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UDK 327+340
Bibliid 0025-8555,55(2003)
Vol. LV, br. 3-4, pp. 307-323
Izvorni naučni rad
Oktobar 2003.

RULE OF LAW AND DEMOCRATIC CONTROL OF ARMED FORCES IN THE POST-COLD WAR ERA

ABSTRACT

The article examines the thesis that rule of law and the democratic control of armed forces go hand by hand, which is taken for granted equally in Western democracies and the transitional societies. The author spells out a new challenges in the post-Cold world era that have made this equation more disputable. Western democracies face new security challenges, which call for a new legal framework for the democratic control of somewhat internationalised armed forces, and at the same time reconciliation of the ‘internationalised’ military engagement with the unilateral one originating from the “last and only nation-state”. Transitional societies face the dilemma “legitimacy or legality” even with regard to their security sector’s civilian oversight. Good examples from the West are either not-applicable and old-fashioned, or are not good examples to follow at all.

1. Rule of Law, Democracy and Democratic Control of Armed Forces in a Nation-State Perspective

Constitutional and legal reforms and debates in the countries in transition have centred on full appliance and renaissance of the liberal democratic concept, and particularly on the rule of law principle. With purpose or out of naivety, the classical Western concept set up throughout centuries and built up in a nation-state context is usually taken for granted and fully imitated. The paradigm that rule of law goes hand in hand with democracy is taken for granted. However, there are

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two basic explanations why this thesis may be not so straightforward as it looks at first glance.

First, Western theorists raise the aspects of existing tensions between rule of law and democracy. Both concepts have two sides – a formal and substantive one and only the two sides in their unity gives the paradigm's full essence. Rule of law, therefore, cannot be reduced to a mere legal form but it needs to be comprehended also as a legal instrument for a political control of power-holders. As for democracy, despite some minimal definitions that reduce democracy on procedures, elections and rotation of political elites, the substantial definitions call for respect for human rights (i.e. the ultimate source of state legitimacy is found in its role of a guarantor of human rights).

However, centuries ago i.e. long before the emergence of the liberal ideology and democratic theory it was Plato who spelt out the dilemma of rule of law: should the best people or the best laws govern the society? Another great philosopher (Aristotle) replied explicitly: "The demand for law to govern means a demand for God and laws to rule, but a demand for a man to govern means to allow also an animal to rule, because a passion is something animal, and a passion corrupts even the best men when on power."² The old philosophers' dilemmas still ring with their accuracy because democracy is neither (only) rule of the people, nor rule of an individual, but rule of law. One should also recollect Hobbs' idea that Law-maker is not only the one upon which will and authority the law is made but also the one upon whose will the law lives.

Historically, scholars have recognised another tension between rule of law and democracy. Namely, rule of law aims at curbing state authority, while democracy has a principal goal to mobilise society in the exercising of state authority.³ In other words, constitutionalists aim at establishing some sort of control over state power believing that state action should be predictable, not arbitrary. Consequently, not even the parliaments are supposed to govern despite of their being principal and only lawmakers. The (legal) principles should.

Introduction and implementation of rule of law, democracy and democratic control of armed forces in post-communist societies face numerous obstacles, most of which originate in the very fact that they are forced to go through several complex processes simultaneously. As many comparative analysts put it, there are immense difficulties in achieving at the same time *efficiency* in the governing process along with *legitimacy*, in some cases *legality* and *legitimacy* do not go hand in hand and even conflict each

2 Aristotle, *Politika III* (Politics III), Kultura, Beograd, 1970: 1286.

3 See more in: Sejersted, Francis. "Democracy and the Rule of Law: Some Historical Experiences of Contradictions in the Striving for Good Government", in: Elster Jon and Slagstad Rune (eds.), *Constitutionalism and Democracy*, Cambridge University Press, Cambridge, 1997.

other, etc.⁴ In political cultures in which Rex dominates Lex, the rule of law usually transforms into law of the rulers. The common denominator of these political culture(s) is so-called ‘state syndrome’ or better – lack of statehood traditions and/or maturity. Under such conditions, there is a wide fascination by state itself, which is the first obstacle for genuine democracy, the rule of law and efficient democratic control of armed forces. In the understanding of the ethno-nationalist elites, the nation-state is invaluable, as the political leadership tends to be as well. It is priceless also in a metaphorical sense – one pays it with human rights and freedoms, and even with human lives (“sacred sacrifices for the national cause”). As long as this creed is valid in a society it can be translated into “first and foremost our state and only then democracy and other principles”.⁵ Instead of curbing state (and military) authority on the scene there is uncritical worship.

