all international live aspects.

The absence of clear regulations concerning hierarchies in legal sources and institutions contain the potential of problems when there are conflicting regulations or authorities among institutions.

One example which can be expressed in this publication is the authority conflicts between the Security Council and International Criminal Court (ICC) where both institutions are mutually independent legal bodies. The Security Council is one of the main institutions in the United Nations (UN) which is established by the UN Charter. Meanwhile the ICC is established by the international community through Rome Statute of 1998 about ICC. ICC is not positioned under the UN structure. The UN has the International Court of Justice (ICJ) as its own court. Similar to the Security Council, ICJ is one of the main bodies of the UN.

¹ Dinah Shelton, “Normative Hierarchy in International Law”, American Journal of International Law (AJIL), 100.J.Int’l291, April 2006, p.1

² Mochtar Kusumaatmadja, Pengantar Hukum Internasional, Binacipta, Bandung, 1982, page. 14

³ Dinah Shelton, Op. Cit, page.3

The presence of the International Criminal Court (ICC) in the year of 2002 through the Rome Statute of 1998 appears to be an oasis in the middle of the lack of law enforcement institutions in the international community. Its establishment is welcomed by the international community as shown by the rapid ratifications of 60 countries requirement of ICC establishment.⁴ This can also be interpreted that the international community places high hopes for better law enforcement towards international crime perpetrator through the ICC.

However, unexpectedly, the presence of ICC is opposed by the super power United States. This country that initially sponsors became worried that the ICC will go against its citizens considering the frequency of the United States involve itself in international and other countries' internal conflicts. In its involvement, it is very probable that UN Troops members including ones from the US commit ordinary and international crimes in countries that they have been assigned.⁵

Various maneuvers have been conducted by the US since the process of the formulations of the articles of the 1998 Rome Statute until after the ICC is formally established where the US attacks the existence of ICC. There are lobbies by the United States to a number of countries that ratified the Rome Statute to sign a bilateral agreement not to surrender US citizen accused of committing international crimes to the ICC.

Unsatisfied with having a number of bilateral agreements, the US uses its position in the Security Council to restate its opposition towards the ICC. As the only super power in the Security Council, the US surely has a big influence toward other council members. With the veto right that it posses, the Bush administration will not face many obstacles in using the Security Council as a political vehicle to achieve its interests. Here lies the conflict of authorities

⁴ Now, there are over 100 countries which ratified the 1998 Rome Statute

⁵ In early 2007 for instance, the international community is shocked by the report of sexual harassment and assault committed by UN troop personnel towards underage minors in Sudan. The Daily Telegraph newspaper edition of January 3rd 2007 reports that the crime had been committed for two years since the UN troops enter the country to help Sudan reconstruction after a civil war which lasted for 23 years. Sudanese government in its press releases stated that it had gathered evidences such as confessions of about 20 people which said that they have been taken by UN workers on UN vehicles and forced to have sexual contact.

between the Security Council through its resolutions and the International Criminal Court through its Rome Statute.

The voting process of the Security Council which consists of 15 members is classified in two. For non procedural matters, 9 votes including all the 5 votes of the Security Council permanent members are required.⁶

International organization legal experts observed that after the Cold War, significant changes in the process of Security Council voting occurred. It is very difficult during the cold war for this council to issue resolutions containing sanctions for countries accused of offending international law. Meanwhile this case does not happen in the post Cold War era. The veto right was highly utilized by the right holder to prohibit the issue of the resolution aimed for their allies in the Cold war era and almost never in post cold war era. This is due to the absence of blocks in the body of the Security Council. There are no two powers which oppose each other. The only power left is in the hands of the United States so it is almost certain that this country never fails.

Although in one hand the Security Council can carry its functions easily without the threat of vetoes, the actions of this council often crosses boundaries. The resolutions which would be used to enforce international law were actually against the law itself.

Even that ICC is an independent institution which is not within the structure of the United Nations, the preamble of 1998 Rome Statute acknowledges the existence of the United Nations. The preamble states that the establishment of ICC is consistent with the UN Charter. The seventh paragraph of the preamble states, “All States refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”.

This statement is present because the United Nations is the largest institution which mission is to promote and maintain world peace and international security. Aside from that, the UN Charter is accepted as the constitution of the international community where in the occurrence of conflicts

⁶ Article 27 of the UN Charter

between members obligation based on the UN Charter and obligations from other legal instrument, then the obligation that was based on the UN Charter should be prioritized.⁷

One article in the Rome Statute that is closely related to the UN, specially the Security Council is article 16 of the statute that states, “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may renewed by the council under the same condition”.

