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JURISDICTION AND CRIMINAL LAW APPLICABLE TO PORTUGUESE MILITARY PERSONNEL CONCERNING UNLAWFUL ACTS COMMITTED IN PEACE MISSIONS OUTSIDE NATIONAL TERRITORY

JURISDIÇÃO E LEI CRIMINAL APLICÁVEL AOS MILITARES PORTUGUESES POR ILÍCITOS PRATICADOS EM MISSÕES DE PAZ FORA DO TERRITÓRIO NACIONAL

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Abstract

In a context where the national participation in international missions, especially peace missions, becomes particularly relevant for the national interests, the due legal protection for the military cannot be neglected.

Consequently, the present research paper focused on the legal analysis of the access to a fair trial in Portugal and on the delimitation of the law applicable to the use of force in order to instil legal certainty to the regulation of the Portuguese Armed Forces military personnel in peace missions abroad.

The research led to the conclusion that, in order to guarantee access to a fair trial in Portugal by the Armed Forces military personnel in peace missions abroad, the Portuguese State should enter into status of forces agreements which include the regulation of the applicable jurisdiction. The Portuguese State should also approve a flexible law, though sufficiently regulatory, that sets the limits to the use of force in peace missions beyond doubts.

Keywords: Law of Military Operations, peace missions, jurisdiction, self-defence, Rules of Engagement, use of force.

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Resumo

Num contexto em que a participação nacional em missões internacionais, maxime, de paz, assume especial relevo para os interesses nacionais, a devida proteção jurídica dos militares não pode ser descurada.

Assim, o presente artigo centrou-se na análise jurídica da forma de garantir o acesso a julgamento justo em Portugal e delimitar a lei aplicável ao uso da força para conferir certeza jurídica às regras de atuação dos militares das Forças Armadas portuguesas em missões de paz em território estrangeiro.

A investigação levou à conclusão de que, para assegurar o acesso a um julgamento justo em Portugal dos militares das Forças Armadas em missão de paz no estrangeiro, o Estado português deve celebrar acordos sobre o estatuto das forças que incluam a regulação da jurisdição aplicável. O Estado português deve ainda aprovar uma lei flexível, mas suficientemente balizadora, que fixe os limites do uso da força em missões de paz, sem margem para dúvidas.

Palavras-chave: *Direito das Operações Militares, missões de paz, jurisdição, legítima defesa, Regras de Empenhamento, uso da força.*

1. The importance of identifying the legal status of Portuguese military personnel on international missions

The fact that soldiers swear an oath on the Portuguese Flag to give their own lives for the Homeland does not diminish the axiological significance of their willingness to expose themselves to the risks involved in the fulfilment of their missions. In this regard, Perry (1995) states that: 'The courage, the loyalty and the willingness of our men and women in uniform to put their lives at risk is a national treasure. That treasure can never be taken for granted, yet neither can it be hoarded like miser's gold'.

On the one hand, the State cannot avoid using military force to defend its interests; on the other, it cannot underestimate the value of the lives of its soldiers. The word 'lives' is not an overstatement in this context because when a State sends its soldiers to foreign lands with hostile environments, it is, in fact, endangering the lives of those who accepted the risks inherent to the military mission, in wartime and in peacetime, under section c) of article 2 of the Basic Law on the Status of the Military Profession (AR, 1989).

It is up to the State to provide military personnel deployed in a hostile environment with all the means they need to fulfil their mission and return safe and sound. This includes the guarantee that they are cognizant of the limits of the use of force, and that they will be entitled to a fair trial, preferably in accordance to the law of their country, should they be accused of any crimes in the course of that mission.

One might think that legal issues are not covered by the safeguard military personnel on mission. However, fear of reprisals for improper use of force can prevent soldiers from acting, endangering themselves and their fellow soldiers, compromising their willingness to follow orders and, ultimately, jeopardizing the mission.

Military personnel on mission in hostile environments have enough to preoccupy them without the added concern of legal uncertainty. Legal certainty in military actions is all the more important today, as the operational environment is becoming increasingly complex due to the asymmetric nature of threats.

In fact, the end of the Cold War and the watershed moment of the fall of the Berlin wall, on the night of 9 November 1989, marked a change in paradigm for global conflicts, which went from interstate to intrastate. *Mutatis mutandis*, the peacekeeping operations of the United Nations Organization (UN) increased exponentially, with the number of effectives in peacekeeping forces rising from 11.000 to 75.000 between 1989 and 1994 (ONU, 2014). On the other hand, peace missions are no longer the sole purview of the UN, and today these missions are also carried out by regional organizations and coalitions of States (Branco, 2009, p. 120).

During the 1960s, and up to the revolution of 25 April 1974, Portugal was focused on the Overseas War, and, in the following years, on addressing its internal situation (Pinto, 2011). Thus, despite some authors referring to Portugal's participation in the operation entitled United Nations Observation Group in Lebanon – UNOGIL, in 1958 (Sousa, 2011, p. 11), it can be said that it was not until the post-Cold War, and the subsequent changes in the international climate, that Portugal revised its strategic choices.

An analysis of the fact sheets published by the UN (2014) revealed that Portugal became a more active participant in peace missions during the 1990s, with some authors attributing that upsurge to a growing awareness of the advantages in terms of clout in international decision making fora (Pinto, 2011; Branco, 2009).

On the matter of the importance of the participation of the Armed Forces in this type of missions, General Soares Carneiro stated: 'We are living in a time of peace, one in which the Armed Forces are becoming more and more an instrument for the State's foreign policy. One might even say that the specific weight of a Country's foreign policy is often measured by its capacity to integrate national Military assets in multinational Forces to accomplish the tasks entrusted to them by the United Nations Security Council. Out of sight, out of mind' (1993 cited in Sousa, 2011, p. 19).

Between October 1989 and January 2000, Portugal became the European country with the largest number of effectives involved in peace missions. In December 1998, Portugal ranked 27th in a list of 75 countries contributing forces to the UN. By March 2000, Portugal ranked 10th out of 82 countries (Sousa, 2011, p. 15).

This increased participation by the Portuguese Armed Forces in United Nations peace missions must have certainly played a role in Portugal's election as a non-permanent member

of the United Nations Security Council in the 1997/1998 and 2011/2012 biennia (Cravinho, 2010). Portugal has also participated in missions for other organizations such as the European Union (EU) and the North Atlantic Treaty Organization (NATO) (EMGFA, 2014).

