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Legal and strategic aspects...

...of control of armed forces in frames
of the complex international security
architecture

Abstract

The contemporary legal and strategic perception of control of armed forces in frames of the complex international security architecture is a very broad issue. As a compendium, it needs a separate study, which goes however beyond this article. Therefore, the author of this analysis considers the most essential issues connected with the subject. This analysis is based on the doctrine and practice of international law as well as broadly understood international security developments, which are supplemented by essential legal and strategic documents of international organizations dealing with the control of armed forces.

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Introduction

The contemporary legal and strategic perception of control of armed forces in frames of the complex international security architecture is a very broad issue. As a compendium, it needs a separate study, which goes however beyond this article. Therefore, the author of this analysis considers the most essential issues connected with the subject. This analysis is based on the doctrine and practice of international law as well as broadly understood international security developments, which are supplemented by essential legal and strategic documents of international organizations dealing with the control of armed forces. The general overview of this issue shows, that the main aim of all contemporary societies is to reconcile the need for broadly understood security, provided by the armed forces, on the one hand, and the requirement to respect democratic values, like rule of law, human rights and freedoms on the other.

The essence of control of armed forces, which indeed nowadays includes a democratic control and civilian management, can be assessed on five main different dimensions, including political, institutional, legislative, judicial, and societal oversight of the armed forces. Moreover, the democratic control of armed forces is an indispensable element of a democratic government and from this perspective it has today two main dimensions, which both enhance and promote confidence-building and peace: domestic and international dimension.¹ Nevertheless, the structure of this analysis attempts to classify some of the competencies at stake, and it will take into account the distinction between the domestic and international dimensions, even when, as it will become apparent, the classifications or divisions are not always exact.

The contemporary civilian management and democratic control over the army do not only consist of establishing organs and mechanisms of control and optimising their activity. It is significant to determine and respect the role of the armed forces in the society, which would allow making the army a politically neutral instrument of legally functioning forces as well as appropriate organisational structures with strictly defined protection measures allocated to carry out the undertakings of the state and the nation.² Therefore, the position and function of the army in society should be based on the fact that it reflects the features of the society it comes from. To facilitate the effective progression of the process, the following aspects should be taken into account: in what manner the army reacts to the decisions and actions of civilian society; whether there are intermediary bodies between these

¹ <https://www.demandat.eu/people/daf>.

² Walter Feichtinger, Carmen Gebhard (eds.), *Globale Sicherheit. Europäische Potenziale. Herausforderungen – Ansätze – Instrumente*, Böhlau Verlag Wien – Köln – Weimar 2010, pp. 85-287.

spheres; to what extent the armed forces represent interests of the society; and whether a soldier-citizen exists or if the two nations should be treated separately.

The concept of civilian and democratic control of armed forces, like truly Tuba Eldem assumes, was widely used during the Cold War era, largely perceived as a response to the threat of praetorianism and the resultant need to enforce civilian executive control of the military. Presently, it is replaced in the post-Cold War era by the concept of democratic control signifying not only the subordination of the military to the civilian executive but also the restriction of the political leaders' autonomy in military and defence policy.³ In this way, the concept of democratic control of armed forces assesses the compatibility of military relations with society in terms of democratic norms such as openness, transparency, accountability, legitimacy, and pluralism.

Several important structural changes that follow the end of Cold War brought the importance of democratic and civil control of the armed forces to the center of the main six academic legal and strategic debates. The first one consists of the emergence of a global democratic "zeitgeist." The second describes the transition that took place in the Central and Eastern Europe and the Western actors' desire to build stable democracies in the region. The third debate includes the enlargements of the EU, NATO, and the Council of Europe and their respective conditionality criteria.⁴ The fourth debate concerns the use of democratic arms control norms as interstate confidence-building measures, such as the OSCE Code of Conduct on Politico-Military Aspects of Security. The fifth consider the attachment of "security sector reform" to the agendas of development, good governance, and peacebuilding communities. The sixth debate discusses the transformation of both NATO and national militaries from conventional war fighters to peacebuilding and peacekeeping actors.⁵

These post-Cold War processes all contributed to the development of essential legal norms of democratic control armed forces and civil management at the regional and international levels. The epistemic communities or expertise-based networks of professionals engaged in security sector reform, which have multiplied within the last decade in tandem with the abovementioned structural

³ Tuba Eldem, *Civilian Control of Armed Forces*, https://doi.org/10.1007/978-3-319-74336-3_11-1.

⁴ Marcin Lech, *Smart Defence im Rahmen des heutigen Völkerrechts*, [in:] *Interkulturelle Kompetenz deren Notwendigkeit für Einsatz und Führung, Workshopbeiträge 2013*, G. Ebner (ed.), "Schriftenreihe der Landesverteidigungsakademie," Wien 2013, pp. 83-100.

⁵ Ibidem.; Walter Feichtinger/ Predrag Jurekovič (eds.), *Internationales Konfliktmanagement im Fokus. Kosovo, Moldova und Afghanistan im kritischen Vergleich*, Nomos Verlag 2006, pp. 34-168.

Marcin Lech, *Legal aspects of of international security in the era of radicalization, extremism and international Terrorism* [in:] Paul. G. Ertl, Gunther Fleck (eds.), *Schriften zu radikalisation, Extremismus und Radikalismus Band 1*, Organisation, Denken, Recht, „Schriftenreihe der Landesverteidigungsakademie," pp. 69-110;

<http://www.nato.org>;

<http://www.osce.org>.

developments, have played a pivotal role in the elaboration of legal norms of democratic control of armed forces and security sector reform in the international level.⁶

Therefore, the main task of this analysis, which is broadly discussed in the doctrine and practice,⁷ dealing with modern control of armed forces, is to identify the necessity and grounds for a democratic oversight of armed forces. The response to the question as to why democratic oversight is needed, then, constitutes the starting point for recognising the actors involved, the acts or issues that are under this control, the mechanisms available for it, and the various times at which control is to be exercised. The main dimensions involved are *who* controls, *what* acts or issues are under control, and *how* the control is exercised. The different solutions adopted by states, in the perspective, to which organs or institutions carry out the control and supervisory functions over the armed forces, to identify the acts and issues of the military that are under control, and to demonstrate the different mechanisms for controlling the decisions by which this national body develops its national security task.⁸ The need to respect democratic principles and fundamental rights permeates all state institutions, including those related to the security sector.

In general, clear, transparent and effective mechanisms of control over the armed forces (and the security sector in general) exist due to the involvement of democratic institutions. Among these, parliament of every state must have an essential role in monitoring, scrutinising and control. Given the specific characteristic of this sector (in which the use of legitimate violence is involved), the underlying question is how to balance, or better, how to optimise, on the one hand, the public good, value or end involved in the decisions or acts of the military, with, on the other hand, principles, standards and values of democracy.⁹

Contemporary armed forces are increasingly involved in international security architecture, for example, in peacekeeping and peace support missions, and in international responses to transnational security threats such as arms proliferation, international terrorism and organized crime, among others. New roles and responsibilities create opportunities for the armed forces to prove their relevance while extending their competencies. However, new roles in internal and international security also create

⁶ Franz Kernic/ Walter Feichtinger (eds.), *Transatlantische Beziehungen im Wandel. Sicherheitspolitische Aspekte der Beziehungen zwischen der Europäischen Union und Lateinamerika*, Nomos Verlag 2006, pp. 9-181.

⁷ <https://venice.coe.int/>;

Security Council Briefed on fast-Breaking Developments in Ukraine as Political Official Warns Failure to Secure Russian-Ukrainian Border Obstructing Peace, <http://www.un.org/press/en/2014/sc11645.doc.htm>>

⁸ <https://www.giplatform.org/actors/geneva-centre-democratic-control-armed-forces-0/>;

<https://www.un.org/unispal/document-source/geneva-centre-for-democratic-control-of-armed-forces-dcaf/>

⁹ <https://venice.coe.int/>;

Wojciech Zaborowski, *The nature of Civilian and Democratic Control over the armed forces*, <http://yadda.icm.edu.pl/yadda/element/bwmeta1.element.bazatech>.

new demands on the armed forces for which they may not necessarily be adequately prepared.¹⁰ At the same time, new internal and international security roles also create new risks of misuse or abuse of power, including for example a militarization of law enforcement; inappropriate application of military force; inappropriate influence in political matters; imbalances of public funding between civilian and military security; and detrimental effects on military preparedness for primary national defence missions.

Academic as well as strategic debates, dealing with the control of armed forces, focus moreover on the situation, wherein every modern state the issue of the proper balance between the armed forces and the civilian political leadership is a key feature of politics. In the most extreme cases, the military itself takes power. In established democracies, civil-military relations do not take this extreme form, but there are still important debated about the proper degree of military policy should be responsive to broader social and cultural values. In this way, it is necessary to underline, that the problem of civil-military relations seems to imply a tension between the two concerns: control and effectiveness of armed forces, that at least theoretically do not have to exist. A nation's armed forces could become more effective without any loss of civilian control on them. When thinking about trying to develop a coherent relationship between military means and a political ends, civilian control of armed forces becomes essential to military effectiveness, by the role and responsibilities of contemporary armed forces in creating of good security sector governance and security sector reform.¹¹

Therefore, in this way of a broad analysis of the control of armed forces, the main arguments included in this article, are constructed in the light of these above presented essential and fundamental dimensions and developments, as well as challenges of contemporary understanding of legal and strategic aspects of control of modern armed forces in frames of the complex international security architecture.

The complexity of democratic control of armed forces in the contemporary world

Democratic control over armed forces represents a guarantee that human rights and fundamental freedoms be respected both within the armed forces and by the armed forces during their operation. Democratic control over armed forces constitutes an international confidence-building measure likely to avoid international conflicts and to consolidate international peace and security. Each member state of the United Nations enjoys the sovereign entitlement to define the mandate of its armed forces,

¹⁰ <https://www.dcaf.ch/download/35599/526415/DemocraticControlArmedForces-backgrounder.pdf>

¹¹ <https://venice.coe.int/>;

<https://www.giplatform.org/actors/geneva-centre-democratic-control-armed-forces-0>.

subject to the constraints of international law, the national constitution, national law and national democratic decision-making procedures.¹² Since the end of the Cold War, there has been also a refocusing of defence and security policy in many member states in response to a changing international strategic environment and a new range of threats.¹³ There has been a move away from the focus on traditional military security to embrace a more comprehensive approach to security. Consequently, armed forces have an increasingly wide-ranging mandate, encompassing external and domestic security roles, beyond their traditional task of the territorial defence of the state.¹⁴

Armed forces in the contemporary world might include three institutions: regular military forces, auxiliary military forces and regular military forces.

The first institution, regular military forces are military institutions whose primary purpose is readiness for war – for example, armies, navies, amphibious forces, air forces, border guards and presidential guards, including all their military support functions. Such forces may be professional or based on conscription, or include a combination of professional uniformed staff, professional civilian staff and/or uniformed non-professional conscripts.

The second, the auxiliary military forces, concern professional security forces that can be called upon to assist the regular military under certain conditions – for example, constabularies, gendarmeries, border guards, coastguards, close protection forces, merchant marines or navies, radio support, air patrols, specialized scientific information and intelligence services, organizational commands, logistics services and education and training establishments, among others. Such forces may be military, civilian or mixed, and may be subject to military discipline.

The third institution is the reserve of military forces. Military forces are composed of either volunteers or compulsory recruits who can be called on to reinforce the regular military – for example army, navy, or air force reserves, special tactical police units, national guards and territorial, militia and home

¹² Marcin Lech, *Making sense of the decision-making process in the structures of the European Union*,

“Gdańskie Studia Międzynarodowe”, M. Malinowski (ed.), vol. 5, nr 1-2, 2007,

Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2007, pp. 57-79;

<https://venice.coe.int/>;

<http://link.springer.com/chapter/10/1007/>

¹³ Marcin Lech, *New security strategies and development of international cooperation against terrorism in the*

light of the legal order of the United Nations, “The Polish Journal of Criminology,” vol. 1, 2015, (s. 13-16): <http://www.pjoc.pl>, DOI: 10.5604/1.1208589;

<https://www.un.org/unispal/document-source/geneva-centre-for-democratic-control-of-armed-forces-dcaf/>

¹⁴ *Historical Review of Developments Relating to Aggression*, United Nations, New York 2003;

Marcin Lech, *The impact of globalization on Europe: challenges for democratic sovereign states*, “Gdańskie Studia Międzynarodowe”, M. Malinowski (red.), vol. 9, nr 1-2, Wydawnictwo Uniwersytetu Gdańskiego, Gdańsk 2011, pp. 65-73.

defence forces, among others. The specific composition of the armed forces depends on the legal definition in each country. However, in times of war customary international law, as well as the Geneva Conventions and their Additional Protocols, may define any armed group under effective command as part of a state's armed forces, regardless of whether they are defined as part of the armed forces under national law, and of whether they are regular military forces or not.¹⁵

Today, all societies have to reconcile the need for security provided for by the armed forces, on the one hand, and the requirement to respect democratic values, human rights and freedoms on the other hand. The lessons learned from history have shown that the military might affect democracy and its values. The interests of the military must, therefore, be subordinate to the interest of a democratic society. The control of the military is an indispensable element of a democratic government. The degree and type of such control will vary considerably according to the system of government, historical traditions and also cultural values.¹⁶

The democratic control over the armed forces has two dimensions, which both enhance and promote confidence-building and peace: domestic and international dimensions.

The *domestic* dimension implies the primacy of the civilian general interest and of the principles of a democracy over the military. The *international* dimension prohibits, in general, the threat or use of force against a state.

At the domestic level, the need to align the interests of the military with the interests of a democratic society has grown significantly over the decades, as have democratic constitutional values such as democracy, the rule of law, fundamental rights and freedoms. Additionally, it should be ensured that the policies decided by parliament and/or governments are carried out as planned (including by the military), and that they are in line with the public interest in public spending for military purposes as well as the citizens' increasing interest in, and their right to know, how the state is planning and applying policies for their security.¹⁷ Furthermore, armed forces as a component of the executive branch and power are also subject to the implementation of the basic democratic principle of separation and balance of powers. This implies a necessary accountability of the military before the society. Moreover, armed forces should always be kept away from involvement in the political process.