Based on that article, the Security Council which bears the main responsibility to maintain the international peace and security reserves the right to issue its resolutions towards the ICC for the duration of 1 year during which the ICC cannot conduct legal processes towards the perpetrators of international crimes under the protection of the Security Council. Based on that article, it can be interpreted that the authority can only be utilized in respect to the implementation of Chapter VII of the UN Charter about Action with Respect to threats to the Peace, Breaches of the Peace, and Acts of Aggression.

Concerning to the authority granted in Article 16 of the Rome Statute, on July 12th 2002, the Security Council adopt Resolution 1422 which mandates ICC to conduct investigations and other prosecutions towards UN Peacekeepers in Bosnia Herzegovina.⁸

This resolution is proposed by the US which wants immunity for its military personnel in Bosnia Herzegovina. The US threats to use its veto right to not extend the UN peacekeeping mission in Bosnia which will end on July 15th 2002 if the resolution draft is denied.

The proposal of the US is adopted through Resolution 1422. The main point of this resolution is to reject the jurisdiction of the ICC towards personnel

⁷ Article 103 of the UN Charter

⁸ Neha Jain, " A Separate Law for Peacekeepers: The Clash Between The Security Council and The International Criminal Court, in European Journal of International Law, April, 2005, page 2

of the UN Peacekeeping Troops that came from states that do not ratify the 1998 Rome Statute (Non-State Party).⁹

Although facing rejections from a number of countries, the same scenario occurred in Resolution 1487 which is the renewal of Resolution 1422 which ends in July 30th 2003. Paragraph 8 point 1 of both resolutions states, “Request, consistent with the provisions of Article 16 of the Rome Statute, that ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over actor omissions relating to a United Nations established or authorized operation, shall for a 12-month period starting 1 July 2003 not commence or proceed with investigation or persecution of any such case, unless the Security Council decides otherwise”.

Unsatisfied by the two resolutions, the US successfully convinced other Security Council members to pass Resolution 1497. This resolution is related to UN Peacekeeping Mission in Liberia. Paragraph 7 of this Resolution states, “decides 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 stabilizations force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State”.

Although the principles of the resolution is similar to the two prior resolutions which exclude the members of the UN troops coming from non-state party from the jurisdiction of ICC, Resolution 1497 does not use the foundation of article 16 of the 1998 Rome Statute. This resolution also does not determine the time limit of the resolution unlike the two prior resolutions which clearly states 12 months effective duration of the resolution. With the absence of time limit, then it can be interpreted that UN troops coming from non-state party assigned in Liberia, including from the US, will have legal immunity from legal processes in the ICC unless their country gives up the immunity of their citizens.

⁹ Ibid

Resolution 1497 shows the arrogance of the Security Council specially the US which will not yield to the jurisdiction of ICC. The resolutions without doubt bring discomfort for UN troops coming from states which ratified the Rome Statute because they are subject to the jurisdiction of the ICC. This is unquestionable an act of discrimination. This discriminative policy is might bring counterproductive problems against the spirit of having as many countries in the Rome Statute.

Resolution 1497 is also viewed as conflicting to Article 16 of the 1998 Rome Statute which mandates 12 months time limit since the adoption of the resolution for the exception from the ICC jurisdiction. Resolution 1497 also rise questions where the condition stated in Article 16 is that the use of Article 16 by the Security Council is only to implement Chapter VII of the UN Charter about Action with Respect to threats to the Peace, Breaches of the Peace, and Acts of Aggression. The next question is whether Resolution 1497 which gives immunity for UN Peacekeeping Troops in Liberia is related to the threat towards peace, violations on peace, or aggressions.

