CENTRAL EUROPEAN UNIVERSITY

USE OF MILITARY FORCE WITHOUT DECLARATION OF WAR: COMPARATIVE CONSTITUTIONAL ANALYSIS

by Stanislav Ivasyk

LL.M. SHORT THESIS
COURSE: Elements of Comparative Constitutional Law
PROFESSOR: Mathias Möschel
Central European University
1051 Budapest, Nador utca 9.
Hungary

Abstract

The change of tactics and means of conducting warfare comes with a transformation of a legal framework of the use of force. The declaration of war seems to become a part of legal history, because states no longer keep a formality of declaration of war before the introduction of military force. Thus, new laws are adopted to grant the Executive broader discretion of the use force. Nevertheless, national Constitution conservatively divides legal status of the state on war and peace, proscribing that the decision to start war should be adopted jointly by the Executive and the Legislator. This situation lies a potential conflict between new legal framework of the use of force and the constitutional regulation of the use of military force. New legal face of the use of force significantly influence a separation of powers system, as any resort to force results in the broadening of the executive powers.

Therefore, this paper evaluates a modern legal realities of the use of force without declaration of war. The thesis describes the preconditions of the use of force, it limits and legal regime. Looking at examples of Ukraine, Israel and the United Sates, I outline how the use of force influence the relations between the Executive and other branches of power on horizontal and vertical level and how it alters the inner structure of the Executive itself. Combining scientific achievements of the national security studies and legal studies, this research evaluates the typical separation of powers problems that occur during non-war use of force.

Table of Content

Introduction

War is one of the most ancient instruments of politics, nonetheless, it constantly changes its face, adopting new means and rules. Recent armed conflicts demonstrate that modern war acquires new features that were untypical for military conflicts of the previous centuries. The role of para-military mechanisms such as support of the riots and terrorist organizations, informational discrediting tactics and economic pressure have been significantly increased. Most scholars name such kind of war a fourth generation warfare (4GW). The concept was first introduced by William Lind, Keith Nightengale, John Schmitt, Joseph Sutton and Colonel Gary Wilson in the article entitled "The Changing Face of War: Into the Fourth Generation"[1]. The authors described the 4GW as a fusion of war and politics, combatants and civilians with terrorism as one of the key instruments[2].

In the circumstances mentioned above the use of force without formal legal declaration of war has become a typical response to hostile activities. Since 1945 almost no State has officially declared war[3]. Consequently, the legislation and practice are changing, adopting to new realities of the use of military forces. New legal grounds appear, the terminology becomes broader and more flexible or special legal regimes are established to justify the use of military powers.

Nevertheless, constitutions of most countries traditionally connect the use of force with the declaration of war. The elimination of military aggression requires the expansion of powers of the Executive and thus it can lead to dictatorship or severe abuse of human rights. This is why, the procedure or at least general requirements of a declaration of war are usually prescribed by the main law of the country – its Constitution. Generally, such a procedure

[1] Lind, William et al. "The Changing Face of War: Into the Fourth Generation", *Marine Corps Gazette (pre-1994)*, Oct 1989, vol. 73, no. 10, ProQuest Direct Complete, p. 22
[2] Ibid
[3] Dieter, Fleck and Bothe, Michael, *The handbook of international humanitarian law*, Oxford ; New York : Oxford University Press, 2007, p. 39

involves different state authorities, presupposing discussion between branches of powers (mainly the Executive and the Legislative) on the necessity to declare war. For instance, the Constitution of the United States authorizes Congress to declare war[4], but recognizes the President as Commander in Chief[5]. The Constitution of Ukraine introduces a similar approach. Article 85 of the Constitution empowers the Parliament to declare war at the proposition of the President, who is "the Commander in Chief of the Armed Forces of Ukraine"[6]. Therefore, we can make the conclusion that the Constitution puts an obvious requirement of the compliance with the principle of separation of powers when war is declared.

To this extent, every use of force without formal declaration of war represents a serious constitutional problem: is such use of force legal under the Constitution, how far can the Executive go in the use of force, and what are the mechanisms of control over his military powers? The problem is even more severe, considering the fact that any rise of the Executive's powers can lead to an imbalance between branches of government and, as a result, to the violation of the principle of separation of powers.

The interest in this particular problem was triggered by the current military conflict in Ukraine. Russian intervention in the Eastern part of the State started with a support of "illegal armed groups".[7] For that reason, a so-called anti-terrorist operation was declared in the Donbas region. Nevertheless, since then the situation has changed into a real military conflict. Now, the declaration of war would show the failure of all peaceful attempts to rule over the situation. To this extent, the President and the security and military authorities were given enormous powers to act under an anti-terrorist operation regime. Even new constitutional amendments are designed to expand President's emergency powers. Therefore, legal regime of the anti-

[4] US Constitution, Art. 1, § 8
[5] US Constitution, Art. 2, § 2
[6] [§ 17 of the Article 108 of the Constitution of Ukraine] Пункт 17 статті 108 Конституції України : Відомості Верховної Ради України (ВВР), 1996, № 30, ст. 146
[7] Council of Europe Parliamentary Assembly Resolution 2028 (2015) adopted at the 27 January 2015 (The humanitarian situation of Ukrainian refugees and displaced persons)

terrorist operation is becoming more and more similar to the state of war. On the other hand, the Constitution of Ukraine limits the President's authority to use war powers. Articles 85(9) and 106(19) provide that military force can be deployed only after certain circumstances and with authorization of Parliament. Consequently, the growth of President's powers invokes questions about its constitutional grounds, especially with the consideration of the fact that Ukraine is a semi-presidential Republic.

However, Ukraine is not the only country that has faced a problem in the growth of the Executive's power in the context of armed conflict. The Presidents of the United States conducted war in Vietnam (1955–1975), in Afghanistan (2001–2014) and in Iraq (2003–2011), intervened in civil war in Libya (2011) and in Syria (2014–to date) and bombed Yugoslavia in 1999, all without formal declaration of war by Congress and sometimes even without its consent. In its turn, Israel has been in a continuous and uninterrupted state of emergency since the establishment of the state in 1948. Under the Paragraph 40 of the Basic Law relating to the Government, the state of emergency allows the Israeli Government to begin any war it wants and the only thing it needs is to notify the Knesset Foreign Affairs and Security Committee and the Knesset plenum.

Many scholars have tried to determine the proper correlation between the Legislative's and the Executive's military powers. Some stated that the President is the "Commander-in-Chief", this is why, he possesses all necessary powers to conduct war and he has no need to consult with other branches[8]. Other commentators object by saying that the Executive is entailed only to "execute" war started, controlled and led by the Legislative[9]. A third group insists that war powers are strictly distributed between constitutional organs[10]. Finally, other

[8] Yoo, John C. "Kosovo, War Powers, and the Multilateral Future." *University of Pennsylvania Law Review*, May 2000, 1673

[9] Tiefer, Charles. "Can Appropriation Riders Speed Our Exit from Iraq" *Stanford Journal Of International Law* no. 2 (2006), 291

[10] Ramsey, Michael D. "Textualism and War Powers." *The University of Chicago Law Review*, 2002., 1543

researchers believe that some military powers are separated, while others are fused to introduce a checks and balances control system[11]. Of course, it is very difficult to find absolute truth in such a plurality of thoughts. In addition, constantly changing realities of military conflicts always cast doubt on the scientific findings.

Therefore, the main aim of this paper is to evaluate previous research, compare it with modern legal realities and to find typical dangers and challenges that threaten a proper constitutional balance between branches of power at the use of force in the absence of war. I evaluate the practice and law of Ukraine, the United States and Israel, as they are the countries currently involved in the military conflict of undeclared war. Thus, these three states are the jurisdiction I have focused mu analysis. I also use an interdisciplinary approach to achieve the thesis's aim, combing scientific findings of the national security studies and the legal studies.

The research is made in several steps. Firstly, it is necessary to discover under which circumstances the military force can be deployed. The UN Charter imposes strict restrictions on the use of force. Nonetheless, the absence of key definitions and different readings of the Charter have led to the different interpretation of its provisions. This is why, it is important to find the interpretation that the best suits the purpose and original meaning of the UN Charter. Moreover, it is necessary to determine how the provisions of national constitutions correspond to the UN Charter's use of force requirements.

However, the restrictions on the use of force do not only consist of the need to deploy force after the occurrence of certain preconditions. After the decision to conduct military actions is made, the intensity of the use of force itself should not overstep a certain threshold. The "amount" of force should be necessary (and no more) to repel the armed threat. Therefore,

[11] Prakash, Saikrishna Bangalore, "The Separation and Overlap of War and Military Powers", 87 *Tex. L. Rev.* 299, December 2008

the next step is to analyze international and national law to discover how military power is restricted quantitatively.

Thirdly, I will outline legal regime under which non-war use of force is conducted. Sometimes the use of force without declaration of war has a special legal framework under national legislation (state of emergency, public danger, anti-terrorist operation etc.). These regimes can be named paramilitary. The problem with these legal regimes is that they are established in other ways than by the state of war, often without parliamentarian authorization or control. They are sometimes not even mentioned in the Constitution. For these reasons, paramilitary regimes may constitute a danger to the principle of separation of powers.

Finally, I will look directly at the problem of separation of powers and the use of force without declaration of war. It is necessary to determine who in the triad of the constitutional subdivision of powers is granted the discretion to decide where the preconditions to deploy force exist and how the adoption and implementation of this decision is controlled under the system of checks and balances. Therefore, I will evaluate the parliamentarian control and judicial review of non-war use of force, the problem of subdivision of the Executive and its impact on the use of force and the vertical separation of powers in the context of non-war use of force.

Thus, the thesis structurally consists of two chapters. The first one outlines the preconditions of the use of force (subchapter one), proportionality and necessity of the use of force (subchapter two) and paramilitary legal regimes (subchapter three). The second subchapter instead is divided into three subchapters that correspondently deal with the legislative power, judicial review, the subdivision of the Executive, and federalism and local self-government in the conditions of non-war introduction of force.

1. Preconditions and Legal Regime of the Use of Military Force Without Declaration of War

In modern democratic countries the use of military force is viewed as a last resort and therefore it must be introduced only in exceptional cases. The state can introduce armed force only in certain conditions, following clear rules and limits of the use of force. Both the international and national law create a specific legal framework of the use of force. The international law regulates the use of force in interstates relations, while the national law creates a specific legal regime of the deployment of military force. Thus, this chapter outlines the requirements on the use of force proscribed by the international law and legal regime of the use of force in domestic legislation.

1.1. Preconditions of the Use of Force

Usually, international and national law connect the use of force with the occurrence of specific legal facts. For instance, the United Nations Charter (UN Charter) contains such terms as 'aggression' (Article 53(1)[12] and 'act of aggression' (Articles 1, 39)[13]. At the same time, Article 51[14] of the UN Charter connects the right to self-defense to the occurrence of an 'armed attack'.

[12] Article 53 (1)
The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further *aggression* by such a state. (emphasis added)

[13] Article 39
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or *act of aggression* and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. (emphasis added)

[14] Article 51
Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if *an armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and

To this extent, the use of military force can be seen as a particularly limited possibility, which can be executed only when it is necessary. Nevertheless, problems can arise, if such legal facts are understood broadly and, as a result, the force may be used in a very wide circle of hypotheses. Therefore, the legal analysis of non-war military powers must begin with defining the legal circumstances that give the right to introduce force.

As mentioned above, the key place in the law of armed conflicts is taken by the UN Charter which contains two main terms – 'aggression' (or 'act of aggression') and 'armed attack'. Although the UN Charter does not define 'aggression', the General Assembly (hereinafter GA) made a significant step to bring light on this legal uncertainty. Resolution 3314 (XXIX) defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".[15] Article 3 of the Resolution also contains a non-exhaustive list of situations qualified as aggression.