At the international level, the use of force by states is prohibited in contemporary international law, the only exceptions - relevant in the framework of this study - being self-defence and the use of force

¹⁵ <https://www.devex.com/organizations/geneva-center-for-the-democratic-control-of-armed-forces-dcaf>.

¹⁶ Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seg1#metadata>.

¹⁷ Cecile Fabre, *Cosmopolitan War*, Oxford University Press, Oxford 2014, pp. 15-99.

as decided or authorised by the United Nations Security Council based on Chapter VII of the United Nations Charter. Thus, where military officials ignore the strict conditions allowing for the use of force to be legitimate, the responsibility of the state is engaged.¹⁸

Therefore, democratic control of the armed forces is a complex matter. Indeed, since the end of the Cold War, armed forces have undeniably undergone a profound shift in both the range and focus of their role. This refocusing of defence and security policy, especially in many Council of Europe member states has led to more and more national participation in international peace missions.¹⁹ Likewise, the changing nature of the threats posed to national security and in particular, the rise of international terrorism has resulted in the re-emergence of an internal role of the army in many states, which requires a specific control of the conditions by which a state uses the army in domestic issues. When considering the control of armed forces at the domestic level, the constitutional framework is of particular importance, since it will fix the organs involved in military issues as well as the control process over the armed forces. The implication and identification of the organs of control will additionally depend on the moment at which the control is exercised: *ex ante*, *ex post* or both.²⁰ When considering the executive level, the impact of the constitutional framework is particularly salient. In parliamentary republics and monarchies, the monarchs or the president will have symbolic or formal control over the military. On the other hand, the presidents of presidential regimes will have substantial powers such as the role of commander in chief, presiding over higher national council and committees as well as appointing military posts.

Some constitutions will also provide for a collegial body at the executive level, like for example, a specific Council for National Defence of which the main task will be to coordinate and consider the main issues related to defence and also in some countries report to the Parliament. However, the role of the head of state being generally preponderant in such a Council, the controlling effects are not as strong as they may seem. Ministers of Defence are not usually commander-in-chief; they will however be the first respondent to Parliamentary enquiries and debates.²¹

¹⁸ Antonia Chayes, *Chapter VII ½: Is Jus Post Bellum Possible?*, „The European Journal of International Law,” vol. 24, 2013, pp. 291-305;

<http://link.springer.com/chapter/10/1007/>

¹⁹ <https://www.devex.com/organizations/geneva-center-for-the-democratic-control-of-armed-forces-dcaf>.

²⁰ <https://files.ethz.ch>;

Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of the Law of Armed Conflict*, „Yale Journal of International Law,” vol. 22, 1997, pp. 52-56;

Christian Tomuschat, *Human Rights and International Humanitarian Law*, „The European Journal of International Law,” vol. 21, no.1, 2010, pp. 15-23.

²¹ <https://www.dcaf.ch>;

<https://venice.coe.int>.

Democratic control over armed forces refers mainly to the existence of a democratically elected organ that reviews and supervises the decisions adopted by the organs or authorities with military competences. The role of the Parliament as an elected body is therefore of paramount importance in the concept of democratic control of armed forces. When considering the parliamentary level of control, the functions and power of a certain Parliament will certainly depend on national rules, on checks and balances that operate within a state. Parliamentary powers over the military sector can comprise powers to legislate, to approve the budget, to advise, to penalise and to approve certain issues or actions.²² The level of this power, however, will vary from state to state. At the legislative level, the approval and control of the budget always fall within parliament's remit and constitute a significant mechanism of control by the Parliament, in the military field also. In this regard, three types of Parliament have been identified: the budget-making parliament which can amend or reject budget proposals and the capacity to formulate alternative budget proposals.²³

The second and largest type, especially in Europe are budget influencing parliaments which can amend or reject the budget without putting forward their proposals. The last category will comprise Parliaments with little effect on budget formulation. These will traditionally give their consent to the defence budget as a global figure as presented by the government. Direct control is even more salient when the parliament takes or participates in the military decision making. In this regard, the study shows a variety of manners of parliamentary involvement. Some legal orders make explicit reference to parliamentary authorisation regarding, for instance, the decision to declare a state of emergency, the power to ratify treaties on military issues and to send troops abroad. Some other countries have developed tighter legislation on the development of troops abroad for instance. Lastly, a low level of parliament involvement is to be seen when, for instance, prior parliamentary approval is not necessary for national participation in any missions abroad or declaration of state of emergency. Only a few Parliaments possess the power of prior approval in all situations, regardless of the nature of international operations. The better-informed Parliaments appear certainly to be those with the power of prior approval.²⁴

Direct control of the Parliament will also occur *ex post facto* this type of control is used to monitor the transparency and the legality of the procedure. Even though in many Parliaments there is a lack of budgetary information regarding specific military missions - notably regarding international missions - the control of the budget and of expenditure which is common to all Parliaments is not to be neglected.

²² <https://iss.europa.eu/content/democratic-control-armedforces>.

²³ https://www.researchgate.net/publication/315513510_;
<https://iss.europa.eu/content/democratic-control-armedforces>.

²⁴ <https://preventionweb.net/organizations/9335>;
<https://iss.europa.eu/content/democratic-control-armedforces>.

In many countries, however, defence procurement represents one of the main topics of Defence Committee hearings and inquiries. Indirect control mechanisms of the Parliament will consist of some degree of interference in military decisions or adding conditions to military decisions.²⁵ This can be the case regarding control over equipment decisions, inspections and visiting troops abroad and the control of arguments which is a more diffuse kind of control. Additionally, when performing its institutional role of proposals and reflection, the participation of the Parliament in the general defence policy must also be interpreted as a mechanism of control.²⁶ Undeniably, parliamentary specialised defence committees, through their specialisation in military and defence matters, constitute an efficient, and hence extremely significant body to perform the functions empowered to a Parliament. In the case of Europe, any Parliament of Council of Europe member States will not only exercise but share its *ex post* control with other institutions like the judiciary, the ombudsman and audit offices.²⁷

The role of the judiciary in the control over armed forces is two-fold. Firstly, constitutional courts as guardians of the rule of law, of democratic procedures and the protection of human rights can check the constitutionality of military affairs when some acts or decisions may have undermined these principles. Secondly, military courts will be competent to judge criminal and disciplinary actions. At the constitutional level, like in Europe, the situation of military courts within the member states of the Council of Europe ranges from constitutional regulation of military courts, constitutional remission to the law for the creation of military courts, constitutional prohibition of military courts or constitutions with no specific provisions on military courts. At the national level, two complementary oversight entities whose functions and power vary greatly among the Council of Europe member states have been identified in the control over armed forces: The Ombudsmen and the Court of Audits. Even though the degree of control of the Ombudsman differs considerably among states, the role of this institution should not be overlooked. Some states confer few competencies to parliamentary ombudsmen regarding complaints related to armed forces.²⁸ At the other end of the spectrum, some countries have instituted a specialised (military) Ombudsman whose tasks will generally be to deal with applications from individuals, both soldiers or citizens, who could be affected by military decisions or actions and to ensure the compliance of the armed forces with constitutional principles but also to assist parliamentary oversight and act as an advisory organ for the chief military and/or the Minister. Additionally, the role played by Audit Offices and Courts of Auditors who control the legality and appropriateness of public spending is an important element and constitutes an adequate response to

²⁵ Erich P. Hochleitner (ed.), *Das Europäische Sicherheitssystem zu Beginn des 21. Jahrhunderts*, Böhlau Verlag Wien – Köln – Weimar 2000, pp. 21-40.

²⁶ <https://venice.coe.int/>;

<http://link.springer.com/chapter/10/1007/>

²⁷ <https://www.impactpad.org/organizations/geneva-centre-for-the-democratic-control-of-armed-forces;>

²⁸ <https://venice.coe.int>.

the growing concern of citizens in the accountability of democracies. The military is generally answerable to a national accounting body, except in some countries. Finally, internal control mechanisms on armed forces should not be neglected since they are a crucial component of democratic oversight of armed forces. The army must be committed to democracy, the rule of law and human rights.²⁹ In this regard, specific codes of conduct or professional ethics have been drafted but foremost the duty of superiors to promote and maintain professional standards throughout the military chain of command must be underlined. At the international level, the control of armed forces can be performed by different organs, i.e. international organisations of which, like in Europe for example member states of the Council of Europe are part and/or international courts. In this case, military affairs reach Constitutional Courts when some act or decision by the armed forces violates fundamental or constitutional rights, undermines the rule of law, or challenges the democratic order. The role of the Constitutional Court in defence and security matters depends not only on the legal practice and culture of each state, but also on the confidence and contribution of this organ to the consolidation of the rule of law. More particularly, the Constitutional Court has a greater impact in some countries than others on the configuration of binding jurisprudence and the interpretation of the military law.³⁰

Judicial control always reinforces the guarantee of armed forces involvement, and anchors it firmly within the principle of the rule of law. Constitutional Courts, as well as military courts, where they exist, bring an important contribution to the control of armed forces. Other oversight entities, such as ombudsmen, including military ones, audit offices and courts of audit complement and reinforce oversight over armed forces. Part of domestic control, internal military mechanisms also play a supervisory role.³¹ Military disciplinary law, criminal law and code of conducts provide the internal regulatory framework for ensuring that orders of civilian command authorities are executed from the top down; they also ensure that members of armed forces have clear standards and norms for fulfilling their duty.

Nowadays, one of the most relevant national decisions about the use of force is involved in international peacekeeping, peace-building or peace-enforcement operations. Accordingly, the second important focus is placed on the international organisations in which the member states take part, the international standards involved in the regulation of the use of force, and the problems of

²⁹ Ibidem.

³⁰ <https://preventionweb.net/organizations/9335>;
<https://iss.europa.eu/content/democratic-control-armedforces>.

³¹ <https://preventionweb.net/organizations/9335>.

control and accountability that these international missions generate for parliamentary and/or government institutions, as well as for the relevant international bodies.

First and foremost, international use of force must be legitimate. States can carry out individual or collective self-defence, but in order for their actions to be legitimate, they must comply with strict conditions which have been laid down by international law. Whether the military presence can be considered as legal or illegal under international law will prefigure the competence of the control organ involved at the international level. Illegal interventions, for instance, refer mainly to the occupation by armed forces of a foreign territory and illegal acts committed by armed forces in a foreign territory. They will in principle be scrutinised by international courts, whether the European Court of Human Rights (ECtHR), the International Court of Justice (ICJ), or for those Council of Europe countries who have ratified its status, the International Criminal Court (ICC). Legal interventions, like those which refer to foreign military bases or joint military exercises, armed forces placed under disposal of a state by another state and peacekeeping or multinational forces have a specific feature since they have been decided or authorised by an international organisation, by an international treaty, special agreements or instruments which will fix the responsibilities and conditions of the military intervention. The organ who has authorised or decided those interventions will first and foremost be the organ of control although international courts might also have a say.³²

There are different types of international organisations whose mission is to safeguard and contribute to international collective defence, security and peace. Their common feature is that the existence of their parliamentary body paved the way for a control of the decisions taken at the executive level of the organisation. The United Nations (UN), for instance, has a worldwide character and a broad mandate from its member states to authorise the adoption of collective measures for the prevention and removal of threats to international peace. The Security Council of the UN may decide or authorize a military intervention; it is the principal provider for the legitimate use of force. The UN General Assembly, which is intergovernmental in nature, would be considered as the control body, although it can only make recommendations on these issues and approve the budget of the UN under which the international missions and operations are financed. Even though this control might seem marginal, it is worth mentioning that the UN General Assembly strengthened the conditions of authorising or endorsing the use of force by identifying five further criteria of legitimacy (seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences).³³

³² <https://venice.coe.int>.

³³ Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seg1#metadata>.

At the regional level, inter-parliamentary institutions within - or related to - international organisations in charge of international security and defence issues, enjoy a limited power of control. Indeed, the Parliamentary Assembly of the North Atlantic Treaty Organisation, stands more as a link between Parliaments and the Alliance than as a control organ of the decisions taken by the decision-making body within NATO.³⁴

In the European case, the Western European Union Assembly, which is the very first European interparliamentary assembly for security and defence matters, has seen its operational activities transferred to the European Union and is mainly a think-tank body with a cooperation role with national parliaments on defence issues. However, more scrutiny on the European Security and Defence Policy (ESDP) of the European Union might be possible in the light of the new European Union Treaty. With regard to the European Union, the second pillar refers to the Common Foreign and Security Policy (CFSP) which might lead to a common defence with the entry into force of the new Treaty. Decision making about the CFSP and the European Security and Defence Policy (ESDP) lies within the Council.³⁵ The European Parliament which would have a truly democratic legitimacy, since it is the sole international body directly elected has also marginal control competences restricted to being informed by the Presidency and the Commission, asking questions to the Council, making recommendations and holding an annual debate on the policy. Other regional international organisations, like the OSCE, the Inter-Parliamentary Union or the Council of Europe are not specifically in charge of international security and defence issues. However, they might deal with the politico-military aspects of security. In this way, the Forum for Security Co-operation of the OSCE seeks to assist states in reforming their legislation in the military field or armed control field for instance.³⁶

These international organisations have fixed and developed through their activities important international standards concerning the democratic oversight of the military. Treaties on human rights and humanitarian law, treaties on armament control which are binding instruments; codes of conduct, model laws, recommendations, resolutions and guidelines which frame the activities of armed forces have resulted from their activities. Lastly, at the international level, International courts play an important role in the oversight of democratic forces. The European Court of Human Rights (ECtHR), the International Criminal Court (ICC) and the United Nations International Court of Justice (ICJ) have contributed a lot to developing and implementing international standards, like the protection of the individual rights of military personnel, the legality of the use of force as well as the definition of

³⁴ <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>; Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, "The British Yearbook of International Law," vol. 30, 1953, pp. 206-212.

