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STUDY ON DEMOCRATIC CONTROL OF ARMED FORCES

**INTERNAL CONTROL MECHANISMS IN ARMED FORCES
IN COUNCIL OF EUROPE MEMBER STATES**

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1. Introduction

Internal accountability mechanisms are a crucial component in the democratic oversight of armed forces. These controls serve to regulate the conduct of the armed forces from the inside, thereby facilitating executive control over the military, as well supporting external accountability mechanisms. Indeed, internal accountability instruments may be seen as the first layer of oversight of the military because they are designed to regulate the conduct of personnel prior to the involvement of external oversight bodies.*

The essence of accountability mechanisms is to ensure that armed forces are both professional and committed to democracy, the rule of law and human rights. This study analyses which internal military mechanisms contribute positively to the democratic disposition of the members of the armed forces.

Internal accountability mechanisms can be divided into five categories, the first of which is the internal regulatory framework that delineates the laws and regulations which apply to the armed forces. Secondly, there are regulatory institutions which serve to enforce this framework through the investigation and prosecution of breaches of regulations and laws. Thirdly, the rights and duties of personnel form the basis of what individual members of armed forces may legitimately do and how they can expect to be treated within the military. Fourthly, command responsibility serves to ensure that both standards of professionalism and the afore mentioned regulatory framework are adhered to. Finally, military training and socialisation are designed to fulfil a preventative role, ensuring that a particular set of values and standards are engrained at all levels within the armed forces.

2. Internal Regulatory Framework

Military law systems provide the overall framework through which the actions of all members of the armed forces are regulated. These systems serve as the primary mechanisms of internal accountability and are designed to promote discipline, uniformity and efficiency, as well as to safeguard the reputation of the armed forces.² According to Georg Nolte and Heike Krieger's seminal study on European military law systems, there are two basic models of military law systems in Europe, the most common framework makes a distinction between military disciplinary law and criminal law, whereas the second model (which is found only in the UK and Denmark) does not make this division.³ The focus of this paper is on the internal regulations, while acknowledging the importance of the wider (external) regulatory framework, (including military service law, conscription law and conscientious objection law), a discussion of these regulations is beyond the scope of this study.

Military law systems

Military disciplinary law regulates the conduct of members of the armed forces and serves as the bedrock of internal regulation. The infringement of disciplinary law does not necessarily entail the breach of criminal law because there are many actions that breach military discipline but are not criminal offences.⁴ Criminal law also regulates the actions of members of armed forces who may be prosecuted in either military or civilian courts for criminal offences

* This work draws heavily upon the forthcoming publication by Hans Born and Ian Leigh, *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming).

² George Nolte and Heike Krieger, "Comparison of European Military Law Systems," in *European Military Law Systems*, ed. G. Nolte (Berlin: De Gruyter Rechtswissenschaften, 2003), p. 135.

³ Nolte and Krieger, p. 129.

⁴ Hans Born and Ian Leigh, "Proper Treatment of Armed Forces Personnel," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming).

committed whilst on duty.⁵ In most Council of Europe (CoE) member states special criminal legislation applies to the military and this is either included in general criminal law or in code of criminal procedure specific to the military.⁶ Military law systems regulate a broad range of relationships and activities including: the relationship between superiors and personnel, complaints procedures, the structure of armed forces and the social rights of personnel.⁷

Codes of conduct or professional ethics

In addition to military laws, many armed forces also have more codes of conduct or ethics. These codes do not form part of military disciplinary law but are frameworks of values to which it is hoped that members of armed forces will assent. These guidelines are conveyed to members of the armed forces through training, and if they are successfully internalised they can serve as an additional constraint on the actions of personnel.

3. Regulatory Institutions

There are an array of institutions which monitor and enforce compliance with laws and regulations within the military. This institutional architecture varies greatly between CoE member states. The main regulatory institutions are outlined and examples from CoE member states are used to demonstrate the variation in the function and powers of these institutions.

Ombudsmen and Inspector Generals

The functions of ombudsmen and inspector generals are covered in detail in another section of this report and therefore their role shall not be fully explored here. Nevertheless, since these institutions are key mechanisms of internal accountability they merit a brief mention.

