

# **THE MANAGEMENT AND DEMOCRATIC CONTROL OF THE ARMED FORCES PARTICIPATING IN MULTINATIONAL OPERATIONS**

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## **ABSTRACT**

Democracy always assumed as the default rule of civilian control upon the armed forces, any deviation from this rule leading to the characterization of being an undemocratic society. This study examines the national and international issues that are involved by need to ensure a democratic control of the armed forces participating in multinational operations. To this end, the first task was to identify the need and requirements of the democratic control. The answer to this question was the starting point for the recognition of actors involved, the actions, the control mechanisms and moments when this control should be exercised. The analysis also takes into account these issues and international dimensions of the responses to the questions: who, what and how they control.

## **I. INTRODUCTION**

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 - even recent - of European States, but not only, 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.

The democratic control of the armed forces is a complex matter and it comprises “traditional” issues such as military expenditure or military budget and appointment of top commanders and issues which correspond to the change in the role of the armed forces, both at national and international level. 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 in many States has led to more and more national participation in international peace missions.

In general, clear, transparent and effective mechanisms of control over the armed forces exist due to the involvement of democratic institutions. Among these, Parliament 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.

Nowadays, one of the most relevant national decisions about the use of force is involvement in international peace support operations. Accordingly, the second important focus is placed on the international organisations in which the States take part and the problems of control and accountability that these international missions generate for parliamentary and/or government institutions, as well as for the relevant international bodies.

## **II. THE NECESSITY FOR THE DEMOCRATIC CONTROL OF ARMED FORCES**

As many democratic theorists have pointed out, control of the military by democratically elected civilian authorities is an indispensable element of a democratic government. 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. Thus, in an American-style presidential system the President, in his capacity as commander-in-chief, is the primary agent of civilian control, whereas in a parliamentary system this task falls to the cabinet. Both systems are compatible with full civilian control, and in either case the legislature is, and should be, another agent enhancing civilian control for a number of reasons, not the least important among which is the fact that in all democracies, regardless of the type of government, the legislature holds the purse strings. 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 first 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. 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. 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) 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.

The international dimension of democratic control over armed forces represents, also, in general, an international confidence-building measure, an important contribution to shaping the “democratic peace” among States. The principle that guides international regulations on these issues is the general prohibition of the use of force, with some exemptions.

Self-defence, as an exception to the prohibition on the use of force is legitimate only insofar as it represents the response to an armed attack. 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 international unlawful act which engages the international responsibility of the respective State. This is a clear justification for the democratic control of the armed forces.

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

to the United Nations International Court of Justice, if 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<sup>[2]</sup> .

The Parliamentary Assembly of the Council of Europe took 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 inter-parliamentary body to which the relevant European executive body would report and with which it 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>[3]</sup>.

To summarise, the above analysis the 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.

### **III. Actors, acts, moments and procedures of control**

#### **A. General Overview**

The renaissance of the debate about the old question ‘who guards the guardians,’ both in national and international spheres, needs to be tackled focusing, first of all, on *who* has the power to control the security sector. Within the security sector, the military has the task of protecting national security and defending the territory from external threats, through the legitimate use of force or the deployment of the proactive apparatus of the State. This task, however, needs to be accomplished within the framework of the rule of law. Democracy presupposes that someone in the State has the power to control the use of force in order to avoid deviations from its constitutionally established functions and principles. Control is also used to stop this power being used to undermine

democratic institutions or to disturb the legal or constitutional established order, international law or International Rule of Law. This ‘someone’ has to be, in turn, a democratically elected institution. This issue is highly relevant because the principle of democracy and the rule of law require protection by democratic mechanisms and institutions. After all, they are fundamental pillars of contemporary democracies. The democratic legitimacy of whoever controls the military is transferred to the acts and decisions of the controlled institution or sphere. That is, the monitoring organ, or the controller, has an indirectly legitimising effect on the performance of the armed forces. The subordination of defence to the command of democratically elected officials, and to the ends defined by them in accordance with the constitutional principles and the prevailing law, appears to be a *sine-qua-non* pre-condition, requirement and characteristic of democratic regimes.

Oversight may take several forms. The control can be either *ex ante*, *ex post* or both. *Ex ante* control is a form of proactive oversight. *Ex ante* tackles issues before they become problematic. *Ex post* oversight is a form of reactive oversight as issues are only addressed after they have occurred.

Parliaments mainly exercise *ex ante* control by passing laws that define and regulate the security services and their powers, and by adopting the corresponding budgetary appropriations. The participation of Parliament in the creation of the national legal framework for security represents the proactive function of Parliament, oriented towards future policies and activities of the executive. *Ex ante* control encompass granting prior authorisation of sending troops abroad. *Ex ante* control is primarily the preserve of the executive. The executive is responsible for the day-to-day management of the armed forces (delegated to military leadership) as well as policy and strategies for the armed forces.

*Ex post* control qualifies the legitimacy of a measure or act previously decided and implemented and, when necessary, imposes a remedy. *Ex post*

control is exercised by a range of institutions including the judiciary, ombudsman, audit offices and Parliament.