³⁵ <https://iss.europa.eu/content/democrtaic-control-armedforces>.

³⁶ Wojciech Zaborowski, *The nature of Civilian and Democratic Control over the armed forces*, <http://yadda.icm.edu.pl/yadda/element/bwmeta1.element.bazatech>.

international crimes.³⁷ However, the Common Foreign and Security Policy (CFSP) and European Security and Defence Policy (ESDP), as such, are excluded from the jurisdiction of the European Court of Justice.³⁸

While carrying out domestic security tasks (which might include military assistance in maintaining public order, in case of disasters etc.), decisions concerning armed forces should always remain in civilian hands, and, if force is used, it should be commensurate with the security needs, in accordance with the principles of subsidiarity and proportionality, and should observe fundamental rights and democratic standards. The most significant external security roles of the armed forces of member states include: defence against external threats (individual self-defence), collective self-defence, peacekeeping and crisis management operations, and peacebuilding operations. The external roles played by armed forces have steadily expanded since the end of the Cold War. The armed forces of member states now fulfil a diverse range of functions in which they collaborate with groups of other states, intergovernmental organisations, non-governmental organisations and the private sector. Although national militaries are making valuable contributions to peace operations and crisis management around the world, it is imperative that the missions in which they participate are duly mandated, and enjoy international legitimacy.³⁹

Military decisions have some special features (speed or urgency, efficacy, secrecy, discretion) that need to be balanced with the democratic control over them. The following acts or issues should be particularly under control: the sending of troops abroad, the use of armed forces in domestic issues during a state of emergency, the use of public funds concerning the military budget and military expenditure, the appointment of top commanders.

The mechanisms for exercising control can adopt several combinations, ranging from systems of minimal control to maximum or more comprehensive oversight of military decisions. Whilst this is not a generalised feature, the constitutional regulation of control is common among countries experiencing a post-authoritarian, post-totalitarian or post-civil war transition to democracy. Thus, the constitutional regulation of control goes further than its functional dimension (i.e. securing that armed forces and command are accountable) to introduce an additional value: it ensures the commitment of armed forces to the new constitutional and democratic order. At the same time, it rules out any eventual identification between armed forces and the pre-democratic regimes. In new democracies and new constitutions, a positive regulation of control and its parameters is highly recommended.

³⁷ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, „The European Journal of International Law,” vol. 10, 1999, pp. 1-22:

³⁸ <https://venice.coe.int>.

³⁹ Larry May, *International Law and the Inner Morality of Law*, „Hart/ Fuller Debates 50 Years Later”, Peter Cane (ed.), Oxford, Hart Publishing co., 2009, pp. 79-96.

Constitutional rules or laws should identify the organs exercising control and oversight over armed forces, as well as the acts or issues under control and the mechanisms to achieve it. Domestic democratic oversight over armed forces is conducted by parliaments, the executive, the judiciary and other entities.⁴⁰

There are diverse mechanisms of control that imply different degrees of intervention or influence of the Parliament in military decisions. Irrespective of the political regime, Parliaments should always have a major role in monitoring, scrutinising and controlling armed forces. Whilst Parliament may not be the only democratic organ in a given state, it is the one that links democratic representation and the function of controlling executives. The absence of significant forms of parliamentary control over armed forces is inconsistent with democratic institutions. The creation of specialised defence committees within Parliaments, insofar as it enables democratic control, is to be welcomed.⁴¹

Among the mechanisms of parliamentary control, the most relevant are the approval and control of the military budget, sending troops abroad, adoption of legislation and other decisions regulating the military field, and direct (co-participation or *a posteriori*) control or indirect control over decisions adopted by organs with military competences - such as those regarding the appointment or dismissing of top commanders and participation in shaping the general defence policy. As regards the role of the executive (head of state, government, National Defence Council), the mechanisms of control include *inter alia* decision-making and control over the use of force in states of emergency and appointment and dismissal of top commanders.⁴²

Especially, internal accountability mechanisms are complementary to executive, parliamentary and judicial oversight of the armed forces. These accountability mechanisms can only function if professionalism and internal accountability of the armed forces are guaranteed. Members of armed forces have specific duties which they must fulfil. Respect for military discipline and the duty to obey are fundamental duties for all personnel. However, they also have to disobey illegal or improper orders. This is particularly important given that all personnel are personally accountable for their actions, and may be liable for breaches of either national or international laws. Commanders at every level play a crucial role in ensuring the discipline of those under their command. Superiors have the responsibility to take the necessary steps to prevent, investigate, and address disciplinary infractions or crimes committed by subordinates.⁴³

⁴⁰ <https://venice.coe.int>.

⁴¹ Wojciech Zaborowski, *The nature of Civilian and Democratic Control over the armed forces*, <http://yadda.icm.edu.pl/yadda/element/bwmeta1.element.bazatech>.

⁴² *Ibidem*.

⁴³ *Ibidem*.

Controlling organs at domestic level should always have, as parameters for their acts, international standards and guidelines. Domestic standards and guidelines should not contradict the international ones. Given the specific characteristic of this sector (in which the use of legitimate violence is involved), the underlying question is how to balance, or better, how to optimise the public good, value or end involved in the decisions or acts of the military, taking into account the principles of democracy.

As a general rule, the controlling organs must obey the principles of respect for human rights, rule of law and democratic accountability, as well as international law. The international dimension of the control involves issues related to international responsibility in case of acts committed by the armed forces during their military presence in foreign territory (which is important to establish which state or international body is entitled to control). It also implies full observance of the international standards regarding the legitimate use of force, as well as the other international treaties related to the use of force, the conduct of hostilities, international humanitarian law and human rights, as well as other nonbinding documents adopted in the framework of various international organisations,⁴⁴ some of them referring expressly to the democratic oversight of the military. This dimension also implies and involves intergovernmental, inter-parliamentary and judicial international forums which exercise various types of control.⁴⁵

Then, an idea of democratic control is closely linked with the notion of above mentioned accountability. On the one hand, horizontal accountability is at stake in the control of armed forces, since Parliament, for example, can control the acts of the Executive related with the military. On the other hand, the concept of democratic accountability appears as a corollary of the later, as parliaments are accountable to their electorates for policies, decisions, and control concerning the military within their sphere of competences. In this sense, democratic accountability means that those who have the authority to decide and act are accountable to the elected representatives (representative democracy) or the people directly (direct democracy). Parliamentary accountability refers to the former.⁴⁶

Parliament regulates decisions about the composition, competences, activities and accountability of military personnel when it exercises its natural legislative functions. The legal framework, including its international dimension, of the defence sector will provide limits, more or less restrictive, to the use of force. Other types of decision are taken at internal level according to the hierarchic military structure. Either the superior in the chain of command oversees them, or the ordinary or military courts do so, depending on the issue under review. In other cases, Parliament itself takes decisions

⁴⁴ John B. Bellinger III, V. M. Padmanabhan, *Detention operations in contemporary conflicts: four challenges for the Geneva Conventions and other existing law*, „The American Journal of International Law,” vol. 105, 2011, s. 201-243.

⁴⁵ <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

⁴⁶ Ibidem.

concerning the military. Thus, the democratically elected representatives may control, directly or indirectly, decisions taken by the government or by the commanders of armed forces. In using its powers, Parliament, as the locus of democracy, substitutes, changes, affects or influences decisions from the defence and security sphere.⁴⁷ Examples range from the appointment of high commanders to the decision to send troops overseas, and the definitions of the contents and extent of the missions. In the latter case, international protagonists become involved, as they have control and oversight competences over troops deployed for an international mission. Regarding the control of the use of force in international missions, the existence of an evolving mixed system of accountability, with procedures and actions both at national and international level, can be observed. The growing use of military forces in international missions calls undeniably for development and reinforcement at national and international level of the variety of legal tools of control.⁴⁸

The analysis shows that the international intergovernmental dimension prevails in terms of decision-making (and, implicitly, in terms of control) in issues involving the international use of armed forces. Moreover, decisions in this field are taken within the competent international bodies of these international organisations by government representatives, even if, at domestic level, the competence to take such decisions belongs or should belong to national Parliaments, thus producing a certain transfer of competences from the domestic parliamentary level to the international governmental one.⁴⁹

The international inter-parliamentary bodies have weak competences and mechanisms for the oversight of armed forces, which are still to be enhanced and developed. Member states must adopt measures of reform aimed at increasing the oversight functions of these international bodies. Also, cooperation of these bodies with national Parliaments, and cooperation between national parliaments in this area, should be strengthened.

International jurisdictions (like the United Nations International Court of Justice, the European Court of Human Rights, the International Criminal Court) play an important role in the oversight of the armed forces. Some of them already contribute a lot and they should contribute further to developing and implementing standards in this field. The classic international courts (for instance, the United Nations

⁴⁷ Cecile Fabre, *Cosmopolitanism, Just War Theory and Legitimate Authority*, "International Affairs," vol. 84/5, 2008, s. 963-976;

⁴⁸ Wojciech Zaborowski, *The nature of Civilian and Democratic Control over the Armed Forces*, <http://yadda.icm.edu.pl/yadda/element/bwmeta1.element.bazatech>.

⁴⁹ Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seg1#metadata>.

International Court of Justice), however, depend upon consent by the parties to an international dispute for their competence to be engaged.⁵⁰

This analysis shows that actors, acts and mechanisms involved in the democratic control over armed forces, both at national and international level, are various and that the national dimension of the democratic control is sounder than the international one.

The variety of models of control, alone or interrelated, reveals that democratic control over armed forces can be shaped and improved to meet efficiently both the needs of the state and the increased concerns linked to democratic values and principles. Armed forces also have secondary missions, providing internal security and stability. In the past this role was often limited to responding to violent internal threats to the state or public that exceeded the capacity of internal security providers, for example threats from insurgencies or separatist movements, among others. Contemporary threats to internal security as well as the professionalization of the military and its changing role in society now mean that armed forces are increasingly called upon in situations where the organization, size, equipment or capabilities of the armed forces are well suited to supplement a primarily civilian operation. Secondary missions in internal security may include, for example: assisting in law enforcement, such as public order operations, border control, drug control, crime investigation, cyber operations, intelligence gathering.⁵¹

The necessity for the democratic control of armed forces

All societies have to deal simultaneously with the need for security (usually met by the armed forces), and the requirement to respect fundamental rights and freedoms. At least in part, the democratic control and oversight of armed forces is a mechanism for meeting the different requirements raised by these needs. As many democratic theorists have pointed out, control of the military by democratically elected civilian authorities is an indispensable element of a democratic government. In terms of democratic theory, the military must be subject to control by the elected representatives of those who hold supreme authority. Nonetheless, in some countries the military retains certain *de iure* or *de facto* privileges, autonomies, reserved domains, and tutelary powers.⁵² This is quite common in countries which have made a transition from a military-dominated authoritarian regime to a democratic government. To put it differently, such “exit guarantees” are the price paid by civilian political elites to the military for securing a peaceful transition to a democratic regime. While such

⁵⁰ <https://venice.coe.int>.

⁵¹ *Ibidem*.

⁵² Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seg1#metadata>.

guarantees can be conceived as facilitating transition to a democratic regime, they can impede the transition to a consolidated democracy.⁵³

While civilian control of the military is a *sine qua non* condition for democracy, the degree and type of such control will vary according to the system of government, historical traditions and cultural values, and different perceptions of threat. On the other hand, the increasing complexity and the technical nature of security issues, the lack of expertise of most parliamentarians, time pressures on Parliaments, and secrecy laws which often come into play in security issues may limit or hinder parliamentary oversight. Furthermore, in countries where democracy has not yet been fully consolidated and the elected authorities still have to contend with the difficult legacies of the previous military regime, the priority is to establish civilian control itself; whether it is exercised chiefly by the executive or the legislature is a matter of relatively secondary importance.⁵⁴

Thus, maximising military professionalism is seen as the means to secure objective civilian control, and military professionalism is defined as voluntary subordination to civilian authorities. In return for the recognition of an autonomous sphere of action for the military, the military adopts a politically neutral standing and voluntarily executes the commands of legitimate civilian authorities.

Moreover, the “raison d’être” of the armed forces in contemporary democratic states is paramount. This “raison d’être” is justified – and always has been - by the need to protect and to ensure the security of the societies of the respective states from external threats, and – nowadays more than ever – to safeguard democratic values, the rule of law and the human rights and fundamental freedoms of all persons subject to that national jurisdiction.⁵⁵

At the same time, in identifying the reasons for motivating the necessity to control the armed forces one cannot ignore the international dimension of the analysis, as – according to contemporary public international law – the maintenance of international peace and security is the most important objective of mankind, and the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state is a fundamental principle of international law, an imperative rule (*ius cogens*).⁵⁶ In other words, the contemporary use of the armed forces of a state against another state (or, in more general terms, outside the national territory) is an exception subject to important restrictions and limitations, the breach of which engages the international responsibility of the state concerned. The use of (armed)

⁵³ <https://venice.coe.int>.

⁵⁴ *Ibidem*.

⁵⁵ Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seg1#metadata>.

