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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

PRELIMINARY REPORT

**ON CIVILIAN COMMAND AUTHORITY OVER THE ARMED FORCES
IN THEIR NATIONAL AND INTERNATIONAL OPERATIONS**

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1. Introduction

In its reply to Parliamentary Assembly Recommendation 1713(2005) on democratic oversight of the security sector in member states, the Committee of Ministers of the Council of Europe (CoE) asked the European Commission for Democracy through Law (Venice Commission) to carry out a study on the constitutional issues involved in the need to ensure civilian command authority over the armed forces in their national and international operations.³ On request of the Venice Commission, this report has been written in order to explore the issues which are related to civilian command authority over armed forces.⁴

The preliminary study has three objectives:

- To clarify the conceptual issue of the Civilian Command Authority over Armed Forces and to identify related issues;
- To map existing research in this field;
- To make recommendations about further research.

2. Relevance of Civilian Command Authority over armed forces for CoE member States

In its Report leading to Recommendation 1713 (2005), the Parliamentary Assembly of the Council of Europe (PACE) states that the reform of armed forces in CoE member States deserves close supervision by the elected civilians in government and parliament.⁵ Three major reasons can be identified for closely examining the democratic supervision of the armed forces in CoE member States: (1) The changing roles and reform of armed forces; (2) the issue of paramilitary forces; and, (3) the problematic democratic oversight of international peacekeeping activities.

A first development concerns the new roles of armed forces. Over the last twenty or so years, there has been a refocusing of defence policy and, in particular the role of the armed forces, towards 'security'. This implies a new concept of the role of the military sector as being above and beyond the traditional roles confined to it at times of war, now centring on tasks that are clearly security-oriented in nature. Since 1990 many defence systems have been restructured to adapt to the new threats posed to security. Often such reforms entail military support to the civilian authorities and the police to cope with serious situations such as terrorist attacks, organised crime and drugs trafficking. In any event, the changing roles of the armed forces and

³ Reply from the Committee of Ministers adopted at the 969th Meeting of the Ministers' Deputies (21 June 2006), doc. 10972, 24 June 2006

⁴ Letter of the Venice Commission concerning 'The study of the civilian command authority over armed forces', 7 September 2006.

⁵ 'Democratic oversight of the security sector in member states', Doc. No. 10567, *Parliamentary Assembly of the Council of Europe*, Strasbourg, 2 June 2005. Available at:

<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10567.htm>

changing use of military resources must take place within the context of clearly defined laws and verified democratic supervision.⁶

Second, in some member states there are certain militarised police and internal security forces, whose structure and functioning are similar to those of the armed forces: gendarmerie, civil guard, and border police. These para-military forces – often subjected to the ministry of interior, ministry of justice or the internal secret services – train and operate like the military with the purpose of protecting domestic security.⁷ Government and parliament should closely supervise the mandate and rules of engagement of these para-military forces, as well as which state bodies are allowed to establish and maintain these types of forces.

Finally, armed forces are increasingly involved in international military cooperation and international peacekeeping activities. In particular, international peacekeeping activities saw a great increase in the post Cold War era. National parliaments find it difficult to supervise decision-making on sending troops abroad in peacekeeping operations. The decisions are taken or pre-arranged by government representatives in international organisations (UN, EU, NATO) and parliaments are often presented with a *fait accompli*. The decisions are reached behind closed doors and parliaments (and the public at large) have great difficulty in obtaining information about upcoming and pending peacekeeping operations.⁸

3. Civilian Command Authority over Armed Forces: Conceptual Issues

Civilian and democratic control of armed forces refers to an old question already raised by Juvenal in the Roman times: ‘Who guards the guardians?’⁹ That is, how does a society, primarily through its legitimate, democratically elected political leaders and their appointed officials, control the military? Democracy always implicitly presumes unlimited civilian supremacy over the command of the armed forces – anything short of that defines an incomplete democracy. But what exactly is democratic oversight, and how can we conceptualise it? Generally speaking, we see a state’s system of democratic oversight as being a product of its system of government, politics, history and culture. Additionally, due to the many different cultures and political systems, many different norms and practices of democratic oversight also exist. Consequently, and for better or worse, there is no single, definitive normative model for democratic oversight.

The modern nation-state has for much of its history been defined in part by its monopoly over the legitimate use of force. The military must command sufficient coercive power to protect the polity from its external enemies, but therein lies an inherent danger: through its management of organised force, the military contains the potential to pose a threat to the democratic polity itself or the values on which it is based. In the most extreme case, a praetorian military could threaten the society it is meant to serve by seizing political power in a military coup (or threatening civilian leaders with a coup), and enforcing its will on the state and society by means of the ensuing military (or military-backed) government. In lesser forms of military intervention and

⁶ Pnt. 98 and 99 of ‘Democratic oversight of the security sector in member states’, Doc. No. 10567, *Parliamentary Assembly of the Council of Europe*, Strasbourg, 2 June 2005.

⁷ Pnt. 100 of ‘Democratic oversight of the security sector in member states’, Doc. No. 10567, *Parliamentary Assembly of the Council of Europe*, Strasbourg, 2 June 2005.

⁸ Hans Born and Heiner Hänggi, *The Use of Force under International Auspices: Strengthening Parliamentary Accountability*, 2005, available at: www.dcaf.ch/_docs/pp07_use-of-force.pdf.

