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PRELIMINARY REPORT
ON THE DEMOCRATIC OVERSIGHT OVER ARMED FORCES

by

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1. Introduction

1. The democratic control of the security sector¹ is a topic that occupies a central place in the actual national and international debates about policies, organization and regulation of Defence. Several international organizations are interested in constructing clearer standards and frameworks for their member states to reach. There are also several research centres working on the issue.²

2. The turning point on the so-called “renaissance” interest on the democratic control of armed forces cannot be precisely located, but it seems that the interest on it reappeared after the Cold War. Since then, there have been several attempts to define the framework of the democratic control of armed forces, but they are still insufficient. This report identifies, firstly, the central issues involved and, secondly, summarises some of the predominant components in the regulation among the members of the Council of Europe.

2. Central issues on democratic control of armed forces

3. The following questions serve to summarize the central issues of the democratic oversight of armed forces:

1. Why to control them?
2. What acts or issues are under control?
3. Who controls?
4. When do they control?
5. How does the competent organ implement this control?
6. Which is the intensity of the control?

4. Apart from the issues mentioned above, other connected subjects are the relations between civil society and armed forces, the general security sector reform, the control of internal and external interventions, international security cooperation, and binding international regulation.

1. Why controlling them?

5. Any society faces simultaneously the necessity of security (to which armed forces generally serve) and the requirement of respecting personal and collective freedoms and rights. At least partially, the democratic control and oversight of armed forces is a mechanism for meeting the different requirements raised by these two needs.

6. In general, the oversight of armed forces may appeal for its justification to the shared values that democratic states protect, such as the rule of law, democracy, and fundamental rights. But there are also underlying factors that justify control: thus, historical experiences may create models of control that react against the excesses that armed forces may have eventually committed in war times in the past. They also convey the mistrust towards pre-existing military dictatorships that have been progressively defeated since the third democratization wave.

¹ The “security sector” includes armed forces, police, intelligence services, border security services, private security services. The present report, however, only focuses on armed forces.

² The most important is the Geneva Centre for the Democratic Control of Armed Forces (DCAF).

7. Democratic oversight of armed forces attempts to achieve, in brief, the following goals: political neutrality and de-ideologization; maximum transparency as possible in their activities; inclusion of the armed forces as an integral part a democratic state governed by the rule of law and the accountability of the armed forces personnel and chief commanders.

2. What acts or issues are under control?

8. The issues under control are numerous and they may vary through countries and time. The following could be considered issues (without pretending to exhaust the list):

- the power to declare war or peace
- the approval of security and military laws;
- the power to conclude or denounce international treaties or agreements on defence or security
- the drafting and approval of military budget; the further control over military expenditures,
- the previous authorization for sending troops abroad to participate in peace international missions
- the legislative decisions about the public or secret nature of armed forces acts and information
- the appointment and dismissing of the higher officials and commanders of armed forces is a competence that implies certain level of control, as the commanders are subjected to a special confidence relation
- the prohibition of forming paramilitary groups
- the different types of accountability fixed by the legal system

3. Who controls?

a. International level

9. States have to adjust their legislation and actions to the recommendations and regulations of the organizations in which they take part. Organizations such as NATO, EU, UN, CE, and OSCE have overlapping functions in order to propose guidelines for the democratic control over armed forces, as a way to reinforce the international security cooperation. A serious effort of establishing some legal guidelines for the democratic control of armed forces was the OSCE Code of Conduct on Politico-Military aspects of the Security³, especially sections VII and VIII. OSCE programmes, NATO and EU, have adopted the Code has been adopted as an obligatory standard.⁴

³ 3 December 1994

⁴ GREENE, O., "International Standards and Obligations: Norms and Criteria for DCAF in EU, OSCE and OECD Areas", Fluri, P., and M. Hadžić (2004), *Sourcebook on Security Sector Reform*, Belgrade / Geneva, DCAF / CCMR, p. 107.

10. There is also a wide scope of international binding regulations on human rights and other specific ones about treatment of prisoners of war⁵. These regulations need to be observed by all national organs and powers including armed forces and they are the general framework of the acts of armed forces members. They must act within this framework, respecting citizens and prisoners fundamental rights. In this sense, it is an element of national and international judgments when they decide about infringements committed by armed forces member.

b. National level

11. State organs (i.e. Parliament, executive and courts)⁶ control armed forces through a plurality of procedures that may involve some or all of them at different or simultaneous moments.

b.1 Executive control

12. The main control on the hands of the national executive is that they are at the end of the chain of command.

b.2 Parliamentary control

13. Among these organs, Parliamentary oversight is considered the most important and effective one.⁷ Almost all of the parliaments of Council of Europe member states operate with specialized committees in this topic.⁸ This control can be exercise or executed through different measures, that can be classified in powers to a) legislate, b) approve the budget, c) advice, d) penalize, and e) approve certain actions or interventions.

a) The power to legislate is the genuine function of Parliaments. In the security and military field, the parliament usually defines the composition and structure of armed forces; specifies the mechanisms and procedures for the administration of armed forces organization; fixes prohibitions to servicemen of the armed forces (like the prohibition to participate in political parties); regulates compulsory or voluntary military service, and alternative civil services for conscience objectors; typifies criminal accountability of armed forces commanders for instructing against legal orders; gives civilian or military

⁵ Geneva Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949. The Convention does not state specific remedies in case of violation, but it leaves to the states the obligation of regulation of them. National courts will be in charge of prosecuting these infringements.