In a situation when nationalism is ultimate expression of patriotism *vox populi* in the political institutions *de facto* means unquestionable support for belligerent policy.⁶ There is no readiness for genuine criticism and control by the parliament and the public. Any critic is perceived as an attack on ‘national security and national interests’. The military sphere becomes untouchable for public scrutiny because allegedly ‘time is not ripe and the enemies of the country/regime can benefit out of it’. Both ruling party and the opposition are well adapted into the regime and behave as part of it.⁷ The opposition may only direct possible critics for the ruling parties towards underachievement of the proclaimed national goals. Therefore, in the states involved in war/conflict there was equal responsibility on

4 Basta-Fleiner, Lidija, “The Relevance of the Western Legal Expertise for the Rule of Law in Countries of Transition”, in: Vankovska, Biljana, (ed.), *Legal Framing of the Democratic Control of Armed Forces and the Security Sector: Norms and Reality/ies*, DCAF and CCMR, Geneva and Belgrade, 2001.

5 Croatian scholar quotes a debate in the Croatian parliament held on 6 October 1993 during which a parliamentarian criticised harshly his colleagues referring (only) to the “state” instead of emphasising “our state”. See: Mirić, Jovan, *Demokracija u postkomunističkim društvima* (Democracy in Post-Communist Societies), Prosvjeta, Zagreb, 1996, p. 228.

6 Croatian experience, for instance, proves that it could be the parliament (i.e. the body that represents the citizens) who makes decisions on taking part in aggression on another country. It was the parliament who gave blessing for Croatian participation in Bosnian war as well in financial support of the para-military forces of Herzeg-Bosna (the Croatian part of Bosnia). Other examples from former Yugoslavia also empirically prove that the parliamentary mechanisms of oversight over the military are not necessarily democratic in essence.

7 Despite avoiding any military involvement in the Yugoslav turmoil Macedonian parliamentarism has been functioning “under the shadow of war”. Namely, since gaining independence in 1991 the parliament adopted two Acts of Defence – both of them with more symbolic than substantial debate and was voted with acclamation. It shows that the state perceives its existence endangered by any sort of (imagined or real threats) it makes great pressure on all state actors to show high degree of “solidarity”, which practically means lack of any critics and constructive debate.

the side of the ruling parties, opposition and the silent public. States with apparently decent legal foundations and institutional mechanisms cannot function because of the evident lack of democratic political culture.

According to the traditional theory of democracy legitimacy or justification of state is in the state having a kind of imaginary contract with its citizens, guaranteeing them, among the other things, safety and protection of their rights. However, one of the weakest points of the post-communist democracies is the so-called ‘question of citizenship’.⁸ Ethno-nationalist systems emphasises the division between majority (dominant nation’s members i.e. *us*) and minority (members of the other ethnic groups, i.e. *others*). Usually the military and other security forces are comprised by members of the dominant ethnic group, which makes it difficult for the ‘others’ to perceive them as all-national institutions. States driven by inter-ethnic tensions are not able to be security (or safety) provides for all their citizens. Under such conditions, even in the parliaments the meaning of ‘majority’ vs. ‘minority’ gets a new ethnic dimension.

There is a naive belief that ‘people power’ is sufficient guarantee for democratic governance to take place. In the Western scheme of thinking the main goal of democratisation is to make people heard, first of all through the parliament and other political institutions. The majority vote is also taken as essence of democracy (certainly with some corrective mechanisms against the ‘tyranny of the majority over the minority’). But very few have been ever thinking of what to do when majority vote and support belligerent policy, greater involvement of the military in resolving ‘national question’ and state building? Majority, in the public and in the parliament, does not necessarily bring democratic incentives and laws and the majority vote behind certain policy must not be taken for granted that has democratic provenience.

Nowadays democratic constitution of a political system becomes legitimisation card and a ‘ticket’ for the developed community of states. Acceptance of the principles of Western democracy is the first and very often the last step on this way. More precisely, the acceptance of Western democracy is limited on the level of imitation that can have two forms – intentionally created illusion or even self-deceit. Ruling elites in the post-communist countries (especially the newly created ones), which are by their mental structure and the political experience authoritarian, loudly accept democratic rhetoric and legal-institutional ornaments in order to get democratic legitimisation before the world and thus, stay on power.

8 According to some most prominent political scientists “the core principle of democracy is citizenship”. (See: O’Donnell Guillermo and Schmitter Philippe, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, John Hopkins University Press, Baltimore, 1986.

Looking West makes double impact on the way transition process is carried out. The imperative of embracing democratic principles, certainly, induces huge benefits that overarch the expectations of the small elites, but in shorter or longer run, will positively change citizens' lives. Even the pure imitation of democracy should not be underestimated because some see it as a way of providing an ambience for learning about and practising democracy.⁹

The negative effects of imitation or disregard of the inapplicability of the purely Western models of political governance are usually not given any serious attention. The essential paradox is the ethno-nationalist elites get alibi for their politics exactly by insisting on models created and implemented in the settings of nation-states. The reality of majority of these transitional societies is multi-ethnic and calls for different solutions.