⁵⁶ Michael Walzer, *Arguing about War*, New Heaven, Yale University Press 2004, pp. 23-66.

force is *only* allowed (in other words is *legitimate*) so that international peace and security can be re-established and the international legality (or International Rule of Law) can be restored. This analysis will try to identify the reasons justifying the democratic control of the armed forces in the context of these two dimensions - one domestic, and the other one international, both being inter-related.⁵⁷

The significance of an essential features of democratic civilian control of armed forces in contemporary civil-military relations

In every modern state, as the most important subject of international law, the issue of a proper balance between the armed forces and the civilian political leadership is a key feature of politics. In this situation, it has an important impact for new international legal regulations dealing with international security issues. In the most extreme cases, the military itself takes power. In established democracies, civil-military relations do not take this extreme form, but there are still important debates about the proper degree of military influence over defence and foreign policy, and the degree to which military policy should be responsive to broader social and cultural values. In effect, civil-military relations have long been an imperative topic not only for political science scholars but also for international lawyers as well. Many problems arise in frames of these situations.⁵⁸ The one of main examples in the area of contemporary international security architecture, concerns the complex problem of the legal personality of international organizations responsible for peace and security (UN, OSCE, EU, NATO), comparing with the political context of international law. Above mentioned context, however, despite its long tradition, this field has been frequently criticized as being too detached from the greater domain of political science and being too conservative in its conceptual, theoretical and methodological foundations, in the relationship with international law. Therefore, a new generation of civil-military research has emerged which has considerably promoted the development of the field beyond the classical dogma.⁵⁹

The two classic works of American civil-military relations, Samuel Huntington's *The Soldier and the State* (1957)⁶⁰ and Morris Janowitz's *The Professional Soldier* (1960) address both military effectiveness and civilian control.⁶¹ Huntington discusses civil-military relations as an explanatory variable, and argues that their nature has an important impact on military effectiveness.⁶² Nevertheless, how he

⁵⁷ <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

⁵⁸ Michael Walzer, *Arguing about War*, New Haven, Yale University Press 2004, pp. 23-66.

⁵⁹ Tuba Eldem, *Civilian Control of Armed Forces*, https://doi.org/10.1007/978-3-319-74336-3_11-1;

Marcin Lech, *Smart Defence im Rahmen des heutigen Völkerrechts*, [w:] *Interkulturelle*

Kompetenz deren Notwendigkeit für Einsatz und Führung, Workshopbeiträge 2013,

G. Ebner (ed.), "Schriftenreihe der Landesverteidigungsakademie", Wien 2013, pp. 63-100.

⁶⁰ https://www.researchgate.net/publication/315513510_;

⁶¹ *Ibidem*.

⁶² *Ibidem*.

formulates this relationship is problematic. M. Janowitz also discusses military effectiveness but it is not clear in his discussion that civil-military relations serve as an explanatory variable for his assessment of what would constitute an effective military. Instead, he bases his argument for a constabulary force on his assessment of the military needs of the United States in the Cold War, and then argues that acceptance of such a role by the military would also have a beneficial impact on the character of civil-military relations and civilian control.⁶³

Contemporary civil-military relations establishes the basis for maintaining civilian control over the military. Not only it involves a diverse range of studies, such as democratic civilian control of the military, the democratization of military professionalism, military institutions and operations or war; it also draws upon various fields of political science, law, philosophy, psychology, sociology, anthropology, economics, history of diplomatic missions, and military science, among others. Contemporary civil-military relations encompasses the entire range of relationships between the military and society at every level. Civil-military relations broadens the focus beyond democratic control to include other dimensions and levels of analysis.⁶⁴

These relations constitute the relationship between the state and civil society on the one hand and the military organizations on the other. They correlate the civilian and military authorities in a given society. Therefore, democratic civilian control is the conception of military/armed forces controlled by the elected representatives of a given state or nation. The general principle of democratic civilian control encompasses transparency and accountability. Civilian or parliamentary supremacy is the basis for the democratic control which promotes (re)integration of the armed forces or ex-combatants into society. The principles of democratic requirements focus on political parties, culture, and government in pursuit of integrated defence ministry, independent judiciary and media. Besides, it acts as a check and balance between the constitutional authorities, free and adult franchise, civic rights and freedoms, rule of law, civic education, dialogue, and mature civil society. The actors of democratic civilian control include both civil and military authorities, such as head of the state and the government, heads of the parliament and judiciary, heads of ministries and bureaucracies, defence and security committees and commissions, formal and informal public leaders, heads of NGOs, chairpersons of courts, think tanks and academic institutions, etc.

The objective of control ("who" actor of "which" concerned institution) is for the officials of mainstream political parties, civil-military relations in all levels, military forces (paramilitary, police, intelligence, etc.) recruitment and size, chain of command, regulations and so forth. The subjective

⁶³ <https://www.iss.europa.eu/content/democratic-control-armedforces>.

⁶⁴ <https://venice.coe.int>.

control complements the objective control for such ("what") issue/activity as war, peace, security, policy, information, command control, operation, and armament, fulfilling their all legal and strategic aspects. The means (purpose or intention) of control would focus on ("which") instruments or tools and exercises for the protection of the constitutional court, judicial and its legal system, referendum, elections, treaty, management, budget, staff, etc. The timing ("when") of control would be the subject of civilian control. It would follow reactive control (control ex-post), proactive control (ex-ante control), and simultaneous control: the ex-post is a control mechanism that comes into effect after the work is done, such as auditing the Defence Ministry's expenses after the end of the fiscal year.⁶⁵ Ex-ante is a preliminary control mechanism that anticipates the future document of defence white papers. The simultaneous control continues accurately at the same time when actions take place. The timing of control intends to synchronize with civilian control at the time of military operation, following the transparency and accountability mechanism.⁶⁶ Along with the end of the Cold War, new challenges were met in the areas of democratic civilian control.

These new challenges focused on restructuring the armed and military forces, enforcement of regulations, restructuring the defence management, asymmetric power relations, etc. The post-Cold War encompasses budget cuts and downsizing the strength of the soldiers. For all such control measures of the democratic civilian control, there should be an appropriate check and balance mechanism pursuing effectiveness, efficiency and legitimacy.⁶⁷ The concept of democratic civilian control reflects mostly the classical meaning of democratic control of armed forces in addition to the traditional focus on military security issues and defence policy. The ways of control refer to how control is exercised, as developed by Samuel Huntington, in the theory of civil-military relations. It belongs to objective and subjective controls. The objective control is the appropriate way to exercise control in a democracy and subjective control is the way of control for nondemocratic systems of civil-military relations. Military officials often advocate maintaining complete control over operations once the political decision to deploy troops or use force has been made. However, many operational decisions have political ramifications, and it is, therefore, important for the civil leadership to exercise scrutiny over actions in the field to ensure that operations are consistent with the country's political objectives. The challenge is to devise systems of accountability and oversight that incorporate the legitimate concerns of both the military and civilian leadership. In terms of NATO, the situation The challenge mentioned above is that of carefully defining the term civil-military relations.⁶⁸

⁶⁵ <https://www.iss.europa.eu/content/democratic-control-armedforces>.

⁶⁶ Ibidem.

⁶⁷ Ibidem.

⁶⁸ <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

As Paul Bracken has suggested, to assess the full impact of civil-military relations it might be helpful to move down a level of analysis and disaggregate civil-military relations into its various dimensions. Another major challenge is that the effectiveness of a military organization, at whatever level being discussed, is likely to stem from several factors. In many cases, there will be internal organizational factors that impact on effectiveness as well as changes in the security challenges a particular country faces. Since the relative importance of internal organizational developments and civil-military dynamics will vary depending on the particular research problem being investigated, this will remain an issue for empirical research in each case.⁶⁹

It is worthwhile to note that the problem of civil-military relations seems to imply a tension between the two concerns – control and effectiveness – that at least theoretically do not have to exist. A nation's armed forces could become more effective without any loss of civilian control. When thinking about trying to develop a coherent relationship between military means and political ends, civilian control becomes essential to military effectiveness. Establishing trust and confidence requires that both parties to the civil-military bargain re-examine their mutual relationship. On the one hand, the military must recover its voice in strategy making while realizing that politics permeates the conduct of war and that civilians have the final say, not only concerning the goals of the war but also how it is conducted. On the other hand, civilians must understand that to implement effective policy and strategy requires the proper military instrument and therefore must insist that soldiers present their views frankly and forcefully throughout the strategy making and implementation process. This is ultimately the key to healthy civil-military relations.⁷⁰

Special rights and obligations make the armed forces very powerful, an effective system of democratic civilian control is necessary to ensure that this power is used effectively and accountably to provide for state and human security with respect for human rights and the principles of good security sector governance.⁷¹

An effective system of democratic civilian control of the armed forces is a mainstay of good security sector governance and includes nine essential elements. The first considers the effectiveness in security provision. In this way, a system of democratic civilian control provides the clearly defined and professional chain of command the armed forces require to fulfil their responsibilities effectively; this can enforce strict discipline and internal control mechanisms avoiding personal or corporatist decision-making. The second element is connected with political neutrality. It remains a system of democratic

⁶⁹ <http://www.nato.org>

⁷⁰ Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seq1#metadata>.

⁷¹ *Ibidem*.

civilian control, which provides the operational independence that the armed forces require to be effective, while guaranteeing the political authority of democratic civilian government. The third element includes human rights protection.⁷² A system of democratic civilian control can provide the institutional resources, discipline, training and oversight necessary to deter and discipline human rights abuses against the population or the men and women of the armed forces and the wider security sector. The fourth is accountability. A system of democratic civilian control establishes checks and balances on the state's use of military force and holds civilian and military leaders and officials accountable for their decisions and actions. The fifth element is based on legitimacy. A system of democratic civilian control assures a high level of credibility in the performance of the armed forces, and thus increases public confidence, trust and legitimacy. The sixth element is connected with the issue of responsiveness. A system of democratic civilian control allows for more representative and participatory processes of national security policy-making, which make security provision more responsive to the distinctive security needs of all men, women, girls and boys. The seventh element describes efficiency. A system of democratic civilian control provides for control over defence budgets and oversight of how public resources are used. The eighth important element concerns rule of law. A system of democratic civilian control is based on a legitimate constitutional legal framework that mandates, controls and oversees the special rights and obligations of the armed forces according to democratic civilian authority under the rule of law. The final ninth element concerns integrity. A system of democratic civilian control of the armed forces provides supervision and oversight that can prevent corruption in the defence sector.⁷³

The above mentioned essential elements take place in every democracy, democratic civilian control, which is important to justify the special rights, obligations and legal exemptions granted to the armed forces. This is particularly important because armed forces around the world have a long history of endangering the state and its population by abusing their power for personal, corporatist or political aims. In the most extreme examples, internal security missions have often served as a pretext for military forces to interfere in politics, including through „coups d'état". Then, an effective system of democratic civilian control ensures the armed forces become neither too weak nor too strong to provide state and human security.⁷⁴

Presently, the general characteristics of contemporary armed forces is highly differentiated, while every context of their evaluation is different. Then typical features of democratic civilian control of the armed forces are broadly described. First of all the main research considers a clearly defined vision for

⁷² *Legal Framework of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies*, <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

⁷³ <https://www.iss.europa.eu/content/democratic-control-armedforces>.

⁷⁴ *Ibidem*.

national security articulated in an inclusive and transparent national security policy, and including a clear understanding of the role of the armed forces in achieving this vision. In this light an important security priorities and policies that are decided by elected or duly appointed civilian politicians based on competent military and civilian advice and sound intelligence, according to the constitutional order and with respect for international law. This is possible by an active, inclusive and well-informed national security body with a coordination and advisory function. Therefore, legally defined missions, engagements, operations and campaigns for the armed forces based on commitment to the constitutional order and by international law, based on parliamentary oversight of security legislation, policy and defence budgets have a big significance in this area. Moreover, financial oversight mechanisms providing transparency and efficiency in defence budgeting and procurement, including through independent auditing fulfils essential technical issues. The typical feature of democratic civilian control of the armed forces concerns also the important role in institutional separation between the head of state and the operational head of the armed forces through layers of public sector management and administration, including national security bodies, ministries, departments and general staff and advisory bodies.⁷⁵ This issue is strictly connected with command, coordination and communication mechanisms regulating interactions between elements of the armed forces and the rest of the security, justice and defence sectors. This is manifested by effective and accountable civilian management and independent oversight authorities, such as civilian experts, parliamentary committees, ombuds-institutions and justice sector actors, including military justice systems. In frames of these contemporary developments, civil society dialogue on national security, including independent civilian experts, academics, researchers, human rights advocates, media, women's organizations, and interest groups such as staff and veterans' associations, among others play an additional role in creating of modern features of democratic civilian control of the armed forces. In this light, security policy-making processes and armed forces that are responsive to the diverse security needs of all men, women, girls and boys, and to the greatest extent possible, representative of the social diversity of the population. Therefore, clear disciplinary mechanisms for transgressions of national law and international conventions, covering both civilian and military justice systems are always needed.⁷⁶

However, what is necessary to underline due to the above-mentioned developments and broad standards, an effective system of democratic civilian control depends not only on external institutional oversight and management of the armed forces, but also on internal control and organization of the armed forces. Internal control mechanisms of the armed forces play an important role, because it

⁷⁵ *Legal Framework of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies*, <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

⁷⁶ Simon Lunn, *The Democratic Control of Armed Forces in Principle and Practice*, <https://www.jstor.org/stable/26322968?seg1#metadata>.

includes appropriate doctrine, codes of conduct, training, resources and organizational support to carry out operations with respect for human rights and the rule of law. An effective chain of command incorporating both individual and command responsibility and ensuring orders conform with national and international law, is strictly connected with a military justice system that balances accountability and justice with the needs of military discipline.⁷⁷ An important role in frames of internal control mechanisms of the armed forces plays a system of internal oversight and complaint recognizing the right to refuse illegal orders and fostering a non-discriminatory work environment. In this way, a system of recruitment, training and promotion using merit-based performance assessment and free from discrimination based on gender, ethnicity, religion or social status is very important in frames of this analysis. Therefore, a strong understanding of duties, responsibilities and obligations in the protection of human rights at all personnel levels is closely connected with an understanding of obligations under civil authority and respect for democracy and the rule of law.⁷⁸

The interdisciplinary dimensions of democratic civilian control of armed forces

In the contemporary academic and strategic discussion and literature, a classical democratic civilian control of armed forces, can be assessed on five different dimensions, including political, institutional, legislative, judicial, and societal oversight of the armed forces.