Parliament exercises *ex post* policy control which takes the form of oral and written questions or interpellation to query a specific act of policy with members of government, budgetary scrutiny and finally accountability on the basis of reports from the Board of Auditors about the implementation of the budget. Where there is a suspicion that serious misconduct may have occurred, Parliament has the authority to hold a formal inquiry. In most Western Parliaments there is a tendency to move beyond control *ex post facto* to participation in the governmental decision-making process even before the government has tabled a formal proposal<sup>[4]</sup>. To this end, it is crucial that Parliaments receive timely information on the government's intentions and decisions regarding security issues. Parliament's case cannot be a strong one if the government only briefs it after having reached a final decision. In such situations, the Parliament is confronted with a *'fait accompli'* and has no alternative but to approve or reject the government's decision. As far as regular and long-term policy issues are concerned, Parliaments should have enough time to analyse and debate essential matters such as the defence budget, arms procurement decision-making or a defence review. One way of getting around the time pressures that routinely confront parliamentarians in carrying out their work is to develop a proactive strategy and to enhance the expertise of parliamentarians with regard to the security sector and to set a clear policy agenda.

A number of factors influence the type and characteristics of the mechanisms of control over the military in the different States, such as historical context, forms of government, legal framework, and the organs responsible for the control. At international level, in turn, the differences among international organisations that intervene in the security sphere, the various legal standards, and the modalities of the control of the acts of national troops that take part in

international missions are some of the key elements for examining the international dimension of control over armed forces.

With regard to the method of exercising control, it could be said that, generally speaking, control means a degree of intervention on the decisions adopted by the controlled organ. Separating decisions and control means that there are at least two views on the same issue. It also serves to assure the compliance of an act or decision with democratic principles, standards and values. The model of control or oversight needs not to be fixed expressly and once and for all. It can, however, be progressively developed.

Democratic control over armed forces refers to the existence of (at least) an organ or institution democratically elected that reviews and supervises the decisions adopted by the organs or authorities with military competences. In this sense, for example, the concept of security itself has become broader, not simply embracing military aspects, but also other geopolitical and contingent international issues. The regional disputes for territory or space in nearby zones, the political instability of some countries linked economically with others, ethnic, religious, cultural or demographic tensions, unsatisfied nationalism, are all factors that could deeply affect national interests. This is why it was urgent to articulate new answers and solutions related to armed forces mission and decisions.

In the same way, armed forces have been forced to adapt their functioning and activities to the new international requirements of security. From decisions focused on clear and defined threats to peace and security, they have moved to face diffuse threats such as terrorism, organised crime, biological or information attacks, among others, and to plan defence and security accordingly<sup>[5]</sup>.

Finally, the armed forces hold a relevant position as a consequence of globalisation, since States integrate in collective security and defence systems, involving them, *inter alia*, with military contributions to various international

missions. For instance, one of the most significant changes in the post-Cold War period was the increase of the participation of armed forces in peacekeeping and humanitarian operations. This is one of the main functions developed by military forces in modern Europe. But this growth of the functions of the armed forces in the international sphere leads to new challenges and problems. One of them is the democratic control of those operations. A further conflict is the subordination to different commanders: on the one hand, national forces act under the command of the international organisation, but, at the same time, they are partly subordinated to the control system of their States. This double control can cause significant difficulties because each control can be organised according to a particular logic and purpose. Clarification is also needed, as to which State (or body) is internationally responsible for the acts of the armed forces in question.

These changes within military systems, caused in turn by the evolving national and international situation, result in extra powers for armed forces. As a result, they adopt new and more complex decisions. Within this group of decisions, one can identify those that have always pertained to the military institutions, such as those related to the administration of armed forces personnel (appointments, incorporations, retirements, sanctions), or those related to supply of military material. Examples of the new type of decision include decisions on participation in peacekeeping missions, or the settlement of common defence techniques between several States or inside an international defence organisation.

## **B. Domestic dimension of the control**

In the domestic sphere, the control and oversight of the defence sector can be carried out by the three branches of the State (executive, Parliament, and judiciary), by independent institutional actors (ombudsmen and auditors), and by

the civil society and media. From a democratic point of view, control by State organs (especially by Parliament), is the most important type of control.

The democratic control of armed forces acting in international mission under the command of these organisations is of relevance, if one considers the progressive transition of military actions to the international sphere of collective security. It will be argued, in accordance with the existing literature, that the subordination of soldiers or units to the command of foreign armed forces alters or undermines the power of the Parliament or other democratic body to control the military decisions and make the servicemen and commanders accountable. When command is transferred or shared, the possibility of controlling the international performance of the troops is weaker. The access information, the decision-making, and way of executing the orders, are beyond the reach of national authorities.

### **1. The role of Parliaments**

There is general consensus as to the paramount role of Parliament in the execution of these controlling functions over security and defence, and about the need to enhance public accountability of this sector. Both requirements are considered keystones of democracy. Regardless of the system of government chosen by specific States, decisions concerning the use of force must be accounted for before Parliament. Parliamentary powers over the military sector comprise powers to legislate, to approve the budget, to advise, to penalise, and to approve certain issues or actions. The functions that a certain Parliament actually has, and their extent and intensity, depend on national rules. They also depend on the general checks and balances system that operates in a State, which is also applicable to the military sphere. In this sense, Parliaments review and exercise oversight over executive decisions and policy-making concerning defence and security policy. In order to achieve this control, Parliaments tend to

employ three types of mechanism: debates, questions and interpellations, and inquiries.

#### **a. Organs involved**

For the control to be effective, Parliaments should have specialist staff and structures in place, to develop the monitoring functions, and the necessary resources for their correct exercise. Most Parliaments have, over the years, created special committees to deal with the various parliamentary dimensions involved in the oversight of armed forces. The institutionalisation of Defence or Security Committees can be explained by several factors, including the renaissance of the subject of democratic control of armed forces, increasing democratic efforts towards specialisation and transparency in Parliaments, the tendency towards in-depth study (thus improving decision-making by creating committees or commissions with defined spheres of action), and the general process of reforming the security sector. The latter, in turn, has three main objectives: democratisation, adaptation to the new security environment, and internationalization<sup>[6]</sup>. The right and practice of questioning the acts of the government – a characteristic of the democratic control of Parliaments over the executive – becomes specific and more accurate through the work of the committees.

