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**STUDY ON DEMOCRATIC CONTROL OF ARMED FORCES**

**WHY CONTROL THE ARMED FORCES?**

by

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## I. Introductory remarks

1. In order to answer to this very important question, the starting point in our analysis should be the “raison d’être” of the armed forces in the contemporary democratic European States. This “raison d’être” is justified – as always was – by the necessity to protect and to ensure the security of the society of the respective States from exterior threats, and also – in our times more than ever – to safeguard the democratic values, the rule of law and the human rights and fundamental freedoms of all persons subject to that national jurisdiction.

2. 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 the contemporary public international law – the maintenance of the international peace and security is the most important objective of the 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,<sup>1</sup> an imperative rule (*ius cogens*). 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 engaging the international responsibility of the respective State. The use of (armed) force is *only* allowed (in other words is *legitimate*) in order to for the international peace and security be re-established and the international legality (or International Rule of Law) be restored.

3. Following these two dimensions – one domestic, and the other one international, both being inter-related – that circumscribe the existence and the potential use of the armed forces, this analysis will try to identify the reasons justifying the democratic control of the armed forces.

## II. The domestic dimension

4. Democracy always implies civilian primacy over the military<sup>2</sup> and control of the command of the armed forces. The reason of this principle is explained by the lessons learned from the history (including the recent one) of European States (and not only): when based on the advantages stemming out of its inherent discipline, of its organised structures, of its management and of its instruments (*i.e.* number of soldiers and arms), the military seized the political power in a military coup or threatened the civilian leaders with such a conduct or decided to impose their will by means of supporting a certain government, the democracy and its values were affected. The Venice Commission underlined on several occasions that democracy and human rights are closely interrelated.<sup>3</sup> It is thus clear that democratic control over the armed forces is necessary in order to align the interests of the military leaders with the interests of the democratic society,<sup>4</sup> so as the democratic constitutional values be guaranteed and protected.

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<sup>1</sup> General Assembly Resolution 2625 (XXV) of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

<sup>2</sup> See Venice Commission document CDL-DEM(2006)003 of 5 October 2006, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Mr. Hans BORN (expert, Netherlands) and Mrs. Cecilia LAZZARINI (expert, Netherlands), p. 4.

<sup>3</sup> See, for example, Venice Commission document CDL-AD(2002)032 of 16 December 2002, Opinion no. 227/2002 on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein (paras. 6-8).

<sup>4</sup> See Venice Commission document CDL-DEM(2006)003 of 5 October 2006, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Mr. Hans BORN (expert, Netherlands) and Mrs. Cecilia LAZZARINI (expert, Netherlands), pp. 4-5.

5. That is why objectives like political neutrality and de-ideologization, maximum transparency as possible in the activity of the armed forces and accountability of their personnel – absolutely necessary for ensuring that the said values are safeguarded – can be achieved only through the democratic control of the military.<sup>5</sup>

6. The democratic control of the armed forces is necessary in order to reduce the so-called “civil-military gap”, including to build the confidence, cooperation and coordination between the civil and military members of the armed forces institutions, and thus promote the integration of the military within the democratic society. It is worth recalling in this context the concept of “democratic peace”: “democracies do not fight each other”.<sup>6</sup>

7. In fact, in a democratic State, the inclusion of the armed forces as an integral part of a society governed by the rule of law<sup>7</sup> means that the armed forces are a component of the executive branch / power. The democratic oversight is justified by the basic democratic principle of the separation / balance of powers that control each other(s). Being an integral part of the executive, the parliamentary and the judicial controls over the armed forces represent a natural and normal implementation of this principle, leading to the necessary accountability of the military before the society they serve and protect.

8. In a parliamentary regime, such a control is natural and logic. In a presidential regime, it is even more justified as its specificities imply, with much more necessity, equilibrating, through increased control of the military by the parliament or by civilian courts, the balance of powers.