⁹ *Sed quis custodiet ipsos custodies?* Juvenal, *Omnia Romae*, VI, 347.

influence, military leaders might pursue the institution's corporate interest or their own personal interests to the detriment of the public interest as defined by the democratically elected civilian authorities. Democratic control, then, is not only a matter of preventing a military from seizing power. It is about aligning the goals of political and military leaders sufficiently that military interests do not overtake the broader societal interests. It is about not allowing the military to subvert democratic constitutional authority or to absorb a disproportionate amount of resources relative to other societal values and priorities, while ensuring that the military can and does fulfil its functions through the provision of adequate resources.¹⁰

Democratic governance of the security sector is the overarching concept for understanding civilian command authority over armed forces. According to the OECD, the governance of the security sector should be:

- 'People-centred, locally owned and based on democratic norms and human rights principles and rule of law, seeking to provide freedom of fear;
- Seen as a framework to structure thinking about how to address diverse security challenges facing states and their populations through more integrated development and security policies and through greater civilian involvement and oversight ;
- Founded on activities with multi-sectoral strategies, based upon a broad assessment of the range of security needs of the people and the state;
- Adhering to basic principles underlying public sector reform such as transparency and accountability;
- Implemented through clear processes and policies that aim to enhance the institutional and human capacity needed for security policy to function effectively.'¹¹

Security sector governance involves six interdependent pillars of oversight and control: internal control; executive control; parliamentary oversight; judicial review; independent oversight; and, oversight performed by civil society.¹²

¹⁰ Hans Born, Marina Caparini, Karl Haltiner and Jürgen Kuhlmann (eds.), 2006, *Civil-military relations in Europe: Learning from crises and institutional change*, London: Routledge, pp. 4-5.

¹¹ 'Security system reform and governance: DAC guidelines and reference series', *OECD-DAC*, Paris, 2005, pp. 12-13.

¹² Born, H. and Leigh, I. (2005), *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, Publishing House of the Parliament of Norway, Oslo, p.15. Online available at www.dcaf.ch.

Table 1: A system of multi-layered Security System Governance¹³

Layer	Major Actors	Main Oversight Mechanisms
Internal	Security forces; Justice providers	Supervision; Internal system of review; Proactive monitoring; Internal complaints mechanisms; Code(s) of conduct; Disciplinary system; Review of performance and control of assignments; Selection, retention and promotion system; Disclosure protection rules.
Executive	Head of State; Ministries; National security advisory and coordinating bodies	Ultimate command authority; Setting basic security policies, priorities and procedures; Selecting and retaining senior personnel; Reporting mechanisms; Budget control; Power to investigate claims of abuses and failures
Legislative	Parliament; Parliamentary oversight bodies	Hearings; Budget approval; Investigations; Enacting laws; Visiting and inspecting facilities; Sub poena powers.
Judiciary	Courts; Tribunals	Adjudicating the services and the individual employees; Monitoring special powers of the security services; Assessing constitutionality; Providing effective remedy; reviewing policies of security and justice providers in context of prosecutions.
Independent Bodies	Ombudsman; Audit Office; Inspector General; Public complaints commissions	Investigating claims of failures and abuses; Ensuring proper use of public funds; Ensuring compliance with policy and the rule of law.
Civil Society	Think Tanks; NGOs; Media	Providing expertise; Lobbying; Providing an alternative view to the public and its representatives; Investigative reporting.

In a democracy, elected officials are the only ones who can claim to represent the national interest or the will of the people. In order to govern, these officials delegate responsibilities to different organs of the state, such as the military, which are then held accountable to the elected officials for their actions. The constitution should reflect this delegation of powers, conceived as a means to keep armed forces under the control of national democratic institutions. To integrate the army within society is fundamental to prevent it from being a tool to be used by the sovereign or government to oppress the civilian population: an adequate control by the civilian government over the armed forces is expected to mitigate any likelihood of the army being used for unlawful purposes.

The civilian control ideal refers to the proper subordination of a competent, [professional military](#) to the ends of policy as determined by civilian authority. Civilian control means that security sector's actors should be accountable to citizens for the use of military force, both internally and abroad. Civilian democratic control over armed forces personnel and military operations is a

¹³ 'Supporting justice and security: A handbook', OECD, Paris, 2006 (forthcoming). In particular the chapter on 'Democratic Oversight and Accountability of the Security System' by Hans Born and Vincenza Scherrer.

firmly established principle in any democratic state. It entails that actors operating within the security sector, i.e. principally armed forces, parliament and government, should operate within a clear legal and institutional framework regulating their respective roles, mandates and hierarchy of authority between them.¹⁴ Civilian democratic control concerns not only oversight over domestic use of force but also control on decisions to deploy and use military force abroad. Decisions on deployment of troops abroad, however, are often made in international institutions, far from the representative structures that democratic governments have relied upon to provide accountability; mechanisms to ensure accountability in these cases have been largely unexplored so far.

Last but not least, it is important to add the word ‘democratic’ to the concept of oversight of the security system. Civilian oversight does not imply that it is necessarily democratic: most dictators of the last century had perfect civilian oversight of their security system.¹⁵

4. Specific Issues of Civilian Command Authority over Armed Forces

This study aims essentially at identifying the means provided for in the constitutions of Council of Europe Member States to ensure democratic accountability of the armed forces.

This section provides an overview of the specific issues that ought to figure in the institutional legal framework of CoE member states in order to support the democratic accountability of the armed forces. As can be seen from Table 2, three groups of issues which should be covered by civilian command authority: (I) Security delivery, referring to the use of force abroad and at home, including the monopoly of force and the issue of visiting forces; (II) The governance of force, referring to ultimate command authority over the armed forces, the control of the budget and expenditures of the armed forces as well as appointing military top commanders and the issue of treaty making powers; (III) Human rights of armed forces personnel (both volunteer and conscript personnel), including limitations of those rights necessary because of military duty and the political neutrality of the armed forces. Table 2 presents the different components and issues linked to the civilian oversight of the armed forces, as well as the indicators that serve to assess the level of civilian command authority over the armed forces. In the remainder of this section, the different issues that are presented in the table, are analysed and grouped according to the three components: security delivery, governance of force, and human rights related.

