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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT EXECUTIVE SUMMARY
ON THE DEMOCRATIC CONTROL OF THE ARMED FORCES

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1. All societies have to reconcile the need for security provided for by the armed forces, on the one hand, and the requirement to respect democratic values, human rights and freedoms on the other hand.
2. The lessons learned from history - even recent - of European States, but not only, have shown that the military might affect democracy and its values. The interests of the military must therefore be subordinate to the interest of a democratic society.
3. The control of the military is an indispensable element of a democratic government. The degree and type of such control will vary considerably according to the system of government, historical traditions and also cultural values.
4. The democratic control over the armed forces has two dimensions, which both enhance and promote confidence-building and peace. The *domestic* dimension implies the primacy of the civilian general interest and of the principles of a democracy over the military. The *international* dimension prohibits in general the threat or use of force against a State.
5. The democratic control of the armed forces is a complex matter. The study has focused on particular aspects related to armed forces: "traditional" issues such as military expenditure or military budget and appointment of top commanders and issues which correspond to the change in the role of the armed forces, both at national and international level.
6. Indeed, since the end of the cold war, armed forces have undeniably undergone a profound shift in both the range and focus of their role. This refocusing of defence and security policy in many Council of Europe member States has led to more and more national participation in international peace missions.
7. Likewise, the changing nature of the threats posed to national security and in particular the rise of international terrorism has resulted in the re-emergence of an internal role of the army in many European states, which requires a specific control of the conditions by which a State uses the army in domestic issues.
8. When considering the control of armed forces at the domestic level, the constitutional framework is of particular importance, since it will fix the organs involved in military issues as well as the control process over the armed forces.
9. The implication and identification of the organs of control will additionally depend on the moment at which the control is exercised: *ex ante*, *ex post* or both.
10. When considering the executive level, the impact of the constitutional framework is particularly salient. In parliamentary republics and monarchies, the monarchs or the president will have symbolic or formal control over the military.
11. On the other hand, the presidents of presidential regimes will have substantial powers such as the role of commander in chief, presiding over higher national council and committees as well as appointing military posts.
12. Some constitutions will also provide for a collegial body at the executive level: a specific Council for National Defence of which the main task will be to coordinate and consider the main issues related to defence and also in some countries report to the Parliament. However, the role of the Head of State being generally preponderant in such a Council, the controlling effects are not as strong as they may seem.
13. Ministers of Defence are not usually commander-in-chief; they will however be the first respondent to Parliamentary enquiries and debates.

14. Democratic control over armed forces refers mainly to the existence of a democratically elected organ that reviews and supervises the decisions adopted by the organs or authorities with military competences. The role of the Parliament as an elected body is therefore of paramount importance in the concept of democratic control of armed forces.

15. When considering the parliamentary level of control, the functions and power of a certain Parliament will certainly depend on national rules, on checks and balances that operate within a State.

16. Parliamentary powers over the military sector can comprise powers to legislate, to approve the budget, to advise, to penalise and to approve certain issues or actions. The level of this power, however, will vary from State to State.

17. At the legislative level, the approval and control of the budget always fall within parliament's remit and constitute a significant mechanism of control by the Parliament, in the military field also.

18. In this regard, three types of Parliament have been identified: the budget-making parliament which has the capacity to amend or reject budget proposals and the capacity to formulate alternative budget proposals. The second and largest type in Europe are budget-influencing parliaments which can amend or reject the budget without putting forward their own proposals. The last category will comprises Parliaments with little effect on budget formulation. These will traditionally give their consent to the defence budget as a global figure as presented by the government.

19. Direct control is even more salient when the parliament takes or participates in the military decision making. In this regard, the study shows a variety of manners of parliamentary involvement.

20. Some legal orders make explicit reference to parliamentary authorisation regarding for instance the decision to declare a state of emergency, the power to ratify treaties on military issues and the to send troops abroad.

21. Some other countries have developed tighter legislation on the development of troops abroad for instance. Lastly, a low level of parliament involvement is to be seen when, for instance, prior parliamentary approval is not necessary for national participation in any missions abroad or declaration of state of emergency.

22. Only a few Parliaments possess the power of prior approval in all situations, regardless of the nature of international operations.

23. The better-informed Parliaments appear certainly to be those with the power of prior approval.

24. Direct control of the Parliament will also occur ex post facto this type of control is used to monitor the transparency and the legality of the procedure. Even though in many Parliaments there is a lack of budgetary information regarding specific military missions- notably regarding international missions - the control of the budget and of expenditure which is common to all Parliaments is not to be neglected. In many countries, however defence procurement represents one of the main topics of Defence Committee hearings and inquiries.

25. Indirect control mechanisms of the Parliament will consist of some degree of interference in military decisions or adding conditions to military decisions. This can be the case regarding control over equipment decisions, inspections and visiting troops abroad and the control of arguments which is a more diffuse kind of control. Additionally, when performing its institutional role of proposals and reflection, the participation of the Parliament in the general defence policy must also be interpreted as a mechanism of control.

26. Undeniably, parliamentary specialised defence committees, through their specialisation in military and defence matters, constitute an efficient, and hence extremely significant body to perform the functions empowered to a Parliament.

27. Finally, any Parliament of Council of Europe member States will not only exercise but share its ex post control with other institutions like the judiciary, the ombudsman and audit offices.

28. The role of the judiciary in the control over armed forces is two-fold.

29. Firstly, Constitutional courts as guardians of the rule of law, of democratic procedures and the protection of human rights can check the constitutionality of military affairs when some acts or decisions may have undermined these principles.

