Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC

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1. Introduction

On 1 August 2003 the UN Security Council adopted resolution 1497 (2003)[1] authorizing UN member states to establish a Multinational Force in Liberia to support the implementation of the 17 June 2003 cease-fire agreement and thus create the conditions for peace. The mandate is very broad and includes the establishment of 'conditions for initial stages of disarmament, demobilization and reintegration activities . . . to help establish and maintain security . . . 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'.[2] In other words, the Security Council authorized states to establish a peace enforcement mission (at the moment consisting mainly of Nigerian troops acting under the flag of ECOWAS, together with troops from Ghana, Mali and Senegal, and the USA) with very broad powers. This mission should prepare the ground for the second stage of the peace process: the deployment of a UN force. The US representative to the UN described this Multinational Force as a 'crucial short-term bridge to our goal of placing UN peacekeepers on the ground in Liberia as soon as possible'.[3] Hence, the Secretary-General was requested 'to submit to the Council recommendations for the size, structure, and mandate of the [UN force] preferably by 15 August'.[4]

Admittedly, the resolution met the demands of the international community, voiced by the UN Secretary-General,[5] and thus commanded widespread support among members of the Security Council. Three members of the Council (France,

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1 This resolution was sponsored by the USA.

2 UN SC Res. 1497 (2003), op. par. 1.

3 See the statement by H.E. Ambassador John Negroponte, UN SC verbatim records, UN doc. S/PV.4803, 1 August 2003, at 5.

4 Operative paragraph 2 of the resolution.

5 Letter of the Secretary General to the President of the Security Council, dated 29 July 2003 (UN doc. S/2003/769).

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Germany and Mexico) declared, however, that to their regret they would be unable to vote for the resolution[6] because of 'a provision which is *unrelated* to the situation in Liberia'[7] and is in contrast with principles of national and international law.[8] The contentious provision is operative paragraph 7, which provides 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.

This provision, covering only personnel from contributing states which are *not parties to the ICC*, grants *exclusive jurisdiction* to such contributing states over acts or omissions by their nationals related to the operations of the Multinational Force or the future UN force, irrespective of whether these acts or omissions amount to international crimes under the jurisdiction of the ICC. In other words, operative paragraph 7 grants very broad immunity to peace-keepers who are nationals of countries not party to the ICC Statute.

2. The Exclusive Jurisdiction of the Sending State over Its Nationals

The dispute over the International Criminal Court once again arises from an artificial contrast between peacekeeping or enforcement and the exercise of criminal jurisdiction over offences committed by the personnel of sending states. In the words of the UN Secretary General, 'the attempts to protect international UN 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'.[9]

At first sight, there would have been no need for such a provision since all peacekeepers[10] from states not parties to the ICC are exempted from the Court's

6 A vote on the resolution paragraph-by-paragraph was requested by Mexico, but the sponsor of the draft resolution, the USA, was opposed to that procedure.

7 France, UN SC verbatim records S/PV.4803, 1 August 2003, at 7.

8 See the statement of the permanent representative of Mexico to the UN (S/PV.4803, 1 August 2003, *supra* note 6), who said that 'To uphold the laws of Mexico and the principles of international law [. . .] Mexico decided to abstain in the vote' (at 3), as well as the declaration of France, stating that 'the scope of jurisdictional immunity [was not] compatible with the provisions of the Rome Statute of the International Criminal Court, the norms of the French law or the principles of international law. Furthermore, [this provision] causes a problem of consistency at a time when the Security Council has the intention of spearheading the movement to reject impunity in all its forms', at 7.

9 See the press conference by the Secretary-General following the Security Council meeting on Liberia, 1 August 2003, reported at http://www.un.org/apps/sg/offthecuff.asp?nid=458# (visited on 10 August 2003).

10 The term 'peacekeepers' is not used in its technical sense, but with a much broader meaning encompassing personnel of peacekeeping and peace-enforcement operations, as well as troops otherwise authorized by the Security Council to resort to armed force.

jurisdiction under SC resolution 1487 (2003).[11] Operative paragraph 7 of the resolution under discussion goes, however, even further (and perhaps too far), providing that personnel from non ICC member states are under the *exclusive* jurisdiction of *their own* national authorities. This provision not only bars the ICC from exercising jurisdiction, but it also *deprives all other states of jurisdiction,* including the state of the *locus commissi delicti* (Liberia) and the state of passive nationality (that is, the state of which the victim is a national). These states usually enjoy jurisdiction over offences committed on their territory – as well as, in many cases over offences against their nationals.[12] Moreover, the limitation provided for in paragraph 7 also applies in cases where the principle of universality could become operational.