Once again, the absence of hierarchy in the international law system, both in legal instrument hierarchy and institutional hierarchy contain the threat of conflicts in practice¹⁰ such as the aforementioned case. Is the Security Council authorized to stop the jurisdiction of ICC? What is the legal consequence if the Security Council Resolution is conflicting with the UN Charter? Starting from the explained cases, this publication analyzes deeper the authority of the UN Security Council in stopping the jurisdiction of the ICC in Case study of Security Council Resolution 1497 (2003)

Jurisdiction of ICC towards citizens of ICC non-states parties is an international law subject which contains international personality. Therefore, the ICC can conduct a number of international legal capacities in carrying its functions.¹¹ The ICC can conduct its function and authority on the territory of its member states and also in other countries with a special agreement.¹²

¹⁰ Shelton, Dinah, Op. Cit, , hIm.3

¹¹ Article 4(1) of 1998 Rome Statute

¹² Article 4(2) of 1998 Rome Statute

The jurisdiction of the ICC is limited to the most serious crimes against the international community as a whole such as genocides, crimes against humanity, war crimes, and crimes of aggression.¹³ The jurisdiction of ICC is not retroactive which means that it can be applied only to the most serious crimes committed after the Rome Statute is made affective and after the country ratifies the Rome Statute unless this country made a specific declaration.¹⁴

Article 12 of the Rome Statute determines that the International Criminal Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.

Based on Article 12 paragraph (a), it can be concluded that if a state where a crime is committed is a party to the Rome Statute, then the ICC can exercise its jurisdiction. This matter has to comply to on the condition that the ICC is a complementary court. If a national prosecutor of the state party is unable or unwilling to exercise its jurisdiction, then the ICC can exercise its jurisdiction. The authority of the ICC to exercise its jurisdiction when the crime is committed in a state party of the Rome Statute disregards the nationality of the accused. Therefore, the ICC will still reserves the jurisdiction even if the accused is a national of a state which have not ratify the Rome Statute (non-state party)

In exercising its jurisdiction, aside from not able to conduct investigation and prosecution due to the authority given by the Statute to the Security Council in Article 16,¹⁵ the ICC may not exercise its jurisdiction if: ¹⁶ (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the

¹³ Article 5(1) of 1998 Rome Statute

¹⁴ Article 11 of 1998 Rome Statute

¹⁵ See page 6 of this article

¹⁶ Article 17 (1)

investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;¹⁷ (d) The case is not of sufficient gravity to justify further action by the Court.

In correlation to the limitation of ICC jurisdiction, if Article 17 discusses the immunity of serious crime perpetrator, then Article 98 of the Rome Statute (1998) determines the following: (a) The court may not proceed with a request for surrender assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the court can first obtain the cooperation of the third State for the waiver of the immunity; (b) The court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

That article determines that the ICC cannot proceed a request of surrender or assistance which may require the requested country to act inconsistently with obligations under the international law in respect with the State or diplomatic immunity of a person or a property of a third state unless if ICC can obtain prior cooperation from the third state to waive the immunity. ICC may not precede a request for surrender which requires the requested state to act inconsistently with its obligation based on international agreements regarding to the matter. Consent from surrendering state is required to the surrender of its citizen to the ICC unless if the ICC acquired

¹⁷ This is an implementation of *ne bis in idem* principle known in criminal law. However, this principle can be neglected if requirements in Article 20(3) of 1998 Rome Statute are met

cooperation/agreement from the sending country for the surrender. Therefore, it can be concluded that regarding the third state or non-state party in the Statute, the ICC does not have automatic jurisdiction when the third state has an agreement, such as extradition agreement or the accused is has an immunity based on international law, with the ICC ratifying state unless the third state is voluntarily surrender its citizen or waive the immunity of the accused.¹⁸

However, regarding immunity of the accused, Article 27 of the statute determined that the statute apply equally towards everyone without any distinction based on official positions. Official positions such as heads of states or governments, members of administrations or parliament, elected representatives, and government officials in any matter do not exclude individuals from their obligations based on the statute. Immunities and special procedural regulations which may be related to an individual's official positions under national or international law do not hamper the ICC from exercising its Jurisdiction on the individual. Therefore, it can be concluded that the ICC does not grant immunities to an accused of the most serious crimes based on the official capacity that the accused hold. Everyone is equal before the ICC.

Resolution 1497 is inconsistent with International Law

1. Resolution 1497 is inconsistent with the UN Charter

On August 1st 2004, to apply Chapter VII of the UN Charter, the Security Council adopts Resolution 1497. This resolution is considered important to issue considering the conflict in Liberia is such that it raises humanity concerns and seriously destabilizes the region and threats the peace and security of the world. This resolution is also considered essential in creating conducive environment for human rights including rehabilitation and protection of civilians and support humanitarian missions. This resolution is also

¹⁸ Audrey I. Benison, "International Criminal Tribunal: Is there a Substantive Limitation on the Treaty Power", in Stanford journal of International Law, Winter 2001, page 546

considered essential in supporting the implementation of cease fire of June 17th 2003 to achieve peace.¹⁹

For its success of recovering the situation in Liberia through resolution 1497, the Security Council considers necessary to form a multinational force. The mandate given to the multinational force is very broad. It consists of disarming, demobilizing and reintegrating, ensuring order, assuring the environment for humanitarian aid, and providing peacekeeping troops for a longer duration to stabilize the condition in conflict areas. In other words, the Security Council grants the authorities to states to form a peace enforcement mission. States in the peacekeeping force under the banners of the UN are Nigeria, Ghana, Mali, Senegal, and US. This mission is a starting point which will be followed by a second mission for the peace process.