Nevertheless, the GA Resolution is only a first step to evaluate the notion of aggression. Talking about acts prohibited under Article 2(4) of the UN Charter and aggression that invoke the state's right to self-defense, we can conclude that not every hostile action invokes a right to self-defense. Such a conclusion is supported by Giovanni Distefano who brings two arguments to support this statement.[16] Firstly, he says that Article 2(4) is written in broader terms.[17] Indeed, the Article prohibits not only the actual use of force, but the "threat" to use it. Secondly, he notes that aggression should overstep a certain threshold to invoke lawful self-defense.[18] Preamble of the Resolution 3314 (XXIX) states that aggression is "*the most serious*

responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. (emphasis added)

[15] United Nations General Assembly Resolution 3314 (XXIX) adopted at the 14 December 1974 (Definition of Aggression)

[16] Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta (eds.). *The Oxford handbook of international law in armed conflict*. n.p.: Oxford, United Kingdom : Oxford University Press, 2014, p. 550

[17] Ibid

[18] Ibid

and dangerous form of the illegal use of force" (emphasis added). This is why, there are another forms of the use of force that are less "serious" and "dangerous". Moreover, such a reading is supported by the International Court of Justice (hereinafter ICJ) judgment in *Nicaragua.*[19] Discussing the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolution 2625 (XXV)), the ICJ held that "alongside certain descriptions which may refer to aggression, this text includes others which refer only to less grave forms of the use of force".[20] Finally, I want to add that the legal interpretation of Article 2(4) and the right to self-defense, according to Article 31(1) of the Vienna Convention on the law of treaties, leads us to the conclusion that not every form of hostile activity bring in the possibility to use self-defense measures. As the purpose of the United Nations is "the suppression of acts of aggression or other breaches of the peace" (Article 1(1), the "inherent right of individual or collective self-defence" (Article 51) must be exercised only in optional cases, while in other cases states should "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (Article 2(3).

The second term the UN Charter refers to is 'armed attack'. The French text of the Article 51 contains the expression *'agression armée'* while the English and Russian variants refer to the term 'armed attack' (*'вооруженное нападение'* in Russian). Such difference in terminology divided lawyers into two camps. On the one hand, Beth Polebaum, advocating the anticipatory self-defense (the concept will be further discussed), describes the French version as a "more carefully drafted and equally authentic".[21] She believes that the French text allows

[19] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *USA),* Judgment, ICJ Reports 1986, p.14 at pp.93-6, 98 and 108-9
Nicaragua sued the United States for the support of rebel groups that organized rebellion against Nicaragua's government. The International Court of Justice ruled in favor of Nicaragua.
[20] Ibid, paras 191
[21] Polebaum, Beth, "National Self-Defense in International Law: an Emerging Standard for a Nuclear Age", (1984) 59 *New York University Law Review* 187 at 202

broader discretion for the self-defense, because "aggression can exist separate from and prior to an actual attack".[22] On the other hand, Louis-Philippe Rouillard rejects Polebaum's interpretation.[23] He admits that the "French word aggression comes from the Latin *aggredi*" and "while an aggression may be verbal or physical, the expression '*agression armée*' clearly indicates the physical form".[24] To this extent, the French '*agression armée*' and the English 'armed attack' are identical and all correspond to the notion of 'aggression'.[25] In this context, the second position seems more grounded. It is hard to believe that the text which is authentical in all official languages (Article 111 of the UN Charter) allows different readings, especially applying described above standard Vienna Convention test of interpretation.

Nevertheless, even considering that aggression and armed attack are synonyms, it does not close the whole dispute. For decades scholars have been arguing if armed attack should be already finished or if a state can repel a hostile attack before it occurs any harm. Actually, international customary law allows them to do so. For the first time in history this rule was crystallized in a so-called *Caroline* controversy (1837-1842) between Great Britain and the United States. In the territory of the United States of America British army destroyed a vessel called the *Caroline*, which was used by the US citizens to support Canadian rebels. The US Secretary of State, Mr. Webster, sent a note to the British Mister at Washington, D.C., Mr. Fox, stating, among others, that British actions could be justified only, if it was possible to show that there had existed "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[26]

[22] Ibid
[23] Rouillard, Louis-Philippe, *Precise of the laws of armed conflicts: with essays concerning the combattant status of the Guantanamo detainees and the Statute of the Iraqi Special TribunalI*, New York : iUniverse, c2004, p. 44
[24] Ibid
[25] Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta. *The Oxford handbook of international law in armed conflict*, Oxford, United Kingdom : Oxford University Press, 2014, p. 553
[26] Rouillard, Louis-Philippe F., *Precise of the laws of armed conflicts: with essays concerning the combatant status of the Guantanamo detainees and the Statute of the Iraqi Special Tribunal*, New York : iUniverse, c2004, p. 36

Modern doctrine defines four kinds of self-defense in its temporal aspect: interceptive, anticipatory, pre-emptive and preventive.[27] Interceptive self-defense is understood as the right of a state "to obstruct an armed attack already launched, yet not having physically achieved its target".[28] In this respect, the timing of the attack is very important – for example, the state can use military counter-measures, if the enemy's air bomb is already sent to hit the target and it is evident that the territory of the state that resorts to self-defense is the destination place of the projectile. This kind of the armed attack possesses the feature of "irreversibility"[29], therefore, it is obvious that in such circumstances it is impossible to "settle… international disputes by peaceful means".[30]

The second type is anticipatory self-defense. It is very close to the previous one, but more remote on a time scale. A state can use its forces in response when the opponent's attack is "on the brink of launch".[31] Anticipatory self-defense can be used even on the other state's territory.[32] Anticipatory self-defense is built on the above-mentioned *Caroline* doctrine – it must be "necessary", "leaving no choice for means" and give "no time for deliberation". So, it cannot be justified by the mere belief that another state is preparing hostile activities, for example, by evaluation of threats and claims[33] or by other vague factors.

The last two kinds of self-defense (pre-emptive and preventive) are considered to be unlawful. Pre-emptive self-defense is based on a state's belief that in a close future it can be a target of aggression, so, it wages war before a possible opponent to "pre-empt" his hostile

[27] Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta (eds.). *The Oxford handbook of international law in armed conflict*, Oxford, United Kingdom : Oxford University Press, 2014, p. 553
[28] Dinstein, Yoram. *War, aggression, and self-defence*, Cambridge [England] ; New York : Cambridge University Press, 2005, p. 91
[29] Ibid
[30] Article 2(3) of the UN Charter
[31] Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta (eds.). *The Oxford handbook of international law in armed conflict*, Oxford, United Kingdom : Oxford University Press, 2014, p. 561
[32] Rouillard, Louis-Philippe F., *Precise of the laws of armed conflicts: with essays concerning the combattant status of the Guantanamo detainees and the Statute of the Iraqi Special TribunalI*, New York : iUniverse, c2004, p. 45
[33] For example, Israel started so-called the "Six-Day War" (1967), because the United Arab Republic's request to withdraw United Nations Emergency Force was, as Israel suggested, a signal of the revival of belligerence

actions. This type of self-defense is clearly rejected by the international community.[34] Nonetheless, some authors were trying to justify pre-emptive self-defense on the base of the "accumulation of events" theory: "if a State is not in a position to respond to a single attack, it would be entitled to respond to the whole series of such attacks, accumulated over time."[35] The problem of the "accumulation of events" doctrine is that the use of force in response to "accumulation of events" is very close (if not identical) to armed reprisals prohibited by the international law.[36] Nonetheless, this does not mean that a state cannot answer the small series of minor attacks by a single counter-hit. As the ICJ held in the *Armed Activities on the Territory of the Congo* case, "the series of deplorable [military] attacks could be regarded as cumulative in character" and thus constitute an aggression.[37] Nevertheless, the response to the series of armed activities must be proportional for achieving the result of repelling the attack and it must not be punitive in its nature.[38]

Finally, the fourth kind of self-defense is preventive self-defense. It is even more remote in time than pre-emptive self-defense and is based on more vague arguments such as political situation in a hostile state or acts of a third state. For example, the Third Reich justified its invention into Norway by the allegation that Norway could be invaded by Britain. Nonetheless, the International Military Tribunal in Nuremberg rejected this argument: "In the light of all the available evidence it is impossible to accept the contention that the invasions of Denmark and Norway were defensive, and in the opinion of the Tribunal they were acts of aggressive war".[39]

[34] Alexandrov, Stanimir A. *Self-defense against the use of force in international law*, The Hague : Kluwer Law International, c1996, p. 165
[35] Shultz Jr., Richard H. "Can Democratic Governments Use Military Force in the War Against Terrorism?." *World Affairs* 148, no. 4 (Spring86 1986): 205, p. 166
[36] United Nations General Assembly Resolution 2625 (XXV) adopted at the 24 October 1970 (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations)
[37] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, [2005] ICJ Reports, p. 222-3
[38] Alexandrov, Stanimir A. *Self-defense against the use of force in international law*, The Hague : Kluwer Law International, c1996, p. 167
[39] International Military Tribunal, Judgment, 1 October 1946 (1947) 41 *AJIL* 207

Summing up, the UN Charter limits the use of force only to single occasion – armed attack. The military force can be also deployed with the authorization of the Security Council, but this precondition is not relevant for the constitutional analysis. Using its power of authorization, the Security Council determines the existence of aggression (or threat to the peace and breach of the peace[40]) by itself. In contrast, the state independently decides whether there are the preconditions to invoke self-defense and this is the stage when constitutional provisions on separation of powers comes into action.

Moreover, even some provisions of national constitutions can resemble UN Charter's restrictions on the use of force. For instance, even though Article 9 makes all "international treaties that are in force... [a] part of the national legislation", the Constitution of Ukraine several times refers to the notion of 'aggression'. Article 85(9) gives the Verkhovna Rada of Ukraine, the Ukrainian Parliament, a power to "approve a decision of the President of Ukraine on the use of the Armed Forces of Ukraine and other military formations in the event of *armed aggression* against Ukraine" (emphasis added) and, in its turn, the President under Article 106(19) "in case of *armed aggression* against Ukraine, adopts a decision on the use of the Armed Forces of Ukraine" (emphasis added). To this extent, the 1996 Ukrainian Constitution long after the introduction of the UN Charter absorbed its main notions and must be interpreted in accordance with the original terminology. In contrast, the US Constitution cannot serve as an example here. Created in 1787, it does not contain such a term as "aggression". The US Constitution puts the requirement of the use of force only after occurrence of certain legal preconditions exclusively on states. Article I § 10(3) proscribes that "State shall, without the Consent of Congress... engage in War, unless *actually invaded*, or in such *imminent Danger* as will not admit of delay" (emphasis added). In addition, the Basic Laws of Israel also did not take the Charter's terminology. Nonetheless, the absence of the UN Charter's provisions in the

[40] Article 39 of the UN Charter

Constitution of the United States of America and the Basic Laws of Israel does not mean that the countries are free from the doctrine of supremacy and mandatory nature of international law.