⁶ Sometimes, also, the Ombudsman and the Auditor General play some role in this control.

⁷ Some authors have identified four reasons for entrusting to Parliaments the oversight of the security sector in general, which are also applicable to armed forces: 1) Parliaments are a cornerstone of democracy to prevent autocratic rule; 2) the principle 'no taxation without representation'; 3) they can create legal parameters for security issues; 4) they are a bridge to the public. BORN, H., P. FLURI, and A. JOHNSON (2003), *Parliamentary Oversight of the Security Sector. Principles, mechanisms and practices*, Geneva & Belgrade: Inter-Parliamentary Union & Geneva Centre for the Democratic Control of Armed Forces, pp. 6 ff.

⁸ For example, Parliamentary Committee on Defence and Security (UK), Parliamentary Defence Committee (Norway), National Defence and Armed Forces Parliamentary Committee (France), Parliamentary Committee on Armed Forces (Greece). Parliaments of countries such as Bulgaria, Germany and Bulgaria have more than one committee that is related with the control of armed forces. Bulgaria has the Defence Committee and the Internal Security and Public Order Committee. Germany has the Defence Committee, the Committee of International Affairs, and the Parliamentary Control Panel. Romania has a Committee for Defence, Public Order and National Security, a joint Committee for the oversight of the Romanian Intelligence Service, and a joint Committee for the oversight of the Foreign Intelligence Service.

courts the competence to judge legal infringements committed by servicemen of armed forces; ratifies or denounce international treaties on defence and security; or reinforces the respect of fundamental rights and interest of armed forces personnel. These examples show that the legislative competence is a very important one in the democratic control of armed forces, as it draws the legal framework within which they can developed their specific security and defence functions.

b) Another parliamentary competence is to approve the military budget and to scrutinise annual military expenditure. The subjection of military expenditure to fixed legal rubrics implies a control at the same time that guarantees a degree of transparency. Control on execution secures adjustment to the established parameters.

c) With respect to the advisory function, parliaments can help to construct cooperation between the military sector and the civil society; to assess in the evaluation of political and military situations before a state of emergency; or to ensure individual and social security in armed forces actions.

d) Although the establishment of penalties and liability are, generally, judiciary functions, parliaments have some competences alike. For example, they can, under some circumstances, penalize infringements of constitutional and legal obligations committed by commanders and officials of armed forces, adopting measures to stop the violation, e.g., suspending them in their command post, or removing them, considering the seriousness of the violation.

e) Finally, Parliament may be required granting its approval for the participation of armed forces in peace operations outside the state borders, that is, for sending troops abroad.⁹ It can also be a power of Parliament to declare the war, to conclude peace, and to ask for military support to recover internal order when the police force proves insufficient.

b.3 Jurisdictional control

14. Judiciary organs for the control of the armed forces can be a special military or martial court settled according to legal provisions, or the common courts existing in the judiciary system of the state. The tendency seems to be to abolish these special jurisdictions, or to give them exceptional character.

b.4 Societal control

15. Finally, a loose form of control is exercised by civil society. Mass media and public opinion are powerful checks to validate the actions of armed forces even though this form of control is rather projected on the executive itself.

⁹ The problem of use of force under international auspices, or in other words, of taking part in international peace missions is one of the most contingent ones in current international relations. The problem is not only the so-called democratic deficit of international institutions, but also that the national power that has to authorized the sending of troops abroad (parliament or executive) fulfils strictly the requirements, and can be accountable for violations or exceeds its mandate. An interesting view of this problematic can be seen in BORN, H.; HÄNGGI, H. (2004), *The "Double Democratic Deficit": Parliamentary Accountability and the Use of Force Under International Auspices*, Aldershot, Ashgate.

4. When control is exercised?

16. The control can be *a priori* or *a posterior*. The *a priori* type of control is exercised mainly by parliaments and governments. It consists on previous authorization to make interventions abroad, to adopt military strategies, to participate in international missions, to declare war and peace, to consent the entrance of foreign armed forces into the state territory, among others.

17. The control *a posterior* qualifies the legitimacy of the measure or act contested, and, if it is the case, imposes a remedy. The judiciary exercises this type of control over acts already done, and examines the lawfulness of armed forces personnel and commanders behaviour, and declare and penalize the violations of norms or the illegal actions.

18. The next consideration would be that related to the special internal or external background in which armed forces adopt measures or act subjected to control, that is, if they are done during peacetime or wartime.