Led by their one and only wish to join West and Euro-Atlantic integration, post-communist regimes are highly sensitive on the influences that come from the so-called external factors. The West in its all dimensions fascinates ethno-nationalist elites, although it is doubtful in which order they perceive the values of Western economic welfare, political stability and military strength. The main problem here is the fact that power in the international arena in the same way they are fascinated by power holding in the domestic contexts. The Western security community as well as each of the Western developed democracies play a model role for the emerging ones. In that sense, every single move they make in their national settings as well as on the international scene has immediate effect on their followers. In that sense, it is needless to say that West bears special responsibility for own behaviour when it comes to democracy, rule of law and democratic control of the security sector. The world has become too much interdependent on a global scene so all the positive and negative developments may easily echo loudly and widely.

2. Internationalisation of Civil-Military Relations in the Post-Cold War Era

While the countries in transition are looking towards West, the Western part of the world moved into the new millennium facing what it sees as new challenges on its way. The traditional discourse on civil-military relations is now being strongly challenged by many new developments and transformations at national and international levels.

Until recently civil-military relations, and especially their core element i.e. the democratic control of the military, were conceived only within a national setting. Yet recent dramatic global changes have affected a whole set of factors calling for the conceptualisation of civil-military relations to include a broader

9 Mirić, Jovan, *Demokracija u postkomunističkim društvima*, op. cit., p. 106.

supranational level. Democratic control of armed forces primarily used to be an internal political and security issue of a nation-state; today, the emphasis is moved towards the democratic control of military alliances (such as NATO) and similar supranational structures. In some views the world is moving away from the old Westphalian model of state system towards a post-modern one, a new model of civil-military relations for the twenty-first century is also called for, where the paradigm of civil-military relations is being redefined into one for society-military relations.

Traditionally, civil-military relations have addressed the relationship of the military to the nation-state. The very concept of nation-state and, consequently, of civil-military relations may, however, be deeply affected by the ongoing process of integration in Western Europe, and especially by the process of NATO enlargement. A new paradigm of society-military relationships emerges, where society is globalised, and the military does not have nationally limited role, but is more focused on the international arena. In other words, the Western security community calls for a process of internationalisation of military forces but radically different from the concept once prescribed by the OUN. The most obvious example is, certainly, adoption of the New Strategic Concept of NATO from 1999.

The end of the Cold War and especially the Gulf War experience have imposed a different way of thinking about “the military in new times”¹⁰ and some old questions called for new answers. However, the traditional perception of the military as an attribute of nation and a symbol of state sovereignty have gone through several tests. For more than a decade the Western military establishments believed that they no longer played the same important national role they used to. Their traditional legitimacy basis has therefore gradually eroded to the extent that many scholars talked about a crisis of legitimacy. Prior to the September 11th the Western political leaderships were concerned with keeping the military ‘busy and happy’ in the absence of threatening enemy threat on the horizon. The solution has been sought at a wider international level, but the core issue is still related to the new missions and the new institutional identity of the military. The immediate question concerns the new military missions to justify NATO’s existence, sense of purpose and enlargement? For a decade, the new threat was identified in the ‘Balkanisation’ i.e. sources of insecurity and instability in the grey zones, with a potential to endanger Western values and the security community.

The thesis that war (which is still possible) has fundamentally changed its characteristics prevails¹¹ and the Clausewitzian trinity (state-military-people) has been abandoned. The inter-state wars have been replaced by intra-state

10 Burk, James (ed.), *The Military in New Times, Adapting Armed Forces to a Turbulent World*, Westview, Boulder, 1994.

11 Van Creveld, Martin, *The Transformation of War*, Free Press, New York, 1991.

conflicts, which made researchers argue that humankind faces a new historical situation of transition from war towards conflict. Truly, classical war between states becomes real exception within violent mass conflicts.¹²

The post-Cold War period was greeted with great expectations and optimism. Most of the newly emerged hopes were connected with the possibilities promised by the peace dividend. Illusions vanished soon after the first serious analyses of the conflicts emerged after the end of the Cold War. The surveys indicated that post-modern society should find appropriate responses to post-modern wars.¹³ Apparently, conventional military was ill prepared for the new kind of conflicts. The militaries, that had been expecting large-scale armed conflicts, became frustrated. An author described the ambivalent feeling in the following way: “A ghost is stalking the corridors of general staffs and defence departments all over the ‘developed’ world – the fear of military impotence, even irrelevance”.¹⁴

The developments that began with the attacks on USA on September 11th challenged a decade-long dominant paradigm on national and international security. Terrorist threat had been known and listed on the security agenda, but the use of terrorist attacks on the national security of the most powerful country in the world opened a range of questions with serious impact on the global and national level. Most disputable points concern some interesting relationships, such as: the relationship between internal and external security priorities; the new military missions somewhere between coalition warfare and strengthening (and even prioritising) homeland (territorial) defence; major disturbances in the relationships between the armed forces and the other segments of the security sector (especially, intelligence and secret services); and finally, the relationship between USA and NATO in regard to the collective security arrangement. The September 11th developments, de facto, showed that the shift from national towards internationalised civil-military relations is unlikely to be straightforward and irreversible as it looked on first sight. Especially, in the US the dilemma openly manifested in regard to the war in Afghanistan and the participation of the NATO allies could be spell out as “the shirt is closer to body than the jacket”. Truly, the relationship between the military and society is essentially determined by the possibility of armed conflict outburst as well as by the threat perception. From the US perspective, the terrorist threat is still imminent and national security should be given priority both in regard to the domestic concerns (human

12 Jung, Dietrich, From Inter-State to Intra-State War, Patters and Trends of Development Since 1945, paper presented at COPRI Symposium on Intra-State Conflicts: Causes and Peace Strategies, May 1997.