The first and core of democratic control is the subordination of military to the political control of the state's democratically elected authorities. Civilian authorities in a democracy should be able to act autonomously from the armed forces without fear of military disloyalty to the regime. Military involvement in political affairs of a state poses the classic, and by far most severe, threat to civilian control. The role armed forces should be limited to national defence, and the military should not take any role in extra-military areas of state apparatus, including police, intelligence, state enterprises, and, of course, politics. Their role in politics is limited with influence, which it exerted through bureaucratic bargaining and expert advice.⁷⁹

The second essential characteristic of democratic control is the institutional control of the armed forces in its professional area of expertise. For most experts, the most effective way is the establishment of a strong, well-staffed, civilian-led ministry of defence that devises, advises, and manages defence policies and oversees military operations. Competent, effective, and courageous civilian cadre that is knowledgeable about military affairs and the existence of institutional platforms

⁷⁷ <https://www.iss.europa.eu/content/democratic-control-armedforces>.

⁷⁸ Ibidem.

⁷⁹ https://www.researchgate.net/publication/315513510_;

allowing strong cooperation and coordination with military leaders are also considered as indispensable for effective institutional control of the military organization.

The third dimension of democratic control is the legislative oversight of all executive decisions regarding the defence and security of the country. The organization, deployment, and use of armed forces; the setting of military priorities and requirements; the allocation of necessary resources; military promotions; and the definition of security threats should be scrutinized by the legislature to ensure popular support and legitimacy. It is the legislative body that “keeps the government accountable and secures a balance between the security policy and society by aligning the goals, policies, and procedures of the military and political leaders.” Legislative oversight of the defence organization – primarily but not exclusively exercised through “the power of the purse” – should go beyond routine (rubber stamp) approval of what the executive proposes. The Civilian Control of Armed Force’s legislatures in advanced democracies perform such a role through the help of an independent and respected audit bureau, competent and suitably supported specialist committees, knowledgeable parliamentary staff, and “outside” expertise.⁸⁰

The democratic control requires the judicial control of the armed forces, the subordination of the armed forces to the civilian rule of law, minimization of the legal autonomy of the military, and the end of the jurisdiction of military courts over civilians. Military personnel should be held accountable for violations of military and criminal law, and they should not have special legal privileges by law or by practice. In consolidated democracies, the military is also subject to the civilian justice system, and either there are no military courts (Sweden, Denmark, Finland, Norway, Austria, and Germany) or if military courts do exist, they have almost no legal jurisdiction outside of narrowly defined internal breaches of military discipline.

Both, the legislative oversight and judicial control of the armed forces based on the level of national law must, however, fulfil the supranational criteria of the international legal order, bearing in mind the membership of all countries in the United Nations, therefore the rules of the United Nations Charter concerning international peace and security.⁸¹

The final dimension of democratic control of armed forces is the public or societal control referring to a popular perception of democratic control of the armed forces, with military staffs subordinated to civilian officeholders whom themselves accountable to the elected representatives of the society at large. An effective public control, therefore, requires not only an existence of a well-developed

⁸⁰ Ibidem.

⁸¹ Ibidem.

participatory political culture that subjects the elected civilians' management and the use of force to a deliberative process but also of a security community representing civil society that nurtures an informed national debate on security issues. Collective actors working outside formal institutions such as expert communities, specialized think tanks, nongovernmental organizations, and universities are involved and that their judgment receive proper weight by the decision-makers. Debates should not be confined to the military organization but should extend to national security policy including the nature of the threat, the operational aspects of military deployment, the very legitimacy for using force, and its utility in promoting the public good.⁸²

Nowadays, scholars use a variety of approaches, which differ in their objects of observation as well as in the causal assumptions they rely upon to assess the degree of civilian control of armed forces. Some students of civil-military relations look at the interaction and behaviour of civilian and military leaders, others at their culture and attitudes, and still others at their institutional environment to measure the degree of civilian control of armed forces in a country.

In this way, discussed dimensions, refer to the challenge of subordinating military under civilian authorities without hampering its effectiveness, which underpins the theory of civilian control. Second, civilian control means more than the absence of a military coup or other forms of overt military intervention. It refers to civilians' decision-making authority over relevant political issues and strategies on the national and international levels, especially the issues dealing with reexamining also all *pros* and *cons* of strategic decision-making and acting in international law.⁸³ This issue plays an important role in the broad debate of the significance of control of armed forces in frames of the decentralized nature of international law today. It reflects in the ranging and disparate set of methods and procedures by which contemporary international law is created, which has an important influence for every control of contemporary armed forces, in line with the United Nations Charter. This law establishes the framework and the criteria for identifying states as the principal actors in the international legal system, being the primary makers of international law. This is only possible by the legislative oversight of democratic and civilian control of all executive decisions regarding the defence and security of the country on the national level.⁸⁴

In this context, control of armed forces by maintaining statehood in the international arena, including actions taken against other states or organizations, on a bilateral or multilateral level, it is not anymore

⁸² Ibidem.

⁸³ Paul Ertl, *Ideengeschichte militärischer Interventionen aus menschenrechtlicher Perspektive: Das Beispiel Deliberate Force*, [in:] *Juristische und philosophische Analyse angewandten Völkerrechts, Eine Case-Study zur Operation Deliberate Force*, Marcin Lech, Paul G. Ertl (eds.), "Schriftenreihe der Landesverteidigungsakademie", Wien, Dezember 2013, vol. 17/ 2013, pp. 9-30.

⁸⁴ <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

possible without explaining the nature of every strategic decision-making processes in military matters. Complexity of these decision-making processes and the influence of specific factors on them can make possible the implementation of initial intentions and plans for political decision-makers in creations of military/ security policy of a state. This issue remains also an important element of the analysis of full integration of the modern international system of security. In this way of deduction, contemporary decision-making processes of selected states in the area of arms control in frames of foreign policy, are liable for understanding and properly interpreting certain states' behaviours in international relations. They act for the common good and comply with commonly agreed norms and principles, which is based on various forms of intergovernmental or transnational cooperation, within which regimes are forced to compromise and negotiate. The foreign policy of states, is a result of a chain of specific processes, consisting of cooperation between different entities, on many organizational levels. These processes are taking place at the national level, where political conditions, relations and social dependencies have a huge impact on the attitude of the actors involved in the strategic decision-making process in military area as well as in acting in the international legal system.⁸⁵

Thus, although in theory, it is absolute and all-encompassing, in practice it is a matter of degree. Moreover, the concept of civilian control, which is operationalized and measured by using institutional, behavioural, and attitudinal approaches, is replaced by the concept of democratic control in the post-Cold War era, in frames of international security architecture. Finally, those strategies reducing the military's disposition to intervene are preferred over those that affect the ability of the military to subvert control since the latter is found inherently limited due to their risk of eroding the military effectiveness.

The role and responsibilities of contemporary armed forces in creating good security sector governance and security sector reform

One of the most essential issues, which characterize the role and responsibilities of contemporary armed forces are good security sector governance and security sector reform. Good security sector governance describes, how the principles of good governance apply to public security provision. The principles of good governance are accountability, transparency, rule of law, participation, responsiveness, effectiveness and efficiency. Good and constructive, like it also should be presented, security sector governance is thus a normative standard for how the state security sector should work in a democracy. The security sector is composed of all the structures, institutions and personnel responsible for security provision, management and oversight at national and local levels. Therefore, good security sector governance means that the security sector provides state and human security,

⁸⁵ <https://venice.coe.int>.

effectively and accountably, within a framework of democratic civilian control, rule of law and respect for human rights. In this light in the present international security architecture, establishing a good security sector governance is the goal of security sector reform. The essence of security sector reform is the political and technical process of improving state and human security by making security provision, management and oversight more effective and more accountable, within a framework of democratic civilian control, rule of law, and respect for human rights. Security sector reform may focus on only one part of the security sector or the way the entire system functions, as long as the goal is always to improve both effectiveness and accountability.⁸⁶

Moreover, the contemporary armed forces are part of the state defence sector, which includes all the actors and organizations involved in providing, managing and overseeing national defence. It has a big influence on the perception of the role and responsibilities of contemporary armed forces. Although the specific configuration and mission of the armed forces and the defence sector depend on the history, culture and society of each country, the principles of good governance can be applied in each system. This is the main goal of defence reform in the context of security sector reform. The armed forces are institutions established by the state for the primary purpose of national defence against external threats and internal conflicts. The composition of the armed forces can differ substantially between contexts.

Under conditions of good security sector governance, the contemporary armed forces perform their legitimate constitutional roles effectively and accountably within a framework of democratic civilian control, rule of law and respect for human rights. Good security sector governance means, that the armed forces have the professional skills, equipment, training and management capacity to fulfil their missions without becoming a danger to the population or the state. The primary purpose of the armed forces is national defence. In the past, the armed forces played a broader role, not only protecting a national territory from invasion but also potentially conducting offensive warfare, sometimes in the context of military alliances. However, in contemporary international affairs, offensive warfare has become increasingly rare and acts of aggression are illegal under international law. As a result of these trends, as well as changes in the relationship between the armed forces and society, the armed forces usually now focus on national defence.⁸⁷

Applying the principles of good security sector governance of the armed forces, it requires a holistic approach to reform that accounts for the roles and responsibilities of the armed forces within the defence sector and the security sector as a whole. Defence reform, as part of a comprehensive and

⁸⁶ <https://files.ethz.ch>.

⁸⁷ *Ibidem*.

holistic approach to security sector reform, changes the way the armed forces function within the context of a democratic political system at the strategic policy level, the organizational level and the level of unit and more solid behaviour. Defence reform in the context of security sector reform is unique because it aims to improve both effectiveness and accountability. Other types of reform that focus exclusively on technical changes and particularly training and equipment are sometimes called “security assistance” or “force modernization”, but such reforms are inconsistent with security sector reform because they don’t consider the overall context of security governance within which the armed forces function. A reform that neglects accountability encompasses the risk of empowering a force that will abuse its power, endangering the state and its population. The extent of change involved in security sector reform depends on the specific needs of each reform context.⁸⁸

Defence reform may take place in the context of an existing system of democratic civilian control that includes regular improvements to the armed forces, for example as part of a regular review of a national security policy. But security sector reform can also be a transformational process that establishes a framework of democratic civilian control where none existed before, for example in the context of a transition to democracy. Defence reform is particularly far-reaching in post-conflict contexts (for example like the transition from the end of armed conflict to the establishment of a stable and lasting peace due to possible *jus post bellum* doctrine), since a radical change in the form and function of the armed forces is often an important element of conflict prevention and peacebuilding. The scope, resources and timeframes for reform differ between these different contexts, but the principles of good security sector governance, that security sector reform aims to establish.⁸⁹

The challenges and potential risks associated with the changing roles of the armed forces in many countries underline the need for good security sector governance. It ensures the armed forces to perform effectively and accountably within a framework of democratic civilian control, rule of law and respect for human rights. Moreover, the armed forces are unlike any other state organization because they are allowed to do things that no other organization is permitted to do (such as using lethal force offensively), and their personnel are required to do things that no other employees are required to do (such as submit to military discipline or ultimately give up their lives in the line of duty).

⁸⁸ Ibidem;

<http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

⁸⁹ *Legal Framework of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies*,

<http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>.

Control of armed forces by international law regulations for the modern global system of stable peace and security

During most of human history, war was a basic instrument of statecraft, considered, for the most part, a lawful, honourable, ennobling, and even romantic pursuit.⁹⁰ These assumptions are often constructed by many prominent specialists from the area of international law and international relations especially analyzing the mutual relationship between international law and the control of armed forces, as well as the use of force, to evaluate them sometimes as a futile challenge today.⁹¹

Moreover, the contemporary intellectual discourse in the doctrines of international law and international relations as well among strategic experts, dealing with the analyzed subject, concerns a main scientific problem today, being an element of strategic forecast: What will happen when a state or federation of member states will apply their power using international legal instruments which are not forbidden by this law to strengthen global system of peace and security as main subjects of international law? Essential requirements are inevitable preconditions of the effectiveness of international law regulations for transparent control of armed forces, due to the Charter of the United Nations, to create a complex global security system-mechanism. These requirements, provide the trust of participants in the system. In this sense, an international global system requires appropriate and fundamental security architecture based on the principal fields of general international law dealing with preservation of international security: control of armed force, the law of use of force, the law of self-defence, the law concerning disarmament, non-proliferation and confidence-security-building measures, legal aspects of combating terrorism, drug-trafficking and other criminal behaviour of transnational character.⁹²

However, the complex relationship between control of armed forces and effectiveness of international law regulations for modern stable global system of peace and security, represents, in general, an international confidence-building measure, an important contribution to shaping the "democratic peace" among states. In this context, the contemporary academic discussion is mainly connected with transformations of international legal order in frames of the international system, which has taken place in the last few years. It shows a need for a big reflection on dealing with international legal order and with the relation to international relations theory. In this way it has an important influence for

⁹⁰ http://books.google.com/books?id=tjcSb5Yw2_UC&pg=/

⁹¹ Some modern writers, like Peter Malenczuk, Shaw, have suggested that a legal system which made no distinction between the legal and illegal use of force and as well as control of armed forces was not worthy of the name of law.

⁹² Marcin Lech, *Zdolność oddziaływania korporacji transnarodowych na współczesne stosunki międzynarodowe w dobie procesu globalizacji*, [in:] J. Menkes, T. Gardocka (ed.), *Korporacje transnarodowe, jeden temat, różne spojrzenia*, Wydawnictwo SWPS Academica, Warszawa 2010, pp. 211-232;

Pierre Allen, Alexis Keller (eds.), *What is a Just Peace?*, Oxford University Press 2008, pp. 12-34.

international security architecture challenges, therefore for the perception of control of armed forces, broadly understood.