Moreover, the participation of the Portuguese Armed Forces in these missions is laid down in the Constitution. Since its original drafting in 1976, several provisions in the Constitution of the Portuguese Republic (CPR) legitimise the Portuguese participation in peace missions, specifically n. 3 of article 8. However, the constitutional review of 1997 introduced n. 5 of Article 275 of the CPR, which specifies that 'The Armed Forces are charged, as laid down by law, with fulfilling the Portuguese State's international commitments in the military field and taking part in humanitarian and peace missions undertaken by the international organisations to which Portugal belongs'.

The increasing importance given to international missions is evidenced in the new National Defence Strategic Concept (Presidência do Conselho de Ministros, 2013), which prioritises 'defending Portugal's international interests' over 'defending the territory', unlike the previous version of the National Defence Strategic Concept (Presidência do Conselho de Ministros, 2003).

This choice can be easily understood. In the words of Rodrigues (2012): 'We are in the presence of a context in which threats are no longer categorised by their geographic proximity, as had happened in the past, but mainly by the risks they pose, both direct and indirect; in a globalised world, this no longer depends on distance'.

The proof of how important these missions are to Portugal is that, according to the Armed Forces General Staff (AFGS) (2014), over 33.000 Portuguese troops have participated in missions abroad from 1991 to 2013. In a context where the national participation in international missions, especially peace missions, becomes particularly relevant for the national interests, the due legal protection for the military cannot be neglected.

It is imperative to prevent Portuguese soldiers from being tried in a hostile scenario, where the government may not have the monopoly on the use of force, and where the courts may find it difficult to guarantee the right to a fair trial. It is equally imperative to clarify the limits of the use of force allowed to Portuguese troops in this type of missions.

In the words of Andrade (1963, p. 54): 'Legal certainty, without which there can be no expectation of predictability in the courts' decisions, is in fact a clear and indispensable condition for individuals to weigh the consequences of their acts (…)'. Thus, the aim of this research paper is to identify the jurisdiction and the criminal law applicable to Portuguese military personnel on peace missions in foreign territory, with the specific objective of identifying their legal status and the situations in which the use of force is permissible.

2. Research strategy

According to the research strategy advocated by Bryman (2012, p. 35), it is important to begin by determining whether a project will rely on quantitative research, qualitative research

or mixed methods research. The author distinguishes between qualitative and quantitative research, depending on the orientation of the relationship between theory and research, and on the research's epistemological and ontological orientation (Bryman, 2012, p. 36).

It is necessary to analyse each of these strands in order to choose the most appropriate strategy for this research, bearing in mind its legal nature.

Quantitative research is based on a deductive approach to the relationship between theory and research, that is, the researcher works on the basis of what is known about a particular domain and deduces a hypothesis which is then subjected to empirical scrutiny (Bryman, 2012, p. 24). In contrast, qualitative research is inductive, and the emphasis is placed on the generation of a theory (Bryman, 2012, p. 36). Thus, 'it is clear, then, that inductive reasoning is developed from the specific to the general. In the first phase, the phenomenon is observed; in the second, observations are categorised; and in the third, hypotheses are formulated which will be verified later, in the fourth phase' (IESM, 2014, p. 13).

Canaris teaches us that (1996, p. 30): 'the attempt to envision the system of a given legislation as logical-formal or axiomatic-deductive is destined to fail from the onset'. In reality, Kantian jus-rationalism (based on the general-abstract, which can only lead to results through empiricism) is considered to have been surpassed by Hegelian dialectics, which focus on concrete institutions (Canaris, 1996, p. XVIII). Thus, in the words of Ferrara (1921, p. 182) 'A Jurist must have the capacity for conception and abstraction, the ability to render concrete into abstract'.

Thus, by resorting to the hermeneutics of the legal system, the present research aims to induct a theory, or at the very least hypotheses, which may allow us to answer the starting question, as is the norm in qualitative research.

In terms of its epistemological orientation, quantitative research posits positivism (Bryman, 2012, p. 36). Since the twentieth century, jurists have rejected legal positivism, which circumscribed their intervention to the exegesis of the written law (Ascensão, 1993). As taught by Cordeiro in his introduction to Canaris (Canaris, 1996, p. XX), positivism fails in decisive aspects, namely 'it does not tolerate - it cannot tolerate – the existence of loopholes. And when, in face of the evidence, it is finally compelled to accept them, it does not present any concrete solutions'.

By contrast, the traditional epistemological orientation of qualitative research is interpretation (Bryman, 2012, p. 36). In the words of Andrade (1963) 'Legal interpretation is the primary attribution of jurists'; therefore, interpretation is fully appropriate to a legal research paper such as the present one.

Lastly, in what concerns ontological orientation, quantitative research demands objectivism, which implies looking at reality as a set of acts outside the influence of social actors (Bryman, 2012, p. 33). In turn, qualitative research advocates a constructivist ontological stance, according to which social phenomena are continuously influenced by social actors, where knowledge is always undetermined and continuously changing, and the researcher's perceptions are seen as constructions of a version of reality (Bryman, 2012, p. 33).

Legal reasoning is constructivist, as taught by Andrade (1963, p. 17): 'there is no single right interpretation spanning the whole rule of law, although there can be two or more equally sound interpretations, at different moments (…) as these are subject to change with the ideas and vicissitudes of the reality in which they exist'. Also along these lines, Ferrara (1921, p. 178) states that legal construction is the 'most advanced phase in the theoretical development of law materials (…)'.

With regard to qualitative research, the IESM (2014, p. 18) points out that 'The research projects which use this method deal with values, beliefs, representations, habits, attitudes, and opinions. Rather than measuring phenomena, their goal is to obtain a deeper and more subjective understanding of the object of study, without concerning themselves with measurements and statistical analysis'. This is precisely the case with legal system research, which does not purport to be measurable, but consists in a evaluative ordering that is teleological in nature, where morals have a role to play (Canaris, 1996, p. XXXIII). The logical corollary of this analysis is that the present research should use a qualitative strategy.

Bryman (2012, p. 45) recommends that, once a research strategy has been defined, a type of research be selected in order to lend trustworthiness and validity to the study, depending on the intended focus one wishes to prioritise, in particular whether that focus falls on the causal relationships between variables, on the generalisation to larger groups of individuals than those participating in the research, on understanding a behaviour, or on how a given phenomenon is perceived.

However, it is understood that neither of the types of research postulated by Bryman (2012, p. 46) is suitable to legal research. One cannot carry out experiments in Law, nor collate of a set of quantifiable and qualifiable data (as is done in transversal and longitudinal research). A case study 'design' or a comparative study could be considered; however, these types are also not appropriate, as the aim is not to analyse a single case, nor to compare two or more cases, but to construct a theory based on the hermeneutics of the legal order.