The process of adopting Resolution 1497 is opposed by three states which are Mexico, Germany, and France. The three countries states that they are not willing to vote for the resolution due to a number of irrelevance of terms in the resolution with the situation in Liberia and its inconsistency with national and international legal principles.

According to its main duty, the UN Security Council are authorized to take measures within the corridors of Chapter VII of the UN Charter to respond the presence of threats towards international peace and security and the presence of aggressions after the SC, based on Article 39 of the Charter determines that the conditions have been met. The practice of the Security Council shows that Article 39 is interpreted broadly and inconsistently. As an example, the Lockerbie case, four years after the bombing incident of Pan Am flight in the United Kingdom, although no incident follows, the Security Council classify this incident as threatening the international peace and security. So is Iraq which had never been proven to posses or develop weapons of mass destruction is categorized as threatening international peace and security.²⁰ The failure of the

¹⁹ Salvatore Zappala, "Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the IW, in *Journal of International Criminal Justice* 671, December, 2003, page 1

²⁰ Sabahi, Babback, Op. Cit., page 3

Libyan government to demonstrate its disapproval towards terrorism is also categorized as a threat towards international peace and security.²¹ In contrast, the brutality of Israel towards the Palestinian population including displacement of people to erect the separation wall has never been categorized a threat or offence towards international peace and security.²² The broad and inconsistent interpretation can be understood considering the decisions of the Security Council are political.

Paragraph 1 of Resolution 1497 gives the foundation of the threat towards international peace and security in Liberia to adopt the resolution and establish UN peacekeeping mission. Paragraph 7 of this resolution states the following:

Decides 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.

From the article, it can be inferred that there are no correlation between threat towards international peace and security in Liberia and the need to grant exclusive jurisdiction to non-state party of the Rome Statute to justify the urgency to adopt a resolution to deny jurisdiction of the ICC.

The two are entirely different. It is clear in Paragraph 1 of the resolution that the consideration of the resolution which is the presence of threat towards international peace and security is due the situation in Liberia which is dense in terms of conflicts that it raises the serious humanitarian concerns and destabilizes the region and does not concern the immunity of UN troops. It is clear that excluding UN troops that came from non-state party does not have a legal foundation and only protects the interest of non-state party. In his press release, the UN Secretary argues, "... the attempts to protect international UN

²¹ Neha Jain, Op. Cit., page 4

²² Sabahi, Babback, Loc. Cit

Peacekeepers from prosecution of the kind that is intended in the resolution is really not necessary ... and quite frankly, my sentiments are with those who abstained from the resolution”²³ A fact found in the field is that actually there is a treat from the US to not extend or establish UN Missions for peace if the ICC exercises its jurisdictions. It is this threat that, according to experts, should be categorized as a threat towards international peace and security. Aside the absence of correlation what so ever between the threat towards international peace and security in Liberia with the need to grant immunity to the members from countries of non-state party, Liberia is actually also a non-state party in the Rome Statute. There is no reason to worry about the application of ICC jurisdiction to the troops sent to Liberia from non-state party. Even without Paragraph 7, all legal offence committed by UN personnel in Liberia cannot be included into the ICC jurisdiction. Therefore, it clear that Resolution 1497 is not only intended to limit the jurisdiction of ICC, but also to impose obligation to all countries to exclude UN troops from a non-state party from all kinds of prosecutions for any offence or crimes in general, unlimited by time and space.²⁴

Beside the presence of threatening condition or violations towards international peace and security, the Security Council resolutions is also limited by certain principles of the UN. In this matter, according to Article 2(7) the Security Council is fundamentally prohibited to interfere with a country’s internal matters unless the intervention is to impose economic or military sanctions towards a country that disobeys the Security Council resolution on a violation which can threat international peace and security including aggressions (Chapter VII of the UN Charter).²⁵