¹⁴ ‘Understanding and Supporting Security Sector Reform’, DFID Issues, 2003, UK Department for International Development, , available online at:

<http://www.dfid.gov.uk/pubs/files/supportingsecurity.pdf#search=%22understanding%20and%20supporting%20security%20sector%20reforms%22>.

¹⁵ Hans Born and Eden Cole, ‘Glossary’, in Hans Born, Philipp Fluri and Simon Lunn (eds.) (2003), *Oversight and guidance: The relevance of parliamentary oversight for the security sector and its reform*. NATO Parliamentary Assembly/DCAF, Brussels/Geneva. Available at www.dcaf.ch

Table 2. Components, Issues, and Indicators of Civilian Command Authority over the Armed Forces

Components	Issues	Indicators
I. Security Delivery	A. The monopoly of force	<ul style="list-style-type: none"> • Which type of forces exist (regular armed forces, state para-military forces, non-state para-military forces, or private military companies)? • Which state institutions (both on a national and regional/local level) have the right to maintain and establish armed and para-military forces? • Is there a legal framework in place that regulates the mandate, rights and obligations of private military companies (in particular, the right to bear arms)?
	B. Sending troops abroad	<ul style="list-style-type: none"> • What is the role of parliament in decision-making on sending troops abroad? Does parliament have the power of prior-authorization? • What procedure is followed in case troops have to be deployed on a very short notice? • Does the decision-making procedure depend on the nature of the troop deployment abroad (e.g., national security vs. peacekeeping operations; mandate of an international organisations; rules of engagement (level of force); size of the troops deployed abroad)?
	C. Exceptional situations & the domestic role of the military	<ul style="list-style-type: none"> • Under which circumstances are the armed forces allowed to play a domestic role, if at all? • Which state body is authorised to use the military at home? • How is civilian command authority over armed forces guaranteed when active at home (e.g., subordination to (local) civilian authorities, duration of the mission, mandate, rule of engagement etc.)?
	D. Visiting forces	<ul style="list-style-type: none"> • Which state bodies of the sending and receiving state have the right to approve the agreement which forms the basis for the presence of visiting forces? • To what extent do personnel of visiting forces enjoy immunity and privileges



II. Governance of Force

A. Ultimate command authority

- related to their duty?
- Who adjudicates over claims arising from the acts of personnel of visiting forces?

- Which institution possesses ultimate civilian command authority over the armed forces?
- To what extent is ultimate civilian command authority over the armed forces shared between the state institutions? For example, what is the role of parliament? Is civilian ultimate command authority a collective responsibility of the cabinet or of one minister/prime minister/president only?
- Is there a difference between wartime and peacetime ultimate civilian command authority over the armed forces?

B. The use of public funds: authorisation & accounting

- What is the role of parliament in authorising the yearly defence budget? Is the defence procurement budget subject to parliamentary approval?
- To what extent is the defence budget open to parliament and open to the public at large (e.g., in percentages of total budget?)
- What is the role of independent national audit offices?

C. Appointment of top military commanders

- Does a military commander-in-chief exist?
- Which executive authority appoints military top commanders?
- What is the role of parliament in the appointing process?

D. Treaty making powers in the area of defence and security policy

- Is the government allowed to conclude secret treaties without the knowledge or consent of parliament?
- What is the role of parliament in concluding treaties - are they able to alter or to stop treaties prepared by government? Are treaties subject to a popular vote?
- Which is the role given to the regions?

III. Human Rights of Armed Forces Personnel

A. Limitations of human rights of armed forces personnel due to military necessity

- Are armed forces personnel allowed to join political parties and other associations of a political nature, or to stand for elections?
- Are armed forces personnel allowed to pursue their interests as employees via joining labour unions or via demonstrations

B. Conscription

- and strike?
- (If applicable) Are the rights of conscripted and volunteer armed forces personnel approached and restricted in the same manner or do differences exist?
 - Does compulsory military exist, not-exist or is it a dormant institution that can be activated in times of war?
 - Who is liable for compulsory military service (men vs. women, minimum age) and what are the modalities of the compulsory military service (duration, exemption grounds, penalties for draft evasion)?
 - Are the human rights of conscripts sufficiently protected, in particular, the right to decent treatment?

C. Conscientious objectors

- Is it recognised that any individual has the right to object against bearing arms and performing military service on the grounds of conscience?
- Who decides, and on what basis, about the claims of conscientious objectors?
- How long does it take to fulfil alternative service as compared to military service?