9. Despite the end of the Cold War, the new, unconventional threats to national and international security imposed a reorientation of the missions, structures, technologies and typology of the armed forces and of their strategies and tactics. All these transformations should be under the attentive democratic supervision, let alone the fact that they imply a lot of costs for the society at large. The years after the end of the Cold War witnessed an overall increase in the domestic public spending for military purposes. The national societies are naturally entitled to control the way their public finances are spent and to oversee if the results of these reforms are in full conformity with the public interests, including with the imperative need that democratic values are observed in this process. This is also in line with the citizens’ right to know how the State is planning and applying policies for their security.<sup>8</sup>

10. The democratic control, in general, is motivated by the need to ensure that the policies decided democratically by the Parliament and/or the elected government are carried out, including by the military, as decided and planned.<sup>9</sup>

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<sup>5</sup> See Venice Commission document CDL-DEM(2006)001 of 3 October 2006, Preliminary Report on the Democratic Oversight over Armed Forces, by Mr. Carlos CLOSA MONTERO (Member, Spain), para. 7, p. 3.

<sup>6</sup> Wolfgang Wagner, *Parliamentary Control of Military Missions: Accounting to Pluralism*, Geneva, August 2006, Occasional Paper no. 12, Geneva Centre for Democratic Control of Armed Forces (DCAF), p. 7.

<sup>7</sup> Idem.

<sup>8</sup> Wim F. van Eekelen, *Democratic Control of Armed Forces: The National and International Parliamentary Dimension*, Geneva, October 2002, Occasional Paper no. 2, Geneva Centre for Democratic Control of Armed Forces (DCAF), p. 16.

<sup>9</sup> Luis L. Boros, *Civilian Control or Civilian Command ?* Geneva, August 2003, Working Paper no. 121, Geneva Centre for Democratic Control of Armed Forces (DCAF), p. 4.

### III. The international dimension

11. The general prohibition to use force, including the armed force, was already a principle of international law in 1928 when the Briand-Kellogg Pact was concluded.<sup>10</sup> Later on, this prohibition was set forth in the UN Charter, especially in Art. 2 (4), as well as in subsequent documents, like the 1970 UN 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 CSCE (OSCE) Final Act adopted in Helsinki. The UN 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.<sup>11</sup>

12. 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 (see *supra* para. 2), 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. So, the prohibition to use force is a consequence of the systemic interpretation of all fundamental principles of contemporary international law.

13. The only *exceptions* from the prohibition to use force, including (or especially) the armed force are, in the contemporary international law, considered to be *the following*:

- the self-defence (individual or collective),
- the use of force as decided or authorised by the UN Security Council on the basis of Chapter VII of the UN Charter, and
- on the basis of the right / principle of self-determination of peoples.

As the last situation is irrelevant to our discussion, the analysis will focus on those aspects related to the first two hypotheses, which are pertinent for the purposes of this study.

14. The self-defence (in French, “*légitime défense*”), as an exception from the prohibition to use force,<sup>12</sup> is legitimate only insofar as it represents the response to an armed attack (in French, “*agression armée*”), response that must be necessary and proportional to the attack.<sup>13</sup> Respecting these conditions is in the responsibility of the military. Their non-observance leads to qualifying the self-defence as illegitimate, the excessive, unnecessary or disproportionate use of force becoming an aggression<sup>14</sup> itself, that is an international unlawful act which engages

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<sup>10</sup> Pierre-Marie DUPUY, *Droit international public*, 5<sup>e</sup> édition, Paris, Dalloz, 2000, p. 5, 38, 521.

<sup>11</sup> Ibidem, p. 533. See also D. J. HARRIS, *Cases and Materials on International Law*, 6<sup>th</sup> edition, London, Sweet & Maxwell, 2004, p. 898.

<sup>12</sup> Dominique CARREAU, *Droit international*, 8<sup>e</sup> édition, Paris, Pedone, 2004, p.564. See also Jean COMBACAU, Serge SUR, *Droit international public*, 6<sup>e</sup> édition, Paris, Montchrestien, 2004, p. 619.

<sup>13</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Rec. CIJ 1986, § 176, § 194. See also Jean COMBACAU, Serge SUR, *op. cit.*, p.629.

<sup>14</sup> The (armed) aggression is prohibited by international law not only by the two London Conventions of 1933 on the definition of aggression (the “Litvinov-Titulescu” Conventions), but also by the UN Charter provisions prohibiting the use of force, the UN General Assembly Declaration on the Definition of Aggression of 1974 (Resolution 3314 (XXIX) of 14 December 1974). The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations provides that “(a) war of aggression constitutes a crime against the peace for which there is responsibility

the international responsibility of the respective State. This is a clear reason justifying the democratic control of the armed forces.

15. The 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, the democratic oversight must, in this sense, prevent *inter alia* the conclusion of “secret understandings” to direct acts of aggression against other States.

