African Union 'Robust' Peace Support Operations: Rules of Engagement and Attribution of Conduct

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Abstract

The development of 'robust' peace support operations in the framework of the African Union is a complex process that revolves around two primary propositions. Firstly, the consent of the host State, factor of the initial legality of the missions. Secondly, the use of force determined by the commanding authority, which ensures the continuance of the legality in terms of respect of the rules of international law.

The participation of the African organization and the States that contribute with their military contingents makes the establishment of the command and control authority over the operation, and the related operational documents, a crucial passage. In this context, there is an operative document of utmost importance for the outcome of the missions, the rules of engagement. As combination between political, legal and military considerations, their construction contributes to the compliance with international law, in particular international humanitarian law.

If and when a potential violation occurs, the assessment of the responsibility of the international organizations and the participant States have to start from the determination of the attributability of the impugned conducts, on the basis of the 'effective control' test. And it is at this stage that the rules of engagement become decisive factors, due to their connection with the command and control structure of the missions.

Keywords

African Union; Robust Peace Supporting; Rules of Engagement: Command and Control; Attribution of Conduct

Introduction

In a continent where crises and conflicts are widespread and tangled, the African Union (AU) is developing and consolidating its capability in the management and resolution of situations endangering continental peace and security. To this aim, one of the main tools created by the founding treaties of the organization is represented by multidimensional 'robust' peace operations. These operations take inspiration from the United Nations (UN), which initially launched peacekeeping missions and developed their main features. The AU incorporates the UN conceptualization. But at the same time it moulds the constituents, with some variances, on the basis of the continental reality and its own doctrine.

In the activation of AU operations there is a document linked to the management of the operational authority, which is of fundamental importance: the Rules of Engagement (RoE). The peculiarity of this instrument is given by its heterogeneous characterisation, which ranges from the observance of the law to political and military considerations, but also by its nature of expression of the authority that directs the actions of peace supporters. The process that leads to the creation of RoE reveals the entities in charge of the drafting and successive management of the very rules and informs their content. The practice and case law in the evolution of the responsibility of International Organizations (IOs) and States for the acts of peace supporters is still scant. Nonetheless, the nature of RoE, whose function is to conciliate the activity of the operational authority with the limitations set by international law, suggests that they play a determinant role in the attribution of impugned conducts.

1. 'Robust' Peace Support Operations

1.1. Origin and Qualification of 'Robust' Peacekeeping Operations

The history of actions to maintain or restore international peace is dominated by the UN, which finds the legal foundations of such missions in the Charter of the United Nations (Charter). The starting point is the responsibility of the United Nations Security Council (UNSC) for the maintenance of international peace and security (Art.24 Charter), through its powers to promote pacific means to settle disputes (Chapter VI) and to use forceful measures (Chapter VII). Additionally, there is the capacity to support and involve regional organizations in the matter (Chapter VIII).

The qualification of the missions relies on the UN authorising resolutions. Historically, due to the lack of explicit legal reference, the list of missions' tasks has constituted the source for the development of the categorization. Therefore, a 'traditional' Peacekeeping Operation (PKO) is one through which troops "monitor a truce between warring sides while mediators seek a political solution to the underlying conflict".[1] PKO is regarded as expression of Chapter VI, namely Art.37(2), and is characterised by three distinctive elements: consent;[2] impartiality, interchanged

1 UN, Capstone Doctrine, p.99. The United Nations Emergency Force (UNEF I) in Egypt is the first example.

2 It can be seen separately as the legal basis to intervene in a country in the form of acceptance of the deployment of the mission by the host State, as well as the agreement of (ideally) all or the main parties to the conflict, manifested as cease-fire or peace deal (UN, Capstone Doctrine, pp.20-21).

with neutrality;[3] and UoF exclusively in self-defence.[4] On the other side of the spectrum, a Peace Enforcement Operation (PEO) is defined as a "[c]oercive action undertaken with the authorization of the United Nations Security Council to maintain or restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression".[5] The result of these actions, framed under Chapter VII, is that the premises of 'traditional' peacekeeping are reversed and the mission is full-scale combat aimed at neutralising the identified enemy.[6]

In the third alternative, inaugurated through the expansion of the concept of self-defence for the United Nation Force in Cyprus (UNFICYP), self-defence meant also peace supporters' counteractions to "[a]ttempts by force to prevent them from carrying out their responsibilities as orders by their commanders".[7] Later, the formulation of the new idea of self-defence was directly linked to the mandate, as delineated in 1973 UNEF II, where "[s]elf-defence would include resistance to attempts by forceful means to prevent it [the Force, author's note] from discharging its duties under the mandate of the Security Council".[8] This dilation of the UoF triggered the formation of the new type of peace operations, called 'robust' PKO. The new feature of the UoF qualifies the category as operation mandated under both Chapter VI and Chapter VII, due to its hybrid elements: the use of peaceful means in the interposition between opposing parties and the enforcement attribute of UoF in a proactive manner in certain situations.

The expansion of the third PKO's constituent affects the second one, not regarded anymore as synonym of neutrality, but distinguished as referring to the strict respect of the mandate and the consequent response to actions intended for impeding it, regardless of whom the instigator is.[9]

The UN 'Brahimi Report' formalises the new idea reassessing two of the 'traditional' PKOs principles: impartiality is reformulated to be distinctly separated from neutrality;[10] and the UoF is intended as the capacity of the troops not just to defend themselves, but also "other mission components and the mission's mandate".[11] The UN 'Capstone doctrine' articulates the new paradigm. It redefines the pillar of consent as the less stringent commitment to a political process aimed at the solution of the hostilities,[12] due to the anticipatory characterisation given to PKOs. This new conceptualization subordinates the missions to the political tools of management of the

3 Donald explains that "[n]eutrality and impartiality have long been seen as at least inseparable, at most synonymous. They have been explicit mainstays of UN peacekeeping since 1957, initially seen as inseparable, later as synonymous" (p.22).