Security Council may not act beyond what is determined in Article 24 (2) and Article 1 (1) of the Charter. According to Article 24 (1), all actions conducted by the Security Council must remain based on the principles and

²³ See press conference by the Secretary General following the Security Council meeting on Liberia, 1 August 2003 reported at <http://www.un.org/appsssss/sg/ofthecuff.asp/nid+458#>

²⁴ Salvatore Zappala, *Op. Cit.*, hIm.2

²⁵ *Ibid.*, page 160

purpose of the UN which is to honor state sovereign equality and rights to sustain political independence and territorial integrity. The actions of the Security Council must be based on the principles of international justice, law, and not harming any state's interest.²⁶

Regulations stated in Paragraph 7 Resolution 1497 clearly distinct UN troops coming from non-state party of the Rome Statute from troops coming from state party of the Rome Statute. By granting exclusive jurisdiction to countries sending the troops, all violations committed by UN troops coming from non-state party of the Rome Statute are in the jurisdiction of the sending country. If similar violations are committed by UN troops that came from state party of the Rome Statute, then the state of territory in which the crime occurred and the nationality of the victim is the jurisdiction of the ICC. This clearly is a discrimination which violates the principles of justice and harms the interest of states.

In one of its arguments to defend Resolution 1497, the US states that based on Article 103, Security Council Resolution holds a superior position to other international agreements so the resolution must be upheld in the case of inconsistencies. In detail, Article 103 determines the following: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 103 can be understood considering the position of the UN Charter is still considered as the constitution of the international community. It is undeniable that the UN Charter contains legal values which are superior in respect with other international treaties and agreements made before and after the charter is in effect. Although international law as coordinative law does not recognize levels or hierarchies in the legal system or national constitutional regulations, by common sense, the presence of levels and hierarchies as stated in Article 103 is undeniable.²⁷

²⁶ Ibid

²⁷ I Wayan Parthiana, 2005, *Hukum Perjanjian Internasional Bagian 2*, Mandar Maju, Bandung, page 304

The US is correct by arguing that Resolution 1497 imposes obligations for UN members in the UN structure considering the Security Council is the main organ in the UN and act on behalf of the UN. This is also supported by Article 25 of the UN Charter which states, "... the member of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the Present Charter." However, it shall be considered that Article 25 requires consistency between resolutions with the charter. Moreover, Article 24 determines that all actions taken by the Security Council should be based on the principles and purpose of the UN which are honoring sovereign equality, state right to defend political independence and territorial integrity. The actions of the Security Council must also be based on the principles of international justice and law without harming any state's interest.²⁸

In the event where the requirements are not met considering the resolution limits the sovereignty of many states, harming interests, violates the principles of equality among countries, and unable to justify a correlation between granting immunities with the matter of peace and security, it can be concluded that the Security Council have acted *ultra vires*. As a consequence, the resolution must become void and do not have any binding consequences.

2. Resolution 1497 Eliminate Judicial Jurisdiction of Other Countries

As mentioned previously, a number of objections addressed towards Paragraph 7 of Resolution 1497 are that the regulation in Paragraph 7 only apply troop personnel from non-state party of the Rome Statute. Therefore, it will create discriminative treatment between troop personnel coming from state party and non state party of the Rome Statute.

Another objection is the granting of exclusive jurisdiction to sending countries towards all violations committed by personnel coming from their country. This means that the resolution denies territorial jurisdiction reserved by the country where the violation takes place, jurisdictions of other states regarding universal jurisdiction according to international law, and the national jurisdiction of the victim's state. As an example, A, UN troop personnel from

²⁸ Ibid

the US committed an international crime towards UN troop personnel from Ghana. In this case, only the US has jurisdiction towards A. On the other hand, if an international crime is committed by troop personnel from state-party of the Rome Statute, then the territorial state, state where the victim comes from, state of the violator, the ICC, and all other countries have jurisdiction over the crime if it is an international crime which have universal jurisdiction. Therefore, the points of Paragraph 7 not only hamper the ICC in exercising its jurisdiction but also seize the rights of all other countries' which have criminal jurisdiction toward the case. It seems fair if said that the points in Paragraph 7 that brings discrimination among UN troop personnel have violated the principle of equality between individuals.