16. According to the UN International Court of Justice, in order for the use of force to be licit, it has to respect the law applicable to the armed conflicts, especially the principles and rules of international humanitarian law.<sup>15</sup> This is yet another reason for the control of armed forces, as a breach of these rules attracts the 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.

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

18. Views were also expressed that democratic control of armed forces is also justified by the need to control the decision-making process to recourse to certain type of arms, such as nuclear weapons.<sup>16</sup>

19. Going now to the second hypothesis – the use of force as decided or authorised by the UN Security Council on the basis of Chapter VII of the UN Charter – what is relevant here is *the manner the decisions to recourse to the use of force are taken*, either in the Security Council, or in any other (regional) international organisation acting under the mandate given by the Security Council in order for the international peace and security be restored and maintained. Provided that the armed actions are duly authorized according to the UN 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,<sup>17</sup> even if at domestic

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under international law”. The 1998 Rome Statute establishing the International Criminal Court set forth the individual criminal responsibility for the “crime of aggression” (the definition of which is still to be convened upon by the State Parties and included in the Statute).

<sup>15</sup> See the *Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, §42.

<sup>16</sup> See, for a comprehensive analysis, Walter B. Slocombe, *Democratic Civilian Control of Nuclear Weapons*, Geneva, April 2006, Policy Paper no. 12, Geneva Centre for Democratic Control of Armed Forces (DCAF).

<sup>17</sup> See Venice Commission document CDL-DEM (2006) 003 of 5 October 2006, Preliminary Report on Civilian Command Authority over the Armed Forces in their National and International Operations, by Mr. Hans BORN (expert, Netherlands) and Mrs. Cecilia LAZZARINI (expert, Netherlands), p. 4.

level the competence to take such decisions belong or should belong to the *national parliaments*. One can notice a *certain transfer of competences* from the (domestic) parliamentary level to the (international) intergovernmental level. This is one more motive justifying the (domestic parliamentary) democratic control of the way decisions regarding the use of force are taken at international level. The mandate to engage the responsibility of the State in this field should be under the constant supervision of the parliamentary level.

20. In this sense, the members of the Western European Union (WEU) Assembly adopted at its session in Berlin (6-7 February 2007) a message to the EU heads of States and Governments ahead of the special European Council meeting of 25 March 2007 on the occasion of the 50<sup>th</sup> anniversary of the Treaty of Rome.<sup>18</sup> In the mentioned message, they urge the EU heads of States and Governments to make every effort to develop a European Security and Defence Policy (ESDP) based on: shared objectives such as described in the European Security Strategy formulated in 2003, credible capabilities and technologies, developments that should be coordinated with NATO so as to strengthen both the ESDP and the Atlantic Alliance, and *democratic legitimacy*. This third pillar of development of ESDP is defined as follows:

*“these policies must be subject to increased democratic scrutiny of the ESDP by national parliaments. In this respect, the Assembly of the WEU plays a decisive role. We need to strengthen this process. This existing interparliamentary forum, which is not a European second chamber, should be enhanced as a vital democratic link with citizens and public opinion.”*<sup>19</sup>

The WEU Assembly called for the European Council to further this idea as a matter of urgency.<sup>20</sup>

21. The above mentioned position of WEU Assembly (which is composed by designated representatives from the national parliaments) is symptomatic and eloquent. On one hand, it stresses the role of the parliamentary scrutiny which could enhance the democratic legitimacy of ESDP, commonly considered, despite its inherent difficulties, as a “success story” of the European construction,<sup>21</sup> (even if the ESDP operations are characterised, since ESDP’s inception, by a large civilian component).<sup>22</sup> At the same time, there is a need to seek and obtain a wider support of the European citizens and public opinion for the European construction, the ESDP being a part of it. But the European Parliament has practically no competences in this area, and it lacks control<sup>23</sup> over the national governments as far as this field is concerned. On

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<sup>18</sup> Assembly of the Western European Union, The Interparliamentary European and Security and Defence Assembly, *The Message from Berlin to the Heads of State and Government on the Way Ahead for the European Security and Defence Policy for their consideration ahead of the European Council meeting to be held on 25 March 2007 on the occasion of the 50<sup>th</sup> anniversary of the Treaty of Rome*, adopted in Berlin, on 7 February 2007. For the full text of the Message, see [http://www.assembly-weu.org/en/presse/espace\\_presse/documents/Berlin%20AssemblyMessage%20FINAL%20ENG%20pres.pdf](http://www.assembly-weu.org/en/presse/espace_presse/documents/Berlin%20AssemblyMessage%20FINAL%20ENG%20pres.pdf).