In this light also, there is a need to scrutinize the relationship between international law and international politics and looking for the explanation of norms by the political interests of states. Essentially, there is a need for analysis of the main conceptions which constitute a contemporary framework of comparative legal thinking dealing with main aspects of the problem for today. This all is connected with an explanation of assumptions and foundations of international law and its relations with international affairs from the classical mutual relationship, diplomatic perception, economic perspective and finally dealing with international security architecture, human rights or humanitarian law. In effect, academicians present international law and international relations as classical interdisciplinary and scholarship. This is a science where almost the same language has been used by them all over the world to present recent development of international doctrine and practice. This interesting interdisciplinary scholarship also adds crucial complexity to internalization theory and its success depends on acknowledging vast differences in national cultures. Scholars in both disciplines should profit for the moment from developing a genuinely collaborative research agenda that will generate both practical and theoretical insights. Scholars may not yet be speaking with one voice, nor should they be. But each side is finding something to say, in a deepening and mutually profitable conversation. Also students, especially from the old continent, compare very often a doctrinal basis of both by searching for an international dimension of many processes which are taking place both in Europe and the world.

The principle that guides international regulations on these issues is the general prohibition of the use of force, with some exemptions. The general prohibition on the use of force, including armed forces, was already a principle of international law in 1928 when the Kellogg-Briand Pact was concluded. Later on, this prohibition was set forth in the United Nations Charter, especially in Art. 2 (4), as well as in subsequent documents, such as the 1970 United Nations General Assembly Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations or the 1975 Conference on Security and Co-operation in Europe (Organisation for Security and Cooperation in Europe) Final Act adopted in Helsinki.⁹³

The prohibition of the use of force is nowadays, the most fundamental rule in international law as well as in international relations. This is a central feature of the modern international legal system in comparison with classical international law as the normative attempt to control the use of force. This rule is codified in Article 2(4) of the Charter of the United Nations. The Article 2(4) should be

⁹³ <https://www.un.org/>

interpreted as totally prohibiting the threat or use of force. Therefore, no doubt it may be galling for a strong state to be prohibited from using force against a weak state which infringes its legal rights, but the Charter is based on the belief that international law should not be enforced at the expense of international peace. The United Nations International Court of Justice clearly indicated in 1986, in its judgment in the Case concerning Military and Paramilitary Activities in and against Nicaragua, that this rule is not only based on conventional provisions, but that it also has a general customary value. This prohibition results not only from the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence, but also from other fundamental principles of international law: the principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered, the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, the principle regarding the duty of states to cooperate with one another, the principles concerning the inviolability of borders and the territorial integrity of states.⁹⁴

This rule is of universal validity; even the few states which are not members of the United Nations are bound by it because it is also a rule of customary international law. Article 2(4) is well-drafted, in so far as it talks of the threat of the use of force, and not of war. In this situation, war has a technical sense in international law, and states often engage in hostilities while denying that they are technically in a state of war. Such hostilities can range from minor border incidents to extensive military operations, such as the Anglo-French attempt to occupy the area surrounding the Suez Canal in 1956. Also, in this debate some issues play an important role, for example: the Kosovo case and the new role of NATO, the question of the legality of the use of force: the case before International Court of Justice or the subsequent debate. Furthermore, some legal rules are essential like a right of pro-democratic intervention, force and self-determination or the claims under Article 2(4) of the UN Charter.⁹⁵

The only exceptions to the prohibition on the use of force, including (or especially) the armed forces, are specified in contemporary international law. Self-defence (in French, "légitime défense"), as an exception to the prohibition on the use of force, is legitimate only insofar as it represents the response to an armed attack (in French, "agression armée"). Any such response must be necessary and proportional to the attack. Part of the responsibility of the military is to respect these conditions. Their non-observance leads to qualifying self-defence as illegitimate, excessive, unnecessary or disproportionate use of force becoming an aggression itself, that is an internationally unlawful act

⁹⁴ Ibidem.

⁹⁵ Ibidem.

which engages the international responsibility of the respective State. This is a clear justification for the democratic control of the armed forces.

Moreover, Article 51 of the Charter of the United Nations, is the legal basis for alliances such NATO and the Warsaw Pact. The words "if the attack occurs," interpreted literally, imply that the armed attack must have already occurred before force can be used in self-defence; there is no right of anticipatory self-defence against an imminent danger of attack. However, supporters of a right of anticipatory self-defence claim that Article 51 does not limit the circumstances in which self-defence may be exercised; they deny that the word "if", as used in Article 51, means if and only if.⁹⁶ This argument sometimes takes the extreme form of saying that a state may use force in defence of a large range of interests, even when there is neither an actual armed attack nor an imminent danger of one.

This view, which is reminiscent of nineteenth-century ideas of vital interests, is generally discredited. In evaluating whether anticipatory self-defence is incompatible with the Charter one should first note that Article 51 is an exception to the earlier mentioned Article 2(4), and it is a general rule of interpretation that exceptions to a principle should be interpreted restrictively, so as not to undermine the principle.⁹⁷ For example, it is also significant that the North Atlantic Treaty and similar treaties based on Article 51 provide only for defence against armed attacks, and not for defence against imminent dangers of armed attacks. The conditions stated in Article 51 cannot be treated as exhaustive, otherwise the words "if an armed attack occurs against a member" would have the absurd result of preventing members from claiming a right to protect non-members against attack.⁹⁸ Moreover, Article 51 describes self-defence as an inherent right, and they suggest that it would be inconsistent for a provision simultaneously to restrict a right and to recognize that right as inherent. This argument is less easy to refute and requires further consideration. Today state practice on the matter is thus rather inconclusive. But a unilateral use of force merely in view of some deployments of weapons or modernization of weapons systems in another country is certainly too dangerous to be regarded as generally admissible.

In frames of the analysed legal acts of international law dealing with the control of armed forces, arms control and the use of force, is the important significance played by Article 4A (2) of the Third Geneva Convention. This is a necessarily low-threshold requirement, which submits that the requirement of belonging demands no more than a de facto agreement between a state 's behalf against another state. Also, there has been little discussion in the literature concerning the requirement of belonging

⁹⁶ Ian Brownlie, *Principles of Public International Law*, London 2003, pp. 700-704.

⁹⁷ Michael Byers, *Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change*, "11 Journal of Political Philosophy," 2003, pp. 171-172.

⁹⁸ Thomas Franck, *Recourse to force*, Cambridge University Press 2002, pp. 2-5.

to a party to an international armed conflict as a criterion for attaining combatant/ prisoners of war status under Article 4A(2) of the Third Geneva Convention.⁹⁹ This is unfortunate, as an understanding of this notion is essential to making sense of the status and role of irregular armed groups in the context of international armed conflicts. In the Tadić case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) equated the requirement of belonging with some measure of overall control that the state must exercise over the armed group. This poses a practical danger to the application of international humanitarian law. The Tadić case also linked the status of combatant under Article 4A(2) of the Third Geneva Convention to the attribution of state responsibility.¹⁰⁰ As K. Del Mar points out, while not all factual scenarios will mean that the actions of combatants falling under Article 4A(2) are attributable to a state, this may occur in some situations. In any event, a state may nevertheless incur responsibility on the basis of failing to exercise due diligence obligations concerning the effects of violations committed by combatants fighting on its behalf.¹⁰¹ Therefore, the concept of belonging to a party to an international armed conflict is useful to bear in mind when examining the role of some non-state actors in international armed conflict situations. It remains to be seen what applications such an analysis of the notion of belonging has for other groups operating in international armed conflict-situations, including private military companies.¹⁰²

It is important to stress, that in the context of the control of armed forces via international law, there is also a problem of the crime of rape, which has been prevalent in all contexts, whether committed during armed conflict or in peacetime, and has largely been characterized by a culture of impunity. International law, through its branches, as presented in this article: international human rights law, international humanitarian law, international criminal law, has increasingly condemned such violence and its progressively obliging states to prevent rape, whether committed by a state agent or a private actor.¹⁰³ Whereas the prohibition of rape has been consistently recognized in these areas of law, the definition of the offence has been a later concern to international law. Attempts to define the crime have, however, been made a later concern of international law.

Therefore, in accordance with international law, democratic control of the armed forces must prevent the temptation for military leaders to use “opportunities” offered by circumstances that in reality cannot justify the use of force in order to achieve certain illicit goals, either at international or at domestic level. Also, democratic oversight must, in this sense, prevent inter alia the conclusion of

⁹⁹ Ibidem., p. 106.

¹⁰⁰ Ibidem., p. 108.

¹⁰¹ Ibidem., p. 121.

¹⁰² Ibidem., p. 124;

Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the meeting of Legal Advisors of the Ministries of Foreign Affairs, 29.10.2007, <http://www.icj-icj.org/court/index.php>

¹⁰³ http://www.ilreports.blogspot.com/2011_11_13_archive.html

“secret understandings” to direct acts of aggression against other states. According to the United Nations International Court of Justice, if the use of force is to be legitimate, it has to respect the law applicable to armed conflicts, especially the principles and rules of international humanitarian law.

This is yet another reason for the control of armed forces, as a breach of these rules attracts international responsibility of the state. A democratic state – which is a state where fundamental rights and freedoms are (to be) respected – cannot ignore the imperative need for the same rights and freedoms to be strictly observed by its armed forces when engaged in international military operations. This is also an imperative need in the actual context of the fight against terrorism, in which armed forces are involved. In general, the democratic control over armed forces represents a guarantee that human rights and fundamental freedoms are respected both within the armed forces and by the armed forces during their operations.¹⁰⁴

Irrespective of the state’s responsibility, a breach of the said rules may involve individual criminal responsibility of armed forces personnel. International criminal law provides for specific sanctions against armed forces personnel who commit crimes against humanity, including genocide, war crimes and the crime of aggression. The democratic control of armed forces must prevent the occurrence of such acts by its political and military leaders, and, in general, by the personnel of its armed forces. This has the potential to affect the credibility of that country in international relations.

Democratic control of armed forces is justified by the need to control the decision-making process over recourse to certain type of arms, especially weapons of mass destruction, such as nuclear weapons. With regard to the second hypothesis – the use of force as decided or authorised by the United Nations Security Council on the basis of Chapter VII of the United Nations Charter – what is relevant here is the manner in which decisions are made, on recourse to the use of force, either in the Security Council or in any other (regional) international organisation acting under the mandate given by the Security Council in order for international peace and security to be restored and maintained. Provided that the armed actions are duly authorised under the United Nations Charter (meaning that they are legal and justified), the problem here is the fact that such decisions are taken by the representatives of the governments in the respective international bodies, even if at domestic level the competence to take such decisions belongs or should belong to the national Parliaments. A certain transfer of competences is discernible, from the (domestic) parliamentary level to the (international) intergovernmental level. This is a further justification for domestic parliamentary democratic control of the way decisions

¹⁰⁴ Marcin Lech, *Legal aspects of international security in the era of radicalization, extremism and international terrorism*, [in:] *Schriften zu Radikalisierung, Extremismus und Terrorismus, Organisation, Denken, Recht, Band 1*, Paul G. Ertl, Günther Fleck (eds.), Wien 2013, pp. 69-110.

regarding the use of force are taken at an international level. The mandate to engage the responsibility of the state in this field should be under constant supervision at the parliamentary level.¹⁰⁵

In this way of thinking and planning of security policy of every country, the control of armed forces understood with its above mentioned legal and strategic arguments, is possible only in frames of creation of global security policy system by using main paradigms of security policy: conflict prevention and crisis management can establish a complex and modern system of global security by an effective multilateralism, aiming in describing of main standards of international cooperation between states and major contemporary international security organizations: OSCE, UN, NATO and the EU.¹⁰⁶ Moreover full implementation of international law standards into the complex character of world security policy by close cooperation between these international organizations should ensure international security in accordance with the new 21st-century security paradigm. International organizations should constantly monitor the full implementation of human rights and minorities rights through international law standards, peace treaties and international agreements for a global and stable system of security.¹⁰⁷ In this case, an important role plays the legal framework, which governs functions and activities of international institutions in the area of international security, peace-keeping and peace-enforcement. In this regard, international humanitarian law is applicable to interstate and internal armed conflicts.

Providing legal standards and norms guaranteeing international security in crisis situations (armed conflict or threat of this conflict) should be done ultima ratio. In this context, first of all, collective self-defence should become the standard form of response to an armed attack for a member of NATO or the EU. Secondly, introducing of authorization by the resolution of the UN Security Council and conducted by NATO or by the appropriate coalition. Thirdly, the introduction of peace and security should be done in accordance with international humanitarian law regulations at that time with taking into account the common law, as well as harmonisation of different doctrines of war in accordance with effective legal and administrative structures will be necessary, in accordance with international law. Effectiveness should be also introduced by development of law concerning disarmament, arms control, strength and capacity-building of international security policy. In this way, it is important to strengthen a legal structure of cooperation between international institutions

¹⁰⁵ <http://www.bezbednost.org/All-publications/4091/Legal-Framework-of-the-Democratic-Control-of-shtml>;
<https://venice.coe.int>.

¹⁰⁶ Ibidem.

¹⁰⁷ Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, „Columbia Journal of Transnational Law,” 2004, vol. 43, p. 4.

Marcin Lech, *Perspektywa globalnej architektury bezpieczeństwa międzynarodowego – analiza prawna i instytucjonalna*, [in:] Jerzy Menkes, Ewelina Cała-Wacinkiewicz, Joanna Nowakowska-Matusecka, Władysław Pęksa, Wojciech Szczepan Staszewski (ed.), *Idee, normy i instytu cje Kongresu wiedeńskiego – 200 lat później- perspektywa prawnomiędzynarodowa*, pp. 269-284.

responsible for global/world international security policy, especially in the context of the law of self-defence peacekeeping operations and the process of introducing of a peace.

International community participation in the international promotion of international law will ensure global security. Globalization and new transnational structures will shape the position of strength and prosperity, while respect for human rights, protection of minorities and the rule of law are common values of the new international security order. Major actors in international law: Sovereign states will delegate part of their authority to global and regional institutions and organizations. It also seems reasonable for political leaders to be personally responsible for their actions under international criminal law. Only the democratic rule of law consistent with the structure of a functioning interinstitutional cooperation of international organizations ensure full global international security. In addition, the full responsibility of the governments of the member states of these organizations and democracy will shape the new organizing principle of global security. However, when choosing: international law or armed force, the choice will be made by the state in a given period of time - the strongest subjects of future global security. So, it is only a wish for the development of modern law to go along with the institutional development of the future architecture of the global system of world security.