The principal functions of ombudsmen are to investigate complaints lodged by members of the armed forces, and to formulate recommendations in response to problems. In states that have ombudsmen who deal with military affairs, their powers, position and status vary significantly. Whilst it is beyond the scope of this paper to conduct an assessment of the relative merits of these structures, it is worth noting the different forms of ombudsmen that exist across CoE member states. In states such as Belgium and the Netherlands the ombudsman is integrated within the military chain of command and they are often known as inspector generals.⁸ In other countries, including Norway and Germany, there is an independent parliamentary ombudsman who deals specifically with military issues.⁹ Finally, in Sweden and Poland military complaints are handled by a general ombudsman who deals with complaints relating to public and governmental authorities more generally.¹⁰

⁵ The forum in which breaches of criminal law by members of the armed forces are dealt with varies significantly between states. In Denmark, Germany and Sweden civilian courts have jurisdiction over all criminal offences committed by members of the armed forces. By contrast, in Turkey, Switzerland and Poland military courts have exclusive jurisdiction over criminal offences committed by members of the armed forces. In other states, such as the UK and France, there are overlapping jurisdictions between civilian and military courts. See Born and Leigh, "Discipline and Military Justice," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming). See also Nolte and Krieger, 160-166.

⁶ Nolte and Krieger, 156.

⁷ Ibid., 19-23.

⁸ See, The Netherlands Inspector General for Defence website.

<http://www.mindef.nl/ministerie/igk/english>, (accessed, 20 August 2007), and The Inspector General Mediator of the Belgium Armed Forces, cited in Born and Leigh, "Ombudsman's Institution," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming).

⁹ For more on information on the Norwegian Parliamentary Ombudsman for the Armed Forces: <http://www.ombudsmann.no/mil/mil/english.asp>, (accessed, 20 August).

¹⁰ Born and Leigh, "Ombudsman's Institution."

Military courts

The role of military courts is dealt with more fully elsewhere in this report, however, they demand a mention within the context of this section. Military courts deal with both criminal offences and military discipline offences (or both) depending on the system.¹¹ In all systems military courts (or tribunals) handle breaches of internal disciplinary regulations which cannot be dealt with through the chain of command, and in some states military courts also deal with criminal offences committed by members of the armed forces.¹²

4. Rights and duties of individual personnel

One of the most significant aspects of internal control within armed forces are the rights and duties that belong to all members of the armed forces. Members of the armed forces enjoy rights which are provided and guaranteed by international human rights law, international agreements and national laws. At the same time, personnel carry a number of obligations which are placed upon them by international humanitarian law, international human rights law and national statutes. These sets of rights and duties combine to provide a framework which both regulates the action of individuals in the armed forces and also governs the manner in which they must be treated.

Rights of members of the armed forces: 'citizens in uniform'

There are a series of rights which are non-derogable and cannot therefore be subject to modifications, these include: the right to life; the right to protection against cruel or degrading treatment; and the prohibition of slavery, servitude, and forced labour. The safeguarding of these rights is important not only from a moral perspective but also in terms of upholding standards of military professionalism. It is the responsibility of superiors within the chain of command to ensure that these rights are upheld (see below). Nevertheless, there have been several high profile incidents in CoE member states, involving the failure of superiors to protect the fundamental right of new recruits. In the UK, there have now been three inquiries into the deaths of four young recruits at Deepcut Army Barracks in 2002, and the circumstances of these deaths remain disputed.¹³ Serious allegations have also emerged regarding the inhuman and degrading treatment of recruits under the Russian military's *dedovshchina* system, which Human Rights Watch described as being characterised by 'predation, violence and impunity.'¹⁴

In principle armed forces personnel enjoy the same rights as civilians since they are 'citizens in uniform,' however, these rights are subject to restrictions that are justified in terms of military discipline and national security.¹⁵ Indeed, the restrictions imposed on the freedoms and rights of

¹¹ Ibid.

¹² For a comparative overview of the jurisdictions of military courts, see Born and Leigh "Discipline and Military Justice."

¹³ Amnesty International, 'United Kingdom, Army Barracks Deaths, Families Demand Justice,' 18 June 2003, [http://web.amnesty.org/library/pdf/EUR450042003ENGLISH/\\$File/EUR4500403.pdf](http://web.amnesty.org/library/pdf/EUR450042003ENGLISH/$File/EUR4500403.pdf). (accessed 21 August 2007). See also BBC News, 'The Deepcut Investigations,' 19 June 2006, http://news.bbc.co.uk/2/hi/uk_news/4215635.stm. (accessed 21 August 2007).

¹⁴ Human Rights Watch, 'The Wrongs of Passage: Inhuman and degrading treatment of new recruits in the Russian armed forces,' *Human Rights Watch*, Vol. 16, No. 8, (October 2004), 3.