The Committees on Defence and Security are created to advise and recommend to the plenary of the Parliament issues related to decision-making on the defence and security sector. They can be permanent (or standing), or created for a specific task (*ad-hoc*). The general key functions of Defence and Security Committees include security policy, legislation, expenditure, management and administration. Together with Committees on Defence and Security, focused on specific security sector issues, committees such as Foreign Affairs, Budget, Industry and Trade, Science and Technology, also have a role

to play in issues related to the security sector, depending on the national regulations and the powers delegated to these expert groups.

Each Committee of Defence and Security exercises the powers and functions fixed by the particular legislation (i.e. rules of procedure of the chamber) or delegated by Parliament. The general powers mentioned above can be broken down as follows: a) development of legislation on defence matters, b) advice on the defence budget and monitoring of expenditure c) review of government defence policy d) consultation over international treaties, e) advice to Parliament about the use of force and deployment of troops, and f) monitoring of defence procurement. These powers can be developed through several mechanisms and activities, such as hearings, inquiries, questions to the Ministry of Defence or the government, requesting documents, requests for audits, scrutiny of transparency and efficiency in spending, examining petitions and complaints, from both military personnel and civilians<sup>[7]</sup>.

## **b. Acts and issues under control**

### ***i) Approval and control of the military budget***

One important competence is the decision over the military budget that derives from the general budgetary power of the Parliament. Defence budgeting is the process of allocating financial resources for defence ministry equipment, infrastructure and programmes. The power to fix the military budget allows Parliament to decide to spend more on one issue than on another. In this way, it can make conditional the decisions adopted by the commanders of armed forces. The importance of this type of decision is quite evident, when one examines the high amount of the defence budget in some countries<sup>[8]</sup>. Such data reinforces the idea that democratic legitimacy is a must in terms of the decision-making process when assigning these sums of money to defence activities.

The way of exercising decisions varies from state to state, especially with regard to the procedure for adopting the military budget. Correspondingly, the efficiency of the control will also vary. For a better-informed decision, Parliaments should have access to all the documents related to the defence budget. The degree to which Parliament is able to perform its control in this field is essentially dependant on the quality and comprehensiveness of the information it receives, and on its actual power to amend the budget. The budget proposal can consist of a document of a few pages in length containing general information about the overall sums of money allocated to different agencies, or it can span hundreds of pages of complex and very detailed information. The essential indicator of the impact of Parliament in the budgeting process is the extent to which it can influence the content of the budget through the amendment process. In broad terms, there are three models for parliamentary involvement in defence budgeting.

Budget-making Parliaments have the capacity to amend or to reject budget proposals, and the capacity to formulate alternative budget proposal. The US Congress is a notorious example of a Parliament which plays an important role in the development of the defence budget. The President's draft budget serves only as a proposal in the strictest sense and has no compulsory character. The Congress holds the Department of Defence firmly accountable, often to a level of detail described by some as excessive micro-management. Such powers require substantial supporting infrastructure in Parliament in terms of staff, experts and money.

Budget-influencing Parliaments can amend or reject the budget, but lack the capacity to put forward their own proposals. Many Parliaments in Europe fall into this category. When ministers fail to convince the legislature of the necessity for certain expenditures, cuts of relevant items can free up additional resources to address more urgent needs elsewhere. The German Bundestag, the

Netherlands and the Danish Parliaments initiate hundreds of budgetary amendments every year and consider the most intricate details of the budget.

Parliaments with little effect on budget formulation: may reduce existing items, but not include new ones nor increase the number of items. Westminster type Parliaments are representative of this model. Traditionally, they give their consent to the defence budget as a global figure and individual amendments are not easily achieved (e.g. Australia, Canada, India, New Zealand, South Africa, the United Kingdom and Zambia). However, even if these Parliaments exert little influence over the budget formulation, they play a vibrant role in auditing defence expenditures, through hearings, inquiries and public reports aimed at informing public opinion. If Parliament’s recommendations and the conclusions of parliamentary debates are effectively taken into account during budget formulation, this might diminish the need for amendment activity.

**Table 1: Budgetary practice of Parliaments**

Approve the budget	Country
– with significant changes	Czech Republic, Denmark, Germany, Hungary, US.
– with minor changes	Austria, Finland, France, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey.
– without changes	Canada, United Kingdom, Greece.

**Source: The OECD Budgeting Database 2002 and DCAF survey 2006**

Once the budget is adopted, Parliament may enforce its *ex post* oversight, including audit functions. The accounts and annual reports of the security services are an important source in aiding Parliaments to assess how money was spent in the previous budget year. Ideally, the audit process should enable Parliaments to evaluate the legality, efficiency and effectiveness with which the departments in question have used their resources.

Defence procurement is an important part of the overall defence budget, representing the process by which national security authorities acquire the equipment and services that are necessary to fulfil their mission. Given that defence contracts represent large amounts of public money, they have a political nature, long term consequences for national industry and are prone to corruption. They are increasingly attracting public attention<sup>[9]</sup>.

### *ii) Sending troops abroad*

National participation in international peace missions has become an important foreign policy and defence issue, which is of direct concern for the Parliaments.