Thus, so far we have a more or less clear picture of the preconditions of the use of force. However, it contrasts with the challenges posed by 4GW, and mainly by terrorism. International law is strictly "state-centered and fundamentally territorial" and self-defense can be invoked only against another state as the only subject of the UN Charter[41]. At the same time, terrorists' activity is cross-territorial and often hardly attributed to the state. The mere fact that the state cannot or does not want to eliminate a terrorist group that resides on its territory does not lead to the attribution of the terrorists' actions to the respective state under the Articles on Responsibility of States for Internationally Wrongful Acts.[42] In contrast, some authors believe that, if a state that hosts terrorists does not make any attempt to suppress them, the victim-state may do "what [another state] itself should have done."[43] The supporters of a self-defense against non-sate actors also add that the fact that Article 51 of the UN Charter does not describe the body behind armed attack, shows that the state can invoke self-defense no matter from what source the threat has come.[44] Nonetheless, this finding seems doubtful in the light of *Armed Activities* judgment that requires a clear link between armed group and respective state:

> while Uganda claimed to have acted in self-defence, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC. The "armed attacks" to which reference was made came rather from the ADF. The Court has found above (paragraphs 131-135) that there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC. The attacks did not emanate from armed bands or irregulars sent by the DRC or on behalf of the DRC, within the sense of Article 3 (g) of General Assembly resolution 3314 (XXIX) on the definition of aggression, adopted on 14 December 1974. The Court is of the view that, on the evidence before it, even if this series of deplorable

[41] Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta (eds.). *The Oxford handbook of international law in armed conflict*, Oxford, United Kingdom : Oxford University Press, 2014, p. 557-8
[42] Ibid, p. 558-9
[43] Dinstein, Yoram. *War, aggression, and self-defence*, Cambridge [England] ; New York : Cambridge University Press, 2005, p. 245
[44] Lubell, Noam. *Extraterritorial use of force against non-state actors*, Oxford ; New York, N.Y. : Oxford University Press, 2010, p. 31-2

attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC. [45]

Therefore, as terrorism is transnational and at the same time often non-attributed to any state, it can be viewed from different legal perspectives. The national security scholars distinguish two models of counter-terrorism: the criminal justice model and the war model.[46] The criminal justice model views terrorism as a crime punished by national legislation. Under this model, terrorism is combated by usual criminal procedure methods and alleged terrorist enjoys all due process guarantees. In contrast, the war model sees terrorism as an armed attack prohibited by the UN Charter. Under the war model, terrorist groups represent the equivalent of a state. This model puts the duty to resist the terrorism on the army that can deploy any military means that do not contradict international humanitarian law. In fact, there is no pure models in reality and counter-terrorism fuse characteristics of both model, but the elements of one model can dominate over the elements of another. [47]

To this extent, war on terrorism still remains an unanswered issue of the international law and legal doctrine. National law of the studied jurisdictions also regulates anti-terrorist activity in different manner. The problem of national anti-terrorist legislation and its correspondence to the Constitution and international law will be described in the third subchapter with a discussion of the legal regime of anti-terrorist operation.

[45] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, [2005] ICJ Reports, p. 146
[46] See, for example, Crelinsten, Ronald D., *Counterterrorism*, Cambridge, United Kingdom : Polity, 2009, p. 48
[47] Ibid, p. 82-88

1.2. Proportionality and Necessity of the Use of Force

The introduction of the precondition of the use of force is not the only way to restrict the resort to military means in international relations – the "amount" of the use of force itself should not overstep certain limits. In this respect, lawyers distinguish proportionality, necessity and immediacy[48] as conditions of the use of force[49].

Necessity means that military force is deployed only as a last resort when it is absolutely obvious that no other means can repel hostile actions. Being derived from above-mentioned *Caroline* doctrine, this requirement also has its place in the UN Charter. Article 2(3) in conjunction with Article 2(4) and Article 51, obliges states to "settle their international disputes by peaceful means" until there is a clear need to resort to the right of self-defense. In addition, Article 42 proscribes that the Security Council should use measures listed in Article 41 ("measures not involving the use of armed force") unless they are "inadequate or have proved to be inadequate". To this extent, necessity requires "to verify that a reasonable settlement of the conflict in an amicable way is not attainable."[50]

The next requirement is proportionality. It is strongly linked with necessity, but "puts emphasis on the outcome of self-defense."[51] The main aim of self-defense is to repel an aggression and secure the future safety of the state. If this aim can be achieved with a single air strike, there is no need to invade a hostile sate. Therefore, defensive actions should correspond to the severity of the enemy's armed attack.

[48] See, for example, Fletcher, George P., *A crime of self-defense : Bernhard Goetz and the law on trial*. n.p.: New York : Free Press, 1988, p. 19

[49] See, for example, Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta. *The Oxford handbook of international law in armed conflict*, Oxford, United Kingdom : Oxford University Press, 2014, p. 553

[50] Dinstein, Yoram. *War, aggression, and self-defence*, Cambridge [England] ; New York : Cambridge University Press, 2005, p. 237

[51] Distefano, Giovanni "Use of Force" in Clapham, Andrew, and Paola Gaeta (eds.). *The Oxford handbook of international law in armed conflict*, Oxford, United Kingdom : Oxford University Press, 2014, p. 555

Proportionality can be subdivided into two categories: proportionality of means and proportionality of result[52]. The first criterion demands to deploy only such military means that are required in a specific situation, considering means that aggressor-state has used. In its turn, the second subcategory mean that the victim-state should take only those steps that are necessary to repel the attack and do not turn into an aggressor itself. Nonetheless, these requirements do not mean a strict correspondence of military force of the aggressor and its victim. It rather presupposes that the defending state should not overstep a certain rational threshold and not cause unnecessary suffering and injury. The ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* can be helpful to evaluate this threshold. The majority of the ICJ did not exclude the use of nuclear weapons "in an extreme circumstance of self-defence in which the very survival of a State is at stake."[53] To this extent, "[t]he proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances."[54]

At the same time, Professor Dinstein sees the state's discretion in proportionality broader terms. Firstly, considering the terrorist events of 9/11 and the Japanese attack against Pearl Harbor in 1941, he believes that "a state fighting a war of self-defense can legitimately [operate] anywhere within the region of war, and there is no need to adjust to geographic limitations conveniencing the aggressor."[55] Therefore, Dinstein stresses that attack on the part of the territory justifies armed response that covers the whole aggressor's territory. Secondly, by the example of World War II, he proceeds that even if the hostile state has lost its will or possibility to continue aggression, the defending country is not obliged to finish its military operation – it can "fight to the finish".[56] Admittedly, Dinstein does not specify what he means

[52] Ibid
[53] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 256
[54] Ibid, p. 245
[55] Dinstein, Yoram. *War, aggression, and self-defence*. n.p.: Cambridge [England] ; New York : Cambridge University Press, 2005, p. 240
[56] Ibid

by the "war to the finish". Nonetheless, these arguments must be taken with some precautions. Of course, the continuation of war was legal and necessary in the examples given by the author, but it does not justify the war "to the finish" *per se*. Under the principle of proportionality the state can only continue military actions even after it has pushed enemy forces away from its territory, if the other state still represents an existing and present danger. It would be hard to justify the invention and overthrow of government of the enemy that already has no means and possibilities to cause any harm. As Professor Gardam evaluates the proportionality requirement, "to go any further and allow excessive destruction of another state is seen as destabilizing a system that is founded on the peaceful settlement of disputes and a collective security system."[57]

The above-mentioned controversy also undermines another issue of more general nature. International law requires proportionality, but 'proportionality to what?' Unfortunately, the answer to this question is far from uniform in contemporary science. Bowett speaks about the proportionality of the response against the danger.[58] In his turn, Hargrove insists on proportionality "against the injury being inflicted."[59] Finally, Waldock understands proportionality as is "required for achieving the object."[60] Notwithstanding, that these arguments are not recent, scholars cannot find a single answer to this basic question.

Finally, the quantitative restriction on the use of force is imminence (or immediacy). It is rarely met in scientific literature, because it is very close to the time characteristic of an armed attack described in the previous subchapter, but, nevertheless, some commenters put it

[57] Gardam, Judith Gail. *Necessity, proportionality, and the use of force by states*, Cambridge ; New York : Cambridge University Press, 2004, p. 16
[58] Bowett, D. W. *Self-defense in international law*, New York : Praeger, 1958, p. 269
[59] Hargrove, John Lawrence. "The Nicaragua Judgment and the Future of the Law of Force and Self-Defense." *The American Journal of International Law*, 1987, p. 136
[60] Waldock, C. "The Regulation of the Use of Force Under the League System." *Collected Courses Of The Hague Academy Of International Law* (1952): 469, p. 463-4

as a separate unit.[61] Imminence is derived from *Caroline's* "no moment for deliberation" and means that the attacked state should respond as quickly as possible. However, immediacy does not oblige the victim to undertake self-defense right after the attack – it leaves time for analysis of the situation, conduction of negotiations, adoption of the decision and transferring it from commanders to soldiers.[62]

Summing up current findings, the state, before introduction of military force, has to satisfy itself that hostile action can be characterized as an aggression. Further, if it sees that there is a need to use armed force, it must deploy only such means and measures that are necessary and proportional in concrete situation of warfare. Therefore, in the next subchapter we will look at specific legislative regulations of the use of force and compare them with requirements of international law and national constitutions.

1.3. Legal Regime of the Use of Force Without Declaration of War

As it has been already mentioned, states do not tend to recognize their involvement in hostilities as a war. In 2005, the High Court of Justice of England and Wales admitted:

> The traditional concept of war has virtually disappeared from state practice since the Second World War. Unhappily, armed conflict has continued to be an instrument of state policy. But it is almost never necessary to invoke the traditional legal concept of war[63].

Armed conflict, even if it is not named a war, requires the use of appropriate military measures. Therefore, modern national legislation allows under certain circumstances to use armed force avoiding a declaration of war. Military force can be introduced under legal regimes that have similar characteristics as a state of war. This is why such legal regimes can be called paramilitary legal regimes.

[61] Rodin, David. *War and self-defense*, Oxford : Clarendon Press ; New York : Oxford University Press, 2002, p. 41
[62] Dinstein, Yoram. *War, aggression, and self-defence*, Cambridge [England] ; New York : Cambridge University Press, 2005, p. 242-3
[63] *Amin v. Brown* [2005] EWHC 1670 (Ch), para 28

Paramilitary legal regimes may constitute a danger to the constitutional balance of branches of power. As I have described in the Introduction, the establishment of the state of war presuppose deliberations between the Executive and the Legislator and the adoption of a joint decision. In contrast, paramilitary legal regimes can be established in other ways than state of war, often without parliamentarian authorization or control. They are sometimes not even mentioned in the Constitution. For these reasons, such regimes may infringe against the principle of separation of powers. Therefore, paramilitary regimes must be closely scrutinized and their constitutionality examined.

An analysis of the United States, Ukrainian and Israeli legislation gives a possibility to distinguish two main paramilitary legal regimes – the state of emergency and the anti-terrorist operation regime. The state of emergency grants the Executive the power to restrict freedom of movement and assembly (Article 16 of the Law of Ukraine "On State of Emergency"), to pass emergency regulations on "public security and the maintenance of supplies and essential services" (Paragraph 39 of the Israeli Basic Law: Government), "investigate, regulate, or prohibit any transactions in foreign exchange" (Section 203 of the United States International Emergency Economic Powers Act[64]) and etc. Obviously, these powers make the state of emergency close to the state of war.

At the same time, the procedure of declaration of the state of emergency in Ukraine seems to be constitutionally balanced. The Constitution of Ukraine specifically regulates declaration of the state of emergency. For instance, Article 106(21) of the Constitution of Ukraine authorize the President to declare the state of emergency. The President's resolution must be after approved by the Parliament in two days. The state of emergency can be declared nation-wide or for a defined territory. The Law "On State of Emergency" further regulates the declaration of emergency in line with the Constitution. Therefore, like a declaration of the state

[64] Pub.L. 95-223, 91 Stat. 1625, enacted December 28, 1977

of war, the establishment of the state of emergency also involves both the Legislative and the Executive.