Thus, this research will be conducted according to the legal method, integrated in a qualitative strategy: the legal method implies turning applicable law into concepts and its composition into a systematic unit. This is achieved by simplifying the law, which is presented in a 'concentrated, ordered, and rigorous synthesis that enables one to intellectually master all positive material' Ferrara (1921, p. 175).

This scientific development of a legal system is carried out in three phases: juristic analysis, logical concentration, and juristic construction. Juristic analysis decomposes the rule of law into its basic units by reducing rules to concepts. Once the legal concepts are distinguished, they must be re-grouped according to their similarities in order to extract general rules and principles, in a logical concentration. Finally, a system is constructed which must coincide exactly with positive law, be free from contradictions and possess *elegantia iuris*, that is, it must envisage extremely complex relationships in a simple fashion: 'Extreme simplicity is the superior manifestation of beauty' (Ferrara, 1921).

3. The taxonomy of peace missions

The first aspect we sought to analyse in the literature on peace missions was their taxonomy, and in doing so found that the terminology is not uniform. The terms 'missions' and 'operations' have been used interchangeably in this research, as in Branco (2010, p.115), notwithstanding the preference for the term 'missions' in the CPR and in the *National Defence Act* (NDA). This choice is justified by the fact that '[the] evolution of the concept and the proliferation of definitions has not been conducive to a universally accepted lexicon' (Branco, et al., 2010, p. 115). Indeed, the UN, NATO and the EU each use their own peace mission taxonomy, which we must familiarize ourselves with.

The UN instruments for peace and security (1992) (1995) are: preventive diplomacy and peacemaking, peacekeeping, peacebuilding, disarmament, sanctions, and peace enforcement.

NATO (2010) considers two types of operations: collective defence operations under article 5 of the North Atlantic Treaty (MNE, 1949), and Crisis Response Operations (CRO), entitled Non-Article 5 Crisis Response Operations (NA5CRO). NA5CRO are divided into peace support operations and other NA5CRO. Under peace support operations, NATO lists conflict prevention, peacekeeping, peacebuilding, peacemaking, humanitarian operations and peace enforcement.

NATO (2010) also provides for the employment of its forces in other NA5CRO, which include support to humanitarian operations, disaster relief, search and rescue, support to Non-Combatant Evacuation Operations (NEO), extraction operations, military support and assistance to civilian authorities and embargo enforcement (embargoes, maritime interdiction and No-Fly-Zones).

Due to lack of consensus on the use of military means, the official EU literature consistently favours the term 'crisis management' over the term 'peace operations' (Branco, et al., 2010, p. 135). With the changes introduced in the EU Treaty in 2007 (AR, 2008), articles 42 and 43 specify: 'missions outside the Union for peace-keeping, conflict prevention and strengthening international security', including 'joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peacekeeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation'.

4. Jurisdiction applicable to the military personnel of the Portuguese Armed Forces on peace missions

The etymology of the word 'jurisdiction' is the latin term *jus dicere*, which means *ad litteram*, to declare the law, that is, it is up to the State, by means of its courts, to settle disputes by determining the applicable law (Silva, 1996).

The term criminal jurisdiction refers to the activity of justice exercised by the courts, as a sovereign function of the State, under article 202 of the CPR. Criminal jurisdiction comprises the set of powers and duties which make it possible to declare an act a crime, and that the defendant is criminally responsible for it, as well as the enforcement of the respective

penalties or security measures. The judicial function is divided among the available courts, and the criminal process is the responsibility of the Constitutional Court, of the courts of law, and of the military courts, when available (Silva, 1996, p. 136).

In order to ascertain the applicability of Portuguese jurisdiction to hypothetical crimes committed by Portuguese military personnel on these missions, we must analyse the criminal law.

With regard to strictly military crimes related to the involvement of the Armed Forces in peace support missions, that is, acts detrimental to the national defence and its military interests, and others entrusted to the Armed Forces by the CPR (AR, 2003, articles 1, 2, and 9), n. 1 of Article 3 of the Military Justice Code (CJM) determines that: 'Except in the case of a treaty or international convention specifying otherwise, the provisions of this Code are applicable whether these crimes are committed on national territory or in a foreign country'.

That is, criminal law is broad enough to allow the Portuguese courts to consider themselves competent to try Portuguese military personnel by acts committed on duty in a military peace mission in foreign territory. However, this does not guarantee the exercise of Portuguese jurisdiction because the host country's courts may choose to exercise their own jurisdiction, as a customary principle of immunity for visiting military forces has not met with consensus.

In the opinion of Miranda (1988, p. 193), 'a State has the right to keep the competing powers of other States away from its territory'. That is, the sovereignty of a State includes the right to exercise jurisdiction in its own territory, without interference from other States. Thus, in order to obtain privileges or immunities inside the territory of a State, a legitimate exception to this general rule must be invoked.

States have granted privileges and immunities to bodies from other States inside their territory based on the principle *par in parem imperium non habet*[1]. For example, in accordance to international customary law, codified by the Vienna Convention on Diplomatic Relations (CM, 1968), diplomats are granted immunity in the State where they exercise their duties.

A similar principle was developed for war ships visiting foreign ports, as in *Schooner Exchange v. McFadden*[2], in which an American court relinquished its territorial jurisdiction in favour of the law of the flag flown by the ship. The judge decided that exercising jurisdiction over a military force of an autonomous State would be an act of bad faith, given that the ship had been granted permission to visit.

The immunity of visiting forces, which are defined as foreign military forces stationed in the territory of a State, with its consent, derives from multiple decisions made in the 19th and early 20th centuries (Fleck, 2001, p. 99). For several authors, the functional immunity of visiting military forces constitutes an international custom (Gill & Fleck, 2010, p. 95, 2008). However, other voices have spoken against the existence of this customary practice (Clark, 2015).

[1] An equal has no power over an equal.

[2] The schooner 'Exchange', which belonged to North-American ship-owners, was apprehended and converted into an armed warship by France. Due to damage caused by a storm, the ship docked in Philadelphia and the ship-owners libelled for restoration of the schooner.

The authors who reject the existence of a custom associate immunity with impunity: in the event of unlawful acts committed by visiting military personnel, the local populations have no way of knowing if any processes were ever conducted in the State of origin, or what the consequences were for the accused. On the other hand, exercising jurisdiction over acts committed in distant places is difficult, especially with regard to producing evidences, namely, the hearing of witnesses. Seriousness demands that origin States provide specialists for in loco investigations (Clark, 2015)[3].