Some constitutions make explicit reference to authorisation for sending troops to participate in missions outside of their border. The Constitution of the Czech Republic states that armed forces can be sent only with consent of both Chambers, with a special quorum (Art. 43(3) b), Art. 39(3)) The Croatian Constitution has the same requirement, except when their national armed forces join an international mission of an organisation of which Croatia is part with the purpose of offering humanitarian aid (Art. 7) Georgia has a similar rule that emphasises the prohibition of using armed forces for honouring international obligations without the consent of the Parliament (Art. 100 (1)), and so has Lithuania (Art. 67.20), Republic of Moldova (Art. 66 l), Norway (Art. 25(2)), Russian Federation (Art. 102 d)), Slovakia (Art. 86 l), Sweden (Chapter 10, Art. 9(1)) and Ukraine (Art. 85(23)). The Hungarian constitution awards to Parliament the power of deciding on the use of armed forces abroad in all kinds of missions (Art. 19(3) j)). Furthermore, issues related to the use of Hungarian armed forces are expressly excluded from referendums (Art. 28/C (5) h)). In the case of Sweden, the above mentioned article also requires that the sending of troops to other country be permitted under a law, which sets out the prerequisites

for such action. The Turkish Constitution (Art. 92) requires prior parliamentary authorisation for sending troops abroad or permitting the stationing of foreign troops in Turkey, except in cases required by international treaties to which Turkey is a party, or by international rules of courtesy.

Decision-making on international peace support operations goes hand in hand with the rules of engagement that settle issues such as the aims of the operation, the chain of command, the duration of the mission, the level of force, the types of troops, and the financial consequences of the mission.

The degree and the instruments at the disposal of Parliaments to direct and to guide the policy of the national government on this matter differ from the traditions and constitutional provisions. The main indicator of the role of a particular Parliament in the deployment of troops abroad is the power to formally approve national participation in an operation, before national personnel are deployed to the mission. Using this indicator, the following table ranks Parliaments within three bands of involvement in sending military troops abroad: *High*, for Parliaments with the power of prior approval, *medium*, for Parliaments whose power of prior approval is limited by significant exceptions, and *low*, for Parliaments without the power of prior approval.

**Table 2: The level of parliamentary involvement in authorising national participation in international missions abroad before troops deployment, as defined by national legislation.**

Level of parliamentary involvement	Country
High – power of prior approval	Austria, Denmark, Finland, Germany, Ireland, Slovakia, Spain, Sweden, Turkey.
Medium – important exceptions from prior approval	Bulgaria, Czech Republic, Hungary, Italy, Luxembourg, Netherlands, Romania.
Low – no prior approval	Belgium, France, Greece, Poland, Portugal, Slovenia, United Kingdom

Source: DCAF survey 2007

Only a few Parliaments possess the power of prior approval in all situations, regardless of the diverse nature of international missions. This is the case in Austria, Denmark, Finland, Ireland, Luxembourg, Slovakia and Sweden, where the legislation in place gives the national Parliament the authority to approve participation in all international operations.

In analysing the national legislation in place in some of the European States, several types of *exceptions* and situations that limit parliamentary involvement in authorising national participation in international missions are discernible. These exceptions and situations may potentially create a space for a democratic deficit. The three main types of such exceptions appear below:

- Some Parliaments have the legal power to approve participation in military operations, while their approval for civilian operations is either unnecessary or remains unclear. In Germany for example, Parliament has to give prior approval for military operations, but can only *post facto* oversee civilian operations. The Spanish Parliament was routinely marginalised in decisions relating to authorised use of force, but, following the unpopular decision to participate in the war in Iraq and the terrorist attacks in Madrid that led to the change of government in the March 2004 elections, a new law was adopted to give Parliament the power to give prior approval for military missions abroad. Still, the law makes no reference to civilian operations.
- In “new” European democracies like Bulgaria, the Czech Republic, Hungary and Romania the legislation defines important exceptions from prior parliamentary approval. The decision to participate in operations which are legitimised by a treaty or an international organisation of which the country is a member, is considered to be an executive responsibility. Therefore these exceptions cover all North Atlantic Treaty Organisation and European Union operations.
- In some countries the legislation allows for exceptions from parliamentary approval in the event of limited national participation in a mission. This

applies for example in Denmark, Germany and Ireland. Sometimes the decision to participate in an operation may only be taken by a parliamentary committee, if few personnel are deployed, or if the operation is not considered to be very important. Examples of this are the Foreign Affairs Committee in Finland and the Defence Committee in Spain.

At the other end of the spectrum, in countries such as Belgium, France, Greece, Poland, Portugal, Slovenia, and the United Kingdom, parliamentary approval is not necessary for national participation in any missions abroad. Although government may ask for prior parliamentary approval, it remains the prerogative of the executive to determine whether this request is appropriate. In some of the “old” European democracies, like France or United Kingdom, members of Parliament are no longer at ease with the current state of deployment legislation or with its inconsistent interpretation. Therefore they try to compensate for the lack of power of approval by developing procedures for parliamentary information and consultation in the early stages of the decision-making process.

Even when the Parliament is excluded from the decision-making process, it may seek to hold the government accountable through the usual methods of ex post oversight such as questions, interpellations, debates, hearings and inquiries. Additionally, parliamentarians often visit the troops deployed abroad. Despite using all these oversight instruments, the information national Parliaments receive about international missions can be considered to be insufficient for an effective involvement. This increases the potential for a democratic deficit. Parliaments are dependent on their national governments to provide them with information about missions abroad. However, many other relevant actors, playing a significant role at intergovernmental level, are not very well known within national Parliaments, and it is impossible to call them to account.