Nonetheless, the risks of abuse of the powers exist while the state of emergency is in effect. For example, paragraph 3 of Article 83 of the Constitution of Ukraine provides: "In the event that the term of authority of the Verkhovna Rada of Ukraine [the Parliament] expires while martial law or a state of emergency is in effect, its authority is extended until the day of the first meeting of the first session of the Verkhovna Rada of Ukraine [the Parliament], elected after the cancellation of martial law or of the state of emergency." Article 11 of the Law "On State of Emergency" also extends the term of authority of the President for the whole period of the existence of the state of emergency. Such a situation obviously invokes personal interest of the President and the Parliament to introduce the state of emergency. The only effective mechanism to avoid power abuse is the limitation of the maximum possible period of the state of emergency to 30 days that can be extended to another 30 days with the consent of Parliament.[65] Another danger is connected with the limited parliamentarian control over the Executive. While in a normal situation the Legislative can dissolve the government, it cannot do so when the state of emergency is active.[66] Moreover, it cannot terminate the state of emergency itself and may only request the President to do so.[67]

The procedure of the declaration of the state of emergency in the United States of America is slightly different. The Constitution does not directly regulate the state of emergency, referring only to general emergency powers. [68] Therefore, the National

[65] Article 7 of the Law "On State of Emergency"
[66] Article 11 of the Law "On State of Emergency"
[67] Paragraph 2 of Article 11 of the Law "On State of Emergency"
[68] Fox example, Article 1 Section 8 of the Constitution provides: "Congress shall have power to… [Paragraph 15] provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Article 1 Section 9 empowers Congress to suspend consideration of writs of habeas corpus "when in cases of rebellion or invasion the public safety may require it." In addition, the Fifth Amendment allows to bring felony charges without presentment or grand jury indictment "in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Emergencies Act[69] is called to regulate the establishment of the state of emergency. Under the Act the President may declare national emergency "with respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power".[70] The President and Congress both have the power to terminate the emergency. The national emergency automatically terminates on the anniversary of its declaration, if not continued by the President.

In the above-described system the danger is that the President may use his emergency powers to gain more authority before Congress cancels the national emergency. Another problem with the national emergency in the United States is that the state of emergency can last for a long period of time and the President can establish emergency on the base of different Acts, so in fact there could exist several states of emergency at the time. For instance, the Washington Post counted 30 emergencies that were in effect in 2014.[71]

The declaration of the state of emergency in Israel is similar to Ukraine and the United States. Paragraph 38(a) of the Basic Law: Government provides that the Knesset, the Israeli Legislator, "may, of its own initiative or, pursuant to a Government proposal, declare that a state of emergency exists". The state of emergency automatically terminates after a year, if not continued by Parliament. The Knesset may "at all times revoke the declaration of the state of emergency".[72] Nonetheless, the Government in an urgency situation, when the Knesset cannot gather for the meeting, may declare the state of emergency that "expire upon 7 days from its proclamation, if not previously approved or revoked by the Knesset".[73] As it was already noted,

[69] Pub.L. 94–412, 90 Stat. 1255, enacted September 14, 1976
[70] Ibid
[71] Christopher Ingraham, 'The United States Is in a State of Emergency – 30 of Them, in Fact', *The Washington Post*, November 19, 2014, accessed March 22, 2016, https://www.washingtonpost.com/news/wonk/wp/2014/11/19/the-united-states-is-in-a-state-of-emergency-30-of-them-in-fact/.
[72] Paragraph 38(e) of the Basic Law: Government
[73] Paragraph 38(c) of the B/asic Law: Government

Israel is in an uninterrupted state of emergency for already 68 years since the establishment of the independence.

Thus, while the declaration procedure of the state of emergency is balanced, the execution of emergency powers may infringe essential principle of the separation of powers. The checks and balances system must be followed at every stage of the state of emergency – its declaration, execution and termination.

More damage to the constitutional power balance may be caused by the so-called anti-terrorist (counter-terrorist) operation legal regime. As was discussed in the first subchapter, two major concepts of counter-terrorism exist – the criminal justice model and the war model. The first model adopted in the national legislation of most countries was the criminal justice model. Under this model the constitutional balance between three branches are built on the traditional criminal justice rules – the Legislative criminalizes the conduct, the Executive brings the criminals to the justice and the Judiciary convicts or acquits the suspected offender. Nonetheless, modern counter-terrorism law of the studied states acquires features of the war model that presuppose that the Executive is granted with the extraordinary powers like in time of a real war.

The transformation of the national counter-terrorism system in Ukraine has happened in the recent years. It is connected with the military conflict in the Eastern part of the country and that the government has chosen the legal form of the anti-terrorist operation regime to fight rival armed groups. The anti-terrorist operation legal regime is regulated by the Law "On the Fight against Terrorism". The introduction of the anti-terrorist operation gives the Executive the possibility to limit rights and freedoms, to use preventive detention up to thirty days, to stop the activity of any natural person located in the territory of the conduct of the anti-terrorist operation and etc.[74] In addition, the Law "On Military-Civilian Administration" allows the

[74] Paragraph 2 of Article 14-1 of the Law "On the Fight against Terrorism"

President to terminate local self-government bodies located in the area of the antiterrorist operation and establish special military-civilian administration that are subordinated to the Head of the Security Service of Ukraine. According to Article 11 of the Law "On the Fight against Terrorism", the decision to conduct the anti-terrorist operation is made by the Head of the Antiterrorist Center that must be approved by the Head of the Security Service of Ukraine. The decision to terminate the anti-terrorist operation is adopted by the head of the operational headquarter of the Security Service of Ukraine who manages this concrete operation. The President solely appoints and dismisses the Head of the Antiterrorist Center and Head of the Security Service of Ukraine and is informed about the adoption of the decision to start or terminate the anti-terrorist operation. Therefore, he or she can control the anti-terrorist operation.

In general, the measures proscribed by the Ukrainian counter-terrorist legislation are adequate to repeal the terrorist threat in the shortest possible period. Nonetheless, the anti-terrorist operation started in April 14, 2014, is now in effect for almost two years. Under the anti-terrorist operation legal regime the Executive has even more powers than under the state of emergency (because the state of emergency does not allow the President to terminate local self-movement bodies), but it almost avoids parliamentarian control.

In its turn, the significant transformation of the US counter-terrorism legislation happened after tragic events called 9/11. The USA PATRIOT Act[75] enacted shortly after the terrorist attacks, grants the Executive such powers as "to declare individuals enemy combatants; to target and kill individuals wherever they are if they are suspected terrorists; to search ships and seize without warrant cargoes suspected of carrying weapons or materials for

[75] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub.L. 107-56, 115 Stat. 272, enacted October 26, 2001

terrorist"[76] and "carry out a wide range of surveillance programs on US soil"[77]. The use of these powers do not depend on the introduction of a special anti-terrorist operation regime like in Ukraine and the Executive uses the powers according to its discretion.

The broad empowerment of the Executive with the emergency powers was explained by the doubtful finding that the country had been in war after September 15, 2001, so all rules and laws of war were in place.[78] The President Bush called it "war on terror" or "global war on terrorism". Moreover, the Bush administration described the "war on terror" as a war of a "new kind" that "attach[es] to individual[s] [meaning suspected terrorist], not the situation [meaning place of hostilities]" and, therefore, justif[ies] target killing policy.[79] By target killing policy the administration meant the power to kill any suspect of the terrorism, wherever he or she is located. For example, the Deputy General Counsel of the Department of Defense for International Affairs, Charles Allen, describing the target killing policy, suggested "it would be lawful to kill an Al Qaeda suspect on the streets of a peaceful city like Hamburg, Germany".[80] Nevertheless, the application of the laws of war in Bush's "global war on terrorism" is questionable from the view point of international law. First, international law prescribes limited circle of parties of conflict. The Geneva Convention[81] applies only to two types of conflicts – international conflicts (the parties to which are two or more states) and conflicts internal character (meaning a conflict between state and non-state actors that occurs on the territory of the respective state). As we can see, the "war on terror" fits into none of the categories. Secondly, the *jus in bello* connects the right to use armed force with the territory of

[76] O'Connell, Mary Ellen "The Legal Case Against the Global War on Terrorism" in Samuel, Katjia L. H. and White, Nigel D. (eds.). *Counter-Terrorism and International Law*, Farnham : Ashgate, 2012, p. 197
[77] Donohue, Laura *The Cost of Counterterrorism : Power, Politics, and Liberty*. Cambridge ; New York : Cambridge University Press, 2008, p. 8
[78] Ibid
[79] O'Connell, Mary Ellen "The Legal Case Against the Global War on Terrorism" in Samuel, Katjia L. H. and White, Nigel D. (eds.). *Counter-Terrorism and International Law*, Farnham : Ashgate, 2012, p. 198
[80] Ibid
[81] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted on 12 August 1949

hostilities.[82] Even Justice Kennedy, concurring in *Rasul v. Bush*, refers to "a zone of hostilities", meaning that hostilities can occur in a specific location and not elsewhere in the world.[83]

The formation of the war model of counter-terrorism in Israel started from the establishment of the independence of the state in 1948. The first anti-terrorist act was Defence (Emergency) Regulations established by the British authorities in mandatory Palestine in 1945 and later incorporated into Israel's domestic legislation. The Executive's anti-terrorist emergency powers are similar to the USA. In addition, the Government may declare "a particular body of persons a terrorist organization unless the contrary is proved [in court preceding]" that allows to confiscate property of such organization and "to close any place serving a terrorist organization or its members".[84] Consequently, the main dangers of the Israeli counter-terrorism legislation are very similar to the ones described in the paragraph above. For example, Israel is also blamed for the illegal use of targeted killing tactic.[85]

Therefore, the paramilitary legal regimes are very similar to the state of war, as they also presuppose the growth of emergency powers of the Executive. At the same time, paramilitary regimes do not introduce the same level of control over the Executive's actions as the state of war does. One may argue that the limited parliamentary and judicial review over the executive branch is caused by the specific character of paramilitary regimes, mainly the need to quickly and effectively repel unexpected threat. However, is such statement true in

[82] O'Connell, Mary Ellen "The Legal Case Against the Global War on Terrorism" in Samuel, Katjia L. H. and White, Nigel D. (eds.). *Counter-Terrorism and International Law*, Farnham : Ashgate, 2012, p. 202
[83] *Rasul v. Bush*, 542 U.S. 466 (2004)
[84] Prevention of Terrorism Ordinance No. 33 of 5708-1948, published in the Official Gazette, No. 24 of the 25th Elul, 5708 (29th September, 1948).
Unofficial translation available at the web-site of the Israel Ministry of Foreign Affairs: http://www.mfa.gov.il/mfa/mfa-archive/1900-1949/pages/prevention%20of%20terrorism%20ordinance%20no%2033%20of%205708-19.aspx
[85] See, for example, Kretzmer, David "Tergeted Killing of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence" in Samuel, Katjia L. H. and White, Nigel D. (eds.). *Counter-Terrorism and International Law*, Farnham : Ashgate, 2012, p. 206

modern realities, where the state of emergency and anti-terrorist operation last for years and involve huge territories, economic resources and military forces?

The Constitutional Court of Ukraine addressed the mentioned-above question for several times. According to Article 157 of the Constitution of Ukraine, the Constitution shall not be amended in conditions of state of war or state of emergency.[86] The Constitutional Court is called to control the execution of this provision. However, until now three draft laws concerning the amendment of the Constitution were introduced in the Ukrainian parliament. In all cases the Constitutional Court stated that the adoption of the laws would not violate Article 157, but in each case several judges dissented on the grounds that, nevertheless the state of war is not legally declared, the "conditions" of it did exist and the Constitution cannot be amended.[87] Let us consider the first one of these cases – the case No. 1-14/2015. The majority found that the formal legal declaration of the state of war or the state of emergency had not happened, so Article 157 of the Constitution of Ukraine did not prevent the adoption of the

[86] Article 157 of the Constitution of Ukraine:
"The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine.
The Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency."