The authors in favour of the custom argue that immunity does not mean that military personnel is not subject to the jurisdiction of their State, or of an international court such as the International Criminal Court (ICC), provided that their State adheres to the corresponding status. Furthermore, this immunity is not limitless, as it is not meant to benefit individuals in their private affairs, and only refers to acts committed in the exercise of their duties. Finally, these authors argue that a host State has never exercised criminal jurisdiction over a member of visiting forces unless provided for in a treaty (Gill & Fleck, 2010, p. p. 95).

The reality is that citizens' awareness of the presence of visiting forces, including UN forces, is increasing, driving parliaments to lay down the applicable rules of jurisdiction (Fleck, 2001, p. 7).

Indeed, since the Second World War there was a noticeable change of paradigm, and a compromise emerged between the law of nationality (*rationae personae*), that is, of the origin State, and the law of the host State (*ratione materiae*), a compromise that is expressed in the several agreements made from that point on, commonly entitled status of forces[4].

The Convention between the States of the North Atlantic Treaty regarding the Status of their Forces (Status of Forces Agreement - NATO SOFA) is one such type of agreement (AN, 1955), laying down a competing jurisdiction attributed to the origin State in certain cases, and in others to the host State.

In any case, lack of consensus on the existence of a custom granting functional immunity to forces stationed in foreign territory, even with the consent of that State, entails legal uncertainty. Indeed, allowing military personnel deployed in the service of the Portuguese State to be tried in foreign courts, by foreign laws, leads to more than the possibility that those individuals may be incarcerated away from their families and friends, and be subject to a trial in a conflict scenario, in courts not likely to have the conditions to guarantee the right to a fair trial, enshrined in article 10 of the Universal Declaration of Human Rights (MNE, 1978). The key issue is that, if the exercise of Portuguese jurisdiction over acts committed while on duty is guaranteed, the existence of Rules of Engagement (ROE) compatible with Portuguese law will endow military individuals with a greater degree of certainty. If these

[3] In our opinion, for a State to have specialists on site in a criminal investigation, the host State must give its consent, which may be agreed to in advance.

[4] A status of forces is an agreement celebrated between a State deploying its forces and the State hosting those forces in its territory. This type of agreement regulates issues such as the jurisdiction applicable to forces, formalities of ingress and egress from a country, force protection, freedom of movement, use and carry of firearms, support from the host State and tax exemptions, among other issues (Gill & Fleck, 2010, p. 94).

individuals are subject to a trial in the courts of the host State, they may be held accountable by local law.

In the event of unregulated jurisdiction, military jurists may attempt to identify conducts punishable by local law, which are legal in the countries of origin of military individuals, and propose that ROE be approved which comply to that law. However, when a State sends its military forces into the territory of another State with the latter's consent, as is customary, it seems fair that the origin State is allowed to determine the scope of the use of that military force, as advocated by Pierini (2007), to ensure its action is not interfered with by the host State.

Thus, the jurisdictional issue must be analysed according to the type of peace mission which the Portuguese military are integrated on, with the purpose of safeguarding the applicability of national jurisdiction to the acts committed in the performance of their duties.

a. Peace missions mandated by the UN

The participation of Portuguese military personnel in peace missions mandated by the UN is threefold: integrated in UN forces, in national forces, or in coalitions of States.

UN forces are institutionally integrated in the United Nations. That is, they not only act under the purview of this organization: they are under its command and control. In these cases, there is a chain of command from the Secretary-General of the UN, to the force commander, to each individual soldier.

A different situation is that of military operations carried out by States or by coalitions of States, under a UN mandate. These forces cannot be called UN forces because the individual governments, and not the Secretary-General of the United Nations, are responsible for the military control of operations[5].

The primary source of the immunities granted to military personnel in UN forces is the SOFA established between the UN and host States. Furthermore, the UN also has a model status of forces agreement[6]. However, there are certain situations in which these agreements are not established, for various reasons, namely due to urgency or to the absence of a government with legal authority to establish and implement an agreement. This was the case with the UN operations in Somalia, for which there was never an underlying SOFA (Worster, 2008).

The main question is knowing whether military personnel benefit from immunities in the absence of status of forces that regulate the issue of applicable jurisdiction, doing away with the need to celebrate those agreements.

With regard to UN peacekeeping operations, it should be emphasized that they have usually been conducted with the consent of the host States, in order to remedy the fact that

[5] This is the case of the ISAF.

[6] *UN Model Status of forces agreement* 'to serve as a basis for the drafting of individual agreements to be concluded between the United Nations and the host countries' (ONU, 1990).

those operations are not contemplated in the United Nations Charter (UNC), and that they are not carried out under chapters VI or VII of that instrument. With the approval of Resolution N. 794 (ONU, 1992) regarding Somalia, the first mission was carried out under chapter VII of the UNC, without the consent of that State.

The issue of consent by countries with stationed forces mandated by the UN largely determines the jurisdictional framework of the operations of UN forces.

Even for the authors who accept that an international custom of immunity of visiting military forces exists, that custom will always depend on consent to the presence of those forces in the territory. If that consent is not expressed in a status of forces agreement, it must be specified in another instrument (Worster, 2008, p. 309).

When a host State opposes the presence of UN forces, an armed conflict occurs, and International Humanitarian Law (IHL) may then be applied.

The issue of the application of IHL to UN forces is not consensual. It is true that the UN has international legal personality recognized by the International Court of Justice (TIJ, 1949), which means that it can celebrate treaties with other subjects of international Law. However, it is not included in a convention on armed conflict, which is understandable, as it is not a State and, as such, does not possess the necessary means to ensure the fulfilment of certain obligations. Still, international custom may be considered applicable in what concerns IHL. Even if this is not the case, some authors argue that, while the UN is not a part of those treaties, the same is not true of the origin States of the military contingents involved (Gill & Fleck, 2010, p. 131), hence, in any case, ICL would be applicable to them.

While this issue is not without contention, n. 2 of article 2 of the Convention on the Safety of United Nations and Associated Personnel (AR, 1998) presupposes that UN military personnel may have combatant status[7]. Thus, it is understood that when UN forces are involved in armed conflict, as in the case of peace enforcement operations, they must be subject to the common law principles of IHL (Fleck, 2001, p. 501).

This understanding is considered advantageous for military personnel because, although combatant status renders them legitimate targets, they cannot be accused of criminal activity for their participation in hostilities, with the exception of war crimes (Worster, 2008, p. 363).

As the application of combatant status is not certain, and not a guarantee of immunity *per se*, it is necessary to seek other sources of immunity, in particular article n. 105 of the UNC, which specifies that the Organization will enjoy, in the territory of its members, the privileges and immunities required for the achievement of its objectives, and that the representatives of the members of the United Nations and the employees of the Organization will also enjoy the privileges and immunities needed for the independent exercise of their duties in service of the Organization (MNE, 1991).