30. Secondly, military courts will be competent to judge criminal and disciplinary actions. At constitutional level, the situation of military courts within the member States of the Council of Europe ranges from constitutional regulation of military courts, constitutional remission to law for the creation of military courts, constitutional prohibition of military courts or constitutions with no specific provisions on military courts. Whether ad hoc or standing courts are concerned, the conditions of independence and impartiality set out by Article 6.1 of the European Convention of Human Rights (ECHR) must be respected.

31. At the national level, two complementary oversight entities whose functions and power vary greatly among the CoE member States have been identified in the control over armed forces: The Ombudsmen and the Court of Audits.

32. Even though the degree of control of the Ombudsman differs considerably among States, the role of this institution should not be overlooked. Some States confer few competencies to parliamentary ombudsmen regarding complaints related to armed forces. At the other end of the spectrum, some countries have instituted a specialised (military) Ombudsman whose tasks will generally be to deal with applications from individuals, both soldiers or citizens, who could be affected by military decisions or actions and to ensure the compliance of the armed forces with constitutional principles but also to assist parliamentary oversight and act as an advisory organ for the chief military and/or the Minister.

33. Additionally, the role played by Audit Offices and Courts of Auditors who control the legality and appropriateness of public spending is an important element and constitutes an adequate response to the growing concern of citizens in the accountability of democracies. The military is generally answerable to a national accounting body, except in some countries.

34. Finally, internal control mechanisms on armed forces should not be neglected since they are a crucial component of democratic oversight of armed forces. The army must be committed to democracy, the rule of law and human rights. In this regard specific codes of conduct or professional ethics have been drafted but foremost the duty of superiors to promote and maintain professional standards throughout the military chain of command must be underlined.

35. At the international level, the control of armed forces can be performed by different organs, i.e. international organisations of which member States of the Council of Europe are part and/or international courts.

36. First and foremost, international use of force must be legitimate. States can carry out individual or collective self defence, but in order for their actions to be legitimate they must comply with strict conditions which have been laid down by international law.

37. Whether the military presence can be considered as legal or illegal under international law will prefigure the competence of the control organ involved at the international level.

38. Illegal interventions, for instance, refer mainly to the occupation by armed forces of a foreign territory and illegal acts committed by armed forces in a foreign territory. They will in principle be scrutinised by international courts, whether the European Court of Human Rights (EctHR), the International Court of Justice (ICJ), or for those Council of Europe countries who have ratified its status, the International Criminal Court (ICC).

39. Legal interventions, like those which refer to foreign military bases or joint military exercises, armed forces placed under disposal of a State by another State and peace keeping or multinational forces have a specific feature since they have been decided or authorised by an international organisation, by an international treaty, special agreements or instruments which will fix the responsibilities and conditions of the military intervention. The organ who has authorised or decided those interventions will first and foremost be the organ of control although international courts might also have a say.

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

41. Their common feature is that the existence of their parliamentary body paved the way for a control of the decisions taken at the executive level of the organisation.

42. The United Nations (UN), for instance, has a worldwide character and a broad mandate from its member States to authorise the adoption of collective measures for the prevention and removal of threats to international peace. The Security Council of the UN may decide or authorize a military intervention; it is the principal provider of legitimacy of the use of force. The UN General Assembly, which is intergovernmental in nature, would be considered as the control body, although it can only make recommendations on these issues and approve the budget of the UN under which the international missions and operations are financed. Even though this control might seem marginal, it is worth mentioning that the UN General Assembly strengthened the conditions of authorising or endorsing the use of force by identifying five further criteria of legitimacy (seriousness of the threat, proper purpose, last resort, proportional means and balance of consequences).

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

44. The Western European Union Assembly, which is the very first European inter-parliamentary assembly for security and defence matters, has seen its operational activities transferred to the European Union and is mainly a think-tank body with a co-operational role with national parliaments on defence issues. However, more scrutiny on the European Security and Defence Policy (ESDP) of the European Union might be possible in the light of the new European Union Treaty.

45. With regard to the European Union, the second pillar refers to the Common Foreign Security Policy (CFSP) which might lead to a common defence with the entry into force of the new Treaty. Decision making about the CFSP and the European Security and Defence Policy (ESDP) lies within the Council. The European Parliament which would have a truly democratic legitimacy, since it is the sole international body directly elected has also marginal control competences restricted to being informed by the presidency and the Commission, asking questions to the Council, making recommendations and holding an annual debate on the policy.

46. Other regional international organisations, like the OSCE, the Inter-Parliamentary Union or the Council of Europe are not specifically in charge of international security and defence issues. However, they might deal with politico-military aspects of security. In this way the Forum for Security Co-operation of the OSCE seeks to assist States in reforming their legislation in the military field or armed control field for instance.

47. These international organisations have fixed and developed through their activities important international standards concerning the democratic oversight of the military. Treaties on human rights and humanitarian law, treaties on armament control which are binding instruments; codes of conduct, model laws, recommendations, resolutions and guidelines which frame the activities of armed forces have resulted from their activities.

48. Lastly, at the international level, International courts play an important role in the oversight of democratic forces. The European Court of Human Rights (ECtHR), the International Criminal Court (ICC) and the United Nations International Court of Justice (ICJ) have contributed a lot to developing and implementing international standards, like the protection of the individual rights of military personnel, the legality of the use of force as well as the definition of international crimes. However, the Common Foreign Security Policy (CFSP) and European Security and Defence Policy (ESDP), as such, are excluded from the jurisdiction of the European Court of Justice.