True, there is nothing new in the provision whereby the territorial state recognizes that foreign personnel acting on its territory are under the *primary* jurisdiction of the sending state. Very often, Status of Forces Agreements provide for jurisdictional immunity of personnel on mission, recognizing the sending state's primacy in the exercise of jurisdiction.[13] Generally such agreements do not imply, however, that the sending state has exclusive jurisdiction; they only grant *primary* jurisdiction to that state. Should the sending state decide not to exercise its jurisdiction, the territorial state courts may step in. Exclusive jurisdiction by the sending state may only exist over acts or omissions that are considered unlawful by that state but lawful by the receiving state.[14] Moreover, these provisions are only binding *between the parties* to each agreement. On the contrary, by operative paragraph 7 the Security Council not only affects the relationships between the sending state and the receiving state; it also interferes with the sovereignty of UN member states in a way that is barely related to the threats to peace justifying actions under Chapter VII.

3. Operative Paragraph 7 and the ICC

One may even wonder whether the provision under discussion has any practical use insofar as the jurisdiction of the ICC is concerned. The ICC Statute requires that

11 This resolution renewed Res. 1422 (2002) which exempts peacekeepers belonging to states not parties to the ICC Statute from the jurisdiction of the ICC for another year. On this issue see S. Zappalà, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UNSC Resolution 1422 (2002) and Article 98 Agreements', 1 *Journal of International Criminal Justice* (2003) 114–134. More broadly on third states and the ICC jurisdiction see in this issue D. Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-parties: Legal Basis', at 618–650.

12 The principle of passive nationality is very common in *civil law* countries, while it is not generally accepted in most *common law* countries, where the principle of territoriality of criminal law is given utmost consideration. In this respect see J. Jones, 'Droit anglais', and G. Fletcher and K.I. Lee, 'Les Pays d'Amérique du Nord', both in A. Cassese and M. Delmas Marty (eds), *Juridictions Nationales et Crimes Internationaux* (Paris: Presses Universitaires de France, 2002) at 31 and 451, respectively.

13 On the issue of immunities under SOFAs see, in this issue, D. Fleck, 'Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?' at 651–670.

14 See, for example, Article VII(2) of the NATO SOFA, which refers to *exclusive jurisdiction* only to cover acts or omissions that are punishable under the law of one State but not the other.

either the state on whose territory the offences are committed, or the state of nationality of the accused, be party to the Statute. Liberia is not a party to the ICC Statute. Therefore, even without operative paragraph 7, any act or omission committed in Liberia by personnel belonging to states not parties to the ICC Statute would lack the necessary requirements for falling within the jurisdiction of the Court. It thus becomes crystal clear that operative paragraph 7 in reality does not aim at limiting ICC jurisdiction, but rather seeks to impose undue restrictions on the criminal jurisdiction of states. It is not even possible to argue that operative paragraph 7 shares the rationale of resolutions 1422 (2002) and 1487 (2003), which exempt peacekeepers of states not parties to the ICC in general terms. Those resolutions were adopted without knowing in which states peacekeeping or enforcement troops would be deployed. Their deployment could have been required in a state party to the ICC; in such a case any international crime committed on the territory of such state, even if perpetrated by nationals of a state not party to the ICC Statute, would have fallen – at least in theory – under the jurisdiction of the ICC. Operative paragraph 7, on the contrary, is entirely pointless insofar as the ICC is concerned. Its effect seems ultimately to boil down to an abusive and arbitrary deprivation of some UN member states' criminal jurisdiction.

4. Was the Security Council's Adoption of Operative Paragraph 7 *Ultra Vires*?

Operative paragraph 7 lends itself to two levels of analysis. First, one could question the very consistency of this provision with the UN Charter and international law. Second, one should consider whether there is nevertheless a way of placing an acceptable interpretation on it.

First of all, one could suggest that there are doubts as to the legality of operative paragraph 7. By this resolution, the Council impinges upon the sovereignty of *all* UN member states. It does so by prescribing that the contributing states not parties to the ICC Statute have exclusive jurisdiction over acts of their personnel, and enjoining that all other states must forgo their criminal jurisdiction over the acts or omissions of personnel of the Multinational or UN force belonging to states not parties to the ICC Statute. For instance, if a US serviceman kills a French, Belgian, Italian or Swiss member of a relief organization, only the USA would have jurisdiction over this criminal offence. In theory, this is justified under the Charter because the Council has acted under Chapter VII. However, on careful analysis of operative paragraph 7 one can hardly see any of the grounds required by the Charter for the exercise of the Council's powers under Chapter VII. In other words, there seems to be no link whatsoever between the situation warranting the exercise of Chapter VII powers – that is the serious crisis and civil war in Liberia (which under the Charter allows for limitations of state sovereignty) – and the provisions exempting peacekeepers from some states (those not parties to the ICC Statute) from the jurisdiction of any state other than their own national state. Arguably, this provision was inserted almost

surreptitiously in a resolution dealing with a totally different issue. Indeed, it does not share the rationale behind the rest of the resolution and is not supported by any explicit and specific ground. To put it differently, the threat to peace which constitutes the underpinning of Chapter VII powers and of resolution 1497 (2003) does not cover or extend to operative paragraph 7.