7 The Secretary-General's Bulletin on the compliance with IHL by UN forces (Secretário-geral da ONU, 1999) also supports these aims, and, while it is not binding for member States, is still an internal administrative rule of the UN (Branco, et al., 2010, p. 97).

However, this precept is not applicable to military personnel in forces outside the command and control of the UN, and its application to UN forces is likewise not without contention (Worster, 2008, p. 319). On the other hand, this precept only grants immunity in the actions required for the independent exercise of duties, and may leave some official actions without due protection (Worster, 2008, p. 319).

It is then necessary to consider the Convention on the Privileges and Immunities of the United Nations (AR, 1998), which specifies the terms of article n. 105 of the UNC, adding the category of 'specialists' to UN personnel. Some authors advocate that this Convention covers the military personnel of UN forces, as experts; however, this understanding is not without contention because expert status depends on nominations by the Secretary-General (Worster, 2008, p. 329).

As for the Convention on the Safety of the United Nations and Associated Personnel (AR, 1998), this instrument requires the immediate release of captured personnel, but does not specifically cover military personnel accused of committing crimes, and their privileges and immunities, turning their regulation over to status of forces agreements.

Some doctrine considers the UN status of forces agreement model to be evidence of customary practice, guaranteeing the jurisdictional immunity of its forces (Secretariat of the United Nations, 2004). This theory is not generally accepted because the existence of a uniform practice of celebration of treaties is not proof that, when such a practice is undertaken, it is believed to be compulsory (Worster, 2008, p. 357).

The UN Security Council has unilaterally granted immunity to UN forces in its resolutions, which remains in force until agreements are established with a given State. Some authors argue that UN resolutions are not empowered to do so because, when the immunity of the military personnel in their forces is not an absolute requirement for the fulfilment of their duties, they call into question the sovereignty of State in question, and that if these resolutions were able to establish status of forces, no agreements would be needed (Worster, 2008, p. 352).

It is possible to conclude that, if these resolutions can be imposed over the sovereignty of a given State (so much so that peace enforcement missions have been carried out under them without the consent of the respective States), they can also impose a status of forces on that State.

The fact remains that the UN seeks a consensual solution, when possible, and favours the celebration of a status of forces agreement over the imposition of such an agreement.

In essence, in the absence of a status of forces or of other instruments which express the waiving of jurisdiction by a host State, the jurisdictional protection of military personnel is ensured by an amalgamation of legal instruments, and it is not entirely clear. Therefore, it is advisable to celebrate a jurisdiction agreement on all occasions, as soon as possible.

b. Peace missions under the aegis of NATO

The status of forces under the aegis of NATO depends on whether these forces are stationed in the territory of the member-States of the alliance and of the participating States in the Partnership for Peace (PfP), or outside the territory of these States.

In general, the NATO SOFA (referred to in article n.1 of the PfP SOFA - AR, 1998), determines that the forces' origin State holds exclusive jurisdiction if the offences have been committed against its property or safety, or against a member of its forces, or if the offence stems from an act or omission in the performance of the official duties of the military authorities; in all other cases, the host State has jurisdictional rights.

The problem is that the NATO SOFA and the PfP SOFA only regulate the status of forces in the territory of member-countries of the Atlantic Alliance and of their partners for peace[8].

Jurisdiction agreements have been celebrated to ensure that military personnel integrated in NATO forces is not tried by a host State that does not belong to the Alliance or to PfP countries. However, NATO is not a sovereign State, nor does it have international legal personality. NATO is also not a unitary international organization, as it comprises several distinctive elements, invested with their own legal personality.

Article 10 of the Paris Protocol grants legal personality to Supreme Headquarters, under which the Supreme Headquarters Allied Powers Europe (SHAPE) has entered into status of forces agreements in favour of member-States, as third parties. However, France has questioned the capacity of a supreme headquarters to enter into agreements which may potentially affect it (Fleck, 2001, p. 307).

It is true that no supreme headquarters can bind a member-State of the Alliance without its express consent, nor prevent a member-State from celebrating its own agreements. However, the French stance is proof that the negotiation of these agreements must include member-countries (Fleck, 2001, p. 307).

Thus, NATO has celebrated agreements on the status of its forces with several non-allied States hosting those forces, along with separate agreements between a given host State and the NATO member-States.

For instance, article 2 of the SOFA with Bosnia and Croatia granted general immunity to NATO personnel. However, it was deemed necessary to celebrate implementation agreements with each NATO member-State to regulate the rules of cooperation in this respect, namely, specifying the competent authorities of the respective State (Fleck, 2001, p. 516).

That is, without prejudice to the understanding that the celebration of status of forces by NATO is advantageous, as it allows for the standardization of the rules applicable to the military personnel in the different contingents, it is necessary to safeguard potential specificities related to national interests. For that purpose, Portugal must analyse the agreements celebrated by NATO to determine whether it is necessary to celebrate a separate agreement with a given host State.

[8] In fact, in 1951, the members of the Atlantic Alliance attempted to address the problem of stationed allied military forces in the territory of NATO member-States. As it happens, it is more common today for NATO military forces to participate in operations outside the NATO area.

However, Portugal has not always shown concern in this respect. Portugal has deployed military contingents under the aegis of NATO on several occasions, without any implementation agreements being celebrated on the status of forces entered into by NATO, especially in the International Security Force (ISAF) in Afghanistan.

c. Peace missions under the aegis of the European Union

EU member-States, much like those under the aegis of NATO, have also celebrated a status of forces agreement, the EU SOFA (AR, 2004). However, the EU SOFA is not yet in force because Denmark, Ireland, United Kingdom and Italy had not ratified it at the time this text was composed.

One might believe that, as we are dealing with EU countries, several typical aspects of the status of forces, such as the free circulation of people and goods, would be resolved *a priori*. However, free circulation of people and goods does not exist across EU countries, even those that are members of the Schengen Area, because military sovereignty has not been transferred to the EU (AR, 2008)[9].

In terms of jurisdiction, unless provided for otherwise and if the judicial reserve of the origin State is accepted as an established international custom, military personnel will be subject to the host State's jurisdiction and will be tried for any acts they have been accused of according to its law, even if they were committed in the exercise of their duties.

If the host State is a member of the EU, the concern with trials that may breach the Universal Declaration of the Rights of Man is negligible. Still, member-States have felt the need to regulate the status of their respective forces on European territory, as evidenced by the celebration of the EUROFOR Statute (AR, 2002).