<sup>19</sup> Emphasis added.

<sup>20</sup> See footnote 14.

<sup>21</sup> See Claire PIANA, *Vers une Europe de la défense ?*, in Damien HELLY, Franck PETITVILLE (ed.), *L’Union Européenne, acteur international*, L’Harmattan, Paris, 2005, p. 91-104.

<sup>22</sup> See Brian CROWE, *Towards a European Foreign Policy*, in *The Hague Journal of Diplomacy*, Vol.1, No. 1, 2006, pp. 110-111. The author also reminds that the 1999 Helsinki European Council decided to establish an ESDP Civilian Committee (Civcom).

<sup>23</sup> See, for a short analysis of the democracy in the EU, in connection with the actual powers of the European Parliament, Trevor C. HARTLEY, *European Union Law in a Global Context*, Cambridge University Press, 2004, pp. 41-43.

the other hand, the national oversight is not satisfactory, as it cannot entirely control the collective actions of the EU governments in the EU. The solution should therefore be a combined one: increasing the national parliamentary control both at domestic level, and at the level of international interparliamentary bodies, like WEU Assembly, which should act in cooperation with EU bodies, including the Security and Defence Subcommittee of the European Parliament.

22. According to the Treaty on the European Constitution, Art. V of the WEU Treaty of Brussels (providing for mutual military assistance in case of aggression directed against one Member State) is to be replaced by the mutual defence clause set forth in Art. I-41, para. 7 of the Constitutional Treaty and by the permanent structured cooperation provided for in its para. 6. Para. 8 set forth that the European Parliament should be regularly consulted on the main aspects and fundamental choices of the ESDP. But the perspectives of the entry into force of the European Constitution are under question, so the best option would be the combined solution mentioned above.

23. The NATO Parliamentary Assembly has a similar position: for example, in its 2001 Resolution on the ESDP, it already urged the member Governments and Parliaments of the North Atlantic Alliance and of the European Union "to strengthen parliamentary oversight over ESDP by the EU national parliaments, which will have to dialogue with the European Parliament and the other national parliaments concerned".<sup>24</sup> As mentioned in the Declaration of the NATO Parliamentary Assembly on NATO's Riga Summit (Quebec, Canada, 17 November 2006), "the Assembly is a visible manifestation of the Alliance's shared commitment to parliamentary democracy. Its activities enhance the collective accountability of NATO. They also contribute to the transparency of NATO and its policies and to improving public scrutiny and awareness".<sup>25</sup> The Democratic Control of Defence Structures is a specific area of cooperation within the NATO PfP.<sup>26</sup>

24. The Parliamentary Assembly of the Council of Europe embraced a similar stance in its Recommendation 1713 (2005) on the "Democratic oversight of the security sector in member states":

"(...)

iv. Defence

a. National security is the armed forces' main duty. This essential function must not be diluted by assigning the armed forces auxiliary tasks, save in exceptional circumstances.

b. *The increasing importance attached to international co-operation and peacekeeping missions abroad must not be allowed to have an adverse effect on the role of parliament in the decision-making process. Democratic legitimacy must take precedence over confidentiality.*

c. At European level, it is essential to avoid any step backwards in relation to the *democratic achievements of the Western European Union Assembly by introducing a system of collective consultation between national parliaments on security and defence issues.*

d. In this connection, *national parliaments should continue to have an interparliamentary body to which the relevant European executive body would report and with which it*

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<sup>24</sup> Committee Resolution 308, 2001 Annual Session, *Resolution on the European Security and Defence Policy* presented by the Defence and Security Committee, Ottawa, 9 October 2001, <http://www.nato-pa.int/archivedpub/resolutions/01-ottawa-308.asp>.

<sup>25</sup> Para. 15.1 of the NATO Parliamentary Assembly Declaration. For the full text of the Declaration of 17 November 2006, see <http://www.nato-pa.int/Default.asp?SHORTCUT=1007>.