[87] [Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine on decentralization to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України щодо децентралізації влади вимогам статей 157 і 158 Конституції України від 30 липня 2015 року № 1-18/2015
and
[Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine on immunity of people's deputies of Ukraine and judges to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України щодо недоторканності народних депутатів України та суддів вимогам статей 157 і 158 Конституції України від 16 червня 2015 року № 1-14/2015
and
[Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine (on Judiciary) to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України (щодо правосуддя) вимогам статей 157 і 158 Конституції України від 20 січня 2016 року № 1-15/2016

reviewed Draft Law. In their turn, the dissenters highlighted that Article 157 of the Constitution referred not to formal existence of the state of war or emergency, but to "existence of *conditions* of the state of war or emergency" (emphasis added). For example, Judge Melnyk, analyzing existing legislation, distinguished three legal situations connected with the state of war/emergency – the existence of conditions that are necessary for the declaration of the state of war or emergency (Article 4 of the Law "On State of Emergency")[88], declaration of the state of war/emergency (Paragraph 20 and 21 of Article 106 of the Constitution of Ukraine, Articles 2 and 6 of the Law "On State of War" and Article 5 and 6 of the Law "On State of Emergency")[89] and execution of measures of the state of war/emergency (Articles 4, 8-12 and 14-17 of the Law "On State of War" and Articles 9-14 of the Law "On State of Emergency")[90]. Judge Melnyk advocated that the task of the Constitutional Court was to interpret the provisions of Article 157 of the Constitution of Ukraine in the light of current legislative practice and find if the terminology of different laws correspond to the Constitution's terminology. In his turn, Judge Shevchuk added that it is typical in modern hybrid warfare that conditions of a state of war exist even without their official recognition. Referring to numerous international agreements, resolutions of intergovernmental organizations, legislative acts, analytical reports and publications, he stated that the Russian aggression and Ukraine's actions to resist it are evidence of existence of "*conditions* of state of war and emergency" (emphasis added). He also advocated that the Court was supposed to interpret the Article 157 of the Constitution in consistence with the 1949 Geneva Convention which recognized the existence of an armed conflict (war) even if the conflicting states did not officially recognized the state of war. More significantly, he also noted that Ukraine had derogated from some of its obligations under the

[88] Article is named "The Conditions of Declaration of the State of Emergency". It contains a list of conditions one of which must occur before the introduction of the state of emergency
[89] Respective provisions regulate the procedure of declaration of state of emergency and state of war
[90] Respective Articles list the measure of state of war and state of emergency and regulate the way of their implementation

International Covenant on Civil and Political Rights and the European Convention on Human Rights.[91] Analyzing the practice of the European Court on Human Rights, Judge Shevchuk concluded that Ukraine could lawfully derogate from the European Convention on Human Rights. At the same time, referring to David Harris[92], he stated that "the only fact on fight with terrorism [the introduction of the anti-terrorist operation regime] would not justify the derogation from the obligations under the Convention." Therefore, he found that Article 157 of the Constitution clearly prohibited to amend the Constitution in the current circumstances.

To sum up, the paramilitary legal regimes do resemble the state of war. Very often states chose the legal form of a paramilitary regime to avoid the declaration of war. Nevertheless, paramilitary regimes do not introduce the same level of checks and balances guarantees as the state of war does, that cause a threat to the constitutional order of the country.

As a conclusion to the first chapter, I would like to admit that using military force states should comply with requirements of both international and national constitutional law. International law requires to use force only in response to an armed attack. At the same time, this response must correspond to the principles of proportionality, necessity and immediacy. In its turn, constitutions require to follow the principle of separation of powers and checks and balances in adoption of important for the nation decisions. The Executive's use of force, no matter what legal form it takes, must be controlled by other branches.

[91] [Resolution of the Parliament of Ukraine "On derogation from certain obligations under the International Covenant on Civil and Political Rights and the European Convention on Human Rights"] Постанова Верховної Ради України "Про Заяву Верховної Ради України "Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод" : Відомості Верховної Ради України (ВВР), 2015, № 29, ст.267

[92] Harris, Davide J et al, *Law of the European Convention on Human Rights*, Second edition, Oxford : Oxford University Press, 2009, p. 623

2. Use of Military Force Without Declaration of War and Separation of Powers

In the previous chapter I made a conclusion that the use of force by the Executive must be controlled by other branches. Thus, in the this chapter I look on how the Legislative and the Judiciary can influence the Executive and what problems can arise with the execution of oversight powers in realities of non-war use of force. I also evaluate how the use force alters the inner organization of the Executive and functioning of parliament, courts and local self-government bodies.

2.1. The Legislative power and parliamentary control over non-war use of force

By the theory of checks and balances the Legislative plays an important role of control over the Executive. Moreover, its "authority necessarily predominates".[93] Therefore, the decision to introduce military force and to conduct war are not outside the scope of the parliamentary control. Nevertheless, the dispute remains open about what powers the Legislative can use to interfere in the Executive's military affairs.

Obviously, the main power of the Parliament is to adopt laws that effect instruments of influence over another branches. More specifically, Constitution grants the parliament specific legislative power in military affairs. For instance, Section 8 of Article 1 of the Constitution of the United States proscribes that Congress has the power "[t]o lay and collect Taxes ... to ... pay the Debts and provide for the common Defence," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make Rules for the Government and Regulation of the land and naval Forces," and "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," as well as "[t]o provide for calling forth the

[93] "The Federalist No. 51 (Madison)" in Geoffrey R. Stone et al. (eds.), *Constitutional Law: 6th Ed.*, New York : Aspen Publishers, 2009, pp. 22

Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."

Nevertheless, the legislative regulation of the Executive's use of force is not always very successful. The Executive has some exclusive powers vested to it solely by the Constitution without any empowerment by law. One of the spheres where it can act without statutory authorization is external affairs. Such a conclusion was made by the Supreme Court of the United States in *Curtiss-Wright.*[94] The Curtiss-Wright Corporation challenged under the non-delegation doctrine the power of the President to prohibit the sales of arms for parties involved in conflict in the Chaco. The power had been granted to the President by special Congress authorization. The Supreme Court found that there was no need to check the constitutionality of the congressional authorization, because the President "as alone... representative of the nation" had "exclusive power" in foreign affairs.[95] The Court described the President's foreign powers as "a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[96] The Constitution of Ukraine takes a similar approach. Article 102 describes the President as the "Head of the State" that "acts in its name". In its turn, Article 106 specifies some exclusive Presidents foreign powers (to represent the state in international relations, to adopt decisions on the recognition of foreign states, to appoint and dismiss heads of diplomatic missions of Ukraine to other states and other powers).

Another constitutional provision that allows the Executive to act independently in the military affairs is the Commander-in-Chief Clause (Section 2 of Article 2 of the United Statutes

[94] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)
[95] Ibid
[96] Ibid

Constitution and Paragraph 17 of Article 106 of the Ukrainian Constitution). This Clause allow the President in cases when the force can be legally used to solely decide how to deploy forces and to choose military tactic he/she believes to be appropriate. However, the President is not completely free to use any military means he/she thinks to be necessary. Analysis of the practice of the Supreme Court of the United States gives the possibility to make a conclusion that in some cases there must be specifically regulation issued by the parliament for the Executive to act. Let us look, for example, at *The Steel Seizure Case*[97]. The employees of steel companies announced a nation-wide strike from April 9, 1952. The strike could result in shortage of steel products necessary for the production of military means, while the United States were engaged in the Korean War (1950-1953). Using the Commander-in-Chief Clause, the President decided to seize the steel mills. Nonetheless, the Court found that the President lacked such an authority. The Court affirmed that the President's power "must stem either from an act of Congress or from the Constitution itself." It stressed that the Commander-in-Chief Clause does not allow to conduct seizure without Congressional authorization, because "to take possession of private property... is a job for the Nation's lawmakers, not for its military authorities." At the same time, the Court evaluated the existing statutory base for the seizure and found no law to support the President's actions:

> There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress from which such a power can fairly be implied... There are two statutes which do authorize the President to take both personal and real property under certain conditions. However, the Government admits that these conditions were not met, and that the President's order was not rooted in either of the statutes.

Moreover, during War of 1812, the Supreme Court was also looking for congressional seizure authorization. In *Brown v. United States*[98] it found that "Congress was empowered to authorize the confiscation of enemy property during wartime, but with absence of such authorization, a

[97] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)
[98] *Brown v. United States*, 12 U.S. (8 Cr.) 110 (1814)

seizure authorized by the President was void."[99] Even later in the *Pentagon Papers Cases*[100] some Justices required the Executive to demonstrate the Congressional authorization to apply prior restraints. Justice Marshall in his concurring opinion noted:

> I believe the ultimate issue in these cases is... whether this Court or the Congress has the power to make law... It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit... The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct, rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.[101]

Unfortunately, the Court did not draw a clear line when the Executive need the authorization and where it could act solely on the base of its constitutional powers. The jurisprudence of the other two studied jurisdictions also does not give an answer to this question.

Another problem of effectiveness of the parliament's legislative power is connected with specific political situation in which use of force laws are enacted and amended. For instance, the counter-terrorist acts are usually introduced after the occurrence of horrific terrorist attacks. "Between September 11, 2001, and January 11, 2002, 98 percent of all bills, resolutions and amendments proposed by the House of Representatives and 97 percent of those by the Senate related to terrorism."[102] In such circumstances no MP wants to be blamed for doing nothing or for not doing enough to repel the threat. The society itself demands to use all possible measures to punish the terrorists. From a political point of view, it is also not easy to change the disputable counter-terrorism legal provisions in the future after the state is no longer

[99] Jennifer Elsea et al, *Congressional Authority to Limit Military Operations*, Congressional Research Service, Report RL31133, 2013, p. 8
[100] *New York Times Co. v. United States*, 403 U.S. 713 (1971)
[101] Ibid
[102] Donohue, Laura, *The Cost of Counterterrorism : Power, Politics, and Liberty*. Cambridge ; New York : Cambridge University Press, 2008, p. 11

in the middle of emergency. As Laura Donohue notes, the amendment of the laws temporarily amended to combat terrorism would require to prove that the terrorist threat no longer exists, but it is impossible to prove it "[as] [t]errorism, in a liberal state, is always possible and so the temporary provisions become a baseline on which future measures are built."[103] For instance, the USA PATRIOT Act had contained sixteen temporal provisions and after five years fourteen of them were made permanent and other two were continued.[104]

As to the other Parliament's military power, some commenters argue that the Legislator can order the Executive to stop the hostilities and to return troops to barracks.[105] Nonetheless, such position is challenged by some scholars. It is notable that the Constitution of the United State gives Congress the power to declare war (Par. 11, Sec. 8, Art. 1), but at the same time it does not specifically empower Parliament to declare peace. Such situation was interpreted by some scholars as an evident that the Framers had not allocated the power to declare peace to the Legislative, because they presumed that "conflicts between nations were typically resolved through treaties of peace" and the international affairs is a sole domain of the President.[106] Following this position, it is possible to say that Congress also lacks the authority to order the withdrawal of forces when the war is not declared. Israeli Basic Laws also do not specifically empower the Knesset to declare peace. Only the Constitution of Ukraine grants the Parliament possibility to declare peace on the proposition of the President. Nonetheless, this provision does not strengthen the Parliament's position, when the war is not officially declared. In 1973, the Parliament of the United States tried to limit the President's use of force by enacting the War Powers Resolution (WPR)[107]. Section 4 of the act requires the President within 48 hours

[103] Ibid, p. 14-15
[104] Ibid, p. 15
[105] Tiefer, Charles. "Can Appropriation Riders Speed Our Exit from Iraq" *Stanford Journal Of International Law* no. 2 (2006), 291
[106] Jennifer Elsea et al, *Congressional Authority to Limit Military Operations*, Congressional Research Service, Report RL31133, 2013, p. 14
[107] Pub.L. 93-148, 87 Stat. 555, enacted November 7, 1973

after introduction of the Armed Forces into hostilities to "submit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report". According to Section 5(b), the President shall terminate the use of military forces after sixty days from the submission of the report, unless Congress "has declared war or has enacted a specific authorization for such use of United States Armed Forces" or "has extended by law such sixty-day period". Section 5(c) also allows Congress by concurrent resolution to order withdrawal of the Armed Forces engaged in hostilities abroad at any time. Nonetheless, the constitutionality of the last provision seems doubtful in the light of *INS v. Chadha*[108]. In *Chadha*, the Court held that for a resolution to become a law, it must go through the bicameral and presentment process in its entirety, therefore, concurrent or simple resolutions, which are not presented to the President for his signature, could not be used as "legislative vetoes" against executive action.[109] Although the Court did not expressly find WPR Section 5(c) to be unconstitutional, it was listed by Justice White in his dissenting opinion.[110] In its turn, while being criticized by many observes[111], Section 5(b) has more support for its constitutionality. Nonetheless, it has never been used by Congress.[112]