Absent such a link, the serious limitation imposed on the sovereignty of all member states (that which asserts the exclusive jurisdiction of the sending state) might be held to lack any basis under Chapter VII. One could, therefore, argue that the Council acted *ultra vires*, with the consequence that the provision at issue would be devoid of any binding force.

Of course, so far no state other than the three abstaining members of the Security Council has argued against the legality of operative paragraph 7. This could, however, happen in the future should a state be confronted with a situation that requires the application of those provisions.

Furthermore, operative paragraph 7 clearly creates a condition of *inequality* among UN member states and their personnel, establishing an invidious distinction between those that are parties to the ICC Statute and those that are not.[15] In addition, although this may seem to be less relevant from an international perspective, this is also a violation of the principle of equality between *individuals*. The consequences of this provision in this respect are rather puzzling. While personnel of states not parties to the ICC are under the exclusive jurisdiction of their own national state, the same does not hold true for personnel of contributing states that are parties to the ICC Statute. For example, under operative paragraph 7, while a Chinese soldier who kills a French civilian in Liberia would be under the exclusive jurisdiction of Chinese authorities, a French soldier who, exactly under the same circumstances, kills a Chinese civilian would – under the resolution and pursuant to the relevant national legislation – fall under the jurisdiction not only of France and the ICC, but also of Liberia and China.

5. How Should One Construe Operative Paragraph 7?

Supposing that states will not formally challenge the legality of operative paragraph 7, it is appropriate to see whether it is open to a judicious construction. It would seem that the provision of operative paragraph 7 may become acceptable and consistent with general principles of international law only under two very strict conditions.

15 As stated by the German representative to the UN in the debate that preceded the adoption of resolution 1497 (2003), '[There] is no precedent for that. There is no reason to limit the national jurisdiction of third countries. There is no justification for discriminating against peacekeepers from countries that are members of the Rome Statute of the ICC', see the verbatim records, *supra* note 7, at 4.

Although one might agree with the words spoken by the US representative to the UN on the occasion of the adoption of resolution 1487 (2003) (UN doc. S/PV.4772, 12 June 2003, at 23) that exempting peacekeepers from non states parties to the ICC from the jurisdiction of the Court 'does not in any way affect [states] parties to the Court', one cannot but emphasise that resolution 1497 (2003) severely impinges upon the sovereignty of ICC states parties, in violation of international law, the UN Charter, and many national provisions.

First, one could suggest that contributing states that have exclusive jurisdiction must be held to be under an *obligation* to investigate and, where compelling evidence is available, lay out charges for offences committed by their personnel in Liberia. That states are under such an obligation is implied in the resolution itself. The resolution explicitly provides for the exercise of jurisdiction, which *presupposes* and implies that investigations are duly undertaken. Certainly the UN SC did not intend to allow peacekeepers to be above the law or enjoy impunity. Should the competent authorities of the sending state feel free not to investigate serious allegations of criminal offences, the provision on exclusive jurisdiction could turn out to be meaningless.

Furthermore, although in principle the contributing state has a primary right and duty to try its nationals it is not sound to exclude any alternative. In particular, as was rightly pointed out by the UN Secretary-General 'in those situations where the governments are not willing or able to [investigate and prosecute], then of course you have recourse to other means'.[16] One could go so far as to contend that, if the national authorities of the contributing state fail to investigate or prosecute, the jurisdiction of any other interested state or international authority should automatically resurrect. True, under standard SOFAs the procedure is regulated in greater detail and it is generally required that when "the state having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other state as soon as practicable".[17] In the case of operative paragraph 7, however, no such procedural requirement was provided for by resolution 1497 (2003).