A number of international law experts argues that what is written in Paragraph 7 is nothing new considering the UN usually makes an agreement with the host state when sending troops the their territory. This agreement is usually formed in what is called Status of Forces Agreement (SOFAs). The background of SOFAs is to give calmness to the troops in carrying their official duties. It is often that the legal system of the state where they are assigned is terrible and does not guarantee or deliver the rights of the accused so they would be more comfortable if being prosecuted in their national court. However, the standard procedure in SOFAs is not to grant exclusive jurisdiction to sending states but to grant primary jurisdiction to the sending state. The sending state has the main right to decide whether to exercise its jurisdiction or not. The state must inform related states as soon as possible. If the sending state is indicated unwilling or unable to exercise its jurisdiction, then other states or the international court can exercise its jurisdiction.

The second point which is not consistent to the SOFAs procedure is that SOFAs only concern to a limited violations. Whereas Resolution 1497 concerns all violations as indicated in the statement, "... for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilizations force...."

There must be a clear limitation of what actions are related to a personnel duty as a member of the UN troop under the UN mandate and actions outside the personnel's duties. As an example, it can be said that the act of a UN troop personnel killing civilian in a military operation conducted to ensure security of a UN humanitarian mission is the jurisdiction of the state that send the particular personnel. But the actions of raping, forcing civilian into prostitution, conducting human trafficking, and other related actions done by a UN troop personnel are unquestionable outside the official mandate of the UN. In the case where the crimes are outside the capacity or official mandate of the troop given by the UN, the country being harmed, such as the state where the crime is being committed may exercise its jurisdiction.

3. Resolution 1497 is inconsistent with Law of Treaties

It is known that Paragraph 7 of Resolution 1497 contains regulations that eliminate the jurisdiction of ICC towards crimes conducted by UN troop personnel coming from non-state party of the 1998 Rome Statute. The Rome Statute is an international agreement signed by over 100 countries. As an international agreement, the principles of law of treaties apply to it.

Article 39, 40, and 41 of the 1969 Vienna Convention on international agreements contain norms which has become a common international practice. Article 39 of the Vienna Convention determines, "... A treaty may be amended by agreement between the parties..." Then Article 40, about amendments of multilateral agreements, determines that every proposal to amend should be informed to all members of the agreements with specific regulations unless stated otherwise.

Article 41 states that, unless stated otherwise, two or more parties of an agreement may close an agreement to change the agreement among them if (a) the possibility of such a modification is provided for by the treaty; (b) the modification in question is not prohibited by the treaty and: (1) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (2) does not relate to a provision, derogation

from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Article 121 and 122 of the 1998 Rome Statute determines that amendments can be conducted by any state parties of the statute after 7 years since the Rome Statute is in effect. This means that this statute could be amended in the year 2009. Amendment proposal should be submitted to the UN Secretary General to be announced to other state parties. Amendment proposal would be discussed in an assembly which is followed by all state party of the Rome Statute.

From the aforementioned determination, it can be seen that, according to law of treaties, an agreement can only be amended by the parties involved in the agreement unless stated otherwise. The Rome Statute determines that the statute can only be amended in 2009 at the soonest and should be in the form of a proposal submitted by state party of the statute.

Regarding Resolution 1497, the UN Security Council is a permanent institution in the UN but not a party of the Rome Statute. Therefore, the Security Council does not have the right to amend the regulations of Article 16 of the Rome Statute and eliminate the jurisdiction of the ICC towards UN troop personnel coming from a non-state party of the Rome Statute. There is no authority granted by the UN Charter to the Security Council to act against other international agreement.²⁹ It can be concluded that the Security Council have acted beyond its authority.

In defense, international law an expert that supports the US argues that Resolution 1497 was not adopted based on Article 16 of the Rome Statute. The resolution neither harms the rights of the state parties of the Rome Statute nor opposes the purpose of the Rome Statute according to them. According to the experts, this is due to the complementary principle of the Rome Statute. The resolution which grants exclusive jurisdiction to sending states is not against the complementary principle. The Rome Statute was signed so that anyone who commits international crime within the jurisdiction of ICC is punishable. The

²⁹ Ibid

presence of exclusive jurisdiction does not mean that the perpetrator of international crime will be free from punishment. Therefore the resolution is not against the objectives and purposes of the ICC which is a complementary court of national courts. Resolution 1497 according to them grants ICC the opportunity to exercise its jurisdiction if the sending states waive its right to prosecute the perpetrator. This argument is easily denied because Resolution 1497 has clearly denied the right of state parties of Rome Statute specially states whose territory have been the place of the crime to exercise its judicial jurisdiction. Exclusive jurisdiction means that only sending states have the right of jurisdiction. If the state is unwilling or unable to prosecute the perpetrator and does not give up the right of jurisdiction then the perpetrator will most likely be unpunished. The principle of complementary court in Rome Statute is carried if the national is willing and able to exercise its jurisdiction without the sending state voluntarily giving up the right. Therefore, it can be concluded that beside inconsistent with law of treaties procedures about the amendment and modification of international agreements, the substance of the Resolution 1497 is inconsistent with the Rome Statute.