4.1. Security delivery

a) *The monopoly of force: para-military forces and sub-national actors*

Vital for any state is the question ‘Who has the monopoly of force?’ The question contains two concepts which need to be unpacked. To start with the latter, the concept of ‘force’ refers to various types of force (or forces) which can be present in a state, (a) regular armed forces; (b) state para-military forces which train and operate like armed forces, but are not part of the regular armed forces, e.g., military police or para-military forces of domestic security services; (c) non-state para-military forces – these type of forces mostly exist during times of conflict or civil war, e.g., in Chechnya; and, (d) private military/security companies. The concept of ‘monopoly’ refers to the question of who has the authority to establish and to maintain these forces. On the national level, this is normally the national government. On its behalf, the ministry of defence deals with the regular armed forces, whilst the ministry of justice or the ministry of interior/home affairs governs the state para-military forces. On the sub-national level, the regions may play a role in governing state para-military forces, as is the case in Spain where the regions have a responsibility in governing the ‘guardia civil’. It is also possible that regions or local authorities may call upon military or para-military forces in times of emergency. In addition to state actors on the national and regional or community level, private actors may have their private military/security companies. Previous studies have shown that the oversight and control of private security companies may raise concerns in terms of lack of adequate legal

framework, accountability and licensing, the use of fire arms as well as the relationship to state security providers.¹⁶ A related issue is to what extent citizens are allowed to bear arms and to what extent laws regulating small arms are effectively enforced by state bodies. Uncontrolled circulation of small arms erodes the state monopoly of force.¹⁷

*b) Sending troops abroad*¹⁸

The question of who has the power to send troops abroad is fundamental to the democratic governance of the armed forces, and should be defined in the Constitution. In some cases this power belongs to the parliament (e.g., Hungary, art. 19), the President (e.g., USA), or the government (e.g., UK). The parliamentary scope of control over the decision of sending troops abroad and related issues varies greatly from country to country. Analysing this issue is extremely important since the deployment of troops under international auspices is often criticised as suffering from democratic deficits, given the limited ability of national authorities to control their troops. Thus, the decision making role of parliaments is to be preserved in this area even though many decisions are taken at the international level; deployed troops should remain accountable to their national parliaments. Additionally, the constitution should establish the occasions in which such a deployment can be ordered, and what powers of oversight the parliament may possess (e.g., to which authority do military personnel deployed on an international mission respond?). The Venice Commission shares the concerns expressed by PACE that ‘a decision-making role of parliaments has to be safeguarded in the area of defence even though many decisions are taken at the international level.’¹⁹

*c) Exceptional situations and the domestic role of the military*²⁰

Regarding states of emergency that pose a fundamental threat to the country (i.e., natural disasters, civil unrest, an epidemic or economic crisis), the constitution should define which branch of the government is to declare the state of emergency; which human rights cannot be derogated from; and, what are the fundamental principles to be respected during the emergency. The constitution should also provide for special powers for dealing effectively with the emergency and for mechanisms for preventing the abuse of emergency powers by national authorities. This fundamental principle is reaffirmed also in PACE recommendation 1713(2005), stating that ‘exceptional measures in any field must be supervised by parliaments and must not seriously hamper the exercise of fundamental constitutional rights.’²¹

¹⁶ For example, Hans Born, Marina Caparini and Eden Cole, 2006 (forthcoming), *Regulating private security companies in Europe: Status and prospects*, Council of Europe, Strasbourg.

¹⁷ For example, see <http://www.smallarmssurvey.org/>

¹⁸ Ku and Kompson, *Democratic Accountability and the Use of Force in International Law*, 2003. Hans Born and Heiner Hänggi, *The Use of Force under International Auspices: Strengthening Parliamentary Accountability*, 2005, available at www.dcaf.ch/_docs/pp07_use-of-force.pdf; Ingrid Beutler and H. Born, ‘Between Legitimacy and Efficiency: A Comparative View on Democratic Accountability of Defence Activities in Democracies’, in G. Caforio, *Social Sciences and the Military: An Interdisciplinary Overview*, London, Routledge, 2006.

¹⁹ Reply from the Committee of Ministers adopted at the 969th Meeting of the Ministers’ Deputies (21 June 2006), doc. 10972, 24 June 2006, para 16.

²⁰ [Finer E.](#), *The man on horseback : the role of the military in politics*, New York : F.A. Praeger, 1962; DCAF Backgrounder, States of Emergency, October 2005.

²¹ PACE recommendation 1713(2005), *Democratic oversight of the security sector in member states*, point Vb.

Democratic governments should follow established procedures for authorising the use of military force at home. Constitutional norms usually establish which state body can declare the state of war and can proclaim its ending; define the special powers granted to governmental authorities; foresee the application of martial law until the state of war has been revoked; and, establish which human rights cannot be derogated from. Furthermore, in exceptional cases, the military can be called upon by the government of a regional state to render support to the police (i.e., Germany, constitution, art. 35.2).

*d) Visiting forces*²²

A clear framework for regulating visiting forces is becoming increasingly relevant because of the manifold international efforts taken so far in many countries to implement and further develop military partnership programmes.²³ The issue of visiting forces includes the use of military bases by foreign powers, transit operations, international military exercises on domestic territory, peacekeeping operations, as well as the particular issue of foreign (nuclear) weapons on domestic territory. The basis for visiting forces can be found in the agreement or treaty between the sending and receiving state. The agreement should regulate (a) who has ultimate power over the forces as well as territory and facilities used by those visiting forces; (b) repartition of criminal and civil jurisdiction between sending and receiving state; and, (c) responsibility for environmental and other type of damages caused by the visiting forces. In general, a state does not abandon its sovereignty entirely when it consents to the presence of foreign forces on its territory – including the provision of ‘functional’ immunity and privileges to the visiting forces. The receiving state retains the right to regulate the presence of foreign forces within the framework of applicable treaties and agreements.²⁴

4.2. Governance of force

*a) Ultimate command authority*²⁵

The constitution should clarify the roles played by the different oversight institutions, i.e., who is the head of the armed forces, its relationship with the military chain of command, the parliament and the executive and civil society. The constitution also defines who acts as the commander in chief of the armed forces in wartime (e.g., Ministry of Defence, Head of State, or Prime Minister). The constitution should articulate the modalities of the supervision exercised by the parliament on the executive (power to summon ministers, participation in the definition of strategic policy issues) and the role of the judiciary in punishing any abuse of powers and other

²² Woodliffe J., *The Peacetime Use of Foreign Military Installation under Modern International Law*, Martinus Nijhoff Publishers, 1992.