4 As individual self-defence and the defence of UN contingents against attacks. Sheeran, p.351.

5 UN, Capstone Doctrine, p.97.

6 Example is the 1950 Korea operation. Bialke, p.23-29.

7 UNSG, S/5653, par.18(c).

8 UNSG, S/11052/Rev.1, par.4(d). Boddens Hosang, pp.478-479; Sheeran, pp.352-353.

9 UN, Capstone Doctrine, pp.33-34; UN, Infantry Battalion Manual, pp.13-14. Brahimi explains that "[i]mpartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement" (Brahimi Report, p.9, par. 50). Donald analyses the process of separation of impartiality from neutrality and the related conceptual and practical ambiguities and hindrances (Donald, from p.23).

10 UNGA, A/55/305-S/2000/809, 21.08.2000 (Brahimi Report), p.9, par.50. Also Caparini, pp.34-35; De Coning, Civil Military Coordination in United Nations and African Peace Operations, p.59.

11 Brahimi Report, p.9, par.49.

12 UN, Capstone Doctrine, p.31.

conflict, as emphasised by the latest UN review of PKOs, the 'Ramos-Horta Report'.[13]

Furthermore, the guidelines explain that the UoF in 'robust' PKOs has a tactical purpose, namely to neutralise the threats that are hindering the execution of the mandate.[14] This would mean the neutralisation of the (identified)[15] enemy in the attainment of a definite military advantage, genuine concept of the law of armed conflicts applicable in the sphere of operations mandated by IOs only to PEOs and explicitly codified in Art.52 Additional Protocol I (AP I).[16] The dilatation of the notion of UoF brings into play the issue of mission accomplishment, that is a military concept associated exclusively to the UoF beyond self-defence, which finds limitations in the specific mandate's commitments. The outcome of this construction is the significance of the operative documents in the configuration of 'robust' PKOs, because they instruct multinational forces on what is allowed to do in the event of actions conducted in an attempt to interfere with mission accomplishment.

The mandate represents the focal point for 'robust' PKOs. As a result, it is incorporated into the third pillar as the reference parameter for the UoF. The defence of the mandate is twofold: the stabilisation of the situation as part of the peace process and the protection of civilians.[17] The justification is the experienced volatility of the context of deployment, even after the formal conclusion of peace negotiations. The critical point is the qualification of the very instances for the preparation of the operational directives, due to their dependence from synchronisation of the prerequisites of the mission with the modifications of the factors on the ground.

1.2. 'Robust' Peace Support Operations in the AU Framework

In the AU framework, the first step to qualify the operations is the analysis of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (Protocol). Firstly, in the rule presenting the Peace and Security Council (PSC)'s guiding principles, Art.4, Par.(a) refers to the "peaceful settlement of disputes and conflicts", wording almost identical to the title of Chapter VI of the Charter; then Pars.(j) and (k) recall the actions codified in Art.4(h) (j) Constitutive Act of the African Union (Constitutive Act), respectively in case of war crimes, genocide and crimes against humanity or pursuant to the request of a member State. Secondly, Art.6 uses the phrase "peace support operations" and "intervention" in Par.(d) with regard to the aforementioned provision of the Constitutive Act; later, it uses "peace-building" in Par.(e) without further specifications.

Moreover, Art.13 establishes the African Standby Force (ASF), an operational instrument of the PSC based on "rapid deployment capacity".[18] Par.1 of the provision explains that the ASF is created for the purpose of "peace support missions and intervention pursuant to Art.4(h) and

13 UNGA, A/70/95 - S/2015/446, 17.06.2015 (Ramos-Horta Report), from p.26.

14 UN, Capstone Doctrine, pp.34-35.

15 De Coning, Peace Enforcement in Africa: Doctrinal Distinctions between the African Union and United Nations, p.3.

16 Melzer, p.330; Schmitt, pp.277-279.

17 UN, Capstone Doctrine, p. 34. Also Brahimi Report, p.11, par.63; Ramos-Horta Report, p.47, par.128.

18 AU, APSA 2010 Assessment Study, p.19.

(j) of the Constitutive Act". The following Par.3 lists the functions of ASF and does not simply recall the operations presented in Par.1 (Lett.c), but refers also to "other types of peace support missions" (Lett.b), to "preventive deployment in order to prevent (i) a dispute or a conflict from escalating, (ii) an ongoing violent conflict from spreading to neighbouring areas or States, and (iii) the resurgence of violence after parties to a conflict have reached an agreement" (Lett.d) and to "peace-building, including post-conflict disarmament and demobilization" (Lett.e). With specific regard to the last clause, the subsequent Art.14 outlines peace-building activities, during and at the end of the hostilities (Pars. 2 and 3). The tasks presented are traditionally assigned to the civilian component of the mission,[19] but they can arguably include military activities, in particular when the hostilities are still continuing.[20] Hence, if AU treaty law is more specific compared to the Charter in the definition of the missions for the maintenance or restoration of international peace, the use of different phrasing for expressing overlapping concepts can be deceptive.

The doctrine clarifies the characteristics of peace operations. The AU takes into paramount consideration the canons developed by the UN, as confirmed by the Preamble and Art.17 Protocol.[21] As a result, the AU shares the three cornerstones of PKOs; nonetheless, it started elaborating its own guidelines on what are generally labelled as 'Peace Support Operations' (PSOs).[22]

In order to define the type of missions that bases the subsequent part of the study, the standpoint that originates from the UN doctrine is examined. It is the 'Ramos-Horta Report' that reflects the African doctrine.[23] The three pillars of UN PKOs remain the bedrock for the elaboration of PSOs. Nonetheless, the insertion of "complementary principles"[24] generates room for interpretative modifications. Consent is viewed as a mean for extending the political process to involve military contribution. Inclusion into the political process implies the anticipation of the deployment to earlier stages of the crisis. PSOs are therefore regarded as supportive tools of the political process activated in order to settle the crisis; as a consequence, the deployment of military forces is a contributor to the achievement of the peace agreement.[25] This signifies that the indispensable element is the acceptance by the host State in order to avoid violations of sovereignty, rule of customary international law[26] mirrored in the Constitutive Act (Art.4(a)), whereas the approval by the other actors is seen as achievable along the mediation process.[27]

The primacy given to the consent of the receiving country is also expressed in a special case codified by treaty law, namely Art.4(j) Constitutive Act that institutes the intervention upon invitation. This option appears to collide with two instances from the outset: with the prerequisite of impartiality and, subsequently, with the inclusiveness of the political process the military mission is part of.