Based on the *Pacta Sunt Servada*, parties in an agreement must formulate and agreement in good will. The principle of Pacta Sunt Servada in a fundamental norm which is in the position of jus cogens in international law. Every resolution that force related parties of an agreement to act inconsistent to the agreement is a violation towards the principle of Pacta Sunt Servada.³⁰ The UN Charter states its commitment to honor obligations rise from international agreements. The preamble of the UN Charter and travaux preparatoires of the UN Charter shows the desire of the founders of UN to honor existing international agreements as an important condition to bring order and stability. Therefore, the presence of a resolution that causes a change in international agreements like the Rome Statute is a violation towards international law.

One article that the Security Council and the US uses to justify Resolution 1497 is Article 103 of the UN Charter. Article 103 of the UN

³⁰ Neha Jain, Op. Cit, page 8

Charter states, “In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligation under the present Charter shall prevail.” The background of Article 103 is the consideration that the regulations of the UN Charter are mostly fundamental principles of international law which is the peremptory norms or jus cogens and general principles of law. The binding characteristics of the charter is more imperative compared to an international agreements that are not categorized as jus cogens or results of understandings among parties in contractual terms.³¹ Therefore, it makes sense if there is an international agreement is inconsistent with the UNC, the charter should be upheld. This is meant to avoid a state to make an agreement inconsistent to the jus cogens.³²

In a glance, this article can be interpreted that the position of Resolution 1497 is higher than the Rome Statute because the resolution is a product of the main organ of the UN that is binding to all members of the UN so it can void all other international agreements including the Rome Statute. However, it should be understood that the UN include Article 103 in the charter as mentioned in the previous paragraph considering that the Security Council resolution is not an international agreement but better categorized as a legislative act or more correctly executive act.³³ Resolution 1497 is an abuse of authority committed by the UN SC. Therefore Article 103 should not be used in discussing the relationship between the Security Council resolution and the Rome statute.

³¹ I Wayan Parthiana, Op. Cit., page 302-303

³² Neha Jain, Op. Cit., page 10

³³ Ibid

Legal Consequences of Resolution 1497

International law does not give a clearly answer regarding the consequences of an illegal act committed by an international organization or an organ of the international organization. In the practice of irregular act conducted by an international organization might be valid, null, or voidable. However, it does not mean that actions conducted by an international organization cannot be analyzed. With all limitations, Resolution 1497 will be tested from the point of view of Rome Statute as an international agreement affected directly by the resolution.

Legal Consequences of Resolution 1497 towards UN Members

The authority of UN Security Council is granted based on delegation of authority by all members of the UN. In delegating the authority, there are limitations which bind the SC. It can be argued that on one hand, there is the right of self defense regulated in Article 52 of the charter. On the other hand, this right is limited by the collective security system which is the only exception. The regulation forbidding the use of violence is stated in Article 2 (4). Therefore, authorization of resolutions in the context of collective security must be based on the fundamental norm stated in Article 2 (4). Related with Article 2 (4) there is a prohibition of aggression which is the jus cogens or the peremptory norms. The presence of peremptory norms is to protect the fundamental values and interests of the international community as a whole. It has been a general understanding and international law that a state cannot make an international agreement that is inconsistent with jus cogens or peremptory norms principles. Therefore, when a state establish an international organization, the state may not delegate authority more than they are allowed (*nemo plus juris transfer quam ipse habet*). In the case of the SC, this organ must act based on the regulations of the charter and its authority must be carried according to peremptory norms. In the end, it can be concluded that the Security Council Resolution is not only a part of secondary law which must obey the

charter but also a part of a system which as a whole is a subordinate of jus cogens.³⁴

Aside from the Article 2 (4) prohibition of the use of violence, the principle of self determination, fundamental human rights, and pacta sunt servada principle is a part of the objectives and principles of the organization according to the preamble and Article 1 of the charter which is also jus cogens.