The better informed Parliaments appear to be those with the power of prior approval. The competent committee, usually the one charged with defence

matters, develops awareness and accumulates knowledge on the matter. Debates about national participation in international operations usually involve the presence of Minister of Defence representatives and a detailed discussion of the mission's mandate, budget and duration. Occasionally, operational implications such as rules of engagement, command and control, type of weapons and equipment to be used and risk assessment, come up for discussion. However, the mission details represent only collateral information, used to consolidate MPs' general views on the operation.

In many Parliaments there is a lack of information about the general national financial contributions to international missions. Scrutiny by most parliaments of the funds for external operations is limited to the annual approval of this expenditure, as part of the overall national defence budget. When participation in individual operations is considered by Parliaments, an estimate of financial costs may be presented by the government, but the real cost of each mission is very difficult to calculate, given that all the costs involved for personnel, training and equipment spread over several budgetary chapters and appropriations, and over several years. In some countries the budget for international operations is made up from the budget of different ministries. In Finland for example, the budget of the Ministry of Foreign Affairs covers personnel costs, and the budget of the Ministry of Defence covers the material costs. In Spain, the funds initially forecasted for international operations in the Minister of Defence budget are supplemented from the Emergency Fond administered by the Ministry of the Economy throughout each year i.e. no parliamentary approval would be required when money is transferred from this Fund.

### **c. Mechanisms of control**

#### ***i) Legislation***

Legislation is one of the principal ways in which Parliament controls military activity. Through different kinds of rules, it defines the mission, functions, structure, and competences of armed forces, specifying the constitutional mandate; in other words, it shapes the legal framework within which the military develops its defence and security activities.

Several constitutions explicitly mention the legislative powers of the Parliament on military and defence issues. The normative delimitation of the mission of the armed forces at constitutional level can act as a limit to the exercise of the power to legislate, since Parliament must respect the Constitution when developing the related legislation. Not all the constitutions settle the missions of armed forces, although some of them do. In other legal systems, the mission of armed forces is defined by means of parliamentary statutes. Nevertheless, and as a general feature, the legal framework of the mission and permissible activities of the armed forces, whether fixed by the Constitution or by statute, remains relatively open. This means that their powers and competences are only relatively limited. This openness means, for example, that, in Belgium, all missions abroad which conform to certain political conditions and which do not violate the general rules of public international law are permissible. The same pattern exists in France, where the only constitutional limitation is that armed forces may not be used for “conquest” and “against the freedom of any people.” Only in a few countries, such as Germany or Spain, do their constitutions make specific reference to the permissibility of certain missions.

The definition of competences through statutes, then, acts as a first filter and mechanism of control over military acts and decisions, since Parliament fixes and delineates the sphere inside which the decisions are adopted. Only decisions adopted within this legal framework will be legitimate. Those outside it are liable to challenge before the courts or corresponding channels.

## *ii) Direct control*

The democratic control of military decisions is that exercised over decisions adopted by organs with military competences. The most important are the decisions taken by the armed forces themselves, through their commanders, and those adopted by the Head of State or the government.

Decisions and acts by the armed forces can be subjected to several types of control. Parliamentary oversight can be classified as direct and indirect control, based on the type and impact of the interference on the decision of the organ exercising military competences.

Direct control consists of the possibility assigned to an organ democratically composed or elected to substitute the decision of the competent organ in military or defence affairs. Within this type of control, one can distinguish the following sub -sections:

### 1) Co-participation in the decision

Co-participation in a military decision means that the democratic body participates in the decision-making. In fact the decision is adopted jointly by the Parliament and the body with military competence e.g. decisions to send troops abroad in countries such as Czech Republic, Denmark, Germany, Hungary, Italy, Netherlands, Norway, Sweden or Turkey require parliamentary approval.

### 2) Control *a posteriori* of military decisions with the possibility to revoke or substitute them

This type of control implies that Parliament can review decisions by the competent organ, but only once they have been adopted. This is the case, for instance to urgent decisions. In Germany, for example, it is possible to take a decision to deploy armed forces to combat danger in cases of natural disaster (Art. 35) or internal emergency (Art. 91). In both cases, the decision can be revoked by the Bundesrat.

### ***iii) Indirect control***

Indirect control carried out by a democratic organ consists of some degree of interference in military decisions or the addition of conditions to decisions. It is possible to identify several mechanisms of indirect control.

Parliament has neither the means nor the vocation to place itself as “co-manager” of defence policy. Nor should Parliament seek to run or decide on actions in parallel with the executive, in the matter of defence policy. However, Parliament can play an important role in defining general defence policy. Indeed, by using fully the range of means of its legislative authority, by launching sound analyses or research on topics of its choice, by performing its institutional role of proposals and reflection, not simply those of control, Parliament enjoys an effective power of influence which has proved to be significant. Furthermore, the participation of Parliament in general defence policy can also be provided for in legislation. For instance, in France, the Law on Military Programming 2003-2008 provides that every other year, a debate within Parliament must be organised in order to discuss future plans for defence policy and their implementation.

## **2. The role of the Executive**

The role of the Executive in the control of armed forces varies in the different member States of the Council of Europe. A priori, the executive commands of the armed forces although the form of government adopted (parliamentary monarchy, presidential republic or parliamentary republic) determines the role played by either of the two branches of the executive (i.e. Head of State and government). Accordingly, this role can be more or less active, symbolic or effective, formal or substantial.

At constitutional level, mentions of the power of the executive over the military sphere are related to the position and the competences of the Head of the State, the government, and the Minister of Defence, depending on the State. Sometimes, the powers are more precisely expressed. In other cases, there are vague references, which are complemented at legislative or administrative level. The existence of a National Security Council is also regulated, on some occasions, in the Constitution, which normally works with the Ministry of Defence or the government.