<sup>26</sup> See <http://www.nato.int/docu/comm/1997/970708/infopres/e-pfp.htm>.

would hold regular institutional discussions on all aspects of European security and defence.

e. Deployments of troops abroad should be *in accordance with the United Nations Charter, international law and international humanitarian law*. The conduct of the troops should be *subject to the jurisdiction of the International Criminal Court in The Hague*. (...).<sup>27</sup>

25. The democratic control over armed forces represents, in general, an international confidence-building measure, an important contribution to shaping the “democratic peace” among States.

#### IV. Conclusions

26. The reasons justifying the civilian democratic control over the armed forces can be identified starting from the two inter-related dimensions (the domestic and the international one), circumscribing the existence and the potential use of the armed forces: the duty of the armed forces in a democratic society is to protect and to ensure the security of the respective society from exterior threats, and to safeguard the democratic values, the rule of law and the human rights and fundamental freedoms of all persons subject to that national jurisdiction, fully respecting, at the same time, the indisputable legal reality that the maintenance of the international peace and security is the most important objective of the mankind, and that the contemporary use of the armed forces of a State against another is an exception subject to important restrictions and limitations, the breach of which engages the international responsibility of the respective State. The use of armed force is *only allowed (or legitimate)* when its purpose and means are directed to re-establish the international peace and security and to restore the international legality.

27. From the analysis of the *domestic* dimension of the problem, the following *reasons* for democratic control can be identified:

- the lessons learned from the history (including the recent one) of European States (and not only) showing that when the military seized the political power in a military coup or threatened the civilian leaders with such a conduct or decided to impose their will by means of supporting a certain government, the democracy and its values were affected;
- the need to align the interests of the military leaders with the interests of the democratic society, so as the democratic constitutional values – democracy, rule of law, fundamental rights and freedoms – be guaranteed and protected;
- the necessity to achieve for the armed forces the political neutrality and de-ideologization, maximum transparency as possible in their activity and accountability of their personnel;
- the fact that the armed forces are a component of the executive branch / power and the need to implement the basic democratic principle of the separation / balance of powers that control each other(s), leading to the necessary accountability of the military before the society; if in a parliamentary regime, such a control is natural and logic, in a presidential regime it is even more justified as its specificities imply, with much more necessity, equilibrating, through increased control of the military by the parliament or by civilian courts, the balance of powers;
- the need to supervise the transformations of the armed forces implied by the post-Cold War realities for ensuring that they conform with the public interests, including with the imperative need that democratic values be observed in this process, and also to control the increased public spending for military purposes.

<sup>27</sup> See <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/erec1713.htm>. Emphasis added.



- in general, the need to ensure that the policies decided democratically by the Parliament and/or the elected government are carried out, including by the military, as decided and planned, which is in line with the citizens' right to know how the State is planning and applying policies for their security.

28. From the analysis of the *international* dimension of the problem, the following *reasons* for democratic control can be identified:

- the international legal reality that the use of force by States is prohibited in the contemporary international law, the only exceptions (relevant for this study) being the self-defence and the use of force as decided or authorised by the UN Security Council on the basis of Chapter VII of the UN Charter; in case the military officials ignore the strict conditions allowing for the use of force to be licit, the international responsibility of that State is engaged;
- the necessity for ensuring the respect by the armed forces of the law applicable to the armed conflicts, especially the principles and rules of international humanitarian law; a breach of these rules attracts the international responsibility of the State. A democratic State cannot accept that the rights and freedoms of any person be violated by its armed forces when engaged in international military operations, including in the actual context of the fight against terrorism. 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;
- the need to avoid the individual criminal responsibility of the personnel of the armed forces, which has the potential to affect the credibility of the respective State in international relations;
- the need to control the decision-making process to recourse to certain type of arms, such as nuclear weapons;
- the fact that decisions to use the armed forces in international operations are taken by the representatives of the governments in the intergovernmental international bodies, even if at domestic level the competence to take such decisions belong or should belong to the national parliaments, which marks a certain transfer of competences from the (domestic) parliamentary level to the (international) intergovernmental level; at European level, in the specific ESDP context and before the entry into force of the European Constitution, the solution can be an increased parliamentary control by national parliaments both at domestic level, and through the interparliamentary bodies like WEU Assembly (or the NATO Parliamentary Assembly, PACE), in cooperation with EU bodies;
- the democratic control over armed forces represents, in general, an international confidence-building measure, likely to avoid international conflicts and to consolidate international peace and security.