While the execution of the previous two powers face some problems, the power of purse seems to be more influential. The basic laws of all three jurisdictions recognize Parliament as a body responsible for adoption of the budget.[113] Thus, Parliament can refuse to finance the military operations or cut army expenditures. The power of purse is also effective from the procedural point of view. Even presuming that there would be no constitutional obstacles for

[108] *INS v. Chadha*, 462 U.S. 919 (1983)
[109] Ibid
[110] Ibid
[111] Bybee, Jay, *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, Department of Justice, Opinions of the Office of Legal Counsel, Volume 26, 2002, p. 15-17
[112] Jennifer Elsea et al, *Congressional Authority to Limit Military Operations*, Congressional Research Service, Report RL31133, 2013, p. 16
[113] Section 8 of Article 1 of the Constitution of the United States, Article 85 of the Constitution of Ukraine and Paragraph 36A of the Israeli Basic Law: Knesset

Parliament to order the armed forces withdrawal by passing the bill, such bill would be still a subject to the President's veto. Therefore, the opposition of the use force has to have two thirds votes of the general amount of MPs.[114] At the same time, not adoption of the budget requires only simple majority. Nonetheless, the Israeli Knesset cannot so easily smooth itself away from enacting the budget, because the Paragraph 36A of the Basic Law: Knesset provides: "Non-adoption of the Budget Law within three months subsequent to the beginning of the fiscal year will be considered to be a Knesset decision on its dispersion." The only obstacle presented here is the policy controversies outlined above – no parliamentarian wants to be responsible for "doing nothing" in a critical moment for the Nation.

To sum up, the Legislator can face many difficulties trying to limit the Executive's power to use military force. The obstacles lie both in legal sphere and in politics. Nonetheless, the Parliament as the organ elected by the people and for the people must overcome populism and where it is possible to prevent the unconstitutional growth of the Executive's power. Thus, the Constitution allows the Parliament to conduct this role.

2.2. The Judicial Power and Judicial Review Over Non-War Use of Force

The Legislative is not the only branch that can control the Executive. It is the primarily duty of the courts to check, if the government has used its powers in accordance with the Constitution and laws. Nonetheless, the use of force also has its impact on the Judiciary. One can argue that ordinary courts are not the suitable place to solve military disputes, because such courts has its permanent place in peaceful cities and towns that can be far away from armed forces location and their judges may lack necessary military knowledge to view the case. These

[114] Section 7 of Article 1 of the Constitution of the Unites States provides that the President's veto can overridden by two thirds of each House of Parliament
Article 94 of the Constitution of Ukraine proscribes that the President's veto can overridden by two thirds of unicameral Parliament

arguments often lead to the creation of special military courts and limiting the competence of the ordinary courts.

Martial courts are presented only in two jurisdictions out of three – in Israel and the United States of America. Special military courts always invokes deep concerns on their impartiality. For instance, general courts-martial (the military courts in the United States) are composed not of traditional juries elected from population,[115] but of a military judge and other five members that are convened by military bodies.[116] In addition, the possibility to appeal to the Supreme Court is extremely limited, because in most cases the Court of Appeals for the Armed Forces (first appellee instance after the courts-martial) must grant a petition for review of its own decision.[117] Finally, many disputes arises from the authority of the commanders to

[115] For the selection process of jurors see, for example, Jury Selection and Service Act of 1968t, 28 U.S.C. § 186

[116] 10 USC 822: Art. 22. Who may convene general courts-martial
(a) General courts-martial may be convened by-
(1) the President of the United States;
(2) the Secretary of Defense;
(3) the commanding officer of a unified or specified combatant command;
(4) the Secretary concerned;
(5) the commanding officer of an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;
(6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;
(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;
(8) any other commanding officer designated by the Secretary concerned; or
(9) any other commanding officer in any of the armed forces when empowered by the President.
(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

[117] 10 USC 867a: Art. 67a. Review by the Supreme Court
(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.
(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.
28 USC 1259: Court of Appeals for the Armed Forces; certiorari
Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari in the following cases:
(1) Cases reviewed by the Court of Appeals for the Armed Forces under section 867(a)(1) of title 10.
(2) Cases certified to the Court of Appeals for the Armed Forces by the Judge Advocate General under section 867(a)(2) of title 10.
(3) Cases in which the Court of Appeals for the Armed Forces granted a petition for review under section 867(a)(3) of title 10.
(4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

review the findings of courts-martial.[118] Therefore, it is hard not to agree with the Supreme Court conclusion on the military courts: "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."[119]

Moreover, for several times in the history of the United States there were attempts to create special courts for a well-defined and very limited amount of cases in military sphere and the Supreme Court answered differently to these challenges. For instance, in *Dames and Moore v Regan*[120] the Court affirmed the President's power to transfer cases to special courts. The long-going controversies between the United States and Iran were resolved by singing bilateral treaty that, among other things, crated Iran-United States Claims Tribunal for viewing all cases (including pending at that time) "between governments of each party and nationals of the other."[121] The President issued executive order to implement the agreement, while Article 3 of the Constitution of the United States authorizes only Congress to create new courts. The order was challenged for its constitutionality by the private firm Dames and Moore. The Supreme Court found an order to be constitutional based on three arguments. Firstly, IEEPA[122] and "Hostage Act",[123] even not constituting "specific authorization to the President to suspend claims in American courts", present the will of Congress to grant the Executive a broad discretion in time of emergency and "hostile acts of foreign sovereigns."[124] Secondly, looking at the International Claims Settlement Act of 1949,[125] the Court found a long-standing "history of acquiescence in executive claims settlement."[126] Finally, the Court interpreted the fact that Congress had not disapproved such actions as the evidence of the Parliament's support of the

[118] See, for example, Williams, Andrew, "Safeguarding the Commander's Authority to Review the Findings of a Court-Martial." *BYU Journal Of Public Law* 28, no. 2, 2014
[119] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).
[120] *Dames & Moore v. Regan*, 453 U.S. 654 (1981)
[121] Ibid
[122] The International Emergency Economic Powers Act (IEEPA), Title II of Pub.L. 95–223, 91 Stat. 1626
[123] 2 U.S.C. § 1732
[124] *Dames & Moore v. Regan*, 453 U.S. 654 (1981)
[125] 64 Stat. 13, as amended, 22 U.S.C. § 1621
[126] *Dames & Moore v. Regan*, 453 U.S. 654 (1981)

President's order. Nonetheless, the decision remains disputable in the light of Article 3 of the Constitution. Moreover, as it was showed above, in the *Steel Seizure Case* the Supreme Court saw the absence of the direct congressional authorization as an obstacle for the President to act.

However, when it came to the enemy combatant cases during the "war on terror", the Supreme Court did not give up its jurisdiction to review the cases. In *Hamdi v. Rumsfeld* the Supreme Court affirmed that the Judiciary had a power to review the Executive's determination of the enemy combatant status.[127] The Court confidently rejected the Government's interpretation of the separation of powers:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government… [T]he Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.[128]

Nevertheless, the Court did not rule that the combatant status had to be reviewed only by ordinary courts, stating that the military tribunals also had a jurisdiction, unless they met the standards articulated by the Court. Therefore, after the case had been decided, Congress created Combatant Status Review Tribunals (CSRTs).[129] Later, Congress significantly limited the possibility to appeal the decision of the CSRTs, making the Court of Appeals for the District of Columbia Circuit an "exclusive" instance to review CSRTs' decisions and proscribing that the Court of Appeals should limit its review only to the question "whether the CSRT followed the "standards and procedures" issued by the Department of Defense and assessing whether those "standards and procedures" are lawful."[130] Those legal novels were challenged in *Boumediene v. Bush*[131]. Despite finding some deficiencies in the work of the CSRTs[132], the

[127] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
[128] Ibid
[129] Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739
[130] Military Commissions Act of 2006 (MCA), 28 U. S. C. A. §2241
[131] *Boumediene v. Bush*, 553 U.S. 723 (2008)
[132] The Court wrote:

Court did not invalidate the establishment of the CSRTs. Nevertheless, it concentrated its review on the question whether the limitation of the appeal was constitutional. The Supreme Court found that such limitation presented the "barriers to habeas review" and, thus, cannot be held constitutional. The case is significant in the separation of powers jurisprudence, because the Court did not only look at writ of habeas corpus as a human rights mechanism. Considering habeas corpus as an important element in checks and balances system, it wrote the following:

> [T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.[133]

Nonetheless, even after we find the court that is responsible for judicial review, there remains some questions on the scope of such review. As it has been already noted, judges are not military experts. Judicial review requires to check the military commanders' decision that may require deep knowledge of military tactics and strategy. However, the Supreme Court of Israel in *Beit Sourik Village Council v. Government of Israel*[134] found a legal mechanism that allows to review militaries decisions effectively. The citizens of Palestinian Beit Sourik Village occupied by Israel challenged the Israeli commanders' decision to construct the separation fence on the territory of the village that would restrict excess to the agricultural lands and main infrastructure. Justice Barak, who delivered opinion of the Court, described the competence of the Court in following words: "[W]e [the Justices] act in all questions which are matters of professional expertise, and so we act in military affairs as well... It is true, that "the security of state" is not a "magic word" which make the judicial review disappear."[135] Nevertheless, it is

"[A]t the CSRT stage the detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention. The detainee can confront witnesses that testify during the CSRT proceedings. But given that there are in effect no limits on the admission of hearsay evidence—the only requirement is that the tribunal deem the evidence "relevant and helpful," the detainee's opportunity to question witnesses is likely to be more theoretical than real."

[133] Ibid

[134] Supreme Court of Israel, *Beit Sourik Village Council v. Government of Israel* (2004), in V. Jackson & M. Tushnet, *Comparative Constitutional Law*, New York, Foundation Press, 2nd edition, 2006, pp. 668-683

[135] Ibid, p. 676

true that judges are not military experts and "shall not substitute the discretion of commanders with [their] own discretion", but they must "check the legality of discretion of military commanders."[136] Therefore, the proportionality test, usually applied by the courts, shall have specific features. As the Court noted, judges shall be less strict on the first (reasonable connection of measures to legitimate aim) and the second (existence of less restrictive measures) subset, because these two questions deeply involve problems of military expertise. Courts must concentrate on the third subtest (proportionality *stricto sensu*), because at this stage courts look at the harm dealt (or that can be dealt) by the military actions. Justice Barak named the evaluation of potential harm the "humanitarian considerations" that is "a legal question, the expertise for which is held by the Court."[137]

Summing up, the use of military force invokes many legal disputes and court is the most suitable place to resolve these disputes. Therefore, the jurisdiction of military courts should be limited; they must act on the principles of independence and impartiality and their decisions have to be reviewed by the higher courts of ordinary jurisdiction. At the same time, ordinary courts shall not avoid the review of military cases. Law gives the judges all necessary means and authority to examine the case.

2.3. Vertical Separation of Powers in Non-War Use of Force

The problem of separation of powers during non-war use of force arises not only at the horizontal level. The growth of war powers can infringe on rights and privileges of local self-government or federal units, which is especially actual, when the use of force is conducted in domestic territory or on occupied territory. The successful conduct of a military operation can require to limit powers of local bodies or even to replace them with military administrations.