19 PSO are multidimensional missions, constructed with military, police and civilian components. See AU, Common African Position on the UN Review of Peace Operations; also UN, Capstone Doctrine.

20 Art.14(3) Protocol lists the peace-building activities, which correspond to the peace-building tasks that the UN doctrine considers part of PKOs (Capstone Doctrine, pp.25-26).

21 AU, Common African Position on the UN Review of Peace Operations, p.2, par.6(i).

22 AU, Roadmap for the Operationalization of the African Standby Force, p.7, par.2.12.

23 AU, Common African Position on the UN Review of Peace Operations.

24 Idem, p. 4, par. 9(iv).

25 Idem, p.7, pars.16-17.

26 Simma et al., p.213.

27 AU and EUEA, NJIWA Exercise Manual, 2012, p.3C-10; Caparini, pp.26-27.

But it is justified by the necessity of operationalisation in the shortest time possible.

A case that reflects the indispensability of consent by the host State for the legality of PSOs is given by the resolution of the PSC for activating the mission to Burundi[28] under the prerequisite in Art.7(1)(a) Protocol, which expresses the anticipatory timing recalled above. The PSC Communiqué of December 2015 raises an issue of extreme importance for the classification of PSOs. Yet, preliminarily, two annotations are necessary. Firstly, Art.7(1)(a) envisages preventive actions in order to avoid conflicts and international crimes; it does not require the involvement of the Assembly of Heads of State and Government of the African Union (Assembly) in the decision-making process for the activation of the mission (unlike Art.4(h)(j) Constitutive Act, as clarified by Art.7(1)(e)(f) Protocol); and the consent of the host country is contemplated, as the Communiqué demonstrates. Secondly, Art.7(1)(e) is similar to Art.7(1)(a) in the scope, but it concerns itself with actions aimed at halting the ongoing perpetration of the international crimes listed in Art.4(h) Constitutive Act (the same foreseen in Art.7(1)(a) plus war crimes), the final decision is referred to the Assembly and consent is not requested, as displayed again by the very Communiqué.[29] In light of these considerations, deployments under Art.7(1)(a) have the shape of 'robust' PSOs (the prevention of genocide and crimes against humanity entails the task of protecting civilians), as the mandate stipulates.[30] Conversely, the assessment is more intricate with regard to the operation under Art.7(1)(e) Protocol: it can be seen as 'robust' PSO without the element of consent, if the other two pillars are maintained and the opinion of the unnecessity of the very consent is hold; it can be labelled as PEO, as some scholars do,[31] assuming that the absence of one of the foundational requirements changes the nature of the mission. The second option is followed, grounded on the absolute relevance of consent for the qualification of a mission, which also leads to an 'internal' pre-eminence over the other two keystones of PSOs. In case of lack of consent, as controversially brought forth by the Communiqué on Burundi, the mission is transformed from 'robust' PSO to PEO.

In respect to the UoF, protection of civilians acquires a central position,[32] illustrating the major direction of expansion of this pillar. The new objective also finds incentive in the development of the 'Responsibility to Protect' (R2P) doctrine,[33] strongly taken into account by the AU to the point that the core element of the protection of civilians is arguably present in Art.7(1)(a) Protocol and Art.4(j) Constitutive Act.

As PSOs are conceived as part of the political process seeking the maintenance or restoration of peace in the host country, the main task assigned to the mission is to create or strengthen the conditions for the peace process to be completed. With such precondition, underlining the instability of the

28 PSC, PSC/PR/COMM.(DLXV)(17.12.2015)(MAPROBU Mandate), p.5, par.13(c)(ii).

29 MAPROBU Mandate, p.5, par.13(c)(iv). In such circumstances it cannot be said that the consent is implicit in the ratification of the Constitutive Act by the State involved (Simma et al., p.1491). In the opposite situation, it is shareable the view that a State cannot "in good faith renounce" to the activation of Art.4(h) of the Constitutive Act when a non-international armed conflict burst in the territory on the basis of internal political divisions (Fox, pp. 832-833).

30 MAPROBU Mandate, p.3, par.13(a)(ii).

31 Amvane, p.290.

32 AU, Common African Position on the UN Review of Peace Operations, p.4, par.9(iv).

33 On the difference between protection mandate and R2P, see Willmot and Mamya, pp. 381-382.

environment and the new form of conflicts undertaken by the parties involved,[34] the protection of civilians is increasingly a prominent issue. As a consequence, the AU is developing a sort of mandate within the mandate, which is contained in the authorising resolution but possesses the higher status of a linchpin of the African Peace and Security Architecture (APSA).[35]

In conclusion, the general tenor of codification and legislative resolutions causes a process in which soft law instruments, doctrine and scholars characterise 'robust' PSOs, reconnecting the substantial features to the most appropriate legal provisions. The consequence is a certain uncertainty on the components of these missions, due also to the complexity of the factual framework of analysis. Nevertheless, the idea of robustness is ingrained into the inceptive tenets of the African institution. On that account, AU 'robust' PSOs can be qualified on the basis of the following elements: employment with the consent of the receiving State (and possibly of the other actors) as part of the political process of resolution of the crisis, or upon invitation of a member State; action in an impartial manner; activation under the mandate to use force beyond self-defence for tactical purposes, with particular consideration to the protection of civilians.[36]

1.3. Command and Control over Peace Support Operations

In PSOs one of the determining elements for the functioning of the mission, the assessment of which is crucial to clarify the allocation of responsibilities, is the command and control. In general terms, first of all it can be said that command and control define the authority and responsibility of specific individuals or organs to issue orders and direct the actions of the armed forces.[37] Secondly, command can be described as "[t]he authority vested in an individual of the armed forces for the direction, coordination and control of military forces",[38] whereas control can be explained as "[t]he authority exercised by a commander over part of the activities of subordinate organizations, or other organizations not normally under his command, that encompasses the responsibility for implementing orders or directives".[39] This classification of control is already oriented towards multinational missions.