These all essential legal aspects dealing with the fundamental normative structure of international security derived from international legal order, reinforces international law regulations in regard of the issues of control of armed conflicts for global security policy in XXI century. They will contain the development of the whole system of international law, especially the concept of just war (*bellum justum*), a regime of international accountability, institutions of recognition and the international justice. This complex effectiveness should be also introduced by development capacity-building of international security policy. In this direction, it is important to strengthen a legal structure of cooperation between international institutions responsible for the global security system, especially in the context of the process of introducing peace. In effect, an international community participation in the international promotion of international law will ensure global security. Also, the process globalization and new transnational structures will shape the position of strength and prosperity, while respect for human rights, protection of minorities and the rule of law are common values of the new international security order.

Major actors in international law: Sovereign states will delegate part of their authority to global and regional security institutions and organizations. It seems reasonable for political leaders to be personally responsible for their actions under international criminal law. Only the democratic rule of law consistent with the structure of a functioning interinstitutional cooperation of international

organizations ensure full global system of security. In addition, the full responsibility of the governments of the member states of these organizations and democracy will shape the new organizing principle of global security. In the context of the control of armed forces, this will have a big significance for mutual relations between states where the ban on the use of force and the peaceful settlement of conflicts establishing a binding norm.

Therefore, continuing the above-presented way of scientific, as well legal and strategic deduction, the central task facing security studies in the early twenty-first century, taking into account the democratic and civil control of armed forces, is thus to define the boundaries of a broadened concept of comprehensive world security policy with which to address the challenges of a changing security environment in accordance with international legal order. Only if security studies is successful in this collective endeavour will it continue to provide one of the most exciting and intellectually stimulating areas of contemporary academic inquiry and to provide the analytical tools required by policymakers and the wider public as they confront an increasingly complex security agenda. Essential requirements are inevitable preconditions for a complex effectiveness of collective security mechanism comparing with general international law standards. Without meeting them there is practically no possibility to provide the trust of participants in the system.

Current international legal analysis of global security policy argues, that democratic peace turned into stability and first of all security. Contemporary security communities use democratic peace, accordingly with international law standards as an international regime, followed by new cooperative security arrangements. Stable security communities promote principles, legal norms, rules and decision-making procedures leading into a stable liberal democratic society. A great importance plays the introducing the system of checks and balances between various bodies of collective security mechanism and thus preventing the usurpation or abuse of power by some participants and organs. In the context of control of armed forces, the neighbourhood of security communities through cooperative security initiatives and arrangements make a guarantee for this process. Moreover, institutionalization of security communities introduces appropriate principles, legal norms, values and decision-making procedures within community members, which share common values, unified legal norms and similar identity which exclude the use of force in conflict resolution within the community. This institutionalization of security communities is simply connected with the all interdisciplinary dimensions of democratic civilian control of armed forces.

Moreover, the important significance for future creation of the shape of the modern control of armed forces of every country in frames of international security architecture, plays the jubilee of the 200th Congress of the anniversary of the Vienna Congress. It leads leads leads however to the the current

complex reflection not only dealing with control of armed forces in XXI century sensu stricto, but to the dealing especially with the global international security policy in the context of international humanitarian law regulations and its evolution.

In this way of thinking, all essential legal aspects dealing with the fundamental normative structure of international security derived from international legal order, especially, an effectiveness of international humanitarian law regulations for world security policy in XXI century shall contain the development of the whole system of international law, especially jus ad bellum and the concept of just war (bellum justum), regime of international accountability, institutions of recognition and the international justice.

In frames of the above-analysed context, this is necessary to underline, that the complex process into anarchy of international relations cannot prevent today of the mutual balance existing between the control of armed forces and international legal order, especially concerning international humanitarian law. This law, has, as its aim, the limitation of the effect of armed conflict, but it does not include a full definition of those situations, which fall within its material field of application. Therefore, by preparing a typology of armed conflicts from the perspective of international humanitarian law, it is necessary to know how the different categories of armed conflict anticipated by the legal regime can be interpreted in the light of recent developments in international legal practice.¹⁰⁸ They should mainly fulfil legal criteria concerning the use of force and control of armed forces dealing with the interpretation of the existing legal norms.¹⁰⁹ This reflects the fact that international humanitarian law has gone through a period of considerable expansion and development in the past two decades, including the conclusion of several new international humanitarian law conventions and codes of offences, the creation of a number of criminal tribunals to prosecute international humanitarian law violations, and the effort to produce a comprehensive elaboration of customary law in the field. The problem also shows, that international humanitarian law has been seriously tested by the armed conflicts of recent years, which have often been vast in scope, long in duration and severe in their human consequences. These conflicts have challenged both the norms themselves and the new institutions that have been created to enforce them.¹¹⁰ Moreover, nowadays, international military missions and their relation to international law play an important role. The law of armed conflict

¹⁰⁸ <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>

<http://www.ohchr.org/Documents>

<http://www.gistprobono.org>

¹⁰⁹ Elisabeth Wilmshurst, *The Crime of Aggression: Custom, Treaty and Prospects for International Prosecution*, [in:] *International Law between Universalism and Fragmentation. Festschrift of Gerhard Hafner*, I. Buffard, J. Crawford, A. Pellet, S. Wittich (eds.), 2008 Koninklijke Brill NV. Printed in Netherlands, pp. 603-624.

¹¹⁰ Michael Matheson, Djamchid Momtaz, *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Martinus Nijhoff Publishers, 2010, pp. 267-1063.

traditionally regulates the actions of states and armed groups, as well as individuals who participate in hostilities. It is increasingly evident that there are significant legal issues regarding the application of this law to the activities of International Military Missions,¹¹¹ especially with regard to United Nations forces and other international organizations because it is sometimes unclear how their activities are regulated by traditional sources of international law.¹¹² In this sense, the contemporary international humanitarian law aims to promote scholarly analysis and discussion of both the theory and practice of the international legal regulation of armed conflict.¹¹³ This issue explores substantive aspects of international humanitarian law including, protection for victims of armed conflict and regulation of the means and methods of warfare, questions of application of the various legal regimes for the conduct of armed conflict, matters relating to the implementation of international humanitarian law obligations, national and international approaches to the enforcement of the law, as well as the interactions between international humanitarian law and other related areas of law such as human rights, refugee law, arms control and disarmament law and international criminal law.¹¹⁴ However, the present international law includes a system of authorized coercion in which force is used to maintain and enhance public order objectives and in which unauthorized coercions are prohibited. Then, the law and coercion are not dialectical vice versa. Formal legal arrangements are not made when there is a spontaneous social uniformity, because there is then no need for law. Law is necessary when there is disagreement, the more effective members of the group concerned imposing their vision of common interest through the instrument of law with its program of sanctions. Law also acknowledges the utility and the inescapability of the use of coercion in social processes, but seeks to organize its economy.¹¹⁵

This subject should be mainly analysed looking at the essence of this law, which regulates the conduct of forces when engaged in war or armed conflict: *jus in bello*. It is that branch of international law which seeks to limit the effects of armed conflict by protecting persons who are not participating in hostilities, and by restricting and regulating the means and methods of warfare available to combatants. It is distinct from *jus ad bellum* which regulates the conduct of engaging in war or armed conflict and includes crimes against peace and wartime-aggression. Together the *jus in bello* and *jus ad bellum* comprise the two strands of the laws of war governing all aspects of international armed conflicts. International humanitarian law operates on a strict division between rules applicable in international armed conflict and internal armed conflict. This dichotomy is widely criticized, because

¹¹¹ <http://www.who-sells-it.com/cy/brill-4907/>

¹¹² Marco Odello, Ryszard Piotrowicz (eds.), *International Military Missions and International Law*, Martinus Nijhoff Publishers 2011, pp. 34-332.

¹¹³ http://www.wosco.org/books/Political_Sciences/International_Law.pdf

¹¹⁴ *Ibidem*.

¹¹⁵ Gentian Zyberi, *Provisional Measures of the International Court of Justice in Armed Conflict Situations*, "Leiden Journal of International Law," vol. 23, 2010, pp. 571-584;

http://digitalcommons.law.yale.edu/fss_papers/739

in the XX century the concept of just war was abandoned. Jus ad bellum has traditionally lost its legal basis. World War II brought more experience, verifying the current status of the international community and international law. The basis of the new international order becomes the United Nations Charter maintaining first of all international peace and security. In this way, the foundations of the right to counteract the war (jus contra bellum) were formed introducing a wide spectrum for world security policy. Especially the end of the Cold War has facilitated some changes, and in any case the correction of the existing regulatory optics. More attention has been focused on the broadly understood state after armed conflict as the principal premise of lasting peace, a fundamental issue for world/ global security. In this context, the place for the new legal order, in frames of international humanitarian law namely jus post bellum has emerged, where still jus ad bellum and jus in bello define the contemporary debate over the fundamental problem, in essence, whether the war is just and moral.

Having dealt with the situation of normality, with the international law governing the peaceful relations between states, this article turns to the situation of abnormality, to the rules governing the use of force and armed conflict. In this sense, the term laws of war can have different meanings and refers to the rules governing the actual conduct of armed conflict jus in bello.¹¹⁶ It is reasonable to treat both areas separately, because of the recognized principle that jus in bello is applicable in cases of armed conflict whether the conflict is lawful or unlawful under jus ad bellum.¹¹⁷ The contemporary meaning of the jus in bello deals with the rules governing the actual conduct of hostilities, once an armed conflict has broken out. For most purposes, this body of law can be treated as separate from the rules governing the resort to the use of armed force – jus ad bellum. The basic reason is the consideration that, if it is not possible to fully prevent war, then at least warfare should be made subject to certain humanitarian restrictions in the interest of protecting, for example, prisoners, the wounded and the civilian population, or by prohibiting certain kinds of weapons.¹¹⁸

In the analysed context dealing with certain kinds of weapons, an essential role plays jus ad bellum and the normative character of the rules and institutions of international law covering international uses of force in the age of proliferation of weapons of mass destruction. The international use of the force law is currently in a state of crisis, precipitated by the proliferation of weapons of mass destruction technologies and revised set of national security calculations, which determine when and

¹¹⁶ http://www.directessays.com/essays/ Nazi_Germany/ Jews/ Portugal.html

¹¹⁷ Peter Malenczuk, *Akehurst's modern introduction to international law*, London and New York 2002, p.306;

W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, "Yale Journal of International Law," vol. 10, 1985, pp. 279-285.

¹¹⁸ Peter Malenczuk, *Akehurst's*, p. 342.

why states choose to use force internationally, that have been thrust upon states as a result.¹¹⁹ Presently, there is currently a crisis in the international use of force law, brought about by weapons of mass destruction, proliferation and changed security realities for states. Jus ad bellum currently faces largely as a result of weapons of mass destruction proliferation. A number of options have been proposed for changing the substance of international laws and institutions which currently regulate this area in order to make them responsive to this change in international security realities, and more effective and useful to states. Using both international legal theory and international relations theory, it will argue specifically that international law regulating uses of force should be deformed and maintained not as legally binding rules, but as politically persuasive norms. The resulting analysis and proposals will no doubt be considered by some to be somewhat revolutionary, and perhaps even radical. This situation interesting analyses D. H. Joyner and argues that, quite the contrary, they are specifically intended to bring the character of international law in the area of international use of force into harmony with the reality of the modern security landscape which states face, and thus ultimately to strengthen the formal corpus of international law generally. With regard specifically to the jus ad bellum, the deformatization thesis advanced herein should be understood not simply as a normative regression, but rather as a tactical normative retreat made necessary by fundamental changes in circumstance. This normative direction could, and should, be reversed in the future when the infrastructure of the international legal system is better able to provide effective regulation in this most sensitive and important area of international relations.¹²⁰

Analysing the meaning of jus ad bellum and jus in bello, P. Malenczuk points out, that there are a number of problems concerning the situations in which this body of law becomes applicable. On the one hand, although formal declarations of war are no longer a criterion because they have become uncommon, still the distinction between a situation of war or peace, between armed conflict and non-armed conflict, is not always easy to make.¹²¹ On the other hand are the rules pertaining to international armed conflict, such as in the case of civil wars.

Therefore, the term international humanitarian law, which is frequently used in this legal analysis, suggests that there is some synthesis between the laws of war and international human rights.¹²² In

¹¹⁹ Daniel H. Joyner, *Jus ad bellum in the age of WMD proliferation*, "The George Washington International Law Review," vol. 40, no.1, 2008, p. 233;

<http://international.vlex.com/vid/>

¹²⁰ D. H. Joyner, *Jus ad bellum*, pp. 234-237;

<http://docs.law.qwn.edu/stdq/qwilr/>

¹²¹ *Ibidem.*, p. 343.

¹²² http://www.wosco.org/books/Political_Sciences/International_Law.pdf

this light of analysis, the consequences from the construction of international humanitarian law in the light of human rights play an important role.