13 Moller, Bjorn, Ethnic Conflict and Postmodern Warfare. What is the Problem? What Could Be Done?, COPRI Working Papers, 1996, No. 12.

14 Van Creveld, Martin, op. cit., p. 3.

rights and liberties, first of all) and international ones (international law and the relationships within NATO). The September 11th attacks having been the first attack on the US national territory since 1812 over night transformed USA in a sort of a laboratory of how a democratic (and militarily powerful) state is reacting to a threat situation where it is almost impossible to distinguish external and internal threats. The immediate response irresistibly reminds on the behaviour of ethno-nationalist regimes and conflict-driven societies.

On an international level, rhetorically and empirically, the security architecture has achieved a high degree of transformation, although not all results can be labelled as successes. Apparently there is relatively well-defined security agenda with a long list of old and new security threats, referent objects, numerous international security (and securitising) agents, etc. Regardless the (dis)agreement on the substantive aspects of this complex mosaic few would argue that the rapid and radical shifts on international security level have been accompanied by adequate changes on the international political plight. The internationalisation of security and armed forces have not been followed by an increased level of international democracy, for which reason the forms of democratic control of the armed forces are very much in doubt. To make it worse, the latest developments have great impact on the democratic principles on a national level too. The first victims of war are the truth, human rights and rule of law. Paradoxically enough, it seems that the ‘war against terrorism’ brought closer Western democracies and post-communist countries.

3. On Internationalisation of Armed Forces and Democratic Control of Armed Forces

Since the end of the Cold War the international security paradigm have centred on two relatively new developments. While (intra-state) conflict-driven regions of the world face a phenomenon called “privatisation of security”, Western security community seems to be moving towards the “internationalisation of civil-military relations”. The September 11th aftermath calls for renaissance or “re-nationalisation of civil-military relations” in the developed democracies under the threat of war. Post-Cold War era has set quite different international security architecture with some of the old (traditional) actors, such as UN and NATO, but also some new emerging and still not thoroughly defined structures (such as forthcoming EU Rapid Reaction Forces). Since war/conflict has been moved into the sphere of improbability in the Western security community, and there has been an international order without a (named) enemy, consequently the new security agenda includes some new threats that should be responded with different means. Threats have been merely perceived in terms of endangered Western values and not territories. At least, the 1999 NATO intervention could have been seen through these lenses. The ‘war against terrorism’ imposes a challenge of de-territorializing

the war/conflict (when it comes to the targets of attack) all in the name of protection of Western values *and* national territories. One can conclude that the September 11th has shifted the attention from one still unresolved issue, while imposing new challenges for the democratic control of armed forces and the security sector on a national level at the same time.

One of the most challenging and so far merely neglected issues has been the one related to democratic control of military alliances and supra-national military forces, and especially possibility of carrying out effective parliamentary oversight over their missions, budgets, etc. Internationalisation of security (as well as the trend of privatisation of security) challenges the traditional premise of a state as a principal bearer of monopoly on the (legitimate) use of force. While Max Weber saw it as a central criterion for a modern state, the discourse on democratic control of armed forces adds two things in order for the state to qualify as a democracy: the monopoly is also effective, at least for any level of force beyond the level of ordinary crime; and the way in which the state uses force for internal or external coercion is subject to public democratic scrutiny and control. The recent shift on the international scene is being made towards forums that overreach the residuum of power of a nation state. Hence the question arises whether the criteria valid for an evaluation of democratic control of armed forces on a national level are also applicable to quite robust, complex and multinational (or supranational) institutions.

In addition to the 'old' world organisation (UN) the new international security architecture consisted of NATO, EU (and till recently WEU), OSCE, etc. has become so complex and dynamic that some analysts speak about organised anarchy.¹⁵ Behind the apparent anarchy the patterns have, however, become more evident and predictable, especially since spring 1999. The world organisation has been marginalised, which is seen as a 'natural and positive development' by the Organisation itself. It praises the more active and pertinent role of NATO, who is dealing with major conflicts. Thus, the UN is given more time and opportunities to deal with so-called 'non-CNN conflicts'.¹⁶ Also the appearance of some organisations and processes (such as emergence of European Security and Defence Identity, for instance) have brought to the fore many dilemmas about their nature and characters, conflicting identities, differentiation of their missions, scope of responsibility, etc. One of the crucial open issues is about the contesting legitimacy of the nation-state on expense of the new emerging hierarchic multinational or supra-national structures. For example, some scholars argue that Europe has been

15 De Wilde, Jaap and Wiberg Hakan (eds.), *Organized Anarchy in Europe: The Role of Intergovernmental Organizations*, I.B. Tauris, London, 1996.