¹⁵ This was stated by the European Court of Human Rights, cited in Born and Leigh, "Proper Treatment of Armed Forces Personnel," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming). See also Parliamentary Assembly of the Council of Europe, 'Human Rights of Members of the Armed Forces, Doc.10861, March 2006:

service personnel may be viewed as important internal accountability mechanisms because they are designed to ensure that: discipline is maintained, the armed forces do not become politicised, and that national security is not compromised. In pursuit of these aims there are several fundamental rights and freedoms that are frequently subject to constraints in relation to armed forces personnel, these include: freedom of expression, freedom of association, the right to vote and the right to stand for elected office.¹⁶

The extent to which these fundamental rights of armed forces personnel are restricted varies significantly between CoE member states. In most states the limitations on soldiers' rights must be prescribed by law and have to be proportional to the justification provided for restricting rights, as is required by the European Convention of Human Rights (ECHR).¹⁷

Freedom of expression

Members of the armed forces are generally restricted in their freedom to express opinions, this is particularly true with regards to political matters and issues related to the operational work of the armed forces. Restrictions on freedom of expression are justified in terms of the secrecy requirements surrounding information relating to national security, and insubordination as the result of public displays of dissent.¹⁸ The European Court of Human Rights has accepted these restrictions, asserting that:

'the proper functioning of an army is hardly imaginable without rules designed to prevent servicemen from undermining military discipline, for example by writings.'¹⁹

In the UK for example, the Ministry of Defence recently banned members of the armed forces from using electronic communications to discuss their professional experiences without permission, and this rule shall apply to both on and off duty personnel.²⁰ These measures have been justified in reference to operational security and the fear that armed forces may receive negative publicity as a result of comments made by personnel.²¹

Freedom of association

The membership of unions and associations is another fundamental right which is often restricted for armed forces personnel.²² The most pertinent arguments justifying a restriction of this right are: the requirement that essential national security operations of the armed forces are not disrupted by participation in unions or associations; and the need to maintain military

<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10861.htm>, (accessed, 22 August 2007).

¹⁶ All of these rights and freedoms are guaranteed in international human rights treaties. For the 'freedom of expression' see the Universal Declaration on Human Rights, Article 19; on the 'freedom of assembly' see the International Covenant on Civil and Political Rights, Article 21; for 'freedom of association' see the Universal Declaration on Human Rights, Article 20; 'the right to stand for elected office' and the 'right to vote,' see Universal Declaration on Human Rights, Article 21.

¹⁷ Nolte and Krieger, p. 75

¹⁸ Born and Leigh, "Civil and Political Rights," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming).

¹⁹ *Engel and Others v. the Netherlands*, judgement of 8 June 1976, ECHR, Series A, no. 22, para. 100.

²⁰ James Macintyre, "MoD to impose gagging orders on blogs written by army personnel," *The Independent*, 10 August 2007, <http://news.independent.co.uk/uk/politics/article2851504.ece>. (accessed, 20 August 2007).

²¹ Ibid.

²² The right to form and join trade unions and associations is guaranteed in both the European Convention on Human Rights, Article 11(2), and the International Covenant on Civil and Political Rights, Article 22 (2).

discipline and the chain of command which may be threatened by the 'insubordination' of union or associational activity.²³ Thus, in several CoE member states (Italy, Spain and France) it is prohibited for armed forces personnel to form or join unions.²⁴ In contrast, for example, members of the Danish, Dutch, German and Hungarian armed forces are entitled to form unions and professional associations, however, they are not allowed to take industrial action.²⁵

Political neutrality

In the majority of CoE member states, members of the armed forces are now permitted to vote. However, in many countries, members of the armed forces are restricted from undertaking political activities such as standing for elected office and holding membership of political parties. These restrictions are a form of internal control mechanism which are justified in accordance with the need for armed forces to remain politically neutral.²⁶ Indeed, the OSCE Code on the Politico-Military Aspects of Security stipulates that each state must ensure that its armed forces remain politically neutral.²⁷ Moreover, it has been argued that political associations may detract from core military tasks and there is also a clear need to prevent political disagreements from permeating the military.²⁸ The extent of restrictions on the rights of armed forces to participate in political activities usually depends on historical experience; where the military has previously played an active role in politics, its members are likely to be more constrained.

In both Spain and Poland members of the armed forces are prohibited from engaging in any political activity both on and off duty, this includes membership of political parties and the distribution of political propaganda.²⁹ In the United Kingdom the laws regulating the political activities of service personnel are less restrictive, servicemen may be members of a political party and express political opinions. However, these actions must not breach regulations on military discipline, and the armed forces are disallowed from standing for elected office.³⁰

In contrast, several CoE member states (including the Netherlands and Germany) place very few restrictions on the political rights of their personnel. In these states armed forces personnel may be members of political parties, stand for election at the local level, and even distribute political publications within military installations.³¹ In fact, these activities are not only permitted but also facilitated by the armed forces, which grant leave to those members that wish to run for elected office.³²

²³ Born and Leigh, "Military Unions and Associations," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming).