Secondly, only a very limited category of acts or omissions may be deemed to fall within the scope of the provision under discussion. The text of operative paragraph 7 stipulates that the contributing state has exclusive jurisdiction over 'alleged acts or omissions *arising out of or related to* the Multinational Force or United Nations stabilization force'. The link between the act or omission and the mission should be very strictly construed. There must be a clear connection between the actions and the mandate of the Multinational Force (and subsequently the UN Force). For example, if a member of the Multinational Force, who is a national of a contributing state not party to the ICC Statute, kills a civilian in the course of a military operation undertaken to secure the environment for delivery of humanitarian assistance, the contributing state will no doubt have primary jurisdiction over these acts. In contrast, if members of the Multinational Force from a contributing state not party to the ICC Statute engage in rape, or forced prostitution, or trafficking in human beings or similar offences, these acts would not fall within the meaning of 'acts or omissions arising out of or related to the Multinational Force'.[18] The Multinational Force has only been established for peace-enforcement and peace-keeping purposes; there is nothing in the UN SC resolution that authorizes personnel of any peacekeeping force to engage in those

16 See the press conference by the Secretary-General, *supra* note 9.

17 See Article VII(3)(c) of NATO SOFA.

18 Therefore, worries expressed by Germany that prosecution of international crimes such as trafficking in human beings in German courts would not be possible are unwarranted (for the German position see UN SC verbatim records, *supra* note 7, at 4).

criminal activities. Therefore, the correct interpretation of operative paragraph 7 should be that it does not cover this class of acts. True, there may be grey areas, such as for example, acts of torture for obtaining information on possible imminent attacks on peacekeepers. In such cases, the solution may be open to debate. One could, however, argue that under no circumstances may torture be considered an authorized behaviour; it would therefore clearly be outside the mandate of peacekeeping forces. Moreover, a presumption should prevail that – at least for the purpose of their prosecution or punishment by states other than the sending state – such acts do *not* arise out of, or are not related to, the mission. Unless the contributing state (or the individual accused) proves that they were linked to the mission, these acts would fall outside the scope of operative paragraph 7. They would consequently be subject to the criminal jurisdiction of any state concerned under the traditional principles of territoriality or active or passive personality (or even universality, where appropriate).

6. Conclusion

Resolution 1497 (2003) has the undeniable merit of having clarified once and for all the position of the USA with regard to the exercise of criminal jurisdiction over offences that may be committed by US personnel abroad. In fact, what seems now more clear is that the opposition of the USA to the ICC is simply a corollary of the basic assumption that only US courts should have the authority to bring to trial US officials accused of crimes abroad, even when the offences can be characterized as international crimes. In other words, for the American administration, US personnel always fall under *the exclusive jurisdiction of the USA*: no other court, whether national or international, can assert jurisdiction.

This development should persuade states parties to the ICC that are members of the UN Security Council (or about to become members of the Council) *not to renew* resolution 1487 (2003), exempting peacekeepers from the jurisdiction of the ICC when it expires in June 2004. Indeed, it is not possible to meet American concerns over the ICC, because the US position is based on the questionable assumption that *only* the USA has jurisdiction over American citizens. This is a position that finds no support in either national or international law. That the USA has repeatedly insisted on the need to stipulate express provisions to this effect, such as that included in resolution 1497 (2003), is in itself clear evidence that the *exclusive jurisdiction* of the sending state is an *exception* (and a controversial one) to the general rule.[19]

It is submitted that the transatlantic dispute over the ICC does not justify choices conflicting with fundamental principles of international law and the principle of equality of both states and individuals. Whether personnel of the Multinational Force

19 This is indirectly confirmed by the words of Chile's representative to the UN, who stated that UN personnel enjoyed some immunity, such as immunity from criminal prosecution, and that Status of Forces agreements also often grant immunities. He was concerned that by granting exceptions, particularly that there exists an exclusive jurisdiction of contributing states over their personnel, the harmonious development of international law would be impeded (see verbatim records, *supra* note 7, at 6).

(or the UN force) are or are not citizens of an ICC state party should have no bearing whatsoever on their criminal responsibility. Nor is it possible to admit that the Security Council may in extremely broad terms and on unspecified grounds limit the scope of the criminal jurisdiction of states *in abstracto*. If the rationale behind resolutions 1422 (2002) and 1487 (2003) was weak and unconvincing, the basis of operative paragraph 7 is even more questionable.

The US administration first tried to include in the ICC Statute a rule based on the position that American citizens would be under the exclusive jurisdiction of US authorities. After failing to do so, it consistently endeavoured to promote this idea through resolutions 1422 (2002) and 1487 (2003), as well as in Article 98 agreements. The same rationale may be discerned behind operative paragraph 7 of resolution 1497 (2003). The wisdom of attempting to foist upon the international community a solution that was rejected by the vast majority of states, remains to be seen. In any case, it does not seem proper to try to achieve such a goal by depriving states of their (inherent) criminal jurisdiction through a questionable resort to Chapter VII powers.