In this framework, three categories of authority can be distinguished to establish which parties (the Troop Contributing Countries (TCCs), the IO(s) or all of them in conjunction) direct and control PSOs: full command, operational command (OPCOM) and operational control (OPCON).[40] Full command is given by the entire command authority, embracing every deliberation on organization and direction of forces, and it is generally maintained at the national level; some elements are delegated for the specific purposes of PSOs, except for the strategic level command that is always retained by States as expression of sovereignty and is symbolised by the authority to determine the participation and the withdrawal of the troops.[41] The indication of the elements

34 AU, Common African Position on the UN Review of Peace Operations, p.4 par.9 and p.7 par.16. See also Caparini, pp.22-23.

35 Okeke and Williams, pp.14-16.

36 In this scheme, interventions under the rationale of Art.4(h) Constitutive Act are excluded due to their purely enforcement nature.

37 Gill, Legal Aspects of the Transfer of Authority in UN Peace Operations, p.45. Leck, p.352.

38 NATO, Glossary of Terms and Definitions, p.28.

39 Idem, p.32.

40 Cathcart, pp.260-262.

41 Cammaert and Klappe, p.181-182; Gill, Legal Aspects of the Transfer of Authority in UN Peace Operations, p.46.

that States relinquish to the IO(s) suggests which entity/entities has/have the decisional power over the accomplishment of the mission, and the focus consequently leads on to the following two types of authority. Therefore, OPCOM is the authority "to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces, and to retain or delegate operational and/or tactical control".[42] On the other hand, OPCON is "[t]he authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time, or location".[43] In the doctrine it is conventionally recognised that TCCs to 'robust' PSOs maintain full command over their contingents, which is reflective of State practice;[44] whereas some elements of the OPCOM or the OPCON are delegated to the IO.[45]

In the AU framework, during the early stages of preparation of the PSO, the Conflict Prevention and Management Task Force (CMTF) outlines the military command structure in the Initial Draft Plan, identifying the command and control over the mission.[46] Once the mandate has been approved by the PSC, the authority is transferred to the Head of Mission (HoM), who is the Special Representative of the Chairperson (SRCC), and to the Force Commander (FC) that is the head of the military component of the PSO and is responsible to the HoM.[47] The authority that the AU exercises "is not full command and is closer in meaning to the generally recognised military concept of "operational command"".[48] The account is specified by a passage of the Mission Implementation Plan, where it is spelled out that the FC "exercises AU Operational Control (OPCON)"[49] over the military contingents.

This construction apparently creates two layers of authority within the organization. Firstly the OPCOM, which is managed by the Peace Support Operation Division (PSOD)[50] and the HoM. Secondly, the OPCON, internally delegated to the FC. The impossibility to outline precisely the scheme is given by the subsequent illustration of the term 'operational authority': "[t]he FC exercises operational command over all military units".[51] The uncertainty is increased by the absence of indications of the portions of operational authority maintained by the TCCs. Notwithstanding the dubious attribution of the authority, from the presence of an integrated command structure and the references to the sole operational command and control contained in the training handbook it is clear that the AU does not apply full authority over PSOs.[52] In conclusion, even if the precise distribution of authority is undetermined form the outset, it is distinct that the AU is not taking full command in 'robust' PSOs. Conversely, there is a distribution of OPCOM and OPCON between the organization and the TCCs. This means that the AU PSOs cannot be categorised as pure AU missions.

42 NATO, Glossary of Terms and Definitions, p.91.
43 Ibidem.
44 Dannenbaum, pp.145-148. Ryngaert, pp.157 and 160.
45 Gill, Legal Aspects of the Transfer of Authority in UN Peace Operations, p.47.
46 AU and EUEA, Aide Memoire, p.24.
47 AU and EUEA, NJIWA Exercise Manual, p.3C-4, par.11.
48 Idem, pars.9-10 and p.3F-4, par.8.
49 Idem, p.3-11.
50 AU Peace and Security Department, PSOD Presentation, pp.15-16.
51 AU and EUEA, NJIWA Exercise Manual, p.3F-9, par.24.
52 AU and EUEA, NJIWA Exercise Manual, p.3F-9, par.24.

2. The RoE: Definition and Role in AU Peace Support Operations

2.1. Classification and Function of the RoE

The nature of PSOs and the role of command and control for the success of the mission lead to the examination of one of the conventional operative documents of such operations: the RoE. RoE are precisely command and control tools[53] that delineate "the circumstances and limitations within which military forces may be employed to achieve their objectives. …. [T]hey provide authorisation for and/or limits on, among other things, the UoF, the positioning and posturing of forces, and the employment of certain specific capabilities".[54] This definition presented by the 'San Remo Handbook on Rules of Engagement' is formulated in general terms to encompass the broad spectrum of descriptions furnished by States, IOs and scholars.[55]

Notwithstanding the different illustrations given to the concept of RoE, it is widely recognised that three components concur to their elaboration.[56] Firstly, political objectives, which are the purposes of the entities involved, States and/or IO(s). The influence of political factors is conceptually embedded into the nature of war, depicted as the "continuation of policy by other means".[57] As a consequence, it can be asserted that RoE "are the instrument by which the political leadership exercises control of the means of armed force".[58] Secondly, military purposes, which embody the regulation of the UoF and the operational construction of the actions. In other words, RoE provide instructions to subordinate commanders and soldiers about the employment of force in execution of the specific mission assigned.[59] Thirdly, legal purposes, represented by the compliance of the actions with international and domestic law.