16 An interview of the author with the Head of the UN Division for Peacekeeping, May 2002, UN HQ, New York.

post-sovereign while the units have retained their sovereignty.¹⁷ Hence, blurred differences between some security organisations and the division of ‘labour’ between them.

The post-Cold War international security spectrum stays contested in many aspects, such as: who are the security actors and furthermore – securitising agents; who defines the security threats and makes priorities, what are the main referent objects of security, who creates legal constraints for use of force in international relations, what are the geographical reaches of activities/operations of various organizations, etc. It seems that there is still lot to be done in the sphere of the international security but the crucial issue should be - internationalisation of security vs. internationalisation of democracy, or *vice versa*.

It seems that the most powerful and influential international actors have accepted new security alliances and missions far more enthusiastically than they have been able to respond to the new challenges for ‘post-modern democracy’. The focus of the new missions has changed from the originally defined both functionally and geographically, and in general one may say that it has extended beyond that of traditional defence concerns. The advocates of internationalisation of military and security forces usually stress the positive sides of as obvious in terms of efficiency, rapid reaction, professionalism, etc. More importantly, states operating within international society are involved in a process of mutual opening, confidence building and acquiring common standards.

However, the question about what democracy might mean at a trans- or supra-national level is still open and waits for more satisfactory but urgent answers. Actually what is in place is a weird way of defining security policy (threats and means to respond on them). On a national (state) level, the security policy mostly derives from the societal value system, the general policy of governance and the dominant threat perceptions, etc. On international level one can observe the process going other way around. In terms of the dominant value system some scholars speak about ‘Westernic’¹⁸ system of norms and ideas, while the others challenge the Westernisation and Western hegemony even in terms of spreading (preaching) values as something without an alternative because democracy is exactly about having alternatives.

Many see the legitimacy problem with NATO’s out-of-area actions and/or point out ‘democratic deficit’ of the EU. Many governments eagerly accept advantages of membership in the collective security arrangements but they are quite reluctant when it comes to giving up some of their sovereign national rights

17 Weaver, Ole, “European Security Identities 2000”, in: Burgess, J. Peter and Tunander, Ola (eds.), *European Security Identities, Contested Understandings of EU and NATO*, Oslo, PRIO Report 2/2000.

18 Buzan, Barry, Focus on: The Present as a Historical Turning Point, *Journal of Peace Research*, vol. 32, no. 4, 1995.

for benefit of ‘internationalising democratic order’. On a theoretical level one may argue what are the premises of democratic control of the armed forces that are applicable on the international level, or better – are these two issues comparable at all. The problem is particularly intriguing when it comes to the respect of rule of law principle.

The premise on the central need for a limited and controlled (political and military) power must not be questioned even in the international arena. The truth of the axiom “power tends to corrupt, and absolute power tends to corrupt absolutely” rings accurately applied on the international scope more than ever. International order is becoming more complex, multi-polar and with a huge military power focused in several forums. The nationally applied ‘check-and-balance’ system does not seem appropriate in this case. It is usually taken for granted that the membership in these organisations/alliances is restricted only to the governments with well proved democratic records, yet it does not say anything about the legitimacy basis of the new forum and the mechanisms of effective control by the civil society and the citizens. If the civilian control is guaranteed (which is indubitable seeing the complex political decision-making network), the democratic character of this control is still to be proved.

On a national level the parliamentary oversight of the security sector is the basic means that makes elected politicians, who possess effective means for control of the military and security forces, accountable to the citizens via parliament. On the other hand, internationalisation may be defined as a deliberate transfer of authority to an organisation or body that national governments entrust with a range of tasks that typically involves either direct involvement of nation states in the policy making or the actions of international officials taken under a delegation of authority by member states.¹⁹ Obviously, internationalisation changes profoundly the essential link between political power/authority and citizens. Moreover, it opens new problems in terms of changed nature of policy making process and democratic accountability. The main problems related to these dimensions of working democracy are the following:

- International policy-making is frequently secretive, or at least more often than it is a case with nationally carried out process;
- International forums deal with a complex range of technical issues, which are untypical for national parliaments;
- Main actors in decision and policy-making processes on international level are usually diplomats or representatives of national executive branch;
- Decision making procedures are almost never open to review by legislators or other representative bodies on national level;

¹⁹ Wilson, Graham K., Accountability and Internationalisation, paper presented at SOG Conference “The Quest for Governance”, Tokyo, November 1999.