²³ Fleck, D. (ed.), 2001, *The handbook of the law of visiting forces*, Oxford: Oxford University Press, p. 3.

²⁴ ‘Opinion on the international legal obligations of the Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners’, adopted by the *Venice Commission* at its 66th plenary session, Venice, 17-18 March 2006, p. 25

²⁵ ‘Democratic oversight of the security sector in member states’, Doc. No. 10567, *Parliamentary Assembly of the Council of Europe*, Strasbourg, 2 June 2005, para 8: The various oversight institutions play different roles. The executive is responsible for controlling (in the sense of managing) the security sector on a day-to-day basis. The parliament deals with the general oversight of the security services, including adopting the budget, enacting adequate laws, and conducting inquiries in case of wrong-doing or failing performance. The judiciary plays a crucial role because it gives or withholds authorization for the use of exceptional powers with a high potential for human rights violations and prosecutes members of the security services in case of wrong-doings. Civil society performs the function of watchdog and can provide the public with a second opinion, in addition to information coming from the government.

misconducts by security sector actors. The effectiveness of these mechanisms will depend in large part on how free the political and judicial systems are from interference by the security forces.

b) The use of public funds: authorisation and accounting²⁶

The Constitution and legal framework should: identify which branch of government has the power to approve the budget; define the parliamentary involvement in assessing defence priorities and needs (e.g., defence budget discussed in parliament, draft of national security strategy); and, define parliamentary influence on the definition of the budget. The constitution should also outline the modalities of parliamentary involvement in the budget execution and control. For example, independent auditors, such as the Court of Accounts or the National Budget Office, should report to the parliament about defence budget execution and about defence procurement. The constitution should clarify the conditions under which the parliament may have access to classified budget documents.

c) Appointment of top military commanders

The Constitution and legal framework should define which state body appoints and promotes the top-commanders of the armed forces, in particular, the commander-in-chief and the commanders of the army, navy and air force. It must be underlined that some countries do not have a military commander-in-chief (e.g., Germany, Austria and Switzerland). In these countries, a so-called inspector-general heads the armed forces. In general, however, the appointment of top commanders can be subject to the approval of the head of state (president or monarch), prime minister, minister of defence, the cabinet and parliament, or a combination of these actors.

d) Treaty making powers in the area of defence and security policy²⁷

The Constitution should define which state body has the power to conclude treaties and the procedure to be followed in the area of defence and security policy. Some issues of particular relevance are the role of parliament, the role of regions, and commitment to international law.

4.3. Issues relating to Human Rights

a) Limitations of human rights of armed forces personnel due to military necessity²⁸

The ECHR treats members of the armed forces as ‘citizens in uniform’ and the general approach of the ECtHR can be derived from the case of *Engel v Netherlands* (1976):

54. ‘... [T]he Convention applies in principle to members of the armed forces and not only to civilians. It specifies in Article 1 and 14 that “everyone within the jurisdiction” of the Contracting States is to enjoy “without discrimination” the rights set out in Section I...’

According to the concept of citizen in uniform, soldiers should enjoy, in principle, the same fundamental rights as every citizen, subject to certain limitations and duties imposed by military duty. The exercise of unlimited human rights and fundamental freedoms by armed forces

²⁶ Greenwood D., *Transparency in defence budgets and budgeting*, DCAF Working Paper No.73, 2002.

²⁷ See Salmon T., [The European Union: Just an alliance or a military alliance?](#), *Journal of Strategic Studies*, October 2006, Vol. 29 Issue 5, p813-842, on the effects of the European Union on the foreign, security and defence policies of several member states.

²⁸ Nolte G. (ed.), *European Military Law Systems*. Berlin: De Gruyter Recht, 2003; Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, 2006.

personnel is considered to be detrimental to the need of discipline in the armed forces and its political neutrality. It is instructive to speculate as to why and how the concept of citizen in uniform developed in the constitutions of the CoE Member States and to analyse what restrictions on the rights and freedoms are justified for a soldier. It is also important to elaborate on the relationship between the concept of citizen in uniform and likely actions by the military against fellow citizens.

Though the ECtHR has embraced the concept of citizen in uniform, it has tended to give states a wide 'margin of appreciation' in cases involving restrictions of human rights of armed forces personnel.²⁹ Thus, CoE member states follow a number of different approaches. In some states it is underlined that working in the military is 'just another job', and similarities can be identified between the rights of civilian and military employees. In these states (e.g., Germany and the Netherlands), armed forces personnel enjoy the right to join a military union, to demonstrate, to join a political party, to stand for elections on sub-national level or to participate in demonstrations. Another approach is to stress the differences between the military and civilian personnel, and to deny soldiers the right to join a political party, to join a military union, or to participate in demonstrations (e.g., France).³⁰

b) Conscription

Constitutions of nearly all CoE member States contain provisions to the effect that the defence of the state is a duty and moral responsibility of every citizen. Through these and other constitutional provisions, states have the power to draft (mostly male) citizens into the army. Many states in the CoE area, however, have renounced on the right to draft citizens. In particular after the end of the Cold War, conscript soldiers were less needed because armed forces became smaller, more focussed on peacekeeping operations and relying increasingly on high-tech equipment.³¹ For those CoE member States which maintain conscription, it is important that the 'citizen in uniform' concept applies (see before), that a proper procedure is in place for recruiting and selecting conscripts, as well as that conscripts' rights are protected in practice. Particularly relevant are the issues of minimum recruitment (18 years concerning obligatory military service)³² and the right to proper treatment (ECHR, art. 3).