The last element of RoE has a special importance under the international law perspective, as it needs to be clarified that these rules are not laws, in particular they are not specifications of International Humanitarian Law (IHL). Some scholars open to the consideration that RoE can at times "amount to state practice for the purposes of developing customary international law"[60] or even that "RoE, enacted by an international organization, can *de facto* become binding as part of customary international law, since … the norm-creating character of the provision in question and the elements of *state practice* and *opinio iuris* are present".[61] Nonetheless, these positions can be rejected by analysing the two elements of customary law. On the objective component, it cannot be said that the content of RoE reflects a "settled practice"[62] because States and IOs have their own views over the rules and, moreover, the very rules are tailored differently for every operation, thus making them mission specific. On the subjective component, it was said above that RoE

53 Cooper, from p.231; LCDR Lee et al., p.81.

54 International Institute of Humanitarian Law (IIHL), p.1, par.3.

55 E.g.: U.S.A., Dictionary of Military and Associated Terms, p.207; NATO, Legal Deskbook, p.254; Carswell, p.928; Pennekamp, p. 1630; Cooper, pp.191-193.

56 Faix, p.138; IIHL, p.2; Phillips, pp.7-8; U.S.A., Operational Law Handbook, pp.81-82.

57 Von Clausewitz, p.87.

58 NATO, Legal Deskbook, p.254.

59 Phillips, 1993, p.8; U.S.A., Operational Law Handbook, p.82.

60 Cooper, p.209.

61 Knoops, p.145.

62 ICJ, North Sea Continental Shelf, Judgment, ICJ Reports 1969 (p.3), p.44, §77.

are tools to be used by commanders and this itself does not align with any sense of "conforming to what amount to a legal obligation".[63] *Ergo*, RoE do not make law. On the contrary, they may restrict the applicable legal norms as a result of the conciliation of political, military and legal deliberations. With regard to the binding character towards the addressees, RoE can assume the status of guidance or lawful commands.[64] The majority of States accept the legally binding nature of RoE, whether directly if seen as operational orders or indirectly through implementation orders.[65]

Once the features are identified, RoE, in terms of functions, "delineate the parameters within which force may be used by designated international peace operational personnel".[66] More specifically, they "define when and how force may be used. ROE may reflect the law of armed conflict and operational considerations but are principally concerned with restraints on the UoF. ROE are also the primary means by which commanders convey legal, political, diplomatic, and military guidance to the military force";[67] this definition stresses the pivotal interest arising from the nature of such missions, which is the limitation to the UoF.

The fundamental role that RoE play here is twofold. On one side, the harmonisation of the positions (policies, military standards, legal obligations) of the TCCs, among them and also with the stances of the IO(s) launching the mission, in order to identify the highest common standard and not the "lowest common denominator". [68] In this context, a critical contribution to the political facet of RoE is given by 'national caveats', which are imperative limitations of national nature imposed by TCCs to the mission from the moment of development of RoE.[69] On the other side, the rules have to forecast an environment of deployment that may switch from peace to armed conflict and vice versa. Hence the mandate[70] of the mission becomes the decisive document, providing the basis for the construction of RoE.

63 Ibidem.

64 Cooper, pp.193 and 201; IIHL, p.1, par.3.

65 Cooper, p.208; Gill et al., p.136.

66 Klappe, p.631.

67 U.S.A., FM 100-23 Peace Operations, p.35.

68 IIHL, p.2, par.7.

69 'National caveats' are submitted by the TCCs to impose restrictions upon the actions and the UoF of their contingents in the context of the multinational PSO (Gill, Characterization and Legal Basis for Peace Operations, 2015, p.159; Gill and others, 2006, p.124; Sheeran, 2015, p.372). As expression of the political leaderships of the TCCs (Williams Jr., 2013, pp.24-25), the caveats stand in a unique position because they are not negotiable in the process of creation or modification of RoE and are applicable exclusively to the peace supporters of the related TCC.

70 The mandate is one of the prerequisites for the legality of the mission. It is represented by two documents: the PSC approval and the UNSC authorisation, as means to comply with the Charter and the Protocol.

2.2. RoE for AU Peace Support Operations and International (Humanitarian) Law

Among the three constituents, the legal component of RoE, in the segment that deals with the observance of international law, requires an attentive analysis. The compliance of RoE for PSOs with international law stems from the consideration of four interconnected elements: the pledge of abidance by the mandating IO(s); the existence of peremptory norms of general international law; the existence of customary international law; and the existence of treaty law obligations.

The first component concerns primarily the legal personality of IOs. This attribute resides in the constitutive treaties of the organizations,[71] where the functions are codified, showing the *sui generis* aptitude to operate in the international sphere.[72] In the specific case, two documents give the preliminary requirement of the legal personality of the AU. On one side, the Constitutive Act,[73] namely Arts. 3 and 4 that proclaim the objectives and principles of the IO. On the other side, the General Convention on the Privileges and Immunities of the Organization of African Unity,[74] where the Preamble and Art.I bolster the judicial personality and functional capacity of the organization by recognising the status of the IO in the territory of member States. The African Court on Human and Peoples' Rights (ACtHPR) has later confirmed the subsistence of the legal personality for the African Union in the case Femi Falana v. The African Union.[75]

Once the prerequisite is clarified, the focus turns to the intent to act in accordance with international law (and IHL specifically). This resolution is expressed in the purposes and principles contained, once again, in the founding treaties and finds subsequent validation in the practice of the organization. The Constitutive Act indirectly pronounces the commitment of the AU to abide by International Human Rights Law (IHRL) and IHL in Art.3(e)(f)(h). Specific recognition of the respect for IHRL and IHL is given by Arts. 3 and 4 of the Protocol, treaty that creates the organ in charge of mandating peace operations in Africa.

Furthermore, APSA considers the compliance with international law a cardinal element to be eventually hinged into RoE. This can be seen with reference to the current African Union Mission in Somalia (AMISOM)[76] as well as in the plan for the consolidation of ASF.[77] In the first case, the Status of Mission Agreement (SOMA), which is the arrangement between the AU and the host State before deployment of AMISOM in 2007 contains specific references.[78] With regard to the preparation of the future deployment of the ASF, training manuals and model documents

71 Mujezinović Larsen, The Human Rights Treaty Obligations of Peacekeepers, pp.88-99; NATO Legal Deskbook, pp.74-76; Zwanenburg, pp.64-68.