²⁴ Nolte and Krieger, 84.

²⁵ For example in Hungary the Honvedszakszervezet (Trade Union of Military Servicemen) has 10,000 members, cited in Born and Leigh, "Military Unions and Associations," Nolte and Krieger. 84.

²⁶ Nolte and Krieger, 77.

²⁷ Organisation for Security and Cooperation in Europe, "OSCE Code of Conduct on Politico-Military Aspects of Security," paragraph 23. http://www.osce.org/documents/sg/1994/12/702_en.pdf. (accessed 22 August 2007).

²⁸ Born and Leigh, "Civil and Political Rights."

²⁹ Nolte and Krieger, 78.

³⁰ *Ibid.*, 80.

³¹ *Ibid.*, 80-83.

³² *Ibid.*, 82.

Duties of members of armed forces

Members of the armed forces are legally required to respect an number of duties in their work. These duties ensure that military discipline and the chain of command are upheld and also make sure that individual soldiers do not act in breach of either national or international laws. The fulfilment of these duties is ensured through internal disciplinary sanctions, military criminal law, and international criminal law which may be enforced by the International Criminal Court.³³

Arguably the most significant obligation bestowed upon members of the armed forces is the 'principal of individual accountability' which makes every member of the armed forces personally responsible for committing an illegal act. This principle applies in all CoE member state armed forces and is firmly established in the third Geneva Convention which states,

"the fact that a person charged with an offence [.....] acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him."³⁴

There are a set of obligations that are designed to ensure respect for military discipline and the chain of command which broadly fall under the 'duty to obey,' these include, the duty to comply with orders, the duty to respect superiors and the duty of loyalty. In all national armed forces the duty to obey commands is stipulated by military rules and may only be derogated from in the event that orders are illegal.³⁵ Equally, members of armed forces have the duty to disobey an illegal or improper order. Improper orders are those that command subordinates to fulfil tasks which do not serve a military purpose, such as harvesting vegetables or engaging in private business.³⁶ Illegal orders are commands which contravene either national or international law.

In most states the members of the armed forces are also obligated to uphold rules on secrecy concerning military activities. This requirement is justified in terms of national security and the need to ensure that the details of operational plans and activities are not unintentionally disclosed to third parties.

5. Command responsibility

Command responsibility refers to the duty of superiors to promote and maintain professional standards throughout the military chain of command. This represents an invaluable mechanism of internal accountability and is a key structure in all CoE member state armed forces. Military commanders have both a moral duty and the legal responsibility to ensure that their subordinates adhere to all applicable laws and regulations. In fulfilling this role military superiors serve preventative, investigative and disciplinary functions.

Commanders serve a preventative role by providing their subordinates with an awareness of laws and instilling particular values in their personnel, in the hope that this training will prevent disciplinary infractions from occurring. Superiors also fulfil an investigative function, examining complaints that are filed within the armed forces. This is particularly important in states such as

³³ For the offences covered under the jurisdiction of the International Criminal Court (ICC), please refer to The Rome Statute of the International Criminal Court, 17 July 1998,

<http://www.un.org/law/icc/statute/romefra.htm>, (accessed 20 August 2007) and for information on the ICC please see, <http://www.icc-cpi.int/home.html&l=en>. (accessed 20 August 2007).

³⁴ Geneva Conventions, 'Third Geneva Convention Relative to the treatment of Prisoners of war,' 12 August 1949, Article

³⁵ It should be noted that there are variations between states regarding the levels of illegality and criminality required for a command to be disregarded, see Nolte and Krieger, 92.

³⁶ Born and Leigh, "The Responsibility of Commanders and Individual Accountability," *Human Rights of Armed Forces Personnel* (Warsaw/Geneva: OSCE-ODIHR and DCAF, forthcoming).

Slovakia and the UK which do not have an ombudsmen for the armed forces.³⁷ Finally, commanders may take disciplinary action for offences which are committed by personnel under their command, however, more serious infractions are likely to be dealt with by military courts.³⁸

Under most military law systems, commanders have specific responsibilities with regard to their subordinates. These duties commonly include: the responsibility for the discipline of subordinates, the duty to set a good example to one's subordinates, the duty to look after subordinates and the duty not to mistreat or abuse subordinates.³⁹ In some states, such as Italy, superiors are also responsible for ensuring that personnel are provided with good working and living conditions.⁴⁰

In addition to notion of individual accountability (see above), commanders are also accountable for the orders that they give, and criminal responsibility may arise from illegal or improper orders.⁴¹

6. Military training and socialisation

Throughout his or her career, every member of the armed forces takes part in military training activities. Although the principal aim of these training activities is to prepare armed forces personnel for fulfilling their positions, military training should also aim for creating professional soldiers who are committed to democracy, rule of law and human rights.