c) Conscientious objectors

Conscientious objectors can be defined as individuals who oppose bearing arms or who object to any type of military training or service. Although all objectors take their position on the basis of conscience, they may have varying religious, philosophical or political reasons for their beliefs. Within CoE member States, Turkey and Azerbaijan are the only two countries which have refused to recognise conscientious objectors. In 2006, the ECtHR found that Turkey had violated art 4 of the ECHR in a case dealing with conscientious objectors.³³ Most of the states

²⁹ Ian Leigh, 2005, *Human rights and fundamental freedoms of armed forces personnel: The European Court of Human Rights*, DCAF Working paper no. 165, p. 5. Available at http://www.dcaf.ch/_docs/WP165.pdf

³⁰ Nolte G. (ed.), *European Military Law Systems*. Berlin: De Gruyter Recht, 2003, pp. 302-303.

³¹ Born, H., Fluri, Ph., Johnson, A., 2003. *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, Handbook No. 5 for Parliamentarians*, Inter-parliamentary Union/DCAF, Geneva, pp. 163-164.

³² 'States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.' Article 2 of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, (entered into force on 12 February 2002).

³³ Ulke v. Turkey, ECtHR, 2006. Available at: <http://www.echr.coe.int/Eng/Press/2006/Jan/Chamberjudgment%20C3%9C1kevTurkey240106.htm>.

recognising the status of conscientious objectors provide for an alternative service either within the armed forces (without bearing arms) or outside the armed forces in institutions of public interest (e.g., hospitals, environmental protection organisations or nurseries).

5. Existing Literature and Research

To date, very little reference material exists on the constitutional issues involved in the need to ensure civilian command authority over the armed forces. The existing research can be divided into two main categories: comparative academic studies and studies dealing with specific policy issues. The annex to this study provides an overview of the literature on civilian command authority over armed forces and the extent to which the literature covers all CoE member States.

5.1. Comparative academic studies

There are few comparative studies dealing with the legal issues involved in the civilian oversight of the armed forces. Among them, are studies that conduct a comparative **analysis of the military system** of selected states. For example, *European Military Law Systems*, covers the UK, Italy, Germany, Denmark, Belgium, France, Luxembourg, the Netherlands, Poland and Spain³⁴. The constitutional dimension of the control over armed forces, however, is only one of the many aspects covered by this manual. Other studies deal with **human rights of armed forces personnel** in peacetime as well as in wartime and during multinational operations, analysing the possible limitations to human rights of military members justified by military necessities.³⁵ Other publications are even more specific, focusing on the human rights of conscripts.³⁶ A further body of literature explores the legal issues raised by the **international deployment of armed forces**. The study that provides the most exhaustive analysis of this issue confines the research to the experiences of only nine countries (Canada, France, Germany, India, Japan, Russia, Norway, UK, USA);³⁷ the main question raised is, who should be accountable to the citizens of these nations and to the citizens of states which are the object of the deployments, for the decisions taken during such military action. The constitutional issues linked to international operations are dealt with only incidentally in the abovementioned book. Finally, there are a certain number of studies that broadly analyse the challenges of democratic supervision of national and international security structures.³⁸ As evident from this short review of the existing literature, the main shortcoming of the available studies is that they are concerned mainly with a selected number of western countries.

³⁴ Nolte G. (ed.), *European Military Law Systems*. Berlin: De Gruyter Recht, 2003.

³⁵ Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, 2006.

³⁶ Sassoli M. and McChesney A., *Conscripts rights and military justice training manual/guide*. (2 volumes). Centre for Recruits' and Servicemen's Right Protection of the Republic of Moldova, Chisinau, 2002. The manual and guide is to be used for training courses.

³⁷ Ku C. and Jacobson H, (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, 2002.

³⁸ Born, H., Hänggi, H., (eds.), *The Double Democratic Deficit: Parliamentary Accountability of the Use of Force under International Auspices*, Ashgate Publishers, London, 2004; Born, H. 'Democratic Control of Armed Forces: Concepts, challenges and Issues.' In: Caforio, G. (ed.), 2003. *Handbook of Military Sociology*, Plenum/Kluwer Academic Publishers, New York, N.J; Born, H., 'Democratic Control of the Military in the US, France, Sweden and Switzerland', in: K. von Wogau (ed.) 2003. *European Defense for the 21st Century*. Freiburg, Basel, Wien: Herder Publishers

A number of studies deal with a single specific issue. Several of them analyse the challenges of **parliamentary supervision of international operations** and of the use of force under international auspices, without providing however, a comprehensive comparative analysis of the constitutional issues involved.³⁹ Other studies deal with the regulation of **states of emergency**;⁴⁰ and, with the independent oversight mechanisms that oversee the security sector, such as, parliamentary committees⁴¹ or ombudsman institutions.⁴² Another important body of research is devoted to the study of the role of Parliaments in ensuring accountability and transparency in **defence budgeting** and in **defence procurement** mechanisms.⁴³ Finally, there are studies that address the legal issues raised by the use of **military bases** by foreign states.⁴⁴

5.2 Policy-oriented studies

The last group of studies aim mainly at advising national parliaments and governments on how to improve their national legislation and national policies relating to specific issues of civilian command authority over armed forces. Usually these studies provide examples of good practices from selected states that can serve as models for other states – mainly developing democracies, wishing to adopt institutional or legislative reforms.⁴⁵