72 Klabbers, p.85; Porretto and Vité, p.18; Purdă, p.892.

73 2158 UNTS 37733. Udombana, pp.81-83.

74 1000 UNTS 14688.

75 Femi Falana v. The African Union, no.001/2011, Judgment, ACtHPR 2012, §68.

76 PSC/MIN/1(CCXXXXV)(15.10.2010), p.2, par.7.

77 PSC, Draft Maputo Strategic Work Plan (2016-2020), Section 23.

78 AU and the Transitional Federal Government of the Somali Republic, Status of Mission Agreement (SOMA) between the Transitional Federal Government of the Somali Republic and the African Union on the African Union Mission in Somalia (AMISOM) (06.03.2007) (AMISOM SOMA), p.5, par.9(a).

offer several indicators confirming the obligation to respect international law and IHL above all.[79]

With reference to the second facet, both States and IOs have to conform to peremptory norms. The starting point is the acknowledgment of the compliance by States with such rules, codified in Art.53 Vienna Convention on the Law of Treaties (VCLT). Subsequently, the genesis of IOs, namely treaties concluded between States, and the recognition of the special status of peremptory norms with regard to treaties concluded by IOs crystallised in Art.53 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986 Vienna Convention), lead to the conclusion that the AU is bound by *jus cogens*.

On the third element, and with specific regards to IHL, its respect is to be determined on the exclusive basis of the facts on the ground, independently from the parties involved.[80] The consequence, whenever the circumstances are definable as armed conflict, is the applicability of IHL to "[e]ach party to the conflict",[81] on the basis of the determination of the customary rule. It means that, if a peace mission becomes involved in a situation that amounts to armed conflict, the correspondent body of customary law is activated.[82]

Lastly, with regard to treaty law obligations, the explicit phrasing of founding treaties and operational documents assists in the clarification of which IHRL and IHL treaties have to be taken as paramount reference for the formation of RoE. This argument is also functional for the clarification of the reasoning presented by the ACtHPR;[83] although anchored to the subject matter of the dispute, the decision keeps the opening clause to the *de facto* adherence to international treaty law by the AU. [84]

79 AU, Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee, 2003, p.9, par.2.19; AU and EUEA, Aide Memoire, p.49; AU and EUEA, NJIWA Exercise Manual, p.4-5, par.8(a)).

80 Ferraro, pp. 573-574 and 600.

81 ICRC, Rule 139, p. 495. The commentary to the rule does not mention IOs, but the commentary to Rule 142, in the same Chapter of Rule 139 on the compliance with IHL, says: "[i]ncreasing use of international peacekeeping and peace-enforcement troops has given rise to a particular concern that such forces be trained in the application of international humanitarian law before being deployed" (p. 503). Also Ferraro, p. 588.

82 Bialke, pp. 36-37; Engdahl, p. 519; Glick, pp. 78-79; Grenfell, p. 647.

83 Femi Falana v. The African Union, no. 001/2011, Judgment, ACtHPR 2012, §69.

84 AU and EUEA, NJIWA Exercise Manual', p.3F-12 par.33, p. 3F-16 par. 50(c) and p.3FI-1 par.5; p.6-3.

2.3. RoE and command and control in AU PSOs

In the scheme of AU, RoE are described as "directions to operational commanders, which delineate the parameters within which force may be used by designated African Union military personnel during the AU peacekeeping operation",[85] representing "the sole authority for the use of force in the accomplishment of … mandate".[86] The first thing to be noticed is that the African organization aligns with the general understanding of RoE as instruments for the regulation of the UoF. Furthermore, the specification from the AU training manual, "[w]here issued as prohibitions, they are orders not to take specific actions. Where issued as permissions, they provide the authority for commanders to take certain specific actions if they are judged necessary to achieve the aim of the mission",[87] shows that the AU's understanding of RoE is that of lawful commands. In the spectrum of conceptions of RoE, this approach reflects the narrow definition, which regards RoE as express authorisations or prohibitions.[88]

RoE, as binding rules for the AU, represent an example of the decision-making process of the very organization in consultation with the TCCs,[89] but are released as AU orders that cannot be altered autonomously by national commanders. This is confirmed by the training manual in the directive to the FC, where RoE are presented as the "sole authority for the use of force in the accomplishment of … mandate".[90] Yet in the same document there is a potentially misleading passage: on the observance of international law by the peace supporters, it is established that IHL applies only to missions under AU command and control.[91] Focusing on the issue of command and control, it can be arguably said that the phrase aims at distinguishing 'robust' PSOs, where elements of the command and control are allocated to the AU, from operations where the IO simply approves the mandate and the command and control is placed under one State or a group of States, the 'coalition of the willing'.[92] The clarification of this passage and the acknowledgment of the nexus between RoE and command and control prompt the scrutiny of the attributability of conducts in PSOs.

85 AU and EUEA, NJIWA Exercise Manual, p.6-1.

86 Idem, p.3F-12. NATO defines RoE as "Directives to military forces, including individuals, that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied" (NATO, Glossary of Terms and Definitions, p.109); the UN define RoE as "directions to operational commanders, which delineate the parameters within which force may be used by the military component of the peace- keeping operation while executing its mandated tasks" (UN, Infantry Battalion Manual, p.50). The EU defines RoE as "Directives to military commanders and forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or other actions which might be construed as provocative, may, or may not, be applied" (EUMC, p.108).

87 Idem, p.6-1.

88 IIHL, p.1. Cooper, p.195.

89 The participation of troops belonging to different countries brings in the issue of 'national caveats'. See IIHL, p.2, par.5); Gill, Characterization and Legal Basis for Peace Operations, p.159; Gill et al., p.124; Sheeran, p.372).