As for the status of EU forces deployed outside the territory of member-States, similarly to what happens with the UN and NATO, it must be provided for in an agreement with the host State.

Contrary to NATO, the EU has international legal personality and clear competence to celebrate international agreements under article 216 of the EU Treaty (AR, 2008). Even so, the Portuguese State must ensure that its interests are being safeguarded and evaluate the need to celebrate separate agreements.

d. National peace missions

Portugal's participation in peace missions is commonly done under the aegis of the UN, of NATO, or of the EU. However, it is also necessary to set the jurisdictional framework of the peace missions which Portugal conducts independently, that is, outside

[9] Should a Spanish military force enter France without prior consent, this will be considered an act of aggression.

the framework provided by those international organizations,[10]. It is in this context that NEO[11], are carried out, of which Operation Crocodile, in 1998, and Operation Manatee, in 2012 are examples.

As described above, criminal law is broad enough to allow the Portuguese courts to consider themselves competent to try Portuguese military personnel by acts committed on duty in military peace missions outside national territory. However, this does not guarantee the exercise of Portuguese jurisdiction because the local State courts may choose to exercise their own jurisdiction, as a customary principle of immunity for visiting military forces has not met with consensus.

In fact, any military personnel already in Portugal will not be extradited, under n. 4 of article 33 of the CPR. However, if they are unable to reach the Portuguese embassy, a ship, or an aircraft before they are arrested, they will risk being tried locally.

The solution to jurisdiction conflicts of this type is the celebration of a status of forces agreement to regulate the applicable jurisdiction. The problem posed by this type of solution is the delays involved[12], which are incompatible with the immediate needs of NEO operations.

As the majority of national missions are carried out within the Community of Portuguese Language Countries (CPLP), the status of forces must be safeguarded *a priori* and in a timely manner. Thus, it would be beneficial to celebrate a status of military forces agreement within the CPLP, similar to those already in place with NATO and with the EU, which would apply even when there are no operations in progress. The celebration of this agreement appears to be justified, given the extensive technical and military cooperation between the countries in this community, which results in the circulation of military personnel in the CPLP area and the ensuing need to regulate their legal status in those situations.

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[10] It should be noted that the constitutionality of the peace missions conducted independently outside national territory is not without contention, bearing in mind that article 275 of the CPR limits them to the framing provided by the international organizations of which Portugal is a member. However, these missions are set out in the LDN (AR, 2014), especially in article 24, n. 1, section c).

[11] NEO are military operations by a State in the territory of another State to protect the lives of its citizens. Although they are not peace missions *sensu stricto*, these missions are framed by NATO as Crisis Response Operations, and are therefore considered relevant to this text.

[12] The approval of treaties on defence and military matters falls within the competence of the Assembly of the Republic (article 161, section i) of the CPR. Thus, the status of the forces to which Portugal belongs has been approved by the Assembly of the Republic. An example of this is the NATO SOFA and the Treaty on the Legal Status of EUROFOR (2002). The possibility might be considered that the executive power, specifically the Ministry of Foreign Affairs, will seek to reach informal jurisdiction agreements with other States, for example, through the exchange of ministerial letters or memoranda, by arguing that what is at stake is not the abdication of jurisdiction by the Government without an international convention, or a special law authorizing it, but the abdication of jurisdiction by the host State. This has not been the case in practice: there are no guarantees that other States will comply with those informal jurisdiction agreements, to the extent that their binding nature will be highly questionable if those States do not accept (as Portugal does not) that the agreements referred to as executive agreements (which only require the intervention of the executive body) have legal effect - an example of that risk is the recent Abu Salem case, where extradition to India was granted based on guarantees given by the Indian Government that were not observed by the Indian courts, which did not consider themselves bound by them (DN, 2015). The only alternative would be a constitutional revision allowing the executive power to approve some treaties on defence, especially with regard to status of forces, thereby expediting what is a rather slow process.

Finally, the Portuguese courts may exercise jurisdiction over the military personnel of the Portuguese Armed Forces in peace missions abroad[13], but in order to guarantee the exercise of national jurisdiction, status of forces must be celebrated with the host States.

5. Limits set by the Portuguese law to the use of force by Portuguese Armed Forces military personnel on peace missions

Based on the assumption of applicability of the Portuguese law, guaranteed by the celebration of jurisdiction agreements, we will now seek to examine the limits of the use of force by Portuguese military personnel on peace missions.

The use of force is limited and controlled by legal, political and military reasons. The ROE are 'a means to exercise that control politically and militarily' (Carreira, 2004, p. 37). However, contrary to belief, failure to comply with the ROE of a given mission is not in itself sufficient legal grounds for criminally prosecuting military personnel.

There are several definitions of ROE, depending on country and organization (Gill & Fleck, 2010, p. 117). Using the NATO concept (2003, p. 2) as a guideline, the ROE 'are 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'.

'Compliance with the ROE is not a guarantee of legality' (Carreira, 2004, p. 38). The ROE are not, in fact, laws. The Portuguese case law treats them as orders from a hierarchical superior (Carreira, 2004, p. 40) - that is, a violation of the ROE constitutes at best an act of indiscipline or a crime of insubordination by disobedience.

Unquestionably, the ROE must be prepared in accordance with the applicable law: 'ROE first must be lawful'[14] (OTAN, 2003, p. 2). The military personnel bound by the ROE assume their legality has been verified. In order to ensure that reliability, it is the responsibility of legal advisers to review them, not only when they are approved but on an ongoing basis. For that purpose, military jurists must be able to identify the jurisdiction and the applicable law.

The ROE are an instrument available to the force commander to harmonize national differences (Gill & Fleck, 2010, p. 126), and States may in fact limit their application to their respective forces through the inclusion of caveats. However, it is up to the national legal adviser to verify whether the proposed ROE are acceptable to these forces, according to the applicable law.

Working on the assumption that the Portuguese jurisdiction applies, it appears that the use of force by Portuguese military personnel on peace missions abroad is based on IHL and on International Human Rights Law (IHRL), on the UN mandate, and on Portuguese criminal law.

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[13] It should be noted that undue delays in the exercise of Portuguese jurisdiction may result in military personnel being tried by the ICC under n.2 of article 17 of its statute (AR, 2002). In spite of the conviction that the ICC grants access to a fair trial, this type of situation would be potentially embarrassing for the Portuguese State.

[14] Above all, the rules of engagement must be legal.

a. International Humanitarian Law and International Human Rights Law

When the violence in a host State does not rise to the level of an armed conflict, IHL cannot be considered applicable, although its general principles may apply (Gill & Fleck, 2010, p. 9). One might then be led to think that IHL is never applicable on peace missions.