[136] Ibid
[137] Ibid, p. 677

In general, the international documents and national constitutions grant wide guarantees for local self-government bodies. For instance, the Preamble of the European Charter of Local Self-Government recognizes the right of people to "participate in the conduct of public affairs" on local level and specifies that "local authorities… [should possess] a wide degree of autonomy with regard to their responsibilities."[138] Article 140 of the Constitution of Ukraine also secures the right of local communities "to independently resolve issues of local character… directly and through bodies of local self-government." Admittedly, neither the European Charter of Local Self-Government nor the Constitution of Ukraine proscribe the mechanism and conditions of derogation or limiting of the right to self-government.

Nonetheless, military realities show the examples of limitation and abolishment of the right to independently resolve local issues. From the start of the tragic events in the Eastern Ukraine many local governments voted for self-dissolution and transferred their powers to armed groups. Other local governors left their posts, running away from the hostilities. Therefore, after Ukrainian Government took control over some territories, there were no democratically elected officials. Military necessity and constant changes in of the theatre of conflict prevented from organization of new local elections. The Law "On Military-Civilian Administrations" is called to resolve the problem of absence of governing bodies on local level. Article 3 of the Law authorizes the President to create military-civilian administrations in the region of the anti-terrorist operation, if local self-government bodies "do not carry out their authority proscribed by the Constitution and laws of Ukraine, because of actual dissolution or withdrawal from their authority." For the same reasons, the President can also replace the local state administrations[139] with the military-civilian administrations. The Law defines military-

[138] European Charter of Local Self-Government, Council of Europe Treaty No. 122, Strasburg, 1985
[139] Local state administrations are local state executive bodies. Their status is determined by the Section 6 of the Constitution and the Law "On Local State Administrations"

civilian administrations as "temporal state bodies that operate within the Antiterrorist Center of the Security Service of Ukraine."

The scheme proposed by the Law "On Military-Civilian Administrations" is effective for conducting military operation, but at the same time questionable from the point of view of the constitutional law. Firstly, Article 106 of the Constitution of Ukraine contains an exhaustive list of the President's powers[140] and the power to dissolve or appoint local organs is not included in that list. Secondly, Article 118 of the Constitution determines local state administrations as local state executive bodies. The Constitution does not provide for the transfer of the authority of the local state administrations to other organs. Finally, the head of the local state administration is appointed and dissolved by the President on the submission of the Government,[141] while the Law "On Military-Civilian Administrations" allows the President to dissolve local state administration and appoint military-civilian administration without any consultations with the Government. A group of MPs filed a constitutional complain for the abstract review of the Law "On Military-civilian Administrations" on December 4, 2015, but the case is still pending in the Constitutional Court.

The President of Ukraine wants to regulate the dissolution of the local bodies amending the Constitution of Ukraine, but these amendments have provoked a heated discussion. Among other things, the amendments would allow the President to temporary suspend the authority of local bodies if they "adopt an act that does not correspond the Constitution of Ukraine, threatens state sovereignty, territorial integrity or national security."[142] Suspending the authority of local

[140] The Constitutional Court of Ukraine in its Decision No. 7-рп/2003 from April 10, 2003, said: "[P]owers of the President of Ukraine are exhaustively defined by the Constitution of Ukraine which prevents adoption of laws that would grant him other rights and duties."

[141] This provision of the Constitution is designed to serve as a check over the President's appointments. According to the Constitution, the President has limited influence over the Government. The Parliament is the only organ that can dissolve the Government and, therefore, the Government is responsible before the Parliament and serve as a control body over the President's actions.

[142] [Draft Law on Amendment of the Constitution of Ukraine on the decentralization of power, Registration No. 2217a] Законопроект про внесення змін до Конституції України щодо децентралізації влади, реєстр. № 2217a

bodies, the President files a constitutional claim for review of the act and appoints a temporary state commissioner that "directs and organizes the activities" of local executive bodies.[143] The Constitutional Court in its decision No. 1-18/2015[144] concluded that the Draft Law corresponds to the requirements of Article 157 of the Constitution of Ukraine. However, the dissenting judges outlined many problems of the proposed law. As it was noted above, Article 157 provides that the Constitution shall not be amended in conditions of state of war or state of emergency. It also prohibits the amendment of the Constitution, if the Draft Law abolishes or restricts human rights. Therefore, the dissenters saw new powers of the President as the severe restriction of the right to self-government. They admitted that such broadly written conditions for suspension would allow to manipulate the local bodies that would be afraid of the suspension. They also noted that the Draft Law does not provide a concrete term of authority of a temporary state commissioner that may lead to the restriction of the right to local self-government for unjustifiably long period. Currently, the Draft Law has been voted in the first reading and there is not enough votes in the Parliament to enact it.

However, the Executive should comply with the right of the community to independently resolve local issues not only within domestic borders, but also on territories where it conducts effective control including occupation. The IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 introduces the principle of humanitarian behavior with the population of the occupied territories and their protection against the consequences of war. Article 27 provides:

> Protected persons [meaning local civilian population] are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and

[143] Ibid

[144] [Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine on decentralization to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України щодо децентралізації влади вимогам статей 157 і 158 Конституції України від 30 липня 2015 року у справі № 1-18/2015

> shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

The principles of the Israeli administrative law comply with the requirements of the international humanitarian law, therefore, "rules of substantive and procedural fairness, the duty to act reasonably, and rules of proportionality" apply to military commander.[145] The Supreme Court of Israel in *Beit Sourik Village Council* recognized such independent rights of the local community as to "to develop and expend", to have infrastructural connections with other settlements, to have access to the necessary services for the well-being of the local population and to conduct independent economic activity.[146] Thus, the Court came to the conclusion that the military commanders must take the rights of the local community ("humanitarian considerations") and "balance between two poles: military necessity on one hand, and humanitarian considerations on the other."[147]

Therefore, using military force, the Executive must look for the best balance between the need to conduct certain military actions and the values of the local self-government. Even in times of the use of force, no matter with or without declaration of war, the rights and privileges of the local population must be preserved. Vertical separation of powers presents the best system of protection of these rights and privileges and that is a reason why it should be preserved.

2.4. Subdivision of the Executive and Its Impact on the Use of Force in Non-War Conditions

The use of force influence not only the relations between different branches of powers on the horizontal and vertical level. The traditional inner structure of the Executive also goes

[145] HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, [Delivered 15.09.2005]
[146] Supreme Court of Israel, *Beit Sourik Village Council v. Government of Israel* (2004), in V. Jackson & M. Tushnet, *Comparative Constitutional Law*, New York, Foundation Press, 2nd edition, 2006, pp. 670
[147] Ibid, p. 672

through many changes. Taking hostages, diversions, mass killings and other acts, which are now referred as terrorism, usually belong to the competence of the police forces. However, calling their enemies terrorists, all three studied states started a full-scale war with the use of army and military machines. Even more recently, after the terrorist attacks in France in November 2015 everyone could observe soldiers patrolling the streets of Paris and other European cities. Therefore, the use of force that has been in the sphere of the police now is split between several departments – the Minister of Internal Affairs, the Minister of Defense and special security agencies (that has separate commanders).

As I have outlined above, the division of the duty to combat the terrorism depends on the model of counterterrorism that the state has adopted. The criminal justice model gives the power to bring the terrorist to justice to the police and prosecution. In contrast, the war model determines the army responsible for the elimination of the terrorist threat. However, as it has been also admitted, there exists no pure model and states often combine the characteristics of both.

The combination of the war model and the criminal justice model leads to the processes that national security scholars name the militarization of the police and the policification of the military.[148] Militarization of the police means the creation of the special units in the structure of the police organs. These unites are used only in specials operations and have weapons and tactics that are more close to the ones used in the army. They also have a broader discretion on the use of the firearms. Ronald Crelinsten calls these special forces a "third power" and "shoot-to-kill" police.[149] The National Guard of Ukraine, SWAT (Special Weapons and Tactics teams) in the United States and Israeli Yamam can serve as an examples of these unites. For instance, Article 1 of the Law "On the National Guard of Ukraine" defines the National Guard of Ukraine

[148] See, for example, Crelinsten, Ronald D., *Counterterrorism*, Cambridge, United Kingdom : Polity, 2009, p. 83-85
[149] Ibid, p. 83-84

as "a military formation with law enforcement functions that is a structural part of the Ministry of Internal Affairs of Ukraine." In contrast to ordinary police forces, Article 19 of the Law allows the National Guard of Ukraine to use military weapons and machinery. Under the state of war the National Guard of Ukraine subordinates to the Ministry of Defense of Ukraine. In its turn, the policification of the military means that the army often executes the police functions. As I have noted above, after recent events governments often use the armed forces to patrol the cities. On international level policification of the military can be best demonstrated on the peacekeeping operations. In such operations the military forces are used to separate parties, disarm them and arrested suspected violators of the laws of war.

Notwithstanding its tactical efficiency, the militarization of the police and the policification of the military can have a negative impact on human rights. The militarized police forces are more trained how to kill a criminals than how to neutralize them and bring them to court. Legislation also allows them to use more deadly weapons and in more occasions than in the case with the ordinary police. It can result in situations when special police units use weapons when it is not necessary. In 2005, the British police killed Jean Charles de Menezes with seven shots in the head and one in the shoulder at a close range, mistakenly taking him for the fugitives involved in the previous day's failed bombing attempts.[150] After a long inner police inquiry the government decided not to prosecute any policemen involved in the shooting. On 10 June 2015, the Menezes family sued the United Kingdom in the European Court of Human Rights, but the case is still pending.[151]

Moreover, in Ukraine the mix of police and military forces can also invoke a constitutional problem. In 2004, the Constitution was amended to limit the powers of the President. The President lost his previous control over the Cabinet of Ministers, Ukrainian

[150] 'Jean Charles de Menezes Family in European Court Challenge', *BBC News*, June 10, 2015, accessed March 21, 2016, http://www.bbc.com/news/uk-33066098.
[151] Ibid

Government, making it more responsible before the Parliament. The Constitution before the amendments proscribed that the President proposed the Parliament a candidate for the Prime-Minister and appointed ministers on the submission of the Prime-Minister. Now amended Article 114 provides that the candidate for the position of the Prime-Minister is proposed by the coalition of majority in the Parliament. The candidates for the ministers except the Minister of Defence and the Minister of Foreign Affairs are proposed by the Prime-Minister and elected by the Parliament. The candidates for the Minister of Defence and the Minister of Foreign Affairs are proposed by the President. The power to propose the candidates for the Minister of Defence and the Minister of Foreign Affairs is given to the President, because, according to Article 102 of the Constitution, he is "the guarantor of state sovereignty and territorial indivisibility" and "the Head of the State and acts in its name". Such a dichotomy of the executive power in Ukraine also demonstrates that the Constitution uses classical notions of war and peace, external and internal affairs, separating these spheres between the President and the Government respectively.

The described double layer system has not justified itself in realities of the undeclared war. A need has arisen to use both the police and military forces to protect the security of the State. Therefore, the National Security and Defense Council of Ukraine (NSDCU) was called to coordinate the forces subordinate to different centers. The NSDCU is defined by Article 107 of the Constitution as the body that "co-ordinates and controls the activity of bodies of executive power in the sphere of national security and defense." The NSDCU consists of the President, the Prime-Minister, the Minister of Defense of Ukraine, the Minister of Internal Affairs of Ukraine and other the representatives of different security agencies. The decision of the NSDCU are adopted by majority. Nevertheless, this agency is not capable to resolve all potential disputes between the Executive's agencies as it is only coordination body and its

decisions "shall be put into effect by decrees of the President of Ukraine"[152] who may refuse to give effect to the decisions he dissents.

To sum up, despite the system of correlations between different branches of power, the use of force also affects the internal structure of the Executive. These changes are justified and necessary to combat terrorist activity, unless they do not infringe human rights and constitutional balance.

Summing up the second chapter, the use of force alters the usual balance between the Executive, the Legislative, the Judiciary and local self-government. It is true that the Executive has to have extraordinary powers to repeal the threat for national security. However, at the same time it is true that the use of these extraordinary powers may cause a great damage to human rights and the constitutional order. Therefore, the principle of separation of powers calls the Legislative and the Judiciary to control the Executive's use of force and they must not withdraw themselves from this responsibility.