90 AU and EUEA, NJIWA Exercise Manual, p.3F-12, pars.31-32 and p.6-3, par.8(a)(2)(3)).

91 Idem, p.3F-12, par.33.

92 Gill, Legal Aspects of the Transfer of Authority in UN Peace Operations, p.39.

3. Attributability of Conducts in Peace Support Operations

3.1. Reference Parameter and Instruments

The participation of several actors in the creation, operationalisation and continuation of multinational 'robust' PSOs plays a determinant role in the assessment of the responsibility for internationally wrongful acts. To assess the responsibility, one of the requirements is the attributability of the conduct to the State(s) or the IO(s), as established by the 'Articles on the Responsibility of States for Internationally Wrongful Acts' (ARS)[93] and the 'Articles on the Responsibility of International Organizations' (ARIO)[94] in the respective Arts. 2 and 4.

With regard to ARIO, the provision that comes into consideration when assessing PSOs is Art. 7. The rule regulates the conduct of a State's organ "placed at the disposal" of the IO. The commentary to the provision clarifies the meaning of the phrase in the sense that the entity acts as an organ of the IO only to a certain extent, still partially operating as organ of the seconding State.[95] This is exactly the configuration presented by the 'robust' PSOs mandated by the AU, where the TCCs make their national contingents available to the continental organization without relinquishing the full command over their troops.

Once determined that Art.7 ARIO is the relevant provision, the proposed parameter of evaluation of attributability has to be examined. On the point, several decisions deserve attention. In 2007 the European Court of Human Rights (ECtHR) decides the cases Behrami and Saramati. Although ARIO are inserted among the relevant instruments for the decision, the Court resolves to build its own parameter for the attributability: the "ultimate authority and control".[96]

In the same year the House of Lords of the United Kingdom decides over the Al-Jedda case. The members of the Appellate Committee rely on the ECtHR judgement, but the conclusion of the majority follows the line set by the Draft ARIO.[97] The application related to the same case before the ECtHR leads the European jurisdiction in 2011 to consider not only the 'ultimate authority' standard, but also the 'effective control' parameter of ARIO, for the determination of attributability.[98]

In 2011, the Dutch Court of Appeal in The Hague decides the case Nuhanovic v. The Netherlands and establishes the criterion furnished by the International Law Commission (ILC) articles as the prerequisite for the evaluation of attributability.[99] Moreover, the significance of this decision is due to the introduction of two major issues connected to the 'effective control' test: the preventive

93 UNGA, A/RES/56/83 (28.01.2002).

94 UNGA, A/RES/66/100 (27.02.2012).

95 ILC, p.20.

96 Behrami v. France and Saramati v. France, Germany and Norway [GC], no.71412/01 and no 78166/01, ECHR 2007, §§133-141.

97 R (on the application of Al-Jedda) v. Secretary of State for Defence, Opinions of the Lords of Appeal for Judgment, House of Lords of the United Kingdom, [2007] UKHL 58, §§5 and 24.

98 Al-Jedda v. The United Kingdom [GC], no.27021/08, ECHR 2011-IV, §84.

99 Nuhanovic v. The Netherlands [Civil Law Section], no.200.020.174/01, Ruling, Court of Appeal at The Hague 2011, §5.8.

theory, which is the capacity of the IO or the State to prevent the conduct; and the dual attribution, which is the application of the parameter to more than one party.[100] The Supreme Court of the Netherlands upholds the decision of the lower Court in 2013.[101]

Lastly, in 2014, the Dutch District Court in The Hague decides the case of the Mothers of Srebrenica through the full endorsement of the parameter set by Art.7 ARIO and accepted by the Supreme Court of The Netherlands. The argumentation of the Court defines 'effective control' as 'factual control' over the specific conduct of the contingents, to be determined on a case-by-case basis.[102] The appeal decision confirms the line of reasoning of the lower judge on the declension of the 'effective control' as factual.[103]

3.2. The 'Effective Control' Test

The ILC commentary on Art.7 draws the elements for the interpretation of the parameter, highlighting that the main field of application is that of multinational operations mandated by IOs.[104] It clarifies that, where IOs are involved, the control test operates with a different function compared to the one implied in the sphere of State responsibility: the parameter does not ascertain if a conduct is attributable or not; it points at the entity to which the conduct has to be attributed.[105] In addition, it specifies that the characteristic of effectiveness has to be regarded as the 'factual control' over the particular conduct;[106] this strengthens the aforementioned idea of vicinity linking the control with the conduct.

The case law of the last decade endorses with increasingly resoluteness the 'effective control' parameter by referring to the distribution of command and control. The Nuhanovic appeal judgement broaches the agreements on the transfer of command and control between IO and TCCs and then specifies that "the decisive criterion for attribution is not who exercised 'command and control', but who actually was in possession of 'effective control'";[107] and the Supreme Court ultimately confirms the parameter.[108] Later, the Mothers of Srebrenica judgements argue by referring also to general definitions and practice.[109]

Despite the growing consensus, a certain prudence is still necessary, as recommended by some commentators.[110] Forasmuch as the practice is scarce, the arguments presented by the latest

100 Idem, par.5.9.

101 The Netherlands v. Nuhanovic [First Chamber], no.12/03324, Judgment, The Supreme Court of the Netherlands 2013.

102 Mothers of Srebrenica v. The Netherlands and the United Nations, no.C/09/295247, Judgment, The Hague District Court 2014, §§4.33-4-34.

103 Mothers of Srebrenica v. The Netherlands, no.C/09/295247, Judgment, Court of Appeal at The Hague 2017, §12.1.

104 Reference already presented in 2004 by Special Rapporteur Gaja in its 'Second report on responsibility of international organizations' (UNGA, A/CN.4/541, Chapter III, in particular par.34).

105 ILC, p.21, par.5.

106 Idem, p.20, par.4.

107 Nuhanovic v. The Netherlands, §5.7.

108 The Netherlands v. Nuhanovic, §§3.9.1-3.9.5 and 3.11.3.

109 Mothers of Srebrenica v. The Netherlands and the United Nations, The Hague District Court 2014, §§4.36-4.42; Mothers of Srebrenica v. The Netherlands, Court of Appeal at The Hague 2017, §§2.20-2.21.