- National representatives are not always able to convey and realise the nationally defined priorities and interests. Decisions are usually dependent on inter-state bargaining for settling major issues;

- There is almost no room for informal (societal) influences, interest groups, NGOs, etc. that would take part in the process on international level;

- International organisations have policy bias, which means that they are not neutral structures that give equal weight to all (security) policy considerations;

- Membership in an international organisation may pose additional financial demands on defence budgets, which may be a great burden to smaller states or states that give more emphasis on their economic security. Many even argue that constant demands for further modernisation and reform of armed forces that come from their participation in an international security arrangements may fuel a kind of militarization of democratic societies;

- Realism of international relations proves that despite the official rhetoric and even consensus-made rules and decisions, all actors are not equal (i.e. some are more equal than the others).

Today the main deficiency is in the lack of a clear answer who represents supreme political authority and who creates and implements supreme legal norms. It is believed that the prime responsibility for the security measures undertaken on a trans- or supra-national level resides with national parliaments. However, the 1999 NATO intervention in FR Yugoslavia was a huge challenge that opened a range of issues. Having in mind that the strongest of all governmental powers is the power to engage in war, the constitutional democracy is supposed to bring the war power of the state under meaningful control. However, it appeared that majority national parliaments had not discussed the operation qualifying it as a kind of a ‘technical issue’. The cross-national comparisons show a lot of variations in terms of a possibility of the national parliaments to carry out an oversight function. Some of the chief executives appeared to be constitutionally authorised to commit their forces to a military campaign without reference to their national parliaments (Great Britain, France), the President of the US violated War Powers Act ²⁰ by not asking the US Congress for extension of the US armed forces’ mission abroad, some parliaments overlooked the question (Norway, Canada), while the German Bundestag was among the rare parliaments that had to act affirmatively to approve armed forces engagement in the Kosovo campaign.

²⁰ Damrosch, Lori Fisler, “The Clinton Administration and War Powers”, in: *Law & Contemporary problems*, Web edition (www.law.duke.edu/journals/lcp/articles/lcp63dWinterSpring2000p125.htm).

With such a diversity when it comes to national legal and political systems, it is not surprising at all that the international level stays void of any reference when it comes to use of force and effective control of the process of decision-making and mission implementation. Lately there have been opinions advocating the need for development of a parliamentary dimension within EU framework.²¹ At the same time, there are also opposite standpoints that primarily argue national dimension.

4. NATO, the Use of Force and Rule of Law: Kosovo Lessons

Rule of law is supposed to subdue political process of decision-making, but it is difficult to say what are the legally binding international norms in the international arena. The 1999 NATO intervention in Yugoslavia has marked the entrance of the international law into a deep crisis. An air-campaign in the name of a ‘humanitarian intervention’ was launched without a legal authorisation of the UN Security Council. The UN officials still remember the shock of 24 March 1999, when in the belief of many it was the end of the international order and international law. Since then, and most recently the Afghanistan war, have emphasised several urgent questions, such as: who is authorised to order use of force in international relations; who guarantees implementation of international humanitarian law; who is responsible for the violation of human rights of one population in the name of protection of human lives of another people; who defines what is international law and who decides on functional and geographical scope of the military missions of the internationalised armed forces?

One of the main dangers for a democracy on a national level comes from the military that has no precisely and legally defined mission, or when the political order is collapsing and the military believes that it is its main mission to preserve the state order. The phenomenon characteristic for praetorian regimes in Latin America and elsewhere has emerged on the international scene. NATO has adopted a self-image of a sole defender of the so-called New World Order. This messiah-mission can be compared with national armed forces that behave as sole guarantor of the constitutional order and a protector of the nation. Its sense of self-righteousness leads to the creation of an image of an ‘international community’ supported by NATO countries and in particular by the only super-power in the world, USA, about which Johan Galtung states that “their sense of exceptionalism, being above ordinary states and nations, is attractive. To break that many international law paragraphs can only be justified if you are above the law, in a direct relation to a God of the universe who ‘created America to bring order to the world’ (Colin Powell) or, in more secular terms, ‘a global nation with global interests’ (Shalikashvili). Smaller states flock to

21 Van Eekelen, Wim (rapporteur), Draft Interim Report: NATO and the European Security and Defence Policy, NATO Parliamentary Assembly Report AU 99 DSC/TC (01)3, 2001 (www.naa.be/publications/comrep/2001/au-099-e.html)

the Exceptional one to reflect, like the cold moon, some of the light, not to mention the heat, burning the non-believers. An old Western tradition.”²²