[152] Article 107 of the Constitution of Ukraine

Conclusion

The use of military force greatly influence a common mechanism of division of powers between the Executive, the Legislative, the Judiciary and local self-government organs. Without diminishing the role of the use of force in repelling threats to the sovereignty of the state and lives and freedoms of its citizens, it must be admitted that the use of force might result in unconstitutional growth of the Executive's authority and breach of human rights. Therefore, the use of force could make even more harm to the values it is called to protect than the actual enemy attack.

The historical examples of studied jurisdictions demonstrate the danger of the use of force. For instance, the Vietnam War (1955-1975) took lives of more than 58 thousand of American soldiers.[153] It was ended as a result of series of events such as declassification of the Pentagon Papers (with a positive role of the Supreme Court in *Pentagon Papers Case* that allowed the mass-publication) and President Nixon's self-resignation, because of Congress attempt to impeach him. Thus, after twenty years of conflict the Judiciary and the Legislator stopped the United States involvement in hostilities by restraining the Executive. As to Ukraine, on February 18, 2014, the government declared the anti-terrorist operation under the Law "On the Fight against Terrorism". After that, February 18-20, 2014, became the most horrific days of protest in Kyiv. If Parliament had more political and legal power to restrict the illegal use of force against peaceful citizens, the victims could be avoided. As to Israel, the Israeli–Palestinian conflict continues until now, causing horrible results.

Therefore, armed force should be deployed only in certain clearly defined circumstances. Article 51 of the UN Charter identifies the only one condition of the use of force – self-defense from an armed attack. Nonetheless, the military response to the terrorism in

[153] 'Vietnam Veterans Memorial Fund | News', accessed 23 March 2016, http://www.vvmf.org/news/article=In-Memory-Day-Ceremony-to-honor-165-Vietnam-veterans-whose-lives-were-cut-short-by-their-service.

modern world does not clearly meet the UN Charter's criteria. The ICJ's *Armed Activities* judgment[154] confirms that the armed force can be used only in response to another state's attack, while the terrorist organizations are often non-attributive to any state. At the same time, the solution of the terrorist problem in international law will depend on what doctrine of counter-terrorism the international community adopts – the war model, the criminal justice model or a combination of both.

However, even if the state satisfies itself with existence of precondition of the use force, it cannot overstep a threshold determined by the international law for the use of armed force. This threshold is characterized with three principles: necessity, proportionality and immanence. Necessity means that the military force shall be introduce only if the situation cannot be ruled over by any other non-military means. Proportionality requires to use only such amount of force that is appropriate for repelling the enemy's attack and not to cause unnecessary harm and destruction. Finally, immanence calls the states to use force in a shortest possible period from occurrence of rival attack, so the use force will be characterized as a real self-defense, but not a revenge or hidden aggression.

As the declaration of war happens very rare, the use of force in national law is being framed in new legal format and by new legal regimes that can be called paramilitary legal regimes. The most common paramilitary legal regimes are the state of emergency and the anti-terrorist operation regime. Both regimes grant the Executive with extraordinary powers that are similar to war powers, but at the same time employ very limited parliamentary and judicial control. Therefore, considering also almost endless period of effect of these regimes in practice, paramilitary legal regimes constitute a threat to the principle of separation of powers.

[154] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda),* Judgment, [2005] ICJ Reports, p. 146

The Legislative as the most democratic branch of government is supposed to overview the Executive's use of force. The main powers of the Parliament is to enact laws, order withdrawal of force and to enact or not to enact budget (a power of purse), but all these powers may be hard to use because of the President's "exclusive" constitutional authorities and political atmosphere in the country. However, in the critical time when the force is used the Parliament must overcome the obstacles and introduce effective control over the Executive. Thus, I have to agree with Laura Donohue: "The aim of terrorism is to terrify people; and when people are afraid, they are likely to make hasty, short-sighted decision. At such times, it is the legislature's task to weigh decisions carefully before commenting them into law."[155]

The Judiciary is also effected by the use of force. Martial courts, which are not without reason blamed to be biased, take the competence to review military cases from the ordinary courts. The use of force cases may require a deep knowledge of military tactics and, thus, they are more difficult than other cases. However, the traditional means of judicial review, including the proportionality test, help the courts to conduct their professional work effectively even in evaluating the military commanders' discretion.

The use force changes the system of power distribution between central and local bodies too. The Executive has a power to limit the authority of the local bodies or even to replace them with military bodies. At the same, the international and national standards of the local-self-government guarantee a local population the right to resolve their local issues independently. Therefore, the interests of national security and right to local self-government should be balanced.

Finally, the use of force alters the inner structure of the Executive itself. The police organs are supplemented with special force that use tactics and have ammunition like the

[155] Donohue, Laura, *The Cost of Counterterrorism : Power, Politics, and Liberty*. Cambridge ; New York : Cambridge University Press, 2008, p. 8

Armed Forces. In its turn, military force are used to fight terrorist and other organized armed group, while traditionally this function has belonged to the police. These tendencies may lead to infringement of human rights. The special forces that are taught more how to kill criminals, but not how to neutralize them and bring to jail, are more likely to use firearms with lethal results. In addition, fusion of military and police can invoke the constitutional problem in such states as Ukraine, where the Constitution strictly divides military and internal affairs between the President and the Government.

Summing up, the use of force invokes many problems connected with the separation of powers. At the same time, the legal picture of the use of force is constantly changing. The series of terrorist acts in France in 7-9 January and 13-14 November 2015, in Turkey in 2015 and in Belgium in 22 March 2016 (that happened when this paper was in progress) will definitely influence the development of the subject of this thesis. Therefore, further research is needed to finally determine what the best balance in the triad of powers is in the times of use of force – the balance that would accommodate both the military necessity and separation of powers principle. It is unacceptable to allow the fight against terror to turn into terror itself.

Bibliography

Articles

Christopher Ingraham, 'The United States Is in a State of Emergency – 30 of Them, in Fact', The Washington Post, 19 November 2014

Fletcher, George P., *A crime of self-defense : Bernhard Goetz and the law on trial*. n.p.: New York : Free Press, 1988

Freeman, Alwyn V. "Professor McDougal's 'Law and Minimum World Public Order'." *The American Journal of International Law*, 1964., 711

Hargrove, John Lawrence. "The Nicaragua Judgment and the Future of the Law of Force and Self-Defense." *The American Journal of International Law*, 1987

Lind, William et al. "The Changing Face of War: Into the Fourth Generation", *Marine Corps Gazette (pre-1994)*, Oct 1989, vol. 73, no. 10, ProQuest Direct Complete

Polebaum, Beth M., "National Self-Defense in International Law: an Emerging Standard for a Nuclear Age", (1984) 59 *New York University Law Review* 187

Prakash, Saikrishna Bangalore, "The Separation and Overlap of War and Military Powers", *87 Tex. L. Rev. 299*, December 2008

Ramsey, Michael D. "Textualism and War Powers." *The University of Chicago Law Review*, 2002., 1543

Rodin, David. *War and self-defense*. n.p.: Oxford : Clarendon Press ; New York : Oxford University Press, 2002

Shultz Jr., Richard H. "Can Democratic Governments Use Military Force in the War Against Terrorism?." *World Affairs* 148, no. 4 (Spring86 1986): 205

Tiefer, Charles. "Can Appropriation Riders Speed Our Exit from Iraq" *Stanford Journal Of International Law* no. 2 (2006), 291

Waldock, C. "The Regulation of the Use of Force Under the League System." *Collected Courses Of The Hague Academy Of International Law* (1952): 469

Williams, Andrew, "Safeguarding the Commander's Authority to Review the Findings of a Court-Martial." *BYU Journal Of Public Law* 28, no. 2, 2014

Yoo, John C. "Kosovo, War Powers, and the Multilateral Future." *University of Pennsylvania Law Review*, May 2000, 1673

Books

Alexandrov, Stanimir A. *Self-defense against the use of force in international law*. n.p.: The Hague : Kluwer Law International, c1996.

Clapham, Andrew, and Paola Gaeta. *The Oxford handbook of international law in armed conflict*. n.p.: Oxford, United Kingdom : Oxford University Press, 2014

Crelinsten, Ronald D., *Counterterrorism*, Cambridge, United Kingdom : Polity, 2009

Dinstein, Yoram. *War, aggression, and self-defence*. n.p.: Cambridge [England] ; New York : Cambridge University Press, 2005

Donohue, Laura K. *The Cost of Counterterrorism : Power, Politics, and Liberty*. Cambridge ; New York : Cambridge University Press, 2008

Fleck, Dieter, and Michael Bothe., *The handbook of international humanitarian law*. n.p.: Oxford ; New York : Oxford University Press, 2007

Fletcher, George P., *A crime of self-defense : Bernhard Goetz and the law on trial*. n.p.: New York : Free Press, 1988

Gardam, Judith Gail. *Necessity, proportionality, and the use of force by states*. n.p.: Cambridge ; New York : Cambridge University Press, 2004

Geoffrey R. Stone et al. (eds.), *Constitutional Law: 6Th Ed.*, New York : Aspen Publishers, 2009

Harris, Davide J et al, *Law of the European Convention on Human Rights*, Second edition, Oxford : Oxford University Press, 2014

Kretzmer, David "Tergeted Killing of Suspected Terrorists: Extra-Judicial Execution or Legitimate Means of Defence" in Samuel, Katjia L. H. and White, Nigel D. (eds.). *Counter-Terrorism and International Law*, Farnham : Ashgate, 2012

Lubell, Noam. *Extraterritorial use of force against non-state actors*. n.p.: Oxford ; New York, N.Y. : Oxford University Press, 2010

O'Connell, Mary Ellen "The Legal Case Against the Global War on Terrorism" in Samuel, Katjia L. H. and White, Nigel D. (eds.). *Counter-Terrorism and International Law*, Farnham : Ashgate, 2012, p. 202

Cases

Amin v. Brown [2005] EWHC 1670 (Ch)

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, [2005] ICJ Reports 222-3

Boumediene v. Bush, 553 U.S. 723 (2008)

[Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine on decentralization to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України щодо децентралізації влади вимогам статей 157 і 158 Конституції України від 30 липня 2015 року у справі № 1-18/2015

[Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine on immunity of people's deputies of Ukraine and judges to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України щодо недоторканності народних депутатів України та суддів вимогам статей 157 і 158 Конституції України від 16 червня 2015 року у справі № 1-14/2015

[Conclusion of the Constitutional Court of Ukraine in the case on the application of the Verkhovna Rada of Ukraine on correspondence of the bill on amending the Constitution of Ukraine (on Judiciary) to requirements of the Articles 157 and 158 of the Constitution of Ukraine] Висновок Конституційного суду України у справі за зверненням Верховної Ради України про надання висновку щодо відповідності законопроекту про внесення змін до Конституції України (щодо правосуддя) вимогам статей 157 і 158 Конституції України від 20 січня 2016 року у справі № 1-15/2016

Dames & Moore v. Regan, 453 U.S. 654 (1981)

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, [Delivered 15.09.2005]

INS v. Chadha, 462 U.S. 919 (1983)

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. *USA), Merits*, ICJ Reports 1986

New York Times Co. v. United States, 403 U.S. 713 (1971)

Supreme Court of Israel, *Beit Sourik Village Council v. Government of Israel* (2004), in V. Jackson & M. Tushnet, *Comparative Constitutional Law*, New York, Foundation Press, 2nd edition, 2006, pp. 668-683

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Other Sources

Bybee, Jay, *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, Department of Justice, Opinions of the Office of Legal Counsel, Volume 26, 2002

Jennifer Elsea et al, *Congressional Authority to Limit Military Operations*, Congressional Research Service, Report RL31133, 2013