In many of the states, the president, the monarch, or the government as a collective holds the position of Commander-in-Chief of the armed forces. But in some States, (most of them presidential regimes), the president of the republic has the power to conclude international treaties on defence and security, the power to declare a state of emergency and war. He or she also has the power to appoint or dismiss high commanders and to make decisions about sending troops for international peacekeeping or enforcement missions.

### ***C. International dimension of the control***

The internationalisation of the defence and security, or more specifically, the emergence of collective security and collective defence organisations, has moved the focus of attention of the control and oversight of armed forces from the national to the international level. Properly speaking, democratic control is that practiced by democratic institutions. The question is, then, whether this type of control is sought and possible within international institutions. In an extreme opinion, it has been said that no oversight of the security and intelligence services exists on the international level. In literal terms, this statement may hold true for intelligence and security services but it may require some qualification when referring to armed forces. Most of the international organisations for defence and security do not have a truly democratically elected institution (i.e. a

Parliament). Often, they lack the power to control the armed forces carrying out the peacekeeping or peace enforcement operation. However, some oversight exists especially at intergovernmental level in authorising international missions and in following up their development.

Thus, to understand the general framework of the democratic oversight of the military, it is important to take into account the international dimension of the use of force, together with the problems and deficits inherent in the design of the control mechanisms.

When deploying troops to attend international peacekeeping missions, questions of democratic accountability arise, as to “authority and responsibility for decisions to deploy military forces, select objectives, incur risk, and implement mandates in the field”. Some scholars identify five issues of democratic accountability related to the use of force under international auspices: 1) international authorisation to use military forces; 2) national authorisation to use military forces; 3) democratic civilian control of military personnel and operations; 4) civilian responsibility to the military for the safety of deployed personnel; and 5) responsibility to comply with norms governing the conduct of military and other international personnel in the field. Moved by these same concerns, some scholars have applied the notion of ‘double democratic deficit’ to name this lack of effective internal and international mechanisms of democratic control of the military in the development of international missions.

In connection with the above issues, the question of foreign command over national soldiers or units is an important and unresolved one. The subordination of soldiers or units to the command of the superior of foreign armed forces is an important issue related to the control of armed forces, unfortunately not debated in depth by scholars. Moreover, generally speaking, States do not raise constitutional questions about the transfer of the command of troops in multinational military cooperation, effectively transferring the exercise

of their sovereign rights in the field of defence. In fact, constitutions do not have rules concerning this issue. Furthermore, the debate of the permissibility of subordination of armed forces to foreign command is also poor. Nevertheless, in Germany specific rules exist and debate over this topic has arisen.

A further problematic topic is the transfer of powers of command to international collective security entities. In the case of the North Atlantic Treaty Organisation, for example, this transfer of powers has been limited to certain powers of command, according to the constitutional law of some countries. The German legal system, for example, requires that a soldier needs to receive an order from his superior, which is revocable and limited in time and scope, if he is to follow the order of a foreign commander. The question about the need to approve specific legislation for a general transfer of power to foreign commander remains open.

## **1. Preliminary issues**

In order to establish with accuracy what acts and issues should be under the democratic control of armed forces, it is necessary to analyse the various types of presence of armed forces in foreign territory. For identifying who – at international level – should exercise this control, it is important to clarify the State or international body responsible for the acts of the armed forces in foreign territory, taking into account the specific situations likely to occur, and the international legal rules and principles applicable to each situation. The identification of which State is responsible at international level is also relevant for the domestic dimension of the control, as the allocation of responsibility to a certain State gives the possibility for its internal mechanisms of control, as described above.

There are also different types of international organisations whose mission is to safeguard and contribute to international collective defence, security and

peace. Each State has its own mechanisms for becoming part of international organisations, according to their legal system. Most of these organisations are created by an international treaty, and can be regional or worldwide in character. The model of the latter is the Charter of the United Nations as a treaty for protecting, maintaining and reaching world security. Regional agreements

The North Atlantic Treaty Organisation, the European Union and the Council of Europe member States “have committed themselves to strong principles relating to democratic governance, human rights and the rule of law”, that are the basis for norms of democratic control over the military. Adherence to these principles has accordingly become a basic requirement for membership of international organisations of democratic states <sup>[10]</sup> .

## **2. Organs involved**

### **a. Intergovernmental Institutions**

At the intergovernmental level, the control basically consists of the authorisation for collective security or defence missions by the Security Council. This means that the Security Council is still the principal provider of legitimacy of the use of force in the international sphere, also for the North Atlantic Treaty Organisation and the European Union, since these missions must be subjected to it. Provided that the armed actions are duly authorised according to the United Nations Charter 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, thus producing *a certain* transfer of competences from the (domestic) parliamentary level to the (international) intergovernmental level. On the other hand, parliamentary control remains with the national Parliaments, to

which their ministers are accountable, in respect of positions taken in international forums.

Concerning the responsibilities derived from the international use of force, it should be said that beyond the general frameworks of the respective treaties of these international organisations, they are generally fixed through special instruments. The participating States draw up the content, plan, procedure, and duty of information.

### ***i) United Nations-Security Council***

The United Nations, as an international organisation with the purpose of maintaining international peace and security, has 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 United Nations has developed a wide range of instruments for maintaining international peace and ensuring security.

### ***ii) North Atlantic Treaty Organisation***

The North Atlantic Treaty Organisation has a military structure responsible for planning the multinational use of force and establishes a commander system. The North Atlantic Council (NAC) is the principal decision-making body within the North Atlantic Treaty Organisation. It is formed by high-level representatives of each member country, and discusses policy or operational questions before adopting decisions.