5. How does the competent organ implement this control?

19. Some of the implementation measures of control, such as the legal and jurisdictional mechanisms in order to determinate the liability of personnel or commander of armed forces, have been mentioned.

20. Nevertheless, there are specific mechanisms that have not been systematically tackled. The supervisory function, exercise by parliament or by executive, is not well defined, and efforts should be made in the sense of establishing what acts are to be controlled and what are the effects of that control.

21. Moreover, not all the special parliamentary committees on defence and security have clear functions and competences to carry out this oversight, and their main activities and recommendations do not reach society or common people.

22. There is neither a clear account of the different types of liability – civil, criminal, administrative, military - that could be applied to armed forces personnel or commanders for an unlawfully behaviour or action.

23. At constitutional level, the supervisory function is not so concretely defined, in order to establish how to exercise the control over armed forces, so it would be necessary to study the specific regulations that develop this control in each state. It's important that the competences are well defined, because in public law, especially at constitutional level, rules the principle according to which the competences or powers must be use in the way and within the limits imposed by norms.

5. Which is the control's intensity?

24. This problem has not been deeply studied. Here, we will limit to mention it. It is clear that some acts can be controlled for their unlawfully results, or because they do not fulfil procedural or competence requirements. But there are other acts or measures that are controlled by its reasonableness or merit, as, for example, when the armed force commander enjoys, by law, a sphere of discretion in adopting some decisions. This problem connects with the extension of transparency in the activities of security sector forces, the confidentially or secret nature of some

information or acts,¹⁰ and, again, the collision between national security and other democratic values.

3. Preliminary outline of common elements among members of the Council of Europe

25. These are the general guidelines of the democratic control of armed forces. Then, a revision of internal rules of each of the Council of Europe member states is required, as well as an account of the international regulations and recommendations binding to these states.

26. A first approach to the constitutional provisions of these states reveals that, generally, the Constitutions only provide a weak or basic legal framework for the democratic oversight. In almost all of them, refers to legislator instructing the regulation of the organization, functioning, instruction, equipment, budget and command of this sector, are made. Most of them, also, prescribe that the President of the Republic or the corresponding simile, depending on the current political regime, is the commander-in-chief. There are generic mentions about military service, considered as a duty and right of citizens of the state, and about the possibility of developing an alternative civilian service in case of conscience objection or religious reasons.

27. Depending on the structure and balancing of powers within the state – that is directly related with the presidential or parliamentary nature of the political regimen - the previous authorization for some military actions – such as sending troops abroad, participating in international peace missions, or intervention in an emergency or siege state when police and other internal security forces are insufficient – corresponds to the Parliament or to the executive. Sometimes, both powers share the authorization competences.

28. Another common feature is that, in federal states, the defence policies, organization, regulations and commands are competence of federal powers. An additional general directive is that intervention of armed forces within the state borders is exceptional, only when the police cannot secure the restoration of internal order, and with the previous authorization of the parliament or the government. It is also common that constitutions establish incompatibilities between military command and other elected public posts. Although political neutrality of armed forces members is not always explicitly enunciated, most of the constitutions restricts or establish the possibility of limitation of the right of association and of the right to participate in political parties. Other rights that can be restricted to the members of armed forces are the right to assembly and to strike.

29. Except a couple of countries,¹¹ no mentions of the necessity of establishing standing parliamentary committees to exercise control over the acts of armed forces is ruled at constitutional level. Few constitutions refer to a “democratic” or “civil” control over armed forces.¹²

¹⁰ An expression of this conflict between transparency and security is Art. 14 N°3 c) of the Constitution of Greece, that allows exceptionally the seizure by order of the public prosecutor after circulation and in case of publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State.

¹¹ Austria, for example, in Art. 52 a) of its Constitution, and Bosnia Herzegovina, in Art. V.5.b).

¹² In this sense, Croatia (Arts. and 80), Poland (Art. 26), and Portugal (Art. 24 N°3, 4), that stipulates that the armed forces “shall obey” the bodies with sovereign powers.

30. A further problem is the accountability of legislative and executive power for their decisions related to armed forces. It has been said that the Parliament should also play a role in the scrutiny of executive role in military command. In these sense, the Constitution of Portugal prescribes for example, that the President of the Republic shall be personally responsible for performing the functions of Commander-in-Chief of the Armed Forces and the Government is responsible for directing the state's military departments and services.¹³ However, there are counterexamples. This is the case of the Constitution of Turkey, when it rules that the acts of the President of the Republic on his or her own competence, and the decisions of the Supreme Military Council are outside the scope of judicial review.¹⁴ Its true that they can be understood as different types of liability (political, in de first case, and civil, criminal or administrative, in the second), but it is only an example that reveals the urgent necessity of giving common guidelines that serve as a starting point in the construction of a complete and reinforced system of democratic oversight of armed forces.

¹³ Art.134 a) and Art. 199d), respectively. Also the Assembly shall be responsible for supervising the involvement of military contingents and security forces abroad (Art. 163 i)).

¹⁴ Art. 125.