The NATO intervention over Kosovo has raised a debate over its legality and justification, which still provokes opposite opinions. The NATO leaders claimed that the air-campaign was all about humanitarian concerns in Kosovo that had been under the extremely repressive regime of Slobodan Milošević. This justification can be questioned from a pre-intervention (causes) and post-intervention (consequences) point of view. Interestingly, the grave situation of the local population had not been unknown but, especially during the Dayton process that brought cease-fire in the Bosnian conflict, Milošević was seen as a guarantor of the ‘peace agreement’. The so-called ‘international community’ turned its deaf ears to the legitimate demands of the leader of the peaceful resistance of the Kosovars, Ibrahim Rugova. Equally, the West turned the blind eye to the harsh repression in Kosovo for almost a decade. Finally, an armed resistance emerged in Kosovo and coincided with the West’s decision to get rid of Milošević. With that purpose the armed groups of Kosovo Albanians were secretly funded, trained and equipped by some secret services as well as by the Albanian Diaspora, mainly financed by mafia-business in Western Europe and USA. In spring 1999 the human rights plight was not worse than in the previous years, while the violent clash between the Serbian forces and Albanian Kosovo Liberation Army (KLA) had not reached extremely high death toll (especially not in comparison to some other conflict zones). The Rambouillet and Paris charades were not even close to a peace process. Thus the Račak massacre was used as a final proof for the murderous politics of Slobodan Milošević.

Having anticipated veto for the military intervention in the UN Security Council, they decided to bypass the only authorised international body when it comes to use of force in the international relations. NATO violated the UN Charter, which forbids use of force except in a case of self-defence and/or collective defence authorised by the UN Security Council. It violated also its own Statute, and the Article 5 that emanates the Alliance’s *raison d’être* (i.e. self-defence and operations on the territories of the member states). During the 72 days-long air campaign, according to the many legal experts, Amnesty International and Human Rights Watch, at least in several occasions NATO forces violated the norms of the international humanitarian law. The adoption of the NATO new Strategic Concept at the Washington Summit in April 1999 meant that NATO became a self-appointed conflict-manager in global scope. It gave ground for the conclusion that “the reality is that NATO is making up the laws as it goes along to suit their convenience”²³. In

22 Galtung, Johan, “The NATO War, the Ethnic Cleansing – is There a Way Out?”, in: TFF Press Info 70, June 10, 1999, Web edition (www.transnational.org).

23 Raju G.C., Thomas, NATO and International Law, Web edition, 1999, (<http://jurist.law.pitt.edu/thomas.htm>).

other words, the ‘law-maker’ appeared to be the same actor as the ‘law enforcer’, which was in essential contradiction to the ‘golden rule’ on separation of powers. The illegal intervention was post festum authorised by the UN Security Council with the adoption of the 1244 Resolution and the deployment of UNMIK. However, the most shocking consequence of the alleged ‘humanitarian intervention’ was the acknowledgement of use of indiscriminated weapons (depleted uranium and cluster bombs, first of all) and the ethnic cleansing of all non-Albanian population in the presence and passive observance of the international forces.

– Obviously, the human rights dimension of the issue is the most crucial part of the discourse, and furthermore – the most exploited one when it comes to justification of the actions that are not in compliance to the existing international law. Most of the humanitarian assistance/intervention endeavours are usually advocated on the ground of humanitarian necessity. The starting point is that the modern international law establishes that serious violations of human rights are matters of international concerns. The traditional doctrine of state sovereignty cannot be used as an alibi for a regime that severely infringes the human rights and freedoms of own citizens. Instead another doctrine in the law of state responsibility has been developed by the UN International Law Commission, according to which it is states’ obligation to respect and protect basic human rights. It concerns all states, that is, it is a norm with *erga omnes* effect.

– Undeniably, Milošević’s regime had been involved in gross violations of human rights in the Serbian province of Kosovo for years. It had been a well-known and documented fact for years but the so-called international community had not done anything to resolve the conflict before it took large-scale violent dimension in 1998. From a legal point of view, many international lawyers agree that NATO threat of armed force against Yugoslavia as ‘humanitarian intervention’ did not fit the standard schema. Within the categories of international legal self-help and enforcement, those threats rather constituted reprisals, or countermeasures, intended to induce Yugoslavia to comply with its obligations arising from general international law, UN Resolutions and Holbrook agreement of 1998.²⁴

– The legal debate on illegality and legality of the alleged “humanitarian intervention” in Yugoslavia is still open and controversial. It usually centres on legal vs. moral dimension of the military campaign. However, few notice the significance of the dimension that refers to the democratic control of the Alliance in the light of rule of law principle. The crucial issue is that the Alliance undertook a military operation against law, beyond the territory of its member-states, and it caused heavy violation of human rights of the Yugoslav population

24 Simma, Bruno, 1999. “NATO, the UN and the Use of Force: Legal Aspects”. In: European Journal of International Law, vol. 10, No. 1, web edition edition (www.ejil.org/journal/Vol10/No1/ab1-1.html).

and destruction of the country's civil infrastructure, used indiscriminated and prohibited weapons. To make it worse, it went without punishment even for allegations on war crimes (cynically called 'collateral damages') committed by NATO forces.²⁵ NATO's often repeated contention that anything it did wrong in Kosovo should be judged in the light of the humanitarian cause it was pursuing, can be seen as a plea for more lenient standards to be applied to NATO than to Yugoslavia. No organisation which strives to be impartial can, however, afford to apply such double standards.²⁶