In relation with Resolution 1497, the question arise is, “What is the legal consequence of Resolution 1497 towards the UN members?” a majority of the UN are state parties of the Rome Statute considering more than 100 countries have ratified the 1998 Rome Statute. When there are conflicts between Resolution 1497 and 1998 Rome Statute, which regulation should be upheld by UN members that are also state parties of the 1998 Rome Statute?

Although signed by only 15 countries Security Council Resolution bind all members of the UN based on Article 25 of the UN Charter because members of the UN have granted Security Council the authority to act on their behalf. However, it should be remembered that the resolution should be in accordance with the UN Charter. In the event a resolution conflicts the UN Charter the resolution does not bind all members of the UN especially state parties of the Rome Statute. As explained in previous sub-chapters, the resolution lacking conditions required by Chapter VII of the UNC, unable prove the link between threat to international peace and security with granting exclusive jurisdiction to UN troop members coming from non-state parties of ICC, violate equality principle, violate pacta sunt servada, and violate the principle not to harm interests of other states. State parties of the Rome Statute in which territory occur international crime which is included in ICC jurisdiction may still exercise its jurisdiction or surrender the perpetrator to the ICC.

³⁴ Efthymios Papastavridis, 2007, “Interpretation of Security Council Resolution under Chapter VII in the Aftermath of the Iraqi Crisis”, in International & Comparative Law Quarterly. 56 ICLQ 83, January 2007, page 17-18

Legal Effects Resolution 1497 towards ICC

ICC is a legal subject of its own which is formed through the Rome Statute of 1998. This institution is an independent institution, a legal institution of its own, and is not within the structure of the UN. As its own international legal subject, the ICC has international personality and legal capacity. This can be observed in its regulations where the ICC has the privileges and inviolability in its member states, ICC may form international agreements with other international legal subjects. However, the position of ICC is not under the UN Security Council or other international institution but it does not mean that the ICC has a superior position in relations to other international institution.

The ICC and UN Security Council each have their own duty and authority. The ICC is not authorized to amend the UN Charter or limit the authority of the Security Council in performing its duty to preserve international peace. The Security Council is also not authorized to amend the Rome Statute or eliminate the jurisdiction of ICC.

On the other hand, Article 25 of the UN Charter is the foundation of the Security Council to force UN members to obey to the resolution cannot be applied to the ICC. This is because Article 25 is only meant to states and not other institutions like the ICC. Therefore, Resolution 1497 only creates binding legal obligation to states and not cause and legal consequences to the ICC. The ICC may still exercise its jurisdiction where the country which territory is the scene of international crime surrenders the accused which comes from a non-state party to the ICC.

Conclusion

Based on the above explanation, it can be concluded that Resolution 1497 of the UN Security Council is inconsistent to international law. The inconsistencies mentioned are the following: (a) Resolution 1497 specifically Paragraph 7 is inconsistent with the UN Charter. There are no links between the threat to international peace and security with the urgency to eliminate the jurisdiction of the ICC towards UN troop personnel coming from non-state parties of the 1998 Rome Statute as required in Chapter VII of the charter. Paragraph 7 of the resolution violates the equity before the law among UN troop personnel principle, equality and sovereignty of UN member states, and harms the interests of many states; (b) Resolution 1497 specifically paragraph 7 is inconsistent to the principles of national jurisdiction in international law. Paragraph 7 has eliminate judicial jurisdiction of the state where the crime would have occurred, state where the victim is from, the ICC and all nations in the case of the crime is categorized as international crime which universal jurisdiction applies; (c) Resolution 1497 specifically paragraph 7 is inconsistent with the principles of law of treaties. The Security Council does not have the right to amend or modify Article 16 of the Rome Statute because only state parties of the statute may propose amendments. Amendments may only be proposed 7 years since the statute is put into effect. Only since 2009 and through procedures determined by the 1969 Vienna Convention on international agreements and the 1998 Rome Statute may the statute be amended.

The ICC and the UN, in this case the SC, are two independent international law subjects which has different duties and authorities. Neither is in a superior position over the other. Therefore, Paragraph 7 of Resolution 1497 does not have legal consequences to the ICC and state parties of the Rome Statute. ICC may still exercise its jurisdiction towards UN troop personnel that came from non-state party of the Rome Statute if the place of the violation is in the territory of a state party of the Rome Statute. As for UN members, even that Article 103 of the UN Charter grant superior position to the charter in relation to other international agreements, the resolution does not bind UN members

because Resolution 103 is not an international agreement and it is inconsistent with the UN Charter.

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