### ***iii) European Union***

The second pillar of the European Union is the Common Foreign and Security Policy. The process of creating a European Security and Defence Policy within the Common Foreign and Security Policy started in the nineties, with the Saint-Malo Declaration of 1998, and continued through other declarations and reports from European Councils, and the modifications introduced by the Nice Treaty.

The Treaty on European Union settles provisions on a Common Foreign and Security Policy under title V (Art. 11-28). The principles and objectives are fixed by Art. 11, and they focus on the protection of the common values, interest and integrity of the Union, the protection and promotion of international peace, security and cooperation, and the development and consolidation of democracy, the rule of law and fundamental human rights and freedoms. The European Union member States shall support it with the spirit of mutual solidarity. The European Security and Defence Policy operations have been characterised, since its inception, by a large civilian component.

Decision-making about Common Foreign and Security Policy is within the remit of the Council and shall be taken unanimously (Art. 23 Treaty on European Union). However, it may act by qualified majority in some cases (decisions based on a common strategy, decisions implementing an European Union joint action or common position, appointment of a special European Union representative).

One further problem is that Art. 46 Treaty on European Union excludes the Common Foreign and Security Policy from the jurisdiction of the European Court of Justice. The intergovernmental character of the security and defence policy, together with the lack of judicial and Parliament scrutiny, produces a deficit in the democratic control of armed forces within the European Union.

#### **b) Inter-parliamentary dimension of the control**

The existence of inter-parliamentary institutions within (or related to) international organisations in charge of international security and defence issues does not automatically imply that they have some role to play in the control over armed forces or troops participating in international missions. Furthermore, with the notable exception of the European Parliament, they are not directly elected assemblies and they lack or have marginal control powers over the executive at international level.

Some scholars have recommended several measures to strengthen the capacity of national Parliaments to oversee multinational peace support operations, such as inter-parliamentary cooperation, adjustment of the legal framework, effective rules of procedure, and cross party-responsibility. At the international level, a solution would be to make the existing international assemblies more representative and to improve their procedures. An inter-parliamentary structure with increased competences in control and decision-making, including in the military affairs, would ensure better decision-making, and more democratic oversight.

#### *i) United Nations General Assembly*

Under the United Nations Charter, the United Nations General Assembly only makes recommendations on these issues, and approves the budget of the United Nations, under which the international missions and operations are financed (Art. 17 Charter). Exceptionally, when the Security Council was unable to adopt decisions for political reasons, the United Nations General Assembly enlarged its competence by assuming tasks belonging primarily to the Security Council (that is to assess situations that appear to be a threat to peace, a breach of peace or an act of aggression, and to make recommendations to United Nations member States for collective measures, including the use of armed forces).

## ***ii) North Atlantic Treaty Organisation Parliamentary Assembly***

The North Atlantic Treaty Organisation Parliamentary Assembly is inter-parliamentary in character and stands as a link between national Parliaments and the Alliance. It functions through committees, searching to build consensus, and adopting resolutions and recommendations that pass to the Secretary General and the North Atlantic Council. One of the aims of the North Atlantic Treaty Organisation Parliamentary Assembly is “to assist in the development of parliamentary mechanisms, practices and ‘know-how’ essential for the democratic control of armed forces”.<sup>[11]</sup> The North Atlantic Treaty Organisation Parliamentary Assembly would like to strengthen parliamentary oversight over European Security and Defence Policy, and promotes in this respect the need for dialogue with the European Parliament and the national parliaments. It sees itself as a “visible manifestation of the Alliance's shared commitment to parliamentary democracy. Its activities enhance the collective accountability of the North Atlantic Treaty Organisation. They also contribute to the transparency of the North Atlantic Treaty Organisation and its policies and to improving public scrutiny and awareness”.<sup>[12]</sup>

## ***iii) European Parliament***

The competences of the European Parliament in the Common Foreign and Security Policy are restricted to being informed by the Presidency and the Commission of the development of this policy, posing questions to the Council and making recommendations, and holding an annual debate on progress in its implementations (Art. 21 Treaty on European Union). Within the European Parliament, there is a Security and Defence Subcommittee.

According to the Treaty amending the Treaty on European Union and the Treaty of European Community, the European Parliament should be regularly consulted and informed on the main aspects and fundamental choices regarding the European Security and Defence Policy. The views of the European Parliament are to be duly taken into account. Also, Protocol no. 1 on the Role of the National Parliaments in the European Union (annexed to the Treaty amending the Treaty on European Union and the Treaty of European Community, provides in its Article 10 the possibility for a “conference of the (domestic parliamentary) bodies charged with European Union affairs” to organise inter-parliamentary conferences to debate particular subjects, including European Security and Defence Policy.

#### **b. International courts**

Three international courts are relevant for this study, and will be briefly examined in the next paragraphs: the European Court of Human Rights, the International Court of Justice, and the International Criminal Court. As regards the European Court of Justice, it is to be noted that Art. 46 of the Treaty on European Union excludes the Common Foreign and Security Policy, including the European Security and Defence Policy, from its jurisdiction.

##### ***i) The European Court of Human Rights***

The High Contracting Parties to the European Convention on Human Rights are subject to the judicial review of the European Court of Human Rights. The control of the European Court of Human Rights over the military is limited to violations of the Convention and its Protocols. Judgments about military issues are usually related to violations of fundamental rights of military personnel, but may also relate to the violation of fundamental rights in the

context of military occupation of foreign territory, of acts committed by armed forces in foreign territory in situations other than occupation, in situations related to peace-keeping operations or multinational coalitions. In both cases, the Court aims to strike the correct balance between national security and individual rights. Armed forces exist to protect democratic values, and have, consequently, to respect the rule of law and fundamental rights in performing its missions.