110 Bakker, pp.291-293, citing Crawford and Montejo.

judicial instances do not enquire painstakingly into the adequacy of the parameter but rather follow reflexively the orientation of the ILC commentary, the declarations of UN and AU that PKO are subsidiary organs of the respective organization are cryptic, it is unclear whether the rule of Art.7 has reached the status of customary international law. Nonetheless, the steps made in the direction of cementing the role of 'effective control' cannot be underestimated.

The arrangement of the authority between IO(s) and TCCs must then be deconstructed. The transfer of command is the first issue to be addressed, but it is not decisive per se; it has to be followed by the evaluation of the translation into practice of the authority, which is the concrete issuing of orders. As the latest decisions of the Dutch Courts indicate, the transfer of command and control takes place over the operational implementation of the mandate. This leads to the concepts of OPCOM and OPCON, recognised among scholars as the elements to be scrutinised for the purpose of international responsibility.[111] The ILC commentary to Art.7 ARIO explains that, in the application of the test of 'effective control', "operational control"[112] is the suitable parameter. Presented as the illustration of the factual characterisation of control, it is not specified whether the term is used in the technical sense of the military definition of OPCON; but this is not determinant. What is important is that the term used for defining the content of Art.7 ARIO is linked with the military concepts of OPCOM and OPCON.

The issuance of orders in the context of PSOs mandated by the IO is connected to OPCOM. Firstly, it has to be remembered that OPCOM contains OPCON at the outset. Secondly, OPCOM considers the issuance of tasks related to the coordination of the activities of the mission, whereas OPCON is more specifically pertinent to the accomplishment of the mission tasks that are emanation of the mandate. The fact that OPCOM encloses OPCON and that the latter can be retained or delegated by the former signifies that the assessment of who gives the orders depends on the distribution of the very OPCOM.

In consonance with and elaboration of the enquiry presented by the ILC, which is "who has effective control over the conduct in question",[113] the consequent question to be answered is "which operational directive influences more closely the conduct". Some authors consider the key to be the assignment of tasks,[114] which correctly points at the crucial factors. However, such a general reference to tasks is ambivalent because it can be reconnected with both OPCOM and OPCON, which are susceptible to overlap due to their constitution. Taking into account OPCOM, the term 'tasks' is associated with the general coordination of the contingents; hence the placement of the authority would be on a more strategic and organizational level. If an operational vicinity between control and conduct is established, the documents and the orders emanated at that level cannot be considered the closest link between the two components of the attribution. On the contrary, the notion of OPCON implicates a reading of 'tasks' that involves more specific operative functions. Thus, the interpretation of 'effective control' that closest ties control and

111 Mujezinović Larsen, Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test, p.513, recalling several scholars.

112 ILC, p.23, par.10.

113 Idem, p.22, par.8.

114 Leck, p.360.

action refers to the directions for mission accomplishment. These directions can assume different forms and facets. Resuming the discourse on the preparation of the necessary documents for the operationalisation of the mission and recalling the definition of OPCON, the reasoning inevitably lands up at the instrument that regulates the UoF that the contingents are allowed to employ in order to accomplish the tasks: the RoE. As a result, RoE assume a determinant characterisation for the assessment of the effectiveness of the control.

RoE are instructions to be applied in every operative context because they regulate actions, being the UoF the dominant one, that always constitute part of the occurrences on the field; consequently, they embody the bulk of the mechanism of control. Beyond the problems that may arise in terms of interpretation of the RoE designations, it is clear that other courses of events outside the path of creation and application of these rules may take place, leading to different evaluations and conclusions. In any event, these hypotheses do not alter the underlying role of RoE.

In conclusion, the interpretation of the 'effective control' test has to start from the consideration of OPCOM, as the first factual expression of the control exercised over the PSOs. The part of OPCOM that can be delegated, OPCON, represents the most suitable link between authority and conduct because it concerns the imposition of orders, also in the form of prohibitions, about the realisation of the action. In the chain of operational directives given to the peace mission, RoE are the baseline illustration of the vicinity between authority and impugned conduct, which signifies that the appraisal of the attribution will necessarily have to look at the party/parties in charge for their creation and modification.

The criterion is applicable in the AU framework, where the concurrent participation of the IO and TCCs shapes the development and application of RoE. And the contribution of several entities opens to the consideration of dual/multiple attribution, considered by the ILC Special Rapporteur Gaja and recently developed by the case law of Dutch courts; but the analysis of the issue lies beyond the scope of the present text.

Conclusion

The AU 'robust' PSOs are conceived as tool of the political process for the resolution of the conflict. Formulated in this fashion, the issue of consent raises a quandary in terms of operationalisation of the mission, ascribable to the demand of balancing the guarantee of its legality with its speedy deployment. And the latter affects the protection of civilians, which represents a mandate within the mandate for these operations.

Apart from that dilemma, which possesses in fact a political nature, the viability of the mission's mandate is mainly governed by the operational instructions that regulate the UoF, the RoE. Their content shows that they determine the action of peace supporters in the most considerable manner in comparison with other instructions, being the executive directives for engagement. The characterisation of RoE arises from the operative authority over the PSOs, reason why they possess the status of command and control tool.

In the process of creation and revision of RoE, the AU distinctly presents the necessity of constant coordination on the matter, which is necessary to overcome the differences arising from national policies, military settings and legal obligations. From the moment of deployment of the PSO, the leadership of the AU becomes paramount to guarantee a uniform interpretation and application of the rules, as well as to circumvent the interference of instructions by national authorities to their national contingents. At any stage, the effort of the AU, in synergy with the TCCs, should reserve particular attention to RoE. This means that a continuous reassessment and adjustment on the basis of the situation on the ground is needed, given that these rules determine the accomplishment of the mission within the limitations imposed by international law.

The two fundamental features of RoE, linked to UoF and authority, open the way to the consideration of their role for the purpose of attribution of conduct in the context of the responsibility of TCCs and IOs. This has to be associated with the convergence in case law and doctrine toward the suitability of the 'effective control' test, which brings the authority as close as possible to the impugned action. The result, applicable in the AU internal assessment of responsibility after the possible occurrence of incidents to the mission's contingents, is the consideration of RoE as one of the underlying document to be analysed.

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