However, as mentioned above, some peace missions may involve combat situations. This is especially the case with UN peace enforcement missions, which, in the words of Gill & Fleck (2010, p. 4), are actions that are 'authorized by the Security Council under Chapter VII to maintain and restore international peace and security, which – while potentially involving combat – will not normally entail the use of full-scale combat on a sustained basis against a State'.

Thus, IHL is only applicable when forces on a peace mission are belligerent occupiers of a foreign territory (Gill & Fleck, 2010, p. 129). While this is not the rule, it does happen, as in the ISAF peace enforcement mission, justified in Chapter VII, in certain areas of Afghanistan where armed conflict is occurring. IHL applies here, although the mission objective is not combat, but rather support to the Afghan government.

As for IHRL, its full applicability during an armed conflict is a matter of contention[15] (Schutter, 2014, p. 584), but it will set the standard for minimum force[16] in the context of peace (Gill & Fleck, 2010, p. 129) and it may be applied extraterritorially (Messineo, 2012).

Portugal has entered into most IHL and IHRL treaties, and as such Portuguese military personnel must comply with IHRL rules in situations of peace, and with IHL, at least, in peace missions where armed conflict may occur.

b. United Nations Mandate

The aim of this research paper is not to discuss the issues related to the legal basis for military operations. Even so, the UN mandate is referred to as the source that legitimises the use of forces by a State on foreign territory in most situations.

This mandate is approved by the Security Council and contains the authorization for the use of force. The Security Council can allow the use of force to ensure compliance with the mandate, under chapter VII of the UNC (MNE, 1991). The details are specified in the Operational Plan and in the ROE. This mandate is legally binding to its addressees, namely Portugal (MNE, 1991, article 25); therefore, the national courts should consider it a basis for the use of force by the military personnel of the Portuguese Armed Forces.

While analysing the mandate and outlining the operational concept, commanders plan the requirements of each participating component (naval, land, aerial and special operations), as well as the type and quantity of units and weapons systems needed to fulfil a given mission. The rules of engagement are drafted at the same time (Gill & Fleck, 2010, p. 151).

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[15] Article 15 of the CEDH accounts for derogations in armed conflict situations..

[16] Minimum force is force that is bound by the degree, intensity and duration needed to achieve an objective, including the authority to use lethal force (OTAN, 2003).

The robustness of these mandates is highly variable, in the sense that the use of force may permitted to a lesser or greater degree. The difference between peace enforcement operations under chapter VII of the UNC and peace operations conducted with the consent of the host State is particularly noticeable.

The use of force in peace enforcement missions may be more than just reactive, especially in the case of hostile acts and intentions. The mandate may include all necessary measures for its execution, combined with the principles of proportionality and necessity (Gill & Fleck, 2010, p. 111). These principles do not stem directly from IHL (which only occurs in the case of combat forces), but from the fact that the Security Council is subject to the UNC, under article 24.

With regard to peace operations carried out with the consent of the host State, those are limited to the use of force for personal defence, the defence of equipment, facilities, civilians, and of the mandate (Gill & Fleck, 2010, p. 150).

c. Portuguese criminal law

Number 4 of article 2 of the UNC stipulates a general ban on the use of force. The UNC specifies caveats in the case of self-defence against an armed attack, and in actions under the aegis of the UN or authorized by the Security Council.

The case could be made, then, for the use of force by military personnel on international missions only being allowed in armed conflict situations, under IHL, or justified by the UN mandate and by IHRL.

However, NEO must also be taken into consideration. The legal basis for NEO operations have been a subject for debate since the entry into force of the UNC (Baptista, 2003, p. 200). Should the host State consent to the operations, the ban referred to in n. 4 of article 2 of the UNC will be excluded. An operation without the consent of the host State will prove more problematic[17].

As the object of this research paper is not the legal basis for operations but rather the legal limits of the use of force by military personnel, it should be emphasised that, even when Portuguese missions have not been mandated by the UN, they were not carried out without the consent of the host State.

The NEO missions conducted by the Portuguese Armed Forces are based on section c) of n. 1 of article 24 of the LDN. However, this precept does not restrict the use of force by Portuguese military personnel in this type of operations.

[17] Resolution n. 3314 of the UN General Assembly (1974), on the definition of aggression, does not include threats to national citizens on foreign territory; however, the definition is not clear-cut. Some authors argue that, even without the consent of the host State, no violation of n. 4 of article 2 occurs, as what is in question is the exercise of self-defence laid down in article 51 of the UNC (Thomson, 2012). Other authors consider that a threat to national citizens abroad does not constitute an attack on the State (Bowett, 1986). Some also argue that unauthorized NEO are based on the right to self-defence, in accordance to customary international law already in force before the drafting of the UNC (Gill & Fleck, 2010). Thus, the ICJ (1980) did not consider the attempt to rescue North American hostages in Tehran illegal.

In the opinion of Silva Dias (2009), public authorities must not appeal to denials and defences in order to broaden the scope of their intervention, as they may incur in a contradiction of values: 'Self-defence and the state of necessity action are, in a broad sense, exceptional cases of protection of private lives available to citizens in the absence of ordinary mechanisms of public protection'.

In reality, Law n. 53/2008 (AR, 2008) and Decree-Law n. 457/99 (CM, 1999) set down police measures and the situations requiring the use of firearms in police actions. Therefore, Figueiredo Dias (2012) considers that these special provisions prevail over the general rules of self-defence.

Also, the Code of Criminal Procedure (AR, 1987) sets down situations in which the criminal police authorities have the authority to act beyond what is allowed to a common citizen, such as detention out of the act of committing the offence (article 257), identifying a suspect (article 250) or searches (articles 174 and 251).

As it happens, the CJM does not provide rules for that effect[18] and no special law exists for the use of force by the military personnel of the Portuguese Armed Forces outside armed conflict situations. The use of military force in peacetime without a UN mandate may have been considered inappropriate; however, situations such as the shootdown of *renegade*[19], aircraft on national territory, or NEO missions abroad should not be forgotten.

Thus, Silva Dias (2009) concedes that an excusatory state of necessity may legitimise the shootdown of *renegade* aircraft by state authorities. That is, in the absence of a special law, the author considers denials and defences defined in the Criminal Code (CC) (CM, 1995) are applicable to Portuguese military personnel, including for air policing activities, that is, in the exercise of public authority tasks.