Advocates of the new doctrine on 'humanitarian intervention' mainly complain against legalistic hair-splitting versus the pursuit of humanitarian imperatives. However, the crucial point is that nobody can simply follow humanitarian impulses. In this very case, it was done on a very discriminatory basis – in order to protect less than 2 millions people another 10 millions have been put on long term security risks, such as the effects of depleted uranium and cluster and graphite bombs. "We should not set new standards only to do the right thing in a single case. The legal issues presented by the Kosovo crisis are particularly impressive proof that hard cases make bad law."²⁷

However, even when it is obvious that a law constrains and limits the wise and rational behaviour, instead of violation of the law, it is necessary to amend the law in accordance to a strictly verified procedure. The eternal tension between rationality and legality is nothing new in the history of human society. But an excuse that a law is bad and that's why we need to undertake lawless and arbitrary actions would be a call off of one of the essential preconditions for genuine democracy and a just world. Truly, legal relations are relations of power, which is particularly true for the international relations. The question if the relations of power are just refers to the old dialectical puzzle on the relationship between law and justice. As the great philosopher Pascal put it, if we are not able make what is just to be powerful, then we should made the powerful be just.

It is common responsibility of the Western security community and the rest of the world actors to pay more attention of the newly emerging variants of the old issues. The essential relationship between democracy, rule of law, human rights and democratic control of armed forces is obviously going through profound changes, which cannot be good excuse for abandoning some of the basic premises that have resisted century long evolution of democracy. As long as they are not replaced by new and better ones, they should be fully respected. The same applies to the urgent

25 See in more detail in: Collateral damage or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force, Amnesty International, London, June 2000, AI Index: EUR 70/18/00; <http://www.amnesty.org>.

26 Gidron, Avner and Cordone, Claudio, "NATO on Trial", in: *Le Monde Diplomatique*, July 2000, web edition.

27 Simma, Bruno, 1999, op. cit.

need to think and undertake a kind of democratic control over internationalised armed forces and/or an Alliance that is the most powerful one in human history. Having said that, one cannot release the only super-power in the world to comply with the international legal norms even when it is an object of an armed attack. The military action in Afghanistan, radically different from the one in Kosovo, still raises internationally important issues of ‘collateral damages’ (civilian casualties), a military action not formally articulated through UN bodies, breach of the Geneva Convention, use of depleted uranium missiles etc. The ‘war against terrorism’ has a great impact internally on the US democracy as well. Some may exploit opportunity to ram through its own agenda, which includes militarization, increase of military spending, ‘missile defence’, restriction of human rights and liberties in the name of national security, etc. Rule of law remains a principle of utmost importance both domestically and internationally, equally for the mature and emerging democracies in times of peace or war.

Original in English

Prof. Biljana VANKOVSKA

VLADAVINA PRAVA I DEMOKRATSKA KONTROLA ORUŽANIH SNAGA U PERIODU POSLE HLADNOG RATA

REZIME

Vladavina prava i principi demokratske kontrole oružanih snaga, jednako svojstveni demokratiji, uzeti su za lajtmotiv tranzicije u postkomunističkim zemljama, ali što je sasvim neobično, iz različitih razloga, i u retkim slučajevima u svom “prirodnom jedinstvu”. Vladavina prava se obično shvata kao *sine qua non* na planu političke demokratizacije i transformacije. Demokratska kontrola oružanih snaga se, pak, retko stavlja u korelaciju sa političkim procesom, već se prvenstveno shvata kao važan kriterijum za ulazak u evro-atlantske strukture. Zbog toga se stvaranje suštinske veze između ova dva principa čini neophodnim kako bi oni postali jasni demokratijama u povelju. Polazna tačka u ovom diskursu je bogata zapadna demokratska tradicija i iskustva stečena kroz vekovima dugu primenu demokratije.

Prema mišljenju autora, sjajni rezultati zabeleženi na planu sprovođenja oba principa ne oslobađaju razvijene demokratije stalne brige za stalnim potvrđivanjem sebe u izmenjenima konstelacijama. Posebno, zapadna bezbednosna zajednica i trend internacionalizacije civilno-vojnih odnosa zahtevaju nove demokratske odgovore ne samo na nacionalnom nego i na međunarodnom planu. Umesto toga postoji neka vrsta prezrivo odnosa – demokratski uspesi se uzimaju zdravo za gotovo, ali se međunarodni aspekti tog pitanja obično ne shvataju kao problem.

Ukratko, i demokratije u povelju i razvijene demokratije treba još dosta toga da urade na pravi način. Uspesi i neuspesi u svakom “bloku” (in)direktno utiču na onog drugog, što zahteva preduzimanje paralelne diskusije i akcije. Mir i bezbednost kao i demokratska perspektiva čovečanstva su u pitanju, zaključuje autor.