5.3 Need for Further Research

The need to ensure civilian command authority over the armed forces in their national and international operations remains an important issue in several CoE member states and raises important constitutional issues. However, as it becomes evident during a preliminary review of

³⁹ Born, H., Hänggi, H., 2005, 'Governing the Use of Force under International Auspices: Deficits in Parliamentary Accountability'. In: *SIPRY Yearbook 2005: Armaments, Disarmaments and International Security*. Oxford University Press; Born, H., 'Parliaments and the Deployment of Troops Abroad under UN, NATO and EU Auspices: A Double Democratic Deficit?' In: *S+F. Sicherheit und Frieden/Security and Peace*, Vol. 22, 2004, No. 4, pp. 109-116; Born, H., Hänggi, H., (eds.), *The Double Democratic Deficit: Parliamentary Accountability of the Use of Force under International Auspices*, Ashgate Publishers, London, 2004; Ku C. and Jacobson H, (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, 2002; *Sending Troops Abroad*, DCAF Backgrounder, forthcoming.

⁴⁰ *States of Emergencies*, DCAF Backgrounder, 2005, available at http://www.dcaf.ch/_docs/bg_states-emergency.pdf.

⁴¹ *Parliamentary Committees on Defence and Security*, DCAF Backgrounder, 2005, available at http://www.dcaf.ch/_docs/bg_intelligence_oversight.pdf.

⁴² *Military Ombudsmen*, DCAF Backgrounder, 2005, http://www.dcaf.ch/_docs/bg_military-ombudsman.pdf.

⁴³ Greenwood D., *Transparency in Defence Budgets and Budgeting*, DCAF Working Paper Series- No.73, 2002.

⁴⁴ Woodliffe J., *The Peacetime Use of Foreign Military Installation under Modern International Law*, Martinus Nijhoff Publishers, 1992.

⁴⁵ Many of the policy oriented studies can be found on the website of the Geneva Centre for the Democratic Control of Armed Forces, www.dcaf.ch. Non exhaustive examples of policy oriented studies are: Born, H., Fluri, Ph., Johnson, A., 2003. *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, Handbook No. 5 for Parliamentarians*, Inter-parliamentary Union/DCAF, Geneva; Born, H., 'Strengthening Parliamentary Oversight of the Security Sector in Transition Countries: An Inventory of Actors'. In: 2003. *Policy Dialogue on Legislative Development*. United Nations Development Programme (UNDP), Belgian Ministry of Foreign Affairs, Brussels; Born, H., Fluri, Ph., Lunn, S., eds. (2003). *Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector and its Reform*. DCAF/NATO Parliamentary Assembly: Geneva/Brussels; Milan Jazbec, *Defence Reform in the Western Balkans: The Way Ahead*, DCAF policy paper, April 2005. This study analyses defence's reforms in Albania, Bosnia and Herzegovina, Croatia, Macedonia, The State Union of Serbia and Montenegro.

the non-exhaustive list of literature, the studies available on civilian control over armed forces do not deal with constitutional issues per se; either they deal with the broader legal aspects involved in the democratic supervision of the military or they are policy-oriented studies.

Furthermore, they analyse mainly the solutions adopted in a selected number of western countries; comprehensive comparative studies on South and Eastern European and former Soviet Union states are missing. Moreover, the research is not always up to date. Therefore, the research available is not sufficient to give a comprehensive overview of the status quo in the field. The lack of systematic research concerning the constitutional issues involved in the civilian command authority over the military has been acknowledged also by the Council of Europe Committee of Ministers: 'This is a topic which has so far not been the object of in-depth reflection within the Council of Europe'.⁴⁶

For these reasons, further research might be considered as necessary. In the following section options for future research are elaborated, with the aim of filling the existing gap in research and to shed light on the common constitutional principles regulating democratic civil-military relations in the CoE Region.⁴⁷

6. Options for further research

There are two main options for conducting this study:

- Option 1: On the basis of existing literature, establish a comprehensive understanding of all related issues. This could be carried out in a short time frame against moderate costs. No field work would be required. The main disadvantage of this method would be that the expert, or group of experts, may lack the necessary knowledge of the local context and, therefore, the means for analysing and evaluating specific local legislation and policies.
- Option 2: According to the second solution, an expert would draft a questionnaire to be filled out by local experts or authorities. On the basis of the responses to the questionnaire, the expert would conduct a comparative analysis of the different solutions adopted by CoE member States, highlighting best practices in the field. By opting for this methodology, the study would take into account the local context without losing its comparative dimension. Furthermore, building up a web of local experts would facilitate the collection of national laws on the civilian control of armed forces.

7. Further issues

The last issue to be defined is whether this study would deal exclusively with constitutional provisions, or also with national legislation (related to relevant constitutional provisions). Examples of relevant national legislation are military service law, conscientious objectors law or

⁴⁶ Reply from the Committee of Ministers adopted at the 969th Meeting of the Ministers' Deputies (21 June 2006), doc. 10972, 24 June 2006, para. 14.

⁴⁷ Indeed, as remarked also by Born, H., Fluri, Ph., Johnson, A., in *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, Handbook No. 5 for Parliamentarians*, Inter-parliamentary Union/DCAF, Geneva, 2003, p.22, no internationally agreed standards in the field of democratic and parliamentary oversight exist, as security and defence were regarded as falling into the domain of national sovereignty. There exist some regional standards, as for example the OSCE Code of Conduct on Politico-Military aspects of Security and the UN Code of Conduct for Law Enforcement Officials, but they do not refer specifically to the constitutional regulations of civilian control over armed forces.

the law on states of emergency and on sending troops abroad. These and other laws, are extremely important for ensuring civilian command authority over the armed forces. Expanding the scope of this study to such relevant national legislation would be of fundamental importance in order to achieve a complete picture of the status quo of the various mechanisms devised by the constitution and by national legislation in order to ensure civilian control over the armed forces.