In our understanding, the same thing occurs with NEO operations. As they are not combatants in an armed conflict in the State where the operation is being carried out, and as they lack a UN mandate providing all the means and measures needed to continue the mission, and, with the provisions made by article 2 of the MJC for the subsidiary application of common criminal law to strictly military crimes, denials and defences specified in the CC are considered applicable to military personnel, as a way to legitimise the use of force.

However, taken to the extreme, this reasoning may mean that Portuguese military personnel will be treated as common citizens, as there is no special law allowing the use of force in other circumstances, as in the case of law enforcement authorities.

Restricting military action to the action of common citizens gives rise to constraints that may jeopardise the fulfilment of a mission and the safety of military personnel and of other individuals

[18] Article 9 of the MJC (Military Justice Code) equates crimes committed on peace support missions to war crimes, but provides no specifications on authorized use of force. In accordance with the principle of legality, the Government can only act on the law, unlike private entities, which are free to act on anything not prohibited by the law (Batalhão, 2015, p. 54) hence it is not enough to assume that anything not prohibited by the MJC is therefore allowed.

[19] 'The term "renegade" is used to define an aircraft or civilian platform operating in such a way as to arouse suspicion that it might be used as a weapon in a terrorist attack'. (CEMGFA, 2010)

protecting it. A proof of the absurdity of that reasoning is that the State entrusts NEO operations to the Armed Forces, and not to security forces, precisely because they are conducted in a hostile environment, emphasizing the need for more robustness in rescue actions.

At the very least, searches must be conducted on those seeking rescue, that is, seeking to return to Portugal. A temporary seizure of weapons may also be required, as well as riot control, detentions (even if rendition to local authorities is agreed with the host State), or installing and guarding cordons. Should military personnel be treated as common citizens with regard to the use of force would entail that the people involved in those acts had to have given their consent, under article 38 of the CC, which is manifestly insufficient for the success of an operation.

Entrusting the military with a mission without granting them the necessary force implies, on the one hand, insufficient legal protection, thus increasing the likelihood of legal action, and, on the other hand, an exponentially higher risk of mission failure, endangering the safety of military personnel and of the citizens in need of rescue.

This being the case, it seems inadvisable to treat military personnel like common citizens, bound by the applicability of denials and defences laid down in common criminal law. Thus, and in the absence of a special law, it is understood that the use of force by military personnel, outside national territory without a UN mandate will be, aside from denials and defences, regulated by articles 2 and 18 of the CRP and IHRL, enshrined in the ECHR (European Convention on Human Rights, AR, 1997), and the principles of necessity and proportionality, as laid down in several precepts, namely in section f) of n. 2 of article 15 of the Statue of the Military Personnel of the Armed Forces (CM, 1999) or in section e) of article 12 of the Rules of Military Discipline (AR, 2009).

Uncertainty about the limits of the use of force by the military personnel of the Portuguese Armed Forces in peacetime leads us to argue that this issue should be defined in a special law. This does not mean that such a law should be comprehensive to the point where it becomes inflexible. What seems advisable is that that the law defines the limits of the use of force by military personnel, in situations in which the Portuguese State decides to employ them, based on necessity and proportionality criteria, laying down, for instance, authority to search, detain out of the act of committing an offence or the concepts of hostile intention and hostile act in the NATO doctrine (2003), which are more comprehensive than denials and defences in common criminal law.

This would clarify the limits of the use of force by Portuguese military personnel in national operations that are not considered armed conflict situations, in the absence of a UN mandate, such as NEO of national citizens.

Conclusion

There is a common perception, among military personnel, that the ROE, *per se*, guarantee those who comply with them exemption from criminal liability. However, the ROE are merely

directives on the use of force, which only grant exemption from criminal liability when based on *a priori* legal work, ensuring their compliance to the applicable jurisdiction and law.

On the other hand, bearing in mind the lack of consensus on the existence of a custom that grants functional immunity to forces deployed in foreign territory, even with the consent of the respective State, the solution to a jurisdiction conflict is the celebration of a status of forces agreement with the host State, specifying the applicable jurisdiction.

Ensuring, when possible, that Portuguese military personnel are subject to national jurisdiction regarding acts committed on duty means the ROE are compatible with Portuguese law, as well as meet those soldiers' expectations, providing them with a greater degree of certainty. In fact, if military personnel are subject to trial in the courts of the host State, they may be held accountable by the local law, and should the ROE not be compatible with that law, compliance with the rules will not do much to exempt them from liability.

Although a case has not yet been discovered when a host State exercised criminal jurisdiction over a member of visiting forces, without explicit provisions having been laid down in a treaty, there is no consensus on the existence of an international custom guaranteeing the jurisdiction of the origin State. Thus, the applicable jurisdiction depends on the type of peace mission in question. In conclusion, the most effective way to set that jurisdiction is through the celebration of status of forces with the host State.

The Portuguese State has the following reservations regarding this solution:

- First, without prejudice to the understanding that the celebration of status of forces by the international organizations in which the Portuguese military are integrated is advantageous, certain potential specificities related to national interests must be safeguarded, which does not currently happen;
- With regard to national missions on foreign territory, particularly NEO operations, the slow process of celebrating a SOFA by the responsible sovereign entities may be incompatible with the immediate needs of an operation;

Thus, the Portuguese State must not deploy its military personnel on peace missions without securing their protection by a status of forces regulating the applicable jurisdiction, in particular regarding acts committed on duty, in order to guarantee access to a trial in Portugal. Thus, it would be of great importance to celebrate a status of military forces agreement within the CPLP, similar to those already in place with NATO and with the EU, which would apply even when there are no operations in progress.

As for the limits of the use of force, when the Portuguese military are part of forces in a peace mission that are legally classified as a part in an armed conflict, or belligerent occupiers in foreign territory, IHL is applicable, and Portuguese military personnel will then acquire combatant status. In the remaining situations, the UN mandate sets the limits for the military personnel actions.

Outside armed conflict situations, and without a UN mandate, no special law exist on the matter at present.

In this way, it is understood that the use of force by military personnel, outside national territory without a UN mandate will be, aside from denials and defences, regulated by articles 2 and 18 of the CRP and IHRL, enshrined in the ECHR (European Convention on Human Rights, AR, 1997), and the principles of necessity and proportionality. In spite of the efforts made towards the application of articles 2 and 18 of the CPR, of IHRL, and of the principles of necessity and proportionality to limit the use of force in those situations, there is the risk that a judge may rule that Portuguese military personnel cannot act outside the scope of common criminal law as any common citizen.

In order to guarantee legal certainty on the use of force by military personnel in these situations, the Portuguese State should approve a clear law, which should also be sufficiently flexible, that does leave either the military or the judges with room for doubt on the use of force in those circumstances.

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