Today, as Ch. Tomuschat points, it is recognized, that human rights law is not generally displaced in times of armed conflict by international humanitarian law. Yet in large part this new insight remains to particularized as to its actual consequences. International humanitarian law is still predominantly under the influence of the concept of military necessity.¹²³ In this situation, according to the assumption of Ch. Tomuschat, there arise two serious consequences of the distinction between the law of human rights and international humanitarian law. Firstly, according to international humanitarian law, a person who belongs to the armed forces of the enemy can be targeted, also outside active hostilities. Secondly, according to the law of human rights, whenever the state wishes to take the life of a human, it must take the utmost precautions, abiding by the narrow requirements of the relevant clauses in the provisions guaranteeing the right to life. The entire context, the specific situation, must be considered. Review of cases of self-defence is carried out according to strict rules. Shots to kill are permissible only in extreme circumstances.¹²⁴ It is important to stress in this context that according to international humanitarian law, a person who belongs to the armed forces of the enemy can be targeted, also outside active hostilities. However, according to the law of human rights, whenever the state wishes to take the life of a human, it must take precautions, abiding by the narrow requirements of the relevant clauses in the provisions guaranteeing the right to life. This right to life is located at the summit of the hierarchy of rights in all human rights conventions, be it at the universal or regional level. Essentially, these conventions have been elaborated for times of peace. Human life was protected, but only within the limits of military necessity, a concept which is susceptible of making a mockery of the entire carefully constructed edifice of international humanitarian law.¹²⁵ It reflects the fact that international humanitarian law has gone through a period of considerable expansion and development in the two decades, including the conclusion of several new international humanitarian law conventions and codes of offences and the creation of a number of criminal tribunals to prosecute a comprehensive elaboration of customary law in the field.¹²⁶ But the topic also reflects the fact that this body of law has been seriously tested by the armed conflicts of recent years, which have often been vast in scope, long in duration and severe in their human consequences. These conflicts have

¹²³ Christian Tomuschat, *Human Rights and International Humanitarian Law*, "The European Journal of International Law," vol. 21, no. 1, 2010, p. 15.

¹²⁴ *Ibidem.*, p. 22.

¹²⁵ *Legality of the Threat or Use of Nuclear Weapons*, "International Court of Justice Reports," 226, 1996.

¹²⁶ Marcin Lech, *Die NATO Operation auf dem Balkan - völkerrechtliche Perspektive*, [w:] Paul G. Ertl, Marcin Lech (red.), *Juristische und philosophische Analyse angewandten Völkerrechts, Eine Case –Study zur Operation Deliberate Force*, "Schriftenreihe der Landesverteidigungsakademie", Wien 2013, p. 31-60.

challenged both the norms themselves and the new institutions that have been created to enforce them.¹²⁷

All essential legal aspects dealing with the fundamental normative structure of international security derived from international legal order, and effectiveness of international humanitarian law regulations for world security policy in XXI century will contain the development of the whole system of international law, especially *jus ad bellum* and the concept of just war (*bellum justum*), regime of international accountability, institutions of recognition and the international justice.

With their existing distinction in the modern law of armed conflict, *jus ad bellum* and *jus in bello* significantly affect the current concept of a new of international law of *jus post bellum*, as well as represent a fundamental legal and normative basis for creating fully legitimate new legal doctrine *jus post bellum*, which may *de lege ferenda* help bring moral considerations closer in line with the law. This legal order will be responsible for enacting and justification of a new international legal order of armed conflict transformation, since its completion to the establishment and achievement of a stable peace, which will have an essential influence for regional and international/world security policy aspects. This legal order will have a supranational character. The development of international humanitarian law on the issue of sanctioning international and internal armed conflicts will play an important role in the process of the construction of the security after armed conflict, which will focus on the new *jus post*. Transparency and predictability of governments and political plans in line with international law, as well as harmonisation of different doctrines of war in accordance with effective legal and administrative structures will be necessary, in accordance with international law.

Possible control of armed forces in *jus post bellum* doctrine

The big challenge in the evolution of international humanitarian law, which has a great impact for a future perception of determinants of control of armed forces, plays a *jus post bellum* doctrine, as an urgently needed and hopefully emerging branch of a new international legal order based on fully reasoned ethical principles. This presented of view refer to justifying this new international legal order in respect to the necessary parallel transformation of the utility of armed response and, particularly, lethal force to meet modern-day and future conflicts. While it is possible to find at least partial answers, many more questions for future development will emerge in order to truly establish what promotes and fulfils the actual achievement of a stable, safe, lasting and just peace. Therefore, the object of this research into legal and ethical possibilities is primarily to assess the quality of a new

¹²⁷ Michael J. Matheson, Djamchid Momtaz, *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, Martinus Nijhoff Publishers 2011, pp. 259-1072; http://www.brill.com/files/brill.nl/brill.law-spring-2012_0.pdf

conceptualization of international justice and law. This allows for the formation of a new law *jus post bellum* and the nature of peace, which might induce the necessary socio-political transformation to sustain a just peace and a new reflection on control of armed forces after the war. The exclusive reference to moral obligations in the theorisation of transition from conflict to peace too often fails to recognize the existing framework of legal rules and principles involved. While analysed from the perspective of international humanitarian law and perspective of independence of nation-states, it characterises assymetric warfare, and the question about the causes driving states' and other communities' activities, particularly *casus belli*. *Jus post bellum* in the age of global transitional justice could prepare for new judicial frameworks, as well as true and real justice after the end of the war.

A complex analysis of the principles and factors for bringing about justice after wars, *jus post bellum* shows that just peace is not only the absence of war (armed conflict), but it is a much more demanding situation – indeed the biggest challenge of the international community. An analysis of a tentative modern branch of international humanitarian law has shown a number of steps of analysis. Essential are philosophical and legal ideas, then strategic considerations, which are necessary for practical foundations of post-war-justice. However, the all-important considerations, dealing with *jus post bellum* as a new branch of international humanitarian law show, that the main aim of *jus post bellum* is the concept of enacting and justification of a new transformative international legal order of armed conflict as part of a continuation of just war theory. Moreover, international state-practice realizes simply that further debate on justice and morality of military action within the international community is impossible without establishing a legitimate post-war law: *jus post bellum*, which will enable a smooth, safe and sustainable transition after the end of armed conflict. Unfortunately, the central problem is the vagueness and lack of clarity of *jus post bellum* doctrine. This must be overcome by international consensus, taking advice legal and 'moral philosophy' (ethical), experts.

The complexity of modern understanding of *jus post bellum* will have a tripartite character in the framework of contemporary just war theory. In this case, breaking the rules and principles of *jus post bellum* will have much greater consequences than the legal systems of *jus ad bellum* and *jus in bello* or, analysed in a contemporary doctrine of international humanitarian law: *jus pacis*, *jus contra bellum*, *jus ex bello* or even international criminal law. However, it must be underlined, that a modern *jus post bellum* cannot be seen only as a kind of *addendum* to *jus ad bellum* and *jus in bello*. A comprehensive assessment of coexistence quality norms of IHL of armed conflict and several legal systems might form a specific typology of norms *jus post bellum* with near-binding *jus cogens* and effective legal obligations *erga omnes*.¹²⁸ Therefore, this process should legitimise the establishment of a specific typology of

¹²⁸ Marcin Lech, *Modern jus post bellum – Finding a New Branch of International Justice and Law*, "Polish

norms and sources of law and universal principles, bearing in mind the variety of contemporary legal systems and jurisdictions. However, the order of contemporary international humanitarian law must be a starting point for this analysis. Therefore, *jus post bellum* should also be consistent with just war theory as a whole, forming a coherent body of norms, which should then be applicable for the political realities of today and effective in limiting the many negative aspects of war.

The present rethinking of *jus post bellum* especially in an age of global transitional justice will play nowadays an important role to prepare for justice after the end of the war. Therefore, the basic element of the definition of *jus post bellum* as a new paradigm of international humanitarian law must become an objective and independent structure of international law, in which the articulation of rules of conduct concern the fundamental principles of *jus post bellum*, bringing termination of armed conflicts and creating peace as the result of the transformation process.

The truly fundamental question of *jus post bellum* to be asked can be formulated as follows: Whether, in spite of the diversity of different legal systems, regimes and legal orders, and considering their multidimensional nature, can there be any unity and universality of international humanitarian law, especially in the context of formulating new normative basis of *jus post bellum*? The broad answer to this question will bring further legal research on *jus post bellum* as a new paradigm of international humanitarian law, which should be continued and presented at the level of comparative law and conflict law analysis. The legal research method on *jus post bellum* as a new figure of international humanitarian law shall be complex, dogmatic but primarily systemic and functional, leading to the synthesis, on the level of general international law, comparative law and comprehensive assessment of international conflict law.

Finally, well-established peacekeeping organizations – mainly professional armies – might become new *jus post bellum* control management and recovery systems after armed conflict. Therefore, *jus post bellum* and the nature of peace should consist in a complex legal order of transition guaranteeing a stable, just, safe and lasting peace after war. It also has to be remembered, that while being internally coherent and when broadly argued, *jus post bellum* considerations can add to just war theory and tradition, but only to a limited extent in restraining the truly horrific effects of war. Development of international humanitarian law on the issue of sanctioning international and internal armed conflicts will play an important role in the process of construction of the security after armed conflict, which will focus on the new *jus post bellum* law and legal control of armed forces. More attention has been

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focused on the broadly understood state after armed conflict as the principal premise of lasting peace, a fundamental issue for world/global security. In this context, the place for the new legal order, in frames of international humanitarian law namely *jus post bellum* has emerged, where still *jus ad bellum* and *jus in bello* define the contemporary debate over the fundamental problem, in essence, whether the war is just and moral. With their existing distinction in the modern law of armed conflict, *jus ad bellum* and *jus in bello* significantly affect the current concept of a new of international law of *jus post bellum*, as well as represent a fundamental legal and normative basis for creating fully legitimate new legal doctrine *jus post bellum*, which may *de lege ferenda* help bring moral considerations closer in line with the law. This legal order will be responsible for enacting and justification of a new international legal order of armed conflict transformation, since its completion to the establishment and achievement of a stable peace, which will have an essential influence for regional and international/world security policy aspects. This legal order will have a supranational character.

Control of armed forces and legal aspects of European security architecture case ¹²⁹

For example, the contemporary comprehension of the complex legal aspects of the operations of restoring peace and the maintenance of security in Europe dealing with the principal security institutions forming *European Security Architecture*: the UN, NATO, the EU and the OSCE play an important role. Today, consideration and legal research of the role of international organizations in the control of armed forces and general international security, especially in the case of *European Security Architecture*, requires, first of all, an analysis of the nature and character of the environment in which those organizations exist and develop. This environment is called the international society, in which the states constitute the primary category of participants. The will and interests of states are giving shape to international relations and exert their influence also on the activities¹³⁰ and behaviour of international organizations. The current legal analysis argues that democratic peace turned into international regime may be an applicable instrument for establishing zones of peace, stability and first of all security. Without these factors, the transparent control of armed forces is simply impossible. In this sense security communities, which have an important influence on the clear rules of the arms control, use democratic peace as an international regime, which is also followed by new cooperative security arrangements. In this way control of armed forces via international law is certainly not a futile challenge. However, and important to stress, is that the international legal process is constantly accumulating threats to security (whether national or international), as they emanate from the

¹²⁹ Marcin Lech, *Legal aspects of the operations of restoring peace and maintenance of security in Europe*, a Lecture held at the international conference *Neunerjahre: Europäische Ordnungsvorstellungen 1919-2009* at the Austrian Defence Academy in Vienna, 9-11.11.2009;

¹³⁰ <http://www.nato.int/acad/fellow/98-00/orakhelashvili.pdf>

behaviour of state and non-state actors, and is elaborating means and methods of response to such threats such as sets of rules, principles and procedures.¹³¹ Therefore, an analysis dealing with the control of armed conflicts via international law should first of all be presented via the issue of legal aspects of the operations of restoring peace and the maintenance of security first in Europe in frames of the *European Security Architecture*, understood then secondly in the global and regional *International Institutional Security* context.¹³² Firstly, it presents a real relevance of legal analysis, constraints upon national power and national interest as well as the notion of collective interests and collective safeguards. Secondly, it is considered the primary responsibility of the UN Security Council in the maintenance of international peace and security with its nature and scope. Thirdly, regional arrangements within the legal framework of enforcement measures under the UN Charter are under consideration. Fourthly, are presented unauthorized actions by states and regional organizations. Finally, the fifth element of this wide analysis deals with peacekeeping forces, as a legal basis for establishment with special regard to the UN peacekeeping operations with legal consideration: *rationae personae, rationae materiae and rationae temporis*.¹³³

Final conclusions

It is very difficult today to address the compendium of legal and strategic aspects of control of armed forces in frames of the complex international security architecture, especially, for a new global system of security because of the different internal practice of many states.

Especially, contemporary international humanitarian law has as its aim today the limitation of the effects of armed conflict. It does not include a full definition of those situations which fall within its material field of application. The relevant conventions refer to various types of conflicts and therefore afford a glimpse of the legal outlines of this multifaceted concept. These instruments do not propose criteria that are precise enough to determine the content of those categories unequivocally. A certain amount of clarity is needed depending on how the situations are legally defined. The rules that apply vary from one case to the next.¹³⁴ By preparing a typology of armed conflicts and then control of armed forces from the perspective of international law, humanitarian law and national legal orders is necessary to show the different categories of armed conflicts anticipated by the legal regime. It can be interpreted in the light of recent developments in international legal practice. It also reviews in international legal practice. It also reviews some actual situations whose categorization under existing legal concepts has been debated.¹³⁵ Moreover, and according to the above-analysed deliberations

¹³¹ Ibidem.

¹³² M. Lech, *Legal aspects...*

¹³³ Ibidem.

¹³⁴ <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>

¹³⁵ Ibidem.

presented in this article, it should be noted that the legal issues of disarmament and arms control, including the problems of the demilitarization or neutralization of certain areas, are beyond the scope of those not directly relevant to the actual conduct of armed conflict.

Additionally, institutionalization of security communities introduces appropriate principles, legal norms, values and decision-making procedures within community members, which share common values, unified legal norms and similar identity which exclude the use of force in conflict resolution within the community.

Nowadays, globalization and new transnational structures will shape the position of strength and prosperity, while respect for human rights, protection of minorities and the rule of law are common values of the new international security order.

Only the democratic rule of law consistent with the structure of a functioning interinstitutional cooperation of international organizations ensure full global international security. It is only a wish for the development of effectiveness of modern international law to go along with the institutional development of the future architecture of the global system of security.

To summarise, the above analysis of both many not only domestic and international inter-related dimensions of the necessity to control the armed forces show an important number of reasons which justify it, based on the objectives of safeguarding the democratic values, rule of law and human rights and fundamental freedoms, and of maintaining the international peace and security as well as respecting contemporary international law.

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