ANNEX

Survey of existing literature on civilian command authority over the armed forces Council of Europe member States

I: Security Delivery

II: Governance of Force

**III: HRs of AF
Personne
I**

	A	B	C	D	A	B	C	D	A	B	C
General		1				6			8	9	9
Albania			3, 17			16				18	
Andorra											
Armenia										18	
Austria										18	
Azerbaijan										18	
Belgium		1		3		1			7		18
Bosnia and Herzegovina			17								18
Bulgaria			13			7, 16				18	
Croatia			17			16					18
Cyprus				3						18	
Czech Republic						1					18
Denmark						1			7	18	18
Estonia											
Finland										18	18
France		1, 2, 10, 11	11	3		1			7		18
Georgia						16				18	18
Germany		1, 10	12, 13	4, 5		1			7	18	18
Greece				3						18	18
Hungary		1	12			1					18
Iceland				3							
Ireland											
Italy		1				1			7		18
Latvia											18
Lichtenstein											
Lithuania										18	18
Luxembourg									8		
Malta				3							
Moldova										18	
Monaco											
Netherlands		1		3		1, 16			7		18
Norway		1, 10				1				18	18
Poland		1				1			7	18	18
Portugal		1		3		1					18

Romania			13			16				18	
Russian Federation				4						18	18
San Marino											
Serbia			17								18
Slovakia											18
Slovenia											18
Spain		1		3		1, 16			7		18
Sweden		1, 2, 11	11			1					18
Switzerland		2, 11	11							16	18
The Former Yugoslav Republic of Macedonia			17			15				18	18
Turkey				3						18	
Ukraine											
United Kingdom		1, 10	12	3		10, 16			7		

LEGENDA

I: Security Delivery

- I A: The monopoly of force: para-military forces and sub-national actors
- I B: Sending Troops Abroad
- I C: Exceptional Situations and the Domestic Role of the Military
- I D: Visiting Forces

II: Governance of Force

- II A: Ultimate civilian command authority
- II B: The Use of Public Funds: Authorization and Accounting
- II C: Appointment of Top Commanders
- II D: Treaty Making Powers in the area of defence and security policy

III: Human Rights of Armed Forces Personnel

- III A: Limitations of human rights of armed forces personnel due to military necessity
- III B: Conscription
- III C: Conscientious Objection

LITERATURE

1. Hans Born and Heiner Hänggi, *The Use of Force under International Auspices: Strengthening Parliamentary Accountability*, 2005. Available at: www.dcaf.ch/_docs/pp07_use-of-force.pdf.
2. Ingrid Beutler and H. Born, 'Between Legitimacy and Efficiency: A Comparative View on Democratic Accountability of Defence Activities in Democracies', in G. Caforio, *Social Sciences and the Military: An Interdisciplinary Overview*, Routledge, 2006.
3. Woodliffe J., *The Peacetime Use of Foreign Military Installation under Modern International Law*, Martinus Nijhoff Publishers, 1992.
4. Fleck, D. (ed.), 2001, *The handbook of the law of visiting forces*, Oxford: Oxford University Press, p. 3.
5. Salmon T., [The European Union: Just an alliance or a military alliance?](#), *Journal of Strategic Studies*, Oct2006, Vol. 29 Issue 5, pp. 813-842.
6. Greenwood D., *Transparency in defence budgets and budgeting*, DCAF Working Paper No.73, 2002.
7. Nolte G. (ed.), *European Military Law Systems*. Berlin: De Gruyter Recht, 2003.
8. Rowe P., *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, 2006.
9. Sassoli M. and McChesney A., *Conscripts rights and military justice training manual/guide*. (2 volumes). Centre for Recruits' and Servicemen's Right Protection of the Republic of Moldova, Chisinau, 2002.
10. Ku C. and Jacobson H, (eds.), *Democratic Accountability and the Use of Force in International Law*, Cambridge University Press, 2002.
11. Born, H., 'Democratic Control of the Military in the US, France, Sweden and Switzerland', in: K. von Wogau (ed.) 2003. *European Defense for the 21st Century*. Freiburg, Basel, Wien: Herder Publishers.
12. *States of Emergencies*, DCAF Backgrounder, 2005.
13. *Parliamentary Committees on Defence and Security*, DCAF Backgrounder, November 2005.
14. *Military Ombudsmen*, DCAF Backgrounder, 2005.
15. Woodliffe J., *The Peacetime Use of Foreign Military Installation under Modern International Law*, Martinus Nijhoff Publishers, 1992.
16. Born, H. (Lead Author), Fluri, Ph., Johnson, A., 2003. *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, Handbook Nr. 5 for Parliamentarians*, Inter-parliamentary Union/DCAF, Geneva.
17. Born, H., Fluri, Ph., Lunn, S., eds. (2003). *Oversight and Guidance: The Relevance of Parliamentary Oversight for the Security Sector and its Reform; Milan Jazbec*, Defence Reform in the Western Balkans: The Way Ahead, DCAF POLICY PAPER, April 2005.
18. *Military Recruitment and Conscientious Objection: A Thematic Global Survey*, Conscience and Peace Tax International, 2005.