In this context, training to make armed forces personnel aware of both their rights and duties is another vital mechanism of indirect internal accountability. Training is preventative in nature as it aims to internalise specific values which will reduce the likelihood that personnel will violate laws and regulations in the future. Efforts focus on providing armed forces personnel with specific knowledge and values relating to international humanitarian law, human rights law, military professionalism and the supremacy of civilian authorities.

Training in rights and duties may take various forms, and may be conducted by individuals within the military or by civilians. In Germany, Belgium and the Netherlands, for example, armed forces officers are required to attend *military* universities in which they are taught not only by military officers but also by civilians.⁴² The Norwegian armed forces have outsourced training in human rights law and international humanitarian law to the International Committee of the Red Cross.⁴³

In Germany, as part of the *Innere Führung* programme, the training of armed forces personnel includes making military personnel aware of their constitutional rights and duties.⁴⁴ In addition to training recruits about legal issues, the programme provides moral and civic education which is

³⁷ Born and Leigh, "Discipline and Military Justice."

³⁸ See Nolte and Krieger, 130, see also Born and Leigh, "Human Rights Education."

³⁹ For an overview of national military laws on the role of superiors refer to Nolte and Krieger, 118-119.

⁴⁰ Decree of the President of the Republic, n. 545/1986, Article 22.

⁴¹ Born and Leigh, "The Responsibility of Commanders and Individual Responsibility."

⁴² Please refer to the websites of the Military universities of The Netherlands, Belgium and Germany: www.kma.nl, www.rma.ac.be, <http://www.unibw.de/startseite/> (accessed 24 August 2007).

⁴³ Born and Leigh, "Human Rights Education"

⁴⁴ Please refer to the websites of the Germany: www.kma.nl, www.rma.ac.be, <http://www.unibw.de/startseite/> (accessed 24 August 2007).

designed to: enhance the willingness of personnel to carry out duties conscientiously, ensure respect for human dignity, and to promote the integration of personnel within society.⁴⁵

7. CONCLUSIONS

1. Internal accountability mechanisms are complimentary to executive, parliamentary and judicial oversight of the armed forces. These external accountability mechanisms can only function if professionalism and internal accountability of the armed forces is guaranteed.
2. Military disciplinary law, criminal law and code of conducts provide the internal regulatory framework for ensuring that orders of civilian command authorities are executed down to the work floor level; they also ensure the members armed forces have clear standards and norms for fulfilling their duty.
3. For maintaining an internal system of checks and balances, armed forces need to have independent institutions (such as military courts, ombudsmen and inspector generals) to investigate and prosecute illegal or improper conduct.
4. As citizens in uniform, members of armed forces are entitled to enjoy the same human rights and fundamental freedoms as other citizens, subject to requirements of military duty. The rights of armed forces personnel can only be qualified subject to specific conditions and requirements: limitations must be necessary within a democratic society, provided for by law, and any restrictions must be proportionate to the military or national security needs. Some fundamental rights are non-derogable, including the right to life; the right to protection against cruel or degrading treatment; and the prohibition of slavery, servitude, and forced labour.
5. Members of armed forces have specific duties which they must fulfil. Respect for military discipline and the duty to obey are fundamental duties for all personnel. However, they also have the duty to disobey illegal or improper orders. This is particularly important given that all personnel are personally accountable for their actions, and may be liable for breaches of either national or international laws.
6. Commanders at every level play a crucial role in both ensuring professionalism and the discipline of those under their command. Superiors have the responsibility to take any action to prevent, investigate, and address disciplinary infractions or crimes committed by subordinates.
7. Training and military socialisation are key in ensuring professionalism and democratic disposition of the military and can play a key role in preventing future indiscretions.

⁴⁵ Innere Führung, German Federal Ministry of Defence, http://www.bmvg.de/portal/a/bmvg/kcxml/04_Sj9SPykssy0xPLMnMz0vM0Y_QjzKLt4w3MrUASUGY5vqRMDfj_zcVP2g1Dx9b_0A_YLciHJHR0VFAJJDCM!/delta/base64xml/L2dJQSEvUUt3QS80SVVFLzZfOV8yQjQ!/?yw_contentURL=%2FC1256F1200608B1B%2FW2686BW2672INFOEN%2Fcontent.jsp. (accessed, 21 August 2007).