### ***ii) United Nations International Court of Justice***

The United Nations International Court of Justice was established by the Charter of the United Nations (Arts. 92-96), and is also regulated by the Statute of the Court and the Rules of the Court. The members of the Charter are *ipso facto* part of the Statute of the United Nations International Court of Justice. The competences of the Court are *inter alia* to decide upon infringements of the Charter, and to give advisory opinions on legal questions by request of the General Assembly or the Security Council, or other United Nations organs and specialised organs authorised by the General Assembly. In settling contentious cases, this court examines issues such as the legality of the use of force in specific missions, frontier disputes, arrest warrants, application of conventions, interpretation questions of a rule, etc. On the other hand, some of the advisory opinions have settled important directives concerning the application of international humanitarian law, or the legality of the threat or use by a State of nuclear weapons in armed conflicts.

### ***iii) The International Criminal Court***

The Parliamentary Assembly of the Council of Europe Recommendation 1713(2005) states that “The conduct of the troops should be subject to the

jurisdiction of the International Criminal Court in The Hague”. Accordingly, the member states of the Council of Europe that are at the same time ratifying parties of the Treaty establishing the International Criminal Court, are under its jurisdiction. The Rome Statute settles the International Criminal Court as an independent, permanent and last resort court, which has jurisdiction to judge serious international crimes, such as genocide (Art. 6), crimes against humanity (Art. 7), war crimes (Art. 8) and the crime of aggression (to be defined and included in the Rome Statute following an amendment to it). Articles 28 and 33 of the Rome Statute of the International Criminal Court deal with the responsibility of commanders and other superiors, and the responsibilities of military personnel for superior orders and prescription of law.

## **VI. Conclusions**

The primary duty of the armed forces in a democratic society is to protect and ensure the security of society from exterior threats and to safeguard democratic values, the rule of law and the human rights and freedoms of all persons subject to that national jurisdiction.

However, the lessons learned from history - including the recent one - of European States has shown that democracy and its values can be affected by abuse when the military seizes power in a military coup or threatens civilian leaders with such conduct, or attacks the civilian leaders with such conduct or decides to impose its will by means of supporting a certain government.

It appears from the study that grounds for democratic oversight over armed forces can be found at the domestic and international level, both being inter-related.

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.

Military decisions have some special features (speed or urgency, efficacy, secrecy, discretion) that need to be balanced with the democratic control over them. 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 as described above in this study.

## REFERENCES

[1] This study is based on the conclusions of the *Report on the Democratic Control of the Armed Forces adopted by the Venice Commission\* at its 74th Plenary Session (Venice, 14-15 March 2008)*, available at [http://www.venice.coe.int/docs/2008/CDL-AD\(2008\)004-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)004-e.asp)

\*European Commission for Democracy through Law is known as Venice Commission

[2] See *Study on Democratic Control of Armed Forces: Civilian control of the military: Why and What?* available at [http://www.venice.coe.int/docs/2007/CDL-DEM\(2007\)005-e.asp](http://www.venice.coe.int/docs/2007/CDL-DEM(2007)005-e.asp)

[3] See <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta05/erec1713.htm>.

[4] VAN EEKELEN W., *Democratic Control of Armed Forces. The National and International Parliamentary Dimension*, DCAF Occasional Paper no. 2, October 2002, available at

<http://www.dcaf.ch/publications/kms/details.cfm?lng='en'&id='18357'&nav1=4>

[5] Institut des Hautes Etudes de Défense Nationale (2002), “*Défense globale et politique militaire de défense*”, *Rapport de 1<sup>ère</sup> phase, 54<sup>ème</sup> Session nationale*, available at <http://www.ihedn.fr/portail/rapports.php>.

[6] BORN H., LAZZARINI C. (2006), “*Civilian command authority over the armed forces in their national and international operations: A preliminary Study*”, available at: [http://www.dcaf.ch/pcaf/venice\\_study.pdf](http://www.dcaf.ch/pcaf/venice_study.pdf).

[7] These functions and activities are summarised in DCAF (2006), “*Parliamentary Committees on Defence and Security*”, available at:

<http://www.dcaf.ch/publications/kms/details.cfm?lng='en'&id='18419'&nav1=4>.

[8] In 2005, for example, the budget of the US Defense Department was raised to a total of US\$ 478.2 billions, while the United Kingdom assigned US\$ 48.3 billions and France US\$ 46.2 billions. See the data of the Stockholm International Peace Research Institute available at:

[http://www.sipri.org/contents/milap/milex/mex\\_major\\_spenders.pdf](http://www.sipri.org/contents/milap/milex/mex_major_spenders.pdf).

[9] For more information see *Democratic Control of Armed Forces Backgrounder Parliaments' Role in Defence Procurement*, available at

<http://www.dcaf.ch/publications/kms/details.cfm?lng='en'&id='25266'&nav1=4>

[10] “*International Standards and Obligations: Norms and Criteria for Democratic Control in European Union, OSCE and OECD Areas.*” available at:

<http://www.dcaf.ch/publications/kms/details.cfm?lng='en'&id='20278'&nav1=4>)

[11] See <http://www.nato-pa.int/default.asp?SHORTCUT=1>.

[12] For the full text of the Declaration of 17 November 2006, see <http://www.nato-pa.int/Default.asp?SHORTCUT='1007'>.